FILED JANUARY 15, 2009

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **ELI A. KITT,** **Member No. 217753,** A Member of the State Bar.	)	Case Nos.: **05-O-02816-RAP (06-O-10799); 06-O-13380 (Cons.)** **DECISION**

I. INTRODUCTION

In this contested, original disciplinary proceeding, respondent **ELI A. KITT** ("respondent") is charged with 15 counts of misconduct in three client matters. The court finds respondent culpable on 14 out of the 15 counts. Deputy Trial Counsel Jean Cha represented the Office of the Chief Trial Counsel of the State Bar of California ("State Bar"). Attorney Richard A. Moss represented respondent.

II. SIGNIFICANT PROCEDURAL HISTORY

The State Bar initiated this proceeding by filing notice of disciplinary charges ("NDC") on August 29, 2006, in case number 05-O-02816 (06-O-10799). Respondent filed a response on December 11, 2006. On April 23, 2007, the State Bar filed a second NDC in case number 06-O-13380. Respondent filed a response on May 15, 2007. The cases were consolidated for all purposes on May 9, 2007.

After completion of pretrial matters, the matter proceeded to trial and, following post-trial briefing, was submitted for decision on October 20, 2008. At trial, the following witnesses testified: respondent; Ion Anton; Virgil Anton; Liliya Mish; John Palacios; Zalman Perelman; Dr. Eugene Berchenko; Margaret Frankel; Dianne DeHart; Svetlana Brontveyn; Susan Arroyo; Jesse Cisneros; Cathleen Sargent, Esq.; Dennis Kogan; and Rachel Rothbart, Esq.

III. FINDINGS OF FACT

A. Credibility Determinations

With respect to the credibility of the witnesses, the court has carefully weighed and considered their demeanor while testifying; the manner in which they testified; their personal interest or lack thereof in the outcome of this proceeding; and their capacity to accurately perceive, recollect, and communicate the matters on which they testified. (See, e.g., Evid. Code section 780 [lists of factors to consider in determining credibility].) Except as otherwise noted, the court finds the testimony of the witnesses to be credible, except for the testimony of respondent, which the court finds lacked candor.

B. Stipulated Facts

The parties stipulated to the following facts:

Petitioner was admitted to the practice of law in the State of California on December 6, 2001.

Case No. 05-O-02816 – The Anton Matter

On April 15, 2002, respondent and Ion Anton ("Ion") executed a retainer agreement.

On April 22, 2002, Stacey Decker of AIG Insurance, the adverse driver's insurance company, contacted GEICO and informed them that AIG had accepted liability.

On April 18, 2002, Decker employed John Palacios ("Palacios") with JP Appraisal, an independent appraisal company, to inspect the damage to Ion's vehicle.

On April 22, 2002, Palacios telephoned respondent's office and left a message for respondent requesting a return telephone call.

On April 23, 2002, Palacios telephoned respondent's office and was able to speak with respondent regarding scheduling the inspection of Ion's vehicle.

On April 23, 2002, respondent informed Palacios that respondent would call him back with a date and time for the inspection.

On April 23, 2002, respondent informed Decker that respondent was Ion's attorney.

On June 7, 2002, Palacios closed the case.

Respondent did not send a demand letter to AIG Insurance.

Respondent's last contact with AIG or GEICO Insurance was in April 2002.

On January 20, 2005, Ion sent a letter to respondent regarding the status of his case.

On March 4, 2005, respondent met Ion at the Holy Trinity Romanian Orthodox Church, located on Verdugo Road in Los Angeles.

On May 5, 2005, the State Bar opened an investigation, case number 05-O-02816, pursuant to a complaint filed by Ion.

On July 27, 2005, December 20, 2005, January 23, 2006, and March 3, 2006, a State Bar investigator wrote to respondent regarding the Anton matter.

Respondent did not respond in writing to any of the investigator's letters.

On May 5, 2006, DTC Anderson wrote to respondent requesting a meeting regarding this case.

Respondent replied to DTC Anderson's letter by telephone on May 25, 2006, and a meeting was scheduled for June 1, 2006.

At the June 1, 2006 meeting between respondent and DTC Anderson, respondent stated that Ion did not have much information regarding the April 13, 2002 vehicle accident.

Respondent also stated that he dropped Ion's case by sending Ion a drop letter sometime before the statue of limitations ran in Ion's case.

Case No. 06-O-10799 – The Mish Matter

On May 29, 2003, respondent met with Sofiya and Yakov Mishes' son-in-law ("Zalman") who is married to their daughter Liliya Mish ("Liliya"), to discuss representing the Mishes.

Respondent is able to understand and speak the Russian language.

On May 29, 2003, respondent met with the Mishes at their home.

On August 7, 2003, respondent signed a medical lien with Dr. Lilia Wexley ("Dr. Wexley") for the Mishes' medical treatment resulting from the accident.

On or about February 12, 2004, Dr. Wexley forwarded the medical reports and billings for the Mishes to respondent.

On or about February 17, 2004, respondent received medical records from Dr. Wexley's office.

Respondent performed no legal services on behalf of the Mishes.

After respondent received the medical reports from Dr. Wexley's office, respondent continued to receive telephone calls from Liliya to discuss the status of the Mishes' case.

Between September 2004 and March 2005, Liliya continued telephoning and speaking to respondent a number of times.

In September 2005, the Mishes employed a new attorney, Svetlana Brontveyn ("Brontveyn"), to represent them with respect to the accident on May 28, 2003.

Brontveyn attempted to reach respondent by telephone and in writing.

On November 14, 2005, the State Bar opened an investigation, case number 06-O-10799, pursuant to a complaint filed by Yakov and Sofiya Mish (the "Mish matter").

On March 17, 2006 and April 4, 2006, a State Bar investigator wrote to respondent regarding the Mish matter. Respondent received these letters. Respondent did not respond in writing to any of the investigator's letters.

At a June 1, 2006 meeting with the State Bar of California, respondent informed DTC Anderson that the Mishes were never his clients. Respondent also stated that he had informed Liliya that he was not the Mishes' attorney.

Case No. 06-O-13380 – The DeHart Matter

On June 4, 2001, Dianne DeHart ("DeHart") filed a petition in pro per for dissolution of marriage in the Los Angeles County Superior Court, case no. BD347590, entitled *Dianne DeHart Robinson v. Carl Dwayne Robinson* (the "dissolution matter").

DeHart received assistance in the dissolution matter from the Harriet Buhai Center for Family Law ("HBC") in May 2001. HBC provides services to indigent individuals living in Los Angeles County. HBC assisted DeHart in preparing the initial pleadings to commence the dissolution matter.

In February 2002, DeHart, became employed. Under HBC policy, DeHart was no longer qualified for services from HBC beginning in March 2002.

On June 12, 2002, DeHart retained respondent to substitute into the dissolution matter and represent her through the conclusion of the dissolution matter. Respondent and DeHart executed a written retainer agreement on June 12, 2002.

On or about January 11, 2006, DeHart spoke with respondent over the telephone and scheduled an in-person meeting with respondent. The meeting was set for February 15, 2006.

On February 17, 2006, DeHart terminated respondent's services.

On February 17, 2006, respondent informed DeHart that he would resolve the dissolution matter and refund the $750 flat fee. DeHart did not oppose this proposition.

On or about February 17, 2006, respondent drafted a request to enter default in the dissolution matter.

On February 21, 2006, respondent filed a Request to Enter Default and/or Judgment with the court.

In February 2006, respondent refunded the $750 flat fee to DeHart.

On June 5, 2006, the Request to Enter Default and/or Judgment was rejected by the court. Respondent received the rejection. The default was rejected because respondent did not file a proof of publication.

On July 19, 2006, the State Bar opened an investigation, case number 06-O-13380, pursuant to a complaint filed by DeHart, alleging that respondent failed to perform and abandoned Dehart's case (the "DeHart matter").

On September 26, 2006, a State Bar investigator wrote to respondent regarding the DeHart matter.

The investigator's September 26, 2006 letter requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the DeHart matter.

Respondent did not respond to the investigator's September 26, 2006 letter or otherwise communicate with the investigator.

On October 16, 2006, the investigator sent a second letter to respondent requesting that respondent respond to the allegations in the DeHart matter. The October 16, 2006 letter enclosed a copy of the September 26, 2006 letter and requested that respondent respond in writing to specified allegations of misconduct being investigated by the State Bar in the DeHart matter.

On January 12, 2007, the investigator called respondent to confirm that all three letters were in fact received by respondent. Respondent acknowledged receipt of all three letters.

C. Additional Findings of Fact

Case Number 05-O-02816 – The Anton Matter

On April 15, 2002, respondent was hired by Ion to represent him in a personal injury/property damage automobile accident. Respondent was to assist Ion in recovering for property damage to his truck and to assist Ion in medical care coverage. Ion was referred to respondent by a friend of respondent's father. Ion brought his truck to the meeting and respondent was able to inspect it. In addition, Ion gave respondent a copy of the traffic collision report from his accident.

Ion also sent respondent three automobile repair estimates, a copy of a business card of a jogger who witnessed the accident, and, in 2003, about a dozen receipts for repairs that Ion made to his truck.[1]

[1] Although the repair estimates appear to be from a repair shop in Ohio, the court finds credible Ion's testimony that he took his truck for an estimate to a local repair shop and it is that estimate he sent to respondent. Ion is not aware of the reason for the discrepancies in the repair estimates and he was not aware of the discrepancies until January 2008.

On April 18, 2002, American Home Insurance ("AIG"), the carrier for the other vehicle in Ion's accident accepted liability for the accident. On that date, AIG hired John Palacios ("Palacios"), an independent appraiser, to inspect Ion's truck. On April 22, 2002, Palacios attempted to contact respondent to schedule an inspection of Ion's truck. Respondent never responded to Palacios' telephone messages, accordingly, a vehicle inspection was not scheduled.

Respondent never informed Ion that Palacios wanted to inspect his truck or that AIG accepted liability in the accident. After not being contacted by respondent, Palacios closed his file in the Ion matter on June 7, 2002. Respondent never contacted AIG to request that Ion's property damage claim be re-opened. Eventually, Ion made the costly repairs to his truck.

Respondent performed no other legal services of consequence in the Anton matter. Ion or Ion's son Virgil ("Virgil") met with or spoke by telephone with respondent, regarding Ion's property damage claim, a total of 13 to 15 times between April 2002 and April 2005. During these discussions, respondent made several requests for extensions and falsely assured Ion and/or Virgil that he was continuing to work on the case.[2]

On January 20, 2005, Ion sent a letter to respondent. In this letter Ion requested that, within 10 days, respondent provide a written response describing how and when he will resolve Ion's matter; otherwise Ion would terminate respondent's employment. Over three months later, on May 4, 2005, respondent hand delivered a letter to Ion stating that respondent's firm will do their best to obtain a settlement within the legal statutory time limits remaining in Ion's case. This was the only correspondence Ion recalls receiving from respondent.

[2] Numerous telephone calls were placed by respondent to Ion or Virgil during this time period, although some of the telephone calls may have been in regard to a family issue concerning Virgil.

Respondent contends that he sent a "drop letter" to Ion on February 17, 2003.[3] The letter was addressed to an address that was not Ion's current residence and Ion did not receive the letter. Ion testified that he collected his mail from that address twice a month from the landlady and the letter was not included in the mail. Respondent never discussed the drop letter with Ion and Virgil at later meetings. Respondent testified that during the litigation of this matter, he discovered the letter in a stack of documents piled on his desk. Respondent did not discover any other documents relating to the Ion matter. Conveniently, respondent only discovered the drop letter. Since Ion had relocated from the address where respondent allegedly sent the drop letter, the court cannot find, by clear and convincing evidence, that respondent created this letter for the purposes of litigation (either the present litigation or any possible civil litigation). Nonetheless, respondent's testimony regarding this miraculous discovery is highly suspicious and inconsistent with the balance of the evidence before the court.

During the course of the Ion matter, respondent never verbally informed Ion or Virgil that he did not represent Ion or would not represent Ion in his accident matter.

Respondent filed two lawsuits on behalf of Ion, listing himself as attorney of record. Both suits were dismissed. Respondent took not additional steps to protect Ion's rights in his matter, and eventually, the statute of limitations ran on Ion's action. There is no evidence of respondent performing any legal services after filing the lawsuits. By performing no legal actions of consequence in the Anton matter, respondent effectively withdrew as counsel without informing his client.[4]

[3] In this letter respondent states that the statute of limitations for Ion's claim will expire one year following the date of the accident (on or about April 2003).

Case Number 06-O-10799 – The Mish Matter

On May 28, 2003, Sofiya Mish ("Sofiya") and Yakov Mish ("Yakov") were involved in an automobile accident when their medical transport vehicle was rear-ended by another vehicle. Mr. & Mrs. Michael "Misha" and Sophia Lyubinin were the other two passengers in the medical van. Respondent represented the Lyubinins for their claim arising from the accident.

On May 29, 2003, Sofiya received a telephone call from respondent at her home. Respondent informed Sofiya that he represented the Lyubinins and suggested that he represent all four passengers, that he would visit Sofiya and Yakov at their home, and that he handle their case as well because they were all together.

On or about May 29, 2003, respondent arrived at the Mishes' apartment and showed them some papers written in English. Respondent asked Sofiya and Yakov to sign the papers. Sofiya contacted her daughter, Liliya, and son-in-law, Zalman, because she could not read English.

An arrangement was made so that Zalman could review the document respondent presented to the Mishes. Zalman reviewed the document, respondent's retainer agreement, and was satisfied that his in-laws would receive 50% of any recovery. Respondent returned to the Mishes' apartment and Sofiya signed the document upon instructions from respondent. Yakov also signed a retainer agreement. Sofiya had no doubt that respondent was her attorney in the car accident case. Respondent gave Sofiya his business card but did not give her a copy of the retainer agreement.

On May 30, 2003, the Mishes signed medical liens with Dr. Wexley. On August 7, 2003, respondent signed the medical liens on behalf of his clients. The medical lien expressly

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[4] Respondent did inform Ion that the statute of limitations had expired in his case.

designates respondent as attorney for the Mishes in the auto accident matter. In February 2004, respondent received the Mishes' medical records from Dr. Wexley.

Liliya also started to contact respondent on behalf of her parents. Liliya contacted respondent on a regular basis until August 2005, calling every month or every other month for a status update. During these calls, respondent falsely assured Liliya that he was working on the case and gave Liliya various updates, such as, that he needed to send papers to the insurance company, that it would take a couple more months, that a deposition would have to take place, that the deposition had been cancelled, that he had sent a claimant form, and that he was going to get money from the insurance company. Respondent also falsely represented to Liliya that the clerk will take care of the case because they have to start from the beginning, that a settlement offer for $1,000 was made but that respondent could get $5,000 each, and that the insurance company does not want to pay because they are waiting for her parents to die.

Liliya asked respondent for the insurance company's phone number. Respondent told her that they could only speak with him. Respondent repeatedly advised Liliya to be patient and that she had to wait for results. After August 2005, respondent stopped returning Liliya's phone calls.

Despite his representations, respondent performed no legal services for the Mishes. By accepting employment with the Mishes and subsequently failing to perform any legal services of consequence, respondent effectively withdrew from representation of the Mishes without informing his clients.

Respondent now claims that he never represented the Mishes, that they never signed a retainer agreement, and that he was merely looking into their case. As noted *ante*, respondent's testimony lacks candor. The overwhelming evidence shows that respondent was the Mishes' attorney in their auto accident case, and failed to perform any legal services of consequence.

Respondent's conduct in dealing with his clients, their daughter, and the Mishes' later attorney, Sventlana Brontveyn, included acts of deceit, misrepresentations and delay.

Case Number 06-O-13380 – DeHart Matter

In May 2001, DeHart sought the dissolution of her short-term marriage. Since she had little to no money, DeHart obtained the services of the Harriet Buhai Center ("HBC") to assist her. Rachel Kronick Rothbart ("Rothbart"), senior staff attorney for HBC, assisted DeHart in her dissolution matter, although DeHart proceeded in pro per. DeHart received legal services from HBC from May 2001 until March 2002, when DeHart no longer qualified for assistance due to her finding employment in February 2002. Rothbart opined that DeHart's matter should have taken approximately 12 to 18 months to complete.

In April 2002, HBC sent DeHart a letter informing her that her case was being closed and that the only remaining action in her matter was to complete the posting process and service requirement, and file a motion requesting the court to enter default. The posting process is available in lieu of publication to establish proper notice in a dissolution proceeding when a party is going by way of default. The posting process of service was being utilized because DeHart could not locate her husband, whom she had not seen since 1999. The posting process allows the sheriff to post pertinent documents at the courthouse for a required number of days. Once the period has elapsed, service is complete and then a motion can be filed requesting the court to enter default. If no response to the default request is filed, a proposed judgment is submitted. According to Rothbart, DeHart's matter was in a good position to complete her dissolution in April 2002.

On April 11, 2002, the court granted DeHart's request to serve summons by posting. The court ordered that the service of certain documents be made upon her spouse by posting these

documents in the Los Angeles County Courthouse for period of 28 days and mailing said documents to her spouse's last known address.

DeHart was referred to respondent by a co-worker at her new place of employment. DeHart spoke with respondent by telephone and explained the circumstances and condition of her matter, and her need for an attorney to complete the final posting stage requirements so that it would be competed in a proper manner. Respondent agreed to assist DeHart.

On June 12, 2002, DeHart signed a retainer agreement and paid respondent $750 to assist her in the final stages of her dissolution matter. Again, DeHart explained to respondent the steps needed to complete the dissolution and gave respondent all of her paperwork collected from HBC and the court, including the court's April 11, 2002 order for posting. DeHart received a $750 loan from her employer to pay respondent. Respondent told DeHart that the task was simple and that she would be divorced by Christmas 2002. DeHart started to follow-up with respondent on a monthly basis.

Respondent did not substitute into DeHart's dissolution matter or comply with the aforementioned posting process and service requirements. Respondent failed to perform any legal services of value to DeHart.

Respondent moved from his office during his representation of DeHart and failed to notify her of his new contact information. Between January 2003 and March 2003, DeHart was attempting to contact respondent, but his phone was disconnected. DeHart was subsequently able to locate respondent by contacting the State Bar of California.

Once in contact with respondent, DeHart would attempt, on a monthly or every other month basis, to contact respondent for updates in her matter. Respondent repeatedly gave DeHart false assurances that he was working on her case. Respondent made several excuses as

to why her case was not yet completed, such as, the court lost her documents, that he was sick, that he had to re-file, and that he lost all the documents and could not find them after he moved. Respondent assured DeHart that everything was okay.

In April 2003, DeHart became engaged and requested that respondent move along her dissolution. According to DeHart, respondent advised that she could go to Las Vegas to get married. DeHart testified that she knew that she could not be married legally in Las Vegas as respondent suggested.

In June 2004, DeHart went to the courthouse and learned that no posting had been done. She spoke with the court clerk who told her that $170 was required for the final posting, which she could not afford. DeHart attempted to contact respondent, who promised a short court date. DeHart made sporadic contact with respondent afterward, and when they spoke, respondent made more excuses why her matter was not completed.

On July 5, 2005, DeHart sent respondent a letter requesting her file. Respondent did not return her file but assured DeHart that he was working on her case.

In February 2006, DeHart filed a notice of change of address with the court and learned that respondent had not filed anything on her behalf. Two days later, DeHart met with respondent and gave him 24 hours to file the correct documents, which respondent failed to do.

DeHart terminated respondent's employment on February 17, 2006. On the same day, respondent convinced her to re-hire him to complete the dissolution and he informed DeHart that he would refund the $750 fee. DeHart agreed to give respondent one last chance.

On February 21, 2006, respondent filed a request to enter default with the court, which was later rejected because he did not file a proof of publication. Respondent did not attempt or complete the posting process.

On June 12, 2006, DeHart sent a fax message to respondent requesting a status update, which drew no response. Respondent claims not to have received the message. DeHart later discovered that respondent's filing had been rejected by the court. DeHart terminated respondent's employment again on June 26, 2006. To date, DeHart's marriage has not been dissolved.

IV. CONCLUSIONS OF LAW

A. Case Number 05-O-02816 - The Anton Matter

Count One – Failure to Perform with Competence (Rule 3-110(A), Rules of Professional Conduct of the State Bar of California)[5]

Rule 3-110(A) of the Rules of Professional Conduct provides that a member must not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

The State Bar has proven by clear convincing evidence that respondent failed to perform legal services with competence, in willful violation of rule 3-110(A), by failing to follow up with Palacios or perform any legal services of consequence on behalf of Ion in his automobile accident case.

Count Two – Improper Withdrawal From Employment (Rule 3-700(A)(2))

Rule 3-700(A)(2) provides that a member must, upon termination of employment, take reasonable steps to avoid reasonably foreseeable prejudice to his client.

Respondent willfully violated rule 3-700(A)(2) by, upon termination of employment, failing to inform Ion of his intent to withdraw and failing to take any reasonable steps to avoid foreseeable prejudice to Ion's rights.

[5] All further references to rule(s) are to the current Rules of Professional Conduct of the State Bar of California, unless otherwise stated.

Count Three – Moral Turpitude (Business and Professions Code Section 6106)[6]

Business and Professions Code section 6106, provides that a member must not commit an act involving moral turpitude, dishonesty, or corruption.

By continuously misrepresenting to Ion and Virgil the status of the Anton matter and the work that respondent was purportedly performing on this matter, and repeatedly requesting more time to resolve the Anton matter, even following the expiration of the statute of limitations, respondent engaged in conduct involving moral turpitude, dishonesty or corruption in willful violation of section 6106.

Count Four – Failure to Cooperate (Section 6068, Subdivision (i))

Business and Professions Code section 6068, subdivision (i), provides that is the duty of a member to cooperate and participate in a disciplinary investigation pending against the member.

Respondent failed to cooperate in a disciplinary investigation, in willful violation of section 6068, subdivision (i), by failing to provide a written response to any of the State Bar investigator's letters or to the allegations of the Anton complaint.

Count Five – Moral Turpitude (Business and Professions Code Section 6106)

The State Bar has alleged that respondent committed an act of moral turpitude by making misrepresentations to the DTC Anderson in relation to the Anton matter. However, the evidence before the court regarding the statements made by respondent to DTC Anderson is somewhat ambiguous. It has been stipulated that respondent told DTC Anderson that Anton did not have much information regarding the April 13, 2002 vehicle accident. The court does not find that such an ambiguous statement establishes, by clear and convincing evidence, a violation of section 6106.

[6] All further references to section(s) are to the Business and Professions Code, unless

Also, while respondent's "drop letter" is certainly suspicious, the court, as previously noted, lacks sufficient evidence to support a finding that the letter is a fabrication. Therefore, the State Bar did not prove, by clear and convincing evidence, that respondent made misrepresentations to DTC Anderson regarding the Anton matter and Count Five is dismissed with prejudice.

B. Case Number 06-O-10799 - The Mish Matter

Count Six – Improper Solicitation of Prospective Client (Rule 1-400(C))

Rule 1-400(C) provides that a member must not make, with a significant motive of pecuniary gain, a communication by telephone of his availability for professional employment to a prospective client with whom the respondent had no family and no prior professional relationship. (See also rule 1-400(B).)

The State Bar has proven by clear and convincing evidence that respondent is culpable of willfully violating rule 1-400(C) by improperly contacting the Mishes, via telephone at their home, for the purposes of procuring professional employment. Respondent's testimony that he did not initiate contact with the Mishes and that he did not go to their home lacked candor and constitutes a deliberate attempt to mislead the court.

Count Seven – Failure to Perform With Competence (Rule 3-110(A))

The State Bar has proven by clear and convincing evidence that respondent intentionally, recklessly and repeatedly failed to perform legal services with competence, in violation of rule 3-110(A), by accepting representation of the Mishes' matter and then failing to provide any legal service of consequence to the Mishes.

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otherwise stated.

Count Eight – Improper Withdrawal from Employment (Rule 3-700(A)(2))

Respondent willfully violated rule 3-700(A)(2) by, upon termination of employment, failing to inform the Mishes of his intent to withdraw and failing to take any reasonable steps to avoid foreseeable prejudice to the Mishes' rights.

Count Nine – Moral Turpitude (Business and Professions Code Section 6106)

By intentionally making repeated misrepresentations to the Mishes and their family members regarding the status of their case and the work that respondent had performed, respondent engaged in conduct involving moral turpitude, dishonesty or corruption in willful violation of section 6106.

Count Ten – Moral Turpitude (Business and Profession Code Section 6106)

By intentionally misrepresenting to DTC Anderson that the Mishes were never his clients, respondent engaged in conduct involving moral turpitude, dishonesty or corruption in willful violation of section 6106.

Count Eleven – Failure to Cooperate (Section 6068, subdivision (i))

Respondent failed to cooperate in a disciplinary investigation, in willful violation of section 6068, subdivision (i), by failing to provide a written response to any of the State Bar investigator's letters or to the allegations of the Mish complaint.

C. Case Number 06-O-13380 - The DeHart Matter

Count One – Failure to Perform With Competence (Rule 3-110(A))

The State Bar has proven by clear convincing evidence that respondent failed to perform legal services with competence, in willful violation of rule 3-110(A), by accepting representation of DeHart and subsequently failing to perform any legal services of consequence on behalf of DeHart in her dissolution matter.

Count Two – Moral Turpitude (Section 6106)

By making numerous intentional misrepresentations to DeHart concerning the status of her dissolution matter over a period of approximately four years, respondent engaged in conduct involving moral turpitude, dishonesty or corruption in willful violation of section 6106.[7]

Count Three – Failure to Inform Client of Significant Development (Section 6068, Subdivision (m))

Business and Professions Code section 6068, subdivision (m), provides that it is a member's duty to keep a client reasonably informed of significant developments in a matter in which a member has agreed to provide legal services.

The State Bar has proven by clear and convincing evidence that respondent willfully failed to keep his client reasonably informed of a significant development by failing to inform DeHart of his new office address and telephone number, in violation of section 6068, subdivision (m).

Count Four – Failure to Cooperate (Section 6068, subdivision (i))

Respondent failed to cooperate in a disciplinary investigation, in willful violation of section 6068, subdivision (i), by failing to provide a written response to any of the State Bar investigator's letters or to the allegations of the DeHart complaint.

V. MITIGATION AND AGGRAVATION

A. Mitigation

The record establishes that there are no mitigating factors.[8] Petitioner did not present clear and convincing evidence concerning his personal marriage dissolution to merit any

[7] The State Bar has not proven by clear and convincing evidence that respondent advised DeHart to go to Las Vegas and get married. Even if respondent had offered such advice, DeHart did not take this advice seriously.

[8] Although respondent has no prior record of discipline, this factor does not warrant any

consideration in mitigation. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)[9]

B. Aggravation

The record establishes the following four factors in aggravation by clear and convincing evidence. (Std. 1.2(b).)

Respondent committed multiple acts of misconduct in three separate client matters. (Std. 1.2(b)(ii).)

Respondent's misconduct significantly harmed his clients. (Std. 1.2(b)(iv).) Due to respondent's misconduct in the Anton matter, his client had to pay for, at a minimum, the repairs to his damaged truck. In the Mish matter, his clients lost their opportunity for recovery of their personal injuries. In the DeHart matter, the excessive delay of the dissolution of his client's marriage has prevented her from being able to remarry as desired.

Respondent has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) Respondent has shown by actions and testimony in this matter that he does not recognize the duty that an attorney owes to his clients, to his profession, and to the court. Respondent displayed an utter disregard and disdain for the consequences resulting from his misconduct and will say almost anything, no matter how incredulous, in order to support his case. Taken as a whole, respondent has not shown any rectification of or atonement for the consequences of his misconduct.

Respondent's testimony lacked candor. (Std. 1.2(b)(vi).) Joined hand-in-hand with respondent's indifference, is respondent's complete and utter lack of candor during these

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consideration in mitigation due to the fact that respondent's misconduct began shortly after his admission to the practice of law in the State of California.

proceedings. The record in this matter is replete with respondent's intentional misrepresentations during his testimony. For example, at one point during the proceedings respondent denied the accusation that he had no client "files" in some of these matters. However, during subsequent questioning by the court, respondent then admitted to just having loose papers in the matters and no official files. The lack of candor respondent demonstrated before the court is a significant aggravating factor.

VI. 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 must be the most severe of the applicable sanctions. (Std. 1.6(a).)

Here, the most severe sanction is found at standard 2.3 which recommends, upon the commission of an act of moral turpitude, that a member receive discipline consisting of actual suspension or disbarment 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 member's acts within the practice of law.

The Supreme Court gives the standards "great weight" and will reject a recommendation

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[9] All further references to standard(s) are to this source.

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 that respondent be disbarred. In support of this recommendation, the State Bar cites *Cannon v. State Bar* (1990) 51 Cal.3d 1103.

In *Cannon*, the attorney was found culpable, in five separate matters, of committing serious misconduct, much of which involved moral turpitude. The attorney's violations included his improper withdrawal from representation, failing to refund unearned fees, failing to perform with competence, failing to communicate, and committing acts constituting moral turpitude. The Supreme Court found a complete absence of substantial mitigating circumstances despite the attorney's lack of a prior record (the attorney had only been in practice for six years prior to the misconduct). In aggravation, the Court noted the attorney's repeated refusal to return unearned fees even after clients obtained arbitration awards and judgments against him, as well as his indifference toward the welfare of his clients. The Supreme Court ordered that the attorney be disbarred.

While *Cannon* shares many qualities with the present matter, the court finds *Cannon* to be more egregious based on the number of matters involved and the attorney's refusal to make his client's whole, even after his clients obtained arbitration awards and judgments against him. The court therefore turns to *In the Matter of Peterson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 73, for further guidance.

In *Peterson*, the attorney abandoned three client matters, deceived two of those clients as to the status of their matters, and failed to participate in the State Bar investigation. In aggravation, the attorney committed multiple acts of disregarding client interests and his misconduct was surrounded by repeated and protracted deceit resulting in significant harm to his clients. Further, the attorney failed to participate in the proceedings. No mitigation was found (the attorney had no prior record, but had only been practicing for six years when the misconduct began). The Review Department recommended that the attorney be suspended from the practice of law for three years, stayed, with three years' probation, including a one-year actual suspension.

Here, while respondent's underlying misconduct is similar to that of *Peterson*, the court is particularly concerned by respondent's on-going practice of deception. After making repeated misrepresentations to his clients, respondent has since attempted to deceive both the State Bar and the court in an effort to escape or minimize his exposure to attorney discipline. Consequently, the court has heightened concerns regarding respondent's willingness or ability to practice within the ethical confines of the law. These concerns are further exasperated by the fact that respondent began committing misconduct at the very outset of his professional career.

Therefore, in the interests of public protection the court recommends, among other things, that respondent be actually suspended for two years and until he provides proof of the satisfaction of the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law pursuant to standard 1.4(c)(ii).

VII. RECOMMENDED DISCIPLINE

Accordingly, it is recommended that **Eli A. Kitt** be suspended from the practice of law for three years and until he provides proof to the satisfaction of the State Bar Court of his rehabilitation, present fitness to practice and present learning and ability in the general law pursuant to standard

1.4(c)(ii), that execution of the suspension be stayed, and that respondent be placed on probation for four years, with the following conditions:

1. Respondent must be actually suspended from the practice of law for the first two years of probation and until he provides proof to the satisfaction of the State Bar Court of his rehabilitation, present fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii);

2. During the period of probation, respondent must comply with the State Bar Act and the Rules of Professional Conduct;

3. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, the report must be submitted on the next following quarter date, and cover the extended period.

In addition to all the quarterly reports, a final report, containing the same information is due no earlier than twenty (20) days before the last day of the probationary period and no later than the last day of the probationary period;

4. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation, which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein;

5. Within ten (10) days of any change, respondent must report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California 94105-1639, **and** to the Office

of Probation, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code;

6. Within one year after the effective date of the discipline herein, respondent must provide to the Probation Office satisfactory proof of attendance at a session of the State Bar Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015, and passage of the test given at the end of the session. Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fees. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE), and respondent will not receive MCLE credit for attending Ethics School (Rule 3201, Rules of Procedure of the State Bar.);

7. The period of probation must commence on the effective date of the order of the Supreme Court imposing discipline in this matter; and

8. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for four years and until he provides proof to the satisfaction of the State Bar Court of his rehabilitation, present fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii), will be satisfied and that suspension will be terminated.

It is also recommended that respondent take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and provide proof of passage to the Office of Probation during the period of actual

suspension. Failure to pass the MPRE within the specified time results in actual suspension by the Review Department, without further hearing, until passage. (But see Cal. Rules of Court, rule 9.10(b), and Rules Proc. of State Bar, rule 321(a)(1) and (3).)

It is further recommended that respondent be ordered to comply with the 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.[10]

VIII. COSTS

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

Dated: January 14, 2009.

RICHARD A. PLATEL
Judge of the State Bar Court

[10] Respondent is required to file a rule 9.20 affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1998) 44 Cal.3d 337, 341.)