

Filed December 16, 2015

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

In the Matter of	)	Case No. 11-O-17015
	)	
DALE IRVING GUSTIN,	)	OPINION
	)	
A Member of the State Bar, No. 76642.	)	
_____	)	

In 2010, a superior court judge awarded over \$8,000 in sanctions against Dale Irving Gustin for engaging in meritless litigation. Gustin failed to pay the sanctions or report them to the State Bar. For this conduct, a hearing judge found him culpable of: (1) failing to obey court orders; and (2) failing to report the sanctions to the State Bar within 30 days, as required. The judge recommended discipline, including a six-month suspension continuing until Gustin pays the sanctions.

Gustin seeks review, arguing he is not culpable because the sanctions orders are invalid, he cannot afford to pay them, and he was denied due process in the superior court. He requests either that the hearing decision be vacated or that he receive no more than a stayed suspension. The Office of the Chief Trial Counsel (OCTC) does not appeal. After independently reviewing the record (Cal. Rules of Court, rule 9.12), we affirm the hearing judge’s culpability findings and recommended discipline.

**I. ANALYSIS OF GUSTIN’S DISCIPLINE HISTORY**

Gustin was admitted to practice law in California in 1977, and has two prior records of discipline. First, in 1995, he received a stayed suspension and probation for five ethical violations in two client matters, including failing to perform legal services competently (Rules

Prof. Conduct, rule 3-110(A)),<sup>1</sup> failing to properly account for and disburse client funds (rule 4-100(B)(3)&(4)), and improper withdrawal from employment (rule 3-700(A)(2)) (*Gustin I*).

Second, in 2003, Gustin was privately reprovved with conditions for committing two ethical violations in a single client matter, including failing to respond to client status inquiries (Bus. & Prof. Code, § 6068, subd. (m))<sup>2</sup> and failing to competently perform legal services (*Gustin II*).

In the present case (*Gustin III*), OCTC filed the Notice of Disciplinary Charges (NDC) in September 2012, and sought a two-year actual suspension. After a three-day trial in January 2013, the hearing judge issued his decision, recommending a six-month actual suspension, on April 19, 2013 (amended May 2, 2013). Gustin filed a request for review of the decision in the Review Department on September 23, 2013.

Shortly thereafter, on November 26, 2013, OCTC filed a fourth NDC in *In the Matter of Dale Irving Gustin*, 13-O-10692 (13-O-11454) (*Gustin IV*). He was charged with three counts of misconduct in two client matters, including failing to perform competently, failing to communicate, and failing to release a deceased client's file. On June 17, 2014, Gustin did not appear for trial, and his default was entered, which was later set aside for limited purposes. On February 12, 2015, the judge issued her decision. She properly noted that the misconduct in *Gustin IV* and the misconduct in the present case occurred during the same time period. She considered the discipline to recommend as if the two proceedings had been brought as one (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct Rptr. 602, 619), and concluded a one-year actual suspension was proper for the totality of the misconduct. Relying on the six-month suspension already recommended by the Hearing Department in the present case, the judge in *Gustin IV* recommended a six-month suspension, a two-year stayed suspension, and

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<sup>1</sup> All further references to rules are to the Rules of Professional Conduct of the State Bar unless otherwise noted.

<sup>2</sup> All further references to sections are to the Business and Professions Code unless otherwise noted.

three years' probation. Notably, OCTC did not seek review of this decision. On September 9, 2015, the Supreme Court imposed the recommended discipline in *Gustin IV*.

Earlier, on December 4, 2014, we had abated the present case pending the outcome of *Gustin IV*.<sup>3</sup> After the hearing judge in *Gustin IV* issued a decision, we terminated the abatement in this proceeding, and oral argument was heard on August 20, 2015. We then ordered supplemental briefing to address: (1) whether we should take judicial notice of the Hearing Department decision in *Gustin IV* as a prior record of discipline; and (2) whether *Gustin IV* should impact our discipline recommendation in the present proceeding. (Rules Proc. of State Bar, rule 5.156 [Review Department may, on its own motion, take judicial notice of a State Bar Court decision even if it was not admitted at trial]; Rules Proc. of State Bar, rule 5.106(E) [record of discipline is not inadmissible merely because recommendation has yet to be imposed].)

In his supplemental brief, Gustin reargued the merits of his defense. For its part, OCTC requested judicial notice of *Gustin IV* and sought Gustin's disbarment for the first time. It argued that a combined analysis of the misconduct in *Gustin IV* and in the present case revealed a pattern of misconduct and/or an unwillingness to practice ethically, citing to standard 1.8(b).<sup>4</sup> While we take judicial notice of *Gustin IV* and the Supreme Court's imposition of the recommended discipline, we disagree that standard 1.8(b) applies here. It expressly does not apply when the prior and the current misconduct occurred during the same time period, consistent with the teachings of *In the Matter of Sklar, supra*, 2 Cal. State Bar Ct. Rptr. 602.

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<sup>3</sup> Unless set aside, defaults often result in disbarment. For this reason, the Review Department may abate consideration of a pending review where a default has been entered in the Hearing Department against a respondent in a subsequent case.

<sup>4</sup> Effective July 1, 2015, the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, were revised and renumbered. Because this appeal was submitted for ruling after the July 1, 2015 effective date, we apply the revised version of the standards. All further references to standards are to this source.

Because the misconduct in *Gustin III* and *IV* overlaps in time, we find *Gustin IV* is not a prior record of discipline for the purpose of the present proceeding and thus has no impact on our discipline recommendation.

## II. FACTUAL BACKGROUND<sup>5</sup>

In 2009, Gustin substituted into a case to represent a Kern County Superior Court employee who had filed a discrimination and harassment lawsuit against her employer 18 months earlier. Gustin wanted to identify a Kern County judge as an additional defendant, but the complaint was time-barred. The plaintiff had previously testified in a deposition that at the time she filed the lawsuit, she knew the judge's identity and the facts that purportedly gave rise to the cause of action against him. Still, Gustin attempted to serve the judge with a "Doe substitution," claiming the plaintiff had just discovered his true identity. Opposing counsel informed Gustin that his service attempt was improper, and cautioned she would file a motion to quash service of the summons and for sanctions if he did not withdraw his attempted service. Gustin did not comply, and opposing counsel filed her motion in the San Luis Obispo Superior Court.<sup>6</sup> Gustin filed a late declaration in opposition, which the court did not consider.

### A. The March 11, 2010 Sanctions Order

On March 11, 2010, following a March 4 oral argument on the motion to quash, the superior court found Gustin's attempt to add the Kern County judge by Doe substitution "procedurally and substantively deficient." The judge ordered \$5,115 in sanctions against Gustin—\$4,115 in reasonable attorney fees payable to opposing counsel for engaging in a "frivolous, costly and meritless maneuver" in violation of Code of Civil Procedure section 128.7,

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<sup>5</sup> The hearing judge's factual findings are generally undisputed. We adopt and summarize those essential to our analysis, supplementing with additional facts from the record.

<sup>6</sup> Gustin's case was transferred to San Luis Obispo County because members of the Kern County Superior Court bench recused themselves.

and \$1,000 payable to the San Luis Obispo Superior Court Clerk for failing to file a timely opposition pursuant to a local rule of court and Code of Civil Procedure section 177.5.<sup>7</sup> The judge concluded that Gustin's late filing interrupted and delayed resolution of the case, and directed Gustin to pay the sanctions because the offending conduct was directly attributable to his legal strategy. The sanctions were due within 60 days. On March 18, 2010, a Notice of Entry of Order was served on Gustin.

**B. The May 26, 2011 Sanctions Order**

In April 2010, a month after the sanctions order was issued, Gustin filed a motion for reconsideration. Opposing counsel advised him the motion was untimely and deficient. She warned she would seek sanctions again if he did not withdraw it. Gustin amended the notice of motion to indicate he was withdrawing his request to reconsider the order quashing service, but not his request to strike the sanctions award. On August 19, 2010, after oral argument, the court denied the motion because it was untimely and presented no new facts or law.

The following day, opposing counsel sought additional sanctions for attorney fees incurred in litigating Gustin's unsuccessful motion to reconsider. Gustin filed a motion to disqualify the judge, which was later denied. On May 26, 2011, the court heard oral argument on the motion for sanctions and found that Gustin's motion for reconsideration had been merely a "tactic" to postpone paying the original sanctions ordered on March 11, 2010. The court ordered Gustin to pay \$3,623 to opposing counsel, and \$1,000 to the Court Clerk within 60 days. On July 18, 2011, a Notice of Entry of Judgment or Order was served on Gustin.

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<sup>7</sup> Like the hearing judge, we do not consider this portion of the sanctions order because the record fails to establish Gustin received advance notice or an opportunity to be heard on whether he should be sanctioned under these authorities.

### **C. Gustin's Response to the Sanctions Orders**

Gustin has not paid the sanctions and did not seek relief from the orders before the payment due dates. He testified he did not appeal the orders because it would have been “a waste of time and money,” and the bond was too expensive. He also failed to report the sanctions to the State Bar, claiming at trial that he never received the orders.

### **III. GUSTIN IS CULPABLE OF DISOBEYING TWO COURT ORDERS**

Count One of the NDC alleged that Gustin failed to obey the March 11, 2010 and May 26, 2011 orders to pay sanctions, in violation of Business and Professions Code section 6103.<sup>8</sup> The hearing judge found him culpable, and we agree.

To establish a willful violation of section 6103, an attorney must know the order was final and binding. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 787 [attorney's knowledge of final, binding order is essential element of § 6103 violation].) Gustin knew the sanctions orders were valid, final, and binding because he received notice of opposing counsel's motions and attended oral arguments for both sanctions motions. In addition, he was served with the Notices of Entry of Judgment for both orders, and did not appeal them. By failing to pay the sanctions, he is culpable of willfully violating court orders, as charged in Count One.

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<sup>8</sup> Under this section, an attorney's “willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear . . . constitute[s] cause[] for disbarment or suspension.” All further references to sections are to the Business and Professions Code.

#### **IV. GUSTIN IS CULPABLE OF FAILING TO REPORT JUDICIAL SANCTIONS**

Count Two alleged Gustin failed to report the sanctions to the State Bar within 30 days, in violation of section 6068, subdivision (o)(3).<sup>9</sup> The hearing judge found him culpable. The record supports this finding, and we affirm it.

#### **V. GUSTIN'S DEFENSES TO CULPABILITY ARE WITHOUT MERIT<sup>10</sup>**

##### **A. Sanctions Orders**

Gustin argues that the sanctions orders are void because they were based on fraud and improper conduct by the Kern County judge Gustin attempted to serve. This argument lacks merit. Despite ample opportunity, Gustin failed to litigate the validity of these orders in the civil courts. We have no reason to disturb these final orders (see *In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 605), and Gustin may not disregard them because he believes they were issued in error. (*In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar. Ct. Rptr. 1, 9, fn. 3 [“Respondent’s belief as to the validity of the order is irrelevant to the section 6103 charge”]; *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 951-952 [“no plausible belief in the right to ignore final, unchallengeable orders one personally considers invalid”].)

##### **B. Financial Problems**

Gustin also argues that he did not willfully violate the sanctions orders because financial difficulties prevented him from paying them. Financial hardship is not a defense to nonpayment of sanctions where the attorney knew about the order imposing them and failed to seek relief

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<sup>9</sup> This section provides that an attorney must report to the State Bar, in writing within 30 days, any judicial sanctions imposed on the attorney, except sanctions for failure to make discovery or monetary sanctions of less than \$1,000.

<sup>10</sup> Having independently reviewed all arguments set forth by Gustin, those not specifically addressed have been considered and are rejected as having no merit.

from it. (*In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 868.) Gustin did not request relief from the orders in superior court until October 2012, a month after the NDC was filed and long after the sanctions were due.<sup>11</sup> We conclude that his failure to pay was willful and is not excused by his claimed inability to pay.<sup>12</sup>

### **C. Due Process**

Gustin contends that he was denied due process in the superior court because he was not summoned to a formal Order to Show Cause hearing. His contention lacks merit. First, Gustin did not appeal the orders to raise this concern. Further, he received the due process protections of Code of Civil Procedure section 128.7, subdivision (c), which require that he be provided “notice and a reasonable opportunity to be heard” as to whether he should be sanctioned for presenting a pleading for an improper purpose. This was not a contempt hearing that would require greater due process protections, as Gustin suggests. He was timely notified in letters and pleadings of the reasons opposing counsel sought sanctions, he had the opportunity to argue the motions before the superior court, he was served with notices that judgments had been entered against him, and he declined to appeal the rulings. We therefore agree with the hearing judge that “[a]ll of the safeguards required by section 128.7 and the requirements of due process were satisfied.”

### **D. Prosecutorial Misconduct**

Finally, Gustin alleges that OCTC committed prosecutorial misconduct by, among other things, denying him the right to counsel, to call witnesses, and to present evidence. At the outset,

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<sup>11</sup> Ultimately, the superior court denied his late request for relief.

<sup>12</sup> Willfulness in this attorney discipline context requires that members charged with wrongdoing intended either to commit the act or to abstain from committing it. (See *Durbin v. State Bar* (1979) 23 Cal.3d 461, 467 [no intent to violate law, to injure another, or to acquire advantage required]; see also *Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186 [willfulness does not require bad faith or knowledge of provision violated].) We find Gustin deliberately did not pay the sanctions.



we note that Gustin is not entitled to the assistance of counsel in State Bar Court proceedings. (*Walker v. State Bar* (1989) 49 Cal.3d 1107, 1116.) Further, the hearing judge properly imposed evidentiary sanctions against Gustin by limiting his evidence at trial after he failed to file a pretrial conference statement or lodge exhibits. (See Rules Proc. of State Bar, rule 5.69(C) [Civil Discovery Act's provisions about misuse of discovery process and most permissible sanctions apply in State Bar court proceedings] and rule 5.101(E) [if party fails to file pretrial statement, Court may exclude evidence].) And Gustin cites to no authority or evidence that, given these circumstances, persuasively supports his claims of prosecutorial misconduct.

## **VI. SERIOUS AGGRAVATION AND NO MITIGATION<sup>13</sup>**

The hearing judge found four factors in aggravation and none in mitigation. We agree, and afford serious weight to the aggravating evidence.

First, Gustin committed multiple acts of misconduct (std. 1.5(b)) by filing several frivolous pleadings, which led to two sanctions orders. However, we give no weight to this aggravating factor because it is improper to consider factual findings in aggravation when they have been used to find culpability. (*In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 68.)

Second, Gustin has two prior records of discipline, *Gustin I* and *Gustin II*. (Std. 1.5(a).) We agree with the hearing judge that only limited weight should apply to these priors because the first was remote in time (1995) and the second involved minor misconduct (failure to respond to client inquiries).

Third, the hearing judge correctly found that Gustin significantly harmed the administration of justice. (Std. 1.5(j).) He failed to reimburse opposing counsel and the court for

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<sup>13</sup> Standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Gustin to meet the same burden to prove mitigation.

wasted expenses caused by his meritless litigation, and he delayed the orderly process of the San Luis Obispo County court's proceedings. (See *In the Matter of Maloney and Virsik, supra*, 4 Cal. State Bar Ct. Rptr. at p. 792 [significant harm to administration of justice where opposing party performed substantial additional work and incurred additional expense resulting in monetary sanctions and undue burden on court system].)

Finally, Gustin's indifference and lack of insight were evident during his trial. As the hearing judge aptly noted, Gustin remained "defiant" and showed "no insight regarding his unethical behavior."<sup>14</sup> (See std. 1.5(k); *Weber v. State Bar* (1988) 47 Cal.3d 492, 506 [lack of remorse and failure to acknowledge wrongdoing are aggravating factors].)

## **VII. SIX-MONTH ACTUAL SUSPENSION IS APPROPRIATE DISCIPLINE**

Our analysis begins with the standards, which "promote the consistent and uniform application of disciplinary measures," and are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 91.) Multiple standards apply to Gustin's misconduct and provide a broad range of discipline from reproof to disbarment.<sup>15</sup>

At trial, OCTC argued against a strict application of former standard 1.7(b) (current standard 1.8(b)), which calls for disbarment due to Gustin's two prior disciplines and lack of mitigation. Instead, OCTC sought a two-year actual suspension continuing until Gustin proves

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<sup>14</sup> For example, despite being sanctioned twice for meritless litigation, Gustin proclaimed at trial: "I don't file frivolous cases. I don't file frivolous things." He also testified that his motion for reconsideration was essentially doomed from the start because the superior court judge "became vindictive against [him] over trying to bring a fellow judge, one of his equals, into the case. It was obvious that he was trying to keep [the Kern County judge] out of this case by whatever means he could do, and he did."

<sup>15</sup> Standards 2.12(a) (disobedience of court orders in practice of law calls for disbarment or actual suspension); 2.12.(b) (violations under § 6068, subd. (o) [failure to report sanctions] call for reproof); 1.8(a) (when attorney has one prior record, present sanction must be greater than sanction previously imposed); 1.8(b) (where attorney has two or more prior records, disbarment is appropriate sanction absent compelling mitigation); and 1.7(a) (when multiple sanctions apply, most severe shall be imposed).

his rehabilitation, citing *In the Matter of Katz* (Review Dept. 1995) 3 Cal. State Bar Court Rptr. 430. In *Katz*, the attorney received a two-year suspension for committing acts of moral turpitude, violating two bankruptcy court orders, filing a bad faith bankruptcy petition, and endorsing his client's false financial statement. He also had a prior record of discipline that involved moral turpitude. Further, *Katz* committed his misconduct while on disciplinary probation, lacked remorse, and significantly harmed the administration of justice.

In the present case, the hearing judge found that the two-year actual suspension *Katz* received was too harsh for Gustin. The judge reasoned that while Gustin shared "many of the same non-redeeming qualities that were present in *Katz*," Gustin's misconduct was not as serious nor was the harm he caused as substantial. The judge recommended a six-month suspension continuing until Gustin pays the sanctions in full. OCTC did not appeal this recommendation. In determining the proper discipline, we have considered the misconduct and aggravation. We have also reviewed the parties' supplemental post-oral argument briefs and the *Gustin IV* judge's discipline analysis that took into account the six-month Hearing Department recommendation in the present case. Accordingly, we find that a two-year stayed suspension with conditions of a six-month actual suspension and probation are appropriate discipline, particularly since the actual suspension will continue until Gustin pays restitution.

Finally, we reject Gustin's requests to vacate the decision below or for an entirely stayed suspension. Violating court orders is unquestionably serious misconduct. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112 ["Other than outright deceit, it is difficult to imagine conduct in the course of legal representation more unbecoming an attorney"].) Given Gustin's lack of insight and other aggravating factors, particularly his ongoing failure to pay the sanctions, the recommended discipline is necessary to protect the public and the courts, and maintain high

professional standards, as well as impress upon Gustin the importance of strictly following court orders and refraining from further misconduct.

## VIII. RECOMMENDATION

For the foregoing reasons, we recommend that Dale Irving Gustin be suspended from the practice of law for two years, that execution of that suspension be stayed, and that he be placed on probation for three years on the following conditions:

1. He must be suspended from the practice of law for a minimum of the first six months of his probation and remain suspended until the following conditions are satisfied:
  - a. He pays the following sanctions and attorney fees and costs (or reimburses the Client Security Fund, to the extent of any payment from the Fund to the payees, in accordance with Business and Professions Code section 6140.5), and furnishes proof to the State Bar Office of Probation in Los Angeles:
    - (1) the \$4,115 sanctions award issued on March 11, 2010 by the Superior Court of the County of San Luis Obispo, plus 10 percent interest per year from March 11, 2010; and
    - (2) the \$3,623 and \$1,000 sanctions awards issued on May 26, 2011 by the Superior Court of the County of San Luis Obispo, plus 10 percent interest per year from May 26, 2011.
  - b. If he remains suspended for two years or more as a result of not satisfying the preceding requirements, he must also provide proof to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law before his suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)
2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.
3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.
4. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation deputy either in person or by telephone. During the period of probation, he must promptly meet with the probation deputy as directed and upon request.
5. He 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, he

must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. 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 probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.
7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the tests given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if Gustin has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

#### **IX. PROFESSIONAL RESPONSIBILITY EXAMINATION**

We further recommend that Gustin be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter, or during the period of his suspension, whichever is longer, and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

#### **X. RULE 9.20**

We further recommend that Gustin be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

## **XI. COSTS**

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

PURCELL, P. J.

WE CONCUR:

EPSTEIN, J.

STOVITZ, J.\*

\*Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.