

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DAVID GREENE LILLY

A Member of the State Bar

No. 86-O-13282

Filed August 21, 1992; as modified, November 5, 1992

SUMMARY

Respondent was found to have commingled client trust funds with his own money, misappropriated the trust funds, and misrepresented to a third party that the funds were in a trust account. In aggravation, respondent had made restitution to the client using money from a probate estate which respondent had no right to use without prior court approval. Finding the only mitigating circumstance to be respondent's lack of a prior record of discipline, the hearing judge weighed that against the serious nature of the misconduct and recommended that respondent be disbarred. (Hon. Ellen R. Peck, Hearing Judge.)

Respondent sought review, disputing his culpability of moral turpitude and contesting the disbarment recommendation. The review department affirmed the hearing judge's findings of fact and conclusions of law. It rejected respondent's contention that he did not have an attorney-client relationship with the owner of the funds, and noted that even if there was no such relationship, respondent still had a fiduciary duty to safeguard the money. Nonetheless, the review department rejected the disbarment recommendation in light of respondent's long record of practice without prior discipline and the relatively short duration of his misconduct. Instead, the review department recommended a five-year stayed suspension, a five-year probation term, and actual suspension for three years and until respondent showed his rehabilitation, fitness to practice and legal learning in a standard 1.4(c)(ii) hearing.

COUNSEL FOR PARTIES

For Office of Trials: Nancy J. Watson

For Respondent: Jeremiah Casselman

HEADNOTES

- [1] **108 Procedure—Failure to Appear at Trial**
 112 Procedure—Assistance of Counsel
 615 Aggravation—Lack of Candor—Bar—Declined to Find

It was not an aggravating circumstance that respondent did not personally attend the hearing on the degree of discipline, since respondent was represented by counsel who appeared on respondent's behalf.

- [2] **159 Evidence—Miscellaneous**
191 Effect/Relationship of Other Proceedings
204.90 Culpability—General Substantive Issues
Where complaining witness testified credibly that an attorney-client relationship existed between himself and respondent, respondent himself had filed pleadings in civil litigation acknowledging such relationship, and respondent's counsel conceded that respondent had held himself out as complaining witness's attorney, respondent's argument in disciplinary proceeding that complaining witness was not his client was without merit.
- [3] **162.20 Proof—Respondent's Burden**
169 Standard of Proof or Review—Miscellaneous
A respondent seeking review by the review department of a hearing department decision does not have the burden of showing that the hearing judge's findings are not supported by substantial evidence. That is a statutory burden applicable only to a respondent appearing before the Supreme Court.
- [4] **204.90 Culpability—General Substantive Issues**
280.00 Rule 4-100(A) [former 8-101(A)]
430.00 Breach of Fiduciary Duty
An attorney holding funds for a person who is not a client is held to the same fiduciary duties in dealing with those funds as if there were an attorney-client relationship.
- [5] **280.00 Rule 4-100(A) [former 8-101(A)]**
An attorney is prohibited from deviating from the rule requiring client funds to be deposited in a trust account even when the attorney has the client's consent to place trust funds in an account other than a trust account.
- [6] **221.00 State Bar Act—Section 6106**
The statute regarding acts of moral turpitude or dishonesty prohibits any dishonest act by an attorney, whether or not committed while acting as an attorney. Where respondent falsely stated to client's prospective lessor that respondent was holding client's lease deposit in trust, respondent committed an act in violation of such statute.
- [7] **745.39 Mitigation—Remorse/Restitution—Found but Discounted**
Respondent could not claim mitigating credit for restitution of misappropriated client funds, where the funds used for restitution were funds which the attorney had no right to use, and the client had to hire counsel and undergo litigation prior to receiving restitution.
- [8 a-c] **710.10 Mitigation—No Prior Record—Found**
822.39 Standards—Misappropriation—One Year Minimum
1092 Substantive Issues re Discipline—Excessiveness
Not all serious trust fund misappropriation cases warrant disbarment. Where respondent had a 21-year record of practice without prior discipline and respondent's misconduct took place within a relatively narrow time frame, standard 1.4(c)(ii) hearing, with three-year actual suspension and five-year stayed suspension and probation, would be adequate to protect public, despite gravity of respondent's misconduct and lack of evidence regarding its cause.

ADDITIONAL ANALYSIS

Culpability

Found

- 221.11 Section 6106—Deliberate Dishonesty/Fraud
- 280.01 Rule 4-100(A) [former 8-101(A)]
- 420.11 Misappropriation—Deliberate Theft/Dishonesty

Not Found

- 213.15 Section 6068(a)
- 220.15 Section 6103, clause 2
- 270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]

Aggravation

Found

- 561 Uncharged Violations
- 691 Other

Mitigation

Found

- 791 Other

Standards

- 802.30 Purposes of Sanctions

Discipline

- 1013.11 Stayed Suspension—5 Years
- 1015.09 Actual Suspension—3 Years
- 1017.11 Probation—5 Years

Probation Conditions

- 1022.10 Probation Monitor Appointed
- 1024 Ethics Exam/School
- 1026 Trust Account Auditing
- 1030 Standard 1.4(c)(ii)

Other

- 1091 Substantive Issues re Discipline—Proportionality

OPINION

STOVITZ, J.:

Respondent, David Greene Lilly, was admitted to practice law in California in 1965. He has no prior record of discipline. After a three-day trial in which most facts were not disputed, a hearing judge of the State Bar Court found respondent culpable of serious misconduct in one matter over a period of a few months in 1986 while acting as a fiduciary of trust funds to be used for a partnership venture of his clients: commingling with his own funds \$20,000 of trust funds, misappropriating those funds and misrepresenting to a third party that the funds were in a trust account when respondent knew they were not. During the entire time period respondent maintained a personal savings account at the same bank which contained more than enough funds to cover the entire amount misappropriated. After the judge determined culpability, respondent presented no evidence in mitigation beyond his long practice without prior discipline, but the judge determined that there were several factors in aggravation, including that respondent made restitution with fees he had taken from a probate estate without court approval. The hearing judge recommended disbarment, concluding that the aggravating circumstances in the record far outweighed the one mitigating factor of respondent's lack of a prior record.

After reviewing the record at respondent's request, we adopt the findings and conclusions of the hearing judge. However, as we shall explain, after reviewing guiding Supreme Court decisions, we have concluded that a five-year suspension stayed on conditions of an actual suspension for three years and until respondent shows proof of rehabilitation and legal learning is more in keeping with precedent and will protect the public adequately in this case of an attorney with a long unblemished record of practice whose misconduct, albeit serious, was concentrated over a relatively short period of time and involved one client matter.

I. KEY FACTS

Most of the essential facts were established either by documentary evidence or testimony not in dispute. In about March 1985, one Thornburgh, an Oklahoma investor who had been in the oil and gas business, was dealing with one Wagner, a California businessperson. The two of them wanted to form Rodeo Coach ("Rodeo") to operate an exotic or classic car business at 9501 Wilshire Blvd., Beverly Hills, one-half block from Rodeo Drive and across the street from the Beverly-Wilshire Hotel. This property, owned by American Savings and Loan Association ("American"), was available for lease and had been used since 1972 for selling exotic or classic cars. Wagner and Thornburgh planned to lease this site for Rodeo.

Respondent first met Wagner in 1985 before Wagner brought up the subject of Rodeo to respondent. Respondent was then practicing law about 10 percent of the time and was involved in a publishing business the rest of the time. Starting in 1985, Wagner assisted respondent in this publishing business.¹ Respondent used a business (non-trust) bank account at Bank of America, West Hollywood Office ("B of A W.H. account") as the operating account for the publishing business and also as an account to hold any legal fees he received. Respondent was the only signatory on this account.

In February 1986, after conversations with Wagner, respondent agreed to represent Wagner. Respondent considered that he was hired primarily to form Rodeo and prepare articles of incorporation and an offering memorandum. As Wagner handled the lease negotiations with American mostly by himself, respondent had little to do with them. By April 1986, negotiations with American had progressed to where it wanted a \$27,000 deposit to an escrow account in return for exclusive lease negotiation rights. Wagner indicated to respondent that the deposit would come from a partner in Oklahoma who was a wealthy "gas and oil person." This person was

1. The record is unclear as to the relationship of Wagner and respondent in the publishing business.

Thornburgh. Thornburgh testified that Wagner told him that respondent was a partner with Wagner in another business and could save them money by representing both Wagner and Thornburgh in forming Rodeo and helping with the American lease. Thornburgh agreed to that and sent Wagner a \$1,000 retainer fee to give respondent. Respondent agreed to hold the \$27,000 wanted by American in trust for Rodeo and disburse it according to instructions of Wagner and Thornburgh.

On April 8, 1986, respondent received a \$27,000 check from Wagner for the deposit requested by American. Wagner wanted the check deposited immediately. Respondent told Wagner the most convenient thing to do was to put it into respondent's B of A W.H. account "right across the street." Wagner told respondent to do that. That same day, respondent wrote to an American employee that he was holding "\$27,000 in my trust account on behalf of Rodeo . . ." Respondent ultimately testified that when he wrote this letter, he did not hold that sum in an attorney-client trust account. As it would turn out, respondent was not holding any money in *any* account for Rodeo or American until April 18, 1986, because Wagner's \$27,000 check bounced even after respondent's later redeposit of it.

Since American insisted on receiving the \$27,000 lease deposit, on April 11, 1986, Thornburgh wired \$27,000 to Wagner's bank. Wagner then gave respondent a cashier's check for \$20,000 and Wagner's separate \$7,000 check. As to the \$7,000 check, Wagner asked respondent not to deposit it without further instruction. Respondent again used his B of A W.H. account to hold the \$20,000. The \$7,000 check was never deposited. It is undisputed that respondent sent no funds to American. Respondent admitted that although in his mind he earmarked this \$20,000 for Rodeo, he used no part of it for Rodeo. While he did not state what amount he used for the publishing

business he and Wagner were involved in, he admitted that "some" of that money went there. As the hearing judge correctly found, based on respondent's bank statements, by May 14, 1986, the balance of respondent's account was down to \$5,694.02. By July 16 of that year, the balance was only \$137.64. However, the hearing judge also found that respondent maintained over \$40,000 in a personal savings account at the same bank throughout this period.

Sometime in April 1986, Thornburgh made a trip to California to work with Wagner on Rodeo. At that time, he met with respondent. Respondent told Thornburgh everything was moving along. In late April, Thornburgh understood that respondent had the \$27,000 in trust. A few months later, Thornburgh checked with Bank of America, learned that there were no trust accounts at the B of A W.H. site and confronted respondent with that information. Respondent represented that Thornburgh would be reimbursed out of his personal savings account which Thornburgh verified contained sufficient funds. Thornburgh demanded that the funds be segregated into an account under his name instead of respondent's. Respondent did not transfer the money to a trust account, but wrote to American that he was not yet authorized by Thornburgh to send the money to American. On July 9, 1986, Thornburgh demanded in writing that respondent place the funds for Rodeo in a trust account and respondent represented to Thornburgh that he had done so. The record reveals that on June 27, 1986, respondent had placed \$20,000 in a new trust account at the Bank of America, Sunset-Wetherly branch. However, instead of taking the money from his savings account this money was taken from the estate of Hiatt, a decedent's estate for which respondent served as executor. According to respondent, this estate money was an "advance on fees." Respondent testified that he had neither the approval of the court nor that of the attorney for the executor to use the estate funds.²

2. At oral argument before us, respondent's counsel claimed that the hearing judge had sustained his objections to questions concerning the source of respondent's \$20,000 deposit in the new Bank of America trust account. Counsel is incorrect. Respondent interposed a belated objection, *after* the source of funds from estate of Hiatt had been established. (R.T. pp. 135-137.) Further, although the hearing judge ques-

tioned the relevancy of this subject at that point in the hearing (before culpability was determined), respondent did not request that she strike the testimony already elicited nor did she do so on her own. (*Id.* at pp. 137-140.) On the contrary, she made an express finding that respondent used the estate funds to open the trust account and also found it to be an aggravating circumstance. (Hearing judge's decision, pp. 12-13, 31.)

In July 1986 Thornburgh discharged respondent and hired another attorney to get his money back from respondent. Wagner and respondent had a falling out. Rodeo never got off the ground. In September 1986, American sued respondent and Thornburgh for damages for breach of contract and fraud. The next month, respondent cross-complained against Wagner and Thornburgh for indemnification and Thornburgh was able to settle with American. In early 1987, Thornburgh recovered his money from respondent.

Respondent never explained why he failed to pay over the Rodeo funds to American or use them for any other Rodeo purpose. He said he had Wagner's permission to use the funds for the publishing business he and Wagner were involved in, but he never provided details or documents supporting his claim.

Respondent testified that he did represent Wagner in a legal capacity with regard to Rodeo and he believed the monies given him for the American lease deposit were Wagner's own funds. One of the few disputes in the record was whether respondent also represented Thornburgh. Thornburgh testified that in March 1986, Wagner had arranged for respondent to represent them both on Rodeo, Thornburgh met with respondent about Rodeo more than once starting in late April 1986, and Thornburgh considered respondent to be Thornburgh's attorney until he discharged him in the summer of 1986. At the trial respondent denied that he represented Thornburgh. However, respondent's testimony on this point was contradicted by his own litigation position in 1986.³

Ultimately, respondent's counsel conceded that the evidence showed that respondent had held himself out as representing Thornburgh.⁴

II. EVIDENCE RE MITIGATION

[1] Respondent did not appear at the hearing on degree of discipline. His counsel told the hearing judge that respondent was out of state on an undefined "absolute, desperate emergency." Respondent's counsel did not seek a continuance, instead stating that respondent had told his counsel that he would have to go ahead without him. The hearing judge properly did not make a finding in aggravation based on respondent's failure to be personally present at the hearing on degree of discipline, since he was represented by counsel. (See *Calvert v. State Bar* (1991) 54 Cal.3d 765, 784.) The judge judicially noticed respondent's lack of a prior record of discipline. No other evidence of mitigation was offered.

III. THE HEARING JUDGE'S CONCLUSIONS

Rejecting a motion by the State Bar examiner to amend the notice to show cause to add a charge of violating (former) rule 8-101(B)(4), Rules of Professional Conduct (failure to promptly pay client's share of funds),⁵ the hearing judge concluded that respondent wilfully violated rule 8-101(A) (failure to keep client funds in a proper trust account) and section 6106 (commission of an act of dishonesty or moral turpitude)⁶—the latter both by misappropriating the \$20,000 in funds and by misrepresenting to American that they were held in a trust account. She declined to find culpability as charged

3. As noted earlier, in early April 1986, respondent wrote to American stating that he was holding in a trust account funds on behalf of Rodeo. (Exh. 1.) In October 1986, in the superior court action brought by American, respondent acknowledged in part in his cross-complaint, "During 1986, [I] acted as the attorney for Michael Wagner and J. Lynn Thornburgh . . . [and] faithfully and correctly carried out all instructions of said clients." (Exh. 15.) Finally, in June 1987, in a reply to a State Bar investigator's inquiry, respondent stated in part that Wagner's partner in Rodeo was Thornburgh, that Wagner instructed respondent to hold the \$27,000 in trust to be disbursed per "their" instructions and that \$20,000 in funds was later placed in a trust account for "the benefit of Mr. Thornburgh[h]." (Exh. 14.)

4. The record on this point reads as follows: "[Hearing judge]: [Respondent] held himself out—the evidence clearly shows he held himself out as representing Mr. Thornberg [sic]. ¶ [Respondent's counsel]: Yes, he did." (R.T. p. 253.)

5. Unless noted otherwise, all references to rules are to the former Rules of Professional Conduct in effect between January 1, 1975, and May 26, 1989.

6. Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code.

under rule 6-101(A)(2) or under sections 6068 and 6103.

IV. DISCUSSION

A. Culpability.

On review, respondent disputes both his culpability and the hearing judge's disbarment recommendation. He disputes any attorney-client relationship between himself and Thornburgh and denies that any of his conduct violated section 6106. We deal with his arguments in turn, noting first that near the end of his review brief, respondent concedes that he commingled and misappropriated client funds and deceived American, although he claims to have acted in good faith and with client Wagner's consent.

[2] Respondent's argument to us to defeat the hearing judge's findings that he had an attorney-client relationship with Thornburgh is without merit. The judge discussed this issue extensively in her decision, citing relevant evidence and court decisions, and respondent has given us no authorities justifying any different conclusion in light of this record. Thornburgh testified credibly that an attorney-client relationship existed; but more significantly, respondent acknowledged such a relationship in his cross-complaint to American's suit and respondent's counsel conceded that the evidence showed that respondent had held himself out as Thornburgh's attorney.⁷ [3 - see fn. 7] [4] Even if no such relationship had ever been created, respondent, having acknowledged more than once that he was holding funds for Rodeo or Thornburgh and Wagner, is still held to the same fiduciary duties to Thornburgh in dealing with those funds as if there were an attorney-client relationship. (See *Johnstone v. State Bar* (1966)

64 Cal.2d 153, 155-156; *Hamilton v. State Bar* (1979) 23 Cal.3d 868, 879; *Worth v. State Bar* (1976) 17 Cal.3d 337, 340-341.⁸)

[5] It is also beyond dispute that respondent's placement of any funds for Rodeo in his general, business, B of A W.H. account, violated rule 8-101(A), even if, as he says, he had Wagner's consent to do that. Prior to 1975, a client's *written direction* to an attorney to deviate from the trust account deposit provisions of rule 8-101's predecessor, former rule 9, would have immunized an attorney from such a rule violation. However, rule 8-101 dropped rule 9's written client direction exception. In any case, respondent never produced any corroborating evidence from Wagner. Moreover, his other client, Thornburgh, insisted commencing in late April, that the funds be placed in a trust account, just as respondent had falsely represented to American he had already done.

Respondent's wilful misappropriation of nearly all of the \$20,000 from Rodeo was also clear. This is not a case of misappropriation based on carelessness or inadequate office management. (Cf. *Palomo v. State Bar* (1985) 36 Cal.3d 785, 795-796.) The evidence shows that respondent depleted most of the funds to be used for Rodeo within a month of their deposit. Admittedly, he used no portion of them for Rodeo and he offered no convincing evidence to justify using them for his own business.

[6] Equally clear is respondent's written misrepresentation to American that he was holding funds in a trust account. He did not make a mistaken deposit. He knew when he falsely wrote to American that the account into which he deposited Rodeo's funds was not a trust account. Contrary to respondent's position

7. [3] In the State Bar's brief on review, while discussing the evidence showing an attorney-client relationship, the examiner stated that respondent had the burden before us to show that the hearing judge's findings are not supported by substantial evidence. She cited as her authority *Dixon v. State Bar* (1982) 32 Cal.3d 728. That authority speaks only to the burden of a member of the State Bar appearing before the Supreme Court—a burden which is specifically defined by statute. (Bus. & Prof. Code, § 6083 (c).) Neither *Dixon v. State Bar*, *supra*, nor any authority of which we are aware supports the proposition that that same burden is imposed on a member of

the State Bar appearing before the State Bar Court Review Department. (See *In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128, 135-136.)

8. Worth had no attorney-client relationship with the mother of his law partner who had given him \$25,000 for investment in a limited realty partnership in which Worth was the general partner. The Supreme Court disciplined Worth for commingling the investment funds with his personal funds, engaging in grossly negligent misrepresentations and failing to account to the investor.

on review, section 6106 prohibits *any* act of attorney dishonesty, whether or not committed while acting as an attorney. (See *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 576.) The Supreme Court's words in *McKinney v. State Bar* (1964) 62 Cal.2d 194, 196, are apt: "It thus is evident that [McKinney] by his own admission intended to deceive the bank. Therefore, it is immaterial whether any harm was done, since a member of the State Bar should not under any circumstances attempt to deceive another person. [Citations.]"

We therefore adopt the hearing judge's findings of fact and conclusions of law.

B. Degree of Discipline.

In recommending disbarment, the hearing judge emphasized the very serious nature of respondent's offenses, found aggravating circumstances preponderating and relied on the Standards for Attorney Sanctions for Professional Misconduct ("standards") (Trans. Rules Proc. of State Bar, div. V) as well relying on as two decisions of the Supreme Court: *Grim v. State Bar* (1991) 53 Cal.3d 21, 29 and *Kelly v. State Bar* (1988) 45 Cal.3d 649, 656. However, *Grim* involved an attorney with a prior record of discipline and *Kelly* involved an attorney with a much shorter prior blemish-free record than respondent. Under the standards, our past decisions and guiding decisions of our Supreme Court, we properly look at the balance of mitigating and aggravating circumstances and the discipline imposed in similar cases in the past in order to best assure that the goals of imposing attorney discipline are served. Those primary goals are the protection of the public, the preservation of the integrity of the legal profession and the maintenance of public confidence in that profession. (Std. 1.3; e.g., *Lebbos v. State Bar* (1991) 53 Cal.3d 37, 45; *In the Matter of Taylor, supra*, 1 Cal. State Bar Ct. Rptr. at p. 582.)

Respondent's offenses were unquestionably serious. [7] While he did set aside funds for restitution

to Thornburgh shortly after his acts of misappropriation, he can claim little or no mitigating credit for restitution for two reasons: first, he had no right to use the estate funds which were the source of restitution⁹ and second, Thornburgh had to endure respondent's suit against him and hire counsel to aid him prior to receiving his restitution.

[8a] Yet, without diminishing the gravity of respondent's misconduct, we believe that the combination of his 21-year record of practice without prior discipline, coupled with the relatively narrow time frame over which his misconduct occurred, are factors which have been weighed more heavily in similar cases by our Supreme Court than by the hearing judge. In *Friedman v. State Bar* (1990) 50 Cal.3d 235, 245, the Supreme Court was faced with very serious misconduct by a practitioner in two client matters with more than 20 years of blemish-free practice. While Friedman presented some additional mitigating evidence which respondent did not, Friedman's misconduct lasted longer than respondent's and included perjured testimony and an attempt to manufacture evidence at the hearing. In rejecting the disbarment recommendation of the former, volunteer review department and instead ordering a five-year stayed, three-year actual suspension, the Supreme Court described Friedman's unblemished record as "highly significant for purposes here" and considering evidence of family problems causing stress, the Court concluded that Friedman's behavior could be termed "aberrational."

More recently, in *Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1021-1022, the Supreme Court followed the suspension recommendation of the former review department rather than the disbarment recommendation of the hearing panel. In that case, an attorney with over 42 years of practice and no prior record of discipline had committed serious misconduct in two matters, including misappropriation of funds and deceit. Although Lipson presented more mitigating evidence than respondent, the Court saw Lipson's very serious offenses remediable by a five-

9. While a personal representative of a decedent's estate is entitled to a fee for performing administrative services, it is well settled that no right to payment accrues until the probate

court enters an order for payment. (See *Hatch v. Bush* (1963) 215 Cal.App.2d 692, 705; *Estate of Johnson* (1956) 47 Cal.2d 265, 272.)

year suspension stayed on conditions of actual suspension for two years and until respondent made a showing under standard 1.4(c)(ii).

Since we must balance all factors, we recognize that an unblemished record of lengthy practice even with other favorable circumstances may not be mitigating enough in all cases to demonstrate that disbarment is inappropriate. To that end, last year a majority of this department recommended disbarment of an attorney with over 20 years of discipline-free practice who had misappropriated a large client settlement and who had deceived the client's agent repeatedly over the next 18 months—misconduct spanning a far greater time period than involved here. (*In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, recommended discipline imposed by Supreme Court, October 29, 1991 (S022164).) [8b] On the other hand, we recognize, as does the Supreme Court, that not all serious cases of trust fund misappropriation warrant disbarment. (See *In the Matter of Tindall* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 652, recommended discipline imposed by Supreme Court, April 16, 1992 (S024352).) There a respondent culpable of misappropriating nearly \$25,000 in 19 unauthorized withdrawals over an eight-month period coupled with other violations received three years actual suspension and until restitution.

In recommending disbarment, the hearing judge did not discuss the *Friedman* and *Lipson* cases or the *Tindall* case, but she did discuss at length the disbarment cases of *Grim v. State Bar*, *supra*, 53 Cal.3d 21 and *Kelly v. State Bar*, *supra*, 45 Cal.3d 649. As discussed above, we believe that the result in *Grim* was significantly influenced by that attorney's prior discipline for a related offense. Kelly had far fewer years of discipline-free practice than does this respondent and that factor has made a significant difference in the outcome of cases as we view them.

[8c] We share the concern stated by the hearing judge in her decision that the record does not reveal the cause of respondent's misconduct and the public therefore could be at risk without severe discipline. We believe that the mechanics of the standard 1.4(c)(ii) rehabilitation hearing, imposed in *Lipson v. State Bar*, *supra*, and *In the Matter of Tindall*, *supra*, would be sufficient, as part of a three-year

actual suspension and a five-year stayed suspension and probationary period, to protect the public adequately in this case.

V. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend to the Supreme Court that the respondent, David Greene Lilly, be suspended from the practice of law in the state of California for a period of five (5) years; that execution of the order for such suspension be stayed; and that respondent be placed upon probation for a period of five (5) years upon the following conditions:

1. That during the first three (3) years of said period of probation and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, he shall be suspended from the practice of law in the state of California.

2. That during the period of probation, he shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

3. That during the period of probation, he shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Office of the Clerk, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, he shall file said report on the due date next following the due date after said effective date):

- (a) in his first report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct since the effective date of said probation;

- (b) in each subsequent report, that he has complied with all provisions of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) hereof;

4. That if he is in possession of clients' funds, or has come into possession thereof during the period covered by the report, he shall file with each report required by these conditions of probation a certificate from a Certified Public Accountant or Public Accountant certifying:

(a) That respondent has kept and maintained such books or other permanent accounting records in connection with his practice as are necessary to show and distinguish between:

(1) Money received for the account of a client and money received for the attorney's own account;

(2) Money paid to or on behalf of a client and money paid for the attorney's own account;

(3) The amount of money held in trust for each client;

(b) That respondent has maintained a bank account in a bank authorized to do business in the state of California at a branch within the state of California and that such account is designated as a "trust account" or "client's funds account";

(c) That respondent has maintained a permanent record showing:

(1) A statement of all trust account transactions sufficient to identify the client in whose behalf the transaction occurred and the date and amount thereof;

(2) Monthly total balances held in a bank account or bank accounts designated "trust account(s)" or "client's funds account(s)" as appears in monthly bank statements of said account(s);

(3) Monthly listings showing the amount of trust money held for each client and identifying each client for whom trust money is held;

(4) Monthly reconciliations of any differences as may exist between said monthly total balances and said monthly listings, together with the reasons for any differences;

(d) That respondent has maintained a listing or other permanent record showing all specifically identified property held in trust for clients;

5. That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of his probation with the probation monitor referee to establish a manner and schedule of compliance, consistent with these terms of probation. During the period of probation, respondent shall furnish such reports concerning his compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him/her to discharge his/her duties pursuant to rule 611, Rules of Procedure of the State Bar;

6. During the period of probation, respondent shall maintain on the official membership records of the State Bar, as required by Business and Professions Code section 6002.1, his current office or other address for State Bar purposes and all other information required by that section. Respondent shall report to the membership records office of the State Bar all changes of information as prescribed by said section 6002.1.

7. That, except to the extent prohibited by the attorney-client privilege and the privilege against self-incrimination, he shall answer fully, promptly and truthfully to the Presiding Judge of the State Bar Court, his or her designee or to any probation monitor referee assigned under these conditions of probation at the respondent's office or an office of the State Bar (provided, however, that nothing herein shall prohibit the respondent and the Presiding Judge,

designee or probation monitor referee from fixing another place by agreement) any inquiry or inquiries directed to him personally or in writing by said Presiding Judge, designee, or probation monitor referee relating to whether respondent is complying or has complied with these terms of probation;

8. That the period of probation shall commence as of the date on which the order of the Supreme Court herein becomes effective;

9. That at the expiration of said probation period, if he has complied with the terms of probation, said order of the Supreme Court suspending respondent from the practice of law for a period of five (5) years shall be satisfied and the suspension shall be terminated.

We further recommend that respondent be ordered to take and pass the California Professional Responsibility Examination prior to the expiration of his period of actual suspension.

We recommend to the Supreme Court that it include in its order a requirement that the respondent comply with the provisions of rule 955, California Rules of Court, and that respondent comply with the provisions of paragraph (a) of said rule with 30 days of the effective date of the Supreme Court order herein and file the affidavit with the Clerk of the Supreme Court provided for in paragraph (c) of the rule within 40 days of the effective date of the order, showing his compliance with said order.

Finally, we recommend that the costs incurred by the State Bar in the investigation, hearing and review of this matter be awarded to the State Bar pursuant to section 6086.10 of the Business and Professions Code.

We concur:

PEARLMAN, P.J.
NORIAN, J.