FILED OCTOBER 16, 2006

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **JAMES MICHAEL KEARNEY, III**, **Member No. 151880**, A Member of the State Bar.	**Case No. 05-O-00309-RMT** **05-O-02209** **DECISION INCLUDING DISBARMENT RECOMMENDATION AND INVOLUNTARY INACTIVE ENROLLMENT ORDER**

I. INTRODUCTION

In this disciplinary matter, Jean Cha appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent James Michael Kearney represented himself.

After considering the evidence and the law, the court recommends that respondent be disbarred.

II. SIGNIFICANT PROCEDURAL HISTORY

Because respondent did not file a pretrial statement as ordered, he was allowed to testify on his own behalf at trial but was otherwise precluded from calling witnesses or offering exhibits at trial.

The parties filed a stipulation as to facts and the admission of documents on July 18, 2006, which is hereby approved.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 4, 1990, and has been a member of the State Bar at all times since.

B. Case no. 05-O-00309 (The Li/Phan Matter)

1. Facts

In October 1999, Dr. Jun Li met with respondent to discuss the possibility of pursuing a breach of contract action claim against Dr. Thi B. Phan regarding the sale of Phan's dental office. Respondent told Li that he was capable of litigating the matter and agreed to file a complaint on li's behalf.

On October 15, 1999, Li retained respondent on an hourly fee basis and paid him $1,000 in advanced legal fees to pursue the case against Phan. Respondent did not file a complaint for Li against Phan.

On December 7, 1999, respondent sent Li a draft complaint against Phan. The draft stated that it was to be filed in the Santa Anita district of the Los Angeles Superior Court.

On December 14, 1999, Phan received a letter from respondent notifying him about the breach of contract case and stating that the case would be settled if he paid Li $24,000. This was the first time Phan heard about the case. Within a few days, Phan called respondent to inquire about the case. He spoke with respondent's secretary. This was the only contact Phan had with respondent.

On January 11, 2000, Li paid respondent an additional $750 in legal fees for the Phan case.

On July 24, 2000, respondent sent Li another draft complaint against Phan for his signature. The draft stated that it was to be filed in the Rio Hondo district of the Los Angeles Superior Court.

On October 10 and November 30, 2000, Li paid respondent, at respondent's request, an additional $200 and $500, respectively, in legal fees for the Phan matter.

On December 10, 2001, Li paid respondent an additional $250 in fees for the Phan case.

By October 2002, respondent had misrepresented to Li that he had filed a complaint and a judgment had been entered against Phan. He knew that he had not filed a complaint and that a judgment had not been entered against Phan.

On October 30, 2002, Li wrote to respondent and raised the possibility of putting a lien

on Phan's home and of conducting a debtor's examination. Although respondent received this letter, he did not respond to it.

On December 15, 2002, Li paid respondent an additional $500 in fees for the Phan case.

On May 16, 2003, Li wrote to respondent asking for a copy of the judgment entered against Phan. Respondent did not answer this letter although he received it.

On August 7, 2003, respondent wrote to Li, advising him that he had been to the courthouse in Pomona twice in inquiring about the status of the efforts to collect on the Phan case but that he had not obtained an answer. He said that he would follow up with Li within a week. He did not follow up with Li. Moreover, respondent knew that there were no collection efforts against Phan.

On November 10, 2003, respondent sent Li a letter in which he enclosed a declaration "in support of default judgment" for Li's signature. The declaration stated that the action was filed in the Rio Hondo district of the Los Angeles Superior Court.

On February 1, 2004, Li sent and respondent received a letter again asking for a copy of the default judgment against Phan.

On February 13, 2004, respondent sent Li a letter with which was enclosed a document entitled "Stipulation for Payments in Satisfaction of Judgment" for Li's signature. In the stipulation, Phan purportedly agreed to pay Li $26,000 in monthly installments, commencing February 28, 2004, with a payment for $2,500. Respondent knew that Phan had not agreed to enter into a stipulation or agreed to pay damages to Li. The stipulation stated that the action was filed in the Pomona district of the Los Angeles Superior Court.

On March 30, 2004, Li returned the signed stipulation to respondent. In a letter he sent that same date, Li asked respondent how he would be receiving the payment from Phan. Respondent received but did not respond to the letter.

On July 2, 2004, respondent sent a letter to Li enclosing a cashier's check for $2,000 purporting to be the first installment of the settlement from Phan. Respondent knew that Phan had not paid any funds toward a settlement with Li.

On July 7, 2004, Li wrote to respondent asking for a copy of the court's order regarding

the stipulation and inquiring why the first installment was $500 short. Respondent did not answer this letter although he received it.

On July 19, 2004, Li wrote to respondent about respondent's not answering the July 7 letter. Li asked about the status of the second installment and again asked for a copy of the court documents in the Phan matter. Respondent did not answer this letter although he received it.

On August 3, 2004, Li wrote to respondent about respondent's not answering the July 19 letter. Li inquired why the first installment was $500 short and whether Phan had made additional payments. Respondent did not answer this letter although he received it.

On September 1, 2004, Li wrote to respondent, asking, in part, that respondent forward any additional payments Phan made. Li also demanded that respondent send him a signed copy of the stipulation purportedly filed in the Phan case.

On September 9, 2004, respondent sent Li a letter stating that he would copy the file in the Phan case and review it with Li. Respondent did not give Li a copy of the file or review it with him.

In August and September 2004, Li left several messages for respondent requesting updates on the status of the Phan case, an explanation for the lack of subsequent payments on the settlement and copies of the documents. Respondent did not answer the calls.

After a multitude of requests for information and documents from respondent went unanswered, Li became concerned that something was wrong regarding the judgment in the Phan case.

On October 6, 2004, Li retained new counsel, May Liou, to pursue collecting the funds from Phan. Liou informed Li that no complaint had been filed on his behalf in Los Angeles County courts and that the statute of limitations had run on his case against Phan.

Liou wrote to respondent for an explanation why no complaint had been filed in the Phan case.

On October 19, 2004, respondent sent a letter to Li admitting that he had not completed the work in the Phan case. He offered to refund the legal fees Li paid and agreed to pay Li the maximum award he would have received from Phan plus interest at the rate of $1,000 per month

as long as needed.

Li paid Liou $2,406.25 in attorney fees to help him collect the funds respondent offered to pay.

In January 2005, respondent paid Li $5,000 in a cashier's check. Respondent arranged with Liou to make seven monthly payments of $5,000 between February and August 20, 2005, for a total amount of $35,000. Respondent post-dated the seven checks.

Li cashed each check as it came due. The checks were returned for insufficient funds and each accrued a $30 processing charge to Li.

On June 17, 2005, Li retained a collection agency, Creative Recovery Concepts, Inc. (CRC), to recover $35,210 (settlement amount plus returned check charges) from respondent. CRC charges a percentage of the sums collected as its fee. As of July 15, 2006, CRC collected $3,650 from respondent and paid Li $2,372.50 of that amount.

2. Conclusions of Law

a. Count One - Rule of Professional Conduct[1] 3-110(A)(Failing to Perform Competently)

Rule 3-110(A) prohibits an attorney from intentionally, recklessly or repeatedly failing to perform legal services competently.

By not filing a complaint for Li; not pursuing Li's breach of contract action against Phan; and otherwise not providing Li with any legal services, respondent intentionally, recklessly or repeatedly did not perform competently in wilful violation of rule 3-110(A).

b. Count Two - Section 6106 (Moral Turpitude)

Section 6106 of the Business and Professions Code[2] makes it a cause for disbarment or suspension to commit any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not.

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[1]Future references to rule are to this source.

[2]Future references to section are to this source.

There is clear and convincing evidence that respondent violated section 6106 by making multiple misrepresentations to Li about the status of his action against Phan and its settlement when he knew that he had not filed, litigated, settled or collected on such a settlement. Accordingly, he committed acts of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

c. Count Three - Section 6068, subdivision (m) (Failure to Communicate)

Section 6068, subdivision (m) requires an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

By not responding to Li's letters, respondent did not respond promptly to Li's reasonable status inquiries in wilful violation of section 6068, subdivision (m).

B. Case no. 05-O-02209 (The Cooks Matter)

1. Facts

In June 1999, Rev. Walter Cooks met with respondent to discuss the possibility of suing the State of California for the wrongful death of Cooks' son while incarcerated. On July 8, 1999, Cooks paid respondent $2,000 in advanced legal fees to represent him in the case.

In 2001, respondent filed a wrongful death case on Cooks' behalf. (*Walter Cooks, Jr., v. State of California, et al*, Kern County Superior Court case no. 241088 JES.) At the time, he had not handled any jury trials in civil matters nor had he filed a civil appeal.

On September 21, 2001, the court ruled in favor of the State of California on the grounds that it was immune from liability.

On November 21, 2001, respondent filed a notice of appeal in this matter.

On December 6, 2001, the court of appeal notified respondent that the $265 filing fee was not submitted with the notice of appeal and, if it was not received within 15 days, the appeal would be dismissed. Respondent received the notice and, on December 11, advised Cooks about the filing fee.

On December 17, 2001, Cooks issued respondent a check for $265 to pay the filing fee.

On December 20, 2001, the court of appeal received the filing fee.

On January 22, 2002, the clerk of the Kern County Superior Court (clerk) sent and respondent received notices asking respondent to pay within 10 days $16.10 for the reporter's transcript and $66 to prepare, certify and copy the clerk's transcript on appeal.[3] Respondent did not advise Cooks about these fees.

On February 5, 2002, the clerk sent and respondent received a notice of default advising respondent that the fee for preparing the transcript had not been paid and had to be paid within 15 days. Respondent did not advise Cooks about the receipt of this notice nor did he take action to set aside the default.

On February 18, 2002, respondent remitted $16.10 to the court of appeal to procure the reporter's transcript. The $66 fee for the clerk's transcript was not paid.

On February 22, 2002, the clerk filed an affidavit declaring that Cooks had not cured the default on the appeal. This affidavit was filed with the court of appeal on February 28, 2002. On that date, the court of appeal dismissed the case. Respondent was served with and received the notice of dismissal.

On March 14, 2002, respondent advised Cooks by letter that the case had been dismissed and that he would contact the court of appeal about it.

On March 27, 2002, respondent wrote to the court of appeal inquiring about the dismissal, which the court received on April 2, 2002.

On April 3, 2002, respondent spoke with someone at the court of appeal who informed him that the court lost jurisdiction of the appeal 30 days after its dismissal on February 28, 2002.

On April 30, 2002, the clerk of the court of appeal issued a remittitur certifying that the dismissal of the case on February 28, 2002, was final and that the State of California could recover its costs.

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[3]Respondent avers that he did not receive the notice regarding the $66 fee. He was moving his office from Pomona to Claremont, California at the time and had put in a request to forward mail. He admits that he did not notify the courts of his change of address, however.

2. Conclusions of Law

a. Count Four - Rule 3-110(A)(Failing to Perform Competently)

By not paying the fees and by not contacting the court of appeal before it lost jurisdiction, respondent intentionally, recklessly or repeatedly did not perform competently in wilful violation of rule 3-110(A).

b. Count Five - Section 6068, subdivision (m) (Failure to Communicate)

By not informing Cooks that additional fees were required and that, if unpaid, would result in the dismissal of the appeal, respondent did not keep Cooks reasonably informed of significant developments in wilful violation of section 6068, subdivision (m).

IV. LEVEL OF DISCIPLINE

A. Aggravating Circumstances

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Std. 1.2(b).)

Respondent has two prior instances of discipline. (Std. 1.2(b)(i).) In Supreme Court case no. S089897 (State Bar Court case nos. 97-O-16583; 97-O-17451; 97-O-18500 (Cons.)), discipline was imposed effective October 20, 2000, consisting of stayed suspension for two years and until respondent complied with standard 1.4(c)(ii) and three years' probation on conditions including 45 days' actual suspension. Respondent and the State Bar stipulated that he was culpable of engaging in the unauthorized practice of law (two counts), dishonesty (three counts)[4], not performing competently and not communicating with clients during the period of approximately April 1995 through October 1997. Aggravating factors included one prior instance of discipline, misconduct surrounded by dishonesty and multiple acts/pattern of misconduct. Mitigating factors included emotional difficulties and family problems, no harm to clients, restitution, candor and rehabilitation.

In Supreme Court case no. S052065 (State Bar Court case nos. 94-O-15938; 94-O-15989;

[4]These including three false quarterly reports with the State Bar during his disciplinary probation and making misrepresentations to clients.

94-O-17404; 94-O-17840; 95-O-12428 (Cons.)), discipline was imposed effective June 8, 1996, consisting of stayed suspension for three years and three years' probation on conditions including one year of actual suspension. Respondent and the State Bar stipulated that he was culpable of engaging in the unauthorized practice of law (two counts)[5] as well as violations of rules 3-100(A) (two counts), 3-500, 3-700(D)(1) and 4-100(A) during the period of approximately April 1994 to January 1995. No aggravating factors were found. Candor with the State Bar during the disciplinary process was a mitigating factor.

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).) Further, the court notices that respondent has engaged in a pattern of misconduct similar to that in the present case since April of 1994.

In relevant part, standard 1.2(b)(iii) permits consideration as an aggravating circumstance whether respondent's misconduct was surrounded or followed by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct. In the instant case, respondent asked for and collected $700 in additional legal fees from Li in October and November 2000 while he was actually suspended from the practice of law by Supreme Court order no. S089897 in wilful violation of sections 6068(a)/6125/6126 (unauthorized practice of law) and rule 4-200 (charging or collecting an illegal fee).

Respondent's misconduct significantly harmed clients. (Std. 1.2(b)(iv).) Li lost his cause of action against Phan and had to retain other counsel to try to resolve the matter. Respondent's checks to Li in settlement of his case were returned for insufficient funds. Li had to retain a collection agency to try to collect the funds from respondent and, as a result, Li will not recover the full amount of $35,000 from respondent. Cooks also had to retain other counsel and lost the opportunity of having his appeal heard.

Respondent has demonstrated indifference toward rectification of or atonement for the

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[5]Respondent sat as a temporary judge for three days while he was on inactive status for noncompliance with MCLE requirements. He also represented a client at an arbitration. both of these events took place after respondent had met with a State Bar investigator to discuss his being placed on inactive status. At that meeting, respondent denied having had notice to his official address regarding being placed on inactive status.

consequences of his misconduct. (Standard 1.2(b)(v).) The misrepresentations towards Li took place during a five-year period and occurred while the disciplinary matter Supreme Court order no. S089897 was pending.

B. Mitigating Circumstances

Respondent demonstrated spontaneous candor and cooperation to the victims of the misconduct and to the State Bar during disciplinary investigations and proceedings. (Standard 1.2(e)(v).) He stipulated to facts and culpability in the Li matter.

C. 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.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.6(a).)

Standards 2.3, 2.4(b) and 2.6(a) apply in this matter. The most severe sanction is found at standards 2.3 and 2.6(a), which call for suspension or disbarment. Standard 2.3 recommends actual suspension or disbarment for culpability of an act of moral turpitude, fraud, intentional dishonesty or of concealment of a material fact from a court, client or other person, depending on the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the attorney's acts within the practice of law. Standard 2.6(a) which recommends suspension or disbarment for violations of sections 6067 and 6068, depending on the gravity of the offense or harm, if any to the victim, with due regard to the purposes of imposing discipline.

Standard 1.7(b) also applies. It provides that, if an attorney has two prior records of discipline, the degree of discipline in the current proceeding shall be disbarment unless the most

compelling mitigating circumstances clearly predominate.

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.)

In the present case, respondent has been found culpable, in two client matters, of not performing competently or communicating with his clients. In one of those client matters, he was found culpable of making repeated misrepresentations to Li, a client, over a five-year period. Some of the misconduct in that matter occurred while he was suspended or on probation in one of his two prior disciplinary cases. In mitigation, respondent was candid and cooperative by stipulating to facts and culpability regarding his conduct in Li's case.

The State Bar recommends disbarment. Respondent seeks two or three years of actual suspension. Having considered the evidence and the law, the court believes that disbarment is the only adequate means of protecting the public and the court so recommends.

Misconduct involving this type of deceit "is inimical to both the high ethical standards of honesty and integrity required of members of the legal profession and to promoting confidence in the trustworthiness of members of the profession. [Citations.]" (*Stanley v. State Bar* (1990) 50 Cal.3d 555, 567; see also, *Codiga v. State Bar* (1978) 20 Cal.3d 788, 793 ["[d]eceit by an attorney is reprehensible misconduct whether or not harm results and without regard to any motive or personal gain. (Citations.)"].)

Lesser discipline than disbarment is not warranted because there are no extenuating circumstances that clearly predominate in this case. (Std. 1.7(b).) The very serious nature of the misconduct as well as the self-interest and protracted dishonesty underlying respondent's actions and the pattern of similar misconduct since 1994 suggest that he is capable of future wrongdoing and raise concerns about his ability or willingness to comply with his ethical responsibilities to the public and to the State Bar. Moreover, it is evident that the prior instances of discipline have

not served to rehabilitate respondent or to deter him from further misconduct, particularly since some of the misconduct in the instant case occurred while respondent was actually suspended or on probation in his second disciplinary matter. Having considered the evidence, the standards and other relevant law, the court believes that disbarment is the only adequate means of protecting the public from further wrongdoing by respondent. Accordingly, the court so recommends.

V. DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that respondent JAMES MICHAEL KEARNEY, III, be DISBARRED from the practice of law in the State of California and that his name be stricken from the rolls of attorneys in this state.

It is also recommended that the Supreme Court order respondent to comply with rule 955, paragraph (a), of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in the present proceeding, and to file the affidavit provided for in paragraph (c) within 40 days of the effective date of the order showing his compliance with said order.

VI. 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.

VII. ORDER REGARDING INACTIVE ENROLLMENT

It is ordered that respondent be transferred to involuntary inactive enrollment status pursuant to section 6007(c)(4). The inactive enrollment shall become effective three days from the date of service of this order and shall terminate upon the effective date of the Supreme Court's order imposing discipline herein or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: October 16, 2006

ROBERT M. TALCOTT
Judge of the State Bar Court