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Attorneys for Respondent: Emahn Counts

FILED
JUL 28 2016
STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of:) Case Nos. 15-O-14756; 15-O-15517
EMAHN COUNTS,) Judge: William Kearsce McGill
No. 231368,)
) **ANSWER TO NOTICE OF DISCIPLINARY**
) **CHARGES**
A Member of the State Bar.)
_____)

Pursuant to Rule 5.43 of the Rules of Procedure of the State Bar of California, Respondent Emahn Counts, by and through his attorney of record, Edward O. Lear, hereby submits the following response to the Notice of Disciplinary Charges:

Respondent hereby generally denies each and every allegation of the Notice of Disciplinary Charges, and submits that there is no violation of any Rule of Professional Conduct.

In response to the specific allegations set forth in the Notice of Disciplinary Charges ("NDC"), Respondent Emahn Counts asserts the following on information and belief:

JURISDICTION

1. In response to Paragraph 1 of the NDC, Respondent is and has been a current member of the State Bar of California, licensed to practice law for over 12 years since 6/3/2004, and without any record of discipline.



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COUNT ONE

Case No. 15-O-14756

[\$3,300 credit card charge]

2. Respondent objects to the allegations of Paragraph 2 of the NDC because they are compound and intertwined with legal conclusions. Notwithstanding said objection, Respondent generally denies the allegations and conclusions contained in Paragraph 2 of the NDC.

Specifically, Respondent admits that his client’s credit card was charged for \$3,300 for attorney fees pursuant to his client’s written authorization. Respondent denies that the charge was “unilateral”. Respondent denies that the charge “without prior knowledge, authorization, or consent.” Respondent denies that the charge was made with “dishonesty”. Respondent denies that the charge was made with “gross negligence”. Respondent denies that the charge was “wrongful.” Respondent denies the assertion that charging a credit card pursuant to a written authorization agreement constitutes “moral turpitude” or “dishonesty.”

COUNT TWO

Case No. 15-O-14756

[\$2,730 credit card charge]

3. Respondent objects to the allegations of Paragraph 3 of the NDC because they are compound and intertwined with legal conclusions. Notwithstanding said objection, Respondent generally denies the allegations and conclusions contained in Paragraph 3 of the NDC.

Specifically, Respondent admits that his client’s credit card was charged \$2,730 for attorney fees pursuant to his client’s written authorization. Respondent denies that the charge was “unilateral”. Respondent denies that the charge “without prior knowledge, authorization, or consent.” Respondent denies that the charge was made with “dishonesty”. Respondent denies that the charge was made with “gross negligence”. Respondent denies that the charge was “wrongful.” Respondent denies the assertion that charging a credit card pursuant to a written authorization agreement constitutes “moral turpitude” or “dishonesty.”

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COUNT THREE

Case No. 15-O-14756

[\$2,560 credit card charge]

4. Respondent objects to the allegations of Paragraph 4 of the NDC because they are compound and intertwined with legal conclusions. Notwithstanding said objection, Respondent generally denies the allegations and conclusions contained in Paragraph 4 of the NDC.

Specifically, Respondent admits that his client's credit card was charged \$2,560 for attorney fees pursuant to his client's written authorization. Respondent denies that the charge was "unilateral". Respondent denies that the charge "without prior knowledge, authorization, or consent." Respondent denies that the charge was made with "dishonesty". Respondent denies that the charge was made with "gross negligence". Respondent denies that the charge was "wrongful." Respondent denies the assertion that charging a credit card pursuant to a written authorization agreement constitutes "moral turpitude" or "dishonesty."

COUNT FOUR

Case No. 15-O-14756

[Fiduciary Duty – credit card charges]

5. Respondent objects to the allegations of Paragraph 5 of the NDC because they are compound and intertwined with legal conclusions. Notwithstanding said objection, Respondent generally denies the allegations and conclusions contained in Paragraph 5 of the NDC.

Specifically, Respondent admits that his client's credit card was charged for \$3,300, \$2,730, and \$2,560 (collectively a total of \$8,590), for attorney fees pursuant to his client's written authorization. Respondent denies that the charges were made "without prior knowledge, authorization, or consent." Respondent denies the assertion that charging a credit card pursuant to a written authorization/cancellation agreement constitutes "moral turpitude" or "dishonesty."

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COUNT FIVE

Case No. 15-O-14756

[Competent Performance – credit card charges; employee supervision; work product]

6. Respondent objects to the allegations of Paragraph 6 of the NDC because they are compound and intertwined with legal conclusions. Notwithstanding said objection, Respondent denies the allegations contained in Paragraph 6 of the NDC.

Specifically, Respondent admits that his staff charged the credit card for attorney fees pursuant to his client’s written authorization. Respondent also admits that his staff submitted a form with a simulated signature without Respondent’s knowledge. Respondent also admits that a discovery motion was denied resulting in \$ 800 in discovery sanctions for attorney fees.

Respondent, in good faith, refunded all disputed credit card charges for attorney fees and court costs. Respondent denies the assertion that any of these 3 circumstances constitutes an “intentional, reckless, or repeated failure to perform legal services with competence”.

COUNT SIX

Case No. 15-O-15517

[Communication with client]

7. Respondent objects to the allegations of Paragraph 7 of the NDC because they are compound and intertwined with legal conclusions. Notwithstanding said objection, Respondent denies the allegations contained in Paragraph 7 of the NDC.

Specifically, Respondent admits he was hired to perform various legal services on a real estate breach of contract/collections matter pursuant to retainer agreement executed 9/2/15 and which by its own express terms did not take effect until the date of the required retainer payment (9/8/15). Respondent admits that he determined that his client’s mechanic’s lien could not be renewed on 9/9/15. Respondent admits that he informed his client of the need to discuss this development on 9/9/15, and that on 9/18/15 his client scheduled a meeting for 9/21/15 to discuss the development and that the development was discussed at the meeting on 9/21/15.

1 Respondent denies the assertion that informing a client of the specifics of a development
2 within less than 2 weeks of the development – without any harm to the client’s legal matter –
3 constitutes a “failure to keep reasonably informed of significant developments”.

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6 **FIRST AFFIRMATIVE DEFENSE**

7 **(Failure to State Sufficient Facts)**

8 The NDC, including all counts, fails to state facts sufficient for discipline, and should be
9 dismissed in its entirety.

10 **SECOND AFFIRMATIVE DEFENSE**

11 **(Burden of Proof and Due Process)**

12 The NDC is based on factual acts that do not have reportable discipline under California
13 State Bar law. At the time of the incidents alleged, there was and is no California State Bar decision
14 as to whether an attorney can charge a client’s preauthorized credit card for attorney fees if client
15 later attempts to revoke the credit card authorization after the benefits have already been received -
16 and without following the revocation policy terms set forth in the authorization agreement. The
17 State Bar cannot meet the required standard of clear and convincing evidence in proving that
18 Respondent’s conduct amounted to disciplinable misconduct. The State Bar should not follow or
19 consider out-of-state opinions or non-published opinions in violation of Respondent’s right to due
20 process. All counts for moral turpitude related to the credit card authorization should be dismissed
21 in their entirety.

22 **THIRD AFFIRMATIVE DEFENSE**

23 **(Good Faith Belief)**

24 Respondent acted under an objectively reasonable good faith belief in light of the totality of
25 the circumstances surrounding Respondent’s charge of his client’s credit card for attorney fees
26 pursuant to the contract signed by the parties, contract law, and state bar ethics advice. There is no
27 moral turpitude, dishonesty, or recklessness in charging a client’s credit card in accordance with a
28 contractual authorization pursuant to contract law. The facts on which some or all of the NDC

1 charges are based constitute, at most, mistake, neglect, or error, and do not rise to the level of willful
2 misconduct; all counts for moral turpitude should be dismissed in their entirety.

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4 **FOURTH AFFIRMATIVE DEFENSE**

5 **(Lack of Actual Harm)**

6 Client suffered no actual harm as Respondent refunded all disputed credit card charges in
7 good faith and out of an abundance of caution.

8
9 **SIXTH AFFIRMATIVE DEFENSE**

10 **(Written Contractual Authorization is Binding)**

11 Client agreed by written contractual authorization for his credit card to be charged for
12 attorney fees as invoiced, including the 3 charges in December 2013, February 2014, and March
13 2014.

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15 **SEVENTH AFFIRMATIVE DEFENSE**

16 **(Contractual Agreement for Revocation Policy and Dispute Resolution is Binding)**

17 Client agreed by written contract not to revoke authorization to charge credit card for
18 payment of attorney fees until attorney is relieved as counsel (or client makes payment by check).
19 Furthermore, there was a contractual agreement between the attorney, client, and the credit card
20 company to follow the specific revocation policy set forth in the contract and to handle dispute
21 resolution through the credit card company.

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26 **EIGHTH AFFIRMATIVE DEFENSE**

27 **(Contract Law is Binding)**

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1 Under black letter contract law, a credit card authorization contract cannot be unilaterally
2 revoked by a client absent mutual agreement, mistake, or fraud; none of which were present. State
3 Bar should follow applicable contract law and find there is not a valid unilateral revocation by a
4 client. [see State Bar of California Committee on Prof. Responsibility Formal Opinion 2007-172]

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TENTH AFFIRMATIVE DEFENSE

(Acts in Accordance with Contract and Contract Law)

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ELEVENTH AFFIRMATIVE DEFENSE

(Client Perjured Testimony is Unreliable)

11 Client (David Melamed) engaged in dishonesty and outright perjury in denying his prior
12 authorizations (as verified by written correspondence), and in denying his prior oral withdrawal of
13 his attempted revocation, making him a non-credible witness for the State Bar to rely upon in
14 making its case.

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TWELFTH AFFIRMATIVE DEFENSE

(Immaterial and Duplicative Charges)

18 The NDC is based on facts containing irrelevant statements, material omissions,
19 inappropriate charges, and duplicative charges; all of which should be stricken. [*Bates v. State Bar*
20 (1990) 51 Cal.3d 1056, 1060; *In the Matter of Lilley* (Rev. Dept. 1991) 1 Cal. State Bar Ct. Rptr.
21 476, 585]

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THIRTEENTH AFFIRMATIVE DEFENSE

(Lack of Knowledge and Isolated Incident re: Employee Supervision)

26 Respondent did not know or have reason to know his staff simulated his client's name on a
27 court fax cover sheet. Furthermore, the simulation of the client's name by Respondent's staff
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1 constituted an isolated incident, and does not constitute sufficient grounds for meeting State Bar's
2 burden of proof of clear and convincing evidence in proving an intentional, reckless, or repeated
3 failure to perform with competence.

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5 **FOURTEENTH AFFIRMATIVE DEFENSE**

6 (Insufficient Evidence re: Competence)

7 Respondent's denied motion to compel responses, does not constitute sufficient grounds for
8 meeting State Bar's burden of proof of clear and convincing evidence in proving an intentional,
9 reckless, or repeated failure to perform with competence.

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11 **FIFTEENTH AFFIRMATIVE DEFENSE**

12 (Insufficient Evidence re: Informing Client of Significant Development)

13 Respondent's discussion of a matter with a client pursuant to a scheduled appointment within
14 two (2) weeks of a research finding does not constitute failure to inform client of a significant
15 development. There is not clear and convincing proof of any ethical violation.

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17 **SIXTEENTH AFFIRMATIVE DEFENSE**

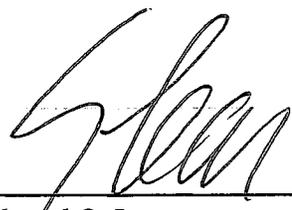
18 (Reproval is Maximum Appropriate Discipline, if any, under Mitigating Circumstances)

19 Assuming any discipline against Respondent were found to be required, the maximum level
20 in light of the mitigating circumstances present, is a Reproval. The mitigating circumstances include
21 the following: the lack of any prior discipline during 12 years of practice; objectively reasonable
22 good faith belief on the part of Respondent in his actions (no dishonesty); the lack of actual harm to
23 the client, the public, or the administration of justice; incident occurred over three years ago;
24 corrective measures taken to revise credit card revocation policy and the issue is not likely to
25 reoccur; full cooperation and candor with the State Bar in its investigation; extraordinary character
26 references; and full restitution of disputed attorney fees refunded to client.

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28 DATED: July 28, 2016

CENTURY LAW GROUP LLP

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Edward O. Lear
Attorney for Respondent: Emahn Counts

DECLARATION OF SERVICE BY PERSONAL SERVICE

Re: In the matter of Emahn Counts

No.: 15-O-14756; 15-O-15517

I, Kathy Ferrera, declare:

I am over the age of 18 years and not a party to the within action. My business address is 5200 W. Century Blvd., Suite 345, Los Angeles, California 90045, in the County of Los Angeles.

On July 28, 2016 I caused to be personally serve, the attached:

ANSWER TO THE NOTICE OF DISCIPLINARY CHARGES

on:

Anand Kumar Deputy Trial Counsel 845 S Figueroa Street Los Angeles, CA 90017	
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and this declaration was executed at Los Angeles, California, on July 28, 2016.


Kathy Ferrera