

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case Nos.: **07-O-11179-RAP**
) (07-O-13616-RAP)
ROBERT STEWART KILBORNE IV,)
) **DECISION**
Member No. 91456,)
)
)
A Member of the State Bar.)

I. INTRODUCTION

In this contested, original disciplinary proceeding, respondent **ROBERT STEWART KILBORNE IV** (“respondent”) is charged with willfully violating State Bar Rules of Professional Conduct, rule 4-100(A)¹ and Business and Professions Code sections 6106 and 6068, subdivision (j).² The court finds respondent culpable on all three charged violations. Respondent represented himself at trial. The State Bar was represented by Deputy Trial Counsel Larry DeSha.

II. PROCEDURAL HISTORY

The State Bar of California initiated this proceeding by filing a notice of disciplinary charges (“NDC”) on January 21, 2009. Respondent filed a response to the NDC on April 3, 2009.

¹ Unless otherwise indicted, all further references to rules are to the State Bar Rules of Professional Conduct.

² All further statutory references are to the Business and Professions Code.

Trial was held on June 9, 2010. Thereafter, on June 16, 2010, the parties filed a stipulation as to facts only (Rules Proc. of State Bar, rule 131). And the court took the case under submission for decision on that same day.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on November 29, 1979, and was a member at all times pertinent to these charges, and is currently a member of the State Bar of California.

B. Credibility Determinations

With respect to the credibility of the witnesses, the court has carefully weighed and considered their demeanor while testifying; the manner in which they testified; their personal interest or lack thereof in the outcome of this proceeding; and their capacity to accurately perceive, recollect, and communicate the matters on which they testified. (See, e.g, Evid. Code, § 780 [listing factors to consider in determining credibility].) Except as otherwise noted, the court finds the testimony of the witnesses to be credible.

C. Stipulated Facts

The parties stipulated to the following facts:

1. On November 30, 2006, Respondent opened a checking account at Union Bank of California, which he intended to use as a client trust account (“CTA”) for the practice of law. No client funds were deposited in the account until June 19, 2007. As of December 30, 2006, the balance in this account was \$98.91, a nominal sum which belonged to Respondent and was used to keep the account open. Respondent closed this CTA on October 5, 2010.

Count One -- Commingling

2. Between January 12, 2007, and August 28, 2007, Respondent deposited personal funds into the CTA, resulting in the CTA balances shown below after the deposits, as follows:

<u>Date</u>	<u>Amount</u>	<u>CTA Balance</u>
01-12-07	\$ 170.00	\$ 55.59
01-30-07	1,700.00	1,674.59
02-05-07	4,500.00	5,024.59
02-05-07	79.76	5,104.35
03-16-07	200.00	221.33
03-19-07	200.00	421.33
04-04-07	1,000.00	589.68
04-13-07	500.00	929.09
07-03-07	1,750.00	1,262.44
07-17-07	800.00	507.32
07-23-07	350.00	177.00
08-28-07	8,000.00	9,904.18

3. Between January 11, 2007, and August 28, 2007, Respondent paid personal expenses from his CTA by a series of 35 checks, which he wrote and signed, as follows:

<u>Date</u>	<u>Check No.</u>	<u>Payee</u>	<u>Amount</u>
01-11-07	2201	Sprint	\$ 157.32
01-16-07	2204	Del Mar Car Wash	135.00
02-20-07	2212	Pep Boys	156.19
02-20-07	2216	Hallmark	20.99
02-20-07	2220	Albertsons	199.72
02-26-07	2218	DMV	76.00
02-26-07	2219	DMV	264.00
03-05-07	2224	Crown Jewelry	112.18
03-08-07	2225	Pure Fitness	215.00
03-19-07	2228	Albertsons	293.69
03-23-07	2226	Mr. & Mrs. R. Kilborne	\$ 300.00
06-12-07	2233	North Coast Pharmacy	28.39
06-15-07	2236	Von's	47.49
06-21-07	2235	Balboa Pharmacy	104.70
06-21-07	2241	Blue Shield	1,600.00
06-25-07	2242	Sprint	150.00
06-25-07	2243	Sprint	100.00
06-27-07	2246	Sprint	323.24
06-28-07	2247	Carlson Wagonlit Travel	167.40
07-02-07	2250	Postal Annex Twelve	30.00
07-02-07	2253	San Marcos Public Storage	175.00
07-02-07	2254	State Farm	144.23
07-03-07	2255	Harry's Coffee Shop	100.00

07-09-07	2261	Costco	93.02
07-16-07	2260	Threads	135.11
07-17-07	2264	Lens Crafters	422.76
07-17-07	2265	Von's	100.00
07-24-07	2269	Ogden's Cleaners	64.90
07-27-07	2263	Balboa Pharmacy	90.98
07-27-07	2270	North Coast Pharmacy	61.85
08-13-07	2280	State Farm	166.35
08-15-07	2287	Von's	155.69
08-17-07	2281	Blue Shield	795.00
08-27-07	2291	Von's	171.59
08-28-07	2293	Horizon Church	100.00

4. Respondent also authorized periodic drafts against his CTA to be submitted by Pure Fitness, his gym. Seven of such drafts were paid from the CTA between April 3, 2007, and October 2, 2007, as follows:

<u>Date</u>	<u>Amount</u>
04-03-07	\$ 65.00
05-02-07	150.00
06-04-07	65.00
07-03-07	65.00
08-02-07	65.00
09-15-07	150.00
10-02-07	65.00

5. On August 30, 2007, the CTA balance was \$969.18, all of which belonged to Respondent as his remaining share of client funds deposited on July 27, 2007. On September 4, 2007, Respondent reduced the balance to \$185.00 by eight electronic fund transfers, at least seven of which were for his personal expenses. On September 7, 2007, Respondent paid three more personal expenses by electronic fund transfers, reducing the CTA balance to \$118.83.

Count Two -- Issuance of Bad Checks

6. Between January 8, 2007, and July 6, 2007, Respondent signed and issued 10 checks against CTA funds which were not paid because they were insufficiently funded. The details, including the CTA balance when presented for payment, are as follows:

<u>Date</u>	<u>Check No.</u>	<u>Payee</u>	<u>Amount</u>	<u>CTA Balance</u>
01-11-07	2201	Sprint	\$ 157.32	\$ 98.91
01-16-07	2204	Del Mar Car Wash	135.00	33.59
03-08-07	2225	Pure Fitness	215.00	81.22
03-12-09	2222	Dr. Bartell	250.00	51.33
03-23-07	2226	Mr. & Mrs. R. Kilborne	300.00	127.64
06-12-07	2233	North Coast Pharmacy	28.39	(132.41)
06-15-07	2236	Von's	47.49	(187.41)
07-02-07	2253	San Marcos Public Storage	175.00	(161.33)
07-02-07	2254	State Farm	144.23	(161.33)
07-16-07	2260	Threads	135.11	(120.58)

7. On April 3, 2007, the draft against his CTA which Respondent had authorized for Pure Fitness was presented for payment of \$65.00. It was rejected because the CTA balance then was only \$59.64. This charge was later paid when presented on May 2, 2007. On June 4, 2007, another monthly charge for \$65.00 was presented by Pure Fitness when the CTA balance was only \$21.59. Union Bank paid the charge, reducing the CTA balance to minus \$43.41. On October 2, 2007, Pure Fitness submitted its final draft for \$65.00. It was rejected because the CTA balance was already minus \$475.17.

Count Three -- Failure to Update Official Address

8. During the three-year period from September 7, 2004, until September 6, 2007, Respondent's State Bar of California membership records address was 2826 Cebu Court, Carlsbad, CA 92009-5903. Respondent moved from that address before January 31, 2007, but he did not change his membership records address until September 6, 2007.

Mitigating Facts

9. Respondent has no prior record of discipline.

10. No client was harmed by the events described in this Stipulation.

D. Additional Finding of Facts

Since 1969, respondent has undergone a total of 43 surgical procedures, mainly on his knees and back. Despite the toll of the surgeries and recovery, respondent was able to graduate

from both college and law school and to thereafter successfully practice without incident for more than 26 years (from November 1979 to January 2007). Respondent has been employed as a city attorney, practiced law as an insurance defense attorney, and finally as a plaintiff's attorney in large civil cases. Respondent has now been a member of the State Bar of California for more 30 years.

Sometime in the year 2000, respondent was treated by Walter Strauser, M.D., for pain associated with respondent's recent back surgery. Respondent was taking low doses of morphine for his pain. Dr. Strauser opined that, between 2000 and 2002, respondent's mental ability was in the normal limits for someone of his education and career achievements. Then, in about July 2002, respondent suffered a significant weight loss for no apparent reason. Respondent also suffered from pain in his right arm. Dr. Strauser recommended to respondent that he see his primary care doctor.

In addition, respondent was not meeting deadlines on his cases and was not writing effectively. Respondent sought medical treatment, believing he was suffering from cancer. All tests for cancer were negative.

In August 2002, respondent was diagnosed with polyarteritis nodosa ("PAN"), which is a disease of the blood vessels that causes the immune system to attack the inner linings of the small and medium arteries resulting in damage to the surrounding tissues and nerves. The disease is serious and causes tremendous pain. Accordingly, respondent was given high doses of morphine for his severe, chronic pain. Respondent was also given the drugs prednisone and imuan. Dr. Strauser opined that prednisone has sometimes caused cognitive difficulties. Also, respondent was taking the drugs Welbutrin and Adderal, the former an antidepressant and the latter a stimulant, for adult attention disorder.

By 2003, respondent believed he was mentally incompetent and has little memories of those years.

In 2004, respondent had a relapse of PAN with the disease spreading to his arms, legs, and testicles. In 2005, respondent's teenage son found respondent at home unconscious. Thereafter, respondent was hospitalized for four days. Respondent believes he suffered a small stroke.

In 2006, respondent was given an IQ test. Respondent scored much lower than one would expect for someone of his education and profession. Respondent's performance score on the test was a 79, and his verbal score was 100. According to Dr. Strauser, respondent's performance score being lower than his verbal score is consistent with someone who has had a stroke.

Also, in 2006, lesions developed on respondent's legs, which killed the underlying tissue. Respondent also developed a staph infection. In addition, respondent developed delirium, which required changes in his immunotherapy medications. Convinced he was going to die, respondent's former wife moved in with respondent to care for him. Because of his poor medical and mental condition, respondent gave his former wife power of attorney over his affairs in January 2006.

Dr. Strauser further noted that, during 2006 and 2007, respondent suffered from cognitive defects, including, but not limited to, memory loss that interfered with respondent's attending medical appointments and compromised respondent's ability to take medications as prescribed. Respondent's failure to take his medications as instructed complicated respondent's treatment and, according to Dr. Strauser, more likely than not adversely impacted respondent's cognitive capacity further.

In October 2007, respondent caused an automobile accident when he had a seizure while driving his car. When Dr. Strauser reported the incident to the DMV, the DMV suspended respondent's driver's license. An MRI scan of respondent's brain indicated that respondent had also had a small stroke in the right frontal region of his brain.

Dr. Strauser also recommended that respondent apply for Social Security disability, which was granted on April 21, 2008, retroactive to November 2005.

Respondent's daily dose of morphine for pain had increased to two and one-half grams, an extraordinary high dose. Dr. Strauser attempted to wean respondent from morphine, but his attempts were unsuccessful.

During his treatment for PAN, respondent's financial and personal conditions were in a freefall. Respondent went from being financially independent to living as a transient and even sleeping in his car at times.

Based on Dr. Strauser's treatment of respondent and based on Dr. Strauser's experience in the fields of pain management and psychiatry, Dr. Strauser opined, to a reasonable degree of medical probability, that respondent suffered from a significant cognitive impairment during 2006 and 2007 because of respondent's complicated medical condition and other factors. Dr. Strauser also opined, to a reasonable degree of medical probability, that during the time that respondent used his CTA as his personal checking account, respondent did not understand the consequences of his actions. Even though the State Bar did not present any direct evidence in opposition to Dr. Strauser's testimony, the court is not bound to accept it.

During 2007, respondent lived at seven different addresses, finally moving in with a former secretary and sleeping on her couch. Nonetheless, during summer 2007, respondent successfully handled and eventually resolved a matter for a client over the telephone. And, in late 2007, respondent successfully handled yet a second matter for another client. In that second

matter, which respondent characterized as short work, respondent's client recovered more than \$1 million.

E. Conclusions of Law

1. Respondent's Defense of Mental Incompetency

As a defense to all of the charged misconduct, respondent contends that he was mentally incompetent to form the required mental state necessary to willfully violate rule 4-100(A), section 6106, or section 6068, subdivision (j) due to mental and physical disabilities. According to respondent, this matter is controlled by *Hyland v. State Bar* (1963) 59 Cal.2d 765, 774, in which the court stated:

The purpose of a discipline proceeding under the State Bar Act is to protect the public, not to punish the offending attorney. [Citations.] The need for protection is the same whether or not the attorney is mentally incompetent. If, however, an attorney's mental incompetence renders him unable to form the intent that is an element of the offenses charged, then he should not be disciplined for the offenses, but should be prohibited from practicing law during the continuance of his mental incompetence. The appropriate remedy is not disbarment or suspension, but enrollment as an inactive member of the Bar, with the opportunity of becoming an active member upon determination that mental competence has been restored. [Citation.]

However, that portion of the foregoing quote from *Hyland* to the effect that an attorney should not be disciplined for an offense if the attorney was mentally incompetent and, therefore, incapable of forming the requisite intent is dictum because the court held that the attorney in *Hyland* failed to establish his claims of mental incompetence.³ (*Id.* at pp. 774-775.) Moreover, that dictum in *Hyland* appears inconsistent with *Grove v. State Bar* (1967) 66 Cal.2d 680, 684-685, in which the court held that the attorney's "impairment of capacity to form sound judgments

³ For the same reason, the court's statement in *Hyland v. State Bar, supra*, 59 Cal.2d at page 774, that "mental incompetence is a defense in State Bar disciplinary proceedings" is also dictum.

and lack of ability to continue on a project to a timely conclusion' ” did not even mitigate the attorney’s habitual neglect of his clients' affairs. There the court stated:

While we sympathize with petitioner's psychological difficulties and commend him on his frankness in recognizing his problems, we cannot find that the psychiatric report states any grounds for excusing him from observation of at least the minimum standards of professional conduct. We realize that in many cases psychoneurotic problems may underlie professional misconduct and moral turpitude. In this area our duty lies in the assurance that the public will be protected in the performance of the high duties of the attorney rather than in an analysis of the reasons for his delinquency. Our primary concern must be the fulfillment of proper professional standards, whatever the unfortunate cause, emotional or otherwise, for the attorney's failure to do so.

(*Id.* at p. 685; accord *Snyder v. State Bar* (1976) 18 Cal.3d 286, 293.)

The State Bar argues that, while respondent’s mental impairment might be a disability worthy of mitigation, it does not excuse his misconduct. In other words, the State Bar asserts that any mental disability respondent suffered is, at best, a mitigating circumstance and not a defense to charged misconduct. To support its position, the State Bar cites to *Rose v. State Bar* (1989) 49 Cal.3d 646, 667 and *In the Matter of Blum*, (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 412.

In *Rose*, the Supreme Court gave the attorney significant mitigation because, at the time of the misconduct, he experienced unusual stress during the breakup of his marriage and underwent profound depression after an adverse verdict in a difficult and emotionally-trying personal injury case. Likewise, in *Blum*, the review department gave the attorney significant mitigation because, at the time of the misconduct, she suffered from severe emotional difficulties and post-traumatic stress disorder from the mental and physical abuse she suffered at the hands of her then law-partner husband. The attorneys’ mental disabilities in *Rose* and *Blum* were not found to be defenses to the charged misconduct.

In any event, just like the attorney in *Hyland*, respondent failed to establish that he was mentally incompetent at the time he engaged in the charged misconduct. Dr. Strauser's and respondent's testimony regarding respondent's alleged inability to comprehend that his conduct (i.e., respondent's improper use of his CTA as his personal checking account, writing checks that were insufficiently funded checks, etc.) violated the State Bar Rules of Professional Conduct and the State Bar Act lacked credibility. The court's adverse credibility determinations are supported by the fact that, during 2007, respondent successfully handled and resolved two client matters for two different clients. In other words, respondent's claim that he was incompetent to form the required mental state necessary to be found culpable of the charged misconduct due to his alleged mental and physical disabilities is inconsistent with his testimony that he competently represented two clients during the same time period.

In addition, the evidence fails to establish that respondent was ever unable to distinguish right from wrong in connection with his actions, unaware of the nature and quality of his acts, or mentally incompetent sufficient to justify the appointment of a guardian or receiver. In short, the court rejects respondent's claimed defense of mental incompetency (or lack of intent).

2. Count One – Commingling (Rule 4-100(A))

In count one, the State Bar charges that respondent willfully violated rule 4-100(A), which proscribes, inter alia, attorney misuse of trust accounts. “Unlike a violation of the State Bar Act, proof of a wilful violation of the Rules of Professional Conduct merely has to demonstrate ‘that the person charged acted or omitted to act purposely, that is, that he knew what he was doing or not doing and that he intended either to commit the act or to abstain from committing it.’” ‘ [Citations.]’ (*In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 633.)

The record clearly establishes that respondent knew and understood that he was depositing his personal funds into his CTA; writing checks for his personal expenses from his CTA; authorizing periodic drafts against his CTA to be submitted by Pure Fitness; and authorizing electronic transfers for personal expenses from his CTA. When respondent deliberately used his CTA for personal purposes not related to any client concern, respondent commingled personal funds in a trust account in willful violation of rule 4-100(A) even if there were no client funds on deposit in the account at the time. (*In the Matter of Doran* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 871, 876.)

3. Count Two – Moral Turpitude (§ 6106)

In count two, the State Bar charges respondent willfully violated section 6106, which proscribes attorney acts involving moral turpitude, dishonesty, or corruption. To establish that an attorney has engaged in conduct involving moral turpitude, the State Bar is not required to prove that the attorney acted with evil intent or in bad faith; “rather, all that is required is “a general purpose or willingness to commit the act or permit the omission.” [Citation.]’ [Citation.]” (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1034.) The practice of issuing numerous checks which an attorney knows will not be honored involves moral turpitude. (*Bowles v. State Bar* (1989) 48 Cal.3d 100, 109.)

The record clearly establishes that respondent willfully violated section 6106 when he repeatedly issued insufficiently funded checks and authorized electronic debts to his CTA when there were insufficient funds on deposit to pay them. Respondent’s conduct was clearly willful “even applying the somewhat more specific level of wilfulness required for violations of the State Bar Act, as opposed to violations of the Rules of Professional Conduct. (Compare, e.g., *Call v. State Bar* (1955) 45 Cal.2d 104, 110-111, with *Zitny v. State Bar* (1966) 64 Cal.2d 787,

791-792.)” (*In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 603.)

4. Count Three – Failure to Update Membership Address (§6068, subd. (j))

In count three, the State Bar charges that respondent willfully violated section 6068, subdivision (j), which requires that attorneys “comply with the requirements of Section 6002.1.” Section 6002.1, subdivision (a)(1) mandates that each attorney maintain, on the official membership records of the State Bar of California, his or her current office address or, if the attorney does not have an office, an address to be used for State Bar purposes. In addition, section 6002.1, subdivision (a), mandates that each attorney notify the State Bar's membership records office of any changes of address within 30 days of the change.

The record clearly establishes that respondent failed to update his official State Bar membership records address in willful violation of section 6068, subdivision (j).

IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Mitigation

The record establishes the following factors in mitigation by clear and convincing evidence. (Rule Proc. of State Bar, tit. IV, Stds for Atty. Sanctions of Prof Misconduct (“standards”), std. 1.2(e).)

Respondent was admitted in November 1979 and did not engage in misconduct until about January 2007. Thus, he is entitled to very significant mitigation for his more than 27 years of discipline free practice. (Std. 1.2(e)(i).)

Respondent’s misconduct did not result in any client harm. (Std. 1.2(e)(iii).)

Respondent was suffering from extreme emotional and physical disabilities that were directly related to the misconduct, and respondent no longer suffers from those disabilities. (Std. 1.2(e)(iv).)

Respondent displayed candor and cooperation during the disciplinary investigation and State Bar Court proceedings, including his execution of an extensive stipulation to facts. (Std. 1.2(e)(v).)

B. Aggravation

The record establishes only one factor in aggravation by clear and convincing evidence. (Std. 1.2(b).) And that is that respondent's misconduct involved multiple acts of misconduct. (Std. 1.2(ii).)

V. DISCUSSION

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 primary 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 any particular violation must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

In this case, the standards call for the imposition of a minimum sanction ranging from suspension to disbarment. (Standards 2.2(b), 2.3, and 2.6.)

Standard 2.2(b) relates to cases involving an attorney's commingling of entrusted funds with personal funds that does not involve the misappropriation of entrusted funds or property. It provides that culpability of such commingling is to "result in at least three months actual suspension, irrespective of mitigating circumstances."

Standard 2.3 relates to cases involving an attorney's commission of acts involving moral turpitude, fraud, dishonesty, or concealment. It provides that culpability of such acts is to "result in actual suspension or disbarment depending upon the extent to which the victim of the

misconduct is harmed or misled or depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law.”

Standard 2.6 relates to cases involving an attorney's willful violation of a provision of section 6068. It provides that culpability of such a violation is to “result in disbarment or suspension depending upon the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3.”

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In the present proceeding, the most severe sanction for respondent's misconduct is found in standard 2.3, which applies to respondent's rule 4-100 violation.

The standards, however, “do not mandate a specific discipline.” (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994, review den. and recommended discipline adopted by Supreme Court on Jan. 24, 2007, in case number S147609; see also *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940 [“although the Standards were established as guidelines, ultimately, the proper recommendation of discipline [rests] on a balanced consideration of the unique factors in each case”].) It has long been held that the court is “not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender.” (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar urges that respondent be suspended from the practice of law for a period of six months. Respondent seeks the dismissal of all three counts⁴.

Clearly, respondent's compelling mitigation predominate when balanced against the single aggravating factor (i.e., multiple acts of misconduct). Respondent has been an attorney for over thirty years with no prior record of discipline and as the medical testimony clearly shows, respondent suffered from extreme physical and mental disabilities. There is no evidence of any venal intent. Moreover, no client was harmed, and respondent was candid and cooperative during the disciplinary process. Nonetheless, "our Supreme Court has [frequently] described the important function of rule [4-100] in serving to protect client's funds and property from the more severe consequences which could accidentally or intentionally result if trust property is attached, lost or misappropriated. [Citation.]" (*In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Accordingly, it is clear that discipline is appropriate.

In *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, 1100, the Supreme Court rejected the review department's recommended three-month actual suspension under a strict application of standard 2.2(b) and, instead, imposed a public reproof on the attorney. Likewise, this court rejects a strict application of standard 2.2(b) in the present proceeding and, instead, recommends that respondent be placed on one year's stayed suspension and three years' probation on conditions, but no actual suspension.

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⁴ Respondent included a motion to dismiss in his trial brief filed on June 9, 2010. In that motion, respondent contends that all of the charges against him should be dismissed under Rules of Procedure of the State Bar, rules 262(a) (based on the insufficiency of the evidence), 262(d) (as being barred by a statute or rule), and 262(e) (as being in the furtherance of justice). Respondent's motion to dismiss is DENIED on all grounds, no good cause having been shown.

VI. RECOMMENDED DISCIPLINE

Accordingly, it is recommended that **ROBERT STEWART KILBORNE IV** be suspended from the practice of law for one year, that execution of the suspension be stayed, and that Kilborne be placed on probation for three years on the following conditions:

1. Kilborne is to comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar, and all of the conditions of this probation.
2. Within 30 days after the effective date of the Supreme Court order in this proceeding, Kilborne must contact the State Bar's Office of Probation in Los Angeles and schedule a meeting with Kilborne's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, Kilborne must meet with the probation deputy either in-person or by telephone. Thereafter, Kilborne must promptly meet with the probation deputy as directed and upon request of the Office of Probation.
3. Kilborne is to maintain, with the State Bar's Membership Records Office and Office of Probation, his current office address and telephone number or, if no office is maintained, an address to be used for State Bar purposes (Bus. & Prof. Code, § 6002.1, subd. (a)(1)). In addition, Kilborne is to maintain, with the State Bar's Office of Probation, his current home address and telephone number (Bus. & Prof. Code, § 6002.1, subd. (a)(5)). Kilborne's home address and telephone number are not to be made available to the general public unless his home address is also his official address on the State Bar's Membership Records. (Bus. & Prof. Code, § 6002.1, subd. (d).) Kilborne must notify the Membership Records Office and the Office of Probation of any change in this information no later than 10 days after the change.
4. Kilborne is to submit written quarterly reports to the State Bar's Office of Probation no later than January 10, April 10, July 10, and October 10 of each year. Under penalty of perjury under the laws of the State of California, Kilborne must state in each report whether he has complied with the State Bar Act, the Rules of Professional Conduct of the State Bar, and all conditions of this probation during the preceding calendar quarter. If the first report will cover less than 30 days, that report must be submitted on the next following quarter date, and cover the extended period.

In addition to the quarterly reports, Kilborne is to submit a final report containing the same information during the last 20 days of his probation.

5. Subject to the assertion of any applicable privilege, Kilborne is to fully, promptly, and truthfully answer all inquiries of the State Bar's Office of Probation that are directed to him, whether orally or in writing, relating to whether he is complying or has complied with the conditions of this probation.
6. Within the first year of his probation, Kilborne is to attend and satisfactorily complete the State Bar's Ethics School; and to provide satisfactory proof of his successful completion of that program to the State Bar's Office of Probation. The program is offered

periodically at either 180 Howard Street, San Francisco, California 94105-1639 or at 1149 South Hill Street, Los Angeles, California 90015-2299. Arrangements to attend the program 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 Kilborne's Minimum Continuing Legal Education ("MCLE") requirements; accordingly, he is ordered not to claim any MCLE credit for attending and completing this program. (Accord, Rules Proc. of State Bar, rule 3201.)

7. Within the first year of his probation, Kilborne is to attend and satisfactorily complete the State Bar's Ethics School -- Client Trust Accounting School; and to provide satisfactory proof of completion of that program to the State Bar's Office of Probation. The school is offered periodically both 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 Kilborne's MCLE requirements; accordingly, he is ordered not to claim any MCLE credit for attending and completing this school. (Accord, Rules Proc. of State Bar, rule 3201.)
8. During each calendar quarter in which Kilborne receives, possesses, or otherwise handles funds or property of a client (as used in this probation condition, the term "client" includes all persons and entities to which Kilborne owes a fiduciary or trust duty) in any manner, Kilborne must submit, to the State Bar's Office of Probation with the probation report for that quarter, a certificate from a California certified public accountant certifying:
 - (a) whether Kilborne has maintained a bank account that is designated as a "Trust Account," "Clients' Funds Account," or words of similar import in a bank in the State of California (or, with the written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction);
 - (b) whether Kilborne has, from the date of receipt of the client funds through the period ending five years from the date of appropriate disbursement of the funds, maintained:
 - (1) a written ledger for each client on whose behalf funds are held that sets forth:
 - (a) the name and address of the client,
 - (b) the date, amount, and source of all funds received on behalf of the client,
 - (c) the date, amount, payee, and purpose of each disbursement made on behalf of the client, and
 - (d) the current balance for the client;
 - (2) a written journal for each bank account that sets forth:
 - (a) the name of the account,
 - (b) the name and address of the bank where the account is maintained,
 - (c) the date, amount, and client or beneficiary affected by each debit and credit, and
 - (d) the current balance in the account;
 - (3) all bank statements and cancelled checks for each bank account; and

- (4) each monthly reconciliation (balancing) of (1), (2), and (3) and, if there are any differences, an explanation of each difference; and
- (c) whether Kilborne has, from the date of receipt of all securities and other properties held for the benefit of a client through the period ending five years from the date of appropriate disbursement of the securities and other properties, maintained a written journal that specifies:
 - (1) each item of security and property held,
 - (2) the person on whose behalf the security or property is held,
 - (3) the date of receipt of the security or property,
 - (4) the date of distribution of the security or property, and
 - (5) the person to whom the security or property was distributed.

If Kilborne does not receive, possess, or otherwise handle client funds or property in any manner during an entire calendar quarter and if Kilborne includes, in his probation report for that quarter, a statement to that effect under penalty of perjury under the laws of the State of California, Kilborne is not required to submit a certificate from a certified public accountant for that quarter.

- 9. This probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of this probation, if Kilborne has complied with all the terms of probation, the order of the California Supreme Court suspending him from the practice of law for one year will be satisfied and that suspension will be terminated.

VII. PROFESSIONAL RESPONSIBILITY EXAM & COSTS

It is further recommended that Robert Stewart Kilborne IV be ordered to take and pass the Multistate Professional Responsibility Examination (hereafter MPRE) administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) within one year after the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation within the same year. Failure to pass the MPRE within the specified time results in actual suspension by the review department, without further hearing, until passage. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8; see also Cal. Rules of Court, rule 9.10(b); Rules Proc. of State Bar, rules 320, 321(a)&(c).)

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Finally, it is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that those costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: August 31, 2010.

RICHARD A. PLATEL
Judge of the State Bar Court