

**STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT - SAN FRANCISCO**

In the Matter of	)	<b>Case No. 06-O-15333</b>
<b>GREGG KAYS,</b>	)	<b>DECISION</b>
<b>Member No. 82052,</b>	)	
<u>A Member of the State Bar.</u>	)	

**I. Introduction**

In this contested matter, respondent **Gregg Kays** (respondent) is charged with three counts of misconduct in one client matter. The charged misconduct includes: (1) failure to perform legal services with competence; (2) improper withdrawal from employment; and (3) failure to respond to client inquiries. The court finds, by clear and convincing evidence, that respondent is culpable of these three charged acts of misconduct.

In view of respondent's misconduct, and the aggravating and mitigating circumstances, the court recommends, among other things, that respondent be suspended from the practice of law for one year, that execution of the suspension be stayed, and that he be placed on probation for two years with conditions, including an actual suspension of 30 days from the practice of law.

**II. Pertinent Procedural History**

On April 9, 2007, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed and served on respondent a three-count Notice of Disciplinary Charges (NDC). On June 25, 2007, respondent filed an answer to the NDC.

Trial was held on October 1-2, 2007. Respondent appeared at trial in propria persona. Deputy Trial Counsel (DTC) Wonder J. Liang represented the State Bar. The court took this proceeding under submission on October 17, 2007, after the State Bar filed its closing brief on

October 16, 2007.

### **III. Findings of Fact and Conclusions of Law**

#### **A. Jurisdiction**

Respondent was admitted to the practice of law in the State of California on November 29, 1978, was a member at all times pertinent to these charges, and is currently a member of the State Bar of California.

#### **B. Counts One, Two and Three**

On November 23, 2005, Chas Mercurio (Mercurio) hired respondent to represent her in a wrongful termination matter. Mercurio wanted respondent to negotiate a severance agreement with Santa Clara University (SCU) as a result of workplace and employment disputes.

The parties signed an attorney fee agreement for a \$500 retainer and an hourly charge of \$250.00. The fee agreement stated, "Client shall pay all interim and final billings within thirty (30) days of receipt." (Exhibit 1.) Mercurio paid respondent the \$500 retainer.

In February 2006, Mercurio began other employment.<sup>1</sup>

On February 22, 2006, counsel for SCU rejected respondent's offer to discuss a transition or separation package for Mercurio.

On February 24, 2006, respondent sent Mercurio a letter enclosing forms to file a complaint with the Department of Fair Employment and Housing (DFEH).

On February 27, 2006, respondent sent Mercurio a letter enclosing a billing for services rendered through February. Respondent also wrote, "We are at a bit of a lull in the progress of the case as we need to get the DFEH complaint filed and the notice of case closure returned by that office before we continue with our efforts on the transition package from SCU." (Exhibit 3.)

In March 2006, Mercurio received her first bill from respondent for legal services. Respondent informed Mercurio that she could make monthly payments, casually stating, "pay what

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<sup>1</sup>At some point in time, respondent told Mercurio that this employment would hurt her case with SCU, but he did not tell Mercurio he was going to stop working on her matter.

you can.”<sup>2</sup>

On May 26, 2006, Mercurio sent an e-mail to respondent noting her disappointment that it had taken so long to file the right to sue document. In her e-mail, Mercurio stated, “Please give me the courtesy and let me know whether you want to continue with my case.” (Exhibit 5.)

On May 31, 2006, respondent’s assistant sent a letter to Mercurio enclosing the original complaint to be filed with DFEH.

In June 2006, a complaint was filed with DFEH. On June 29, 2006, DFEH issued a right to sue notice on behalf of Mercurio.

On July 7, 2006, respondent wrote to Mercurio and advised her that the next step was to send a demand letter to SCU. Respondent asked Mercurio for her input on the amount of her damages and her bottom line for settlement. In the letter, respondent advised Mercurio that a lawsuit must be filed within one year from June 29, 2006. Respondent advised that if he received the information from Mercurio by July 21, 2006, he would send the demand letter to SCU in August.

On July 13, 2006, Mercurio wrote respondent a letter providing him with the information he requested regarding her “bottom line” for settlement. Respondent received this letter and was aware of its contents. Thereafter, Respondent did not prepare or send the demand letter or contact counsel for SCU. Respondent stopped working on Mercurio’s case because Mercurio was very delinquent in paying respondent’s bills for legal services. Though Mercurio had not paid respondent’s bills in full, she had made some partial payments. However, respondent never advised Mercurio that he would not send the demand letter to SCU unless she fully paid his bills for legal services.

Between August 1 and September 18, 2006, Mercurio left respondent seventeen telephone messages requesting an update regarding the status of her case and the demand letter that respondent stated he would send in August. Respondent received the telephone messages and was aware of their contents. However, respondent did not respond to these messages.

On September 11, 2006, respondent’s secretary, on behalf of respondent, advised Mercurio

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<sup>2</sup>Testimony of Chas Mercurio. The court found both respondent and Mercurio to be credible witnesses; however, the court found Mercurio more credible with respect to the number of times she telephoned respondent and what she told him she wanted in her case.

that respondent would be sending something to her that week. However, Mercurio did not receive anything from respondent the week of September 11, 2006, or thereafter.

On September 19, 2006, Mercurio wrote to respondent requesting the status of her case and the status of the demand letter to the SCU. Mercurio advised that she would make a complaint to the State Bar if she did not receive a response within five working days. Respondent received Mercurio's letter of September 19, 2006, and was aware of its contents. However, respondent did not respond to Mercurio's September 19, 2006, letter or otherwise advise her of the status of her case.

On October 2, 2006, Mercurio made a complaint to the State Bar regarding respondent.

On October 26, 2006, State Bar complaint analyst Eric McLendon wrote to respondent regarding Mercurio's complaint.

On December 1, 2006, respondent sent a written response to the complaint to the State Bar. Respondent advised that he would no longer work on Mercurio's case until she paid her outstanding legal bill. Respondent estimated that Mercurio owed him \$3,325.00 as of December 1, 2006. In his December 1, 2006, letter to the State Bar, respondent also advised the State Bar of several reasons he felt that Mercurio's requested amount of damages was not feasible given the facts of the case. However, respondent did not advise Mercurio of the reasons that he felt her requested amount of damages was not feasible.

In January 2007, respondent sent Mercurio a bill stating \$3,419.16 was due. The bill also included 10% interest which was not set forth in the parties' fee agreement or discussed by the parties. Respondent enclosed bills to Mercurio dated March 16, April 1, May 1, June 1, July 1, and August 1, 2006, and January 15, 2007. Respondent sent Mercurio no bills between September 2006 and December 2006. The bills reflected that Mercurio had made the following payments: \$500 in March; \$250 in April; \$0 in May; \$250 in June; \$250 in July; and \$150 in August 2006. Mercurio also paid respondent \$25 in October 2006, and \$25 in January 2007.

On January 22, 2007, Mercurio sent respondent a letter indicating her dismay that respondent had charged her interest and disputing the charges.

By failing to take action on Mercurio's case due to the outstanding bill, respondent

constructively terminated his services to Mercurio in August 2006. Respondent did not advise Mercurio that he was withdrawing from her case. Upon his termination, respondent did not take reasonable steps to avoid reasonably foreseeable harm to Mercurio. Respondent did not return the client file and papers to Mercurio and did not advise Mercurio of the status of the case.

***Count One: Failure to Perform with Competence (Rules Prof. Conduct, Rule 3-110(A))<sup>3</sup>***

The State Bar proved by clear and convincing evidence that respondent willfully violated rule 3-110(A). Rule 3-110(A) provides that “[a] member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.” Although respondent did perform work on Mercurio’s legal matter, by failing to taken any action on Mercurio’s wrongful termination matter after July 13, 2006, including failing to prepare and send the demand letter to SCU or otherwise pursuing Mercurio’s matter, respondent willfully failed to perform legal services with competence in willful violation of rule 3-110(A).

***Count Two: Improper Withdrawal From Employment (Rule 3-700(A)(2))***

The State Bar proved by clear and convincing evidence that respondent willfully violated rule 3-700(A)(2). Rule 3-700(A)(2) provides that an attorney may not withdraw from employment until taking reasonable steps to avoid reasonably foreseeable prejudice to the client’s rights. Respondent constructively terminated his services to Mercurio in August 2006 by failing to take further action in her case due to the fact that Mercurio had not fully paid respondent’s legal fees. Although Mercurio owed further legal fees to respondent, this did not permit respondent to simply cease working on Mercurio’s matter without communicating with her or taking other steps, such as returning her client file and papers, to avoid reasonably foreseeable prejudice to Mercurio’s rights. Respondent therefore willfully violated rule 3-700(A)(2) by failing, upon terminating his employment with Mercurio, to take reasonable steps to avoid reasonably foreseeable prejudice to Mercurio such as informing Mercurio that he was withdrawing from her case, advising Mercurio of the status of her case, and returning Mercurio’s client file and papers.

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<sup>3</sup>References to rule(s) are to the current Rules of Professional Conduct of the State Bar of California, unless otherwise stated.

***Count Three: Failure to Respond to Client Inquiries (Business and Professions Code, Section 6068, Subdivision (m))***<sup>4</sup>

The State Bar proved by clear and convincing evidence that respondent willfully violated section 6068, subdivision (m). Section 6068, subdivision (m), provides that it is an attorney's duty "[t]o respond promptly to reasonable status inquires 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." By failing to respond to Mercurio's messages left between August 1 and September 18, 2006, and by failing to respond to her September 19, 2006, letter, respondent failed to respond to reasonable status inquiries in willful violation of section 6068, subdivision (m). Furthermore, by failing to advise Mercurio of the reasons he felt that Mercurio's requested amount of damages was not feasible given the facts of her matter, respondent failed to keep a client reasonably informed of a significant development in her legal matter in willful violation of section 6068, subdivision (m).

**IV. Mitigating and Aggravating Circumstances**

**A. Mitigation**

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(e).)<sup>5</sup> Here, respondent did not submit any evidence of mitigating circumstances. The court, however, observed respondent's interaction with the State Bar throughout these proceedings and finds that respondent's cooperation with the State Bar warrants some consideration in mitigation. (Standard 1.2(e)(v).)

**B. Aggravation**

**Respondent's Prior Record of Discipline**

In aggravation, respondent has one prior imposition of discipline. (Std. 1.2(b)(i).)

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<sup>4</sup>Unless otherwise indicated, all further references to section(s) refer to provisions of the Business and Professions Code.

<sup>5</sup> All further references to standards are to this source.

On May 15, 1992, respondent was privately reproved with conditions in State Bar Court Case No. 90-O-16549 for: (1) failing to competently perform legal services for which he was employed in willful violation of rule 3-110(A); (2) failing to promptly reply to his client's reasonable requests for information in willful violation of section 6068, subdivision (m) and rule 3-500; and (3) failing to properly withdraw from his client's employment in willful violation of rule 3-700(A)(2). In mitigation, respondent had no prior record of discipline over many years of practice, displayed candor and cooperation with the State Bar, and was a participant in several volunteer and community activities. No aggravating factors were involved.

Almost sixteen years elapsed between respondent's past and present misconduct. However, when making a determining whether a prior discipline is remote in time, one "should not simply consult the Gregorian calendar with blinders on." [Citations.]” (*In re Silvertown* (2005) 36 Cal.4th 81, 90.) Here, the court is greatly concerned by the fact that respondent's past and present misconduct are virtual mirror images of one another. Both involved respondent's failing to perform legal services for which he was employed, failing to promptly reply to his client's reasonable requests for information, and failing to properly withdraw from his client's employment. And despite being previously disciplined for nearly identical misconduct, this experience apparently did not serve to rehabilitate respondent or prevent him from committing the instant misconduct. Therefore, the court finds that respondent's prior misconduct warrants consideration in aggravation. (See *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443-444 [considered the similar nature of the respondent's instant misconduct while determining whether his prior misconduct was remote in time].)

### **Substantial Harm to the Client**

Respondent's misconduct caused his client substantial harm. (Std. 1.2(b)(iv).) Mercurio was suffering from anxiety, insomnia, depression, weight loss, and hair loss due to her termination from employment. Respondent's misconduct while handling her case only compounded her stress. Additionally, after Mercurio's experience with respondent, she was unable to trust another attorney. Thus, the court finds that the harm suffered by Mercurio constitutes an aggravating circumstance.

### **Indifference Toward Rectification or Atonement**

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) After making her complaint to the State Bar, respondent could have attempted to rectify his mishandling of the Mercurio matter. Instead, respondent added insult to injury by sending Mercurio a bill for past-due legal fees, plus 10% interest. This interest was unilaterally added by respondent and was not reflected in the parties' original retainer agreement or discussed by the parties at any time. Therefore, the court finds in aggravation that respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct.

### **V. Discussion**

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.3 sets forth the purposes of disciplinary proceedings and sanctions as “the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession.”

In addition, standard 1.6(b) provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

In this case, the standards provide for the imposition of a minimum sanction ranging from reproof to suspension. (Standards 2.4(b), 2.6, and 2.10.) Standard 1.6(a) states, in pertinent part, “If two or more acts of professional misconduct are found or acknowledged in a single disciplinary proceeding, and different sanctions are prescribed by these standards for said acts, the sanction imposed shall be the more or most severe of the different applicable sanctions.” In addition, standard 1.7(a) requires that the degree of discipline in the current proceeding must be greater than that imposed in the prior proceeding unless the prior discipline imposed was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust.

Standard 2.6 provides that culpability of a member of a violation of section 6068 shall result



in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim. Standard 2.4(b) states that, “Culpability of a member of wilfully failing to perform services in an individual matter or matters not demonstrating a pattern of misconduct or culpability of a member of wilfully failing to communicate with a client shall result in reproof or suspension depending upon the extent of the misconduct and the degree of harm to the client.” Standard 2.10 provides that culpability of a member of a violation of rule 3-700(A)(2) shall result in reproof or suspension according to the gravity of the offense or the harm, if any, to the victim.

The standards, however, “do not mandate a specific discipline.” (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) It has long been held that the court is “not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender.” (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton*, *supra*, 36 Cal.4th at p. 92.)

The State Bar urges that respondent be actually suspended for 30 days. In support of its recommended discipline, the State Bar cited the standards and case law, including the State Bar Court Review Department’s opinion in *In the Matter of Nunez* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 196 and the California Supreme Court’s decision in *Layton v. State Bar* (1990) 50 Cal.3d 889.

In *In the Matter of Nunez*, the court noted that in an earlier case, *In the Matter of Aguiluz* (Review Department 1992) 2 Cal. State Bar Ct. Rptr. 32, 45-46, the Review Department discussed several Supreme Court cases involving a single client abandonment by an attorney with no prior record of discipline. The Review Department noted that these cases resulted in discipline ranging from no actual suspension to an actual suspension of 90 days. (See *In the Matter of Nunez*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 206.)

In *Layton*, the respondent failed to conserve the assets and obtain the distribution of an estate for which he was the attorney and executor over a five year period. In aggravation, the respondent’s misconduct significantly harmed a beneficiary by denying her distribution from the estate at a time

when she was experiencing extreme financial need and also harmed the estate by depriving it of interest and causing it to incur tax penalties. The respondent was also indifferent toward rectification or atonement. In mitigation, the respondent had practiced law for over 30 years without discipline and had been under considerable emotional and physical strain due to the need to care for his terminally-ill mother. The Supreme Court ordered that respondent be suspended for three years, stayed, with three years probation, including a 30-day actual suspension.

The court also finds instructive the Supreme Court's decision in *Stuart v. State Bar* (1985) 40 Cal.3d 838. In *Stuart*, the respondent's client's personal injury claim was dismissed due to the respondent's failure to answer defense interrogatories. The respondent also failed to communicate with his client, despite his client's numerous attempts to contact him. In aggravation, the respondent had a prior record of discipline consisting of a private reproof. Noting the respondent's carelessness in running his office and demonstrated lack of diligence and concern for his client's interests, the Supreme Court found that, "Some actual suspension is necessary to bring home to [the respondent] the high degree of care and fiduciary duty he owes to those he represents." *Id.* at p. 847. The respondent received a one year suspension, stayed, with one year probation, including a 30-day actual suspension.

The instant case, like *Stuart*, involves an attorney who has repeatedly failed to understand the high degree of care and fiduciary duty he owes his clients. After being disciplined for nearly identical misconduct many years ago, respondent again failed to perform legal services with competence, improperly withdrew from representing a client, and failed to communicate with a client. Although respondent was cooperative with the State Bar during these proceedings, his misconduct caused harm to his client, and he demonstrated indifference toward atonement for or rectification of the consequences of his misconduct. Thus, the court finds a period of actual suspension, as recommended by the State Bar, the appropriate disposition in this matter, along with a lengthy probationary period with rehabilitative conditions attached thereto.

## **VI. Recommended Discipline**

Accordingly, the court hereby recommends that respondent **Gregg Kays** be suspended from the practice of law for one year, that said suspension be stayed, and that he be placed on probation

for two years on the following conditions:

1. Respondent must be actually suspended from the practice of law for the first 30 days of probation;
2. During the period of probation, respondent must comply with the State Bar Act and the Rules of Professional Conduct;
3. Within thirty (30) days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in-person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request.
4. Respondent must submit written quarterly reports to the Office of Probation of the State Bar of California on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report must be submitted on the next following quarter date, and cover the extended period. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the probation period and no later than the last day of the probation period;
5. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein;
6. Within ten (10) days of any change, respondent must report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California, 94105-1639, **and** to the Office of Probation, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes,

as prescribed by section 6002.1 of the Business and Professions Code;

7. Within one year after the effective date of the discipline herein, respondent must provide to the Probation Office satisfactory proof of attendance at a session of the State Bar Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015, and passage of the test given at the end of the session. Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE), and respondent will not receive MCLE credit for attending Ethics School or Client Trust Accounting School (Rule 3201, Rules of Procedure of the State Bar.);
8. The period of probation will commence on the effective date of the order of the Supreme Court imposing discipline in this matter; and
9. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for one year will be satisfied and that suspension will be terminated.

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE), administered by the National Conference of Bar Examiners, and to provide proof of passage of the MPRE to the Office of Probation, within one year after the effective date of the discipline herein. Failure to pass the MPRE within the specified time will result in actual suspension by the State Bar Court Review Department, without further hearing, until respondent provides the required proof of passage. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn.8.)

## **VII. Costs**

The court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and

Professions Code section 6140.7 and as a money judgment.

Dated: January \_\_\_\_, 2008

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LUCY ARMENDARIZ  
Judge of the State Bar Court