FILED JUNE 25, 2009

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **STEWART W. LENZ,** **Member No. 129758,** A Member of the State Bar.	)	Case Nos. **08-O-11182-PEM; 08-O-13367 (Cons.)** **DECISION**

I. Introduction

In this consolidated default disciplinary matter, respondent **Stewart W. Lenz** is charged with multiple acts of professional misconduct in two matters, including (1) failing to perform competently; (2) failing to communicate with client; (3) failing to return client files; and (4) failing to cooperate with the State Bar.

The court finds, by clear and convincing evidence, that respondent is culpable of the alleged counts of misconduct. In view of respondent's misconduct and the evidence in aggravation, the court recommends, among other things, that respondent be suspended from the practice of law in California for one year, that execution of suspension be stayed, and that he be suspended for a minimum of 75 days and until the State Bar Court grants a motion to terminate his suspension (Rules Proc. of State Bar, rule 205).

II. Pertinent Procedural History

A. First Notice of Disciplinary Charges (Case No. 08-O-11182)

On August 27, 2008, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed and properly served on respondent a first Notice of Disciplinary Charges (NDC) at his official membership records address. Respondent did not file a response.

Respondent's default was entered on November 26, 2008, and respondent was enrolled as an inactive member on November 29, 2008. The matter was submitted on December 16, 2008.

B. Second Notice of Disciplinary Charges (Case No. 08-O-13367)

On December 8, 2008, the State Bar filed and properly served a second NDC on respondent at his official membership records address. Respondent did not file a response.

On January 27, 2009, the court consolidated the two cases. The submission date of December 16, 2008, was vacated. Respondent's default was entered on March 12, 2009, and respondent was enrolled as an inactive member on March 15, 2009.

Respondent did not participate in the disciplinary proceedings. The matter was submitted for decision on March 31, 2009, following the filing of State Bar's brief on culpability and discipline.

III. Findings of Fact and Conclusions of Law

All factual allegations of the NDCs are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).)

Respondent was admitted to the practice of law in California on December 11, 1987, and has since been a member of the State Bar of California.

A. The Leitgeb Matter (Case No. 08-O-11182)

Respondent had previously represented Joseph and Mary Leitgeb in updating their estate documents in 1996. On or about August 31, 2007, respondent was again hired by the Leitgebs to update their estate documents, at an hourly rate of $200. The Leitgebs gave respondent the following estate documents for updating:

- Second Amendment to the Leitgebs Living Trust;
- First Amendment to the the Leitgebs Living Trust;
- IRA Beneficiary Designation Agreement;
- Community Property Agreement;
- Last Will and Testament of Joseph Edward Leitgeb;
- Last Will and Testament of Mary Elizabeth Dell Leitgeb;
- Power of Attorney (Financial) – Joseph Edward Leitgeb;
- Power of Attorney (Financial) – Mary Elizabeth Dell Leitgeb
- Power of Attorney for Health Care – Joseph Edward Leitgeb;
- Power of Attorney for Health Care – Mary Elizabeth Dell Leitgeb;
- Declaration of Desire for a Natural Death – Joseph Edward Leitgeb;
- Declaration of Desire for a Natural Death – Mary Elizabeth Dell Leitgeb;
- Net Worth Statement.

On or about September 4, 2007, the Leitgebs sent respondent an e-mail, instructing him to change their successor trustee and name their daughter as the successor trustee to their existing trust. They also provided him with her address in this e-mail, which respondent received.

Subsequently, respondent did not perform the services for which he was hired, including failing to revise the Leitgebs' estate documents, and did not communicate with the Leitgebs regarding their matter. On or about October 4, 2007, the Leitgebs e-mailed respondent requesting a status report. Respondent received this e-mail but did not respond.

From on or about October 4, 2007 to in or about early November 2007, the Leitgebs made numerous telephone calls to respondent, each time leaving a message for respondent to contact them regarding their case status. Although respondent received these messages, he did not return their calls.

In or about mid-November 2007, the Leitgebs were able to contact respondent by telephone. At that time, respondent advised them that he was going through a divorce but would have the updated documents to them in about a week. But, again, respondent did not do so as promised.

On or about December 6, 2007, the Leitgebs telephoned respondent and, again, respondent did not respond.

Then on or about December 11, 2007, the Leitgebs sent a registered letter to respondent at his membership records address. Respondent received this letter and signed the registered receipt. But he did not comply with their requests; he did not complete their matter or advise them of the case status.

On or about January 8, 2008, the Leitgebs telephoned respondent again. He received this message, but failed to contact them.

From on or about January 8, 2008, to the present, despite their numerous attempts to contact him by telephone and letters, respondent failed to contact or communicate with them, failed to advise them of the status of their matter, and failed to perform the services for which he was hired.

Finally, on or about January 15, 2008, the Leitgebs sent respondent a letter to respondent's membership records address terminating his services and requesting that he return their documents so that they could hire another attorney to complete the matter. Respondent received this letter, but failed to respond to it and failed to deliver to the Leitgebs their documents. To date, respondent has yet to return the documents and property to the Leitgebs.

On or about January 25, 2008, the Leitgebs filed a complaint with the State Bar regarding respondent.

On or about March 6, 2008, a State Bar complaint analyst sent respondent at his membership records address a letter requesting that respondent provide the State Bar with a written response to the allegations of the Leitgebs. This letter was placed in a sealed envelope correctly addressed to respondent at his membership records address. The letter was properly mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business. The United States Postal Service did not return this letter as undeliverable or for any other reason. Respondent received this letter by on or about March 11, 2008, but failed to respond to the State Bar and failed to cooperate in the State Bar's investigation.

On or about April 15, 2008, a State Bar investigator sent to respondent at his membership records address a letter requesting that he provide a written response to the allegations and provide certain documents by April 29, 2008. This letter was placed in a sealed envelope correctly addressed to respondent at his membership records address. The letter was properly mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business. The United States Postal Service did not return this letter as undeliverable or for any other reason. Respondent received this letter by on or about April 21, 2008, but failed to respond to the State Bar and failed to cooperate in the State Bar's investigation.

On or about June 4, 2008, a State Bar investigator sent another letter to respondent requesting that he provide a written response to the allegations and provide certain documents by June 18, 2008. The United States Postal Service did not return this letter as undeliverable or for any other reason. Respondent received this letter by on or about June 9, 2008, but failed to respond to the State Bar and failed to cooperate in the State Bar's investigation.

On or about July 29, 2008, the State Bar, through Deputy Trial Counsel Sherrie McLetchie, sent respondent at his membership records address a letter inviting him to meet with her to discuss this matter. This letter was properly mailed by first class mail, postage prepaid, by depositing for collection by the United States Postal Service in the ordinary course of business. The United States Postal Service did not return this letter as undeliverable or for any other reason. Respondent received this letter by on or about August 4, 2008, but failed to respond to the letter. Respondent failed to cooperate in the State Bar's investigation.

Conclusions of Law

Count 1: Failure to Perform Competently (Rules Prof. Conduct, Rule 3-110(A)) [1]

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

By failing to revise the clients' estate documents for which he was hired, respondent intentionally, recklessly and repeatedly failed to perform legal services with competence in willful violation of rule 3-110(A).

Count 2: Failure to Communicate (Bus. & Prof. Code, § 6068, Subd. (m)) [2]

Section 6068, subdivision (m), provides that it is the duty of 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 repeatedly failing to respond to the Leitgebs' inquiries and by failing to keep them reasonably informed of the status of their case, respondent willfully failed to respond promptly to reasonable status inquiries of a client and failed to keep a client informed of significant

[1] References to rules are to the Rules of Professional Conduct, unless otherwise indicated.

[2] References to sections are to the provisions of the Business and Professions Code.

developments in a matter in which respondent had agreed to provide legal services, in willful violation of section 6068, subdivision (m).

Count 3: Failure to Return Client File (Rule 3-700(D)(1))

Rule 3-700(D)(1) requires an attorney whose employment has terminated to promptly release to a client, at the client's request, all the client's papers and property.

By not returning the Leitgebs' estate documents, despite their request, respondent willfully failed to promptly release, upon termination of his employment on January 15, 2008, to his client, all of the client's papers and property, in willful violation of rule 3-700(D)(1).

Count 4: Failure to Cooperate With the State Bar (Bus. & Prof. Code, § 6068, Subd. (i))

Section 6068, subdivision (i), provides that an attorney must cooperate and participate in any disciplinary investigation or proceeding pending against the attorney.

By failing to respond to the State Bar's March, April, June and July 2008 letters and failing to cooperate in the State Bar's investigation of the Leitgebs' complaint, respondent willfully failed to cooperate and participate in the disciplinary investigation, in willful violation of section 6068, subdivision (i).

B. The Genger Matter (Case No. 08-O-13367)

In or about 1991, Joan Genger hired the law firm of Stanley Pedder, now of Pedder, Hesseltine, Walker & Toth (the Pedder law firm) to represent her in an estate matter, *In re Estate of Robert Genger,* case No. P92-00416, filed in Contra Costa County Superior Court. At that time, respondent was an associate or employee at the Pedder law firm. The estate was worth in excess of several million dollars and there was significant litigation involving the late Robert Genger's interest in a corporation that he had worked for as a vice-president.

The litigation resolved in or about 1995. However, there were, and still are, several ancillary matters that need to be resolved between the parties, including the exercise, by

Genger, of various stock options pursuant to an agreement and note regarding the corporate matters.

Respondent assisted Pedder, the primary attorney who litigated the estate matters.

In or about 1998, respondent left the Pedder law firm and took Genger with him as a client. The Pedder firm maintained several boxes of files related to the litigation, but respondent took a significant amount (unknown) of the Genger legal records, files, and/or papers (the Genger file) with him when he left the Pedder firm.

In or about January 2008, Genger returned to the Pedder law firm and requested the firm to resume representation of her for the ongoing, ancillary estate matters. On or about January 22, 2008, Genger executed a written authorization for the law firm of Pedder, Hesseltine, Walker & Toth to become her attorneys of record to handle her legal affairs, and she requested, in writing, that respondent turn over to the Pedder firm all of the legal records in his possession.

At all times noted herein, respondent's law offices were located at 251 Lafayette Circle, suite 330, Lafayette, California, 94549. All letters mentioned herein, that were mailed to respondent, were mailed to respondent at this address, via United States mail, first class, postage pre-paid.

On or about March 14, 2008, Ronald Whitney, a private investigator hired by Pedder, spoke to respondent on the telephone regarding the Genger files. Whitney, on behalf of the Pedder firm, requested the return of the Genger file. In response, respondent asked Whitney to call him in the middle of the following week so that Whitney could pick up the files. On March 14, 2008, Whitney, (at respondent's request) also mailed respondent a copy of the January 22, 2008 authorization, signed by Genger, authorizing and requesting that respondent release the Genger files to the Pedder law firm.

Respondent received the March 14, 2008 letter and authorization/ release and was aware of its contents.

On or about March 19, 2008, Whitney again telephoned respondent, and left respondent a telephone message regarding the return of the Genger file. Respondent received the message but did not respond or return the Genger file.

On or about March 24, 2008, Whitney went to respondent's office and spoke directly to respondent. Respondent advised Whitney that he would have the files ready for Whitney "tomorrow."

On or about March 26, 2008, and again on March 27, 2008, Whitney called respondent on the telephone and left messages regarding picking up the Genger file. Respondent received the two telephone messages but failed to respond or otherwise return the Genger file.

On or about April 2, 2008, Pedder wrote and mailed a letter to respondent. In the letter, Pedder enclosed a copy of a letter that Pedder had written to the State Bar, complaining about respondent. Respondent's letter implicitly again, requested a return of the Genger file.

Respondent received Pedder's April 2, 2008 letter and was aware of its contents. He did not respond or otherwise return the Genger file.

On or about April 7, 2008, Pedder wrote and mailed another letter to respondent. Pedder enclosed a report from Whitney in which Whitney detailed his efforts to obtain the Genger file from respondent. Implicit in Pedder's letter was another request that respondent return the file.

Respondent received Pedder's April 7, 2008 letter and failed to respond or otherwise return the Genger file.

On or about April 10, 2008, Pedder went to respondent's law offices and met with respondent. Pedder spoke directly to respondent and requested the Genger files. Respondent

promised to deliver the files to Pedder by April 14, 2008, representing that he had some Genger files at home and some in storage in Lafayette.

To date, respondent has failed to return the Genger file to Pedder.

On or about April 7, 2008, Pedder filed a complaint with the State Bar against respondent for failing to return the Genger file.

On or about May 8, 2008, the State Bar wrote to respondent regarding the Pedder complaint, advising him to notify Pedder within 10 working days that the client file was available. Respondent received the letter and was aware of its contents. Yet, he still failed to return the file.

On or about September 3, 2008, the State Bar left a message for respondent regarding the Genger/Pedder matter. Respondent received the message and failed to respond.

On or about September 29, 2008, a State Bar investigator wrote to respondent, advising him of the Pedder complaint and requesting that respondent respond, in writing, to the complaint no later than October 13, 2008. Respondent received the letter and failed to respond or otherwise cooperate in the State Bar investigation.

On or about October 16, 2008, the State Bar investigator again wrote to respondent, asking for a response to the Genger/Pedder complaint. Respondent received the letter and failed to respond or otherwise cooperate in the State Bar investigation.

Conclusions of Law

Count 1: Failure to Return Client File (Rule 3-700(D)(1))

By not returning the Genger file, despite Genger, Pedder and Whitney's repeated requests and numerous efforts to obtain the file, respondent willfully failed to promptly release, upon termination of his employment, to his client, all of the client's papers and property, in willful violation of rule 3-700(D)(1).

Count 2: Failure to Cooperate With the State Bar (§ 6068, Subd. (i))

By failing to respond to the State Bar's May, September and October 2008 letters and telephone call or otherwise cooperate in the investigation, respondent failed to cooperate and participate in a disciplinary investigation pending against respondent, in willful violation of section 6068, subdivision (i).

IV. Mitigating and Aggravating Circumstances

The parties bear the burden of establishing mitigation and aggravation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,[3] stds. 1.2(e) and (b).)

A. Mitigation

No mitigation was submitted into evidence. (Std. 1.2(e).) However, respondent's lack of a prior record of discipline in 20 years of practice of law at the time of his misconduct in 2007 is a mitigating factor. (Std. 1.2(e)(i).) "Absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time." (*In re Young* (1989) 49 Cal.3d 257, 269.)

B. Aggravation

There are several aggravating factors. (Std. 1.2(b).)

Respondent committed multiple acts of wrongdoing by abandoning the Leitgeb matter and by failing to return important client file to Genger. (Std. 1.2(b)(ii).)

Respondent's misconduct harmed significantly Genger, who needed her documents in order for the Pedder law firm to handle her matter. (Std. 1.2(b)(iv).) Attorney Pedder informed the State Bar that as of December 4, 2008, that there are crucial documents, namely, a note and written agreement, that currently cannot be located by the corporation which is bound to honor

[3] Future references to standard(s) or std. are to this source.

the note, and that this potentially has a large financial impact on Genger's interests. It is imperative that Genger obtain this note and agreement back from respondent if it is in respondent's possession. Pedder is currently searching all Genger documents in the possession of the Pedder firm in an effort to locate this note and written agreement.

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) He had not yet returned the client files to the Leitgebs, Genger or to the Pedder law firm.

Respondent's failure to cooperate with the State Bar before the entry of his default, including filing an answer to the NDC, is also a serious aggravating factor. (Std. 1.2(b)(vi).)

V. 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.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The standards provide a broad range of sanctions ranging from reproval to disbarment, depending upon the gravity of the offenses and the harm to the victim. Standards 2.4, 2.6, and 2.10 apply in this matter.

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.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions.

Standard 2.4 provides that culpability of a member's willful failure to perform services and willful failure to communicate with a client must result in reproval or suspension, depending upon the extent of the misconduct and the degree of harm to the client.

Standard 2.6 provides that culpability of certain provisions of the Business and Professions Code must result in disbarment or suspension depending on the gravity of the offense or the harm to the victim.

Standard 2.10 provides that culpability of other provisions of the Business and Professions Code or Rules of Professional Conduct not specified in these standards must result in reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client.

The State Bar urges 90 days of actual suspension with a probation condition requiring respondent to return the client file to Genger. The State Bar cited several cases in support of its recommended level of discipline, including *In the Matter of Kopinski* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 716; *Wren v. State Bar* (1983) 34 Cal.3d 81; and *Harris v. State Bar* (1990) 51 Cal.3d 1082, whose level of discipline ranging between no actual suspension to 90 days' actual suspension.

In *Kopinski*, the attorney was suspended for six months, stayed, with two years of probation and no actual suspension for failing to communicate with clients, failing to promptly return client file, and improperly withdrawing from employment in three matters. His five years

of discipline-free practice is of little weight in mitigation. Unlike respondent, the attorney participated in the proceedings.

In *Wren*, an attorney, in practice for 22 years without a disciplinary record, represented a client in a dispute over a mobile home sold by his client. Over almost two years, the attorney had two meetings with the client, misrepresented the status of the case to the client (claimed a trial had been set when no trial date existed), and did nothing to prepare the case for filing. Moreover, the Review Department found that the attorney attempted to mislead the State Bar by giving false and misleading testimony. The attorney participated in the disciplinary proceedings. He was suspended for two years, stayed, with two years of probation and 45 days of actual suspension. Here, respondent's 20 years of discipline-free practice is also a strong mitigating factor; but his failure to participate in these proceedings is a serious aggravating factor.

In *Harris*, the attorney, admitted to practice 10 years earlier, neglected a personal injury matter for over four years and the client died during the pendency of the case, resulting in a considerable financial loss to the estate. Based on the duration of the misconduct and the seriousness of the harm suffered as a result of the misconduct, the Supreme Court suspended her for three years, stayed, with an actual suspension of 90 days. Contrary to Harris, in this instant matter, respondent's misconduct took place over several months, and not years.

In recommending discipline, the "paramount concern is protection of the public, the courts and the integrity of the legal profession." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.) Failing to appear and participate in the hearing shows that respondent comprehends neither the seriousness of the charges against him nor his duty as an officer of the court to participate in disciplinary proceedings. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507-508.) Respondent may have indicated to his client that he was going through a divorce. While the court sympathizes with respondent's personal difficulties, his failure to participate in this proceeding

leaves the court without information about the underlying cause of his misconduct or of any mitigating circumstances surrounding his misconduct.

Instead of cooperating with the State Bar or rectifying his misconduct, respondent defaulted in this disciplinary proceeding. Therefore, balancing all relevant factors – respondent's misconduct, the standards, the case law, the aggravating evidence and his lack of a prior record of discipline in 20 years of practice, the court concludes that placing respondent on a suspension for a minimum of 75 days would be appropriate to protect the public and to preserve public confidence in the profession.

VI. Recommendations

A. Discipline

Accordingly, the court hereby recommends that respondent **Stewart W. Lenz** be suspended from the practice of law in California for one year, that said suspension be stayed, and that respondent be suspended from the practice of law for a minimum of 75 days. He is to remain suspended until he files and the State Bar Court grants a motion to terminate his suspension. (Rules Proc. of State Bar, rule 205.)

It is recommended that respondent be ordered to comply with any probation conditions imposed by the State Bar Court as a condition for terminating his suspension. (Rules Proc. of State Bar, rule 205(g).)

It is also recommended that if respondent remains suspended for two years or more as a result of not satisfying the preceding conditions, he will remain suspended until he has shown proof to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law. (Standard 1.4(c)(ii) and Rules Proc. of State Bar, rule 205.)

B. Multistate Professional Responsibility Exam

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination within one year after the effective date of this order, or during the period of his suspension, whichever is longer, and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

C. California Rules of Court, Rule 9.20

If respondent remains actually suspended for 90 days or more, he must also comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule within 120 and 130 calendar days, respectively, after the effective date of this order. Willful failure to do so may result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.[4]

D. Costs

It is further 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.

Dated: June _____, 2009

PAT McELROY
Judge of the State Bar Court

[4] Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)