FILED DECEMBER 6, 2012

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **ASHKAN ALEX MOTAMEDI,** **Member No. 228384,** A Member of the State Bar.	)	**Case No.: 10-O-07616-DFM** **DECISION**

INTRODUCTION

Respondent **Ashkan Alex Motamedi** (Respondent) is charged here with four counts of misconduct in a single client matter. The counts include allegations that Respondent willfully violated (1) rule 3-310(C)(1) of the Rules of Professional Conduct[1] (potential conflict – representing multiple clients); (2) Business and Professions Code section 6068, subdivision (m)[2] (failure to respond to client inquiries); (3) rule 3-110(A) (failure to perform with competence); and (4) rule 3-700(A)(2) (improper withdrawal from employment). The State Bar had the burden of proving the above charges by clear and convincing evidence. The court finds culpability and recommends discipline as set forth below.

[1] Unless otherwise noted, all future references to rule(s) will be to the Rules of Professional Conduct.

[2] Unless otherwise noted, all future references to section(s) will be to the Business and Professions Code.

PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed in this matter by the State Bar of California (State Bar) on September 9, 2011. On November 15, 2011, the State Bar filed a motion seeking the entry of Respondent's default due to his failure to make an appearance in the case. On December 7, 2011, this court entered Respondent's default and enrolled him inactive pursuant to section 6007, subdivision (e). On June 13, 2012, after the requisite waiting time had expired, the State Bar filed a petition seeking Respondent's disbarment due to his default. Respondent then appeared in the matter by filing both a response to that petition and a request to set aside his default. In this response, Respondent successfully pointed out that the State Bar had not properly served him with the NDC. On August 3, 2012, this court then set aside the default and ordered the parties to appear for an initial status conference on August 20, 2012. At that status conference, the State Bar indicated its intent to file an amended NDC and the matter was given a trial date of November 27, 2012, with a two-day trial estimate.

On August 31, 2012, Respondent filed his response to the First Amended NDC, denying culpability and virtual all of the factual allegations.[3]

Trial was commenced on November 27, 2012. On the second day of trial, Respondent indicated an urgent need to seek medical attention, and the trial was recessed after a morning of testimony and continued to November 30, 2012. The trial was then completed and submitted for decision. The State Bar was represented at trial by Deputy Trial Counsel Hugh Radigan. Respondent acted as counsel for himself.

[3] Although the State Bar had already provided Respondent with the First Amended NDC prior to this date, the document was not filed with the State Bar Court until September 19, 2012.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on Respondent's response to the First Amended NDC and the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in California on December 2, 2003, and has been a member of the State Bar at all relevant times.

Case No. 10-O-07616

On January 6, 2005, Golnaz Ebrahami Bolouri and her minor daughter, Behnaz Bolouri (the Bolouris) were passengers in a vehicle, driven by Kathy Mahmoudzadeh (Kathy), when they were involved in an automobile accident in Los Altos, California. The other vehicle involved in the accident was owned by John Komo and was being driven by his wife, Nan (Nan). The accident occurred when Nan attempted to make a left turn in the face of oncoming traffic.

Although the accident had taken place in Santa Clara County in northern California, the Bolouris and Kathy employed Respondent, whose office was in Los Angeles, to pursue personal injury claims on their behalf as a result of the accident.

On December 26, 2006, Respondent filed a civil action on behalf of the Bolouris and Kathy in the Santa Clara County Superior Court. At the time that the complaint was filed, only John Komo, as the owner of the vehicle, was a named defendant. The driver was named as a Doe defendant. On February 7, 2007, after learning that the driver of the car was Nan Komo, Respondent added her as an additional defendant. In May 2008, he obtained a favorable award for his clients in a judicial arbitration, which award was then rejected by the defendants. In June 2008, Respondent successfully opposed a summary judgment motion filed on Nan's behalf,

based on the two-year statute of limitations. At the end of 2008, the case was scheduled to begin trial on March 2, 2009.

At some point after the arbitration hearing in March 2008, the Bolouri plaintiffs began to make clear that they were difficult clients. Benham Bolouri, the husband of Golnaz Bolouri and the father of Behnaz, had criticized Respondent for his handling of the arbitration and had expressed unhappiness with the arbitration award. In response to these criticisms, Respondent wrote a letter on May 19, 2008, detailing the various criticisms, responding to each of them, and recommending that the clients consider having independent counsel evaluate the case. Thereafter, after Benham Bolouri had campaigned for Respondent to obtain assistance from another attorney in handling the case, Respondent talked with James Tillipman, an attorney in Santa Monica, about associating into the case as co-counsel. Tillipman had previously made a special appearance on behalf of Respondent in the case. On September 15, 2008, believing that Tillipman had agreed to become involved in handling the case, Respondent notified his clients of Tillipman's future involvement in the case and provided them with Tillipman's contact information.

In January 2009, communication problems begin in the personal injury action. Respondent was busy trying another matter in southern California, and he believed that Tillipman was minding the case while Respondent is busy. For his part, Tillipman was having second-thoughts about associating into the case. He had not acted to file a formal association of counsel. Nor had he taken steps to prepare the case for trial. When the clients tried to communicate with Respondent about the case, they were unsuccessful in reaching him. They then contacted Tillipman.

Tillipman was caught in a dilemma. He did not want to become formal co-counsel with Respondent in the case. At the same time, he knew that Respondent was looking to him to deal with problems in the case while Respondent was pre-occupied with other matters.[4] As a result, when he was unsuccessful in getting Respondent to step back immediately into the matter, he assumed the role of "specially appearing" for the plaintiffs in the personal injury action. In that capacity, he filed an ex parte application on the clients' behalf on February 23, 2009, to vacate the March 2, 2009 trial date.[5] The motion was granted, and a new trial setting conference was scheduled for April 28, 2009. Respondent was given notice by the court of this continuance and new trial setting conference.

During this same period, Respondent was beginning to suffer mental and physical problems that initially impaired his ability to practice law and eventually became disabling by April 2009. When the trial setting conference was held on April 28, 2009, Respondent was not present. Neither was Tillipman. As a result, the court rescheduled the conference for June 2, 2009, providing notice to Respondent of that fact.

On June 2, 2009, Respondent again failed to appear for the trial setting conference. At that time, the court scheduled the case to begin a five-day jury trial on October 19, 2009, and scheduled a mandatory settlement conference on October 14, 2009. Notice of these dates was also provided to Respondent by the court.

On July 1, 2009, Respondent was administratively enrolled inactive and ineligible to practice law due to his failure to provide the required proof of his compliance with his MCLE

[4] Both Tillipman and Respondent testified that they had a history of providing back-up assistance to one another (without formal compensation) on various matters.

[5] Although Tillipman included proof that he had notified defense counsel of the ex parte application, there is no evidence that he informed Respondent of it.

requirements. This ineligibility continued until July 16, 2010, more than a year later. After becoming ineligible to practice, Respondent had no further contact with the clients in this matter.

On September 17, 2009, Tillipman, once again making a special appearance for the Bolouris and Kathy, filed an ex parte application to continue the October trial date. The continuance was granted and a new trial setting conference was scheduled for October 6, 2009. Notice of this new conference date was sent by the court to Respondent's official State Bar membership address, rather than to his address of record in the case.

Respondent failed to appear for the new trial setting conference on October 6, 2009. Tillipman also did not appear in the matter. At that time the court issued an order to show cause (OSC) re dismissal as a result of Respondent's failure to appear. The hearing date of the OSC was November 12, 2009. Notice of the OSC was again sent by the court to Respondent's official State Bar membership address, rather than to his address of record in the case. The notice was returned to the court as undeliverable.

On November 6, 2009, Tillipman, again only specially appearing for plaintiffs in the case, filed a "Plaintiffs' Response on Hearing of OSC re Dismissal." In this document, he stated that the clients had now asked that he substitute into the case. He also disclosed that he had now received from Respondent "what purports to be his file." He asked that the court delay any dismissal of the action until a substitution of counsel could be signed or an appropriate motion to remove Respondent as counsel could be filed. On November 7, 2009, the court rescheduled the dismissal hearing to January 7, 2010. Notice of this hearing was again sent by the court to Respondent's official State Bar membership address and was returned as undeliverable.

The dismissal hearing was held on January 7, 2010. An attorney named William Pierce made a special appearance on behalf of plaintiffs at the hearing and the matter was not dismissed. Instead, it was scheduled for a trial setting conference on February 9, 2010.

At the February 9, 2010 trial setting, Mr. Pierce also specially appeared, and the case was given a trial date of June 14, 2010. Notice of this action was again sent by the court to Respondent's official membership address and returned as undeliverable.

On March 25, 2010, Respondent signed substitutions of attorneys in the action, designating Tillipman as the new counsel of record for each of the plaintiffs in the case. Those substitutions were filed with the court on April 7, 2010.[6] Tillipman thereafter settled the cases for the amount of money that the defendants had offered to pay at or about the same time that they rejected the arbitration award. (Exh. 4, p. 153.)

Count 1 – Rule 3-310(C)(1) [Potential Conflict – Representing Multiple Clients]

Rule 3-310(C)(1) provides that an attorney shall not, without the informed written consent of each client, accept representation of more than one client in a matter in which the interests of the clients potentially conflict.

In this count the State Bar alleges that there was a potential conflict between Kathy and the Bolouris and that Respondent agreed to represent them all in the personal injury action without obtaining the informed written consent of the clients, as required by rule 3-310(C)(1).

The evidence at trial was uncontradicted that Respondent advised the clients, at the time that they first met with him, about the potential conflict and that they nonetheless indicated that they still wanted him to represent all of them in pursuing the personal injury action. Attorney Tillipman also informed the clients of the potential conflict and received the same informed waiver by the clients.

[6] The Kathy substitution was initially rejected by the court on April 7, 2010, but was subsequently filed on April 12, 2010.

The only issue in dispute is whether Respondent secured the informed written consent of his clients to the waiver of the potential conflict. Respondent credibly testified that he obtained that written consent, and the court so finds.

The State Bar had the burden of proving by clear and convincing evidence that no written consent was obtained from the clients. It failed to do so. None of the clients appeared to testify at the trial. While Benham Bolouri appeared as a witness at trial and testified that no written consent to the potential conflict had ever been provided, his testimony was neither persuasive nor credible. His recollection and understanding of what had happened in the case was demonstrably poor, including his repeated untrue assertion that the trial court had dismissed the case before Tillipman became involved. Bolouri's testimony was also contradicted by Tillipman, who stated that he had required the clients to sign an informed written consent to the potential conflict before he would agree to substitute into the case.

This count is dismissed with prejudice.

Count 2 – Section 6068, subd. (m) [Failure to Respond to Client Inquiries]

Section 6068, subdivision (m) of the Business and Professions Code obligates an attorney to "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."

From the beginning of 2009 and continuing for the balance of that year, the clients and their designated representatives tried repeatedly to communicate with Respondent regarding the status of their personal injury action. Respondent failed to respond to those inquiries. This conduct by Respondent constituted a willful violation by him of his obligation under section 6068, subdivision (m).

Count 3 – Rule 3-110(A) [Failure to Perform with Competence]

Rule 3-110(A) provides that an attorney "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

From the beginning of 2009, until his removal from the case in April 2010, Respondent failed to perform any work on the clients' pending personal injury action, notwithstanding the existing trial dates and various court orders. While he was ineligible to perform legal services after being enrolled inactive on July 1, 2009, his inattention to the file and to the court's orders prior to that date constituted a willful violation by him of his obligation under rule 3-110(A).

Count 4 – Rule 3-700(A)(2) [Improper Withdrawal From Employment]

Rule 3-700(A)(2) provides, "A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules." An attorney may effectively withdraw from a case without any intent to do so, when that attorney virtually abandons the client and is grossly negligent in communicating with the client. (See, e.g., *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 951; and cases cited therein.)

Beginning in January 2009, Respondent effectively stopped representing the clients. He was not working on their case; he was not returning their calls and other communications; and he was not responding to various deadlines and orders issued by the court. Most significantly, when he was ordered inactive on July 1, 2009, he failed to notify his clients of that fact or take reasonable steps to avoid reasonably foreseeable prejudice to the clients. His actions and

omissions constituted an abandonment by him of those clients and a willful violation by him of rule 3-700(A)(2).

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b).)[7] The court finds the following with regard to aggravating factors.

Prior Discipline

Respondent has been formally disciplined on one prior occasion.

On May 18, 2012, the Supreme Court issued an order (S199217), suspending Respondent for eighteen months, stayed, and placing him on probation for three years, subject to various conditions of probation, including the requirement that he be actually suspended for the first 90 days of 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. 1.4(c)(ii).) Respondent's culpability in the matter was for violations of rules 3-110(A), 3-700(A)(2), and 4-100(B)(3), and sections 6103 and 6068, subdivision (i).

Respondent's prior record of discipline is an aggravating circumstance. (Std. 1.2(b)(i).) However, as will be discussed below, the weight to be given to this aggravating factor must be evaluated in the manner set forth in *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602.

Multiple Acts of Misconduct

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

[7] All further references to standard(s) or std. are to this source.

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) The court finds the following with regard to mitigating factors.

Emotional Difficulties

Respondent testified during the trial that he suffered a physical and mental problems beginning in February or March of 2009 and was unable to work as an attorney thereafter.

Extreme emotional difficulties may be considered mitigating where it is established by expert testimony that they were responsible for the attorney's misconduct and are shown by clear and convincing evidence to have now been resolved. (Std. 1.2(e)(iv); *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 701-702.) The evidence here does not provide the required proof that Respondent's emotional and medical problems in 2009-2010 are a mitigating factor here. While it is clear that there was a nexus between those problems and Respondent's misconduct, there was insufficient evidence for this court to conclude that any of the emotional and/or medical problems suffered by Respondent in the past have now been satisfactorily resolved. Instead, the testimony by Respondent at trial was quite to the contrary.

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are

not binding, they are to be afforded great weight because "they promote the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, the court is permitted to temper the letter of the law with considerations peculiar to the offense and the offender. (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994; *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the court considers relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions.

Under the facts of the present proceeding, the most potentially severe sanction for Respondent's misconduct is found in standard 1.7(a), which provides: "If a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of one prior imposition of discipline as defined by standard 1.2(f), the degree of discipline imposed in the current proceeding shall 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."[8]

In the instant proceeding, Respondent's misconduct here took place during the same time as the misconduct that led to his prior discipline. In such situations, the potential effect of standard 1.7 is tempered by the analysis called for by the Review Department's decision in *In the Matter of Sklar*, *supra*, 2 Cal. State Bar Ct. Rptr. 602. That analysis requires this court to "consider the totality of the findings in the two cases to determine what the discipline would have been had all of the charged misconduct in this period have been brought as one case." (*Id.* at page 619.)

In the prior order imposing discipline, Respondent was suspended for eighteen months, stayed, and placed on probation for three years, subject to various conditions of probation, including the requirement that he be actually suspended for the first 90 days of 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. The recommendation by this court that Respondent's period of actual suspension continue until he presents proof of his fitness to practice resulted from the following observation by this court:

> Also of considerable concern to this court is Respondent's testimony regarding the lengthy history, impact, and current status of his impaired mental condition. Because of his nervous breakdown in February/March 2009, Respondent testified during trial that he has not been mentally able to practice law at all for nearly three years, has generally not sought to do so, and still feels unable to practice. Given the length of time that Respondent has already been removed from the practice of law, this court concludes that, after he has been actually suspended for any additional period in the future, he should not be restored to active status

[8] Also potentially applicable are standards 2.4(b), 2.6(a), and 2.10, which suggest discipline ranging from reproval to disbarment for various offenses, depending on the extent and/or severity of the misconduct and the gravity of any resulting harm.

without first being required to present proof to this court that he meets the standards set forth in standard 1.4(c)(ii).

That Supreme Court's order in the prior matter became effective on June 17, 2012. As of the date of the trial in this matter, Respondent still remained actually suspended as a result of the prior disciplinary order and will be until he presents adequate proof under standard 1.4(c)(ii). Applying the required *Sklar* analysis to the instant case, the court concludes that the

Appropriate discipline to recommend in this matter is a two-year stayed suspension and a three-year period of probation with conditions. Given that Respondent has now been actually suspended for more than five months and remains suspended as a result of his misconduct occurring in 2009, the court finds no need or rationale for recommending any additional minimum period of actual suspension in the future for the misconduct presented in the instant matter. Furthermore, as Respondent remains under the 1.4(C)(ii) requirement in the prior matter, the court finds no need to again impose that requirement in this case.

RECOMMENDED DISCIPLINE

Recommended Suspension/Probation

For all of the above reasons, it is recommended that **Ashkan Alex Motamedi**, Member No. 228384, be suspended from the practice of law for two years; that execution of that suspension be stayed; and that Respondent be placed on probation for three years, with the following conditions:

1. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation.
2. Respondent must maintain, with the State Bar's Membership Records Office and the State Bar's Office of Probation, his current office address and telephone number or, if no office is maintained, an address to be used for State Bar purposes. (Bus. & Prof. Code,

§ 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office and the State Bar's Office of Probation, his current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will not be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

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 and 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 report, in writing, to the State Bar's Office of Probation no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which Respondent is on probation (reporting dates).[9] However, if Respondent's probation begins less than 30 days before a reporting date, Respondent may submit the first report no later than the second reporting date after the beginning of his probation. In each report, Respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

[9] To comply with this requirement, the required report, duly completed, signed and dated, must be received by the Office of Probation on or before the reporting deadline.

(a) in the first report, whether Respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

(b) in each subsequent report, whether Respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

During the last 20 days of this probation, Respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, Respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

5. Subject to the proper or good faith assertion of any applicable privilege, Respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to Respondent, whether orally or in writing, relating to whether Respondent is complying or has complied with the conditions of this probation.

6. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter.[10]

7. At the termination of the probation period, if Respondent has complied with all of the terms of his probation, the two-year period of stayed suspension will be satisfied and the suspension will be terminated.

[10] Because Respondent is already subject to an order requiring him to take and pass the State Bar's Ethics School and the Multi-State Professional responsibility Examination, no comparable requirements are recommended in this matter.

Costs

It is further recommended that costs be awarded to the State Bar in accordance with section 6086.10 and that such costs be enforceable both as provided in section 6140.7 and as a money judgment. It is also recommended that Respondent be ordered to reimburse the Client Security Fund to the extent that the misconduct in this matter results in the payment of funds and that such payment obligation be enforceable as provided for under Business and Professions Code section 6140.5.

Dated: December _____, 2012

DONALD F. MILES
Judge of the State Bar Court