

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of)	Case Nos. 03-O-02715-PEM; 03-O-03913;
)	04-O-13946
THOMAS C. JEING,)	
)	
Member No. 142357,)	DECISION
)	
<u>A Member of the State Bar.</u>)	

I. Introduction

In this disciplinary proceeding, respondent **Thomas C. Jeing** stipulated to misconduct relating to at least three clients, which misconduct occurred from 2001 through 2003, including recklessly failing to perform services, improperly withdrawing from employment, and committing acts of moral turpitude.

In January 2005, after respondent and the Office of the Chief Trial Counsel of the State Bar of California (State Bar) reached a stipulation as to facts and conclusions of law, this court approved the stipulation and accepted respondent as a participant in the State Bar Court's Alternative Discipline Program (ADP).¹ (Rules Proc. of State Bar, rules 800-807.)

However, respondent has recently been terminated from both the State Bar's Lawyer Assistance Program (LAP) and from the State Bar Court's ADP as a result of his failure to comply with the requirements of those programs.

In light of his admitted misconduct in this proceeding, this court recommends that respondent be suspended from the practice of law for two years, that execution of the suspension be stayed and that respondent be placed on probation for three years on conditions that include his actual

¹This program is also known as the State Bar Court's Program for Respondents with Substance Abuse and Mental Health Issues and formerly known as the Pilot Program.

suspension for one year.

II. Significant Procedural History

A. Respondent's Acceptance into the Alternative Discipline Program

A notice of disciplinary charges was filed against respondent on March 11, 2004. Respondent filed a response on April 7, 2004.

At a status conference on May 17, 2004, respondent expressed his desire to participate in the State Bar's Pilot Program. The court referred respondent to LAP for an evaluation of his eligibility to participate in the LAP, a prerequisite for respondent's acceptance as a participant in the State Bar Court's ADP. (Rule 802(a), Rules Proc. of State Bar.)

On June 7, 2004, at respondent's request, his matters were referred to the State Bar Court's ADP for a determination as to his eligibility for participation in the program. (Rules Proc. of State Bar, rules 800-807.)

On January 31, 2005, this court approved a stipulation as to facts and conclusions of law signed by the parties on November 18, 2004. (Rules Proc. of State Bar, rule 802(a).) The stipulation included respondent's admission that he wilfully violated rules 3-110(A) and 3-700(A) of the Rules of Professional Conduct² and Business and Professions Code section 6106.³

On January 31, 2005, respondent was accepted into the ADP. Respondent's eligibility and acceptance into the Program was based on, among other things: 1) his participation in the LAP; 2) the stipulation as to facts and conclusions of law he entered with the State Bar; 3) the nexus evidence he provided; and 4) his agreement to accept the court's low and high levels of recommended discipline set forth in the Decision re Alternative Recommendations for Degree of Discipline, lodged on January 31, 2005. (Rules Proc. of State Bar, rule 802.) The terms and conditions of participation were set forth in the Contract and Waiver for Participation in the State Bar Court's Program for Respondents with Substance Abuse or Mental Health Issues (Program Contract), which respondent

² Unless otherwise noted, all further references to rule(s) are to the Rules of Professional Conduct.

³ All references to section (§) are to the Business and Professions Code, unless otherwise indicated.

signed on January 31, 2005.

Paragraph 5 of the Program Contract signed by respondent provides as follows:

“Respondent understands that eligibility for participation in the State Bar Court Program is contingent upon acceptance and participation in the Lawyer Assistance Program (hereinafter “LAP”). Respondent agrees to comply with all terms and conditions set forth by the LAP. Respondent understands that, if his participation in the LAP is terminated without successfully completing the LAP, Respondent’s participation in the State Bar Court Program will be terminated and discipline will be recommended as set forth in paragraph 4 above.”

B. Respondent’s Termination from the Alternative Discipline Program

On December 19, 2005, the court received a LAP notice of termination regarding respondent, confirming that the LAP Evaluation Committee terminated respondent’s participation in the LAP on December 12, 2005. A copy of a letter from the Director of the LAP, Janis R. Thibault, to respondent was attached to the notice of termination, which provided that respondent’s consistent absence from the LAP group and no response to repeated attempts to contact him warranted his termination.

On January 10, 2006, due to respondent’s non-compliance with the requirements of the Program, the court issued an order to show cause (OSC) why respondent should not be terminated from the ADP and the higher level of discipline set forth in the court’s January 31, 2005 Decision should not be recommended to the California Supreme Court. (Rules Proc. of State Bar, rule 805.)

On January 23, 2006, the court held an in-person hearing on the OSC. The State Bar was represented by Deputy Trial Counsel Cydney Batchelor. Respondent did not appear.

By order filed January 23, 2006, the court terminated respondent from the State Bar Court’s ADP based upon his termination from the LAP and ordered that the stipulation as to facts and conclusions of law be filed. The court stated that this decision and recommendation would follow regarding the higher level of discipline as set forth in the Decision Re Alternative Recommendations for Degree of Discipline lodged on January 31, 2005. (Rules Proc. of State Bar, rule 803(a).)

III. Facts and Conclusions of Law

The stipulation as to facts and conclusions of law approved by the court and filed on January 24, 2006, is hereby incorporated by reference, as if set forth fully herein.

A. Jurisdiction

Respondent was admitted to the practice of law in California on April 1, 1992, and has been a member of the State Bar of California at all times relevant to this proceeding.

B. Case No. 03-O-03913 (The Foxlink Peripherals Matter)

In 2003, respondent was employed by Foxlink Peripherals, Inc., to provide legal services in the defense of a wrongful termination action filed by Alex Lukashevskiy in *Lukashevskiy v. Foxlink Peripherals, Inc.* in Alameda County Superior Court. Respondent filed an answer on behalf of Foxlink on April 7, 2003, but thereafter failed to file a case management statement and failed to attend two case management court conferences. Foxlink subsequently terminated respondent's services, but respondent failed to notify the court of the termination.

While respondent was still counsel of record, he failed to oppose a discovery motion brought by the plaintiff. Following his failure to attend the second case management conference and his failure to file any opposition to the plaintiff's discovery motion, the court removed respondent as counsel of record on its own motion.

As a result of respondent's misconduct, Foxlink was ordered to pay and paid sanctions in the amount of \$1,700 in favor of plaintiff Lukashevskiy.

Failure to Perform with Competence (Rules Prof. Conduct, Rule 3-110 (A))

Rule 3-110(A) of the Rules of Professional Conduct provides that a member of the State Bar shall not intentionally, recklessly or repeatedly fail to perform legal services in a competent manner.

By failing to file a case management statement and to attend two case management conferences, respondent recklessly failed to perform legal services with competence in wilful violation of rule 3-110(A).

Improper Withdrawal from Employment (Rules Prof. Conduct, Rule 3-700(A)(2))

Rule 3-700(A)(2) states: "A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules."

Upon the termination of his employment, by failing to take reasonable steps to avoid

reasonably foreseeable prejudice to his client, thereby causing his client to be sanctioned by the court in the amount of \$1,700, respondent wilfully violated rule 3-700(A)(2).

C. Case No. 03-O-02715 (The Pretec Electronics Matter)

In October 2001, respondent was counsel of record for Memorex and Pretec Electronics Corporation (Pretec) in patent and trademark infringement litigation brought against them by SanDisk in the United States District Court for the Northern District of California.

Respondent filed an answer on behalf of Memorex and Pretec on December 12, 2001, but thereafter failed to respond to some of the discovery in a timely manner. In a motion proceeding, respondent prepared two declarations in support of an opposition to a motion initiated by SanDisk. The declarations were virtually identical to declarations that had previously been signed by the same declarants and that had been filed in a related case. Both of the declarants worked in Taiwan and written communication with them was difficult. Instead of obtaining an original signature of Pretec President Gordon Yu on one of the declarations, respondent signed the declaration with Yu's name and filed it with the court.

Elliope Shieu, the chief engineer of C-One Technology, sent the signature page of his declaration to respondent by facsimile transmission. However, the signature on the facsimile was illegible, so respondent traced Shieu's signature onto the declaration and then filed the declaration with the court.

Respondent's services were subsequently terminated by his clients. The new attorneys for Memorex and Pretec later reported to the court that Yu and Shieu had not personally signed the declarations that respondent had filed with the court.

Failure to Perform with Competence (Rules Prof. Conduct, Rule 3-110 (A))

Therefore, by failing to respond to some of the discovery in the SanDisk litigation in a timely manner, respondent recklessly failed to perform legal services with competence in wilful violation of rule 3-110(A).

Moral Turpitude (Bus. & Prof. Code, § 6106)

Section 6106 provides that the member's commission of an act involving moral turpitude, dishonesty or corruption constitutes grounds for suspension or disbarment.

By filing declarations with the U.S. District Court that were purportedly signed by Gordon Yu and Elliopes Shieu but which, in reality, were signed or traced by respondent, respondent committed acts of moral turpitude and dishonesty in wilful violation of section 6106.

D. Case No. 04-O-13946 (The Stratton Properties Matter)

In April 2003, respondent substituted into a property damage case and appeared at one status conference. Although the case had already been dismissed, respondent represented to opposing counsel that he would file a motion to set aside the dismissal. Respondent subsequently failed to file the motion to set aside the dismissal, failed to make any further appearances in the case and had no further contact with his clients.

In November 2003, the court sanctioned respondent's clients in the amount of \$636.50 in favor of Stratton Properties as a result of respondent's failure to respond to discovery.

Failure to Perform with Competence (Rules Prof. Conduct, Rule 3-110 (A))

Thus, by failing to perform the legal services for which he was retained, including failing to file the motion to set aside the dismissal, respond to discovery and make any further appearances in the case, respondent recklessly failed to perform legal services with competence in wilful violation of rule 3-110(A).

IV. Aggravation and Mitigation

A. Aggravation

Respondent's misconduct evidences multiple acts of wrongdoing relating to at least three separate clients. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)⁴

B. Mitigation

Respondent does not have any record of prior discipline in approximately 10 years of practice prior to his misconduct in the current proceeding. A period of at least 10 years of practice without prior discipline is entitled to weight as a mitigating factor. (Standard 1.2(e)(i); *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [significant weight given to more than 10 years of practice prior to first

⁴All further references to standards are to this source.

act of misconduct].)

In mitigation, the parties stipulated that respondent was candid and cooperative with the State Bar during the investigation and resolution of these matters. (Standard 1.2(e)(v).) However, the mitigating force of this factor is dramatically reduced based on respondent's subsequent refusal to comply with the treatment requirements of the LAP and his termination from the ADP.

The Supreme Court has held that extreme emotional difficulties are a mitigating factor where expert testimony establishes that those emotional difficulties were directly responsible for the misconduct, provided that the attorney has also established, through clear and convincing evidence, that he or she no longer suffers from such difficulties. (*Porter v. State Bar* (1990) 52 Cal.3d 518, 527; *In re Naney* (1990) 51 Cal.3d 186, 197; *In re Lamb* (1989) 49 Cal.3d 239, 246; standard.1.2(e)(iv).) However, the Supreme Court also has held that, absent a finding of rehabilitation, emotional problems are not considered to be a mitigating factor. (*Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1072-1073; *In re Naney, supra*, 51 Cal.3d at p. 197.)

In accepting respondent into the ADP, the court found that respondent has suffered from major depressive disorder and alcohol dependence and that there was a sufficient connection between respondent's psychological problems and the stipulated misconduct. (Rules Proc. of State Bar, rule 802(c).) However, respondent's conduct before this court while participating in the ADP and his termination from that program and from the LAP prevent the court from making a finding that respondent has established his sustained rehabilitation by clear and convincing evidence. Accordingly, respondent is not provided with any mitigation credit for his participation in the LAP or the ADP.

V. Degree of Discipline

In determining the appropriate disposition in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession and maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; standard 1.3.) Standard

1.6(b) provides that the specific discipline for a particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

The standards applicable to this proceeding are standards 2.3, 2.4(b), and 2.10, which provide for reproof, suspension or disbarment, depending upon the gravity of the offenses and the harm to the clients.

Standard 2.3 provides that culpability of a member of an act of moral turpitude, fraud or intentional dishonesty toward 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. In this proceeding, respondent admits that his execution of Gordon Yu's name on a declaration, his tracing of Elliopes Shieu's signature on a second declaration and his filing of those declarations in the federal court were acts of moral turpitude and dishonesty.

Standard 2.4(b) provides that culpability of a member of wilfully failing to perform legal services in an individual matter or matters shall result in reproof or suspension depending upon the extent of the misconduct and the degree of harm to the client. Respondent admits that he failed to competently perform the legal services for which he was retained in three separate client matters.

Finally, standard 2.10 provides that culpability of a member of, among other things, a violation of any Rule of Professional Conduct not otherwise specified in the standards shall result in reproof or suspension according to the gravity of the offense or the harm, if any, to the victim. Respondent admits that, by failing to inform the court of the termination of his services in the Foxlink matter, he wilfully violated rule 3-700(A)(2).

The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.)

Citing to the standards and *In re Paguirigan* (2001) 25 Cal.4th 1, the State Bar recommended disbarment if respondent fails to successfully complete the ADP. Respondent recommended

imposition of a six-month to one-year stayed suspension, with an actual suspension of 90 days, if he fails to complete the Program.

The court has reviewed the cases cited by the parties in support of their respective disciplinary recommendations. The court does not find the case cited by the State Bar to support its disbarment recommendation, i.e., *In re Paguirigan* (2001) 25 Cal.4th 1, to be relevant to this proceeding for the following reasons: (1) unlike Paguirigan, respondent has not been convicted of any criminal offense; and (2) this court has serious doubts as to whether the facts and circumstances of the instant case rise to the level and/ or meets the criminal definition of forgery. The court does not believe that respondent's misconduct in this proceeding warrants disbarment.

Likewise, the court concludes that many of the cases cited by respondent in support of his disciplinary recommendations are also clearly distinguishable or inapposite. The court concludes that the most relevant cases cited by respondent are *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269 and *In the Matter of Bragg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 615. Like the current matter, both *Dahlz* and *Bragg* involve findings of culpability for acts involving moral turpitude.

In *In the Matter of Dahlz*, the attorney was found culpable, in one client matter, of failing to perform and communicate, improperly withdrawing from representation and committing an act of moral turpitude, namely misrepresenting to an insurance adjuster that his client no longer wanted to pursue her claim. In aggravation, the court found multiple acts of misconduct, one prior instance of discipline, client harm and lack of candor toward the court and the State Bar investigator. The lack of candor was "more egregious than the misconduct found against him in this proceeding." (*Id.* at p. 282.) It included presenting a false telephone log entry prepared for purposes of trial; presenting to the State Bar investigator a falsified stipulation purporting to resolve his client's case; and misrepresenting to the investigator that he appeared before a WCAB judge at the time his client's claim was settled. In mitigation, the court afforded slight weight to *pro bono* services rendered because his involvement was not great and was remote in time. As a result, the Review Department increased the attorney's discipline from five months to one year actual suspension because of his

deception to the opposing party, the State Bar investigators and the State Bar Court.

In *In the Matter of Bragg*, the attorney was suspended for two years, stayed, and placed on probation for two years, conditioned on a one-year actual suspension for various acts of misconduct, including aiding a non-lawyer to engage in the practice of law which involved moral turpitude.

Here, respondent cites to depression and other psychological problems as major contributing factors to his misconduct. Respondent was seeking and obtaining professional treatment and support to address his difficulties. However, since respondent has been terminated from the LAP and the court's ADP, he is not entitled to any mitigating credit for his efforts since he has failed to establish his rehabilitation by clear and convincing evidence.

Therefore, after considering the scope of respondent's acts of admitted misconduct, all of the mitigating and aggravating circumstances and the relevant case law cited by the parties, the court concludes that the imposition of a lengthy period of actual suspension with appropriate conditions is warranted. In particular, as a condition of probation, the court is recommending that respondent be required to continue with his counseling. Also, the court notes that respondent had made restitution to Alex Lukashvskiy and Stratton Properties.

VI. Discipline

IT IS HEREBY RECOMMENDED that respondent **Thomas Ching Jeing** be suspended from the practice of law in the State of California for two years and until he provides satisfactory proof to the State Bar Court of his rehabilitation, present fitness to practice law and present learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. The court recommends that execution of such suspension be stayed and that respondent be placed on probation for three years on the following conditions:

1. Respondent must be actually suspended from the practice of law for the first one year of the period of probation;
2. Respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct;

Within 10 calendar days of any change in the information required to be maintained on the

State Bar's membership records pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone or, if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office of the State Bar and to the Office of Probation;

3. Within 30 calendar days from the effective date of the Supreme Court's final disciplinary order in this proceeding, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request;
4. Respondent must submit written quarterly reports to the Office of Probation no later than each January 10, April 10, July 10 and October 10 of the period of probation. Under penalty of perjury, respondent must state whether he has complied with the State Bar Act, the Rules of Professional Conduct and the conditions of probation during the preceding calendar quarter. If the first report will cover less than 30 days, that report must be submitted on the reporting due date for the next calendar quarter and must cover the extended period. In addition to all quarterly reports, respondent must submit a final report, containing the same information required by the quarterly reports. The final report must be submitted no earlier than 20 days before the last day of the probation period and no later than the last day of such period;
5. Respondent must obtain psychiatric or psychological treatment from a duly licensed psychiatrist, psychologist or clinical social worker, at his own expense, a minimum of twice per month and must furnish evidence of his compliance to the Office of Probation with each quarterly report. Treatment should commence immediately and, in any event, no later than 30 days after the effective date of the Supreme Court's final disciplinary order in this proceeding. Treatment must continue for the period of probation or until a motion to modify

this condition is granted and that ruling becomes final. If the treating psychiatrist, psychologist or clinical social worker determines that there has been a substantial change in respondent's condition, respondent or the State Bar may file a motion for modification of this condition with the State Bar Court Hearing Department pursuant to rule 550 of the Rules of Procedure. The motion must be supported by a written statement from the psychiatrist, psychologist or clinical social worker, by affidavit or under penalty of perjury, in support of the proposed modification;

6. Upon the request of the Office of Probation, respondent must provide the Office of Probation with medical waivers and access to all of respondent's medical records. The revocation by respondent of any medical waiver is a violation of this condition. Any medical records obtained by the Office of Probation are confidential and no information concerning them or their contents will be given to anyone except those members of the Office of Probation, the Office of the Chief Trial Counsel and the State Bar Court who are directly involved with monitoring, enforcing or adjudicating these conditions;
7. Respondent must abstain from the use of any alcoholic beverages, and may neither use nor possess any narcotics, controlled substances, marijuana, or associated paraphernalia, except with a valid prescription;
8. Respondent must select a licensed medical laboratory approved by the Office of Probation. Respondent must furnish to the laboratory such blood and/or urine samples as may be required by the Office of Probation to show that respondent has abstained from the use of alcohol and drugs. The samples must be furnished to the laboratory in such a manner as may be specified by the laboratory to ensure specimen integrity. Respondent must cause the laboratory to provide to the Office of Probation, at respondent's expense, a screening report on or before the 10th day of each month of the period of probation, containing an analysis of respondent's blood and/or urine obtained not more than 10 calendar days previously;
9. Respondent must maintain with the Office of Probation a current address and a current telephone number at which he can be reached. Respondent must return any telephone call

from the Office of Probation concerning the testing of his blood and/or urine within 12 hours. For good cause, the Office of Probation may require respondent to deliver his blood and/or urine sample(s) for additional reports to the laboratory described above no later than six hours after actual notice to him that the Office of Probation requires an additional screening report;

10. Subject to the assertion of applicable privileges, respondent must answer fully, promptly and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with these probation conditions;
11. Within one year of the effective date of the discipline herein, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015-2299, and passage of the test given at the end of that session. Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE), and respondent will not receive MCLE credit for attending Ethics School (Rules Proc. of State Bar, rule 3201);
12. The period of probation will commence on the effective date of the Supreme Court's final disciplinary order in this proceeding; and
13. At the expiration of the period of this probation, if respondent has complied with all of the terms and conditions of probation, the Order of the Supreme Court suspending respondent from the practice of law for two years will be satisfied and that suspension will be terminated.

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE), administered by the National Conference of Bar Examiners, and to provide proof of passage of the MPRE to the Office of Probation, within one year of the effective date of the Supreme Court's final disciplinary order in this proceeding. Failure to pass the MPRE, and to provide proof of such passage, within the specified time will result in actual

suspension by the State Bar Court Review Department, without further hearing, until respondent provides the required proof of passage of the MPRE.

It is also recommended that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court and that he be ordered to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, from the effective date of the Supreme Court final disciplinary order in this proceeding. Failure to comply with rule 955 could result in disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent is required to file a rule 955(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

VII. Costs

It is further recommended that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10 and are enforceable both as provided for in Business and Professions Code section 6140.7 and as a money judgment.

Dated: April 20, 2006

PAT McELROY
Judge of the State Bar Court