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**FILED**  
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APR 25 2016

In Pro Per

STATE BAR COURT CLERK'S OFFICE  
SAN FRANCISCO

STATE BAR COURT

*Filed per judge's order*

HEARING DEPARTMENT - SAN FRANCISCO

<p><u><i>In the Matter of</i></u></p> <p>ROBERT N. KITAY, NO. 229966</p> <p>A Member of the State Bar</p>	<p>Case No.: 15-O-10294 [15-O-11631]; 15-O-12316; 15-O-12317; 15-O-12595</p> <p><b>RESPONSE TO NOTICE OF DISCIPLINARY CHARGES</b></p>
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**JURISDICTION**

I do not deny that jurisdiction is appropriate.

**COUNT ONE**

I deny that I knew or was grossly negligent in not knowing that there was insufficient funds to cover check no. 1089 issued on 12/15/2014 in the amount of \$3,4474.1. This allegation is puzzling because the item was paid. Moreover, there has been no foundation established that any amount of money, and if so what amount, was required to be maintained in the CTA.



## COUNT TWO

I deny that I willfully commingled personal funds with my CTA, and I deny intentionally or willfully violated any rule of conduct. At the time I took these actions, I thought what I was doing was required. After taking the State Bar Trust Account class, I now understand very clearly that what I did was improper. Again, my actions were not a willful or intentional violation of any applicable rule.

As I have told the State Bar repeatedly, I cannot provide any specificity in response to these allegations because my CTA records (as I have repeatedly explained to the State Bar in responding to various inquiry letters) were lost. When I closed my practice (when the suspended came into effect in November 2014) I had my staff place everything in storage, except for a few personal files that came to my home (the CTA records should have been included in the records coming to my home).

As I have explained repeatedly, the Supreme Court issued a summary denial (November 5, 2015, which I received a few days later) in response to my appeal from the Review Department decision (increasing my suspension from 75 days to 180 days). The summary denial stated that the suspension imposed by the Review Department would start, but did not state when it would start. I was waiting for a Notice of Suspension, which I was told by the State Bar Court would be the official notice of the suspension and indicate the start date of it.

This never came.

So I called the State Bar Court (on or about November 17, 2014) and was told by a staff person that the Supreme Court's summary denial of the appeal served as the notice of

suspension, that no other notice would be given, and that the suspension was to start on November 28, 2014.

Upon learning this information, I immediately filed an application to delay imposition of the suspension. I ask the State Bar Court to take judicial notice of this filing (November 17, 2014), and the reasons set forth within it. Simply stated, given the relatively short notice that the suspension was starting (12 days actual notice; and if you measure from the Supreme Court summary denial, 23 days), I was not going to have enough time to get everything done that was required to be done by 12/28/2015. I knew at the moment I was told (the 17th) that the suspension was going to start on the 28th that, given the relatively short timeline to get everything done, and the situation with my father (see below), that there was going to be grave problems. When I spoke with the State Bar prosecutor about the situation, he had ZERO sympathy for what was going on and told me "to do the best I could".

At this time, my father was in ICU (stage 4 lung cancer), and was clearly not going to survive this admissions (this was his 4th admission since diagnosis in August 2014). I told the State Bar Court in my motion asking for a delay in the imposition of the suspension that it was probable my father was going to die within 2 weeks of the application, and that given all of the surrounding circumstances I was dealing with, I was going to need some time to grieve my father's death and then deal with the suspension issues. As I predicted, my father passed away on 11/29/2014.

Instead of giving me some time to grieve my father's death, and to perform the necessary tasks to close up my practice (and let's not forget this was the holiday season of Thanksgiving and Christmas), I was given no quarter of any kind by either the State Bar Court or the State Bar itself.

So, for the time period of 11/28/2015 to 12/28/2015, I had to deal with my father's death and its effects on me, as well as the effects on my kids, my mother, and my sister, and in all that, somehow must up the ability and energy to manage the closing up of my law practice.

To state it simply, I really did not work much at all between 11/18/2015 and about 12/28/2015. Admittedly, there were some things that were not done as well, or correctly, as I they should have been done.

My office was packed up to be placed into storage, and I had relatively little to do with it. The work of wrapping up my practice, and everything that Rule 9.20 requires, was delegated to my staff (then 2 people). The work of indexing and packing everything to be moved into storage was delegated to my staff. There were relatively few days during this time period that I went to the office to deal with any issue. I responded to a few things that only I could respond to, but other than that, I left everything in the hands of my staff. With everything that was going on with my family I felt I had no other course of action.

One of the biggest problems that I have had to face in dealing with State Bar inquiries is that my CTA ledger and other CTA records have been lost. I have searched for them several times, and been unable to locate them. They should have been packed into a box with CTA records that were kept in my private office, and then delivered to my house, but they were not anywhere to be found. I have examined every record and box delivered to my home 3 times, and every record and box delivered to my storage shed, and so far have not been able to find the CTA records. The loss of these records was not intentional or the result of gross negligence, but in reality, was the result of too much being asked of me and my staff under the circumstances.

As a result, it is extremely difficult to re-create data and information to respond to allegations regarding the CTA, most especially Counts 1 and 2.

As I have explained to the State Bar, and the State Bar Court (when we had an early neutral case evaluation in January 2016), that I was transferring personal money into the trust account in error in some instances. As I explained then, I was under the mistaken belief that certain payments to adverse parties, adverse counsel, vendors, and former clients (to whom I was giving refunds for unused portions of deposit retainers) had to come from the CTA. I was also operating with the understanding that advance fee deposits were not required to be deposited from the CTA (which is current law on the subject).

So, to answer Count 2 as honestly as I possibly can, I deny in part and admit in part.

### **COUNT THREE**

I respond to the allegations as follows:

1. I deny that I provided any legal advice or counsel to Elizabeth Upton regarding her active litigation after my suspension began. Any communication with her was solely in regards to her false charge back and getting paid for services I had rendered to her.
2. I did continue to use [rnkitay@rnkitaylaw.com](mailto:rnkitay@rnkitaylaw.com) for email correspondence with former clients, but it was not willful and was the result of the circumstances discussed in Count 2 (simply stated, it took me a while to regain my bearings, due to my father's illness and death, and once I did I realized the problem with the email account).
3. I did not remain as counsel in 6 cases as I filed a Notice of Suspension in all active litigation cases, which operates by law to end my status as counsel of record in any matter.
4. I deny that I signed a dissociation of counsel on 12/05/2014 in Sacramento Superior Court case no. 31-2012-0012581.

#### **COUNT FOUR**

I admit that I had 3 malpractice actions filed against me within a 12 month period, and failed to report that to the State Bar. However, I deny that my failure to do this was willful, intentional or the result of gross negligence. As I explained in response to the Inquiry Letter on this subject, the failure to report was due to the fact that I never knew the actual filing dates of 1 (or more) of these matters.

#### **COUNT FIVE**

I admit that I failed to report, within 30 days, the imposition of judicial sanctions against me. However, my failure to report this was neither willful, knowing, or grossly negligent. As I explained in my inquiry response letter, I was never advised by my counsel (Sean Gjerde) that sanctions had been imposed upon me (I was a party in the matter). I recall that he filed a demurrer, and I recall that he told me it was denied. After telling me it was denied, I did not go an obtain the written ruling at any time, and as such, was unaware of the sanction.

Also, and this is assuming I was aware at some point of the sanction (which I was not), I was a party to an action and not an attorney, and therefore, did not believe that I was required to report the imposition of any sanction, especially if the sanction arose due to conduct of counsel, which it did in this instance (and I note that Mr. Gjerde was disbarred about 1 year later for similar type conduct).

#### **COUNT SIX**

I admit that I failed to pay the judicial sanction against me. However, my failure to pay this was neither willful, knowing, or grossly negligent. As I explained in my inquiry response

letter, I was never advised by my then counsel (Sean Gjerde) that sanctions had been imposed upon me (I was a party in the matter). Also, and assuming I did have knowledge of the sanction (which I have no memory of), this debt was discharged in bankruptcy.

#### **COUNT SEVEN**

I deny that I made any mis-statement to the State Bar in response to the inquiry regarding the 3 malpractice lawsuits against me. And if I did make a mis-statement, any factual mis-statement was not willful, was not intentional, was not knowing, and was not grossly negligent.

#### **COUNT EIGHT**

I deny that any mis-statement in any bankruptcy petition was knowing, willful, or the result of gross negligence. I do admit that a mis-statement was made.

In this instance, my wife and I were previously represented in our bankruptcy case by Sean Gjerde, who did a horrible job and caused the dismissal of our first 2 BK petitions. We then filed in a subsequent BK petition pro per, but then shortly after filing had Gary Matta take over and handle the matter for us.

Shortly after taking our case, Mr. Matta gave up the practice of law and moved to Guam.

What we didn't know or realize was that at the time my wife and I filed in pro per, our prior credit counseling (which we had done when Mr. Gjerde represented us) had lapsed (it was done more than 6 months prior to the filing of the BK that Mr. Matta was handling). We did not realize the error when we filed, and Mr. Matta did not bring that to our attention. So, by the time Mr. Matta abandoned our case, and we became aware of the problem, we decided to let the BK filing lapse and not pursue it.

### COUNT NINE

I admit that my initial Rule 9.20 declaration was not accurate and contained a misstatement because I was unable to follow the mandates of Rule 9.20, and in the declaration, stated that I had. The filing of an inaccurate Rule 9.20 declaration not willful or knowing, nor was it the result of gross negligence. It was the result of the circumstances discussed in my response to Count 2.

Due to those circumstances, I relied upon my staff to read and advise me as to what I needed to do to adhere to Rule 9.20. I myself read Rule 9.20. Unfortunately, despite my best efforts, and the best efforts of my staff, we were not able to follow all of the mandates of Rule 9.20. The failure to do this was not knowing, was not willful, and was not the result of gross negligence.

### COUNT TEN

I admit that I did not give certified mail notice of my suspension to adverse parties and/or counsel, as required by Rule 9.20. I did, however, file with each court a Notice of Suspension in all active cases, and served that notice upon all adverse counsel (and adverse parties if not represented by counsel). All adverse attorneys and parties were made aware of the suspension by these filings.

My failure to follow Rule 9.20 exactly was not willful or knowing, nor was it the result of gross negligence. It was the result of the circumstances discussed in my response to Count 2.

Due to those circumstances, I relied upon my staff to read and advise me as to what I needed to do to adhere to Rule 9.20. I myself read Rule 9.20. Unfortunately, despite my best efforts, and the best efforts of my staff, we were not able to follow all of the mandates of Rule

9.20. The failure to do this was not knowing, was not willful, and was not the result of gross negligence.

#### **COUNT ELEVEN**

I did not hold myself out to practice law in the *Lawson* matter after my suspension began. That matter had concluded as a Judgment was entered, Notice of Entry of Judgment was served, and all work for which I had been retained was completed. I performed no tasks whatsoever for this case. The only communication I had with anyone about this case was with my former client, who owed me a substantial amount of money.

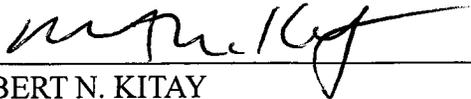
#### **COUNT TWELVE**

I deny that I willfully practiced law in the Forsyth matter. As I have explained to the State Bar repeatedly, my client's case had already been transferred to new counsel. Prior to the suspension, a settlement was being discussed with Mr. Forsyth, which provided that the case would settle for a payment (a check) to my client. I interpreted his email as an intention to complete the settlement that had been discussed and agreed upon (informally). The only thing that I can admit to doing is offering to allow him to drop the check off at my office so as to avoid a delivery problem for him and my client. My client lived in Carmichael, and her new attorney's office was in El Dorado Hill (about 40 minutes away). I was trying to be kind by allowing him to drop it off at my office, and I deny that allowing him to do this constituted "practicing law".

As discussed above, using my law office email account was not a willful practice of law on my part. It was an oversight due to the circumstances discussed above in my response to

Count 2. Once I began to regain my bearings after my father's death, I realized the error and shut down my office email account.

Date: 4/22/16

  
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ROBERT N. KITAY  
ATTORNEY AT LAW

**Proof of Service**  
**C.C.P. 1013(a), 2015.5**

Case: In Matter of Robert N. Kitay  
Case Number: 15-O-10294, et al

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. My address is 5150 FAIR OAKS BLVD. #326, Carmichael, CA 95608.

On the date set forth below I served the following documents: RESPONSE TO NOTICE OF DISCIPLINARY CHARGES

To the following person(s) or entity: CATHERINE TAYLOR, Deputy Trial Counsel, Office of Chief Trial Counsel, 180 Howard Street, San Francisco CA 94105-1639

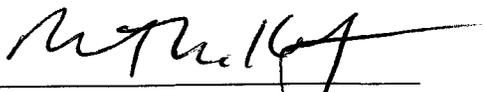
In the following manner:

- \_\_\_\_\_ by over-night Fed Ex Delivery  
\_\_\_\_\_ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.  
\_\_\_\_\_ by causing a true copy thereof to be personally delivered to the person(s) at the address(es) set forth below.  
\_\_\_\_\_ by regular first class mail, postage prepaid  
\_XX\_ via electronic delivery (email))

I am readily familiar with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **04/22/2016** at Carmichael, California.

  
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ROBERT N. KITAY