

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of) Case No.: **13-PM-16275-RAP**
)
KENNETH JOHN KLEINBERG,) **ORDER GRANTING MOTION TO REVOKE**
) **PROBATION AND ORDER OF**
Member No. 110732,) **INVOLUNTARY INACTIVE ENROLLMENT**
) **(Bus. & Prof. Code, § 6007, subd. (d)(1))**
A Member of the State Bar.)

Introduction¹

The Office of Probation of the State Bar of California (OP), represented by Supervising Attorney Terrie Goldade, filed a motion seeking to revoke the disciplinary probation that the Supreme Court imposed on Respondent **KENNETH JOHN KLEINBERG**² in its order filed on November 6, 2008, in case number S166492 (State Bar Court case number 04-O-11238), styled *In re Kenneth John Kleinberg on Discipline (Kleinberg I)*. (§ 6093, subds. (b); Rules Proc. of State Bar, rule 5.310 et seq.) Respondent participated in this proceeding and is represented by Attorney Jayesh Patel.

As set forth below, the court finds, by a preponderance of the evidence (§ 6093, subd. (c); Rules Proc. of State Bar, rule 5.311), that Respondent wilfully failed to comply with two of the conditions of his probation in *Kleinberg I* as charged in OP's motion to revoke probation.

¹ Unless otherwise indicated, all statutory references are to the Business and Professions Code.

² Respondent was admitted to the practice of law in California on December 12, 1983, and has been a member of the State Bar of California since that time. As discussed *post*, Respondent has two prior records of discipline.

Accordingly, the court will grant the motion to revoke Respondent's *Kleinberg I* probation and recommend, inter alia, that Respondent be actually suspended from the practice of law for one year and until he pays restitution in the sum of \$80,380.95 together with interest thereon.

Moreover, the court will order that Respondent be involuntarily enrolled as an inactive member of the State Bar of California under section 6007, subdivision (d)(1) effective three calendar days after the service of this order by mail.

Procedural History

In its November 6, 2008, order in *Kleinberg I*, the Supreme Court placed Respondent on two years' stayed suspension and five years' probation on conditions, including 120-day period of actual suspension. Respondent had actual knowledge of the Supreme Court's order in *Kleinberg I* a few days after it was filed on November 6, 2008.³

On November 4, 2013, OP filed a request that this court take judicial notice of certified copies of various pleadings and the July 22, 2013, State Bar Court decision case numbers 09-O-12176-RAP, 09-N-12374-RAP, and 12-O-13024-RAP (consolidated) as Respondent's second prior record of discipline under standard 1.2(e) of the Standards for Attorney Sanctions for Professional Misconduct.⁴ Respondent failed to file a response to that request. However, on November 18, 2013, Respondent filed a response to the motion to revoke probation.

In his response, Respondent requested a hearing on the motion to revoke his probation. Accordingly, on February 24, 2014, the court held a hearing on the motion.

³ In Respondent's second disciplinary proceeding, respondent stipulated that the Clerk of the California Supreme Court served a copy of the Supreme Court's order in *Kleinberg I* on him by mail on the day it was filed and that he thereafter actually received that service copy of the Supreme Court's order.

⁴ The standards are found in title IV of the Rules of Procedure of the State Bar. All further references to standards are to this source.

At the February 24, 2014, hearing, in accordance with OP's November 4, 2013, judicial-notice request, the court took judicial notice of the pleadings and the State Bar Court's July 22, 2013, decision in case numbers 09-O-12176-RAP, 09-N-12374-RAP, and 12-O-13024-RAP (consolidated) as Respondent's second prior record of discipline. Even though both parties had to have known that the Supreme Court imposed the discipline recommended in the State Bar Court's July 22, 2013, decision in an order filed on November 20, 2013, in case number S213323 (State Bar Court case numbers 09-O-12176-RAP, 09-N-12374-RAP, and 12-O-13024-RAP [consolidated]), styled *In re Kenneth John Kleinberg on Discipline (Kleinberg II)*, neither party notified this court of that fact. (See Rules Proc. of State Bar, rule 5.106(E) [a State Bar Court discipline recommendation is admissible as a prior record of discipline, but requires two alternative discipline recommendations] .) Accordingly, the court sua sponte takes judicial notice of the Supreme Court's November 20, 2013, order in *Kleinberg II*.⁵ (Evid. Code, § 452, subd. (d).)

At the conclusion of the February 24, 2014, hearing on the motion, the court took the motion under submission for decision.

Findings of Fact and Conclusions of Law

As noted *ante*, in its November 6, 2008, order in *Kleinberg I*, the Supreme Court placed Respondent on two years' stayed suspension and five years' probation with conditions. The Supreme Court imposed that discipline, including each of the conditions of probation, on Respondent in accordance with a stipulation regarding facts, conclusions of law, and disposition to which Respondent pleaded *nolo contendere* and which the State Bar Court approved in an order filed on July 7, 2008, in case number 04-O-11238 (i.e., *Kleinberg I* stipulation). The legal

⁵ The court's case administrators are directed to include, in the record in this proceeding, a copy of the Supreme Court's November 20, 2013, order in case number S213323 (i.e., *Kleinberg II*).

effects of Respondent pleading nolo contendere to the charges set forth in the stipulation are the same as that of an admission of culpability except that neither Respondent's nolo contendere plea nor any admissions required by the State Bar Court when inquiring as to the voluntariness of or the factual basis for Respondent's nolo contendere plea can be used against Respondent in certain civil lawsuits (e.g., legal malpractice, etc.). (§ 6085.5, subd. (c).)

Probation-Reporting Condition

Respondent's probation-reporting condition required that Respondent submit written-quarterly-probation reports to OP on every January 10, April 10, July 10, and October 10. In each report, Respondent was required to state, under the penalty of perjury, whether he had "complied with the State Bar Act [§ 6000, et seq.], the Rules of Professional Conduct, and all the conditions of probation during the preceding calendar quarter." In addition, Respondent's probation-reporting condition required that Respondent submit a final written-probation report to OP during the last 20 days of his probation (i.e., between November 16, 2013, and December 6, 2013).

The record establishes that, as charged, Respondent willfully violated his reporting condition by (1) filing his October 10, 2011, quarterly report 1 day late on October 11, 2011; (2) filing his July 10, 2012, quarterly report 153 days late on December 10, 2012; (3) filing his April 10, 2013, quarterly report 91 days late on July 10, 2013; and (4) filing his October 10, 2013, quarterly report 95 days late on January 13, 2014.

In addition, while not charged in the motion to revoke probation, the record establishes that Respondent willfully violated his reporting condition by filing his final probation report 38 days late on January 13, 2014. Because that violation was not charged in the motion to revoke, the court considers the violation only for purposes of aggravation under standard 1.5(d).

(Edwards v. State Bar (1990) 52 Cal.3d 28, 35-36.)

Restitution Condition

Respondent's restitution condition required that he pay restitution to four governmental entities for at least \$80,380.95 in unpaid taxes related to Respondent's former employee Sallie Matonis plus applicable penalties and interest. More specifically, Respondent was required to make restitution of at least \$36,470.38 to the United States Department of the Treasury (Treasury Department); \$33,871.56 to the Social Security Administration (Social Security); \$9,173.99 to the California Franchise Tax Board (FTB); and \$865 to the California Employment Development Department (EDD) (\$36,470.38 plus \$33,871.56 plus \$9,173.99 plus \$865 equals \$80,380.95).

Respondent's restitution condition also required that Respondent make minimum-monthly-restitution payments totaling \$1,488.55 to those four entities. Specifically, Respondent was required to make minimum monthly payments of \$675.38 to the Department of the Treasury; \$627.26 to Social Security; \$169.89 to FTB; and \$16.02 to EDD (\$675.38 plus \$627.26 plus \$169.89 plus \$16.02 equals \$1,488.55).

OP charges that Respondent willfully violated his restitution by failing to make any restitution payments whatsoever to any of the four governmental entities for the 29-month period from June 2011 through October 2013. The record establishes the charged violations of Respondent's restitution condition. Moreover, the record establishes that Respondent has never paid any restitution to any of the four governmental entities or to Matonis.

Bad faith is not a requirement for finding a probation violation; "instead, a 'general purpose or willingness' to commit an act or permit an omission is sufficient. [Citations.]" (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.) Even though Penal Code section 1203.2, subdivision (a) prevents a California court from revoking a criminal defendant's probation for the defendant's failure to comply with a restitution condition unless the defendant both willfully failed to pay and had the ability to pay restitution, section 1203.2 does

not apply in State Bar Court disciplinary proceedings. (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at p. 537; see also *In the Matter of Respondent Y, supra*, 3 Cal. State Bar Ct. Rptr. at p. 868, fn. 4.) Nonetheless, the review department has made clear that, when an attorney's failure to pay restitution is the subject of a disciplinary probation revocation proceeding, fundamental fairness and due process mandate that the State Bar Court consider both the attorney's ability to pay restitution and his or her efforts to acquire the funds to pay restitution before revoking the attorney's probation. (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 537-538, citing *Bearden v. Georgia* (1983) 461 U.S. 660, 672-673 [In a criminal-law context, if a "probationer has made all reasonable efforts to pay [a] fine or restitution, and yet cannot do so through no fault of his own, [Fn. omitted] it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available. This lack of fault provides a "substantial reaso[n] which justifie[s] or mitigate[s] the violation and make[s] revocation inappropriate. [Citations.]"]].)

Stated differently, implicit in an attorney disciplinary probation condition requiring restitution is the duty to make sufficient bona fide efforts to legally acquire the resources needed to pay restitution as ordered. An attorney has a clear duty to undertake sufficient good faith efforts to comply with a disciplinary probation condition requiring restitution. (*In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 311; *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 148, fn. 8; see also *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81, 86.) At a minimum, if an attorney cannot fully comply with a restitution probation condition, the attorney must make restitution to the best of his or her financial ability, which includes making all reasonable sacrifices in his or her standard of living to maximize the amount of restitution paid. (*In the Matter of Lybbert* (Review

Dept. 1993) 2 Cal. State Bar Ct. Rptr. 297, 307.) An attorney is “expected to exercise his [or her] very best efforts in making restitution and to immediately embark upon a decisive course of action designed to timely do so.” (*In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459, 464, fn. 4.)

Respondent failed to present any credible, concrete evidence as to the actual efforts he has undertaken to find work (legal or nonlegal). In short, Respondent has failed to establish that he has made sufficient bona fide efforts to legally acquire the resources necessary to pay restitution as ordered. Nor has Respondent established that he has undertaken sufficient good faith efforts to comply with his restitution condition. Nor has Respondent established that he has made restitution in accordance with his ability to pay. The court finds that “no circumstances have been presented showing that it would be fundamentally unfair to revoke the probation in this case.” (*In the Matter of Taggart, supra*, 4 Cal. State Bar Ct. Rptr. at p. 310.)

Finally, even assuming arguendo that Respondent actually lacked the financial ability to make any restitution payments whatsoever during the 29-month period in issue, he is not being disciplined for violating a probation condition for which he lacks the ability to comply. Instead, he is being disciplined for not comply with the restitution condition without first attempting to be relieved from the condition based on his inability to pay. (*In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 868, fn. 4.)

Aggravation

Prior Records of Discipline (Std. 1.5(a).)

Respondent has two prior records of discipline.

First Prior Record of Discipline

Respondent’s first prior record of discipline is the Supreme Court’s November 6, 2008, order in *Kleinberg I* placing Respondent on two years’ stayed suspension and five years’

probation with multiple conditions, including a 120-day actual suspension and more than \$80,000 in restitution. Respondent's misconduct in *Kleinberg I* involved his failure to pay income and employment taxes for his former employee Sallie Matonis for the 10-year period from 1994 through 2003.

During that 10-year period, Respondent withheld from Matonis's wages a total of about \$64,276.02 in federal income taxes, FICA Social Security taxes, FICA Medicare taxes, state income tax, and state unemployment and disability insurance taxes. Respondent, however, never paid any portion of that \$64,276.02 to the government. In addition, during that 10-year period, Respondent never paid any portion of his employer's share of Matonis's FICA Social Security taxes, which total about \$16,935.78. Respondent's \$80,360.95 restitution condition addresses Respondent's failures to properly pay the \$64,276.02 that he withheld from Matonis's salary to the appropriate governmental entities and to pay his \$16,935.78 share of Matonis's Social Security tax.⁶

The *Kleinberg I* stipulation conclusively establishes Respondent's culpability on four counts of failing to support the laws of the United States and of this state in willful violation of section 6068, subdivision (a) by (1) failing to file Matonis's W-2 form with Social Security each year for 10 years; (2) failing to pay Matonis's Social Security and federal income taxes each year for 10 years; (3) failing to pay Matonis's state income tax each year for 10 years; and (4) failing to withhold and pay Medicare tax and state unemployment insurance/state disability insurance from Matonis's salary. The *Kleinberg I* stipulation also conclusively establishes Respondent's culpability on one count of violating section 6106 for providing Matonis with a false W-2 form each year for 10 years.

⁶ \$64,276.02 plus \$16,935.78 does not equal \$80,380.95. It equals \$81,211.80. The difference between \$80,380.95 and \$81,211.80 is \$830.85, which is the amount of Medicare tax that respondent withheld from Matonis salary, but never paid to Social Security.

In aggravation, Respondent's misconduct in *Kleinberg I* caused serious harm to Matonis. There was no mitigation in *Kleinberg I*.

Second Prior Record of Discipline

Respondent's second prior record of discipline is the Supreme Court's November 20, 2013, order in *Kleinberg II* placing Respondent on three years' stayed suspension and four years' probation with conditions, including a nine-month actual suspension. In *Kleinberg II*, Respondent stipulated to the following misconduct: (1) failing to comply with California Rules of Court, Rule 9.20; (2) committing an act of moral turpitude by intentionally or with gross negligence filing a false declaration with the State Bar Court; (3) holding himself out as entitled to practice law and engaging in the unauthorized practice of law; (4) failing to obey the law (two counts); (5) willfully disobeying a court order; and (6) failing to comply with the terms of his probation in *In Kleinberg I*.

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

Respondent's present misconduct again involves multiple acts of misconduct.

Mitigation

Financial Difficulties

During the time of his misconduct, Respondent was suffering from severe financial difficulties.

Discussion

Public protection and attorney rehabilitation are the primary goals of attorney disciplinary probation. (*In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, 452.)

“[T]here has been a wide range of discipline imposed for probation violations from merely extending probation . . . to a revocation of the full amount of the stayed suspension and

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imposition of the amount as an actual suspension.” (*In the Matter of Gorman* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567, 573.)

In determining the appropriate level of discipline in a probation revocation proceeding, the court is to consider the “total length of stayed suspension which could be imposed as an actual suspension and the total amount of actual suspension earlier imposed as a condition of the discipline at the time probation was granted.” (*In the Matter of Potack, supra*, 1 Cal. State Bar Ct. Rptr. at p. 540.) The court is to also consider the seriousness of the probation violations, the Respondent’s recognition of his or her misconduct, and the Respondent’s efforts to comply with the conditions of probation. (*Ibid.*) Furthermore, “[t]he violation of a probation condition significantly related to the attorney’s prior misconduct merits the greatest discipline, especially if the violation raises a serious concern about the need to protect the public or shows the attorney’s failure to undertake steps toward rehabilitation.” (*In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 151.) “The degree of discipline ultimately imposed must, of necessity, correspond to some reasonable degree with the gravity of the misconduct at issue.” (*In re Nevill* (1985) 39 Cal.3d 729, 735.)

In addition, the court considers standard 1.7(a), which provides that, when an attorney has a prior record of discipline, “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.”

An attorney’s failure to strictly comply with the conditions of her or her State Bar disciplinary probation “ ‘demonstrates a lapse of character and a disrespect for the legal system that directly relate to [the attorney’s] fitness to practice law and serve as an officer of the court.

[Citation.]’ [Citation.]” (*In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 530.)

In short, the court concludes that Respondent’s probation violations require the imposition of actual suspension. In that regard, the court finds *In the Matter of Howard, supra*, 2 Cal. State Bar Ct. Rptr. 445 instructive on the appropriate length of that actual suspension. In *Howard*, the attorney was placed on one year’s actual suspension because she failed to file two probation reports, failed to deliver a former client’s personal financial records to an accountant, and failed to otherwise establish that she had complied with a prior civil court order to turn over files and financial records to the former client. In contrast, the attorney in *Howard* failed to appear and participate in the probation revocation proceeding, while Respondent appeared and participated.

In short, the court concludes that the appropriate level of discipline to recommend in the present proceeding is two years’ stayed suspension and three years’ probation on conditions, including a one-year actual suspension that will continue until Respondent pays restitution and until Respondent complies with standard 1.2(c)(1) if he remains on actual suspension for two or more years.

The court does not recommend that Respondent be again ordered to take and pass a professional responsibility examination because he was ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) in the Supreme Court’s November 20, 2013, order in *Kleinberg II*. Nor does the court recommend that Respondent be again ordered to attend and successfully complete the State Bar’s Ethics School because is required to attend and complete that school as a condition of the probation imposed on him under the Supreme Court’s November 20, 2013, order in *Kleinberg II*.

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Order and Discipline Recommendation

The court orders that the Office of Probation's October 11, 2013, motion to revoke probation is GRANTED. Accordingly, the court also recommends that the probation imposed on Respondent **KENNETH JOHN KLEINBERG** in the Supreme Court's November 6, 2008, order in case number S166492 (State Bar Court case number 04-O-11238), styled *In re Kenneth John Kleinberg on Discipline*, be revoked. The court further recommends that **KENNETH JOHN KLEINBERG** again be suspended from the practice of law in the State of California for two years, that execution of that two-year suspension be stayed, and he be placed on probation for three years subject to the following conditions:

1. Kleinberg is suspended from the practice of law for the first year of probation (with credit given for the period of his involuntary inactive enrollment under Business and Professions Code section 6007, subdivision (d)(1) in accordance with Business and Professions Code section 6007, subdivision (d)(3)), and he will remain suspended until the following requirements are satisfied:
 - A. Kleinberg makes restitution to the following payees (or reimburses the Client Security Fund, to the extent of any payment from the fund to the payees, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles:
 - (1) United States Department of the Treasury (on behalf of Sallie Matonis) in the amount of \$36,470.38 plus 10 percent interest per year from July 7, 2008;
 - (2) Social Security Administration (on behalf of Sallie Matonis) in the amount of \$33,871.56 plus 10 percent interest per year from July 7, 2008;
 - (3) California Franchise Tax Board (on behalf of Sallie Matonis) in the amount of \$9,173.99 plus 10 percent interest per year from July 7, 2008; and
 - (4) California Employment Development Department (on behalf of Sallie Matonis) in the amount of \$865 plus 10 percent interest per year from July 7, 2008.
 - B. If Kleinberg remains suspended for two years or more as a result of not satisfying the preceding restitution condition, he must also provide 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).)

2. Kleinberg is to comply with the provisions of the State Bar Act, the State Bar Rules of Professional Conduct, and all of the conditions of this probation.
3. Within 30 days after the effective date of the Supreme Court order in this proceeding, Kleinberg is to contact the State Bar's Office of Probation in Los Angeles to schedule a meeting with his assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, Kleinberg must meet with the probation deputy either in-person or by telephone. Thereafter, Kleinberg must promptly meet with the probation deputy as directed and upon request of the Office of Probation.
4. Kleinberg is to maintain, with the State Bar's Membership Records Office in San Francisco and with the State Bar's Office of Probation in Los Angeles, 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)(1)). In addition, Kleinberg is to maintain, with the State Bar's Office of Probation, his current home address and telephone number (Bus. & Prof. Code, § 6002.1, subd. (a)(5)). Kleinberg's home address and telephone number are not to be made available to the general public unless his home address is also his official address on the State Bar's Membership Records. (Bus. & Prof. Code, § 6002.1, subd. (d).) Kleinberg must notify the Membership Records Office and the Office of Probation of any change in this information no later than 10 days after the change.
5. Kleinberg is to submit written quarterly reports to the State Bar's Office of Probation in Los Angeles. The reports must be delivered or postmarked no later than each January 10, April 10, July 10, and October 10. In each report, Kleinberg must state, under penalty of perjury under the laws of the State of California, whether he has complied with the State Bar Act, the State Bar Rules of Professional Conduct, and all conditions of this probation during the preceding calendar quarter. If the first report will cover less than 30 days, that report must be submitted on the next following quarter date, and cover the extended period.

In addition to the quarterly reports, Kleinberg is to submit a final report containing the same information. The final report must be delivered or postmarked no earlier than 10 days before the last day of the probation period and no later than the last day of probation period.

6. Subject to the assertion of any applicable privilege, Kleinberg is to fully, promptly, and truthfully answer all inquiries of the State Bar's Office of Probation that are directed to him, whether orally or in writing, relating to whether he is complying or has complied with the conditions of this probation.
7. Kleinberg's new three-year probation will begin on the effective date of the Supreme Court order in this probation revocation proceeding. At the expiration of this new three-year probation, if Kleinberg has complied with all the conditions of probation, the new two-year period of stayed suspension will be satisfied and that suspension will be terminated.

Rule 9.20 & Costs

The court further recommends that **KENNETH JOHN KLEINBERG** 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.

Finally, the court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that the costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Order of Involuntary Inactive Enrollment

The requirements set forth in Business and Professions Code section 6007, subdivision (d)(1) having been met, the court orders that **KENNETH JOHN KLEINBERG** be involuntarily enrolled as an inactive member of the State Bar of California under Business and Professions Code section 6007, subdivision (d)(1) effective three calendar days after service of this order by mail (Rules Proc. of State Bar, rule 5.315). (See also Bus. & Prof. Code, § 6007, subd. (d)(2); Rules Proc. of State Bar, rule 5.315.)

Dated: March 26, 2014.

RICHARD A. PLATEL
Judge of the State Bar Court