

Filed May 27, 2014

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

In the Matter of	)	Case Nos. 11-O-11276 (11-O-15541)
	)	
ROBERT NORIK KITAY,	)	OPINION
	)	
A Member of the State Bar, No. 229966	)	
_____	)	

Robert Norik Kitay stipulated to two counts of misconduct in two client matters: (1) moral turpitude for making misrepresentations and not transferring assigned settlement funds to a third party; and (2) failing to perform competently. As part of the stipulated discipline, the Office of the Chief Trial Counsel of the State Bar (OCTC) agreed to a 30-day suspension, which the hearing department approved. The Supreme Court returned the stipulation for further consideration. The parties presented evidence in aggravation and mitigation, and the hearing judge increased Kitay’s suspension to 75 days.

OCTC seeks review, requesting that Kitay be suspended for two years and be required to prove his fitness to practice law before being reinstated. Upon independent review of the record (Cal. Rules of Court, rule 9.12) and guided by comparable case law, we recommend increasing Kitay’s suspension to six months.

**I. SIGNIFICANT PROCEDURAL HISTORY**

In January 2012, the parties entered into a written stipulation as to facts, conclusions of law, and proposed discipline, establishing the two violations. The

stipulation specified no factors in aggravation and three in mitigation (lack of prior record in six years, severe financial stress, and restitution payment); the discipline recommendation included a 30-day suspension. The Supreme Court returned the stipulation to the hearing department for “further consideration of the recommended discipline in light of the applicable attorney discipline standards. (*In re Silverton* (2005) 36 Cal.4th 81, 89-94; see *In re Brown* (1995) 12 Cal.4th 205, 220.)” (*In re Kitay on Discipline* (August 27, 2012, S202084) Cal. State Bar Ct. Nos. 11-O-11276, 11-O-15541.)<sup>1</sup>

OCTC moved to withdraw certain mitigation and add the following aggravating factors: uncharged misconduct (misappropriation); multiple acts of wrongdoing; and significant harm. Kitay opposed the motion. The hearing judge ruled that the stipulated mitigation would remain, but the parties could present testimony “regarding aggravation and mitigation at the time of the stipulation,” and she would “assess based on the stipulation whether there is uncharged misconduct such as misappropriation.” The judge also allowed Kitay to “present declarations regarding his good character if he presents at trial two live witnesses who are fully aware of the extent of his stipulation re: culpability.” Neither party sought interlocutory review of this pretrial order. Following a two-day trial, the hearing judge increased Kitay’s suspension from 30 days to 75 days. Since the parties are bound by the stipulated factual recitals establishing culpability

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<sup>1</sup> All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, and reflect the modifications to the standards effective January 1, 2014. Since this case was submitted for ruling in 2014, the new standards apply, and do not conflict with the relevant former standards.

(*Inniss v. State Bar* (1978) 20 Cal.3d 552, 555), the issues before us are aggravation, mitigation, and level of discipline.

## II. THE MODESO MATTER

### A. Facts

In February 2008, Kitay replaced attorney David Martin in his parents' tort action against the State of California. A few months later, Martin sent Kitay a Notice of Lien for Attorney Fees and Costs. When Kitay developed financial difficulties, he assigned his right to attorney fees in January 2010 to Modeso LLC, a New York limited liability company, for \$10,000. Pursuant to the assignment, Kitay was to place the percentage of the settlement monies attributable to his fees into a trust account and then transfer the full amount of the assigned payment to Modeso. Kitay also agreed that the money transferred to Modeso was its exclusive property, it was not a loan, and he would hold the funds for Modeso's benefit. In December 2009, Kitay settled his parents' case. In April 2010, he received the settlement checks, which he deposited in his client trust account (CTA) the following month.<sup>2</sup>

Thereafter, Kitay made several misrepresentations in the Modeso matter. First, he falsely represented in his assignment application that no liens existed. He also lied repeatedly to Modeso's president and CEO, Peter Speziale, about the status of the settlement funds. In May 2010, Kitay informed Speziale by email that he was still waiting for the money but believed he would receive it soon; he claimed he was unaware of the reason for the delay. In fact, he had already received the settlement checks the

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<sup>2</sup> The record does not indicate the amount of the settlement.

previous month. A few weeks later, and without informing Speziale, Kitay issued \$7,500 to himself for attorney fees and costs, and \$7,500 to Martin to satisfy the lien.

In early September 2010, Kitay spoke with Speziale by telephone, telling him that he had received the settlement funds eight weeks earlier, along with a \$30,000 lien from a health insurance company. He also represented that none of the funds had been released due to a pending lien. These statements were false — Kitay had already distributed a total of \$15,000 to Martin and himself. In September and October 2010, Speziale sent three e-mails and left one voicemail requesting a status update, but Kitay did not respond. OCTC filed disciplinary charges in October 2011. Two months later, in December 2011, Kitay paid Modeso, claiming he had been unable to do so earlier due to his bankruptcy.

At trial, Kitay testified that he lied to Modeso because he needed the money to pay his staff. He reasoned that he could not live with himself if he laid off his employees just before Christmas. Kitay claimed that he intended to pay Modeso as soon as other cases settled, but they spiraled into protracted litigation. He described his remorse: “I am ashamed that I lied the way I did. What I should have done is told Modeso about my situation and been forthright with them and let them take the course of conduct that they chose to take in response.”

## **B. Stipulated Culpability**

Kitay stipulated to committing acts of moral turpitude in violation of Business and Professions Code section 6106<sup>3</sup> by: (1) concealing the existence of Martin’s attorney’s fee lien before entering into the assignment agreement with Modeso; (2) misrepresenting

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<sup>3</sup> Section 6106 provides in relevant part: “The commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension.” All further references to sections are to the Business and Professions Code.

to Speziale that he had not received the settlement funds when he had; (3) misrepresenting to Speziale that none of the settlement funds had been released when he had disbursed a total of \$15,000 to himself and Martin; and (4) failing to transfer the assigned funds to Modeso. The facts support the stipulated culpability finding, and we adopt it.

### **III. THE ADAMS AND ANDERSON MATTER**

#### **A. Facts**

In June 2008, Arnella Adams and John Anderson were injured in an automobile accident. They were insured by Farmers Insurance and the other motorist involved was insured by Safeco Insurance. Adams and Anderson filed a claim for medical treatment against Farmers, and in June 2008, they hired Kitay to pursue a personal injury claim against the other motorist. While the claims were pending, Farmers sent several letters to Kitay reminding him that it was entitled to reimbursement for its medical payments on behalf of Adams and Anderson. Farmers also sent Kitay a Medical/PIP Subrogation Notice, advising Kitay it had a right to recover these costs.

The case settled in December 2010. Kitay provided his clients an “Accounting of Proceeds of Personal Injury Settlement” to sign. Adams’ gross settlement totaled \$6,800 and Anderson’s was \$11,800. After Kitay subtracted his attorney fees, costs, and medical liens from each, Adams would recover \$3,500 and Anderson would receive \$7,000. However, Kitay’s accounting was wrong because he did not include reimbursement to Farmers for the medical benefit payments.

In early 2011, Farmers wrote Kitay several letters informing him it was aware of the settlement with Safeco, and would accept \$3,891.36 to satisfy both clients’ medical

payments. When Kitay did not answer, Farmers wrote to Adams requesting reimbursement and notifying her that Kitay failed to respond to its correspondence. In May 2011, Kitay wrote to Farmers, asserting that it was not entitled to reimbursement for medical payments because the settlement did not make Adams and Anderson whole. Farmers then wrote to Kitay, Adams, and Anderson, again requesting reimbursement. Farmers was never paid.

At trial, Kitay admitted he mishandled the Farmers' lien but explained that the error was due to his filing system. He stated that he was unaware of Farmers' lien because he kept all liens in a separate file. Kitay testified he has taken remedial measures to ensure the mistake does not recur: "We now use five-part files instead of separate files, so everything is together . . . . We have a liens section, medical bill section and discovery section and pleadings section . . . . So there's a built in safeguard to this happening again, and I can say it's never happened since in all my years of practice."

## **B. Stipulated Culpability**

Kitay stipulated that he violated rule 3-110(A) of the Rules of Professional Conduct,<sup>4</sup> by failing to: (1) provide Adams and Anderson with an accurate accounting of the settlement funds; (2) satisfy Farmer’s reimbursement claim; and (3) advise Adams and Anderson that the Farmers’ claim existed. We adopt the finding of culpability.

## **IV. AGGRAVATION AND MITIGATION**

OCTC must establish aggravation by clear and convincing evidence.<sup>5</sup> (Std. 1.5.) Kitay has the same burden to prove mitigating circumstances. (Std. 1.6.)

The stipulation states there are no factors in aggravation, and after the subsequent trial, the hearing judge found none. We disagree and find two aggravating factors — multiple acts and significant harm to Modeso. Like the hearing judge, we do not find uncharged misconduct by misappropriation because we have already relied on the same underlying facts to establish Kitay’s culpability for moral turpitude. (*Bates v. State Bar* (1999) 51 Cal.3d 1056, 1060 [little purpose served by duplicate charges of misconduct].) As to mitigation, the stipulation specifies no prior record in six years, financial distress, and payment of restitution in mitigation, which the hearing judge confirmed in her pretrial ruling. At trial, the judge found additional factors: cooperation, good character, and remorse. We agree with the hearing judge’s mitigation findings, but assign most factors limited weight, as detailed below. On balance, the aggravation outweighs the mitigation.

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<sup>4</sup> Rule 3-110(A) provides: “A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.” All further references to rules are to this source unless otherwise noted.

<sup>5</sup> Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)





**A. Two Aggravating Factors**

**1. Multiple Acts (Std. 1.5(b))**

Kitay committed multiple acts of wrongdoing, including repeated concealment and dishonesty in the Modeso matter and failure to competently perform in the Adams and Anderson matter. These multiple acts are an aggravating factor. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646 [two matters of misconduct may or may not be considered multiple acts of misconduct]; *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594 [multiple acts in aggravation for one count of moral turpitude where attorney made 11 misrepresentations over two years].)

**2. Significant Harm (Sd. 1.5(f))**

Kitay's misconduct caused significant harm to Modeso, as testified to by Speziale, its President and CEO. The company expended many employee hours to ascertain the status of the settlement funds and to obtain the assigned payment. Further, it lost \$1,290 in interest. Such financial harm aggravates this case.

The record does not, however, establish that Adams and Anderson suffered significant harm. Adams admitted her credit was not negatively impacted, although she had to spend time writing to credit bureaus for confirmation. We acknowledge that she also changed insurance companies and responded to phone calls from Farmers about payment for medical treatment. But the inconvenience she experienced as a result of Kitay's incompetence does not clearly and convincingly establish *significant* harm in aggravation. (See *In the Matter of Jensen* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr.

283, 290 [no specific, cognizable harm to administration of justice for police, child services, and hotel staff efforts to investigate report of child left in hotel room].)

## **B. Five Mitigating Factors**

### **1. No Prior Record of Discipline (Std. 1.6(a))**

The stipulation provided that Kitay was entitled to “little weight in mitigation” for his six-year discipline-free record. We agree.

### **2. Candor/Cooperation (Std. 1.6(e))**

Kitay is entitled to mitigating credit for cooperating with OCTC by entering into a stipulation and admitting culpability. His cooperation greatly conserved judicial resources. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive weight in mitigation for those who admit culpability and facts].)

### **3. Good Character (Std. 1.6(f))**

The hearing judge found that Kitay proved “an extraordinary demonstration of good character attested to by a wide range of references in the legal and general communities.” He presented live testimony from a superior court judge, a client, an employee, and a private investigator friend, and witness declarations from three attorneys, including one former superior court judge.<sup>6</sup> The witnesses were generally aware of Kitay’s misconduct and described it as out of character. They characterized him as generous, compassionate, understanding, dedicated to his clients, and honest. Like the hearing judge, we assign significant mitigating weight to this evidence, particularly since we give great consideration to the testimony of judges and attorneys who have a “strong

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<sup>6</sup> At trial, the hearing judge instructed Kitay to revise the declarations and resubmit them after incorporating and attaching the parties’ stipulation. OCTC received copies of the three declarations described above. After the trial, Kitay resubmitted those declarations plus an additional one that we do not consider since OCTC had no opportunity to review or respond to it at trial.

interest in maintaining the honest administration of justice.” (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319.)

We reject OCTC’s claims that the witness declarations are inadmissible hearsay or that the hearing judge erred by not permitting cross-examination. Evidence is admissible in disciplinary proceedings if it is relevant, and is the “sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs . . . .” (Rules Proc. of State Bar, rule 5.104(C).) The witness declarations are relevant to establishing Kitay’s good character in mitigation and, as sworn statements, they are reliable. (See *Self-Insurers Security Fund v. ESIS, Inc.* (1988) 204 Cal.App.3d 1148, 1160 [declaration under penalty of perjury assures good faith in party’s statements; indictment for perjury may follow if declaration is false]; *Mast v. State Board of Optometry* (1956) 139 Cal.App.2d 78, 85-86 [affidavit subscribed and sworn to before state official is sort of information that is reliable].) As to cross-examination, although rule 5.104(B)(3) of the Rules of Procedure of the State Bar gives each party the right to cross-examine opposing witnesses, “[h]earing judges are accorded wide latitude to receive all relevant evidence and actual prejudice must be established before a party is entitled to relief.” (*In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 241.) OCTC failed to prove it suffered such prejudice.

#### **4. Financial Difficulties**

Financial difficulties may be considered in mitigation for professional misconduct. (See *Bradpiece v. State Bar* (1974) 10 Cal.3d 742, 747-748.) Given the parties’ stipulation that Kitay’s financial woes mitigated his misconduct, we assign some weight to this factor. (See *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar

Ct. Rptr. 511, 522 [attorneys must cope with financial stresses without engaging in dishonest activities].)

### **5. Remorse/Recognition of Wrongdoing (Std. 1.6(g))**

Kitay testified that he regrets his misconduct, is ashamed he lied, and has made changes to his office procedures to cure the errors made in the Adams and Anderson matter. Further, he repaid Modeso once his bankruptcy was resolved, although it was after discipline charges had been filed. (See *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480, 496 [restitution made under pressure of disciplinary proceeding given little weight].) And he acknowledged his misconduct by stipulating to culpability and has emphasized throughout this proceeding that he should have been honest with Modeso about his financial problems.

However, it appears Kitay does not fully accept the wrongfulness of his conduct. In his opening statement at trial, he stated: “I want to be perfectly frank, as I’ve tried to throughout this, that had I to do this all over again, that I would have made the same decision because if I let them [staff] go at that time [before Christmas], chances are they’re not going to find another job because the economy was really bad at the time . . . . So I made the decision to do this. What I regret is that I was dishonest with Modeso about it. And if I could go back in time and change things, that’s what I would change because my intent was never to not pay them.” Kitay’s comments demonstrate he does not recognize that his fiduciary responsibilities as an attorney take precedence over his employees’ financial circumstances. Accordingly, we assign minimal mitigation credit for Kitay’s remorse and recognition of wrongdoing.

## **V. DISCIPLINE DISCUSSION**

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 professional standards for attorneys. (Std. 1.1.) Ultimately, we balance all relevant factors on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.) We begin our analysis, as always, with the standards. (*In re Silverton, supra*, 36 Cal.4th 81, 91.)

The most applicable standard is 2.7, which provides that “[d]isbarment or actual suspension is appropriate for an act of moral turpitude” depending on the magnitude of the misconduct, the harm to the victim, and the extent to which it relates to the member’s practice of law. Kitay’s repeated acts of dishonesty to Modeso are serious, directly related to the practice of law, and caused financial harm. Given these circumstances and the broad range of discipline in standard 2.7 (suspension to disbarment), we consult case law for guidance. (See, e.g., *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

The hearing judge primarily relied on *In the Matter of Regan* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 844, to recommend a 75-day suspension. We find this case distinguishable. In *Regan*, the attorney made appearances for clients without their authority and committed an act of moral turpitude in attempting to mislead a judge. We recommended a 75-day suspension in large part because the attorney had practiced law without discipline for 17 years, which significantly mitigated the misconduct despite several aggravating factors. However, based on Kitay’s multiple acts of dishonesty and his lack of insight, we find that *Levin v. State Bar* (1989) 47 Cal.3d 1140 is more comparable.

In *Levin*, the Supreme Court imposed a six-month actual suspension for an attorney's misconduct in two client matters. The misconduct included *repeated* dishonesty, communicating with a represented party, settling a lawsuit without client permission, forging a client's signature on a release, and mishandling the settlement funds. The misconduct was aggravated by attempts to conceal dishonest acts, and multiple, similar acts of wrongdoing that did not actually constitute a pattern. The misconduct was tempered by 18 years of discipline-free practice, a delay in the disciplinary proceedings, no additional complaints since the State Bar began its investigation, and candor and cooperation. Nonetheless, the court found that the six-month suspension was justified because the aggravation outweighed the mitigation, and the attorney's "various acts of deceit and carelessness [evidenced] a consistent disregard of the truth." (*Levin v. State Bar, supra*, 47 Cal.3d at p. 1150.)

As in *Levin*, Kitay's mitigation does not outweigh the aggravation since we assigned limited weight to most mitigating factors. Further, Kitay fails to fully understand the nature of his misconduct. We find that his "acts of dishonesty and his careless handling of his client's affairs violated the high ethical standards that members of the bar are expected to maintain." (*Levin v. State Bar, supra*, 47 Cal.3d at p. 1147.) For such misconduct, even with several mitigating factors, a six-month suspension and lengthy probation are appropriate under *Levin*. Contrary to Kitay's explanation, his misconduct cannot be excused because of economic problems — many attorneys experience comparable financial difficulties. "While these [financial] stresses are never easy, we must expect attorneys to cope with them without engaging in dishonest activities . . . ." (*In the Matter of Spaith, supra*, 3 Cal. State Bar Ct. Rptr. at p. 522.) Our

recommendation to increase the suspension period from 75 days to six months is designed to advance the goals of the attorney discipline system — particularly protection of the public — and to impress on Kitay the importance of strictly complying with his ethical obligations, regardless of his employees' personal circumstances.

## **VI. RECOMMENDATION**

For the foregoing reasons, we recommend that Robert Norik Kitay 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 two years, with the following conditions:

1. He must be suspended from the practice of law for a minimum of the first six months of the period of his probation.
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 of the State Bar's Client Trust Accounting School and passage of the tests given at the end of those sessions. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School or Client Trust Accounting School. (Rules Proc. of State Bar, rule 3201.)
8. 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 time period of stayed suspension will be satisfied and that suspension will be terminated.

#### **VII. PROFESSIONAL RESPONSIBILITY EXAMINATION**

We further recommend that Kitay 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 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).)

#### **VIII. RULE 9.20**

We further recommend that Kitay 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.

### **IX. 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, J.

WE CONCUR:

REMKE, P. J.

EPSTEIN, J.