



PUBLIC MATTER

FILED

NOT FOR PUBLICATION

JUN 25 2015

STATE BAR COURT CLERK'S OFFICE  
SAN FRANCISCO

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT - LOS ANGELES

In the Matter of	)	Case No.: 14-O-01317-LMA
	)	
KEVAN HARRY GILMAN,	)	DECISION AND ORDER
	)	
Member No. 97573,	)	
	)	
<u>A Member of the State Bar.</u>	)	

**Introduction**<sup>1</sup>

This contested disciplinary matter stems from a highly litigious and protracted bankruptcy matter. Here, respondent Kevan Harry Gilman is charged with three counts of misconduct, including failing to maintain respect due to the court (two counts) and threatening administrative or disciplinary charges to gain an advantage in a civil dispute. Having considered the facts and the law, the court finds respondent culpable on only one of the three counts. Based on the limited scope and nature of the misconduct, this court orders, among other things, that respondent be privately reproved.

**Significant Procedural History**

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) against respondent on September 29, 2014. Respondent filed a response to the NDC on November 14, 2014.

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<sup>1</sup> 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.

The State Bar was represented by Deputy Trial Counsel Diane Meyers. Respondent represented himself. Trial in this matter commenced on January 27, 2015. Respondent, however, suffered a medical emergency during trial. Following respondent's recovery, trial continued from April 7-9, 2015. This matter was submitted for decision on April 9, 2015.

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

Respondent was admitted to the practice of law in California on May 29, 1981, and has been a member of the State Bar of California at all times since that date.

#### **Facts**

##### **The September 18, 2013 Discovery Sanctions Matter**

On February 7, 2011, respondent filed his own Chapter 7 bankruptcy petition in the United States Bankruptcy Court, Central District, *In re Kevan H. Gilman*, case no. 1:11-bk-11603-VK (the bankruptcy matter). Respondent was represented by attorney Shirlee Bliss (Bliss) in the bankruptcy matter.

Tammy Phillips and Tammy Phillips, a Professional Law Corporation, were creditors in the bankruptcy matter (the creditors). The creditors were represented by attorney, Charles Jakob (Jakob). The bankruptcy matter was protracted and highly litigious, including hundreds of motions filed by Jakob. Jakob also took respondent's deposition numerous times. During the pendency of the bankruptcy matter, there have been many sanctions issued against Bliss and respondent. All of these sanctions have been paid, with the exception of the two referenced below.

On June 14, 2013, Jakob filed a motion to compel respondent to respond to discovery on behalf of the creditors (the June 14, 2013 motion to compel). On June 29, 2013, Jakob filed another motion to compel respondent to respond to discovery on behalf of the creditors (the June 29, 2013 motion to compel).

On September 18, 2013, the United States Bankruptcy Court granted the June 14, 2013 motion to compel and entered an order imposing a \$2,670 discovery sanction against respondent in the bankruptcy matter. This order required respondent to pay \$2,670 to the creditors by October 18, 2013 (the \$2,670 sanction). On September 18, 2013, the bankruptcy court served notice of the \$2,670 sanction on Bliss, via Notice of Electronic Filing (NEF), and Bliss received notice of the \$2,670 sanction. While it is not clear whether respondent personally received this notice, Bliss notified respondent, and he was aware of the \$2,670 sanction.

On September 18, 2013, the United States Bankruptcy Court also granted the June 29, 2013 motion to compel and entered an order imposing a \$1,530 discovery sanction against respondent in the bankruptcy matter. This order required respondent to pay \$1,530 to the creditors by October 18, 2013 (the \$1,530 sanction). On September 18, 2013, the bankruptcy court served notice of the \$1,530 sanction on Bliss, via NEF, and Bliss received notice of the \$1,530 sanction. Bliss notified respondent, and he was aware of the \$1,530 sanction.

On October 11, 2013, Jakob filed another motion requesting discovery sanctions against respondent and Bliss in the bankruptcy matter (the October 2013 sanction motion).

On January 9, 2014, the State Bar received a complaint from Jakob, made on behalf of the creditors and against respondent, alleging that the \$2,670 and \$1,530 sanctions had not been paid. Jakob further alleged that respondent, in an unrelated matter, threatened to bring administrative or disciplinary charges against respondent's insurance company to obtain an advantage in a civil dispute.<sup>2</sup>

On January 17, 2014, respondent, through Bliss, filed his Reply to Creditor's Opposition to Order to Show Cause in the bankruptcy matter. In a declaration attached to this reply,

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<sup>2</sup> As further illustrated below, this allegation stemmed from language contained in an August 10, 2011 letter respondent produced to Jakob in discovery.

respondent acknowledged that he had not paid “a discovery sanction ordered by [the bankruptcy court].” (Exhibit 11, p. 9.) Respondent further noted that he offered a payment plan, but Jakob refused.<sup>3</sup>

By letter dated February 24, 2014, the State Bar notified respondent of Jakob’s State Bar complaint and requested a response. Respondent received the State Bar’s February 24, 2014 letter.

On March 25, 2014, the State Bar sent another letter to respondent regarding Jakob’s complaint and asked respondent to provide proof of payment of the \$2,670 and \$1,530 sanctions. It is unclear whether respondent received the State Bar’s March 25, 2014 letter, but he ultimately received a copy of it as an attachment to a subsequent letter from the State Bar, as referenced below.

On March 27, 2014, the United States Bankruptcy Court issued an amended order<sup>4</sup> granting the October 2013 sanction motion and entering an order imposing a \$1,410 sanction against respondent and Bliss in the bankruptcy matter. This order required respondent and Bliss to pay \$1,410 to the creditors within 14 days after the entry of the order (by April 10, 2014) and, if this sanction was not timely paid, they were required to pay an additional \$15 for every day the payment was late (the March 27, 2014 sanctions order).

On April 18, 2014, Bliss issued a \$1,530 cashier’s check to Jakob pursuant to the March 27, 2014 sanctions order (the \$1,530 cashier’s check). The \$1,530 cashier’s check represented the original \$1,410 sanction plus an additional \$120 late payment, calculated at \$15 per day for eight days.

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<sup>3</sup> Respondent’s declaration does not go into detail, but his reference to “a discovery sanction” indicates a mistaken belief that only one sanctions order was outstanding.

<sup>4</sup> This order amended an order issued one day earlier, on March 26, 2014.

Upon issuing the \$1,530 cashier's check, Bliss told respondent she had paid the sanctions. Bliss was confused regarding the status of the outstanding sanctions. Bliss was overwhelmed by Jakob's many motions and sanctions demands. Her confusion was also partially based on the fact that one of the September 18, 2013 sanction orders was for the same amount as Bliss's April 18, 2014 cashier's check. Respondent reasonably relied on Bliss's representation that the sanctions had been paid.

On June 9, 2014, the State Bar sent a letter to respondent regarding Jakob's complaint. This letter included the State Bar's March 25, 2014 letter as an attachment. Respondent received the State Bar's June 9, 2014 letter. By letter dated June 20, 2014, to the State Bar, respondent responded to Jakob's complaint.

On September 19, 2014, respondent mistakenly informed Deputy Trial Counsel Diane Meyers in an email that the \$1,530 sanction had been paid by Bliss by cashier's check, dated April 18, 2014, and he provided a copy of the \$1,530 cashier's check. At the time respondent made this representation, he reasonably believed and relied on Bliss's mistaken representation that the \$1,530 cashier's check was for the September 18, 2013 sanction in the same amount.<sup>5</sup>

On September 25, 2014, Bliss, on behalf of respondent, filed a motion to modify the court's ruling regarding the bankruptcy court's \$2,670 sanction issued September 18, 2013. In this motion, Bliss requested that the bankruptcy court modify its order to allow respondent to make payments (including interest). In this motion, Bliss referenced that a "subsequent order for \$1,530" had been paid to Jakob.<sup>6</sup> (Exhibit 19, p. 2.)

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<sup>5</sup> Even at trial in this proceeding, Bliss was still confused regarding what sanctions were paid and when.

<sup>6</sup> Reviewing Bliss's September 25, 2014 motion, she was thoroughly confused regarding the ordered sanctions and the amounts outstanding. (See Exhibit 19.)

To date, the bankruptcy court has not modified its September 18, 2013 orders imposing the \$2,670 and \$1,530 sanctions. These sanctions remain unpaid, but respondent does not currently have the ability to pay either sanction.

### **The United Healthcare of California Matter**

In or about October 2009, respondent had a kidney removed due to a large malignant tumor. In or about 2011, respondent tested positive for cancer again. As a result, respondent's doctor prescribed an open magnetic resonance imaging procedure (open MRI). Respondent was prescribed an open MRI, rather than a standard MRI, because he was claustrophobic.

Approximately three and a half months later, on or about August 2, 2011, respondent received a letter from HealthCare Partners Medical Group (HCPMG) denying respondent's request for an open MRI. Respondent's frustration grew, as he felt he was fighting against corporate bureaucracy while his life was at stake.

On August 10, 2011, respondent sent a letter to his health insurance carrier, United Healthcare of California (UHC), demanding payment for the open MRI denied by HCPMG. In this four-page letter, respondent explained the situation, detailing how he was getting the run-around from HCPMG and how he believed HCPMG was stalling in hope that respondent would die before they had to pay for expensive testing. Respondent concluded his letter by stating, "If I have not received authorization for this open MRI ... on or before 5:00 P.M. on Monday, August 8, 2011, I will schedule the MRI, pay for it myself, file a complaint with Dave Jones, the Insurance Commissioner of California, and pursue every legal remedy at my disposal."<sup>7</sup>

(Exhibit 24, p. 5.)

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<sup>7</sup> The court notes that respondent's letter gave a deadline of August 8, 2011, but was not sent until August 10, 2011.

Jakob subsequently obtained a copy of this letter through discovery. Approximately two and a half years after the letter was written, Jakob sent it to the State Bar alleging that respondent had violated rule 5-100(A). UHC did not complain to the State Bar and no one from UHC testified in the present proceedings. While the evidence demonstrates that respondent faxed this letter to UHC, there is no indication that anyone at UHC read or responded to it. There is also no evidence that UHC suffered any harm or damages as a result of respondent's August 10, 2011 letter.

### **Conclusions**

#### **Count One – Section 6068, Subd. (b) [Failure to Maintain Respect Due to Courts]**

Section 6068, subdivision (b), provides that attorneys have a duty to maintain respect due to the courts of justice and judicial officers. The State Bar alleged that respondent failed to maintain respect due to courts and judicial officers, in willful violation of section 6068, subdivision (b), by failing to pay a monetary sanction in the amount of \$2,670, as ordered by the bankruptcy court on September 18, 2013. This court disagrees. In this highly litigious matter, Bliss became confused regarding the sanctions ordered September 18, 2013. Respondent reasonably relied on Bliss's representation that the sanctions had been paid. When Bliss ultimately realized that the \$2,670 sanction remained outstanding, she brought a motion to modify the sanction order. Although the \$2,670 sanction remains outstanding, respondent—who was filing bankruptcy to begin with—is financially unable to satisfy it at this time.

Respondent's failure to pay or promptly seek relief from the September 18, 2013 sanctions derived from a misunderstanding. This error does not rise to the level of a failure to maintain respect due to the courts, especially when there is no indication that respondent failed to comply with other court orders. Consequently, it has not been established that respondent has

intentionally or willfully failed to maintain respect for the court, and Count One is dismissed with prejudice.

**Count Two – Section 6068, Subd. (b) [Failure to Maintain Respect Due to Courts]**

As laid out above, it has not been established that respondent's failure to pay the \$1,530 sanction order from September 18, 2013, constituted a willful failure to maintain respect due to the courts. Accordingly, Count Two is dismissed with prejudice.

**Count Three – Rule 5-100(A) [Threatening Charges to Obtain an Advantage]**

Rule 5-100(A) provides that a member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute. By threatening to file a complaint against UHC with the California Insurance Commissioner if UHC did not authorize respondent's open MRI, respondent threatened to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute, in willful violation of rule 5-100(A).

**Aggravation<sup>8</sup>**

**Prior Record of Discipline (Std. 1.5(a).)**

Respondent has been previously disciplined on one occasion. On June 10, 1998, the Supreme Court issued order no. S068216 (State Bar Court case nos. 92-O-13956; 96-O-07119 (Cons.)) suspending respondent from the practice of law for one year, stayed, with two years' probation, including a 60-day actual suspension and until payment of court imposed sanctions. In this default matter, respondent was found culpable of improperly withdrawing from representation, failing to communicate, failing to perform legal services with competence, failing

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<sup>8</sup> All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

to obey two court orders requiring the payment of sanctions,<sup>9</sup> failing to timely report a court sanction, and failing to participate in a disciplinary investigation. In aggravation, respondent committed multiple acts of misconduct, demonstrated indifference toward rectification, significantly harmed his client, and failed to participate in the proceedings. In mitigation, respondent had no prior record of discipline and suffered from an undisclosed health condition.

Respondent's prior misconduct occurred approximately 14 years before the current misconduct. It was remote in time and not related to the present misconduct. Accordingly, the court assigns somewhat reduced weight to this factor in aggravation.

### **Mitigation**

#### **Extreme Emotional/Physical Difficulties (Std. 1.6(d).)**

At the time respondent drafted his letter, he was facing his own mortality. While not an excuse, respondent was fighting for something more significant than "an advantage in a civil dispute." He was fighting for his life, and the procedure he believed necessary to save it.

After being prescribed an open MRI three and a half months earlier, respondent's insurance company was still spinning its wheels and giving him the run-around. Clearly, respondent's frustration was turning to desperation with each passing day.

While expert testimony is typically required to establish mitigation for emotional and physical difficulties, respondent's medical condition at the time of the misconduct is not at issue and is the centerpiece of this case. The extreme emotional and physical difficulties respondent was experiencing at the time he wrote the letter to UHC warrant significant weight in mitigation.

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<sup>9</sup> It was also determined that respondent failed to give due respect to the court, but this charge was deemed redundant, as it was based on his failure to obey court orders.

**Lack of Harm (Std. 1.6(c).)**

Respondent's misconduct was limited in scope and duration, and did not cause any harm. Although it has been found that respondent wrote and faxed the letter threatening an administrative complaint, there is no indication that UHC reacted to or even read respondent's letter. This matter is only before this court because it was raised by third-party opposing counsel with clear ulterior motives. Accordingly, the court assigns some weight in mitigation for lack of harm.

**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. 1.1.)

In determining the level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d. 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628). Second, the court looks to decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d. 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.7 provides that if aggravating or mitigating circumstances are found, they should be considered alone and in balance with any other aggravating or mitigating factors.

Standard 2.15 is applicable to the misconduct in this matter. Standard 2.15 provides that suspension (not to exceed three years) or reproof is appropriate for violation of a provision of the Business and Professions Code or the Rules of Professional Conduct not specified in the standards.

Due to respondent's prior record of discipline, the court also looks to standard 1.8(a) for guidance. Standard 1.8(a) provides that if an attorney has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust. As noted above, respondent's prior record of discipline was remote and the court concludes that, based on the facts and circumstances of the present matter, imposing greater discipline would be manifestly unjust.

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.) 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.)

The State Bar recommends, among other things, that respondent be actually suspended for a period of 90 days.<sup>10</sup> Respondent, on the other hand, urges that this matter warrants an admonition.

The case law pertaining to matters involving a violation of rule 5-100(A) is extremely limited. Although not directly on point, the court found some guidance in *In the Matter of Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160. In *Elkins*, the attorney, after being removed as co-executor of his father's estate, left 53 threatening and abusive voicemail messages to the successor administrator of the estate and others. The attorney's misconduct was found to have involved moral turpitude. In addition, the attorney threatened to report various individuals to

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<sup>10</sup> The State Bar's recommendation was presumably based upon its assumption that respondent would be found culpable on all three alleged counts of misconduct.

state and federal agencies to gain an advantage in a civil dispute,<sup>11</sup> failed to maintain respect for the court by making reckless accusations that a judge was accepting bribes, and failing to update his membership records address. In mitigation, the attorney had been practicing for 24 years with no prior record of discipline. In aggravation, the attorney committed multiple acts of misconduct, caused significant harm to the administration of justice, and lacked insight into the wrongfulness of his actions. The Review Department recommended a two-year stayed suspension with two years' probation, including a 90-day period of actual suspension.

*Elkins* and the present matter represent opposite ends of the rule 5-100(A) spectrum. *Elkins* involved considerably more misconduct, including 53 threatening and abusive voicemails, and three additional counts of misconduct, including moral turpitude, making accusations about a judge with reckless disregard for the truth, and failing to maintain an updated membership records address. By contrast, the present case involves only one incident of threatening an administrative complaint to gain a civil advantage.

While *Elkins* did not have a prior record of discipline, this factor was counterbalanced by his significant aggravation, including multiple acts of misconduct, significant harm to the administration of justice, and lack of insight. By contrast, the aggravation in the present matter is limited to a remote and unrelated prior record of discipline, and is offset by significant mitigation.

Possibly the most significant difference between *Elkins* and the present matter boils down to state of mind. The attorney in *Elkins* was vindictive, harassing, and relentless. Respondent, on the other hand, was acting out of self-preservation and desperation, as he was facing a

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<sup>11</sup> This charge added no additional weight in culpability because the Review Department relied on those same facts to establish moral turpitude.

potentially life-threatening situation. In total, the present matter warrants substantially lower discipline than *Elkins*.

Having considered the parties' contentions, the facts, the case law, and the mitigating and aggravating factors, the court determined that, among other things, a private reproof is the appropriate level of discipline to protect the public and preserve public confidence in the profession.

### **Discipline Order**

It is ordered that respondent Kevan Harry Gilman, State Bar Number 97573, is privately reproofed. Pursuant to the provisions of rule 5.127(A) of the Rules of Procedure of the State Bar, the private reproof will be effective when this decision becomes final. Furthermore, pursuant to rule 9.19(a) of the California Rules of Court and rule 5.128 of the Rules of Procedure, the court finds that the interests of respondent and the protection of the public will be served by the following specified conditions being attached to the private reproof imposed in this matter. Failure to comply with any condition(s) attached to the private reproof may constitute cause for a separate proceeding for willful breach of rule 1-110 of the State Bar Rules of Professional Conduct. Respondent is ordered to comply with the following conditions attached to his private reproof for one year following the effective date of the private reproof:

1. During the one-year period in which these conditions are in effect, respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation.
2. 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'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.
3. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions attached to his private reproof. Upon

the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the one-year period in which these conditions are in effect, respondent must promptly meet with the probation deputy as directed and upon request.

4. During the period in which these conditions are in effect, respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10. Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions attached to his reproof during the preceding calendar quarter or applicable reporting period. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the period in which these conditions are in effect and no later than the last day of that period.
5. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions attached to this reproof.
6. Within one year after the effective date of the discipline herein, respondent 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.)
7. The period during which these conditions are in effect will commence upon the date this decision imposing the private reproof becomes final.

In light of the level of discipline imposed, it is not ordered that respondent take and pass the Multistate Professional Responsibility Examination.

**IT IS SO ORDERED.**

Dated: June 25, 2015

  
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LUCY ARMENDARIZ  
Judge of the State Bar Court

## CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on June 25, 2015, I deposited a true copy of the following document(s):

### DECISION AND ORDER

in a sealed envelope for collection and mailing on that date as follows:

- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

KEVAN HARRY GILMAN  
KEVAN HARRY GILMAN, ESQ.  
6553 VARNA AVE  
VALLEY GLEN, CA 91401

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

DIANE J. MEYERS, Enforcement, Los Angeles

TERRIE L. GOLDADE, Probation, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on June 25, 2015.



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Bernadette C.O. Molina  
Case Administrator  
State Bar Court