

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of) Case No.: **07-O-12632-LMA**
)
HOKYUNG KIM)
) **DECISION**
)
Member No. 151373)
)
A Member of the State Bar.)

I. Introduction and Pertinent Procedural History

This default matter was submitted for decision on August 27, 2008. At the time of submission, the State Bar of California (“State Bar”) was represented in this matter by Deputy Trial Counsel Treva R. Stewart. Respondent Hokyung Kim (“respondent”) failed to participate in this matter either in-person or through counsel.

The State Bar filed a Notice of Disciplinary Charges (“NDC”) against respondent on June 3, 2008. A copy of the NDC was properly served on respondent on May 30, 2008, in the manner set forth in rule 60 of the Rules of Procedure of the State Bar of California (“Rules of Procedure”).¹

As respondent did not file a response to the NDC, on July 22, 2008, the State Bar filed and properly served on respondent a motion for the entry of respondent’s default.²

¹Unless otherwise indicated, all documents were properly served pursuant to the Rules of Procedure.

²The motion also contained a request that the court take judicial notice of all of respondent’s official membership addresses. The court grants this request.

When respondent failed to file a written response within ten days after service of the motion for the entry of his default, on August 7, 2008, the court filed an order of entry of default and involuntary inactive enrollment.³ A copy of said order was properly served on respondent at his membership records address; however, it was subsequently returned to the court by the U.S. Postal Service as undeliverable.

Thereafter, the State Bar waived the hearing in this matter, and this matter was submitted for decision.⁴

The State Bar's and the court's efforts to contact respondent were fruitless. The court concludes that respondent was given sufficient notice of the pendency of this proceeding to satisfy the requirements of due process. (*Jones v. Flowers, et al.* (2006) 547 U.S. 220 [126 S.Ct. 1708, 164 L.Ed.2d 415].)

II. Findings of Fact

A. Jurisdiction

All factual allegations of the NDC are deemed admitted upon entry of respondent's default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).)

Respondent was admitted to the practice of law in California on December 6, 1990, and has been a member of the State Bar of California at all times since that date.

³Respondent's involuntary inactive enrollment pursuant to Business and Professions Code section 6007, subdivision (e) was effective three days after the service of this order by mail.

⁴Exhibits 1-3 attached to the State Bar's July 8, 2008 motion for the entry of respondent's default are admitted into evidence.

B. The Nguyen Matter (Case No. 07-O-12632)

On or about April 8, 2006, client Nhuan Nguyen (“Nguyen”) hired respondent to represent her in a medical malpractice case against O’Conner Hospital. Nguyen signed a retainer letter and paid respondent \$3,500.00 by way of check number 2327 drawn on Meriwest Credit Union, and \$800.00 cash, shortly thereafter.

The retainer letter specified that Nguyen had until May 25, 2006 to file claim against O’Conner Hospital. The retainer letter also characterized the \$3,500.00 payment as a “true retainer” and a no costs retainer, but also stated that Nguyen would be billed from time to time for “costs that exceed \$3,500.00,” that quantum merit value of respondent’s services would be \$325.00 per hour for attorney services, and that Nguyen would also be paying a contingency fee of 40% against any ultimate award.

On or about May 11, 2006, respondent wrote to Susan Oster Fish, attorney for O’Connor Hospital (“Fish”). In his letter, respondent stated that he was hired to file a claim against the hospital after 90 days. He made a demand for \$500,000 on behalf of Nguyen and requested a waiver of time in order to commence litigation after fifteen days. Respondent personally delivered, or arranged for hand-delivery of, the letter which was hand-delivered on May 26, 2006.

Respondent failed to file suit against O’Conner Hospital by May 25, 2006 or at anytime thereafter.

On or about February 8, 2007, Nguyen filed suit against O’Conner Hospital, in pro per, entitled *Nhuan Nguyen v. O’Connor Hospital; Jan Bravo, M.D.; Charles Griffin, M.D.; Vineet Sharman, M.D.; Ken Mally, R.N.; Florence Lee, R.N.; Lolita Ison, R.N.; and Does 1 to 50, inclusive*. On or about April 4, 2007, O’Conner Hospital, represented by Fish, filed a demurrer. In her demurrer, Fish stated that Nguyen’s cause of action for

intentional infliction of emotional distress is barred by the relevant one year statute of limitations, and it should have been filed no later than May 2006. On or about June 15, 2007, the court granted the demurrer with leave to amend. On or about June 19, 2007, the court set the matter for an Order to Show Cause due to Nguyen's failure to serve all parties. On or about June 18, 2007, Fish filed a request for dismissal as to O'Connor Hospital and the three nurses named in the suit. On or about June 26, 2007, the court dismissed the suit against O'Connor Hospital and the three nurses.

On or about March 16, 2007, almost one year after respondent's assessment of the date for the statute of limitations on the claim, respondent wrote to Nguyen and advised Nguyen that he was declining to represent her in the medical malpractice case.

When respondent terminated his services to Nguyen, Nguyen repeatedly requested an accounting of her fees and the return of unearned fees. Nguyen telephoned respondent on several occasions regarding her requests.

In respondent's letter to Nguyen dated on or about March 16, 2007, he advised Nguyen, "[a] summary of time and related legal expenses is being prepared for your review." In fact, respondent never provided Nguyen with a summary of time and legal expenses.

On or about July 21, 2007, State Bar Investigator John Matney wrote to respondent and advised him of the Nguyen complaint. Investigator Matney asked respondent to respond to several allegations, including but not limited to, the allegation that he failed to account for his fees and failed to return unearned fees. Investigator Matney sent the letter to respondent at his official membership records address, maintained by the State Bar pursuant to Business and Professions Code, section 6002.1. This address was 14125 Capri Drive, Suite 5, Los Gatos, California 95032. Investigator

Matney sent the letter via United States Mail, postage pre-paid. The letter was not returned as undeliverable. On or about September 10, 2007, Investigator Matney left respondent a telephone message, requesting a response to the allegations of the letter dated July 21, 2007.

On or about May 26, 2006, respondent delivered, or had personally delivered, the aforementioned demand letter to attorney Fish. The letter was dated May 11, 2006. On or about May 31, 2006, respondent also wrote to attorney Cyrus Tabari regarding O'Connor Hospital and Nguyen's claim. Thereafter, respondent took no action which was of any benefit to Nguyen. Respondent's actions were preliminary in nature and provided no benefit to Nguyen. Therefore, his \$3,500.00 and \$800.00 were unearned.

Respondent did not refund any fees to Nguyen upon his termination of employment.

III. Conclusions of Law

A. Count One: Rules of Professional Conduct of the State Bar of California, Rule 3-110(A)⁵ [Failure to Perform with Competence]

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

Respondent recklessly failed to perform legal services with competence, in willful violation of rule 3-110(A), by willfully failing to file suit against O'Conner Hospital by May 25, 2006, as specified in respondent's retainer letter to Nguyen.

B. Count Two: Rule 3-700(A)(2) [Improper Withdrawal from Employment]

Rule 3-700(A)(2) provides that an attorney may not withdraw from employment until taking reasonable steps to avoid foreseeable prejudice to the client's rights.

⁵ All further references to rule(s) are to the current Rules of Professional Conduct of the State Bar of California, unless otherwise stated.

The State Bar alleges that respondent violated rule 3-700(A)(2) by: (1) failing to withdraw prior to the expiration of the statute of limitations on Nguyen's claim for negligent infliction of emotional distress; and (2) failing to withdraw in sufficient time for Nguyen to hire subsequent counsel or prepare to file suit in pro per, prior to the expiration of the statute of limitations.

The State Bar has alleged that by **not** withdrawing from employment prior to expiration of the expiration of the statute of limitations, respondent violated his duty to **not** improperly withdraw from employment. The court declines to find that respondent's failure to withdraw from representation prior to the expiration of the statute of limitations constitutes an improper withdrawal.

Additionally, the State Bar's allegation is not adequately supported by the record. The facts alleged in the NDC make no mention of a negligent infliction of emotional distress claim or the duration of the statute of limitations associated with such a claim; yet, the State Bar's concluding paragraph in Count Two specifically addresses respondent's failure to file suit prior to the expiration of Nguyen's cause of action for negligent infliction of emotional distress. Even if the court were to assume that the NDC contains a typographical error, the court cannot accurately decipher which portion of the NDC is in error.

Therefore, the court finds that the State Bar did not present clear and convincing evidence of a violation of rule 3-700(A)(2); and Count Two is dismissed with prejudiced.

C. Count Three: Rule 4-100(B)(3) [Failure to Render Accounts of Client Funds]

Rule 4-100(B)(3) requires that an attorney maintain complete records and render appropriate accounts of all client funds in the attorney's possession. By failing to account for Nguyen's funds, despite Nguyen's repeated requests for an accounting,

respondent failed to render appropriate accounts to a client regarding all funds of the client coming into respondent's possession, in willful violation of rule 4-100(B)(3).

D. Count Four: Rule 3-700(D)(2) [Failure to Refund Unearned Fees]

Rule 3-700(D)(2) requires an attorney whose employment has been terminated to promptly refund any part of a fee paid in advance that has not been earned. By failing to promptly refund, upon termination of employment, the \$4,300.00 in advanced fees paid to him by Nguyen, which respondent did not earn, respondent failed to refund unearned fees in willful violation of rule 3-700(D)(2).⁶

IV. Mitigating and Aggravating Circumstances

A. Mitigation

No mitigating factors were submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)⁷ Respondent, however, has no prior record of discipline in fifteen years of practice prior to engaging in his first act of misconduct in the current proceeding.⁸ Practicing law for fifteen years before committing misconduct is entitled to some weight in mitigation.

B. Aggravation

Respondent committed multiple acts of misconduct by failing to perform with competence, failing to account, and failing to refund unearned fees. (Std. 1.2(b)(ii).)

Respondent's misconduct also significantly harmed his client. (Std. 1.2(b)(iv).) As a result of respondent's misconduct, Nguyen was financially harmed in the amount of \$4,300. Respondent continues to retain the unearned fees advanced to him by Nguyen.

⁶ Rule 3-700(D)(2) does not apply to true retainer fees. The court finds that the fees paid to respondent in the present matter were not true retainer fees.

⁷ All further references to standard(s) are to this source.

⁸ Pursuant to Evidence Code section 452, subdivision (h), the court takes judicial notice of respondent's membership records.

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to 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; std. 1.3.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline.

In this case, the standards call for the imposition of a minimum sanction ranging from reproof to suspension. (Standards 2.4(b) and 2.10.) The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) The standards are not mandatory; they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

The State Bar has requested that respondent be actually suspended for 90 days. In support of this recommendation, the State Bar cited, among other cases, *Harris v. State Bar* (1990) 51 Cal.3d 1082. In *Harris*, the attorney was retained to process a slip-and-fall case and file a related wrongful death action. Except for filing the wrongful death lawsuit and serving it on the defendant, the attorney, in over four years, performed virtually none of the duties for which she had been retained. The attorney also repeatedly failed to communicate with her client. In aggravation, the attorney showed a lack of candor to her client, demonstrated indifference toward the consequences of her misconduct, and caused

harm to her client. In mitigation, the attorney had no prior record of discipline and suffered from typhoid fever during a portion of the period of her misconduct. Ultimately, the California Supreme Court recommended that the attorney be suspended from the practice of law for three years, stayed, with a three-year period of probation including a 90-day actual suspension.

The present case is similar to *Harris* in that it involves a failure to perform in a single-client matter by a practitioner with no prior record of discipline. The court finds that the present case involves less aggravation and less mitigation than *Harris*. While the misconduct in the present case lasted for only one year (as opposed to the four years of misconduct found in *Harris*), respondent, unlike the attorney in *Harris*, failed to participate in the present proceeding and never filed the lawsuit for which he was originally retained.

Consequently, the court agrees with the State Bar that a level of discipline similar to that found in *Harris* is appropriate under the present circumstances.

VI. Recommended Discipline

Accordingly, the court recommends that respondent **HOKYUNG KIM** be suspended from the practice of law for two years and until: (1) he makes restitution to Nhuan Nguyen in the amount of \$4,300 plus 10% interest per annum from April 8, 2006 (or to the Client Security Fund to the extent of any payment from the fund to Nhuan Nguyen, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnishes satisfactory proof thereof to the State Bar's Office of Probation;⁹ and (2) he has shown proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general

⁹ Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. It is further recommended that execution of the above suspension be stayed, and that respondent be actually suspended from the practice of law for 90 days and until:

(1) The court grants a motion to terminate his actual suspension pursuant to rule 205 of the Rules of Procedure of the State Bar of California; and

(2) He makes restitution to Nhuan Nguyen in the amount of \$4,300 plus 10% interest per annum from April 8, 2006 (or to the Client Security Fund to the extent of any payment from the fund to Nhuan Nguyen, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnishes satisfactory proof thereof to the State Bar's Office of Probation;¹⁰

If the period of actual suspension reaches or exceeds two years, it is further recommended that respondent remain actually suspended until he has shown proof satisfactory to the State Bar Court of rehabilitation, present fitness to practice, and present learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (See also, rule 205(b).)

It is also recommended that respondent be ordered to comply with the conditions of probation, if any, hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension.

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

¹⁰ See footnote 9.

and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.¹¹

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners and provide proof of passage to the Office of Probation, within one year after the effective date of the discipline herein or during the period of his actual suspension, whichever is longer.

VII. Costs

It is recommended 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.

Dated: November _____, 2008

LUCY ARMENDARIZ
Judge of the State Bar Court

¹¹ Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)