

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES

In the Matter of)	Case No.: 12-O-16170 - RAH
)	
JOHNNY SISON ASCANO,)	DECISION INCLUDING DISBARMENT
)	RECOMMENDATION AND ORDER OF
Member No. 166219,)	INVOLUNTARY INACTIVE
)	ENROLLMENT
<u>A Member of the State Bar.</u>)	

Introduction¹

In 2006, respondent Johnny Sison Ascano settled a case for his 20-year-old client, but delayed paying her for several years. During this time, he withdrew some of his client's funds, and paid them to himself, resulting in a misappropriation of over \$20,000. Compounding his errors, he sought to mislead his client into thinking that he was still working on the case, when in fact, he had already taken a portion of the money.

He also mismanaged other aspects of his client trust account, and failed to maintain client ledgers and an account journal for about ten years, commencing in 2004. Only on the eve of trial in this matter did he begin complying with his ethical duties in this regard.

As a result of his actions in this single client matter, he deprived his client of the use of these funds, impairing her ability to pay for her education. He only finally paid the amounts owed in 2012.

¹ Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

Under the circumstances present in this matter, and in particular, given the large amount of money misappropriated, the court finds that respondent's disbarment is necessary to adequately protect the public.

Significant Procedural History

The Notice of Disciplinary Charges (NDC) was filed on November 27, 2013. Trial commenced on March 25, 2014. Melissa R. Marshall appeared on behalf of the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Edward O. Lear represented respondent.

During trial, the parties stipulated to certain amendments to the NDC, as follows: page 2, lines 23 and 24, and page 4, line 18, the references to \$37,746.30 are changed to \$37,262.71.

The matter was submitted for decision on March 25, 2014.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on December 1, 1993 and has been a member of the State Bar of California at all times since that date.

Facts

In June 2005, Pauline Pan employed respondent to represent her in a personal injury matter arising out of an automobile accident that occurred on June 1, 2005. She was referred by her uncle, who was her father's brother and respondent's friend. Pan signed a contingency fee agreement, which called for respondent's fee to be 33.3% prior to the filing of a lawsuit and 40% after the filing of a lawsuit. Because Pan was only 20 years old at the time of the accident, she relied heavily on her father, Lamarin Pan, and her uncle to assist her in working with the lawyer. Lamarin and respondent often communicated through the uncle.

Respondent filed a claim with Farmers Insurance Exchange and also an underinsured motorist claim with State Farm Insurance. On April 20, 2006, respondent filed a lawsuit in the Los Angeles Superior Court on behalf of Ms. Pan.

On January 26, 2006, State Farm issued a settlement check for \$2,795.00 made payable to Pan and respondent. He received the check the next day and deposited it into his client trust account (CTA) on her behalf but did not notify her that he had received these funds.

On April 28, 2006, respondent paid a \$320.00 filing fee and a \$45.50 service of process fee for Pan.

On September 29, 2006, respondent paid \$45.00 in costs for photocopying and stamps on Pan's behalf.

On December 6, 2006, Farmers issued a \$15,000.00 settlement check made payable to Pan and respondent. He received it on December 13, 2006, and deposited it into his CTA on Pan's behalf.

On May 7, 2007, respondent paid \$73.09 on an invoice for documents for Pan.

On July 22, 2008, State Farm issued a settlement check for \$1,615.50 made payable to Pan and respondent. He received it on August 5, 2008, and deposited it into his CTA on Pan's behalf.

On September 23, 2009, State Farm issued a settlement check in the amount of \$43,500.00 made payable to Pan and respondent. On September 29, 2009, respondent received the check and deposited it into his CTA.

By September 29, 2009, respondent had deposited a total of \$62,910.50 in his CTA for Pan, and he had paid costs totaling \$483.59 on her behalf. At the time, Pan was entitled to receive \$37,262.71. She had only been paid \$24,713.59, leaving a balance owed to her of \$12,549.12.

On December 15, 2009, respondent paid a \$3,060.00 medical lien on Pan's behalf.

Between December 24, 2009 and January 4, 2010, respondent issued four CTA checks totaling \$4,000.00 to himself.

On January 7, 2010, the CTA's balance was \$21,589.20.

On February 22, 2010, respondent issued Pan a check for \$10,000.00.

Between February 23 and December 10, 2010, respondent issued 52 checks totaling \$97,428.33 to himself or his law corporation.

On December 10, 2010, the CTA account balance was \$2,928.69.

On August 5, 2011, respondent issued Pan a check for \$5,000.00.

Between August 8 and December 15, 2011, respondent issued 12 checks totaling \$13,200.00 to himself or his law corporation.

On December 15, 2011, the account balance was \$3,209.93.

On February 3, 2012, respondent issued Pan a check for \$6,000.00.

Between February 3 and 24, 2012, respondent issued three checks totaling \$2,300.00 to his law corporation.

On February 24, 2012, the account balance was \$1,271.44.

On November 14, 2013, respondent issued a check for \$170.00 to a medical provider for Pan and to Pan for \$12,063.41.

On November 26, 2013, respondent issued Pan a supplemental check for \$969.30, which she accepted. He also provided her with an updated Client Liquidation Sheet.

From September 2009, when Lamarin found out that the case had settled, he called respondent several times to inquire as to the status of the case. Respondent acknowledged that he was aware of these calls, and that Lamarin wanted an accounting of the funds he was holding. Respondent put him off by stating that he "was working on the case." This was not true. In fact,

respondent knew that he had received and spent a portion of the funds. By falsely informing his client that he was working on the case when he was not, he sought to conceal his misappropriations and delay repayment until he could raise other funds.

Lamarin repeatedly asked respondent to finish the case, disburse the funds and provide an accounting. He told respondent that his daughter needed to pay for school. Ms. Pan also sent respondent a certified letter in March 2012, attempting to obtain an accounting.

Respondent attempted to show that his substantial delay in distributing funds from the settlement checks he received was a result of difficulties he had in resolving a Blue Shield lien for Pan. The evidence presented in this regard was scant. What evidence was presented was not credible, in light of respondent's neglect of his CTA and his failure to maintain any records of his client's accounts.

Respondent's Trust Account Practices

Respondent has not maintained trust account ledgers for his clients or an account journal since 2004. He did not commence maintaining client ledgers until just before trial in this matter. As a result, during this period, he was completely unable to determine the amount in his account that belonged to either his clients or to him. During the time he represented Pan, he did not balance his CTA monthly.

Conclusions

Count One - (Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account])

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in a client trust account and no funds belonging to the attorney or law firm must be deposited therein or otherwise commingled therewith, except for limited exceptions.

Respondent failed to maintain a balance of \$37,262.71 in his CTA, in willful violation of rule 4-100(A).

Count Two - (§ 6106 [Moral Turpitude])

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

Between October 2009 and December 2010, respondent dishonestly misappropriated for his own purposes \$21,274.02 that Ms. Pan was entitled to receive, thereby committing an act involving moral turpitude, dishonesty or corruption, in willful violation of section 6106.

Count Three - (Rule 4-100(B)(1) [Notification to Client of Receipt of Client Property])

Rule 4-100(B)(1) requires an attorney to notify a client promptly of the receipt of the client's funds, securities, or other properties.

The communication process agreed upon by the parties was rather circuitous. When Pan had the accident in 2005, she was 20 years old and relied extensively on Lamarin to communicate with the lawyer. Often, the father, in turn, relied on his brother, who did not testify, to communicate with respondent. As such, there was no clear and convincing evidence that respondent failed to keep his client informed of the receipt of funds. Count three is dismissed with prejudice.

Count Four - (Rule 4-100(B)(4) [Promptly Pay/Deliver Client Funds])

Rule 4-100(B)(4) requires an attorney to promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the attorney's possession which the client is entitled to receive.

Respondent failed to pay promptly, as requested by his client, \$12,549.12 which Ms. Pan was entitled to receive, in willful violation of rule 4-100(B)(4).

Count Five - (Rule 4-100(B)(3) [Maintain Records of Client Property/Render Appropriate Accounts])

Rule 4-100(B)(3) provides that an attorney must maintain records of all client funds, securities, and other properties coming into the attorney's possession and render appropriate accounts to the client regarding such property.

Respondent failed to render an appropriate accounting to his client after Ms. Pan requested such an accounting, in willful violation of rule 4-100(B)(3).

Aggravation²

Prior Record of Discipline (Std. 1.5(a).)

Respondent received a private reproof on April 9, 2003 after stipulating to a violation of rule 3-110(A) and 3-700(A)(2), arising out of his representation of a client in immigration proceedings. In that matter, he failed to timely file a brief with the immigration court and then, after the case was dismissed, failed to take steps to protect his client's rights and prevent prejudice to the client. As a result, his client faced deportation proceedings. (State Bar Court case no. 02-O-13577.) This is an aggravating factor.

Multiple Acts/Pattern of Misconduct (Std. 1.5(b).)

Respondent engaged in multiple acts of misconduct over a period of several years. This is an aggravating factor.

Intentional Misconduct, Bad Faith, Concealment, Dishonesty, Overreaching or Other Uncharged Violations of the Business and Professions Code/Rules of Professional Conduct (Std. 1.5(d).)

By falsely informing his client that he was working on the case when he was not, he sought to conceal his misappropriations and delay repayment until he could raise other funds.

² All references to standards (std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Harm to Client (Std. 1.5(f).)

Respondent's client needed the funds to repay student loans. His delay resulted in additional interest being assessed on her outstanding debt. This is an aggravating factor.

Indifference Toward Rectification/Atonement (Std. 1.5(g).)

Respondent delayed in paying the amounts owed to his client until these proceedings were about to commence. In addition, respondent failed to maintain client ledgers for approximately ten years from 2004 to 2014. This reflects negatively on his desire to practice law in an ethical and otherwise appropriate manner. This is a serious aggravating factor.

Mitigation**Cooperation with the State Bar (Std. 1.6(e).)**

Respondent agreed to an extensive stipulation of facts, which admitted to culpability and dramatically reduced the length of time required for this trial. This is a mitigating factor.

Good Character (Std. 1.6(f).)

Respondent has presented evidence of his good character from a broad cross-section of the legal and general communities, all of whom were aware of his misconduct and still testified very positively about his good character. This is a significant mitigating factor.

Remorse/Recognition of Wrongdoing (Std. 1.6(g).)

During trial, respondent showed remorse for his misconduct. He also has taken steps to assure that this does not happen again, including participating in trust accounting school before ordered to do so, and revising the manner in which his office handles trust accounting. However, the mitigating effect of this remorse and these acts are minimized as a result of his long delay in repaying the amounts owed his client and the fact that payment was only made after he knew that the NDC was soon to be filed.

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. 1.1.)

Standard 1.7 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. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed must be the most severe of the applicable sanctions. (Std. 1.7(a).) Discipline is progressive. However, the standards do not require a prior record of discipline as a prerequisite for imposing any appropriate sanction, including disbarment. (Std. 1.8.)

Standards 2.1(a) and 2.2(a) and (b) apply in this matter, allowing a range of disciplinary recommendations from reproof to disbarment. The most severe sanction is prescribed by standard 2.1(a) which suggests disbarment for intentional or dishonest misappropriation of entrusted funds or property unless the amount misappropriated is insignificantly small or the most compelling circumstances clearly predominate, for which one year's actual suspension is appropriate.

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; std. 1.1.) Although 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; std. 1.1.)

This case involved one client and culpability of violating section 6106 and rules 4-100(A) and 4-100(B)(3) and (4) (one count each). In aggravation, the court considered multiple acts of misconduct, a prior disciplinary record, dishonesty, indifference and harm. Mitigating circumstances included cooperation, good character and remorse.

The State Bar recommends disbarment. Respondent concedes as appropriate six months' actual suspension with other probationary conditions.

From 2004 until just before trial in this matter, respondent had no idea what funds were in his CTA and he kept no client ledgers to assist him in that regard. Failing to critically look at the CTA over a ten-year period indicates a conscious awareness of his misconduct. This is compounded by his knowing misappropriation of Pan's funds for his own benefit when he did not have the money to pay her and then misrepresenting the status of the case when asked about it. The court finds that respondent's intentional dishonesty warrants the most serious discipline as the amount misappropriated is far from insignificantly small and the mitigating factors are not compelling and do not clearly predominate.

The court found instructive *Kelly v. State Bar* (1988) 45 Cal.3d 649. In *Kelly*, the attorney was disbarred for willfully misappropriating \$19,597.05 in client trust funds over a five-month period. He also failed to account to the clients; communicated with the clients after they became adverse parties to him and were represented by counsel³; and engaged in acts of moral turpitude and dishonesty. His partial repayment of the misappropriated funds was not a mitigating factor because it occurred after a client told him that she would complain to the State

³The communications occurred without their attorney's knowledge or consent and were about the disputed matter (the misappropriated funds).

Bar. His seven and one-half years of practice without prior discipline was not a mitigating factor. Lesser discipline than disbarment was not warranted because extenuating circumstances did not show that the misappropriation was an isolated event. The absence of an acceptable explanation for the misconduct along with the self-interest underlying his actions suggested that he was capable of future wrongdoing. In the instant matter, the misappropriations took place repeatedly over several years despite knowing of his client's need for her money. Respondent did not account to his client for the funds although he was asked to do so and he repeatedly misrepresented the status of the case to cover up his theft of client funds. He put his interests above his client's. His conduct merits the highest level of discipline.

Accordingly, having considered the facts and the law, the court recommends respondent's disbarment as the only means to protect the public from further misconduct.

Recommendations

It is recommended that respondent Johnny Sison Ascano, State Bar Number 166219, be disbarred from the practice of law in California and respondent's name be stricken from the roll of attorneys.

California Rules of Court, Rule 9.20

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding.

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.

Order of Involuntary Inactive Enrollment

Respondent is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Respondent's inactive enrollment will be effective three calendar days after this order is served by mail and will terminate upon the effective date of the Supreme Court's order imposing discipline herein, or as provided for by rule 5.111(D)(2) of the State Bar Rules of Procedure, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: June _____, 2014

RICHARD A. HONN
Judge of the State Bar Court