

PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

FILED AUGUST 10, 2011

**STATE BAR COURT OF CALIFORNIA
REVIEW DEPARTMENT**

In the Matter of) Case No. 09-O-16067
)
KAVEH ARDALAN,) OPINION
)
A Member of the State Bar, No. 188775.)
_____)

Respondent Kaveh Ardalan appeals from a State Bar Court hearing judge’s recommendation that he be actually suspended for one year. Ardalan, who was admitted to practice law in 1997 and has two prior records of discipline, failed to respond to the State Bar Office of The Chief Trial Counsel (State Bar) during its investigation into an insufficient funds check he issued from his client trust account (CTA). Ardalan contends that the recommended suspension is excessive. The State Bar asks us to affirm.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we adopt the hearing judge’s culpability finding. We also recommend a one-year suspension, although we find less mitigation and different aggravation than the hearing judge. While a single count of failure to cooperate generally would not warrant such a lengthy suspension, Ardalan was on disciplinary probation when he committed the misconduct *and* this is his third discipline case.

Guided by the Standards for Attorney Sanctions for Professional Misconduct¹ and relevant case law, we find a one-year suspension is appropriate under the facts unique to this case.

I. FACTUAL FINDINGS

The parties stipulated to most of the facts. This matter started with Ardalan's inattention to his CTA. In 2009, he agreed to refund a \$2,500 retainer to a former client and to provide the money to the client's new attorney, Alan Armstrong. In exchange, Ardalan would receive \$600 from the client for work he had performed. On May 27, 2009, Ardalan issued a \$2,500 check from his CTA to Armstrong. The client's representative picked up the \$2,500 check, and in exchange, gave Ardalan a \$600 check. Ardalan needed to deposit the \$600 check immediately to cover the \$2,500 check, but he failed to do so. As a result, the \$2,500 check was returned for insufficient funds (NSF) on June 1, 2009. Upon learning of his error, Ardalan deposited the \$600 check on June 5, 2009, and reissued a check for \$2,500 to Armstrong. The second check was honored.

The State Bar opened an investigation after Bank of America notified it of the NSF check. On October 7, 2009, and again on October 30, 2009, a State Bar investigator sent letters to Ardalan. The first letter asked Ardalan to respond in writing to allegations of CTA misconduct and warned him that failure to cooperate with the investigation was a violation of Business and Professions Code section 6068, subdivision (i).² The second letter enclosed a copy of the first letter, again asked for a response, and reminded Ardalan again about his duty to cooperate. Ardalan admits he received these letters, but did not respond. He offers several reasons for these failures, including procrastination, embarrassment, lack of concern for his professional future, and disregard of the State Bar.

¹ All further references to "standard(s)" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

² All further references to "section(s)" are to this source.

On January 11, 2010, State Bar Deputy Trial Counsel Monique Miller sent Ardalan a letter stating that the State Bar would file a Notice of Disciplinary Charges (NDC) against him if he did not contact her by January 28, 2010. Ardalan received this letter, but did not contact Miller. On February 1, 2010, the State Bar filed the NDC. From the time Ardalan issued the NSF check through the time he failed to respond to the State Bar, Ardalan was on disciplinary probation.

II. CULPABILITY

The hearing judge properly found Ardalan culpable of the single count at issue: his failure to cooperate with a State Bar investigation in violation of section 6068, subdivision (i).³ This section requires attorneys to “cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself.” As charged, Ardalan violated this duty when he received and ignored the two October 2009 letters from the State Bar investigator asking for his response. He is culpable even though he ultimately participated in these proceedings after the NDC was filed. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 644 [§ 6068, subd. (i) “contemplates that attorneys may be found culpable of violating their duty to cooperate if they fail to participate *either* in the investigation *or* in the formal proceedings” (italics in original)].)

³ The NDC originally included one count of moral turpitude in violation of section 6106 for the NSF check, but the hearing judge dismissed this count prior to trial upon the State Bar’s motion. Ardalan’s failure to properly manage his CTA is troubling, especially since he was disciplined for similar misconduct in 2005 (see below). Nonetheless, we adopt the dismissal of the count because it was based on one NSF check, which under the limited facts of this case would not support a finding of moral turpitude. (Cf. *Bambic v. State Bar* (1985) 40 Cal.3d 314, 324, citing *Tomlinson v. State Bar* (1975) 13 Cal.3d 567, 577 [issuing numerous NSF checks manifests dishonesty].)

III. AGGRAVATION AND MITIGATION

We determine the appropriate discipline in light of the relevant circumstances, including mitigating and aggravating factors. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) Ardalan must establish mitigation by clear and convincing evidence (std. 1.2(e)), while the State Bar has the same burden to prove aggravating circumstances. (Std. 1.2(b).)

A. Aggravation

We find two factors in aggravation, including the prior record found by the hearing judge, and Ardalan's multiple acts of misconduct that the hearing judge did not consider.

1. Two Prior Disciplines (Std. 1.2(b)(i))

Ardalan's two prior records of discipline are a serious aggravating factor. In December 2005, the Supreme Court ordered a six-month stayed suspension and one-year probation. (Supreme Court Case S137450.) Ardalan stipulated to two violations: moral turpitude in violation of section 6106 for mismanaging his CTA by issuing checks when he knew or should have known the account contained insufficient funds, and a violation of rule 4-100(A) of the Rules of Professional Conduct for using his CTA for personal matters. There were no aggravating factors. In mitigation, Ardalan received credit for no prior record of discipline, no client harm, his candor and cooperation, and his demonstration of remorse.

In June 2008, the Supreme Court ordered a six-month actual suspension and two years' probation. (Supreme Court Case S162325.) Ardalan stipulated to failing to perform competently and to respond to reasonable status inquiries in two client matters; failing to take reasonable steps to avoid prejudice to his client upon termination of employment in one matter; and failing to comply with seven probation conditions imposed in his first disciplinary matter. In aggravation, Ardalan had a prior discipline record and there was client harm. In mitigation, Ardalan demonstrated spontaneous candor and cooperation with the victims of his misconduct,

and he was suffering extreme personal difficulties at the time. Among other probation conditions, he was ordered to comply with the State Bar Act. As a result of this 2008 case, Ardalan was on disciplinary probation from July 2008 to July 2010.

2. Multiple Acts of Misconduct (Std. 1.2(b)(ii))

In addition to not responding to the two investigatory letters, Ardalan failed to respond to Deputy Trial Counsel Miller's letter warning him of the intent to file an NDC. That was his third instance of failing to cooperate over a four-month period. Since this third incident was not charged in the NDC or used for determining culpability, we consider it as evidence of multiple acts of misconduct in aggravation. (*In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 529.)

3. No Aggravation for Uncharged Misconduct (Std. 1.2(b)(iii))

As uncharged misconduct in aggravation, the hearing judge found that Ardalan also violated the State Bar Act when he did not cooperate with the investigation, thereby failing to comply with his probation conditions in violation of section 6068, subdivision (k). However, since this violation is based on the same facts as those forming the basis for Ardalan's culpability under section 6068, subdivision (i), we assign no additional weight in aggravation. (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 595.)

B. Mitigation

Although the hearing judge found three factors in mitigation, as discussed below, we decline to give any credit for no client harm. Accordingly, we find that Ardalan has established two minor factors in mitigation.

1. Cooperation (Std. 1.2(e)(v))

We agree with the hearing judge that Ardalan is entitled to “nominal” mitigation for stipulating to easily provable facts. (*In the Matter of Bouyer* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 888, 891.)

2. Remorse and Recognition of Wrongdoing (Std. 1.2(e)(vii))

The hearing judge gave Ardalan mitigation credit for expressing remorse and recognition of wrongdoing, and the State Bar does not dispute this finding. Like the hearing judge, we afford only limited weight to this factor because Ardalan did not promptly take objective steps spontaneously demonstrating his remorse as called for under standard 1.2(e)(vii). (*In the Matter of Rech* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 310, 316, fn. 4.) Ardalan issued an NSF check while on probation, but failed to promptly address the issue despite three State Bar letters. Such inaction is not a spontaneous demonstration of remorse.

3. No Credit for Lack of Harm (Std. 1.2(e)(iii))

The hearing judge gave Ardalan credit for lack of client harm. We decline to afford mitigation for lack of harm. Although no client was harmed, the real victim of Ardalan’s misconduct was the State Bar and its discipline process. (Std. 1.2(e)(iii).) As Ardalan acknowledged, his conduct subjected the State Bar to “administrative and . . . monetary costs” and his failure to cooperate led to a “very expensive investigation.” These circumstances do not establish lack of harm.

IV. DISCIPLINE

The purpose of discipline is not to punish the attorney, but to protect the public. (Std. 1.3.) In determining the appropriate level of discipline, we first consider the standards applicable to this case. While we are “not compelled to strictly follow [the standards] in every case,” we look to them for guidance. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.)

Generally, they should be given great weight in order to assure consistency in attorney disciplinary cases. (*In re Brown* (1995) 12 Cal.4th 205, 220.)

In light of Ardalan's prior record of discipline, we begin with standard 1.7(b), which is the most serious and calls for disbarment for a culpable attorney with two prior records of discipline unless "the most compelling circumstances clearly predominate."⁴ However, standard 1.7(b) is not applied rigidly and the Supreme Court has not always ordered disbarment for a third discipline case. (E.g., *Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-508 [one-year actual suspension even though no compelling mitigation in std. 1.7(b) case].) Rather, we must examine the nature of Ardalan's record of discipline in order to apply standard 1.7(b) in a manner consistent with the purposes of attorney discipline. (*In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136.)

This is not a case where Ardalan has demonstrated progressively more serious conduct with each discipline, which would more readily support a disbarment recommendation. We also note that Ardalan eventually cooperated in these proceedings, expressed remorse and accepted responsibility for his misconduct. We find that disbarment under standard 1.7(b) would be overly harsh for his failure to respond to the State Bar's investigation considering the nature and chronology of Ardalan's record. (*Conroy v. State Bar, supra*, 53 Cal.3d at pp. 506-507; see also *In the Matter of Buckley* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 201, 205, fn. 2 [disbarment not recommended on third discipline where it "would be manifestly disproportionate to respondent's cumulative misconduct"].)

Nonetheless, we must consider whether progressive discipline is called for under standard 1.7(a). This provision provides that if an attorney has a prior imposition of discipline "the degree

⁴ Standard 2.6(a), also applicable, provides that any violation under section 6068 should result in suspension or disbarment depending on the gravity of the offense and the harm to the victim.

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.” (Italics added; *In re Silverton* (2005) 36 Cal. 4th 81, 90-91.) The two-prong exception to standard 1.7(a)’s requirement of greater discipline for recidivist attorneys is not applicable since Ardalan’s 2008 discipline record is neither remote nor minimal. We find no other compelling justification to deviate from the standard. Thus, at a minimum, Ardalan’s discipline should include a period of suspension longer than the six-month period ordered in 2008.

Had this been Ardalan’s first offense, the limited nature of his misconduct ordinarily might call for a relatively modest level of discipline. But Ardalan’s current misconduct is aggravated by his serious prior record, tempered only by the limited weight we give his belated cooperation and remorse. In sum, we are concerned about Ardalan’s inability to comply with the simple requirement that he respond to the State Bar’s investigatory letters, particularly since he received them while he was on disciplinary probation. His failure violated the terms of probation imposed after his second discipline. Ardalan’s conduct is reminiscent of his prior failures to perform competently, respond to clients, and comply with probation conditions.

Under these circumstances, we conclude that a one-year period of actual suspension is appropriate because it provides Ardalan a lengthy time to reflect upon his recurring inability to meet the administrative demands of his practice. It serves both purposes of progressive discipline and protection of the public, the courts, and the legal profession. Our recommendation is consistent with case law involving prior disciplines coupled with failure to cooperate in discipline proceedings or to comply with probation terms. (*Conroy v. State Bar, supra*, 53 Cal.3d 495 [one-year actual suspension for attorney with two prior disciplines who abandoned

client and failed to cooperate during disciplinary proceeding]; *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138 [concurrent one-year actual suspensions after probation revocation and discipline proceedings where attorney with two prior disciplinary records engaged in three probation violations, misused his CTA, and failed to respond to two State Bar investigator letters]; *In the Matter of Tiernan, supra*, 3 Cal. State Bar Ct. Rptr. 523 [11-month actual suspension for attorney with four prior disciplines who failed to cooperate with probation monitor or file quarterly reports].)

V. FORMAL RECOMMENDATION

We recommend that respondent Kaveh Ardalán be suspended from the practice of law in California for two years, that execution of that period of suspension be stayed, and that he be placed on probation for a period of two years subject to the following conditions:

1. He must be suspended from the practice of law for the first year of probation;
2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all the conditions of this probation.
3. 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 conditions of 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.
4. Subject to asserting applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation which are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.
5. 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 of the State Bar and the State Bar's Office of Probation.

6. 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.
7. At the expiration of the period of probation, if he has complied with all the conditions of probation, the two-year period of stayed suspension will be satisfied and that suspension will be terminated.

VI. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Ardalan take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court's disciplinary order in this matter and provide satisfactory proof of such passage to the State Bar's 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).)

VII. CALIFORNIA RULES OF COURT, RULE 9.20

We further recommend that Ardalan be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter. Willful failure to comply with the provisions of rule 9.20 may result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.

VIII. 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.

REMKE, P. J.

WE CONCUR:

PURCELL, J.

EPSTEIN, J.