

Filed April 24, 2018

STATE BAR COURT OF CALIFORNIA
REVIEW DEPARTMENT

In the Matter of)	Case No. 16-O-11205
)	
KLAYTON KHISHAVEH,)	OPINION
)	
A Member of the State Bar, No. 236903.)	
_____)	

This is Klayton Khishaveh’s second disciplinary case in less than three years. In 2015, he stipulated to serious misconduct and was ordered to serve a two-year actual suspension, continuing until he proves his rehabilitation. He remains suspended.

While Khishaveh negotiated the discipline in his first case, he committed the present misconduct. He ignored his client’s personal injury claim for two years, the statute of limitations passed, and the cause of action was lost. He stipulated to facts and culpability for failing to perform competently, communicate significant developments, and avoid prejudice to his client upon withdrawal from representation. The hearing judge recommended a one-year actual suspension—a downward departure from the disciplinary standard that mandates progressive discipline.¹ The Office of Chief Trial Counsel of the State Bar (OCTC) appeals, seeking a three-year actual suspension. Khishaveh does not appeal, but requests a six-month actual suspension.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we affirm culpability, but find no reason to depart from the progressive discipline standard. We recommend a three-year actual suspension, continuing until Khishaveh proves his rehabilitation.

¹ Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. All further references to standards are to this source.

I. KHISHAVEH'S CURRENT MISCONDUCT (*KHISHAVEH II*)

A. Stipulated Facts

Khishaveh was admitted to practice law in California in June 2005. On May 8, 2013, Edyn Rodas retained him for his personal injury claim resulting from a car accident that day. Allstate Insurance Company (Allstate) insured the other motorist. Between June 6, 2013 and May 1, 2015, Khishaveh ignored 25 letters from Allstate that requested he submit a demand letter and “special package” to proceed with Rodas’s claim.²

Khishaveh answered Allstate for the first time on May 5, 2015, two years after receiving the first letter. His response did not provide the bills and medical reports that Allstate requested to substantiate the settlement demand. Instead, it provided an “outline of client’s treatment,” listed two of Rodas’s medical providers and their treatment costs, and made a settlement demand of \$6,578. On May 12, Allstate confirmed receipt of Khishaveh’s letter and again requested that he provide information regarding Rodas’s claim, which Khishaveh again failed to do. On May 27, Allstate wrote to Khishaveh and requested evidence that he had filed a lawsuit to protect the statute of limitations on Rodas’s claim. Khishaveh failed to respond. On June 10, 2015, Allstate sent him another letter asking that he contact the company within 10 days or it would close Rodas’s matter. Again, Khishaveh failed to respond.

As a result of Khishaveh’s failure to file a lawsuit or negotiate a settlement, Allstate closed the claim after the statute of limitations expired. Khishaveh did not inform Rodas of these events. On February 5, 2016, nearly three years after Rodas’s accident, Allstate informed him

² Allstate’s 2013 letters were dated June 6, June 29, July 26, September 23, October 22, November 11, and December 19. Its 2014 letters were dated January 8, February 8, March 31, May 2, May 31, July 2, July 25, August 22, September 20, October 23, November 20, and December 16. And its 2015 letters were dated January 14, January 23, February 7, March 13, April 2, and May 1.

that his claim had been closed and that Khishaveh had not provided medical information or filed a lawsuit to protect the statute of limitations. Rodas complained to the State Bar.

B. The Notice of Disciplinary Charges

On December 16, 2016, OCTC filed a three-count Notice of Disciplinary Charges (NDC), alleging that Khishaveh failed to: (1) perform legal services with competence, in violation of rule 3-110(A) of the Rules of Professional Conduct;³ (2) keep his client reasonably informed of significant developments in his matter, in violation of Business and Professions Code section 6068, subdivision (m);⁴ and (3) take reasonable steps to avoid reasonably foreseeable prejudice to his client before withdrawing from employment, in violation of rule 3-700(A)(2).⁵

C. The Disciplinary Trial

The trial was held on April 11, 2017. The parties did not call witnesses, but had previously filed a Stipulation as to Facts, Conclusions of Law, and Admission of Documents (Stipulation). Khishaveh stipulated to culpability on all counts. The judge approved the Stipulation and admitted other exhibits. OCTC gave opening and closing statements, and Khishaveh chose not to testify or to give any statements. The judge called for mitigation and aggravation evidence. In mitigation, Khishaveh offered his Stipulation (as cooperation). In

³ Rule 3-110(A) provides that an attorney “shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.” All further references to rules are to the Rules of Professional Conduct unless otherwise noted.

⁴ Section 6068, subdivision (m), provides that it is the duty of an attorney “[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.” All further references to sections are to the Business and Professions Code.

⁵ Rule 3-700(A)(2) prohibits an attorney from withdrawing from employment until the attorney has taken reasonable steps to avoid reasonably foreseeable prejudice to the client’s rights, including giving due notice to the client, allowing time for employment of other counsel, and complying with rule 3-700(D) (promptly returning client’s papers and property and refunding unearned fees) and other applicable rules and laws.

aggravation, OCTC offered Khishaveh's prior discipline record, his multiple acts of misconduct, and Rodas's victim impact statement. The trial took less than one day. Both parties submitted posttrial briefs. The judge issued her decision on June 14, 2017, finding Khishaveh culpable on all three counts, as charged.

D. Stipulated Culpability

We affirm the hearing judge's culpability findings, as supported by the Stipulation and the evidence. We focus on mitigation, aggravation, and whether progressive discipline applies.

II. AGGRAVATION OUTWEIGHS MITIGATION

OCTC must establish aggravating circumstances by clear and convincing evidence⁶ (std. 1.5), while Khishaveh has the same burden to prove mitigation (std. 1.6). We agree with the hearing judge that the aggravation far outweighs the mitigation, as detailed below.

A. Aggravation

1. Prior Record of Discipline—*Khishaveh I*

Standard 1.5(a) provides that a prior record of discipline may be an aggravating factor. The hearing judge found that Khishaveh's prior record was "serious" and afforded it "significant aggravating weight." We agree.

Khishaveh's misconduct began in 2011, about six years after his 2005 admission to the State Bar. On May 2, 2014, OCTC filed an NDC in *Khishaveh I* alleging he committed several acts of misconduct in three matters in case numbers 13-O-12709, 13-O-16445, and 13-O-16740. On February 11, 2015, Khishaveh signed a stipulation to facts, culpability, mitigation, aggravation, and discipline.

⁶ *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552 (clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind).

In the first matter, Khishaveh represented a client who was injured in a car accident. Khishaveh made false representations about the settlement to his client's medical provider, Dr. Suzanne Fratto, failed to maintain funds in his client trust account (CTA) for Dr. Fratto, misappropriated by gross negligence \$2,789 that Dr. Fratto was entitled to receive, and failed to properly communicate with or pay Dr. Fratto until the doctor filed a lawsuit.⁷

In the second matter, Khishaveh commingled funds and issued insufficient funds (NSF) checks from his CTA from 2011 to 2013. He made seven deposits of personal funds (totaling \$35,200) into his CTA, and issued five NSF checks (totaling \$6,926.82) from his CTA.⁸

In the third matter, Khishaveh failed to timely pay a \$1,000 sanctions order issued by an administrative law judge on May 28, 2013. On October 1, 2013, he paid the sanctions but never reported them to the State Bar, as he is required to do.⁹

In aggravation, Khishaveh engaged in multiple acts of wrongdoing, caused significant harm to Dr. Fratto, committed trust violations, and lacked insight and remorse. In mitigation, he was credited for his cooperation (entering into a pretrial stipulation) and given nominal or "the lightest possible weight (if any)" for his five years of discipline-free practice.

On June 22, 2015, the Supreme Court adopted the stipulation recommendation for discipline and ordered Khishaveh suspended for three years, stayed, with four years' probation, subject to a two-year actual suspension, continuing until he proves his rehabilitation, fitness to practice, and learning and ability in the general law. (Supreme Court Case No. S225940.) The Supreme Court order became effective on July 22, 2015.

⁷ These acts violated section 6106 (moral turpitude by misrepresentation), rule 4-100(A) (failure to maintain funds), and section 6106 (moral turpitude by grossly negligent misappropriation).

⁸ These acts violated rule 4-100(A) (commingling) and section 6106 (moral turpitude by gross negligence).

⁹ These acts violated sections 6103 (disobeying court order) and 6068, subdivision (o)(3) (failure to report sanctions to State Bar within 30 days).

To determine the aggravating weight of Khishaveh's prior discipline, we consider that his past misconduct was serious, and that it is similar to some of his present wrongdoing. In particular, he failed to properly communicate with Dr. Fratto about monies due to her and, likewise in the present case, he never contacted Rodas, even after Rodas's cause of action was lost. Dr. Fratto and Rodas suffered significant harm. (See *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443–444 [similarities between prior and current misconduct render previous discipline more serious, as they indicate prior discipline did not rehabilitate].) These commonalities render Khishaveh's prior record particularly serious and deserving of the significant aggravating weight the hearing judge assigned. (See *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619 [part of rationale for considering prior discipline as having aggravating impact is that it is indicative of recidivist attorney's inability to conform his conduct to ethical norms].)¹⁰

2. Multiple Acts of Wrongdoing

The hearing judge found aggravation for multiple acts of wrongdoing based on the three charges in the NDC. (Std. 1.5(b) [multiple acts of wrongdoing are aggravating].) The judge assigned minimal weight because the misconduct was "limited in scope and involved a single client." OCTC argues for increased aggravation because Khishaveh committed at least 25 acts of wrongdoing over a two-year period by repeatedly failing to respond to Allstate's letters. We agree. Multiple acts of wrongdoing are not limited to the counts pled. (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 279.) We assign significant aggravating weight to Khishaveh's recurring ethical violations.

¹⁰ The aggravating force of prior discipline is generally diminished if the misconduct occurred during the same time period as the current misconduct. (*In the Matter of Sklar, supra*, 2 Cal. State Bar Ct. Rptr. at p. 619.) This principle does not apply here because Khishaveh committed most of his current misconduct either after the NDC was filed or after he signed the stipulation in *Khishaveh I*.

3. Significant Harm

The hearing judge correctly found that Khishaveh's misconduct significantly harmed his client. (Std. 1.5(j) [significant harm to client, public, or administration of justice is aggravating circumstance].) Khishaveh's incompetence cost Rodas his cause of action. Rodas's unchallenged victim impact statement describes the hardship of this experience. He "lost faith in the legal community," and continues to suffer physical pain because he did not receive necessary medical treatment. He also has difficulty driving, which affects his personal life. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646 [significant aggravation where attorney failed to pursue client's case, resulting in its dismissal and client's inability to obtain damages].)

4. No Aggravation for Indifference

The hearing judge did not assign aggravation for indifference. (Std. 1.5(k) [indifference toward rectification or atonement for consequences of misconduct is aggravating].) For the first time on review, OCTC requests that we assign aggravation because Khishaveh did not make amends by paying for Rodas's medical treatment. We decline to do so. When the judge called for aggravation evidence at trial, OCTC did not raise this issue, which deprived Khishaveh of an opportunity to provide rebuttal evidence. Further, our independent review of the record does not clearly and convincingly establish if, when, or by whom Rodas's medical bills were paid.

B. Mitigation

1. Cooperation

The hearing judge assigned significant mitigation credit for Khishaveh's cooperation with the State Bar because he stipulated to facts and culpability. (Std. 1.6(e) [spontaneous candor and cooperation to State Bar is mitigating].) We agree. The comprehensive Stipulation assisted OCTC's prosecution and conserved judicial time and resources, resulting in less than a one-day

trial. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive mitigation given to those who willingly stipulate to facts and culpability].)

2. No Mitigation for Remorse and Recognition of Wrongdoing

Khishaveh argues that he is entitled to additional mitigation for remorse for entering into the Stipulation. (Std. 1.6(g) [mitigation available for “prompt objective steps, demonstrating spontaneous remorse and recognition of the wrongdoing and timely atonement”].) We reject this argument. Khishaveh entered the Stipulation shortly before trial, which does not demonstrate *prompt* objective steps indicating remorse, as the standard requires. And there is no other evidence of remorse in the record as Khishaveh did not testify or call witnesses. Notably, we have already assigned significant mitigation credit for Khishaveh’s Stipulation under standard 1.6(e) (cooperation).

III. PROGRESSIVE DISCIPLINE IS WARRANTED¹¹

Our disciplinary analysis begins with the standards which, although not binding, are entitled to great weight (std. 1.1; *In re Silverton* (2005) 36 Cal.4th 81, 91–92), and should be followed whenever possible. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) If we deviate from the standards, we must clearly articulate compelling reasons for doing so. (*Aronin v. State Bar* (1990) 52 Cal.3d 276, 291; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.)

We first determine which standard applies to Khishaveh’s misconduct. Standard 2.7(c) provides for suspension or reproof as the presumed sanction for “performance, communication, or withdrawal violations, which are limited in scope or time.”¹² But given Khishaveh’s disciplinary history, we also look to standard 1.8(a), which calls for increased discipline if the

¹¹ The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts and the legal profession; to preserve public confidence in the profession; and to maintain high standards for attorneys. (Std. 1.1.)

¹² The degree of sanction depends on the extent of the misconduct and the degree of the harm to the client or clients. (Std. 2.7(c).)

attorney has a prior record.¹³ It provides: “If a member has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust.”

The hearing judge analyzed standard 1.8(a) and found that it applied, but did not follow its directive for progressive discipline. The judge incorrectly reasoned that since Khishaveh’s present misconduct was less extensive and serious than his past misconduct, imposing an additional three-year actual suspension would be manifestly unjust. Instead, the judge deviated from standard 1.8(a) and applied standard 2.7(c), and the attendant case law, to recommend a one-year actual suspension—less than the two-year actual suspension the Supreme Court ordered in *Khishaveh I*.

We disagree with this disposition. The language of standard 1.8(a) directs that we *must* impose greater discipline except for a narrow exception not applicable here. The hearing judge seemed to focus on comparing whether Khishaveh’s present misconduct was more serious than his past misconduct to determine if it was “progressive.” This comparison is not the test for progressive discipline.

Standard 1.8(a) mandates progressive discipline for a second case of misconduct—but progressively *serious* misconduct in the second case is not required. We acknowledge that Khishaveh’s present misconduct is less serious than his past wrongdoing, but it is still significant. He committed multiple acts of misconduct over two years and significantly harmed Rodas. Khishaveh should have been, but was not, keenly aware of his ethical duty to avoid future misconduct because his first discipline case had been initiated when he committed the present misconduct. He failed to respond to at least 13 of 25 letters from Allstate after the

¹³ The most severe sanction shall be imposed where multiple sanctions apply. (Std. 1.7(a).)

May 2, 2014 NDC was filed in *Khishaveh I*. And later, after he signed his stipulation for a two-year actual suspension in *Khishaveh I*, he disregarded more letters from Allstate *before* the statute of limitations expired or his client was harmed. Since Khishaveh chose not to testify at trial, no evidence explains his inexcusable inaction. This misconduct, his recent serious discipline record, and the overall aggravation call for measured and progressive discipline under standard 1.8(a). We find nothing in the record that merits a departure from that standard.

Khishaveh argues on review that imposing progressive discipline would be a rigid application of standard 1.8(a), and would unfairly result in greater discipline than is warranted for his present misconduct. He urges that imposing an additional three-year actual suspension “on top” of the two-year actual suspension he has already served would be grossly excessive and, as the hearing judge found, “manifestly unjust.” In support, he offers two cases where progressive discipline was not imposed for additional misconduct: *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83 and *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527.

Both cases are distinguishable. Most notably, *Wyrick* and *Friedman* were decided more than a decade before *In re Silvertown*, *supra*, 36 Cal.4th 81—the Supreme Court’s most recent approval of progressive discipline under former standard 1.7(a) (currently standard 1.8(a)). *Silvertown*, a disbarment case, makes clear that the purpose of former standard 1.7(a) is to address recidivist misconduct by *requiring* greater discipline in a second case unless the specified exceptions set out in the standard are met. Contrary to Khishaveh’s argument, the Supreme Court did not limit its analysis in *Silvertown* to cases where an attorney’s prior discipline was disbarment. As to *Wyrick*, the case involved a prior criminal conviction, which was different from the new misconduct, and there were no other aggravating circumstances. (*In the Matter of Wyrick*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp 87–90.) *Friedman* involved the late filing of a

California Rules of Court, former rule 955 (current rule 9.20) declaration, also different misconduct than in the prior case, and the attorney proved compelling mitigation, including that no clients were harmed. (*In the Matter of Friedman, supra*, 2 Cal. State Bar Ct. Rptr. at pp. 530–532.) Unlike *Wyrick* and *Friedman*, Khishaveh’s aggravation outweighs his mitigation, he committed similar acts of wrongdoing in his past and present cases, and he caused significant harm to Rodas.

We also reject Khishaveh’s argument that an alternative “safeguard” to imposing progressive discipline already exists since he must prove his rehabilitation under standard 1.2(c)(1), as ordered in his prior discipline case. We disagree. That discipline case did not impress upon him the negative consequences of failing to perform his ethical duties, namely, that it can cause harm to others and can subject him to progressive discipline. The totality of the circumstances warrants progressive discipline as directed by standard 1.8(a), including a three-year actual suspension continuing until Khishaveh proves his rehabilitation, fitness to practice, and present learning and ability in the general law under standard 1.2(c)(1).

IV. RECOMMENDATION

For the foregoing reasons, we recommend that Klayton Khishaveh be suspended from the practice of law for four years, that execution of that suspension be stayed, and that he be placed on probation for four years on the following conditions:

1. He must be suspended from the practice of law for a minimum of the first three years of his probation and until he provides proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law. (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 case specialist to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation case specialist either in person or by telephone. During the period of probation, he must promptly meet with the probation case specialist 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 test 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 he has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Klayton Khishaveh be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of his actual suspension in this matter 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).)

VI. RULE 9.20

We further recommend that Klayton Khishaveh 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.

VII. 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:

HONN, J.

McGILL, J.

Case No. 16-O-11205

In the Matter of

KLAYTON KHISHAVEH

Hearing Judge

Hon. Yvette D. Roland

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