PUBLIC MATTER **JULY 7, 2011**

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **MICHAEL STEPHEN KUCSAN,** **Member No. 187828,** A Member of the State Bar.	)	Case No.: **09-C-11956-RAH** **DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**[1]

Introduction

In this conviction-referral proceeding, which is proceeding by default, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) is represented by Supervising Trial Counsel Kevin B. Taylor (STC Taylor). Even though respondent **Michael Stephen Kucsan** [2] has actual knowledge of this proceeding, he failed to appear either in person or through an attorney.

In February 2009, respondent was convicted of one felony count of stalking, which was enhanced as a hate crime, and one misdemeanor count of making telephone calls with the intent

[1] The Rules of Procedure of the State Bar of California were amended effective January 1, 2011. Nonetheless, the court orders the application of the former Rules of Procedure of the State Bar based on a determination that injustice would otherwise result. (See Rules Proc. of State Bar (eff. Jan. 1, 2011), Preface, item 3.)

[2] Respondent was admitted to the practice of law in the State of California on April 26, 1997, and has been a member of the State Bar since that time. He has no prior record of discipline.

to annoy. For the reasons set forth below, the court finds that the facts and circumstances surrounding respondent's convictions involved moral turpitude and concludes that the appropriate level of discipline is disbarment.

Significant Procedural History

Respondent's Conviction

On February 20, 2009, after respondent changed his pleas from nolo contendere to guilty, the Riverside County Superior Court convicted respondent on (1) one felony count of stalking (Pen. Code, § 646.9, subd. (a)) with an enhancement because it was a hate crime (Pen. Code, § 422.75, subd. (a)) and (2) one misdemeanor count of making telephone calls with the intent to annoy or harass (Pen. Code, § 653m). Thereafter, the superior court placed respondent on three years' formal probation with conditions, including 180 days in custody (30 days of which must be served in the county jail on 15 consecutive weekends and 150 days of which must be served in respondent's home under monitored house arrest); various fees and fines; and restitution to the victim in an amount that was to be determined later. On September 10, 2009, the superior court notified the State Bar that respondent's convictions were final.

Referral Order, Notice of Hearing & Respondent's Default

Thereafter, on July 22, 2010, the State Bar filed, in the State Bar Court Review Department, a certified copy of respondent's convictions together with a motion seeking respondent's summary disbarment. (Bus. & Prof. Code, § 6102, subd. (c);[3] Cal. Rules of Court, rule 9.10(a); former rules 320(a); 600(b), 602, Rules Proc. of State Bar;[4] see also *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 609, fn. 3.)

[3] Except where otherwise indicated, all further statutory references are to the Business and Professions Code.

[4] Unless otherwise indicated, all further references to "former rule or rules" are to the former Rules of Procedure of the State Bar of California (see footnote 1, above).

On August 13, 2010, the review department filed an order denying the State Bar's motion for summary disbarment. In that same order, the review department also placed respondent on interim suspension pending the final disposition of this proceeding and referred respondent's two convictions to the hearing department for a trial on the issue of whether the facts and circumstances surrounding respondent's convictions involved moral turpitude (§§ 6101, 6102) or other misconduct warranting discipline (see, e.g., *In re Kelley* (1990) 52 Cal.3d 487, 494).

On August 27, 2010, one of this court's case administrators filed and properly served, on respondent at his latest address shown on the official membership records of the State Bar of California (official address) by certified mail, return receipt requested, a notice of hearing on convictions (a copy of the review department's August 13, 2010 referral order was attached to the notice of hearing). (§ 6002.1, subd. (c); former rules 60(a),(b), 600(b).) Service, on respondent, of the notice of hearing on convictions was deemed complete when mailed even if respondent did not receive it. (§ 6002.1, subd. (c); Bowles v. State Bar (1989) 48 Cal.3d 100, 107-108; but see also *Jones v. Flowers* (2006) 547 U.S. 220, 224-227, 234.)

Respondent's response to the August 27, 2010 notice of hearing on convictions was due no later than September 21, 2010. (Former Rules 63(a), 601.) On August 27, 2010, and then again on September 22, 2010, respondent telephoned STC Taylor and, on each occasion, had a detailed discussion with Taylor about the present disciplinary proceeding (at least one of those discussions lasted almost an hour). Furthermore, in each of those detailed discussions, STC Taylor reminded respondent of respondent's duty to file a response to the notice of hearing on convictions. Respondent, however, never filed a response to the notice of hearing.

On November 4, 2010, STC Taylor sent, to respondent, a proposed stipulation resolving this proceeding. The next day, however, respondent telephoned STC Taylor and left a voicemail message for Taylor rejecting Taylor's proposed stipulation and instructing Taylor to stop

communicating with him and to proceed with the present disciplinary proceeding by way of default. Later that same day, Taylor filed and served a motion for the entry of respondent's default, which the court granted in an order filed on November 23, 2010..

Even though the court granted the State Bar's November 5, 2010 motion for entry of respondent's default, the court vacated that ruling when it became clear that the State Bar's recitation, in its motion for entry of default, of the facts and circumstances surrounding respondent's convictions was incomplete. (See former rule 604(c)(3).)

On February 25, 2011, the State Bar filed and served a first amended motion for the entry of respondent's default that contained the detailed recitation required under former rule 604(c)(3). The court granted the State Bar's first amended motion of entry of respondent's default on March 21, 2011.

On April 7, 2011, the State Bar filed a first amended brief on discipline, and the court took the matter under submission for decision without a hearing.[5]

Findings of Fact and Conclusions of Law

Conviction Referral Proceedings

In attorney disciplinary proceedings, "the record of [an attorney's] conviction [is] conclusive evidence of guilt of the crime of which he or she has been convicted." (§ 6101, subd. (a); *In re Gross* (1983) 33 Cal.3d 561, 567.) Stated differently, an attorney's conviction is conclusive proof that the attorney committed all of the acts necessary to constitute the crime of which he or she was convicted. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 110.)

[5] In its first amended brief on discipline, the State Bar proffers into evidence a certified copy of the Riverside County Sheriff's investigation file on respondent. The State Bar previously attached a copy of that same file to its February 25, 2011 first amended motion for entry of respondent's default; accordingly, the court grants the State Bar's request and admits the certified copy of the sheriff's file into evidence. (Cf. former rule 604(c)(3),(4) [now Rules Proc. of State Bar, rule 5.345(C)(2),(3)&(D)].)

At least with respect to crimes that do not inherently involve moral turpitude, such as respondent's convictions in the present proceeding, "Whether those acts amount to professional misconduct . . . is a conclusion that can only be reached by an examination of the facts and circumstances surrounding the conviction." (*In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 589, fn. 6.) That is because it is the attorney's misconduct, not the conviction, that warrants discipline. (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 935, see also *In re Gross, supra*, 33 Cal.3d at p. 568.) In determining whether the facts and circumstances surrounding an attorney's conviction involve moral turpitude or other misconduct warranting discipline, the court may consider any dismissed and pending criminal charges in addition to the charge of which the attorney was convicted. (*In re Langford* (1966) 64 Cal.2d 489, 496.)

However, because respondent's default has been entered in the present proceeding, the court may properly consider and rely on only the surrounding facts and circumstances recited (i.e., disclosed) in the State Bar's first amended motion for entry of respondent's default (former rule 604(c)(3)) when determining whether the facts and circumstances surrounding respondent's convictions involved moral turpitude or other misconduct warranting discipline. Of course, because respondent's default has been entered in this proceeding, the surrounding facts and circumstances recited in the State Bar's April 7, 2011 first amended motion for entry of respondent's default are "deemed admitted . . . and no further proof shall be required to establish the truth of such facts."

Facts and Circumstances Surrounding Respondent's Convictions

Respondent's felony conviction for stalking with a hate-crime enhancement (Pen. Code, §§ 646.9, subd. (a), 422.75, subd. (a)) alone conclusively establishes that respondent willfully, maliciously, or repeatedly followed or harassed someone and made a credible threat intending to

place that person in reasonable fear for his or her safety or for the safety of his or her immediate family. (§ 6101, subd. (a); *In re Gross, supra*, 33 Cal.3d at p. 567.)

Moreover, the facts and circumstances surrounding respondent's convictions establish that, over about the three-year period from fall 2005 through fall 2008, respondent, who is a white male, deliberately engaged in the following criminal conduct against an African-American woman who is court supervisor for the Riverside County Superior Court and who used to be one of respondent's supervisors when he used to work for the Riverside County Superior Court. The court hereafter refers to this woman as the "victim." Respondent's only explanation or justification for his criminal conduct is that it was "just a game."

In 2005, the victim worked in the courthouse in Corona, California. At that time, respondent almost routinely telephoned the victim and hung up without saying anything. Respondent made up to about 10 such hang-up calls a day. All the victim heard was either a buzzing sound or a sound similar to that heard when a caller hits his or her handset against a hard surface. During that period, respondent would intermittently stop calling the victim for a short while and then begin again.

Respondent also stopped calling the victim for a short period of time in 2006 when she was reassigned to the Historic Courthouse in Riverside. When respondent resumed calling her, the victim began to fear for her safety, and her work telephone number was changed. Thereafter, respondent stopped calling for about six months, but then resumed.

In early 2008 respondent again stopped calling the victim for a short period of time when she was reassigned back to the Corona Courthouse. In the first half of 2008, respondent made about 75 hang-up calls to the victim. In June 2008, for the first time, respondent made two calls in which he spoke to the victim. In the first such call, respondent told the victim something to the effect that "You may be able to pass as white on the outside, but I know you are black as the

ace of spades." In the second such call, respondent told the victim something to the effect that "Caller ID can be blocked." These two telephone calls seriously scared the victim because they convinced her that respondent intended to harm her. Respondent made additional calls to the victim through about September 2008.

In fall 2008, the Threat Assessment Team of the Court Services West of the Riverside County Sheriff's Department, which investigates crimes against court employees, had a wire tap put on the victim phone and though a search warrant obtained telephone company records that led it to respondent, who eventually confessed.

Conclusion Regarding Moral Turpitude

The court concludes that the facts and circumstances surrounding respondent's convictions involved moral turpitude.

Aggravation and Mitigation

Aggravation

Respondent's conduct following the commission of his crimes involved dishonesty and concealment. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(iii).)[6] Respondent lied to the deputy sheriff at least twice. First, respondent lied about his identity. Second, before admitting his guilt, respondent adamantly denied it. An attorney is not to engage in any act involving moral turpitude, dishonesty or corruption. (§ 6106.) " 'An attorney's practice of deceit involves moral turpitude.' [Citations.]" (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 888.)

Respondent demonstrated indifference towards rectification of and atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) During his initial interview by a deputy sheriff, respondent asked to write a letter of apology to the victim of his three-year harassment.

[6] All further references to standards are to this source.

The deputy sheriff left the room and gave respondent ample time to write such a letter, but when the sheriff returned, respondent had written nothing and stated that he did not have anything to write.

Mitigation

Because respondent did not appear in this proceeding, he did not establish any mitigating circumstances. Nor is any mitigating circumstance otherwise apparent from the record.

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. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

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

Standard 3.2 provides:

> Final conviction of a member of a crime petitioner [whether a felony or a misdemeanor] which involves moral turpitude, either inherently or in the facts and circumstances surrounding the crime's commission shall result in disbarment. Only if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a two-year actual suspension, prospective to any interim suspension imposed, irrespective of mitigating circumstances.

Without question, standard 3.2 counsels strongly for disbarment for both felony and misdemeanor crimes involving moral turpitude either inherently or in the surrounding facts and circumstances. In fact, " ' "disbarments, and not suspensions, have been the rule rather than the

exception in cases involving serious crimes involving moral turpitude. [Citations.]" ‘ " (*In the Matter of Rech* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 310, 317.)

The record in this proceeding does not contain any evidence of compelling mitigating circumstances. In sharp contrast, there are two aggravating circumstances: (1) respondent's misconduct was surrounded by concealment and dishonesty and (2) respondent is indifferent towards rectifying the personal harm he deliberately inflicted upon his victim and appears to lack any remorse for his crimes. Also, respondent's criminal conduct continued for almost three full years. In short, the court concludes that the appropriate level of discipline necessary to protect the public, the court, and the profession in this proceeding is disbarment. (Accord, std. 3.2.)

Recommendations

Discipline

The court recommends that **Michael Stephen Kucsan**, State Bar number 187828, be disbarred from the practice of law in the State of California and that his name be stricken from the Roll of Attorneys of all persons admitted to practice in this state.

California Rules of Court, Rule 9.20

The court further recommends that Michael Stephen Kucsan be ordered to comply with 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 proceeding.

Costs

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

Order of Involuntary Inactive Enrollment

In accordance with Business and Professions Code section 6007, subdivision (c)(4), the court orders that Michael Stephen Kucsan be involuntarily enrolled as an inactive member of the State Bar of California effective three calendar days after the service of this decision and order by mail (Rules Proc. of State Bar, rule 5.111(D)(1)).[7]

Dated: July 6, 2011.

RICHARD A. HONN
Judge of the State Bar Court

[7] This court must order respondent's involuntary inactive enrollment regardless of respondent's membership status. (Bus. & Prof. Code, § 6007, subd. (c)(4).)