

PUBLIC MATTER – DESIGNATED FOR PUBLICATION

FILED DECEMBER 5, 2005

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of

Stephine M. Wells

A Member of the State Bar.

01-O-00379

OPINION ON REVIEW

Respondent, Stephine M. Wells, was admitted to the practice of law in California in 1984. In 1996, respondent moved to South Carolina, and while a resident there, she practiced law without a license. Although respondent's unauthorized practice of law is of serious concern, we are perhaps even more concerned with her overreaching of her clients and her dishonesty with officials in both California and South Carolina, who were responsible for investigating her misconduct.

The hearing judge found clear and convincing evidence that respondent was culpable of two counts of violating California Rules of Professional Conduct, rule 1-300, subdivision (B), which prohibits the practice of law in another jurisdiction where to do so would be in violation of that jurisdiction's regulation of the profession.¹ In addition, the hearing judge determined that respondent was culpable of charging an illegal fee, failing to return unearned fees, failing to maintain funds in a trust account, and three acts of misconduct involving moral turpitude. The

¹South Carolina Code (SCC) section 40-5-310, which proscribes the unauthorized practice of law, provides: "No person may practice or solicit the cause of another person in a court of this State unless he has been admitted and sworn as an attorney. A person who violates this section is guilty of a felony. . . ."

kwiktag*

022 603 420



hearing judge recommended that respondent be placed on probation for two years, with conditions, including six months' actual suspension. Both respondent and the State Bar appeal.

We review the record de novo (*In re Morse* (1995) 11 Cal.4th 184, 207), although we give great weight to the credibility determinations made by the hearing judge, who saw and heard the parties testify. (Rules Proc. of State Bar, rule 305(a); *Franklin v. State Bar* (1986) 41 Cal.3d 700, 708.)² Based upon the record, including the parties' stipulations, the exhibits and the testimony in the hearing below, we adopt most of the hearing judge's findings, with modifications that ultimately do not affect the degree of discipline recommended. Accordingly, we recommend that respondent be suspended for two years, stayed, with two years' probation on the condition she be actually suspended for six months and until respondent pays restitution equal to the amount of the fees collected, plus interest, for her unauthorized legal representation of Lance Amyotte and Hana Odeh in South Carolina. We believe this discipline is adequate to protect the public, the courts, and the profession.

I. FACTUAL AND PROCEDURAL BACKGROUND

Respondent has practiced law in California since 1984. The focus of respondent's practice has been employment discrimination claims under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) (Title VII). She has one prior discipline in 1993, a private reproof, for misconduct in a one-client matter involving commingling personal funds in a client trust account, and in a second matter where she represented a client without a retainer agreement, and failed to place a disputed fee in her client trust account.

In August of 1996, respondent moved to Lake Wylie, South Carolina, and bought a home after her marriage to Calvin Moragne. She considered Lake Wylie her "home base," although

²The hearing judge found that respondent, as well as the two complaining witnesses, Lance Amyotte and Hana Odeh, "were not entirely credible in their testimony."

she spent a significant amount of time commuting to San Francisco, where she continued to represent clients.

After she moved to Lake Wylie, respondent practiced employment law from her home until it became too crowded for her to continue there. In June or July of 1999 she rented space in a building close to her home, which she claims she used only as her "administrative office." However, respondent and two clerical personnel used the office on a regular basis, and the two complaining witnesses testified they were interviewed at length by respondent in this office in connection with their respective employment discrimination cases. In addition to maintaining the Lake Wylie office, respondent listed herself in the local phone book as "attny." and she printed a business card, which read: "Stephine M. Wells-Moragne, Esquire, 4605 Charlotte Highway, Suites 5-6, Lake Wylie, South Carolina 29710." The business card contained the following notation: "Member of the California Bar and of counsel for Mariano F. Cruz [with local telephone and facsimile numbers]."³ In addition to her legal representation of the two complaining witness (see discussion below in Case No. 01-O-00379 and Case No. 01-O-00659), respondent represented at least seven other clients in various matters in state and federal courts while she was a resident of South Carolina.

Respondent closed her Lake Wylie office in early 2001, returned to California, re-established residency and divorced Moragne. Respondent was not admitted as an attorney in South Carolina during the entire time she resided there.

The State Bar filed a 13-count Notice of Disciplinary Charges (NDC) on September 25, 2002, and respondent filed an Answer on October 25, 2002. An Amended NDC was filed on

³Mariano Cruz was an attorney with offices in Rock Hill, South Carolina, who briefly moved into respondent's office in Lake Wylie and worked with her on one case, as discussed below.

April 7, 2003, and a response was filed by respondent on April 28, 2003. Two counts in the NDC alleging violations of Business and Professions Code section 6068, subdivision (a),⁴ were dismissed by order of the court upon request of the State Bar at a pretrial conference. On June 24, 2003, the parties entered into a Stipulation as to Facts and Admission of Documents (“Stipulation”). A five-day trial commenced on the same date, and the matter was submitted on December 16, 2003. The hearing judge filed her decision on March 11, 2004, finding respondent culpable of two counts of Unauthorized Practice of Law (UPL) in another jurisdiction, in violation of Rules of Professional Conduct, rule 1-300, subdivision (B);⁵ and violations of rule 4-200, subdivision (A) [charging an illegal or unconscionable fee]; rule 3-700, subdivision (D)(2) [failure to return unearned fees]; rule 4-100, subdivision (A) [failure to maintain funds in trust account]; and section 6106 as the result of three separate acts of misconduct involving moral turpitude. She recommended that respondent be suspended for two years, stayed, with an actual suspension of six months and that she pay restitution to the two clients for the fees she charged and collected.

Respondent stipulated that she practiced law while she was a resident of South Carolina. Nevertheless, she argues on appeal that she is not culpable under rule 1-300(B) because she maintains her professional activities in South Carolina were confined to federal employment discrimination claims. As such, she asserts state regulation of her law practice was preempted by federal law. Respondent also challenges this court’s jurisdiction and further claims these proceedings violate her due process rights. Finally, respondent maintains that there was

⁴All further references to “section” are to the Business and Professions Code, unless otherwise noted.

⁵All further references to “rule” are to the Rules of Professional Conduct, unless otherwise noted.

insufficient evidence of UPL as to one client and that her actions did not constitute moral turpitude. Respondent accordingly asks that we reverse the hearing judge's culpability determinations, with the exception of her failure to maintain a client trust account in one client matter, to which she stipulated, and remand this matter for a new discipline determination by the hearing department. The State Bar also is appealing from the decision below, seeking additional culpability findings and asking for disbarment as the appropriate discipline.

II. FINDINGS OF FACTS AND CULPABILITY DISCUSSION

A. The Amyotte Matter (Case No. 01-O-00379)

1. Factual Findings

On January 22, 2000, Lance Amyotte, a resident of South Carolina, hired respondent to represent him in a sexual harassment case arising from his employment by Huddle House, Inc. in York, South Carolina. Amyotte worked as an assistant manager trainee in one of Huddle House's restaurants. He was referred to respondent by a local attorney, Mariano Cruz. On January 22, Amyotte signed a retainer agreement with respondent, which provided: "I have agreed to represent you in your claims against Huddle House, Inc. . . . as Pro Hac Vice Counsel with South Carolina Counsel, Mariano F. Cruz (attorneys). I am licensed to practice in California. . . . [¶] Plaintiff ("the client"), by signing this agreement, retains The Law Offices of Stephine M. Wells-Moragne, as pro hac vice counsel, and local counsel, Mariano Cruz, ("the attorneys"), to advise and represent the client in the client's case. . . ."⁶ During the entire time

⁶Respondent never was admitted *pro hac vice* in the Amyotte matter, nor was she eligible for *pro hac vice* status since she was a resident of South Carolina at the time of her representation of Amyotte. South Carolina Appellate Court Rules, rule 404(b) provides in relevant part: "An attorney may not appear *pro hac vice* if the attorney is a resident of South Carolina. . . or is regularly engaged in the practice of law. . . ." (See also, United States District Court for the District of South Carolina, Rules By District Court, rule 83.I.05(C) limiting *pro hac vice* status to the "occasional" appearance in federal court.) As a resident, respondent was required to be a

she represented Amyotte, respondent was not admitted or sworn as an attorney in South Carolina.

The retainer agreement specified a “ ‘Win or Lose’ Retainer Fee,” which would be “credited dollar for dollar against the recovery and refunded to the client.” The agreement provided that Amyotte would pay \$1,000 on signing, with the remaining \$4,000 to be paid when he received a settlement in an unrelated personal injury case, which was handled by the Philpot Law Firm. The retainer agreement also required an advance of \$3,000 for out-of-pocket expenses. The agreement further provided for a “standard” contingent fee of 33 percent of the recovery if the case settled before trial and 40 percent after the case was set for trial.

Amyotte paid respondent \$1,000 when he signed the retainer agreement on January 22.⁷ On August 1, 2000, respondent and Cruz received and negotiated a check in the amount of \$7,000 from the Philpot Law Firm to cover the non-refundable retainer fee and expense advance. Respondent has no records of the deposit or disbursement of this \$7,000, which she claimed she split with Cruz, keeping \$4,000 for herself and giving him \$3,000.

Beginning in January 2000 and concluding in February 2001, respondent stipulated that she “actively represented Mr. Amyotte” and that she “practiced law in Mr. Amyotte’s matter including, but not limited to, providing him legal advice, negotiating with and proposing settlement terms to the opposing party and its counsel, representing him at a mediation, and receiving and negotiating a settlement check on his behalf.” She also corresponded with Amyotte, telling him where to file his charge with the South Carolina Human Affairs Commission (SHAC), and advising him about what he should tell SHAC in his complaint. On

member in good standing of the South Carolina Bar in order to appear in federal court. (United States District Court for the District of South Carolina, Rules By District Court, rule 83.I.03(A).)

⁷On July 28, 2000, respondent sent an amended notice of lien to the Philpot Law Firm for \$7,000 asserting that Amyotte agreed to pay her legal fees and costs from the settlement of a personal injury case handled by the Philpot Law Firm.

July 5, 2000, with respondent's counsel and guidance, Amyotte filed a claim with the EEOC and with SHAC. In addition, respondent researched South Carolina law and drafted numerous letters, including a demand letter sent to the general counsel for Huddle House, citing South Carolina cases as precedent for the restaurant's liability, which she maintained "could reach monumental proportions." Respondent also corresponded with outside counsel for Huddle House, sending them a summary of witness statements. Most of her correspondence contained the letterhead "Law Offices of Stephine M. Wells-Moragne & Associates/William R. Hopkins III"⁸ and listed her Lake Wylie address as her "Out of State Administrative Office." There was no indication in any of the correspondence that she was not admitted to practice in South Carolina or that she was licensed only in California.⁹

Ultimately, Huddle House settled with Amyotte, who signed a settlement agreement on February 11, 2001, pursuant to which he released Huddle House of all federal and state claims in exchange for \$9,000 payable to Amyotte "and his attorney, Stephine M. Wells-Moragne." The agreement recited that Amyotte had consulted with respondent before signing it.

Respondent returned to California prior to receiving the settlement funds from Huddle House. She received the \$9,000 check from Huddle House on February 15, 2001, and deposited it on February 20, 2001. The settlement funds were not placed into a client trust account. On February 22, 2001, she wired \$4,000 to Amyotte's checking account from the Bank of America account of her son, Hopkins, which was neither a client trust account nor the account into which she had deposited the settlement funds. Five days later, on February 27, 2001, respondent issued

⁸William Hopkins III is respondent's son, also a California-licensed attorney.

⁹Some of her letters contained letterhead using her name only, followed by "Esquire" with the notation that she was a "Member of the California Bar and of counsel for Law Office of Mariano F. Cruz." A few of her letters had no reference to her status as a California attorney.

a check in the amount of \$750 from a personal checking account in her name and that of her husband at First Union National Bank, which was not the account into which she had deposited the settlement funds. On the same date she also paid Amyotte \$650 in cash. Thus, from the Huddle House settlement proceeds respondent distributed a total of \$5,400 to Amyotte, and kept \$3,000 as attorney's fees plus \$605 as costs. Respondent failed to credit Amyotte with either the \$7,000 lien payment she previously had received from the Philpot Law Firm or the \$1,000 initially paid by Amyotte when he signed the retainer agreement. Accordingly, the total amount respondent obtained from Amyotte's case was \$11,605: \$1,000 deposit + \$7,000 from Philpot lien + \$3,605 from settlement proceeds. Respondent maintained no financial records for this matter, but in her final "Settlement Disbursement" sent to Amyotte, she stated her costs were \$605 and her fee was \$3,000 as one-third of the \$9,000 settlement proceeds.

2. Culpability Discussion

Respondent was charged with six counts of misconduct in connection with her representation of Amyotte. We discuss each count, with the exception of count 1 (failure to support the U.S. Constitution and California law (Section 6068(a)), which, as noted *ante*, the judge dismissed upon the request of the State Bar. We adopt the dismissal of count 1.

a. Unauthorized Practice of Law in Another Jurisdiction (Rule 1-300(B))

The hearing judge found respondent culpable of the unauthorized practice of law in South Carolina pursuant to rule 1-300(B).¹⁰ We agree. Respondent stipulated that while she resided in South Carolina "[b]etween January 2000 and January 2001, respondent actively represented Mr. Amyotte. . . ." and that she "practiced law in Mr. Amyotte's matter. . . ." The record amply supports these stipulations. Nevertheless, respondent contends on appeal that her practice of law

¹⁰Rule 1-300(B) provides: "A member shall not practice law in a jurisdiction where to do so would be a violation of regulations of the profession in that jurisdiction."

was restricted exclusively to Amyotte's Title VII federal civil rights claim before the EEOC, and, accordingly, she argues that under *Sperry v. Florida* (1963) 373 U.S. 379, the doctrine of federal preemption precludes a finding of culpability for UPL pursuant to SCC section 40-5-310 and rule 1-300. In *Sperry v. Florida, supra*, 373 U.S. 379, 404, the United States Supreme Court held that the preparation and prosecution of applications for letters patent before the United States Patent Office was expressly intended by Congress to be governed exclusively by federal law and therefore the practice by non-lawyers before the Patent Office could not be enjoined by the State of Florida as the unauthorized practice of law.

Respondent's preemption argument is unavailing in this case for the simple reason that the record establishes beyond a reasonable doubt¹¹ that respondent's representation of Amyotte was not confined exclusively to the practice of law in federal court or before the EEOC. Rather, respondent's activities also included resolving Amyotte's *state* tort claims against Huddle House, as well as providing legal advice and counsel regarding SHAC. Indeed, in the course of her representation, respondent assisted Amyotte in the completion of two SHAC forms, the Initial Inquiry Questionnaire and the Charging Party Questionnaire. This assistance alone constituted the practice of law in South Carolina. (*State of South Carolina v. McLauren* (2002) 349 S.C. 488, 499 [563 S.E.2d 346, 351]; *State of South Carolina v. Despain* (1995) 319 S.C. 317, 320 [460 S.E.2d 576, 578].) But respondent also drafted various demand letters specifying federal *and* state law as the basis of liability, and she negotiated a settlement on behalf of Amyotte which compromised his federal *and* state law claims against Huddle House. "Conduct constituting the

¹¹The hearing judge found "clear and convincing evidence" that respondent engaged in UPL while residing in South Carolina. In view of the undisputed facts and respondent's Stipulation, we are persuaded that the record in this case satisfies the more stringent evidentiary standard of beyond a reasonable doubt, which would be the evidentiary standard for violations of SCC section 40-5-310, making UPL a felony punishable by up to five years in prison and/or a \$5,000 fine.

practice of law includes a wide range of activities. [T]he practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients . . . and in general all advice to clients and all action taken for them in matters connected with the law.” (*The South Carolina Medical Malpractice Joint Underwriting Association v. Froelich* (1989) 297 S.C. 400, 402 [377 S.E.2d 306, 307.]) Respondent’s practice of law in the Amyotte matter extended beyond his EEOC claim and clearly falls within South Carolina’s broad definition of the practice of law.

Moreover, we find there is evidence beyond a reasonable doubt that respondent held herself out as entitled to practice, which also is considered by the California Supreme Court and the South Carolina Supreme Court to constitute UPL. (*Crawford v. State Bar* (1960) 54 Cal.2d 659, 666 [“unauthorized practice of law includes the mere holding out by a layman that he is . . . entitled to practice law”]; *In re Cadwell* (1975) 15 Cal.3d 762, 771, fn. 3 [implied representation of entitlement to practice constitutes UPL]; *Bluestein v. State Bar* (1974) 13 Cal.3d 162, 175, fn. 13 [use of term “Of Counsel” on letterhead to describe an unlicensed person constitutes UPL]; *In the Matter of Clarkson* (2004) S.C. LEXIS 131 [representation by a disbarred attorney that he had graduated from law school constituted holding out in violation of SCC section 40-5-310].)

Here, respondent stated on much of her correspondence and her business card that she was licensed in California, was “of counsel to the Law Office of Mariano F. Cruz” and designated her office as an “Out of State Administrative Office,”¹² but she failed to advise that

¹²We find that her designation of her Lake Wylie office as “administrative” elevates form over function. Amyotte and Odeh testified that they believed they were meeting in respondent’s

she was licensed *only* in California or that she was unlicensed in South Carolina. In so doing, respondent held herself out as entitled to practice law. (*In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 91 [suspended attorney found to have created a false impression that he was currently able to practice by using the term “Member of the State Bar” and the honorific “ESQ.” next to his signature on a job application]; *The South Carolina Medical Malpractice Joint Underwriting Association v. Froelich, supra*, 377 S.E.2d at p. 307 [attorney created false impression he was entitled to practice in South Carolina because letterhead used a South Carolina address and the words “licensed to practice” in another state, without specifying that he was licensed *only* in the other state, and not licensed in South Carolina].) One simply “cannot expressly or impliedly create or leave undisturbed the false impression that he or she has the present or future ability to practice law” when in fact she is ineligible to practice. (*In the Matter of Wyrick, supra*, 2 Cal. State Bar Ct. Rptr. at p. 91.) Thus, independent of her representation of Amyotte, respondent’s actions in holding herself out as entitled to practice constituted UPL in South Carolina and therefore violated SCC section 40-5-310.¹³

law office when they met with her to discuss their cases. In addition, for a period of time, attorney Cruz, with whom she associated as “of counsel,” practiced law in the Lake Wylie office.

¹³Parenthetically, we uncovered no precedent or legislative history establishing that 29 Code of Federal Regulations (CFR) 1601.7, sub.(a), cited by respondent as authority for her preemption argument, either authorizes the practice of law before the EEOC by non-attorneys or is intended to pre-empt state law regulating UPL. The legislative powers of the states will not be superceded by federal law unless that is “the clear and manifest purpose of Congress.” (*Jevne v. Superior Court* (2005) 35 Cal.4th 935, 949, citing *Cipollone v. Ligget Group Inc.* (1992) 505 U.S. 504, 516.) Such a “clear and manifest purpose” is not evident in 29 CFR 1601.7, which merely *permits* “any person, agency or organization” to make a *charge* of an unlawful employment practice under Title VII on behalf of an aggrieved individual with the EEOC. (Compare *Sperry v. Florida* (1963) 373 U.S. 379 [express congressional authorization for Commissioner of Patents to prescribe regulations allowing the recognition of agents or other persons to practice before the Patent Office in patent cases].) Neither rule 1-300 nor SCC section 40-5-310 conflicts with the purpose and objectives of Title VII (*Jevne v. Superior Court, supra*,

The hearing judge also rejected respondent's argument that her activities were permitted because they were merely preliminary to her appearance in the Amyotte case as *pro hac vice* counsel, and we reject this argument as well. As a resident of South Carolina, she did not qualify for this status. "*Pro hac vice* admission . . . is not a vehicle by which a South Carolina resident, who is a member of an out-of-state bar, may circumvent the rules of admission to practice in this State." (*The South Carolina Medical Malpractice Joint Underwriting Association v. Froelich, supra*, 377 S.E.2d at p. 308; see fn. 6 at p.5.)

b. Illegal and Unconscionable Fee (Rule 4-200(A))

Our conclusion that respondent is culpable of UPL compels the further conclusion that the fees respondent charged and collected from Amyotte were illegal under rule 4-200(A). Regardless of the fact that she was compensated pursuant to a contract, respondent was not entitled to charge or collect her fees for those services that constituted UPL. (*Birbrower, Montalbana, Condon and Frank v. Superior Court* (1998) 17 Cal.4th 119,136.)¹⁴ Moreover, when services are rendered under a fee contract that is unenforceable as illegal or against public policy, quantum meruit recovery will not be allowed if the proscription is directed at "the very conduct for which compensation was sought. . . ." (*Huskinson & Brown, LLP v. Wolf* (2004) 32 Cal.4th 453, 463; compare *In re Van Sickle* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 756

35 Cal.4th 949-950) since merely making a *charge* of unlawful employment practice with the EEOC would not, without more, constitute UPL. Furthermore, when acting in a dual capacity as an attorney and a lay person for a client, all services performed involving the practice of law are subject to the Rules of Professional Conduct. (*In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 373.)

¹⁴Our conclusion comports with the general rule that attorneys who are not admitted to practice in the state where they performed the services are not entitled to recover compensation for such services even though admitted to practice in another state. (See Annot., *Right of Attorney Admitted in One State to Recover Compensation for Services Rendered in Another State Where He Was Not Admitted to the Bar* (1967) 11 A.L.R.3d 907.)

[quantum meruit allowed where fee contract is unenforceable but services were not intrinsically illegal]; see also, Annot., Attorney's Recovery in Quantum Meruit for Legal Services Rendered Under a Contract Which is Illegal or Void as Against Public Policy (1965) 100 A.L.R.2d 1378.) We therefore agree with the hearing judge that respondent charged an illegal fee in violation of rule 4-200(A).

The hearing judge further found there was not clear and convincing evidence that the fee was unconscionable. The State Bar argues on appeal that the record supports a finding that the fees collected were unconscionable, and we agree. Pursuant to respondent's fee contract, Amyotte agreed to pay a 33 percent contingency fee against any recovery, including a \$5,000 non-refundable deposit that would be "credited dollar for dollar against the recovery and refunded to the client." The agreement also required \$3,000 as an advance against costs, which Amyotte in fact paid. The record reflects that respondent incurred \$650 in costs. Respondent was entitled to retain only those costs she reasonably incurred; she was not entitled to profit from the \$3,000 cost advance. (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 851.) Nor was respondent entitled to charge more than was due her under her fee agreement. (*Id.* at p. 855.) Respondent collected fees and costs equaling \$11,650, which is almost three times the amount Amyotte agreed to pay her. The fees and costs respondent wrongfully collected from Amyotte were so wholly disproportionate to what he agreed to pay as to shock the conscience. (*Bushman v. State Bar* (1974) 11 Cal.3d 558, 564; *Herrscher v. State Bar* (1935) 4 Cal.2d 399, 402-403; *In re Van Sickle, supra*, 4 Cal. State Bar Ct. Rptr. at p.765 [fee twice as much as agreed to by client was unconscionable]; see also rule 4-200(B)(1) [amount of fee in proportion to value of services considered in determining unconscionability].) We thus conclude that the fees and costs charged by respondent were both illegal *and* unconscionable under rule 4-200(A).

c. Failure to Refund Unearned Fee (Rule 3-700(D)(2))

The hearing judge found respondent violated rule 3-700(D)(2), which requires that when an attorney's employment is terminated, he or she must refund any portion of a fee paid in advance that has not been earned. We agree. Respondent retained a fee of \$3,650 from the Huddle House settlement proceeds, which, as discussed above, was illegal and therefore unearned. Furthermore, respondent failed to refund the additional \$8,000 in advance fees and costs she received from Amyotte and the Philpot Law Firm. Accordingly, the total amount of \$11,000 should be refunded to Amyotte.¹⁵

d. Failure to Maintain Client Trust Account (Rule 4-100)

Respondent stipulated she violated rule 4-100 when she failed to deposit the funds she received for the benefit of Amyotte into a client trust account and paid him the settlement funds from her personal accounts. We therefore adopt the hearing judge's conclusion that respondent is culpable of a violation of rule 4-100.

e. Moral Turpitude (Section 6106)

The hearing judge concluded that respondent wilfully violated section 6106 because "by holding herself out as entitled to practice and actually practicing law when she was not a member of the South Carolina Bar, when she was not admitted to practice before a federal agency under title 5 United States Code Annotated, section 500, and when she was not admitted as *pro hac vice* counsel, respondent committed acts of moral turpitude and dishonesty."¹⁶ We believe a

¹⁵Respondent now maintains that she was not obliged to refund all of the fees since she claims that she gave \$3,000 of these funds to the referring attorney, Cruz. There was no agreement with Amyotte allowing respondent to split fees with Cruz, and therefore she was not authorized to do so.

¹⁶The hearing judge also relied on respondent's incorrect accounting and her failure to credit Amyotte with the \$8,000 as a basis for her moral turpitude finding. But, this specific

finding of moral turpitude is at odds with the hearing judge's factual findings in support of mitigation to the effect that "[respondent] thought she was giving adequate notice to the public that she was not entitled to practice law in South Carolina by stating on her stationery 'Out of State Administrative Office' and 'Member of the California Bar.' She also told Amyotte that she was not admitted to [the] South Carolina Bar and associated herself with local counsel Cruz and Wall, thinking that such association would entitle her to practice." Although these actions were insufficient to protect respondent from a charge of UPL, they do militate against a finding of clear and convincing evidence of ill will or dishonesty establishing moral turpitude, and we therefore recommend that count six charging a violation of section 6106 should be dismissed with prejudice.

B. The Odeh Matter (Case No. 01-O-00659)

1. Factual Findings

Hana Odeh lived and worked in Charlotte, North Carolina. She was employed by American United Insurance Agency (AUIA), a North Carolina subsidiary of a South Carolina company, The Thaxton Group (Thaxton). On June 7, 2000, Odeh met respondent at her Lake Wylie office through a referral from a North Carolina attorney, Melvin Wall Jr., who desired to associate with respondent because of her employment discrimination expertise. The purpose of the June 7 meeting was to discuss Odeh's discrimination claim against AUIA/Thaxton. At that time, Odeh gave respondent a check for \$1,500 for legal fees.¹⁷ On May 23, 2000, prior to the

conduct is the basis of our culpability determination under rule 3-700 (D)(2) and is therefore duplicative. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119.)

¹⁷On June 4, 2000, Odeh paid Wall \$250 and on June 22, 2000, signed a retainer agreement with him, which provided for a contingency fee of 33 1/3 percent. There was no agreement between Odeh and respondent or between Wall and respondent allocating fees between them.

meeting with respondent, Odeh filed a Charge of Discrimination with the EEOC against AUIA/Thaxton, claiming that she was unfairly denied a promotion from assistant manager to manager based on her gender, religion and country of origin. At the meeting with respondent, Ms. Odeh completed a "Client Information" form which provided personal information.

In the proceedings below, respondent stipulated that "[b]etween June 2000 and in or about August 2000, respondent actively represented Ms. Odeh." She further stipulated that during the same time period she "practiced law in Ms. Odeh's matter including, but not limited to, providing her legal advice, negotiating and proposing settlement terms to the opposing party and its counsel, representing her at mediation, and receiving a settlement check on her behalf." More specifically, on June 8, 2000, the day after their first meeting, respondent wrote to Bill Russell, Director of Human Resources for Thaxton, at its corporate offices in Lancaster, South Carolina, advising: "Our office, along with local counsel Attorney Melvin L. Wall, represents Hana Odeh." Respondent also notified Russell that it might be necessary to file a lawsuit to resolve Odeh's employment dispute, indicating that "the recent adverse employment actions [by Thaxton] may derive from Ms. Odeh's status as a whistle-blower." She advised that the investigation was ongoing as to this issue. The letterhead on this correspondence stated: "Law Offices of Stephine M. Wells-Moragne, Esquire" and listed her Lake Wylie, South Carolina address as her "Out of State Administrative Office." Following the word "Esquire" was the notation "Member of the California Bar and Of Counsel for Law Office of Melvin Wall, Jr., 3115 Clearview Drive, Charlotte, North Carolina." There was no indication that respondent could practice only in California.

On June 12, 2000, respondent sent a demand letter to Russell at Thaxton's South Carolina office, proposing a settlement of \$75,000 for "all claims" so that Thaxton could avoid a "long and expensive lawsuit." The June 12 letter contained extensive legal analysis to justify the

settlement demand, including analyses of Odeh's EEOC claim and "the public policy issues [that] are not covered through EEOC," such as her claims of retaliation due to Odeh's whistleblowing activities, as well as claims of fraud and misrepresentation arising out of alleged inducements made to Odeh at the time of the acquisition of AUIA by Thaxton. Respondent indicated, however, that "there still may be a global settlement of all claims within that framework." In this letter, respondent advised Russell "[s]ince my practice is in California . . . and I make appearances only if requested as pro hac vice counsel once a lawsuit is filed, you may want to communicate directly with Mr. Wall, Ms. Odeh's local counsel."

On the same date that she sent the demand letter, respondent attempted to withdraw from the case because she was unwilling to accept a contingency fee instead of an hourly fee. Also, she felt she could not meet Odeh's demands for attention to her case. But on June 19 she had a change of heart and wrote to Odeh: "Mr. Wall requested that I continue to assist him. Therefore as a favor to him, I will." She indicated that Wall would send Odeh a contingency agreement, and respondent enclosed an invoice for costs incurred and legal services rendered, which she billed at the rate of \$175 per hour.

Respondent continued settlement negotiations with Michael Carrouth, a South Carolina attorney to whom the matter had been referred by Thaxton. She wrote several letters to him, including a letter dated July 19, 2000, countering his settlement offer with a demand for \$70,000, which she justified based on her analysis of the North Carolina unfair trade practices statute (North Carolina General Statue 58-63-15). Ultimately, Thaxton agreed to settle the matter for \$15,000. On July 31, 2000, respondent advised Carrouth by letter that she had reviewed the draft release form and awaited the final version with the recommended revisions.¹⁸

¹⁸Respondent used a different letterhead template for this correspondence stating "Law Offices of Stephine M. Wells-Moragne & Associates/William R. Hopkins III" again listing her

Pursuant to the Settlement and Release Agreement, which the parties signed on August 7, 2000, Thaxton agreed to pay Odeh \$10,000 "less applicable deductions" and also to pay respondent an additional \$5,000 as attorney's fees and costs. Odeh agreed to dismiss the charges of discrimination filed with the EEOC, and released Thaxton/AUIA from all statutory, administrative, common law and state claims based on her claims of employment discrimination, fraud and misrepresentation. The Settlement and Release Agreement included a warranty by Odeh that respondent and Wall were her attorneys in this matter and that they had consulted with her before she signed the agreement. Finally, the Settlement and Release Agreement contained the following certification by respondent:

"I certify that I am licensed to practice law by the Supreme Court of a state other than North Carolina, that I represent Ms. Odeh, that I have reviewed this document, and that I have given her the benefit of my professional advice." Respondent testified that she authorized Wall to sign the agreement on her behalf.

On August 21, 2000, Thaxton issued a check to Odeh in the amount of \$6,203.40, which it computed as payment of her gross salary in the amount of \$10,000, deducting payroll taxes.¹⁹ On the same date, Thaxton issued a \$5,000 check in the name of respondent, with the notation "for legal fees." Respondent delivered the \$6,203.40 check to Odeh and negotiated the \$5,000

Lake Wylie address as her "Out of State Administrative Office" but also including Mariano F. Cruz "Attorney at Law" in the listing at her office. There was no indication on the letterhead that respondent was a California-licensed attorney or that she was not licensed in South Carolina.

¹⁹Odeh subsequently disputed the settlement amount, claiming the payroll deductions were in error and that she was entitled to additional unemployment benefits. She sent a letter to respondent on November 10, 2000, complaining about the settlement and asking for assistance. Respondent did not respond to this letter. Wall unsuccessfully attempted to recover the additional unemployment benefits for Odeh.

check, splitting the fees equally with Wall.²⁰ Respondent thus charged and received a total of \$6,500 in fees (\$1,500 from respondent + \$5,000 from Thaxton), which is 43 1/3 percent of the gross recovery. Respondent did not maintain any records of the funds received or disbursed, nor did she provide Odeh with an accounting of her fees.

In February 2001, the State Bar of California commenced an investigation after receiving a complaint by Odeh. In response to a letter from State Bar Investigator Lisa Edwards, respondent wrote on December 11, 2001: "Please be assured that I did not practice law in North Carolina or South Carolina without a license in those states. [¶] I was living briefly in Lake Wylie South Carolina because I had married [Calvin Moragne]." In her letter, respondent further described her relationship with Odeh: ". . . Ms. Odeh wanted me to represent her. I explained that I could not . . . Ms. Odeh, is from the Middle East. She is extremely pushy and reacted to my firm responses that I did not and never had represented her with a great deal of efforts [*sic*] to manipulate me and disparage Mr. Wall. I would never have put myself in the position to be the subject of her boundless wrath." Three days later, respondent followed with another letter to Investigator Edwards, enclosing certain documents and reiterating: "Please note that my involvement [with Odeh] was short term as a preliminary evaluation to determine if I would apply to appear pro hac vice with Mr. Wall. I did not. . . ."

In February 2001, the Office of the Solicitor for the State of South Carolina, Sixteenth Judicial District, began its own investigation of respondent for charges of UPL in violation of SCC section 40-5-310. On February 9, 2001, respondent spoke by telephone for approximately ten to fifteen minutes with deputy solicitor Kevin Brackett about her activities within that state. During the conversation, respondent stated she was handling three cases in South Carolina and

²⁰Wall was in poor health and instructed Thaxton's counsel to send the check for the attorneys' fees directly to respondent.

would be returning to California within a month. Respondent testified that she thought Brackett wanted to know only about her current caseload and was in fact more interested in the whereabouts of Mariano Cruz, so she did not advise Brackett that she had actually worked on nine cases while in South Carolina. Nor did respondent disclose to Brackett that she had an office in Lake Wylie and had been a resident of South Carolina for the past four and one half years.

2. Culpability Discussion

Respondent was charged with six counts of misconduct in connection with her representation of Odeh. The judge dismissed count 7 (failure to support the U.S. Constitution and California law (Section 6068(a)) upon the request of the State Bar. We adopt the dismissal of this count.

a. Unauthorized Practice of Law in Another Jurisdiction (Rule 1-300(B))

Respondent stipulated that she actively represented Odeh and practiced law on Odeh's behalf between June 2000 and August 2000, while she resided in South Carolina. But, respondent again asserts the federal pre-emption argument in her defense, which we again reject for the reasons discussed *ante*. Specifically, respondent did not limit her practice to prosecuting Odeh's Title VII claim. Her settlement demands to Thaxton were based on federal and state law claims, including fraud, misrepresentation, unfair insurance practices and violation of public policy. Respondent's activities on behalf of Odeh were conducted within South Carolina and her negotiations were with South Carolina attorneys, who represented Thaxton, a South Carolina corporation.²¹ We thus conclude that respondent's legal representation of Odeh constitutes UPL

²¹We reject respondent's argument that to the extent her representation exceeded the bounds of federal EEOC law, she still would not be culpable under rule 1-300(B) for UPL in *South* Carolina because Odeh resided in North Carolina and her place of employment was in North Carolina. Not only did all of respondent's professional activities take place in South

within the ambit of SCC section 40-5-310. (*The South Carolina Medical Malpractice Joint Underwriting Association v. Froelich, supra*, 377 S.E.2d 306, 307.)

Finally, the same facts which underlie our conclusion in the Amyotte case that respondent held herself out as entitled to practice law apply to this matter as well, including the use of stationery which identified her as an attorney with an office in South Carolina, her business card, telephone listing, etc., none of which advised that she was either licensed only in California or unlicensed in South Carolina. (*The South Carolina Medical Malpractice Joint Underwriting Association v. Froelich, supra*, 377 S.E.2d at p. 307.) Such activities in holding herself out were independent of her purported practice before the EEOC and constituted UPL in violation of SCC section 40-5-310. (*In the Matter of Clarkson, supra*, 2004 S.C. LEXIS 131.) We thus find respondent violated rule 1-300 due to her legal representation of Odeh in South Carolina while she was unlicensed in that state.

b. Illegal and Unconscionable Fee (Rule 4-200(A))

The hearing judge found that the fees respondent received in the Odeh matter were illegal because she was not entitled to practice in South Carolina. We agree, and adopt her finding of culpability under rule 4-200(A). Respondent was not entitled to charge or collect fees for those services that constituted UPL. (*Birbrower, Montalbana, Condon and Frank v. Superior Court, supra*, 17 Cal.4th 119,136.)

The hearing judge further found, without explanation, that the fees charged were not unconscionable. However, we agree with the State Bar that there is clear and convincing evidence that respondent collected an unconscionable fee from Odeh when she unilaterally determined to collect 43 percent of Odeh's gross recovery. We find no evidence in the record

Carolina, she compromised Odeh's state law claims against Thaxton, which by terms of the Settlement and Release included claims under South Carolina law.

that Odeh ever agreed to this fee.²² *In the Matter of Kroff, supra*, 3 Cal. State Bar Ct. Rptr. 838, is instructive to our analysis. In *Kroff*, we found two instances of unconscionable fees in violation of rule 4-200(A) where an attorney charged a mere \$217.18 without the agreement of the client (*Id.* at p. 851-852), and in another matter unilaterally increased fees and costs by \$758.18 beyond the amount agreed to by a client. (*Id.* at p. 855.) We there said: "Dollar amounts are not the sole criteria in determining unconscionable fees. Here, respondent did not have the informed consent of the client." (*Id.* at p. 851; see also *In the Matter of Scapa & Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635 [unconscionable fees because of lack of informed consent of clients]; see also rule 4-200(B)(11) [client's informed consent to fee to be considered in determining unconscionability].)

As noted *ante*, Odeh had no fee agreement with respondent, although Odeh paid her \$1,500 at their first meeting. When AUIA/Thaxton settled the matter for \$15,000, it disbursed \$6,203.40 to Odeh (reflecting \$10,000 as gross salary minus applicable payroll taxes) and \$5,000 to respondent as attorney's fees. In total, respondent unilaterally charged and collected \$6,500 (43 1/3 percent of the gross recovery) without the agreement or informed consent of Odeh. Accordingly, we find the fees charged and collected are unconscionable. (*In the Matter of Kroff, supra*, 3 Cal. State Bar Ct. Rptr. at 855.)

c. Failure to Refund Unearned Fee (Rule 3-700(D)(2))

The hearing judge found respondent culpable under rule 3-700(D)(2). We agree. Since respondent's fee was illegal, it was of necessity unearned. Once her services were terminated,

²²The only indicia of the fee Odeh agreed to pay for the prosecution of her claim was in her contingency agreement with Wall, which stated that Wall would represent her "with regards to complaints of discrimination . . . against [AUIA], including mediation of related EEOC charges and, if necessary, litigation" for a contingency fee of 33 1/3 percent of the gross recovery. That agreement was not signed by respondent and did not provide for fee splitting.

respondent was required to refund the unearned \$6,500 in fees she collected from Odeh and Thaxton for her illegal representation of Odeh.²³ The fact that she gave half of the \$5,000 she received from the settlement to Wall does not absolve respondent of responsibility for reimbursement of the entire \$6,500 since Odeh did not agree to the fee split between Wall and respondent. Accordingly, we recommend restitution in the amount of \$6,500 plus interest be paid to Odeh.

d. Moral Turpitude re Unauthorized Practice of Law (Section 6106)

The hearing judge found respondent culpable of moral turpitude under section 6106 on the basis of her activities in holding herself out as entitled to practice and in actually practicing law in the Odeh matter. However, the evidence of respondent's efforts, albeit ineffectual, to alert opposing counsel and her clients about her status as a California attorney, as well as her belief that she was entitled to practice on a *pro hac vice* basis, militate against a finding of clear and convincing evidence of acts of moral turpitude in connection with respondent's UPL. We therefore recommend that count 11 be dismissed with prejudice.

e. Moral Turpitude re Response to State Bar (Section 6106)

Respondent stipulated that during the time she resided in Lake Wylie, she actively practiced law on behalf of Odeh, and in fact, as of August 21, 2000, she had received \$6,500 in fees for her representation of Odeh. Nevertheless, when respondent wrote to Lisa Edwards, the State Bar Investigator, on December 11, 2001, she stated: "Please be assured that I did not practice law in North Carolina or South Carolina without a license in those states. [¶] I was living *briefly* in Lake Wylie South Carolina because I had married [Calvin Moragne]." (Italics added.)

²³As noted, *ante*, respondent may not be heard to claim that the fees were earned under a theory of quantum meruit, since quantum meruit recovery is not allowed where a violation of the rules of professional conduct "proscribe the very conduct for which compensation was sought . . ." (*Huskinson & Brown LLP v. Wolf, supra*, 32 Cal.4th 453, 463.)

Respondent further described her relationship with Odeh: “. . . Ms. Odeh wanted me to represent her. I explained that I could not. . . . *I did not and never had represented her.*” (Italics added.) Respondent followed with another letter to Investigator Edwards enclosing certain documents and reiterating: “Please note that my involvement [with Odeh] was short term as a preliminary evaluation to determine if I would apply to appear pro hac vice with Mr. Wall. I did not. . . .”

The hearing judge found these misrepresentations constituted moral turpitude under section 6106, and we agree. However else moral turpitude may be defined, it most assuredly includes creating a false impression by concealment as well as affirmative misrepresentations. *In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9, 15; *In the Matter of Wyrick, supra*, 2 Cal. State Bar Ct. Rptr. at pp. 90-91; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266.) Moreover, “‘deception of the State Bar may constitute an even *more serious offense* than the conduct being investigated.’ [Citation.]” (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 282.)

f. Moral Turpitude re Response to Solicitor’s Office (Section 6106)

The hearing judge found there was insufficient evidence of moral turpitude arising from respondent’s evasive responses during the telephone conversation on February 9, 2001, with Kevin Brackett, the South Carolina deputy solicitor. We respectfully disagree. Brackett testified that he specifically asked respondent “what legal matters have you undertaken since you have been in South Carolina.” Respondent did not identify either the Amyotte or Odeh matters (and omitted five other matters that she now admits she worked on while in South Carolina), specifying just three cases in her conversation with Brackett. She also misled Brackett about the length of her stay in South Carolina, telling Brackett that she was in South Carolina to resolve a family crisis and would be returning to California shortly. Respondent did not tell Brackett that she had been a resident of South Carolina for almost four and one-half years or that she had an

office there (which Brackett then advised respondent he knew about). Respondent testified that she thought Brackett was focusing on the activities of Mario Cruz and was asking about her current caseload only. Brackett testified he made it clear during the conversation that he was investigating possible violations of SCC section 40-5-310 by respondent and was inquiring about the scope of all of her activities while she was in South Carolina. He testified: "And so I asked her were there any other cases [other than the three she disclosed] that she was involved in any way, shape or form, and she assured me that no, that was the extent of her practice in South Carolina." The substance of Brackett's conversation was corroborated by his sworn affidavit, which was prepared shortly after the telephone call of February 9, 2001.

We have reviewed the evidence de novo and find Brackett to be more credible than respondent, who gave disingenuous and inconsistent testimony about the telephone interview.²⁴ For example, she testified she thought Brackett wanted to focus on Mario Cruz's activities rather than her own, which makes no sense in light of the specific questions Brackett asked her and the specific, albeit incomplete, responses she gave him. Furthermore, at the time she talked to Brackett, she was actively representing Amyotte and was in the process of negotiating a \$9,000 settlement on his behalf. (The settlement check arrived six days after Brackett's interview with her.) Even under her own claimed misunderstanding of the nature of the telephone interview, she did not answer honestly as she was required to do.

We cannot overstate the importance of the high degree of honesty that was required when the South Carolina deputy solicitor asked respondent to provide information relevant to the investigation of her possible UPL activities. Respondent stipulated that Brackett advised her of the focus of his investigation, which should have put her on notice of the nature and import of

²⁴The hearing judge did not make a credibility ruling as to Brackett, but she did rule that in general respondent was not entirely credible.

their conversation. It matters not that the conversation lasted only ten or fifteen minutes; had respondent answered honestly and completely, we have no doubt that the conversation would have been lengthier and more substantive. We have said: “No distinction can . . . be drawn among concealment, half-truth, and false statement of fact. [Citation.]’ [Citation.]” (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Accordingly, we find sufficiently clear and convincing evidence of dishonesty during respondent’s telephone interview with the Office of the Solicitor for the State of South Carolina, Sixteenth Judicial District to constitute moral turpitude.

C. Jurisdictional and Due Process Issues

Before turning to the issue of the degree of discipline, we address two points raised by respondent relating to our jurisdiction to hear this matter and to certain due process claims.

1. Jurisdiction

Respondent argues that under the Sixth Amendment to the United States Constitution, the State Bar Court has no jurisdiction to decide respondent’s culpability for a felony violation of SCC 40-5-310, which “occurred entirely in South Carolina, and where South Carolina has not first adjudicated the fact of her violation of that statute.”

Respondent’s jurisdictional argument lacks merit. A disciplinary action may be maintained even though the attorney has been acquitted of criminal charges that have been dismissed based on the same facts. (*Wong v. State Bar* (1975) 15 Cal.3d 528, 531.) Moreover, we have jurisdiction to regulate misconduct even when that misconduct occurred in another state and did not result in an out-of-state criminal conviction. (*Emslie v. State Bar* (1974) 11 Cal.3d 210.) “Although the State Bar has discretion whether to pursue allegations of alleged misconduct in other states, there is simply no jurisdictional requirement that the alleged misconduct must occur in this state in order to be prosecuted by the State Bar of California.” (*In*

the Matter of Respondent V (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 442, 447; see also Section 6049.1(e) permitting non-expedited disciplinary proceedings against a California attorney based on the attorney's conduct in another jurisdiction.)

In *Emslie v. State Bar, supra*, 11 Cal.3d 210, the Supreme Court disbarred a California member for misconduct that occurred in Nevada even though the criminal charges were dismissed by the State of Nevada because of insufficient evidence. The Supreme Court found that the attorney "committed acts *in the nature of* burglary and grand theft, that the commission of these acts constitute[d] moral turpitude and dishonesty on his part, and that the protection of the courts and the integrity of the legal profession requires that he should be disbarred." (*Id.* at 230, italics added.) Similarly, as an arm of the Supreme Court, we have jurisdiction to determine whether respondent's unlicensed practice of law in South Carolina "would be" a violation of SCC 40-5-310, regardless of whether such charge has been adjudicated in South Carolina.

2. Due Process

Respondent further argues that because SCC section 40-5-310 is a criminal statute, this court may not discipline her under the due process clauses of the United States and South Carolina constitutions in the absence of a trial by jury and conviction based on evidence beyond a reasonable doubt.²⁵ The Supreme Court has previously rejected such broad due process challenges to our authority. (See, e.g., *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 928.)

Respondent's Sixth Amendment claim to a jury trial may be relevant to criminal proceedings in South Carolina, but such a right does not attach to these disciplinary proceedings

²⁵Ordinarily, "guilt need not be proved beyond a reasonable doubt [but] must be established by convincing proof and to a reasonable certainty. . . ." (*Emslie v. State Bar, supra*, 11 Cal.3d 225-226.) However, as we noted at fn.11, a violation of SCC section 40-5-310 is a felony, and therefore we have utilized the evidentiary standard of beyond a reasonable doubt in our de novo review of the record.

in California. It has oft been said “ ‘that the purposes of the two proceedings are vastly different. A criminal proceeding has for its purpose the punishment of the accused if he is found guilty. A disciplinary proceeding . . . is not intended for his punishment, but is for the protection of the public, the courts, and the legal profession.’ ” (*Wong v. State Bar, supra*, 15 Cal.3d at 531-532, citing *Best v. State Bar* (1962) 57 Cal.2d 633, 637.) For this reason these proceedings “are not governed by the rules of procedure governing . . . criminal litigation. . . . [Citation.]” (*Emslie v. State Bar, supra*, 11 Cal.3d at pp. 225-226.) Accordingly, we reject respondent’s due process challenge.

III. DISCIPLINE

A. Mitigation

The hearing judge found clear and convincing evidence of “compelling mitigating factors.” We consider respondent’s mitigative evidence to be significant, although we do not view it as compelling, particularly because we do not agree with the hearing judge’s finding that respondent’s conduct was surrounded by good faith. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e)(ii).)²⁶ Respondent did in fact affirmatively disclose in her retainer agreement with Amyotte that she was licensed in California and would represent him in South Carolina on a *pro hac vice* basis along with local counsel Cruz. She further advised in a letter to opposing counsel in the Odeh case that her practice was in California and she made “appearances only if requested as *pro hac vice* counsel once a lawsuit is filed, [so] you may want to communicate directly with Mr. Wall, Ms. Odeh’s local counsel.” On much of her stationery, business cards and similar documents, she identified herself as licensed to practice

²⁶All further references to standards are to these Standards for Attorney Sanctions for Professional Misconduct.

We take judicial notice of the official State Bar Court records pertaining to respondent’s prior record of discipline under Evidence Code section 452.

in California, and denoted her office as an “Out of State Administrative Office.” She also associated with local counsel in both the Amyotte and Odeh cases.

Based on these facts, we found, *ante*, that respondent’s UPL activities did not involve dishonesty amounting to moral turpitude. However, this evidence is not sufficient to prove good faith mitigation. The State Bar correctly argues that “In order to establish good faith as a mitigating circumstance, an attorney must prove that his or her beliefs were both honestly held *and* reasonable. [Citation.]” (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653 (italics added).) Respondent may have honestly believed that she could practice in South Carolina on a *pro hac vice* basis, but as an experienced practitioner who litigated employment discrimination cases in various jurisdictions, we find it was unreasonable for her to proceed on this basis. As the hearing judge acknowledged, “Respondent knew or should have known the proper procedures required to engage in multijurisdictional practice. Yet, she failed to comprehend the need to adhere to basic compliance with the South Carolina and federal procedures.” We accordingly do not adopt the hearing judge’s finding in mitigation that respondent’s conduct was surrounded by good faith.

The hearing judge further found that respondent suffered from extreme emotional distress due to serious marital problems and hostility and racism directed at her by some members of the local population. (Std. 1.2(e)(iv).) The testimony of respondent and her marriage counselor, Stephanie Rauch, establishes this mitigating factor.

Respondent presented eight character witnesses, including a retired superior court judge and three attorneys. (Std. 1.2(e)(vi).) All of them testified as to her diligence, integrity, honesty and dedication to her clients. Five of the witnesses had known respondent for at least 15 years, and most, although not all, of the witnesses were aware of the charges against her. The hearing judge gave this testimony mitigative weight, and so do we.

We make the additional finding in mitigation that respondent cooperated with the State Bar by entering into a stipulation of material facts. (Std. 1.2(e)(v).)

B. Aggravation

We balance this strong showing of mitigation against the substantial evidence in aggravation. The hearing judge found in aggravation that respondent has a prior record of discipline. (Std. 1.2(b)(i).) Respondent was privately reproved pursuant to a stipulation filed on January 4, 1993, for trust account violations in two client matters. The prior misconduct is similar to some of the misconduct in the current proceedings, and we consider it as a significant aggravating factor. (See *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443-444.)

We adopt the hearing judge's finding that respondent committed multiple acts of wrongdoing based on our determination that respondent is culpable of eleven separate counts of misconduct in two client matters. (Std. 1.2(b)(ii).)

We agree with the hearing judge that respondent's conduct significantly harmed the public, the administration of justice and her clients. (Std. 1.2(b)(iv).) Respondent collected fees from two clients that were illegal and unconscionable. She also interfered with the investigations by the California State Bar and the State of South Carolina by giving false and misleading information.

We also agree with the hearing judge that respondent demonstrated indifference towards the consequences of her misconduct (Std. 1.2(b)(v)) since, as of the date of the hearing below, she had not yet refunded the fees and costs she wrongfully collected.

C. Level of Discipline

In making her discipline recommendation, the hearing judge focused on respondent's culpability for the unlicensed practice in South Carolina. We found additional culpability

relating to respondent's collection of unconscionable fees on two occasions and her dishonesty in responding to the South Carolina deputy solicitor.²⁷ We also declined to adopt the hearing judge's findings of moral turpitude in two counts alleging dishonesty surrounding respondent's unauthorized practice. We consider as applicable standards 2.2, 2.3, 2.7 and 2.10.²⁸ Thus, the suggested range of discipline is a minimum of six months under standard 2.7 to disbarment under standard 2.3.

We look to the standards for guidance (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11), but we also give due consideration to the decisional law. (*In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 30.) The hearing judge focused on cases involving UPL, including *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229; *In the Matter of Mason* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 639; *Chasteen v. State Bar* (1985) 40 Cal.3d 586; *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar

²⁷Our findings in mitigation and aggravation differ somewhat with those of the hearing judge, but on balance do not materially affect our disciplinary recommendation.

²⁸Standard 2.2(b) provides that violation of rule 4-100 which does not result in wilful misappropriation of entrusted funds "shall result in at least a three month actual suspension . . . irrespective of mitigating circumstances."

Standard 2.3 provides in relevant part: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person shall result in actual suspension or disbarment depending upon 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."

Standard 2.7 provides in relevant part that culpability for "collecting an unconscionable fee for legal services shall result in at least a six month actual suspension . . . irrespective of mitigating circumstances."

Standard 2.10 provides in relevant part: "Culpability of a member of any violation of any provision of the Business and Professions Code not specified in these standards or of a wilful violation of any Rule of Professional Conduct not specified in these standards shall result in reproof or suspension according to the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline"

Ct. Rptr. 585; and *Farnham v. State Bar* (1988) 47 Cal.3d 429. The discipline in those cases ranged from 30 days' to six months' actual suspension. The hearing judge cited respondent's deception to the State Bar investigator as reason for her recommendation of six months' actual suspension, citing *Olguin v. State Bar* (1980) 28 Cal.3d 195, 200.

However, the hearing judge did not consider discipline cases involving unconscionable fees. For example, in the case of *Finch v. State Bar*, (1981) 28 Cal.3d 659, which involved misconduct in five client matters that was at least as serious as the instant case, the Supreme Court imposed six months' actual suspension. In addition to collecting an unconscionable fee, Finch (1) misappropriated client funds in two matters totaling \$5,750; (2) forged a client's signature on a settlement check; (3) failed to perform services in three matters; (4) failed to return unearned fees promptly; (5) failed to forward client files and documents to subsequent counsel; and (6) withdrew from representation without protecting his client's interests. (*Id.* at pp. 664-665.) The Supreme Court acknowledged in mitigation that Finch was an alcoholic when the misconduct occurred and that he had since stopped drinking. (*Id.* at 665.) The Court also favorably noted Finch's acknowledgment of wrongdoing and his cooperation with the proceedings. (*Id.* at p. 666.) Finch had no prior disciplinary record, but this was given little weight in mitigation as he had only been practicing law for three years prior to his misconduct. (*Id.* at p. 666, fn. 3.) Similarly, the Court ascribed little weight to Finch's payments of restitution because they had been made under pressure. (*Id.* at p. 666.)

The totality of the circumstances in *Finch* is more serious than in the instant case. The Supreme Court characterized the misconduct as "habitual" warranting "severe" discipline. (*Id.* at p. 665.) But in mitigation, Finch acknowledged his wrongdoing and was on a path towards

rehabilitation, whereas respondent has demonstrated an unwillingness to recognize the consequences of her misconduct.

We also consider *In the Matter of Harney, supra*, 3 Cal. State Bar Ct. Rptr. 266, where this court placed an attorney on six months' actual suspension because he concealed from his client and the court the statutory fee limit under the Medical Injury Compensation Reform Act (MICRA) and collected a fee that was \$266,850 in excess of that limit. We noted that the "gravamen of this case is not simply respondent's collection of an illegal fee. . . . Rather, this case is about respondent's clear overreaching of his own client . . . and profiting handsomely as a result." (*Id.* at p. 284.) We found additional, serious misconduct, including violations of sections 6068(b), 6068(d), 6106 and rule 7-105. (*Id.* at p. 283.)

In mitigation, we found Harney had impressive character testimony reflecting a long history as an outstanding practitioner prior to his initial disciplinary encounter with the State Bar. (*In the Matter of Harney, supra*, 3 Cal. State Bar Ct. Rptr. at p. 282.) We viewed as serious aggravation the fact that Harney had not gained any insight "into his duty to protect his client's entitlement to her full share of the recovery vis-a-vis his own self-interest in maximizing his fee." (*Id.* at p. 273.) Because of his intransigence, at least four clients were forced to sue him to obtain the fees he illegally collected. (*Ibid.*) We further considered as "very serious" aggravation Harney's breach of his duty of good faith and fair dealing to his severely disabled client. (*Id.* at p. 284.) Also aggravating was Harney's lack of candor to this court, his prior public reproof for similar misconduct in collecting fees in excess of MICRA limits, as well as "significant" harm to the administration of justice and to his client. (*Id.* at p. 283.) We concluded that six months' actual suspension was warranted because of our "grave concern" that he might continue to ignore the law and his duties to his clients. (*Id.* at p. 285.)

We consider *Harney* to be an apt comparison to the instant case, most significantly because the misconduct involved the collection of an excessive fee accompanied by overreaching of clients, and misrepresentations constituting moral turpitude, which caused harm to clients and the administration of justice. Harney and respondent had strong good character testimony, but both lacked insight into their wrongdoing, having failed to return their ill-gotten fees. However, we view the circumstances in the aggregate to be more serious in *Harney* in that he displayed disdain for his client and the trial court, as well as lack of candor to this court. (*In the Matter of Harney, supra*, 3 Cal. State Bar Ct. Rptr. at p. 283.) Although the hearing judge found respondent's testimony was "not entirely credible," we do not find on our independent review of the record that respondent has demonstrated contempt for these proceedings. Furthermore, we view Harney's prior disciplinary record to be more aggravating than in this case because it mirrored the misconduct that was of greatest concern in his second disciplinary proceeding, i.e., charging a fee that grossly exceeded the allowable MICRA limit. Finally, we consider the overreaching in *Harney* as more oppressive, given the size of the fee and the severity of the client's disability. (*Id.* at 284.)

We also look to *In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343, where we recommended a one-year actual suspension for misconduct including the collection of an illegal fee for services not performed. Burckhardt also was found culpable of UPL as the result of his representation of a client in a criminal matter while he was on suspension, as well as his improper withdrawal while representing a client, and acts of moral turpitude because he lied to his client on several occasions, telling him that he had filed a tort claim on his behalf, when he had not. In addition, Burckhardt was found culpable of failure to cooperate with the State Bar because he did not respond in any way during the investigation and ultimately defaulted to the entire disciplinary proceeding. We found no evidence in mitigation other than Burckhardt's thirteen years of practice without prior discipline. (*Id.* at 350.)

The misconduct in *Burckhardt* reasonably approximates that which occurred in this case. But, in recommending a one-year actual suspension, we focused on Burckhardt's prior discipline, which included a one-year actual suspension. (*In the Matter of Burckhardt, supra*, 1 Cal. State Bar Ct. Rptr. at p. 350.) We also emphasized that Burckhardt had utterly failed to cooperate, resulting in his default in the proceedings. (*Id.* at 351.) Burckhardt's serious prior discipline, which suggested a disciplinary floor of at least one year (see Std. 1.7(a)), provides a significant distinction to the instant case, as does his default, which is to be contrasted with respondent's participation and cooperation in these proceedings.

Finally, we consider *In the Matter of Yagman* (Review Dept. 1997) 3 State Bar Ct. Rptr. 788, wherein we recommended a three-year stayed suspension and three years' probation, conditioned on a one-year actual suspension. Yagman was a well-known civil rights attorney, who in one matter involving several clients, was found culpable of accepting an unconscionable fee of \$378,175 awarded by the court, in addition to a \$44,000 fee, representing 45 percent of the recovery in the same case. (Each plaintiff received \$810.) (*Id.* at p. 800.) We found moral turpitude because Yagman knowingly failed to disclose in his fee application to the court that he had a contingency agreement with his clients. (*Id.* at p. 801.) He also was culpable of failing to communicate a settlement offer to his clients, commingling funds, failing to pay funds promptly and failing to account properly. Although we further found Yagman culpable of misappropriation, we did not give any material weight to this finding because of his honest but misplaced reliance on his fee agreement, which we found contained illegal restrictions on his clients' recovery. (*Id.* at p. 805.)

The misconduct in *Yagman* is similar to that in the instant case, except that *Yagman* involves unconscionable fees of far greater magnitude, i.e., \$378,175 awarded by the court, *plus* a \$44,000 contingent fee. The aggravating circumstances in *Yagman* included multiple acts of misconduct and significant harm to his clients. (*In the Matter of Yagman, supra*, 3 Cal. State Bar

Ct. Rptr. at p. 806.) In mitigation, we found “compelling” evidence of good character, candor in the proceedings, and cooperation in that he entered into stipulation of facts where appropriate. (*Id.* at p. 807.) Unlike respondent, and to Yagman’s credit, he promptly took action to resolve the fee disputes with his clients, refunded the disputed fees, and accepted responsibility for his misconduct. (*Ibid.*)

But, as with *Burckhardt*, our discipline recommendation in *Yagman* was in large measure influenced by his prior discipline, which consisted of six months’ actual suspension as the result of the collection of an unconscionable fee. (*In the Matter of Yagman, supra*, 3 Cal. State Bar Ct. Rptr. at p. 807.) We noted “a disturbing similarity” to the misconduct that was then before us (*Ibid.*), and that Yagman “was only recently free of probation from that prior case at the time he committed the offenses now before us.” (*Id.* at p. 807.) We accordingly looked to standard 1.7(a) as a basis for our recommendation of one-year actual suspension. (*Id.* at p. 808.) Standard 1.7(a) provides no such justification here for imposing a discipline significantly greater than that recommended by the hearing judge since respondent’s prior discipline was a private reproof.

The State Bar cites two misappropriation cases, *Worth v. State Bar* (1978) 22 Cal.3d 707 and *Chang v. State Bar* (1989) 49 Cal.3d 114, in support of disbarment. But, these cases involved neither UPL nor unconscionable fee cases and are not as persuasive as those relied upon by the hearing judge or cited above. As we remarked in *Yagman*, “The gravamen of the case before us is not in the area of misappropriation, but rather in the area of . . . collecting unconscionable fees.” (*Id.* at p. 809.) The State Bar also cites *Barnum v. State Bar* (1990) 52 Cal.3d 104, wherein the Supreme Court imposed disbarment for a wide range of misconduct including one count of charging an unconscionable fee. We do not believe the discipline analysis in that case is pertinent to the instant case, because in *Barnum*, the Supreme Court specifically found the attorney “[was] not a good candidate for suspension and/or probation” because the

attorney had breached two terms of the prior disciplinary order, defaulted in a prior proceeding and once again was in default in the proceedings before the Court. (*Id.* at p. 106.)

We conclude that the hearing judge's recommended discipline was well within the appropriate range based on our analysis of the unconscionable fee cases discussed above, all of which involved substantial additional misconduct. We are mindful that standard 2.7 expressly provides that culpability for charging an unconscionable fee "shall result in at least a six month actual suspension . . . irrespective of mitigating circumstances." But, we do not believe that the six-month minimum suggested by standard 2.7 is necessarily additive, i.e., that actual suspension of greater than six months is prescribed whenever, in addition to the unconscionable fee, there is further misconduct warranting actual suspension.

Our conclusion is reinforced by the framework of the standards. Standard 1.6(a) provides in part that "[I]f two or more acts of professional misconduct are found . . . and different sanctions are prescribed . . . the sanction imposed shall be the more or most severe of the different applicable sanctions." The Board of Governors thus has expressly adopted a methodology for assessing the appropriate level of discipline in cases involving multiple acts of misconduct that directs us to calculate "the more or most severe of the different applicable sanctions." Had the Board of Governors intended that our discipline recommendations be based upon the mathematical *product* of each applicable standard, it presumably would have so stated.

Ultimately, our discipline analysis is guided by the unique facts of this case. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Because each case is *sui generis*, the standards of necessity are not binding, although they are to be afforded great weight because "they promote the consistent and uniform application of disciplinary measures." (Citation.)" (*In re Silverton* (2005) 36 Cal. 4th 81, 91.)

The above discussion of cases involving unconscionable fees is not intended to diminish the import of the hearing judge's analyses of those cases which focus on the unauthorized

practice of law. Without question, respondent's UPL activities provided the underpinning to the misconduct that followed, including the unconscionable fees and the misrepresentations to the State Bar and the deputy solicitor for South Carolina. We are concerned that an experienced practitioner such as respondent was ignorant of the most basic rules regarding her license to practice, and as a consequence, the South Carolina Supreme Court was deprived of the ability to ensure she would adhere to that state's standards of professional responsibility. We are equally troubled by respondent's overreaching and her seeming disregard of her obligation to repay her clients.

In spite of these misgivings, in light of the totality of the misconduct that has occurred here, we adopt the hearing judge's recommendation of two years' suspension, stayed, with two years' probation on the condition of six months' actual suspension, and until restitution is paid. We believe this recommendation appropriately satisfies the six-month minimum suggested by standard 2.7, while giving due consideration to the level of discipline imposed in previous cases where the misconduct was most similar to that which occurred here.

IV. RECOMMENDATION

We recommend that respondent Stephine M. Wells be suspended from the practice of law in the State of California for two years and until she shows proof satisfactory to the State Bar Court of her rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct, that execution of that suspension be stayed, and that respondent be placed on probation for two years on the following conditions:

1. That respondent be actually suspended from the practice of law in the State of California during the first six months of probation and until she has satisfied each of the conditions in this part 1:
 - (a) pays restitution to Lance Amyotte, or the Client Security Fund if it has paid, in the amount of \$11,000 plus simple interest thereon at the rate of 10 percent per annum from the dates respondent received the fees and costs from Amyotte, the Philpot Law Firm and Huddle House, until paid;

- (b) pays restitution to Hana Odeh, or the Client Security Fund if it has paid, in the amount of \$6,500, plus simple interest thereon at the rate of 10 percent per annum from the dates respondent collected the fees and costs from Odeh and AUIA/Thaxton, until paid;
 - (c) provides satisfactory proof of all such restitution as prescribed above to the State Bar's Office of Probation in Los Angeles; and
 - (d) further provided that if under this provision, respondent's actual suspension remains in effect for more than two years, it shall continue until she shows proof satisfactory to the State Bar Court of her rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.
2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation.
 3. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, her current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, her current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.
 4. Respondent must report, in writing, to the State Bar's Office of Probation in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation (reporting dates). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of her probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and must certify by affidavit or under penalty of perjury under the laws of the State of California as follows:
 - (a) in the first report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and
 - (b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

During the last 20 days of this probation, respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

5. Subject to the proper or good faith assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.
6. Within one year after the effective date of the Supreme Court order in this matter, respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation in Los Angeles. This condition of probation is separate and apart from respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Accord, Rules Proc. of State Bar, rule 3201.)
7. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. And, at the end of the probationary term, if respondent has complied with the conditions of probation, the Supreme Court order suspending respondent from the practice of law for three years will be satisfied, and the suspension will be terminated.

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of her actual suspension and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

VI. RULE 955

We further recommend that respondent be ordered to comply with rule 955 of the California Rules of Court and to perform the acts specified in paragraphs (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.

VII. COSTS

We further recommend that the costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs be payable in accordance with Business and Professions Code section 6140.7.

EPSTEIN, J.

We Concur:

STOVITZ, P.J.

WATAL, J.