

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO**

In the Matter of) **Case No. 05-O-04404-PEM**
)
WILSON REID OGG,)
) **DECISION & ORDER OF**
Member No. 26145,) **INVOLUNTARY INACTIVE**
) **ENROLLMENT**
A Member of the State Bar.)

I. INTRODUCTION FILED JANUARY 10, 2008

In this original disciplinary proceeding, Deputy Trial Counsel Manuel Jimenez appeared for the Office of the Chief Trial Counsel of the State Bar of California (hereafter State Bar). Respondent Wilson Reid Ogg participated in a number of status conferences in this proceeding between May and September 2007. However, thereafter he stopped participating and the matter proceeded by default.

In this proceeding, the State Bar charges respondent with three counts of misconduct involving a single client matter and one count of misconduct involving the California Department of Corporations. The court agrees with the State Bar that disbarment is the appropriate discipline.

II. KEY PROCEDURAL HISTORY

On March 28, 2007, the State Bar filed a notice of disciplinary charges (hereafter NDC) against respondent in this proceeding and served a copy of it on respondent at his latest address shown on the official membership records of the State Bar (hereafter official address) by

certified mail, return receipt requested in accordance with Business and Professions Code section 6002.1, subdivision (c).¹ Even though he participated in a May 14, 2007, status conference in this proceeding, respondent failed to file a response to the NDC. Thereafter, the State Bar filed a motion for the entry of respondent's default. On July 3, 2007, the court granted the State Bar's motion, entered respondent's default and ordered that respondent be involuntarily enrolled as an inactive member of the State Bar.

On July 19, 2007, the State Bar filed a motion for leave to file an amended NDC. And, on August 2, 2007, the court granted the State Bar's motion to file an amended NDC, vacated the prior entry of respondent's default, terminated his involuntary inactive enrollment, and ordered the amended NDC deemed filed as of August 2, 2007.

On August 15, 2007, the State Bar properly served a copy of the amended NDC on respondent at his official address by certified mail, return receipt requested. Even though respondent participated in an August 21, 2007 status conference and a September 10, 2007 status conference at which he was instructed to comply with the Rules of Procedure of the State Bar of California by filing a response to the amended NDC, respondent failed to do so. Accordingly, the State Bar filed a second motion for the entry of respondent's default. Respondent, however, failed to file a response to the amended NDC. Therefore, on September 24, 2007, the court again entered respondent's default and ordered that he be involuntarily enrolled inactive under section 6007, subdivision (e)(1).

On October 12, 2007, the State Bar filed a request for waiver of default hearing and brief on culpability and discipline. On October 15, 2007, the court took the matter under submission for decision without a hearing.

¹ Unless otherwise noted, all further statutory references are to this code.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings of fact are based on: (1) the well-pleaded factual allegations contained in the amended NDC, which allegations are deemed admitted by the entry of respondent's default (§ 6088; Rules Proc. of State Bar, rule 200(d)(1)(A)); and (2) the facts in the official court file in this matter.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on June 16, 1955, and has been a member of the State Bar since that time.

B. Misconduct

1. DeMello Client Matter

In November 2001, Gordon, Charles, and Albert DeMello agreed to sell their mobile home to Timmy Nguyen for \$97,000. On November 5, 2001, the DeMellos retained respondent to represent them as their attorney regarding the sale. At the same time, respondent agreed to act as the escrow agent for the sale. Respondent previously owned an escrow agency specializing in mobile home sales.

In November 2001, the DeMellos hired Robert Chess, a contractor, to work on their mobile home. Not long thereafter, a dispute arose between the DeMellos and Chess over the amount the DeMellos owed Chess for the work he did. In December 2001, Chess filed a breach of contract lawsuit against the DeMellos in the Alameda County Superior Court (hereafter the Chess lawsuit). In that lawsuit, Attorney Patricia Turnage represented Chess, and Attorney Michael Dias represented the DeMellos.

Sometime during the first quarter of 2002, Nguyen gave respondent the \$97,000 purchase price to hold in trust as the escrow agent, and respondent deposited the \$97,000 into his client

trust account. On February 19, 2002, the sale of the mobile home closed; respondent agreed to hold \$25,000 of the \$97,000 sales proceeds in trust for the prevailing party in the Chess lawsuit; and respondent gave the DeMellos a check for \$57,684.19 as their share of the proceeds as set forth in a closing statement respondent prepared.

On March 6, 2002, Attorney Turnage (Chess's attorney in the Chess lawsuit) told respondent that she was going to seek a temporary restraining order (hereafter TRO) from the superior court to prohibit respondent from disbursing the \$25,000 he held in trust until the resolution of the Chess lawsuit. During that discussion, respondent agreed not release the escrow funds pending the outcome of the TRO and to accept service of the TRO by fax.

On March 11, 2002, the superior court issued a TRO restraining respondent from disbursing the money he held in his escrow account to the DeMellos except for the purposes of paying Chess. Soon thereafter, Attorney Turnage served a copy of the TRO on respondent by fax. However, on May 1, 2002, the balance in respondent's client trust account was a negative \$223.78.

In August 2003, the superior court ruled in favor of the DeMellos in the Chess lawsuit. Thus, on August 23, 2003, Attorney Dias (the DeMellos' attorney in the Chess lawsuit) sent respondent a letter in which he asked respondent to release the \$25,000 to the DeMellos. Thereafter, respondent claimed that he no longer had the \$25,000 because some of his employees embezzled money from his client trust account.

On October 17, 2003, the superior court formally entered judgment in favor of the DeMellos, dissolved the TRO, and ordered respondent to release, to the DeMellos, the \$25,000 he was required to hold in trust under the TRO. Even though he knew of the superior court's October 17, 2003 judgment and order, respondent failed to pay the \$25,000 to the DeMellos as

ordered. Between August 2003 and March 2004, Attorney Dias attempted to obtain information from respondent regarding the alleged embezzlement. Respondent failed to respond to Dias's repeated requests for information or to pay the DeMellos any portion of the \$25,000.

Accordingly, in April 2004, the DeMellos filed a breach of contract lawsuit against respondent in the Alameda County Superior Court in which they sought to recover the \$25,000 plus interest. Respondent defaulted in the DeMellos' lawsuit. And, on October 28, 2005, the superior court entered a default judgment against respondent in that lawsuit for \$30,192.68. Even though respondent learned of the judgment shortly after it was entered, he failed to pay it.

Counts 1 & 2: § 6106 (Moral Turpitude) & Rule 4-100(A) (Trust Account Violations)

In counts 1 and 2, the State Bar charges that respondent willfully violated section 6106 and rule 4-100(A) of the State Bar Rules of Professional Conduct (hereafter rule 4-100(A)). For clarity, the court addresses first the rule 4-100(A) violation charged in count 2.

Rule 4-100(A) -- just like its predecessor, former rule 8-101(A) (hereafter former rule 8-101) -- requires, inter alia, that all funds received or held for the benefit of a client by an attorney be deposited into one or more identifiable client trust account. "An attorney violates [rule 4-100] when he or she fails to deposit and manage funds in the manner delineated by the rule, even if this failure does not harm the client. [Citation.]" (*Murray v. State Bar* (1985) 40 Cal.3d 575, 584.) It has long been established that an attorney has a "personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds." (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 795.) In fact, an attorney's duty to comply with rule 4-100 is nondelegable. (Cf. *Coppock v. State Bar* (1988) 44 Cal.3d 665, 680 [applying former rule 8-101].)

Moreover, a violation of rule 4-100(A) may involve conversion of client or other trust funds. Of course, not every conversion of such funds involves moral turpitude, dishonesty, or

corruption in violation of section 6106. (*In the Matter of Hagan* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 167-168, and cases there cited.) However, when the conversion involves moral turpitude, dishonesty, or corruption, the conversion is appropriately denominated as a “misappropriation” or a “willful misappropriation.”² (*In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 26.)

A rule 4-100(A) violation involving the conversion of client funds is established whenever the actual balance of the bank account in which the client funds were deposited drops below the amount credited to the client. (*Edwards v. State Bar, supra*, 52 Cal.3d at p. 37; *Palomo v. State Bar, supra*, 36 Cal.3d at p. 795; *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 123.) Once such a violation is established, the burden then shifts to the attorney to show (1) that he or she did not act in bad faith or engage in an act involving moral turpitude, dishonesty, or corruption and (2) that the conversion occurred as a result of only ordinary negligence and not gross carelessness and reckless. (Cf. *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 585-586; *In the Matter of Respondent F, supra*, 2 Cal. State Bar Ct. Rptr. at p. 26). Otherwise, the attorney will be found culpable of misappropriating client or other trust funds, which merits severe discipline.

The record clearly establishes that respondent willfully violated rule 4-100(A) and converted the \$25,000 he held in trust as an escrow agent on May 1, 2002, when the balance in his client trust account fell below the \$25,000 he held in trust as the escrow agent. Moreover, respondent failed to establish that he did not act in bad faith or that he did not engage in an act

² The terms “misappropriation” and “willful misappropriation” are often used interchangeably, but neither of them appear in the Rules of Professional Conduct or the State Bar Act. Even though the courts have held that those terms cover a wide range of conduct varying significantly in the degree of culpability (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 38; see also *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367), serious opprobrium commonly attaches to them (*In the Matter of Respondent F, supra*, 2 Cal. State Bar Ct. Rptr. at p. 26). Accordingly, this court attempts to use the terms to describe a conversion of client or other trust funds *only* when the conversion involves moral turpitude, dishonesty, or corruption. (*Ibid.*)

involving moral turpitude, dishonesty, or corruption. Respondent also failed to establish that his rule 4-100(A) violations were the result of mere negligence.

Even though respondent claimed that his employees embezzled the \$25,000 from his client trust account, there is no evidence that even remotely supports such a claim. Moreover, respondent never provided Attorney Dias with the information he requested regarding the alleged embezzlement. An attorney's refusal or failure to account for trust funds in response to repeated demands that he or she do so supports a finding of misappropriation. (*Brody v. State Bar* (1974) 11 Cal.3d 347, 350; *Jackson v. State Bar* (1979) 23 Cal.3d 509, 513.)

In sum, the record clearly establishes that, no later than May 1, 2002, respondent willfully misappropriated the entire \$25,000 he held in trust as the escrow agent for the DeMellos' sale of their mobile home to Nguyen, and that respondent's misappropriation involved moral turpitude, if not dishonesty, in willful violation of section 6106.³ (Cf. *Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020, 1021.)

Count 3: § 6103 (Failure to Obey Court Order)

In count 3, the State Bar charges that respondent willfully violated section 6103, which provides that the willful "disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension." The State Bar's section 6103 charge is based *only* on respondent's violation of the TRO by failing to maintain the \$25,000 in trust pending the

³ It is not duplicative to find that respondent willfully violated both rule 4-100(A) and section 6106. (*In the Matter of Hagen, supra*, 2 Cal. State Bar Ct. Rptr. at p. 169.) That is because it is not duplicative to find that an attorney's violation of a Rule of Professional Conduct is so egregious that it rises to the level of an act involving moral turpitude, dishonesty, or corruption in violation of section 6106. (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520.)

outcome of the Chess lawsuit. However, as noted *ante*, the court has relied on that same conduct to find respondent culpable of violating rule 4-100(A) and section 6106. Thus, it would be inappropriate for the court to again rely on that same misconduct to find respondent culpable of willfully violating section 6103. In other words, the charged section 6103 violation is duplicative of the found rule 4-100(A) and section 6106 violation. “It is generally inappropriate to find redundant charged violations. [Citations.]” (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.) And that is because the appropriate level of discipline for an act of misconduct does not depend upon how many rules or statutes proscribe the misconduct. (*Ibid.*)

In short, count 3 is dismissed with prejudice.

2. Department of Corporations Matter

On April 11, 2002, the California Department of Corporations filed a civil action against respondent in the Alameda County Superior Court because respondent was operating an escrow agency without a license. On April 25, 2002, the superior court issued a preliminary injunction prohibiting respondent from acting as an escrow agent.

In that civil action, respondent executed a declaration under penalty of perjury on June 20, 2002, in which he deliberately misrepresented (1) that, as of June 21, 2002, all escrows that were handled by his law office had been transferred and cancelled and (2) that there were no more open escrows. When respondent executed that declaration, he knew that he was still acting as the escrow agent on the DeMellos’ sale of their mobile home to Nguyen for which he was to have been holding \$25,000 in escrow funds in trust.

Count 4: § 6106 (Moral Turpitude)

In count 4, the State Bar charges that respondent violated section 6106 when he executed his June 20, 2002 declaration in the civil action filed against him by the Department of

Corporations. The record clearly establishes that respondent engaged in an act involving moral turpitude and dishonesty in willfully violation of section 6106 when he deliberately misrepresented, in his June 20, 2002 declaration that, as of June 21, 2002, all escrows that were handled by his law office had been transferred and cancelled and that there were no more open escrows.

IV. AGGRAVATING AND MITIGATING CIRCUMSTANCES

A. Aggravating Circumstances

Respondent's misconduct involves multiple acts of misconduct. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std 1.2(b)(ii).)⁴

Respondent's misconduct has caused significant harm to his clients (i.e., the DeMellos). (Std. 1.2(b)(iv).) Respondent misappropriated \$25,000 from them and has never paid the \$30,192.68 judgment that they obtained against him for misappropriating the \$25,000.

Respondent's failure to participate in this disciplinary proceeding before the entry of his default is an aggravating factor. (Std. 1.2(b)(vi); *In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

B. Mitigating Circumstances

The State Bar has not proffered any evidence indicating that respondent has a prior record of discipline, which would be an aggravating circumstance under standard 1.2(b)(i). As noted above, respondent was admitted to practice on June 16, 1955. Furthermore, the State Bar's official membership records show that respondent has continually been an active member of the State Bar since that time.⁵ The misconduct found in this proceeding began sometime in the first half of 2002. Thus, the record establishes that respondent has practiced law discipline-free for

⁴ All further references to standards are to this source.

⁵ Pursuant to Evidence Code section 452, subdivision (h), the court takes judicial notice of the State Bar of California's official membership records pertaining to respondent.

about 37 years, which is a very substantial mitigating circumstance. (Std. 1.2(e)(i); cf. *In re Mostman* (1989) 47 Cal.3d 725, 741; see also *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527, 532.)

V. DISCUSSION ON DISCIPLINE

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Second, the court looks to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In this case, the most severe sanction for respondent's misconduct is found in standard 2.2(a), which applies to respondent's misappropriation of the \$25,000 in escrow funds he held in trust in violation of section 6106.

Standard 2.2(a) provides:

Culpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances.

In its October 12, 2007 brief on culpability and discipline, the State Bar failed to cite a single case to support its contention that disbarment is the appropriate level of discipline in this proceeding.

Even though respondent does not have a prior record of discipline in more than 37 years, the Supreme Court has repeatedly held that misappropriation of trust funds is a grievous violation. Moreover, the Supreme Court has made clear that even an insolated instance of

misappropriation by an attorney without a prior record of discipline will result in disbarment in the absence of compelling mitigation. (*Chang v. State Bar* (1989) 49 Cal.3d 114, 128-129; *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1071-1073.) There is no compelling mitigation in this proceeding, and even at this late date, there is no evidence that respondent has paid a single dollar of restitution to his former clients.

In sum, the court concludes that both the standards and case law support a disbarment recommendation in this proceeding. Moreover, the court concludes that respondent should be ordered to make restitution to the DeMellos for the \$30,192.68 judgment the superior court entered against respondent on October 28, 2005.

VI. DISCIPLINE RECOMMENDATION

This court recommends that respondent WILSON REID OGG be disbarred from the practice of law in the State of California; that his name be stricken from the Roll of Attorneys of all persons admitted to practice in this state; and that he be ordered to make restitution to Gordon, Charles, and Albert DeMello jointly in the total amount of \$30,192.68 plus interest thereon at the rate of 10 percent per annum from December 27, 2005,⁶ until paid (or to the Client Security Fund to the extent of any payment from the fund to Gordon, Charles, or Albert DeMello, plus interest and costs, in accordance with Business and Professions Code section 6140.5. Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d).

VII. RULE 9.20 & COSTS

The court further recommends that OGG be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within

⁶ December 27, 2005, is 60 days after the superior court entered the \$30,192.68 judgment against respondent.

30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

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

VIII. ORDER OF INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that WILSON REID OGG be involuntarily enrolled as an inactive member of the State Bar of California effective three days after service of this order by mail. (Rules Proc. of State Bar, rule 220(c).)

Dated: January ____, 2008.

PAT McELROY
Judge of the State Bar Court