

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of)	Case Nos.: 09-O-18100-PEM (09-O-18760)
)	
CHARLES GADSDEN KINNEY,)	DECISION
)	
Member No. 66428,)	
)	
<u>Member of the State Bar.</u>)	

Introduction¹

Respondent Charles Gadsden Kinney was declared a vexatious litigant twice – in 2008 and 2011. The Court of Appeal found that he had “pursued a persistent and obsessive campaign of litigation terror against his neighbors and the City of Los Angeles.”² The appellate court tersely wrote: “Kinney’s conduct must be stopped, immediately.”³

Consequently, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) charged Kinney with multiple acts of misconduct in this contested disciplinary proceeding, including: (1) engaging in malicious prosecution; (2) maintaining unjust actions or proceedings; (3) committing acts of moral turpitude; and (4) encouraging unjust actions based on corrupt motive.

¹ Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

² *In re Kinney* (2011) 201 Cal.App.4th 951, 953.

³ *In re Kinney* (2011) 201 Cal.App.4th 951, 960.

The court finds, by clear and convincing evidence, that respondent is culpable of some of the charged counts of misconduct and dismissed several counts as duplicative charges.

Based upon the serious nature and extent of culpability and the applicable mitigating and aggravating circumstances, the court recommends that Kinney be suspended from the practice of law for three years, that execution of suspension be stayed, that he be placed on probation for four years and that he be suspended for a minimum of three years and until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law, pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

Significant Procedural History

The State Bar initiated this proceeding by filing a notice of disciplinary charges (NDC) on October 11, 2012, against two attorneys:

- (1) Kinney in case Nos. 09-O-18100 and 09-O-18760 and
- (2) Kimberly Jean Kempton in case No. 12-O-10802.

Kinney filed a response on October 31, 2012.

A four-day trial was held on April 2-5, 2013. The State Bar was represented by Deputy Trial Counsel Christine Souhrada. Kinney represented himself and Kempton was represented by attorney Samuel C. Bellicini of Fishkin & Slatter, LLP. On April 5, 2013, following closing arguments, the court took this matter under submission.

At a status conference on June 17, 2013, the court severed Kinney's and Kempton's matters. The parties filed a motion to terminate Kempton's proceeding due to her death in a traffic accident on June 7, 2013. On June 17, 2013, the court granted the motion and issued an order terminating the disciplinary proceeding regarding Kempton in case No. 12-O-10802.

(Rules Proc. of State Bar, rule 5.125.)

The disciplinary matter regarding Kinney stands as submitted.

Findings of Fact and Conclusions of Law

Kinney was admitted to the practice of law in California on December 18, 1975, and has been a member of the State Bar of California at all times since then.

Case No. 09-O-18100 – The Fernwood Property

Background Facts

This case exemplifies an outrageous waste of judicial resources, involving difficult attorneys and thousands of pages of documentary evidence that spanned from 2006 to the present. A long, laborious and litigious battle arose between Kinney and Kempton and their neighbors. In 2006 and 2007, Kinney and Kempton pursued five lawsuits and filed more than a dozen appeals regarding one real property on Fernwood Avenue in Los Angeles. They failed to prevail in any of the litigations.

During this period Kinney also engaged in similar, multiple lawsuits stemming from his ownership of a house in Laguna Beach. On November 19, 2008, the Los Angeles County Superior Court found that: (1) in the immediate preceding seven years, Kinney had maintained at least five litigations that were determined against him or had been pending for more than two years without going to trial or hearing within the meaning of Code of Civil Procedure section 391, subdivision (b)(1); and (2) Kinney had repeatedly filed unmeritorious motions, pleadings or other papers (Code Civ. Pro., § 391, subd. (b)(3)). Thus, the superior court declared Kinney a vexatious litigant and required him to post security of \$20,000 since he did not have a reasonable probability of prevailing on the merits. Kinney became subject to a prefiling order.

Undeterred, in 2009, Kinney then used Kempton's name as plaintiff and appellant to circumvent his status as a vexatious litigant in yet another lawsuit, the sixth one, regarding their Fernwood property. Finally, on December 8, 2011, the Court of Appeal issued a published

opinion, *In re Kinney* (2011) 201 Cal.App.4th 951, declaring Kinney a vexatious litigant and prohibiting him from filing any new litigation – either in his own name or in the name of Kempton – without first obtaining leave of the presiding judge. Furthermore, the Court of Appeal sent a copy of its opinion to the State Bar, noting that Kinney engaged in vexatious litigation that “smacks of grievously unethical conduct.”

The matter is now before this court.

Facts – The Fernwood Property

In September 2005, Kinney and Kempton purchased a house on Fernwood Avenue, Los Angeles, California (the Fernwood property), as tenants in common. Beginning in 2006, Kinney and Kempton brought a series of lawsuits all relating to their ownership of the Fernwood property. They sued their neighbors, the City of Los Angeles, the prior owner, and the real estate brokers over basically two things – the fence and the driveway. Initially, both Kinney and Kempton were co-plaintiffs. But after Kinney was declared a vexatious litigant in 2008, Kempton became the sole plaintiff with Kinney as her attorney.

These are Kinney and Kempton’s six underlying lawsuits⁴ regarding the Fernwood property filed in the trial court:

1. **June 19, 2006** – *Kempton and Kinney v. Cooper and Clark*, Los Angeles County Superior Court, No. BC354136 (fence dispute with neighbor and previous owner).
2. **June 19, 2006** – *Kempton and Kinney v. Harris*, Los Angeles County Superior Court, No. BC354138 (fence dispute with neighbor).
3. **December 2, 2006** – *Kempton and Kinney v. City of Los Angeles*, Los Angeles County Superior Court, No. BC363837 (fence dispute).

⁴ Due to the multiple appeals and motions in the underlying trial court cases, references to the appeals will be to the trial court case numbers.

4. **December 11, 2006** – *Kempton and Kinney v. Cooper and Harris*, Los Angeles County Superior Court, No. BC363261 (tort claim against neighbors for invasion of privacy).
5. **July 26, 2007** – *Kempton and Kinney v. Clark and Prudential California Realty*, Los Angeles County Superior Court, No. BC374938 (breach of contract and fraud).
6. **May 7, 2009** – *Kempton v. City of Los Angeles and Cooper*, Los Angeles County Superior Court, No. BC413357 (curb dispute on City property).

After losing these cases in the trial courts, Kinney and Kempton continued their litigation battle and filed endless frivolous appeals and motions over and over again, despite tens of thousands of dollars of sanctions and harsh reprimands against them.⁵ In the Court of Appeal alone, Kinney lost 16 times since 2007. Yet, they pressed forward with their real property dispute with their neighbors and the city in their quest to widen the driveway entrance by a few feet and to obtain an easement over their neighbors' property.

There is clear and convincing evidence of Kinney and Kempton's filing repeated frivolous appeals and failing in all of them. An example is *Kempton and Kinney v. Clark and Prudential California Realty* (BC374938), in which Kinney was relentless in his meritless appeals within the same suit:

- In February 2009, the appellate court denied Kinney and Kempton's appeal because (1) Kempton lacked standing as the adjudication of Kinney as a vexatious litigant did not injuriously affect her rights or interests (her appeal was dismissed); (2) Kinney failed to meet the burden of showing that his appeal had

⁵ Kinney paid all his sanctions and reported to the State Bar under section 6068, subdivision (o)(3) [reporting imposition of judicial sanctions against the attorney of \$1,000 or more].

merit and had not been taken for the purpose of harassment or delay; and (3) his appeal was duplicative.

- In June 2010, the appellate court denied to lift Kinney's vexatious litigant status and dismissed the appeal, finding that Kinney had not shown that he had mended his offending conduct in such a manner that the relief sought may be granted.
- In November 2011, the appellate court denied Kinney and Kempton's appeal regarding nondisclosure and fraud, finding that the facts, which Kinney and Kempton claimed the opposing parties failed to disclose, were either already known to them or within their own diligent attention.
- In November 2011, the appellate court denied a separate appeal regarding costs and imposed \$2,000 sanctions on each of them for filing frivolous appeal. The court noted: "Kempton's brief is nothing but an attempt to reargue the merits of the trial court's ruling... There is only one word to describe Kempton's appeal: Insulting. Any reasonable attorney would agree that the appeal is devoid of merit, and lacks any legal or factual support. ... Kempton's brief is rife with false and erroneous statements." The court further directed them to report the judicial sanctions to the State Bar.

There are many other examples of Kinney's obsessive and frivolous appeals.

In February 2010, in *Kempton and Kinney v. Cooper and Clark* (BC354136), the appellate court denied Kinney and Kempton's appeal re trial court's order awarding attorney fees to Clark, finding their arguments without merit.

In May 2011, in *Kempton and Kinney v. Harris* (BC354138), the appellate court found that Kinney and Kempton had no easement over their neighbors' property, that there was no public or private nuisance, and that the Harrises prevailed in other claims.

In November 2011, in *Kempton v. City of Los Angeles and Cooper* (BC413357), the appellate court denied the appeal, finding no private or public nuisance as alleged by Kinney and Kempton. The court noted: “It is impossible to discern from [Kinney and Kempton]’s incoherent appellate brief what their theory of recovery is....The only reason Kempton gave for needing a wider entrance to her driveway is to discourage people from parking their cars near her driveway, hardly a legitimate basis for a nuisance suit.”

Finally, on December 8, 2011, in another Kinney and Kempton’s appeal in *Kempton v. City of Los Angeles and Cooper* (BC413357), the appellate court stepped in to curb Kinney’s “litigation terror” and published an opinion, declaring Kinney a vexatious litigant. The Court of Appeal found that Kinney’s overzealous litigation and self-interests have wasted vast quantities of judicial resources. The appellate court cited a few examples of what other courts had written regarding Kinney’s litigiousness and opined the same:

- “As one trial judge aptly wrote in a statement of decision, Kinney is ‘a relentless bully’ who displays ‘terrifying arrogance’ by filing ‘baseless litigation against the City and its citizens.’”
- “The Ninth Circuit wrote, ‘attorney Kinney has continued in his efforts to relitigate nonmeritorious claims through vexatious and multiple filings within the current suit. Even in this appeal, despite a circuit decision to the contrary, he seems intent upon arguing that his claims are meritorious.’”
- There “was ample reason for concluding that Kinney filed the motions for an improper purpose, such as to cause needless delays or to harass or punish [plaintiff] for bringing suit.”
- “We termed the appeal ‘insulting’ and imposed sanctions ... for processing their frivolous appeal.”
- “Kinney ... pursues obsessive, meritless litigation against the hapless residents of this state who have the misfortune to be his neighbors.”
- “Kinney has demonstrated a pattern of using the judicial system as a weapon in an unrelenting quest to get advantages that he does not deserve, imposing onerous litigation costs on his opponents that he does not incur himself because he is a lawyer.”

- “The lawsuit had nothing to do with Kinney’s ability to use his driveway, and everything to do with harassing Cooper. It was a ‘grudge suit.’”
- “Kinney is clearly terrorizing his neighbors, the prior owner of his house, and the City by filing endless unmeritorious actions.”

On May 21, 2012, in *Kempton and Kinney v. Clark and Prudential California Realty*, No. BC374938, Kempton was declared a vexatious litigant because the superior court found that Kempton was the straw man for Kinney and/or Kinney was using her as his puppet or proxy in the Fernwood property litigation, based on the December 2011 Court of Appeal’s finding. The court ordered Kempton to post security in the sum of \$185,000.⁶

Although Kempton was declared a vexatious litigant by the superior court, there is no clear and convincing evidence that Kempton is the straw man for Kinney or his puppet. Because Kinney and Kempton are tenants in common, they have equal rights as well as equal responsibilities to the Fernwood property.

Conclusions

Count 1 - (Rule 3-200(A) [Malicious Prosecution])

Rule 3-200(A) provides that an attorney must not seek, accept, or continue employment if the attorney knows or should know that the objective of that employment is “[t]o bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person.”

The State Bar alleged that by bringing multiple lawsuits and actions regarding the Fernwood property that were patently unmeritorious and for all reasons as more fully set forth in the December 2011 Court of Appeal opinion, Kinney accepted and continued employment when he knew or should have known that the objective of such employment was to bring an action, conduct a defense, assert a position in litigation, and take an appeal without probable cause and

⁶ When Kempton did not post bond, the case was dismissed.

for the purpose of harassing or maliciously injuring any person in willful violation of rule 3-200(A).

Kinney clearly and convincingly violated rule 3-200(A). But since the rule 3-200(A) violation is essentially duplicative of section 6068, subdivision (c), for purposes of assessing degree of discipline, the court hereby dismisses rule 3-200(A) and finds Kinney culpable of only the section 6068, subdivision (c) violation (see count two below). (See *In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 118; *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060.)

Count 2 - (§ 6068, subd. (c) [Attorney's Duty to Counsel/Maintain Only Legal or Just Actions or Defenses])

Section 6068, subdivision (c), provides that an attorney has a duty to counsel or maintain those proceedings, actions, or defenses only as appear to the attorney legal or just, except the defense of a person charged with a public offense.

“We agree ... that attorneys have a duty to zealously represent their clients and assert unpopular positions in advancing clients’ legitimate objectives. However, as officers of the court, attorneys also have a duty to judicial system to assert only legal claims or defenses that are warranted by the law or are supported by a good faith belief in their correctness.” (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591.)

The purpose of the vexatious litigant statutes “is to address the problem created by the persistent and obsessive litigant who constantly has pending a number of groundless actions and whose conduct causes serious financial results to the unfortunate objects of his or her attacks and places an unreasonable burden on the courts. [Citations.]” (*In re Kinney* (2011) 201 Cal.App.4th 951, 957-958.)

Here, Kinney may have a right to assert legal claims against his neighbors and the City of Los Angeles regarding his Fernwood property, even if it was extremely unlikely that he

would win on appeal. But after losing six lawsuits and more than 16 appeals in which the courts had repeatedly chastised him for filing unmeritorious papers, Kinney's claims that he was advancing his legitimate objectives could no longer be plausible, legal or just. Kinney apparently thought he had the right to continuing litigating until he got the result he wanted regardless of the law. In fact, he had lost his ability to examine his conduct in a detached manner as Kempton's lawyer in the May 2009 lawsuit. As the Court of Appeal wrote: "He continues to sue and to appeal, wasting vast quantities of judicial resources and taxpayer money to process his absurd and unsupported claims." (*In re Kinney* (2011) 201 Cal.App.4th 951, 960.)

Kinney was thus declared a vexatious litigant.

Accordingly, by bringing and maintaining meritless lawsuits and actions regarding the Fernwood property, by failing to address the merits of the litigation, and for all the reasons set forth in the December 2011 Court of Appeal opinion, Kinney failed to counsel or maintain such actions, proceedings, or defenses only as appear to him legal or just, in willful violation of section 6068, subdivision (c).

Count 3 - (§ 6068, subd. (g) [Duty Not to Encourage Action Based on Corrupt Motive])

Section 6068, subdivision (g), provides that an attorney has a duty not to encourage either the commencement or the continuance of an action from any corrupt motive of passion or interest.

The State Bar alleged that by bringing multiple lawsuits and actions regarding the Fernwood property that were patently unmeritorious and for all reasons as more fully set forth in the Court of Appeal Decision, Kinney encouraged the commencement and the continuance of an action or proceeding from a corrupt motive of passion or interest, in willful violation of section 6068, subdivision (g).

However, because count three is based in large part on the same misconduct as alleged in count two (maintaining an unjust action), the court hereby dismisses this count with prejudice as duplicative. (*Bates v. State Bar, supra*, 51 Cal.3d 1056, 1060.)

Count 4 - (§ 6106 [Moral Turpitude])

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

The State Bar alleges that Kinney willfully violated section 6106 (1) by pursuing a “persistent and obsessive campaign of litigation terror” and (2) by using Kempton as his straw man, puppet or proxy in the Fernwood property litigation.

Because Kinney and Kempton both owned the Fernwood property, there is no clear and convincing evidence that Kempton was Kinney’s straw man, puppet or proxy in the Fernwood property litigation. While the two clearly engaged in “persistent and obsessive campaign of litigation terror” against their neighbors and the City of Los Angeles, there is no clear and convincing evidence that their acts involved moral turpitude, dishonesty or corruption.

In *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, the attorney was found culpable of violating section 6106 because he repeatedly misstated facts and failed to reveal prior adverse rulings to trial and appellate courts, failed to follow court rules and flouted the authority of the courts. “Such serious, habitual abuse of the judicial system constitutes moral turpitude in violation of section 6106.” (*Id.* at p. 186.)

Similarly, in *In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 122, the court concluded that the attorney failed to use truthful means and committed moral turpitude.

Unlike *Varakin* or *Lais*, Kinney did not engage in acts of dishonesty or corruption. Although he had clearly filed unmeritorious motions, pleadings, and other papers, his relentless

litigation did not constitute serious, habitual abuse of the judicial system that involved moral turpitude. He was persistent and obsessive but not corrupt or dishonest. Thus, Kinney did not commit acts of moral turpitude in willful violation of section 6106 in count 4.

Case No. 09-O-18760 - Smedberg Litigations

This matter involved three separate lawsuits and their multiple appeals, based on an easement on land owned by Kinney's clients, Gerald and Robin Toste, for the benefit of their neighbors, the Smedbergs. Like the Fernwood property matter discussed above, this case also consumed an outrageous waste of judicial resources. But unlike the Fernwood property matter, there was no triable issue because the Tostes had no claim to the easements as the easements clearly belonged to the Smedbergs. Even though Gerald Toste was found in contempt for disobeying the court's injunction order, Kinney and the Tostes sued the Smedbergs, the superior court, the county and the title insurance company with a vengeance. The Tostes lost repeatedly.

Facts

Smedberg Litigation #1

In 1977, Kenneth and Bonnie Smedberg (the Smedbergs) bought 11 acres that were divided into five parcels of land in Pollock Pines, California⁷ (the Pollock Pines property). Their hope was that one or more of their children could build a home on the acreage. The property is bisected by a creek that makes it difficult to access the east portion of the property from the west portion of the property. The Smedbergs' home and driveway are on the west side of the creek. In 2003, the Smedbergs deeded a parcel of their 11 acres on the east side of the creek to their son Darin, who then deeded an interest to his fiancée, Teresa Rowan (Teresa), so they could build a home upon the property. To provide access to the parcels on the east side of the creek, two

⁷ Pollock Pines is a rural area located between Lake Tahoe and Sacramento, California.

contiguous easements were created near the southeast portion of the Smedbergs' property. These easements were in existence when the Smedbergs bought the property.

In 1999, Gerald and Robin Toste (the Tostes) bought an acre of property adjacent to the Pollock Pines property. Unbeknownst to the Tostes at that time, the Smedbergs held an easement that would allow the Smedbergs to install a driveway on the Tostes' property to gain access to their own property.

In 2006, Darin and Teresa started the construction of the driveway to the home they had built on their parcel. When the Tostes learned of this construction plan, they made a claim to First American Title Insurance Company (First American) because First American, who issued the title insurance on their property at the time of purchase, failed to disclose the existence of the Smedbergs' easement. First American responded to the claim by acknowledging its error and offering to reimburse the Tostes for the actual loss to their property (including attorney fees and expenses in defending against the easement),⁸ as a result of the Smedbergs' easement. The Tostes asserted that the easement made their property worthless.

In June 2006, as the Smedbergs began constructing the driveway, the Tostes responded by blocking construction activities on the driveway. On June 15, 2006, First American wrote the Tostes that it would not provide them with legal representation should the Smedbergs bring legal action against them. First American explained that under its title insurance policy, it had no obligation to defend the Tostes against any allegations of trespass, nuisance or other intentional torts or to indemnify them against any tort damages.

On July 3, 2006, the Smedbergs filed a lawsuit against the Tostes in *Smedberg v. Toste*, El Dorado County Superior Court, case No. PC20060340. The complaint sought to quiet title to

⁸ First American paid \$54,000 to the Tostes to defend against the Smedbergs – the loss in the easement case.

the easements, to obtain declaratory relief, and to obtain an injunction and damages for negligence. They also sought a preliminary injunction to stop the Tostes from blocking their use of the easements and to compel to remove a fence and other obstructions from the easements. After First American refused to defend the Tostes,⁹ they employed respondent Kinney¹⁰ to defend them against the Smedbergs' complaint.

On July 13, 2006, the court issued a preliminary injunction prohibiting the Tostes from interfering with the Smedbergs' use of the easement. And on July 28, 2006, Kinney filed an answer and cross complaint on behalf of the Tostes. The cross complaint sought to extinguish the Smedbergs' easement based upon the Tostes' adverse possession of the easement. On August 24, 2006, the court issued an injunction prohibiting the Tostes from interfering with the use of the easement. And on April 12, 2007, the court found Gerald Toste guilty of 12 counts of contempt for violating the preliminary injunction and ordered him to serve a 60-day jail sentence.¹¹

On April 19, 2007, Kinney filed a petition for writ of prohibition to set aside the contempt order and stay sentencing set for April 20, 2007, in *Toste v. Superior Court, County of El Dorado et al.* (Smedbergs real parties in interest), California Court of Appeal, Third Appellate District, case No. C055452. And on April 19, 2007, the appellate court denied Kinney's petition and request for a stay.

⁹ First American discharged its attorney from representing the Tostes on June 1, 2006, because it found that the Smedbergs did have an easement and the fact that an easement had not been used since it was created did not lessen its validity. Again, First American agreed to reimburse any actual loss incurred by reason of the easement and any attorney fees incurred up to June 1, 2006.

¹⁰ Gerald Toste has known respondent Kinney for over 20 years. They were both volunteers on the voluntary ski patrol in Lake Tahoe.

¹¹ The Tostes' claim that the judge was bias is not supported by the record.

On June 6, 2007, Kinney filed a second petition for writ of prohibition attacking the contempt order in *Toste v. Superior Court, County of El Dorado et al.* (Smedbergs real parties in interest), California Court of Appeal, Third Appellate District, case No. C055861. The second petition raised arguments identical to those raised in the first petition. And on June 7, 2007, the appellate court denied Kinney's second petition and request for a stay.

On June 11, 2007, the lawsuit in *Smedberg v. Toste*, case No. PC20060340, proceeded to trial. And on June 20, 2007, the jury returned a verdict in favor of the Smedbergs on their claims for nuisance and trespass, and awarded the Smedbergs \$65,000 in compensatory damages and \$40,000 in punitive damages.

Further on July 12, 2007, the trial court issued its judgment on special verdict after trial, and awarded damages and costs of suit, and imposed a permanent injunction prohibiting the Tostes from interfering with the use of the easement.

On August 13, 2007, Kinney appealed the July 12, 2007 judgment in *Smedberg v. Toste*, California Court of Appeal, Third Appellate District, case No. C056578.

On November 19, 2007, Kinney filed three petitions for writ of mandate with request for stay: *Toste v. Superior Court of El Dorado County* (Smedbergs real parties in interest), California Court of Appeal, Third Appellate District, case Nos. C057414, C057415, and C057416. And on November 21, 2007, the appellate court denied the three petitions for writ of mandate and request for stay. In these writs Kinney argued that the Tostes' land was inversely condemned because of El Dorado County's approval of the Smedbergs' easement, the Tostes' trial was tried by a biased judge, and the judge must disqualify himself.

On January 11, 2008, the superior court ordered Gerald Toste to serve 60 days in jail and issued a judgment awarding attorney fees incurred in bringing the contempt charge. And on January 14, 2008, Kinney filed a petition for writ of prohibition with request for stay in *Toste v.*

Superior Court of El Dorado County (Smedbergs real parties in interest), California Court of Appeal, Third Appellate District, case No. C057874. The writ was denied without prejudice to filing in the appellate division of the El Dorado Superior Court.

Also, on January 14, 2008, Kinney filed an amended notice of appeal in *Smedberg v. Toste*, California Court of Appeal, Third Appellate District, case No. C057962.

On January 24, 2008, Kinney filed a further amended notice of appeal in *Smedberg v. Toste*, California Court of Appeal, Third Appellate District, case No. C058031. And on January 31, 2008, the appellate court, on its own motion, transferred case No. C057962 to the Appellate Department of the El Dorado County Superior Court. Finally, on July 7, 2008, the Appellate Department of the El Dorado County Superior Court dismissed case No. C057962.

On December 10, 2008, the appellate court affirmed the trial court's judgment and awarded costs on appeal in case No. C056578 to plaintiffs. On January 16, 2009, Kinney filed a petition for review in the California Supreme Court (case No. S169760) on the appellate court's decision in case No. C056578. And on February 18, 2009, Kinney's petition for review was denied.

On September 28, 2009, in case No. C058031, the appellate court affirmed the trial court's judgment, found that the appeal was "frivolous," assessed sanctions against the Tostes and Kinney, jointly and severally, in the amount of \$9,875 payable to the plaintiffs and \$2,500 payable to the courts, and also awarded costs to the plaintiffs. Moreover, in the unpublished opinion, the appellate court stated that "no reasonable attorney could have thought that the Tostes' recycled versions of previously rejected appellate arguments could possibly succeed."

Undeterred by the sanctions and costs and the harsh language about his appeal, on November 6, 2009, Kinney filed a petition for review in the California Supreme Court (case No.

S177748) with regard to case No. C058031. And on December 17, 2009, Kinney's petition for review was denied.

Smedberg Litigation #2

County of El Dorado

While the Smedberg lawsuit (litigation #1) was pending on May 11, 2007, Kinney filed a second lawsuit with regard to the Pollock Pines property against El Dorado County, alleging a single cause of action for dangerous easement conditions in *Toste v. County of El Dorado*, El Dorado County Superior Court, case No. PC20070291. And on August 28, 2007, Kinney filed an amended complaint, adding the Superior Court of El Dorado County as a defendant, and alleging dangerous condition and inverse condemnation.

On November 19, 2007, Kinney filed a petition for writ of mandate with request for stay in *Toste v. Superior Court of El Dorado County*, California Court of Appeal, Third Appellate District, case No. C057415. And on November 21, 2007, the appellate court denied Kinney's petition for writ of mandate.

On January 10, 2011, upon a motion for judgment on the pleadings, the court struck the first amended complaint in its entirety. And on February 9, 2011, Kinney filed a second amended complaint, alleging three causes of actions for dangerous condition, inverse condemnation and declaratory relief. On April 21, 2011, upon a demurrer, the court struck the second amended complaint in its entirety. On May 23, 2011, Kinney filed a third amended complaint, which essentially re-stated the same three causes of action that were pled in the second amended complaint. Finally on June 22, 2011, El Dorado County filed a demurrer to the third amended complaint. And on September 29, 2011, the court sustained the County's demurrer without leave to amend.

Superior Court of El Dorado County

On May 21, 2008, Kinney filed a notice of appeal in *Toste v. Superior Court of El Dorado County*, California Court of Appeal, Third Appellate District, case No. C058938. On October 27, 2009, the appellate court affirmed the trial court's order of dismissal, and awarded the Superior Court its costs on appeal. On December 4, 2009, Kinney filed a petition for review in the California Supreme Court (case No. S178456). And on January 21, 2010, Kinney's petition for review was denied by the California Supreme Court.

On January 9, 2012, Kinney filed a second notice of appeal in *Toste v. County of El Dorado*, California Court of Appeal, Third Appellate District, case No. C070100. In a recent opinion, on January 31, 2013, the Court of Appeal held that Kinney's appeal was the sixth installment in baseless litigation arising out of easements on land owned by the Tostes for the benefit of the Smedbergs. The court stated:

Kinney is no stranger to the courts. He has been declared a vexatious litigant in Los Angeles Superior Court in 2008 and in the Court of Appeal, Second Appellate District, Division Two in 2011. (*In re Kinney* (2011) 201 Cal. App. 4th 951, 960.) In those instances, Kinney "pursued a persistent and obsessive campaign of litigation terror against his neighbors and the City of Los Angeles...." (*Id.* at p. 953.) Those cases, as does the litigation here, arose out of a property dispute against neighbors involving easements. (*Id.* at p. 954) "As one trial judge aptly wrote in a statement of decision, Kinney is a 'relentless bully' who displays 'terrifying arrogance' by filing 'baseless litigation against the City of [Los Angeles] and its citizens.'" (*Id.* at p. 953.) This appeal fares no better.

Smedberg Litigation #3

On May 11, 2007, Kinney filed a third lawsuit with regard to the Pollock Pines property against First American for breach of contract based on the title insurance policy in *Toste v. First American Title Insurance Company*, El Dorado County Superior Court, case No. PC20070292. Kinney argued that First American was liable for his attorney fees and damages incurred by the

Tostes because after its refusal to defend the litigation brought on by the Smedbergs, the Tostes were forced to hire him. He stated that to date the litigation had resulted in damages against the Tostes in an amount of about \$65,000.

On November 8, 2007, Kinney filed a request for disqualification and sought to disqualify Judge Daniel Proud in Department 9 from hearing any of the three pending actions (case Nos. PC20060340, PC20070291, and PC20070292). The court denied Kinney's motion. Then First American moved for summary judgment as to each of the contractual duties allegedly owed to the Tostes. And on January 3, 2011, the court granted First American's motion for summary judgment.

On February 22, 2011, Kinney filed a notice of appeal in *Toste v. First American Title Insurance Company*, California Court of Appeal, Third Appellate District, case No. C067520. And on March 28, 2012, the appellate court affirmed the trial court's summary judgment decision, and awarded First American its costs on appeal.

Conclusions

Count 5 - (Rule 3-200(A) [Malicious Prosecution])

The State Bar alleged that by bringing multiple lawsuits and actions regarding the Pollock Pines property that were patently unmeritorious, Kinney accepted and continued employment when he knew or should have known that the objective of such employment was to bring an action, conduct a defense, assert a position in litigation, and take an appeal without probable cause and for the purpose of harassing or maliciously injuring any person in willful violation of rule 3-200(A).

As similarly discussed in count one in the Fernwood property matter, Kinney clearly and convincingly violated rule 3-200(A). But since the rule 3-200(A) violation is essentially duplicative of section 6068, subdivision (c), for purposes of assessing degree of discipline, the

court hereby dismisses rule 3-200(A) and finds Kinney culpable of only the section 6068, subdivision (c) violation (see count six below). (See *In the Matter of Lais*, *supra*, 4 Cal. State Bar Ct. Rptr. 112, 118; *Bates v. State Bar*, *supra*, 51 Cal.3d 1056, 1060.)

Count 6 - (§ 6068, subd. (c) [Attorney's Duty to Counsel/Maintain Only Legal or Just Actions or Defenses])¹²

In the Smedberg litigation #1, it was clear that the Smedbergs had easements on the Tostes' property. First American as early as June 2006 made it clear that it could not defend the Tostes against the Smedbergs' easement because it was valid and fully enforceable. Likewise, in Tostes' cross complaint as to adverse possession of the easement, it was clear that the Tostes had not met the requirements for an adverse possession claim.

As to Smedberg litigation # 2 against the El Dorado County for approving the Smedbergs driveway within 50 feet of a permanent stream a driveway with a blind corner thereby creating a dangerous condition, the trial court ruled there were two fatal flaws to the Tostes' claim of dangerous condition of public property. One of the obvious flaws was that the Tostes' allegation related to the private road on the Smedbergs' easement was not on public property. The statute made it clear that the dangerous condition must be on public property to make it actionable. (Gov. Code, § 835 ["public entity is liable for injury caused by a dangerous condition of its property"].) The other fatal flaw was that to be actionable under Government Code section 835, the fear for their safety must be the type of emotional distress that is actionable under the common law.

It was also clear that the Tostes' claim of inverse condemnation against the county was meritless as the case involved no taking of or damage to the Tostes' property for a public

¹² The NDC inserted wrong case numbers for counts six, seven and eight. Case No. "09-O-18100" should have been "09-O-18760" and is hereby corrected. Also, reference to "Fernwood property" under count seven, paragraph 85, should have been to "Pollock Pines property." These typographical errors caused harmless confusion.

purpose. Rather, the building of the road only affected the Tostes' property, vis-a-via, the lawful holders of rights in the easements, the Smedbergs, who had a right to build a road on the easement. As for the claim against the El Dorado County Superior Court for inverse condemnation because its rulings constituted an inverse condemnation in that it took the Tostes' land for public use without just compensation within the prohibition of the state and federal constitutions, any lawyer would know that court rulings are entitled to absolute judicial immunity.

As to Smedberg litigation #3, the undisputed evidence offered by First American was that it did not authorize Kinney to defend the Tostes and the policy did not require for it to defend the Tostes. The title insurance policy stated it had the right to hire an attorney of its choosing and was required only to repay for attorney fees that were approved in advance.

Therefore, by bringing and maintaining meritless lawsuits and actions regarding the Pollock Pines property and by failing to address the merits of the litigation, Kinney failed to counsel or maintain such actions, proceedings, or defenses only as appear to them legal or just, in willful violation of section 6068, subdivision (c).

Count 7 - (§ 6068, subd. (g) [Duty Not to Encourage Action Based on Corrupt Motive])

The State Bar alleged that by bringing multiple lawsuits and actions regarding the Pollock Pines property that were patently unmeritorious, Kinney encouraged the commencement and the continuance of an action or proceeding from a corrupt motive of passion or interest, in willful violation of section 6068, subdivision (g).

Because count seven is based in large part on the same misconduct as alleged in count six (maintaining an unjust action), the court hereby dismisses this count with prejudice as duplicative. (*Bates v. State Bar, supra*, 51 Cal.3d 1056, 1060.)

Count 8 - (§ 6106 [Moral Turpitude])

There is clear and convincing evidence that Kinney brought and maintained meritless lawsuits and actions regarding the Pollock Pines property. When the Smedbergs bought the land in 1977, easements on the adjacent property were in existence. In 2006, some 29 years later, when the Smedbergs decided to build a driveway on a portion of the easement on the Tostes' property, their right to the easement still existed. Despite repeated lawsuits, recycled arguments, six appeals, and even a 60-day jail sentence for Gerald's violating a preliminary injunction, Kinney continued to wage his frivolous litigations against the Smedbergs. Indeed, Kinney is a "relentless bully" and his relentless tactics on an easement dispute that has no merit is tantamount to committing acts of moral turpitude through gross negligence.

"Such serious, habitual abuse of the judicial system constitutes moral turpitude in violation of section 6106." (*In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, 186.) Thus, by bringing and maintaining meritless lawsuits and actions regarding the Pollock Pines property, Kinney committed acts involving moral turpitude through gross negligence in willful violation of section 6106.

Aggravation¹³

Multiple Acts/Pattern of Misconduct (Std. 1.2(b)(ii).)

Kinney's misconduct evidences multiple acts of wrongdoing, including failing to maintain just actions in two matters and committing acts of moral turpitude.

Kinney's multiple violations demonstrate a borderline pattern of misconduct. "Only the most serious instances of repeated misconduct over a prolonged period of time could be characterized as demonstrating a pattern of wrongdoing." (*Levin v. State Bar* (1989) 47 Cal.3d

¹³ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

1140, 1149, fn. 14, citing *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367.) Kinney's misconduct since 2006 in two separate matters depicts an endless course of maintaining unjust actions which overburdens the court and harms the public. He overzealously advocated similar baseless real property rights, whether based on his own Fernwood property or on his client's Pollock Pines property. While his misconduct may not yet constitute a pattern, it was serious enough for the courts to declare him a vexatious litigant.

Harm to Client/Public/Administration of Justice (Std. 1.2(b)(iv).)

Kinney significantly harmed the public and the administration of justice. His vexatious litigation required the courts to repeatedly rule on meritless lawsuits and motions, wasting valuable judicial time and resources. The cumulative effect of his conduct over the course of six years of meritless litigation in the Fernwood and Smedbergs matters is prejudicial to the administration of justice, taking judicial resources away from other meritorious cases. Moreover, Kinney's misconduct caused harm to the legal profession. He used the courts as a means of intimidating and oppressing people of modest means by his endless litigations against his own neighbors and his clients' neighbors.

Kinney is stubbornly litigious in filing frivolous appeals. There is a point which zealous representation must yield to the judicial process and the rule of law and duty to the court.

Without such deference, respect for the process and rule of law is lost.

There is clear and convincing evidence of the harm to the administration of justice caused by his litigiousness.

In November 2011, the Court of Appeal in *Kempton v. City of Los Angeles* (BC413357) stated:

"In this grudge suit, ... [Kinney and Kempton] continue their relentless assault on the good will and sensibilities of their hapless neighbors. ... Unsurprisingly, the trial court found [their] claim baseless. So do we."

The court further commented on Kinney's basis for the appeal regarding public nuisance and private nuisance:

"The only nuisance we perceive is the waste of judicial resources occasioned by this meritless lawsuit."

In another appellate opinion, the Court of Appeal in *Kempton and Kinney v. Clark and Prudential California Realty* (BC374938) noted:

"Litigants with bona fide disputes are waiting in line and are prejudiced by the useless diversion of resources while we process this meritless appeal. [Citations.] [The] ... appellate system and the taxpayers of this state are damaged by what amounts to a waste of this court's time and resources. [Citation.]"

Furthermore, there is clear and convincing evidence of the harm to the public caused by Kinney's litigiousness. The following witnesses testified as follows:

Bonnie Smedberg, one of the neighbors whom the Tostes sued, testified that her family considered her son's fiancée, Teresa Rowan, as a daughter. As a result of the protracted litigation, Teresa moved to Bosnia and lost contact with them. Bonnie Smedberg testified that she lost her friendship with Teresa. The lawsuit has emotionally bankrupted them. Her children whom she originally bought the property for will have nothing to do with the property due to the lawsuits swirling around them. The litigation cost has been \$118,000, excluding costs. She had to seek counseling because she was depressed and frustrated over the lawsuits.

Kenneth Smedberg testified that it has been very stressful and has had recurring nightmares as a result of these lawsuits. His children and grandchildren do not visit them at the home because of the lawsuits. Like his wife, he is also seeing a therapist as a result of these lawsuits. He also had a heart attack in 2010 which he attributes to the stress of this litigation.

Teresa Rowan testified telephonically from Bosnia. She and Darin Smedberg were lifelong partners until the multiple lawsuits by Kinney began. She testified that she quit her job as an IT person in Sacramento and put all her savings (\$300,000) into building a house on the

Smedberg property. But the litigation costed money and delays. She testified that Darin Smedberg was so sick of the lawsuits that he asked her to leave and leave she did. She testified that she lost everything; at age 51, she just took off to Europe and ended up in Bosnia, where she is renting a single room, washes her clothes in a bathtub and cooks on a wooden stove. She further testified that she lost her best friends – Bonnie and Kenneth Smedberg.

Michelle Clark was the prior owner who sold the Fernwood house to Kinney and Kempton. She testified that the financial impact has been enormous. She owes her attorneys over \$200,000. She testified that the emotional impact is overwhelming; she is afraid to answer the phone or open her mail for fear of another lawsuit from Kinney.

Carolyn Cooper, a single parent and one of the neighbors in the Fernwood litigation, testified that she has no savings because she has had to spend all her money on the attorneys defending against the Kinney litigation. She has spent \$180,000 in legal fees and used the equity in her home to pay the legal fees. Cooper claimed that Kinney had ruined the close-knit neighborhood. She testified that as a result of the multiple lawsuits, people are afraid to talk to each other. And because of the legal expenses, she testified that she was unable to help her only child with his college tuition.

Michael Olivares, Carolyn Cooper's son, flew in from New York to testify. He was accepted at the University of Pennsylvania at the time of the Fernwood property litigation. He testified that because of the cost of lawsuits, it was unclear whether he could attend. Once he attended, his mother could not afford the tuition because she was spending all the money on the lawsuit. He testified that his world was shaken and he lived in constant fear of being sued. He described that once Kinney bought the house, it was like a virus had moved into the neighborhood – everyone seemed consumed by the stress of frivolous lawsuits.

Judy Harris, one of the neighbors in the Fernwood litigation, testified that her family suffered nothing financially as their insurance company paid for all the litigation but the emotional impact has been overwhelming. She lived in total fear after Kinney began his lawsuits.

Jeffrey Harris, another neighbor, testified that he believes Kinney harassed and intimidated his wife. Once Kinney bought the Fernwood property, the neighborhood changed; he could no longer walk his dog in peace. He felt he was being stalked.

Benjamin Harris, another neighbor, was sued when he turned 18 (he is now 24). He could not invite people over. There was the constant fear of being served with a lawsuit.

Indifference Toward Rectification/Atonement (Std. 1.2(b)(v).)

Kinney demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. “The law does not require false penitence. [Citation.] But it does require that the respondent accept responsibility for his acts and come to grips with his culpability. [Citation.]” (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.)

Kinney expressed no remorse or recognition of the serious consequences of his misbehavior. He was relentless in pursuit of his claims. Kinney had to know that his arguments in many of the appeals were not supported by the law. Yet, he was undeterred by having to pay costs on appeal or civil sanctions; he soldiered on filing meritless appeal after appeal. He has no insight into his behavior in that he thinks he is being prosecuted because he is a whistleblower. Also, in the Smedberg matter, he blames everything on the judge, claiming that the judge was bias, and completely ignores that the Tostes lost the trial by jury, not by judge. And there was no evidence of bias or jury misconduct. He was unapologetic toward the harm he has caused

people. Instead of convincing the Tostes to end their useless pursuit of taking away the easement from the Smedbergs, Kinney became equally obsessive.

Kinney's unrestrained vexatious litigation that characterized his conduct in the underlying court proceedings is repeated in the State Bar Court proceedings. The court takes judicial notice that in March 2013, three days before this hearing, Kinney sought the federal district court to issue a temporary restraining order against the State Bar from conducting the current disciplinary proceedings, arguing that the State Bar is violating his federal rights. The district court denied his application. While Kinney may assert his legal rights, he is unrelenting in pursuing his claims. And this application for temporary restraining order is the most recent example of his litigious behavior. He clearly does not recognize his culpability.

Kinney's failure to accept responsibility for actions which are wrong or to understand that wrongfulness is considered an aggravating factor. (*Carter v. State Bar* (1988) 44 Cal.3d 1091, 1100-1101.)

Mitigation

No Prior Record (Std. 1.2(e)(i).)

Kinney's lack of a prior record of discipline in 31 years of practice at the time of his misconduct is a significant mitigating factor. (*In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735 [attorney's 25-year legal career without discipline was an important mitigating circumstance].)

Good Faith (Std. 1.2(e)(ii).)

Kinney strongly held the belief that his litigation was justified. In order to establish good faith as a mitigating circumstance, an attorney must prove that his beliefs were both honestly held and reasonable. To conclude otherwise would reward an attorney for his unreasonable

beliefs and for his ignorance of his ethical responsibilities. (*In the Matter of Thomson* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966.)

Here, the appellate courts had repeatedly denied his claims, finding them unmeritorious and baseless. One appellate court concluded that Kinney engaged in vexatious litigation that “smacks of grievously unethical conduct.” Kinney’s good faith belief may be honestly held but was unreasonable and does not constitute as mitigation.

Good Character (Std. 1.2(e)(vi).)

Kinney presented three character witnesses. Two of his witnesses were his clients, Gerald and Robin Toste. They think he is honest and great. They really think the Smedbergs have stolen their land by making it worthless with an easement. Testimony by three character witnesses is not entitled to significant weight in mitigation since it was not an extraordinary demonstration of good character attested to by a wide range of references. (*In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153.)

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The standards provide a broad range of sanctions ranging from reproof to disbarment, depending upon the gravity of the offenses and the harm to the victim. Standards 1.6(a), 2.3 and 2.6 apply in the Kinney matter.

The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Standard 1.6(a) provides, in pertinent part, 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.

Standard 2.3 provides that culpability of moral turpitude and intentional dishonesty toward a court or a client must result in actual suspension or disbarment.

Standard 2.6 provides that culpability of certain provisions of the Business and Professions Code must result in disbarment or suspension depending on the gravity of the offense or the harm to the victim.

Kinney contends that he should be exonerated of all charges. He maintains that he is completely free of any wrongdoing, that he is a mere whistleblower, trying to protect his and his clients’ established property rights, and that the neighbors are the wrongdoers. He asserts that the judges were assisting these wrongdoers to the detriment of the public.

The State Bar urges disbarment, citing *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179 in support of its recommendation.

In *Varakin*, the attorney was disbarred for filing frivolous motions and appeals in four different cases over 12 years solely for the purpose of delay and harassment of his ex-wife and others who became embroiled in his vendetta against her and was proud of his conduct. He persisted in this pattern of misconduct despite many sanctions. In fact, within four years, he

received at least 14 sanctions, totaling \$80,000. He also intentionally refused to report sanctions and to cooperate with the State Bar investigation. Stressing respondent's abuse of the judicial system, lack of repentance, and obdurate persistence in misconduct, the Review Department concluded that no discipline less than disbarment was consistent with the goals of maintaining high ethical standards for attorneys and preserving public confidence in the legal profession.

Unlike *Varakin*, Kinney did not file all those 16 appeals in the Fernwood property and the numerous litigations in the Pollock Pines property for the sole purpose of delay or harassment of the neighbors. He was not vengeful or spiteful. But he was litigious and persistent in maintaining unjust actions, despite thousands of dollars of sanctions and various court orders to pay attorney fees to opposing parties. While *Varakin* filed frivolous appeals over 12 years in four cases, Kinney engaged in unmeritorious litigations over six years in two cases. He had paid and reported his sanctions to the State Bar. There is no evidence he refused to cooperate with the State Bar investigation. Thus, his misconduct is less egregious than the misconduct in *Varakin*.

In another case, *Rosenthal v. State Bar* (1987) 43 Cal.3d 612, the Supreme Court disbarred an attorney because of the egregious nature of his misconduct and the need to protect the public from further injury. Like Kinney, the attorney maintained unjust actions and committed acts of moral turpitude. But, Rosenthal also engaged in additional serious misconduct. He was found to have: engaged in transactions rife with undisclosed conflicts of interest, taken positions adverse to former clients, overstated expenses and double-billed for legal fees, failed to return client files or provide access to records, failed to give adequate legal advice or provide his clients with the opportunity to obtain independent counsel, filed fraudulent claims and given false testimony, and engaged in conduct intended to harass his former clients, delay court proceedings, obstruct justice and abuse the legal process.

While disbarment was clearly warranted in *Rosenthal*, Kinney's misconduct was not as extensive as the misconduct in *Rosenthal*.

In *In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, in a marital settlement dispute, the attorney was found culpable of filing patently frivolous appeal, dishonesty and misleading the court in two client matters. The court found that "anytime [r]espondent lost on the merits of an issue, he could not accept the court's adverse judicial determination and would attempt to blame the ruling on the court's lack of understanding of the issues." (*Id.* at p. 124.) The attorney was also found culpable of misconduct in five client matters in an earlier disciplinary matter. He was actually suspended for two years with three years' stayed suspension and three years' probation.

In this matter, Kinney became so blindly self-righteous and consumed with his goal to claim the rights he thought his neighbors and his clients' neighbors had taken away from him and the clients that he had burdened the courts and the administration of justice for so many years. Perseverance is laudable but one must weigh and balance the nature of that trait against the harm that Kinney had caused. As the Court of Appeal in the Smedberg litigation #1 matter wrote: "Much as we might admire perseverance and struggle against the odds, there is nothing noble about subjecting parties and this court to the unnecessary labor and expense of a duplicative appeal." (*Smedberg v. Toste*, C058031.)

"While an attorney is expected to be a forceful advocate for a client's legitimate causes [citations] ... the role played by attorneys in the honest administration of justice is more critical than ever ... Attorneys, by adherence to their high fiduciary duties and the truth, can sharply reduce or eliminate clashes and ease the way to dispute settlement." (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 473.) Instead, Kinney's frivolous appeals

burdened the court, opposing parties and counsel, causing substantial harm to the administration of justice and the public.

While Kinney's offenses are not as serious as that of the attorneys in *Varakin* and *Rosenthal*, substantial discipline is required. The enormous harm to the administration of justice and to the public weighs heavily in assessing the appropriate level of discipline. Kinney repeatedly engaged in frivolous litigations, whether on his own or his clients' behalf. He is unrepentant and relentless. He does not acknowledge defeat with grace, but attacks it with more ferocious appeals. Yet, disbarment is not appropriate, given his 31 years of practice with no prior record of discipline.

In recommending discipline, the "paramount concern is protection of the public, the courts and the integrity of the legal profession." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) The court also had the opportunity to assess Kinney's character and conduct over four days of trial. Based on the court's observation and the record, disbarment is unnecessary and is not the only means of protecting the public.

Therefore, having considered the nature and extent of the misconduct, the aggravating and mitigating circumstances, as well as the case law and the standards, the court believes that disbarment would not further the objectives of attorney discipline and would be punitive in nature. Accordingly, the court concludes that a three-year stayed suspension and four-year probation, including an actual suspension of three years and until he provides proof of rehabilitation and fitness to practice, would be appropriate for Kinney under the facts and circumstances in this case.

Recommendations

It is recommended that respondent Charles Gadsden Kinney, State Bar Number 66428, be suspended from the practice of law in California for three years, that execution of that period of

suspension be stayed, and that Kinney be placed on probation¹⁴ for a period of four years subject to the following conditions:

1. Respondent Kinney is suspended from the practice of law for a minimum of three years of probation, and respondent will remain suspended until the following requirement(s) are satisfied:
 - i. Respondent must provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law before his suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std 1.4(c)(ii).)
2. Respondent Kinney must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation.
3. Within 30 days after the effective date of discipline, respondent Kinney 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. 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 respondent Kinney's current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.
5. During the probation period, respondent Kinney must report in writing quarterly to the Office of Probation. The reports must be postmarked no later than each January 10, April 10, July 10, and October 10 of the probation period. Under penalty of perjury, respondent must state in each report whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of respondent's probation conditions during the preceding calendar quarter or applicable reporting period. If the first report would cover less than 30 days, no report is required at that time; however, the following report must cover the period of time from the commencement of probation to the end of that next quarter. In addition to all quarterly reports, a final report must be postmarked no earlier than 10 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, respondent Kinney must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any

¹⁴ The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.

7. Within one year after the effective date of the discipline herein, respondent Kinney 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 respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)
8. At the expiration of the probation period, if respondent Kinney has complied with all conditions of probation, respondent will be relieved of the stayed suspension.

Multistate Professional Responsibility Exam

It is recommended that respondent Kinney be ordered to take and pass the Multistate Professional Responsibility Examination during the period of his suspension and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

California Rules of Court, Rule 9.20

It is further recommended that respondent Kinney 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.

Costs

It is recommended 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: June ____, 2013

PAT McELROY
Judge of the State Bar Court

