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STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

PUBLIC MATTER

In the Matter of	)	Case No.: **15-O-10870-PEM**
	)	
DAVID IRA KELVIN,	)	**DECISION AND ORDER**
	)	
Member No. 95190,	)	
	)	
A Member of the State Bar.	)	

Introduction[1]

In this contested disciplinary proceeding, respondent **David Ira Kelvin** is charged with one count of failing to perform with competence in a murder trial. Respondent admitted to ineffective assistance of counsel based not on his intentional failure to competently represent his client, but on his error in judgment made in good faith.

Nevertheless, respondent is culpable of recklessly failing to perform with competence. This court is not here to punish respondent. Its primary goals are the protection of the public, the profession, and the courts, the maintenance of high professional standards, and the preservation of public confidence in the legal profession. After carefully considering all issues and evidence set forth during the three-day trial, particularly the compelling mitigation (no prior record of discipline in 33 years of practice and spontaneous steps taken to atone for the consequences of

[1] Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

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respondent's mistake), the court concludes that a private reproval is the appropriate level of discipline to address its goals.

Significant Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on September 11, 2015. And on September 23, 2015, respondent filed a response to the NDC.

Trial was held on December 8, 9, and 10, 2015. A stipulation as to facts and admission of documents was filed December 8 and admitted into evidence. Supervising Senior Trial Counsel Robert Henderson represented the State Bar. Respondent represented himself. Following closing arguments, the court took this matter under submission on December 10, 2015.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on December 16, 1980, and has been a member of the State Bar of California at all times since that date.

Case No. 15-O-10870 - The Barrow Matter

Facts

Respondent represented Maurice Gregory Barrow (Barrow) in *People v. Maurice Gregory Barrow*, Alameda County Superior Court, case No. 172072A (Barrow case). Barrow was charged and convicted of the murder of Otis Key, Jr. (Key), and the attempted murders of Craig Phillips (Phillips) and Brayan Acosta (Acosta).

Key was murdered on August 24, 2012. On November 21, 2012, Barrow was arrested and charged with the murder of Key, the attempted murders of Phillips and Acosta, two felony accounts of assault with a semi-automatic firearm on Phillips and Acosta, and possession of a firearm by a prior felon.

In or about June 2013, respondent represented Barrow. On September 24, 2013, Barrow's trial began before Judge Thomas Reardon. According to the evidence presented by the prosecution at trial, a shooting occurred on August 24, 2012, at approximately 8 p.m. on Sycamore Street in Oakland where Key was shot to death, Phillips was shot in the leg, and Acosta was hit in the neck. During the prosecution's case-in-chief, Phillips identified Barrow as one of the three shooters.

Respondent presented an alibi showing that Barrow was in Vallejo at the time of the shooting, not in Oakland. He believed that his client was innocent. But on October 29, 2013, after a 12-day trial, the jury found Barrow guilty of first degree murder, attempted murders, and other charges. Respondent was shocked by the verdicts. To this end, he immediately alerted to the need for a new trial and counsel for Barrow. After Barrow's convictions, attorney H. Ernesto Castillo (Castillo) was eventually hired to identify whether a motion for new trial was warranted.

On February 6, 2014, attorney Castillo filed a motion for new trial, arguing that Barrow was entitled to a new trial because he received ineffective assistance of counsel.[2]

On January 26, 2014, respondent submitted a declaration, which was filed on March 17, 2014, in the Barrow case, stating, among other things, that: "There is no doubt in my mind that if I properly presented the defense by introducing the AT&T records and serving a subpoena on the defendant's relative in Vallejo, the result would have been an acquittal."

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[2] The test for determining whether respondent's performance was ineffective is whether his performance at trial fell below an objective standard of reasonableness. Once it is determined that his performance at trial fell below an objective standard of reasonableness, the court inquires whether there is a reasonable probability that, but for his unprofessional errors, the result would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) If the court determines that counsel was ineffective and that there is a reasonable probability that but for the counsel's professional errors that the result would have been different, a new trial must be granted. A court hearing on ineffectiveness claim must consider the totality of the evidence before the judge or jury. (*Id.* at pp. 694-695.)

On January 14, 2015, respondent submitted another declaration in the Barrow case, declaring, among other things, that: "There is no question in my mind that had I presented all of the evidence corroborating Mr. Barrow's whereabouts and his alibi witnesses, the result of his trial would be an acquittal."

On April 10, 2015, there was a hearing on Barrow's motion for new trial in which respondent testified. At the hearing, Judge Reardon found respondent's work to be ineffective, stating: "[Kelvin's] failure to know what a Clipper card was or examine what a Clipper card was, his failure to be more diligent about what records either he had or the Court had in regard to Ms. Vega's cell phone records, his failure to hire an investigator in a murder case, his failure to find out more information or send somebody out in that regard to locate this - - potentially locate this other person who was in the car or to make some steps to secure Mr. McDaniel's presence or seek some continuance from the Court to do that, all of that together adds up to, in my mind, ineffective assistance of counsel and below the appropriate legal standards."

After finding that respondent's performance was below the appropriate legal standards, Judge Reardon turned his attention to "whether there was a reasonable possibility, this new information would have raised a reasonable doubt in the minds of the jury." He basically stated that given the weaknesses of the prosecution's case, there was a reasonable possibility if this information had been presented to the jury, it might have raised a reasonable doubt as to Barrow's guilt.[3]

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[3] Under *Strickland,* it should be noted that the standard is not "reasonable possibility" but reasonable probability. "Probable; likely; possible" – these words – in order of decreasing strength – express gradations of the relative chance that something might happen. (Garner, Dict. of Modern Legal Usage (2d ed. 1995) p. 693.) Probability is defined as an event that is likely to be or become true or real. (Webster's 9th New Collegiate Dict. (1990) p. 937.) But possibility is defined as an event that may or may not happen. (Black's Law Dict. (7th ed. 1999) p. 1185.)

On April 10, 2015, the verdicts were vacated and a retrial was ordered. The trial is now pending in Alameda County Superior Court.

Conclusions

Count 1 - (Rule 3-110(A) [Failure to Perform Legal Services with Competence])

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

Despite the short time frame of four months to prepare for such a serious criminal matter, respondent had represented Barrow with due diligence. Unfortunately, his performance was below the objective standard of reasonableness. His misconduct need not involve deliberate wrongdoing or a purposeful failure to attend to the duties due to a client. (*King v. State Bar* (1990) 52 Cal.3d 307, 314.) Contrary to respondent's contentions, an attorney's acts need not be shown to be willful where there is repeated failure of the attorney to attend to the needs of the client. (*Kapelus v. State Bar* (1987) 44 Cal.3d 179, 188.) In this matter, respondent repeatedly failed to provide certain corroborative evidence to support Barrow's alibi whereabouts.

In fact, Judge Reardon had determined that respondent's multiple acts of omission were outside a wide range of professional competent assistance. Therefore, respondent provided ineffective assistance of counsel to Barrow. Accordingly, this court finds that respondent recklessly failed to competently perform legal services on behalf of Barrow by failing to introduce the AT&T records and failing to serve a subpoena on Barrow's relative in Vallejo, in willful violation of rule 3-110(A). (*In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354 [where an attorney acted in good faith, and was kept in the dark by his associate, his good faith did not relieve the attorney from culpability for failure to perform services competently].)

Aggravation[4]

There is no clear and convincing evidence in aggravation.

Uncharged Violations (Std. 1.5(h).)

Marlena Cohen, Barrow's present wife,[5] testified that she hired respondent on behalf of Barrow and paid him the legal fees. Respondent did not obtain Barrow's written consent. The State Bar argued that respondent's failure to obtain the client's informed written consent was aggravation as an uncharged violation of rule 3-310(F), which requires a client's informed written consent when accepting compensation from a non-client.

The court declines to find this uncharged misconduct because the State Bar had ample opportunity but did not move to amend the NDC to include the new charge; therefore, respondent did not have sufficient notice or opportunity to defend against it. (*In the Matter of Lenard* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 250.)

Harm to Client/Public/Administration of Justice (Std. 1.5(j).)

The State Bar also argued that respondent's failure to perform legal services with competence is an aggravating circumstance because it harmed the administration of justice. The court disagrees.

Where harm to the administration of justice is inherent in respondent's ineffective assistance of counsel, it would be duplicative to find such harm as an aggravation factor. (*In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229.)

Mitigation

Respondent has several compelling mitigating factors.

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[4] All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

[5] At the time respondent was hired, Cohen was not Barrow's wife.

Prior Record of Discipline (Std. 1.6(a).)

Respondent's lack of a prior record of discipline in 33 years of practice at the time of his misconduct is a significant mitigating factor. (*In the Matter of Smithwick* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 320 [attorney's 30-year discipline-free practice is given significant weight in mitigation]; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [discipline-free record is most relevant when misconduct is aberrational and unlikely to recur].)

Good Faith (Std. 1.6(b).)

In order to establish good faith as a mitigating circumstance, respondent must prove that his beliefs were both honestly held and reasonable. (*Sternlieb v. State* Bar (1990) 52 Cal.3d 317, 331.) Respondent's conduct in hindsight might be viewed as reckless. But when respondent represented Barrow during the four-month period, he honestly and reasonably believed that his client was innocent, that he worked very hard to be prepared and to effectively represent Barrow, and that the weight of prosecution's evidence was light. He was the third defense attorney when he took over the Barrow case. He believed that the large number of counsel working on the case was partially responsible for the conviction of an innocent man. Also, because his client refused to waive time, despite respondent's opposition, respondent had less than four months to review the files and put on the trial. He was paid $2,500 to represent Barrow charged with one murder and two attempted murders. Respondent in good faith thought Barrow's defense was ironclad.

Respondent testified that he seldom hires investigators in most of his cases. Because he in good faith believed that Barrow was innocent of all charges, he did not hire an investigator for the case. Castillo, Barrow's new attorney, testified that in his 13 years of practice where his caseload is 100% criminal, there are times when hiring an investigator is unnecessary even in a murder case.

Respondent thought that since the prosecution's witnesses were such liars and had criminal records, he did not have to put on much corroborating evidence to support Barrow's alibi witness, Alicia Vega, who testified that he was with her in Vallejo and not at the scene of the crime. He believed that because the jury was instructed that when two inferences could be drawn – one pointing to innocence (Barrow was in Vallejo and not in Oakland) and the other to guilt (Barrow was in Oakland), the jury had to pick the inference pointing to innocence. Consequently, he did not pay much attention to the AT&T records and did not present them into evidence.

And as to not subpoenaing the witness, respondent reasonably assumed that since the person was a friendly witness, he relied on the witness's word that he would come in and testify. Respondent's assumption was incorrect. Respondent may have been overconfident, but his beliefs were held honestly and reasonably.

Furthermore, it is undisputed that he did an effective job in cross-examining Phillips, the victim and key witness identifying Barrow. Respondent produced evidence through the Sprint phone records that Barrow was in Vallejo at the time of the shooting. He thought that those records were enough. He also introduced evidence that Phillips was lying. For example, Phillips said the shooters had long assault weapons when the evidence was that the killing was done by men with pistols. Respondent thought eliciting impeachment evidence and discrepancies was enough. He was obviously wrong.

In view of the circumstances surrounding his reckless failure to perform competently, respondent's good faith belief, which was held honestly and reasonably, that there was no need to present the additional corroborating evidence is a strong mitigating factor.

Candor/Cooperation to Victims/State Bar (Std. 1.6(e).)

Respondent cooperated with the State Bar by entering into a stipulation as to facts.

Respondent displayed spontaneous candor and cooperation to his client and the court in the Barrow case, which is a significant mitigating factor. Immediately after the guilty verdict, he alerted the trial court that if he had "properly presented the defense by introducing the AT&T records and serving a subpoena on the defendant's relative in Vallejo, the result would have been an acquittal." Respondent was cooperative, took full responsibility for his failure to present corroborative evidence, and recognized Barrrow's need of new counsel and a new trial. (See *In the Matter of Lybbert* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 297, 304 [strong mitigation where an attorney, after authorities' discovery of welfare fraud committed by him and his wife, was cooperative and remorseful, took full responsibility, and stipulated to most of the facts at the State Bar hearing].)

Before the client filed a complaint, respondent filed a declaration in support of a new trial in January 2014, admitting his fault. As a result, a motion for new trial was immediately filed in February 2014 and a hearing was held in April 2015, wherein Judge Reardon vacated the verdicts and ordered a new trial. This greatly conserved resources and sped up process. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 ["more extensive weight in mitigation is accorded those who ... willingly admit their culpability as well as the facts"].)

Good Character and Service to Others (Std. 1.6(f).)

Three former clients testified to respondent's good character. Because two of them were not fully aware of the charge against respondent, the weight to be accorded to his good character evidence is diminished.

Yet, based on their testimony, it is clear that respondent has contributed in significant ways to his community and helped those in need. Randolph Walker testified that respondent transferred to him a home that needed repairs. After some years, a lien was placed on the home

and a notice of trustee sale was later placed on the home. Walker, who was originally from Mississippi, ignored all notices/summons until there was a foreclosure. The home was auctioned off and Walker was evicted from the property. When respondent became aware of the problem, he pursued legal remedies free of charge on behalf of Walker; as a result, Walker was able to get his home back.

Darisha Moran testified that respondent represented her in three different criminal cases including illegal possession of a firearm and an assault. He did not charge her for his representation. His only request was that she attend and graduate from college. She attributes her attainment of a B.A. in international business from San Francisco State University to his legal services and his belief in her abilities.

Stephen Debrunner, a former deputy sheriff, testified that respondent represented him in a case at a significantly reduced rate. During the years 2010-2012, respondent took into his home the daughter of an imprisoned man. This gave the girl a stable home for two years.

For 10 years, respondent was on the board of directors of The Urban Strategies Council, an organization that works in education, economic opportunities, and community safety and justice to eliminate persistent poverty in Oakland. Civic service can deserve recognition as a mitigating circumstance. (*Porter v. State Bar* (1990) 52 Cal.3d 518, 529.)

Based on the above, the court concludes that respondent's pro bono work and community service is a mitigating circumstance.

Remorse/Recognition of Wrongdoing (Std. 1.6(g).)

Respondent is entitled to significant mitigation for his remorse and recognition of his mistake for taking prompt objective steps to atone for the error. He exhibited overwhelming and immediate remorsefulness for his performance. When the jury came back with a guilty verdict, respondent spontaneously raised the issue of a need for a new trial. The court then appointed

another counsel. That counsel was relieved and Barrow hired a new lawyer, H. Ernesto Castillo, to look into the issue of a need for a new trial. Respondent cooperated with Castillo and submitted a declaration where he detailed errors he had made in trial. This declaration was essential to Barrow getting a new trial. Respondent was selfless as he was willing to risk his law license to insure a new trial for his client.

The court finds respondent's selfless and remorseful act in admitting ineffective assistance of counsel a compelling mitigating factor. He demonstrated genuine and spontaneous contrition, acknowledged he had committed an error in judgment, and tried to atone for his mistake.

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney but to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.1; *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 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) 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.)

Standards 1.7(b) and 1.7(c) provide, in pertinent part, that the specific sanction for the particular violation found must be balanced with any mitigating or aggravating circumstances,

and if the net effect demonstrates that a greater or lesser sanction is needed to fulfill the primary purposes of discipline then it is appropriate to impose or recommend a greater or lesser sanction.

Standard 2.7(c) is applicable to the misconduct in this matter. Standard 2.7(c) provides that suspension or reproval is the presumed sanction for performance, communication, or withdrawal violations, which are limited in scope or time. The degree of sanction depends on the extent of the misconduct and the degree of harm to the client or clients.

The State Bar asks that respondent be given a one-year stayed suspension due to his deficient performance.

Respondent argues that he did not commit the misconduct with any intent, that he worked very hard to be prepared and to effectively represent Barrow, and that the conviction was the result of a combination of respondent underestimating the weight of the prosecution's evidence and the prejudicial contribution of Barrow.

The court finds these cases instructive.

In *In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439, the attorney was found culpable of a single "common law" failure to communicate with a client. Because of his 40 years of practice without prior discipline, the review department determined that the private reproval which would otherwise be the appropriate discipline would be improperly punitive, and that the matter should be disposed of by admonition.

In *In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 175, the attorney was privately reproved for his repeated failure to perform services competently in a probate case by failing to ensure that his client knew the amount of state inheritance tax assessed against the client.

In *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, the attorney was culpable of commingling and failing to retain disputed funds in trust. He had over

40 years of practice (his one prior private reproval was so remote in time that it was discounted). The review department noted that if the attorney had promptly resolved the matter, no discipline would have been appropriate. But because he delayed it for a year, he was privately reproved.

In this matter, respondent did promptly inform the court of his omissions at trial. Once he realized his error, respondent, holding his client's interests above his own, immediately cooperated with Barrow's defense and atoned for his ineffective assistance of counsel. But his error in judgment was too serious for this court to dispose the matter with an admonition. His failure to uphold the standard of objective reasonableness under *Strickland* must be addressed.

Respondent, an experienced criminal attorney, knew or should have known that more corroborative evidence was needed to advocate on behalf of his client and that a not guilty verdict is never guaranteed. He had miscalculated the strength of the prosecution's evidence and the mindset of the jury. Indeed, his misconduct was reckless, albeit unintentional.

Yet, significant in the present matter is respondent's extensive demonstration of mitigation. Respondent has no prior record of discipline; he made his mistake in good faith; he expressed remorse, candor, cooperation, and atonement; and he has provided community service and demonstrated strong commitment to helping others. While respondent's failure to provide effective assistance of counsel violates the high professional standards demanded of attorneys and harms the preservation of public confidence in the legal profession, his 33 years of discipline-free practice are persuasive evidence that his misconduct was aberrational. Therefore, the court concludes that a private reproval is the appropriate level of discipline. More importantly, to impose anything higher than a private reproval under the facts of this case puts a chilling effect on defense attorneys in taking significant steps to mitigate their errors.

Order

It is ordered that respondent **David Ira Kelvin,** State Bar Number **95190**, is privately reproved. The private reproval will be effective when this decision becomes final. (Rules Proc. of State Bar, rule 5.127(A).) Based on the nature and extent of respondent's misconduct, the court does not order any conditions attached to his reproval.

Costs

No costs are awarded to the State Bar in accordance with section 6086.10.

Dated: February 10, 2016

PAT McELROY
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on February 10, 2016, I deposited a true copy of the following document(s):

DECISION AND ORDER

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

DAVID IRA KELVIN
2307 BUENA VISTA AVE
STOCKTON, CA 95204

☐ by certified mail, No. , with return receipt requested, through the United States Postal Service at , California, addressed as follows:

☐ by overnight mail at , California, addressed as follows:

☐ by fax transmission, at fax number . No error was reported by the fax machine that I used.

☐ By personal service by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Robert A. Henderson, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on February 10, 2016.

George Hue
Case Administrator
State Bar Court