

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 98-O-03773 (02-O-11651;
)	02-O-11927); 03-O-03100;
STEPHEN ROBERT KILSTOFTE,)	04-O-11202 (Cons.)
)	
Member No. 79493,)	DECISION AND ORDER SEALING
)	CERTAIN DOCUMENTS
A Member of the State Bar.)	
)	

On June 14, 2004, after the filing of a Notice of Disciplinary Charges in case nos. 98-O-03733; 02-O-11651; 02-O-11927 and in case no. 03-O-03100,¹ respondent **Stephen Robert Kilstofte** contacted the State Bar of California’s Lawyer Assistance Program (LAP) to assist him with his mental health issue, and on December 30, 2004, respondent executed a Participation Agreement with the LAP.

Respondent also sought to participate in the State Bar Court’s Alternative Discipline Program (ADP). On October 22, 2004, respondent submitted a declaration to the court which established a nexus between his mental health issue and his misconduct. The parties entered into a Stipulation Re Facts and Conclusions of Law on January 4, 2006. In June 2006, respondent and his counsel signed the Contract and Waiver for Participation in the State Bar Court’s ADP (Contract). On June 16, 2006, the court lodged its Confidential Statement of Alternative

¹ Case nos. 98-O-03773, etc. was consolidated with case no. 03-O-03100 pursuant to an order filed on March 24, 2004.

Dispositions and Orders, the Contract, and the parties' Stipulation Re Facts and Conclusions of Law,² and the court accepted respondent as a participant in the ADP.

At a status conference held on July 10, 2008, the court found that respondent has successfully completed the ADP, and the parties' Stipulation Re Facts and Conclusions of Law, with the attached order modifying and approving the stipulation, was filed on that day.³

Accordingly, the court now issues this decision recommending that the Supreme Court impose upon respondent the discipline set forth below in this decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties' Stipulation Re Facts and Conclusions of Law, including the court's order modifying and approving the stipulation, are attached hereto and hereby incorporated by reference, as if fully set forth herein. The Stipulation Re Facts and Conclusions of Law set forth the factual findings, legal conclusions and aggravating and mitigating circumstances in this matter.

Furthermore, at the time respondent engaged in the misconduct for which he has been found culpable, respondent was suffering from a mental health issue, and respondent's mental health issue directly caused the misconduct in this proceeding. Supreme Court and Review Department case law establish that extreme emotional difficulties are a mitigating factor where expert testimony establishes that these emotional difficulties were directly responsible for the misconduct, provided that the attorney has also established, through clear and convincing evidence, that he or she no longer suffers from such difficulties. (*Porter v. State Bar* (1990) 52 Cal.3d 518, 527; *In re Naney* (1990) 51 Cal.3d 186, 197; *In re Lamb* (1989) 49 Cal.3d 239, 246; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 701-702.)

² The court executed the order modifying and approving the parties' stipulation on June 19, 2006.

³ On July 21, 2008, the court issued an order finding that respondent has successfully completed the ADP.

However, the Supreme Court has also held that, absent a finding of rehabilitation, emotional problems are not considered a mitigating factor. (*Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1072-1073; *In re Naney, supra*, 51 Cal.3d at p. 197.)

Respondent has been participating in the LAP since December 30, 2004. The LAP issued a Certificate of One Year Participation in the Lawyer Assistance Program dated May 23, 2008, which reflects that respondent has complied with the requirements set forth in the LAP Participation Agreement/Plan for at least one year prior to May 23, 2008, and that during this time period, respondent has maintained mental health and stability and has participated successfully in the LAP.

Respondent has also successfully completed the ADP. Respondent's successful completion of the ADP, which required his successful participation in the LAP, as well as the Certificate of One Year Participation in the Lawyer Assistance Program from LAP, qualify as clear and convincing evidence that respondent no longer suffers from the mental health issue which led to his misconduct. Accordingly, it is appropriate to consider respondent's successful completion of the ADP as a further mitigating circumstance. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(e)(iv).)

DISCUSSION

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. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

After reviewing the parties' briefs on discipline and considering the standards and case law cited therein, the parties' stipulation setting forth the facts, conclusions of law, and the aggravating and mitigating circumstances with respect to this disciplinary proceeding, and

respondent's declaration regarding the nexus between his mental health issue and his misconduct in this matter, the court advised the parties of the discipline which would be recommended to the Supreme Court if respondent successfully completed the ADP and the discipline which would be recommended if respondent was terminated from the ADP. Thereafter, respondent executed the Contract to participate in the ADP; the Contract was lodged with the court; and respondent was accepted for participation in the ADP.

Thereafter, respondent successfully participated in the ADP and, as set forth in the July 21, 2008, status conference order, the court found that respondent 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 of Alternative Dispositions and Orders if respondent successfully completed the ADP.

RECOMMENDED DISCIPLINE

IT IS HEREBY RECOMMENDED that respondent **STEPHEN ROBERT KILSTOFTE** be suspended from the practice of law for a period of one year; that execution of the suspension be stayed; and that respondent be placed on probation for a period of three years on the following conditions:

1. During the probation period, respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct of the State Bar of California;
2. Within ten (10) days of any change, respondent 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;

3. Within thirty (30) days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request;
4. Respondent must 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 must 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. Respondent 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 thirty (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 twenty (20) days before the last day of the period of probation and no later than the last day of the probation period;

5. Subject to assertion of applicable privileges, respondent must answer fully, promptly and truthfully any inquiries of the Office of Probation and any probation monitor assigned under these conditions which are directed to respondent

personally or in writing relating to whether respondent is complying or has complied with the probation conditions;

6. Respondent must comply with all provisions and conditions of his Participation Agreement with the Lawyer Assistance Program (LAP) and must provide the Office of Probation with certification of completion of the LAP. Respondent must immediately report any non-compliance with any provision(s) or condition(s) of his Participation Agreement to the Office of Probation. Respondent 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 respondent'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. Respondent will be relieved of this condition upon providing to the Office of Probation satisfactory certification of completion of the LAP;
7. It is not recommended that respondent provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School and passage of the test given at the end of that session, as respondent completed Ethics School on December 7, 2006.
8. Probation will commence upon the effective date of the Supreme Court order in this matter. (Cal. Rules of Court, rule 9.18.)

Respondent must provide proof of passage of the Multistate Professional Responsibility Examination (MPRE), administered by the National Conference of Bar Examiners, to the Office of Probation within one year after the effective date of the discipline imposed in this matter .

Failure to pass the MPRE results in actual suspension without further hearing until

passage. (But see Cal. Rules of Court, rule 9.10(b); Rules Proc. of State Bar, rule 321(a) & (c).)

COSTS

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

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 806(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 23 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 disclosure. All persons to whom protected material is disclosed will be given a copy of this order sealing the documents by the person making the disclosure.

IT IS SO ORDERED.

Dated: November _____, 2008

RICHARD A. HONN
Judge of the State Bar Court