



PUBLIC MATTER

FILED
MAY 12 2016
STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 14-O-03483-WKM
)	
DAVID DOE-OOK KIM,)	
)	DECISION AND ORDER OF
Member No. 128030,)	INVOLUNTARY INACTIVE ENROLLMENT
)	(Bus. & Prof. Code, § 6007, subd. (c)(4).)
<u>A Member of the State Bar.</u>)	

Introduction

The Office of the Chief Trial Counsel of the State Bar of California (OCTC) charges respondent **DAVID DOE-OOK KIM** (respondent) with four counts of misconduct in a labor law matter in which respondent represented two restaurant employees in a dispute with their employer and others. Specifically, respondent is charged with willfully violating (1) rule 4-100(B)(1) of the State Bar Rules of Professional Conduct¹ (failure to notify of receipt of client funds); (2) rule 4-100(A) (failure to maintain client funds in trust account); (3) section 6106 of the Business and Professions Code² (moral turpitude – misappropriation); and (4) section 6106 (moral turpitude – misrepresentation). As set forth *post*, the record clearly establishes and respondent admits that he is culpable on all four counts. In addition, the record clearly

¹ Unless otherwise noted, all future references to rules are to the State Bar Rules of Professional Conduct.

² Unless otherwise noted, all future references to sections are to the Business and Professions Code.

establishes that respondent is culpable on multiple counts of *uncharged*, but proved misconduct, which the court considers only for purposes of aggravation.³ (See, e.g., *In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 340-341 [uncharged, but proved misconduct may not be used as an independent ground for discipline, but may be considered, in appropriate circumstances, for other purposes such as aggravation].)

Finally, in light of the very serious uncharged, but proved, misconduct regarding aggravation,⁴ the court finds that the appropriate level of discipline for the found misconduct is disbarment. Because the court will recommend that respondent be disbarred, the court will order respondent's involuntary inactive enrollment pending the final disposition of this proceeding. (§ 6007, subd. (c)(4).)

Pertinent Procedural History

OCTC filed the notice of disciplinary charges (NDC) in this matter on November 18, 2014. On November 19, 2014, the matter was initially assigned to State Bar Court Judge Patrice E. McElroy.⁵ Respondent did not appear at the initial status conference on December 15, 2014, and the matter proceeded to default.

On December 18, 2014, OCTC filed a motion for entry of respondent's default. On January 5, 2015, respondent's default was entered. On April 2, 2015, respondent filed a motion to set aside the default, which OCTC did not oppose. On April 20, 2015, the entry of

³ "Aggravation" or "[a]ggravating circumstances" are factors surrounding [an attorney's] misconduct that demonstrate that the primary purposes of discipline warrant a greater sanction than what is otherwise specified in a given Standard." (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(h) (all further references to standards are to this source).)

⁴ The court does not "suggest that ... OCTC should engage in speculative overcharging. Nevertheless, ... it would have been helpful if all potentially meritorious allegations of rule [and statutory] violations had been clearly and succinctly included in the pleadings." (*In re Silverton* (2005) 36 Cal.4th 81, 93, fn. 4.)

⁵ On June 3, 2015, this proceeding was reassigned to the undersigned State Bar Court Judge for all purposes.

respondent's default was vacated, and respondent was ordered to file a verified response to the NDC within 45 days. Respondent timely filed his response to the NDC on May 19, 2015.

On May 14, 2015, respondent filed a motion to dismiss under rule 5.124(F) of the Rules of Procedure of the State Bar. Respondent's motion argued that the OCTC's October 29, 2014, closure of its investigation of the complaints of respondent's two former clients based on its determination that no disciplinary action was warranted precluded OCTC from reopening its investigation of the two clients' complaints just nine days later on November 7, 2014, under rule 2603 of the Rules of Procedure of the State Bar. OCTC opposed respondent's motion to dismiss. On May 26, 2015, respondent's motion to dismiss was denied based on a finding that OCTC properly closed and then reopened the underlying disciplinary investigation in accordance with rule 2603.

On August 18, 2015, respondent filed a motion to resolve this proceeding by admonishing respondent for his misconduct. (Rules Proc. of State Bar, rule 5.126.) OCTC filed an opposition to that motion, and respondent filed a reply to OCTC's opposition. The court denied respondent's motion for admonition on September 22, 2015.

On October 15, 2015, respondent filed yet another motion to dismiss. In this motion to dismiss, respondent asserted that this proceeding is barred by Civil Code section 3517, which provides that "No one can take advantage of his own wrong." OCTC filed an opposition to this motion to dismiss, and respondent filed a reply to OCTC's opposition. The court denied this motion to dismiss on October 28, 2015, noting that respondent may pursue his unclean hands defense at trial.

The parties filed separate pretrial statements. On November 4, 2015, respondent filed a motion for reconsideration of the court's October 28, 2015, order denying respondent's October 15, 2015, motion to dismiss. OCTC filed an opposition to respondent's motion for

reconsideration. On November 6, 2015, the court denied respondent's motion for reconsideration. On November 12, 2015, respondent filed a petition for interlocutory review of the court's November 6, 2015, order denying reconsideration in the State Bar Court Review Department. With that petition, respondent concurrently filed a motion to stay the proceedings in the hearing department pending a ruling on his petition for interlocutory review. At a status conference on November 16, 2015, this court granted respondent's motion to stay over OCTC's objection. On November 20, 2015, the review department denied respondent's petition for interlocutory review.

On February 12, 2016, respondent filed a substitution of attorney in which Attorney Kendall T. Jones (Jones) was substituted in place of respondent as respondent's attorney of record in this disciplinary proceeding. On the same day, respondent filed an amended pretrial statement.

A two-day trial was held in this matter on February 16 and 17, 2016. On the first day of trial, the parties filed a partial stipulation as to facts and admission of documents. On the second day of trial, the parties filed a stipulation as to the testimony of Alecsi Carrillo. Also, during the second day of trial, respondent stipulated on the record to his culpability on the four counts of charged misconduct. Both parties filed posttrial briefs, and the court took the matter under submission for decision on March 2, 2016.

At trial, OCTC was represented by Senior Trial Counsel Eli D. Morgenstern. Respondent was represented at trial by Jones.

Findings of Fact and Conclusions of Law

The following findings of fact are based on respondent's response to the NDC, the parties' partial stipulation of facts, the parties' stipulation as to the testimony of Alecsi Carrillo, and the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in California on June 17, 1987. He has continuously been a member of the State Bar of California since that time.

Case Number 14-O-03483-WKM

Facts

On December 15, 2011, Mario Tzunux (Tzunux) and Aleci Carrillo (Carrillo) employed respondent to represent them on a contingency fee basis on what were primarily wage-and-hour claims against the restaurant for which they worked, its owner, and others. The restaurant for which Tzunux and Carrillo worked is owned and operated by Il Yoon Kwon (Kwon).

Respondent, Tzunux, and Carrillo signed an attorney retainer agreement that same day, in which respondent was to receive “forty percent (40%) of the net recovery, after deducting costs and expenses advanced by [respondent] ...”⁶ (Underlining original.) Contrary to respondent’s contention, the retainer agreement does not provide respondent with a lien on any recovery that Tzunux and Carrillo might obtain on their claims. (Ex. 4.)

On March 29, 2012, respondent filed an original complaint on behalf of Tzunux and Carrillo and against their restaurant employer, its owner, and others in Los Angeles Superior Court case number BC481799, entitled *Mario Tzunux and Aleci Carrillo v. H.K. Seafood Inc., et al.* (civil matter). On July 27, 2012, respondent filed a first amended complaint on behalf of Tzunux and Carrillo in the civil matter. During the litigation, Carrillo made the following two payments totaling \$4,952.57 for the costs of an interpreter used during the deposition of a Dr. An: on June 17, 2013, Carrillo paid \$1,775 directly to the interpreter, and on August 9, 2013,

⁶ The court construes the agreement to define the term “net recovery” to be the total recovery less the costs and expenses advanced (i.e., paid) by respondent.

Carrillo paid \$3,177.57 to respondent. At the time, respondent represented Dr. An in Dr. An's appeal of a judgment for more than \$3.5 million that Kwon (the owner of the defendant restaurant employer in the civil matter) obtained against him in a lawsuit that was unrelated to either Tzunux, Carrillo, or the civil matter. To the extent that respondent contends that he obtained Tzunux's, Carrillo's, and Dr. An's informed written consent and waiver of potential conflicts of interests to permit him to simultaneously represent them in their respective disputes with Kwon, the court rejects the contention because respondent did not introduce the written consents and waivers into evidence.

After filing the original complaint in, and during the prosecution of the civil matter, respondent became angry with and felt betrayed by Tzunux and Carrillo when he learned that they were undocumented workers who did not have Social Security Numbers and who had given their restaurant employer Social Security Numbers that did not belong to them. In addition, respondent became upset with his clients when they turned down a settlement offer that respondent thought they should have accepted.

Moreover, beginning in August 2013, respondent and his clients began to develop a mutual distrust of each other. Respondent's distrust of his clients began to develop shortly after the defendants in the civil matter filed a motion to disqualify respondent from representing Tzunux and Carrillo because, inter alia, respondent had "violated the ethical standards and requirements of judicial proceedings and has made it impossible to ... resolve the matter according to proper judicial standards." Respondent believed that Tzunux and Carrillo had refused to sign declarations in support of respondent's opposition to the motion to disqualify him.

Attached to the defendants' motion to disqualify respondent are two emails that respondent sent to Attorney Daniel Lee (Lee or Attorney Lee), who is the attorney for the

defendants in the civil matter. In the first email, dated July 22, 2013, respondent begins by stating that he was inquiring whether Lee's client (i.e., Kwon) "is amenable to facilitate a global settlement to resolve all actions, currently pending as well as a floodgate of future cases that would follow should there be an entry of a court judgment holding your clients liable for concealment of tips [i.e., theft of the tips that were left for the restaurant's serving staff]." Respondent continues stating, with respect to the defendants in the civil matter, that he had "carefully compiled overwhelming evidence of deliberate and reckless concealment of income and tips in violation of criminal statutes." He then states: "I am willing to settle all cases including any and all other future actions for \$ 1 million for [Tzunux and Carrillo], \$ 1 million and an apology plus 5 years of free rent for Dr. An, and \$ 1 million for my firm's agreement not to file any more actions against your client, in civil or criminal court, which agreement could be made binding and enforceable *by my firm's agreement to be your client's legal advisor for a limited time period following the settlement.*" (Emphasis added.)

In the second email, dated July 23, 2013, respondent states that he is trying to help Attorney Lee's client Kwon "make amends with Dr. An and divert the vindictive path he is currently on. He is no longer up against Dr. An. He is up against me." Respondent continues by stating "I don't relish in sending people to prison but that is what I had promised I would help Dr. An do, not knowing both sides of the story. If you think my attempt to resolve this amicably is a sign of weakness, I dare you to test me." Respondent concludes by stating:

I may have no choice but to turn [Kwon] in after I am done with him though, since I now know he deserves it. His dirty laundry may have to come out because of his soured relationship with Dr. An, but what I have discovered in the process about him as a person is quite disgusting. If he blows this chance to come clean because of greed, confirming Dr. An's assessment of him in the process, I will not hesitate to make an example out of [Kwon] in the [Korean-American] community of the need to respect the law and that people who pushes [sic] the legal limits as he has by consulting shady professionals will be sent to the prison, big time.

In his declaration in support of his opposition to the defendants' motion to disqualify, respondent states, under penalty of perjury, that "I warned [Attorney Lee] that if I am forced to litigate this case, I would see to it that, in the process, evidence of his clients' criminal acts will be compiled to be turned over to the criminal authorities, which warning he summarily dismissed as frivolous."

Tzunux's and Carrillo's mistrust of respondent began to develop shortly after a failed mediation that took place on September 3, 2013. Respondent did not tell his clients about the mediation until they were told to come to the mediation *after it had started*.

On September 11, 2013, which was the first day of trial in the civil matter, the parties finally agreed to settle the case for \$425,000, which was a significantly higher amount than previously offered. During the conversation that resulted in settlement of the civil matter, Tzunux and Carrillo, for the first time, told respondent that they did not want to have to pay income taxes on the \$425,000. Thereafter, respondent asked Attorney Lee if the settlement proceeds could be paid to Tzunux and Carrillo without Internal Revenue Service Form 1099's (1099) being issued to his clients. Lee said that it could be done, apparently not being clear that it was simply his position that 1099's did not have to be issued to respondent's clients, but that a 1099 would be issued to respondent instead. As a result of this misunderstanding, respondent and his clients ineptly believed that the defendants had agreed not to report the \$425,000 settlement proceeds to the Internal Revenue Service (IRS) as income to Tzunux and Carrillo and that Tzunux and Carrillo would not have any income tax liabilities on the \$425,000 settlement.⁷

On about September 16, 2013, Lee drafted a "confidential settlement agreement and release" in the civil matter (the settlement agreement) and sent it to respondent's office.

⁷ Because Tzunux and Carrillo's claims against the defendants in the civil matter were primarily wage-and-hour claims, there was very little that Tzunux and Carrillo could do to avoid the reporting of the \$425,000 settlement to the IRS as income to Tzunux and Carrillo.

Regarding tax liabilities and IRS reporting, the settlement agreement provided that a 1099 would be issued to respondent's CTA for each settlement check issued, and that his clients would be "solely and ultimately responsible for all tax obligations" arising from the settlement.

Respondent attempted to have Lee change this aspect of the settlement agreement, but respondent was unsuccessful. The defendants would not agree to pay Tzunux's and Carrillo's income tax on the \$425,000 settlement.

For purposes of this decision, the remaining relevant terms of the settlement agreement provided that Tzunux and Carrillo were to receive \$425,000 from the defendants in the civil matter, according to the following payment schedule:

- (i) \$50,000 within 30 days of the execution of the agreement;
- (ii) \$50,000 within 60 days of the execution of the agreement; and
- (iii) the balance of \$325,000 payable at the rate of \$20,000 each and every 30 days thereafter, until the balance was paid in full.

Finally, the settlement agreement also provided that the parties would keep confidential the existence and the terms of the settlement agreement, and also that all of the settlement agreement payments were to be made by check made payable to respondent's client trust account (CTA).

Respondent's clients received the settlement agreement on about September 19, 2013, and saw the provision which provided that they would be liable for all tax liabilities related to the \$425,000 settlement. Because this term had changed from their understanding at the courthouse on September 11, 2013, Tzunux and Carrillo refused to sign the settlement agreement.

On September 24, 2013, respondent, Tzunux, and Carrillo met to review the terms of the settlement agreement. In order to induce his clients into signing the settlement agreement, respondent prepared and signed a letter memorializing their agreement as to how the settlement proceeds would be distributed (settlement distribution agreement). The letter provides that:

1. From the first payment of \$50,000, respondent was entitled to receive \$38,000 as reimbursement for advanced costs (and expenses). The balance of \$12,000 was to be distributed such that respondent's clients would receive 60 percent of the payment, and respondent would receive 40 percent.
2. The second payment of \$50,000 was to be divided such that respondent's clients would receive 60 percent of the payment, and respondent would receive 40 percent.
3. All the remaining monthly payments of \$20,000 were to be divided so that respondent's clients would receive 60 percent of the payments, and respondent would receive 40 percent.

Respondent concluded the letter by stating: "Irrespective of what the final amount of costs is, we agree that your respective portions will be no less than \$118,000 each after deducting all costs, expenses and *taxes*." (Emphasis added.)

From the outset, respondent had no intention of abiding by the promise of his clients receiving \$118,000 *after taxes*. In fact, under the terms of the settlement distribution agreement as set forth *ante*, respondent's clients would each receive only \$116,100⁸ *before taxes*.

Respondent had planned on making his clients pay the income tax on their respective shares of the \$425,000 settlement. He intended to issue to each client and to file with the IRS, a 1099 for the client's share of the \$425,000. Under the settlement disbursement agreement, respondent was entitled to recover a total of \$192,800 (\$38,000 as reimbursement for advanced costs plus \$154,800 in attorney's fees [40 percent of \$387,000 (\$425,000 less \$38,000) equals \$154,800].

⁸ \$7,200 [which is 60 percent of \$12,000] plus \$30,000 [which is 60 percent of \$50,000] plus \$195,000 [which is 60 percent of \$325,000] divided by 2 equals \$116,100.

On about September 26, 2013, respondent received an email from Lee. Lee accused respondent's clients of breaching the settlement agreement by disclosing in a local Korean newspaper the terms of the settlement agreement by telling the newspaper that the lawsuit settled with defendants paying respondent's clients between \$400,000 and \$450,000. While Lee initially threatened to seek an order nullifying the settlement agreement or to file a lawsuit on his clients' behalf against respondent and respondent's clients for breach of contract, Lee in fact took no actions, and his clients honored the terms of the settlement agreement.

At this point, respondent decided to secretly breach the settlement distribution agreement. Instead of making pro rata payments to his clients of 60 percent of each settlement check received after he was reimbursed for \$38,000 in advanced costs with respondent keeping the remaining 40 percent as his contingent fee, respondent decided to pay himself first from the settlement proceeds until he collected, from the \$425,000 settlement, a total of \$192,800 (\$38,000 in reimbursed advanced costs plus \$154,800 as his contingent fee (which is 40 percent of \$387,000, which is \$425,000 minus \$38,000)).⁹ After respondent had been reimbursed for his advanced costs and collected his total contingent fee, respondent intended to request Lee to issue all remaining payments to his clients, with each client receiving equal amounts.

Respondent decided to secretly breach the settlement distribution agreement because he believed that it would avoid any potential problems with the IRS over issuing 1099's to Tzunux and Carrillo that had inaccurate social security numbers for his clients. He believed that if he knowingly provided a false social security number on a 1099 to either of his clients, he could

⁹ At some point in this disciplinary proceeding, respondent contended that the settlement disbursement agreement was void for illegality under Civil Code section 1608. The contention is meritless. Moreover, even assuming arguendo that the settlement disbursement agreement was void for illegality, respondent would still not have been entitled to collect his reimbursement for advanced costs or his attorney's fees first. He would have still been required to split each settlement payment with Tzunux and Carrillo pro rata. (Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2015) ¶ 5:211, p. 5-31, and cases there cited.)

have been responsible for any tax liabilities related to those payments that he made to his clients.¹⁰ By receiving into his CTA only those funds which were for his fees and expenses, all of the remaining IRS problems would be for his clients and Lee to resolve.

On November 7, 2013, respondent deposited the first \$50,000 payment on behalf of Tzunux and Carrillo into his CTA. Respondent did not notify Tzunux or Carrillo of his receipt of the \$50,000 payment, and applied all of the \$50,000 to his advanced costs (and expenses) and his contingent fee.

On November 12, 2013, Tzunux and Carrillo sent respondent an e-mail asking about the status of their case. Respondent received the e-mail, but did not respond. On November 17, 2013, Tzunux and Carrillo sent respondent a second e-mail, this time asking about collecting the settlement funds. Respondent received the e-mail and replied on November 20, 2013.

In his reply email, respondent made material misrepresentations to his clients. He falsely stated that, on November 8, 2013, he and Lee went to see the judge about their disclosure of the confidential settlement terms to the newspaper. He also falsely stated that a new lawsuit would have to be filed to enforce the settlement agreement. He also chastised them by stating "I am very upset you lied to me and ruined the settlement." In addition, respondent stated: "Also, I am no longer your attorney because your case was already dismissed." None of respondent's statements were in fact true; they were all utterly false. Further, respondent knew they were all false when he made them. He made the false statements to conceal his breach of the settlement disbursement agreement and his resulting misappropriations of Tzunux's and Carrillo's shares of the settlement proceeds and to ensure that Tzunux and Carrillo would not be looking for any settlement funds in the near future.

¹⁰ Notably, respondent did not seek any advice from a tax professional or tax attorney on this perceived problem of completing a 1099 with a false Social Security Number and any consequences that could befall him for doing so.

On December 5, 2013, respondent deposited the second \$50,000 payment on behalf of Tzunux and Carrillo into his CTA. Again, respondent did not notify his clients about this receipt of the \$50,000, and he applied all of the \$50,000 to his contingent fee.

On January 3, 2014, respondent deposited the first \$20,000 monthly payment he received on behalf of Tzunux and Carrillo into his CTA. Respondent did not notify his clients about this receipt of the \$20,000, and he applied all of the funds to his attorney fees.

On February 6, 2014, respondent deposited the second \$20,000 monthly payment on behalf of Tzunux and Carrillo into his CTA. Respondent did not notify his clients about this receipt of the \$20,000, and he applied all of the funds to his attorney fees.

On March 4, 2014, respondent deposited the third \$20,000 monthly payment on behalf of Tzunux and Carrillo into his CTA. Respondent did not notify his clients about this receipt of the \$20,000, and he applied all of the funds to his attorney fees.

On April 7, 2014, respondent deposited the fourth \$20,000 monthly payment on behalf of Tzunux and Carrillo into his CTA. Respondent did not notify his clients about this receipt of the \$20,000, and he applied all of the funds to his attorney fees.

On April 9, 2014, Tzunux and Carrillo retained Attorney Jae S. Kim (Jae Kim or Attorney Jae Kim) to represent them in the civil matter. On April 22, 2014, Jae Kim substituted into the civil matter as the attorney of record for Tzunux and Carrillo in place of respondent. Respondent consented to the substitution. Tzunux and Carrillo learned from Jae Kim that respondent had been receiving settlement checks. Jae Kim charged Tzunux and Carrillo a total of \$10,000 in attorney's fees.

On May 19, 2014, Tzunux and Carrillo retained Attorney Alex Cha (Cha or Attorney Cha) to represent them in the civil matter and to replace Attorney Jae Kim. Cha received the remainder of the settlement checks from the defendants in the civil matter. Out of the settlement

proceeds he received, Cha paid Jae Kim the \$10,000 in attorney's fees that Jae Kim charged Tzunux and Carrillo. With one exception, Cha retained 15 percent of each settlement check he received as his attorney's fees. The one exception is that Cha did not collect a 15 percent fee on the \$10,000 that he paid to Jae Kim. Cha collected \$220,000 (he received 11 checks of \$20,000 each). Cha charged and collected from Tzunux and Carrillo attorney's fees in the amount of \$31,500 (15 percent of \$210,000 [\$220,000 minus \$10,000]).

In July 2015, the defendants sent Cha a \$25,000 check as the final payment of the full \$425,000. However, the defendants included respondent as one of the payees on the check, and respondent claimed at trial that he was entitled to be paid \$14,157.79 from the \$25,000. Cha does not believe that respondent is entitled to any of the \$25,000, presumably because respondent has not produced a valid written lien on Tzunux's and Carrillo's recovery in the civil matter. Respondent had refused to endorse the check because Cha would not agree to pay him \$14,157.79.

In respondent's posttrial brief, Attorney Jones represents to the court that respondent authorized Attorney Lee "to pay all but \$9205.22 of the final \$25,000 to [Tzunux and Carrillo], claiming an attorney lien against the final \$9205.22. [Respondent] reduced his attorney lien from \$14K to \$9K in order to reimburse his [former] Client, Mr. Carrillo, for the deposition expense related to Dr. An's deposition." As noted *ante*, under the settlement disbursement agreement respondent was entitled to recover a total of \$192,800. Respondent has collected \$180,000. Thus, at best, respondent might be entitled to \$12,800 (\$192,800 less \$180,000) of the \$25,000 if respondent has a valid written lien on Tzunux's and Carrillo's recovery in the civil matter.

///

///

Conclusions of Law

Count One - Rule 4-100(B)(1) (Notification of Receipt of Client Funds)

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 record clearly establishes, and respondent stipulates, that respondent willfully violated rule 4-100(B)(1) as charged in count one. Specifically, respondent violated rule 4-100(B)(1) when he failed to notify Tzunux and Carrillo that he received the six settlement checks totaling \$180,000 from the defendants in the civil matter between early November 2013 and early April 2014.

Count Two - Rule 4-100(A) (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. The record clearly establishes, and respondent stipulates, that respondent willfully violated rule 4-100(A) as charged in count two. Specifically, respondent violated rule 4-100(A) when he failed to maintain \$85,200¹¹ from the six settlement checks totaling \$180,000 that he received from the defendants in the civil matter.

The fact that respondent was ultimately entitled to the \$85,200 and more as his attorney's fees is not a defense to the charged rule 4-100(A) violation. "Under California law, absent an enforceable contractual lien, an attorney commits a trust account violation by unilaterally determining his or her fee and withdrawing trust funds to satisfy the fee, even though the attorney may be entitled to a fee in the withdrawn amount." (*In the Matter of Lazarus* (Review

¹¹ In counts two and three, OCTC incorrectly alleges that respondent was required to maintain \$90,000 of the \$180,000 in his CTA for the benefit of Tzunux and Carrillo.

Dept. 1991) 1 Cal. State Bar Ct. Rptr. 387, 399, citing *Silver v. State Bar* (1974) 13 Cal.3d 134, 142; and *Brody v. State Bar* (1974) 11 Cal.3d 347, 350, fn. 5.)

Count Three - § 6106 (Moral Turpitude-- Misappropriation)

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. The record clearly establishes, and respondent stipulates, that respondent willfully violated section 6106 as charged in count three. Specifically, respondent violated section 6106 by misappropriating for his own use and benefit the \$85,200 that he failed to maintain in his CTA for Tzunux and Carrillo out of the six settlement checks totaling \$180,000 that respondent received on behalf of Tzunux and Carrillo from the attorney for the defendants in the civil action. Respondent's misappropriations involved moral turpitude, if not dishonesty. The fact that respondent was ultimately entitled to the \$85,200 and more as his attorney's fees is not a defense to the charged misappropriation. Respondent deliberately breached his fiduciary duties to his clients and put his interests above those of his clients. Moreover, respondent deprived his clients of the use of their shares of the settlement proceeds for many months.

Count Four - § 6106 (Moral Turpitude-- Misrepresentation)

The record clearly establishes, and respondent stipulates, that respondent willfully violated section 6106 as charged in count four. Specifically, respondent violated section 6106 when he falsely stated, in his November 20, 2013, email to Tzunux and Carrillo, that they had "ruined" the settlement agreement and that they would have to bring a new lawsuit to enforce the settlement agreement. Respondent made the false statements knowing they were false. He made the false statements to conceal his breach of the settlement disbursement agreement and his resulting misappropriations of Tzunux's and Carrillo's shares of the settlement proceeds. Respondent's misrepresentations to his clients involved both moral turpitude and dishonesty.

Aggravating Circumstances

OCTC bears the burden of proving aggravating circumstances by clear and convincing evidence. (Std. 1.5.) As set forth *post*, OCTC has established five aggravating circumstances.

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

Respondent has one prior record of discipline. In 2011, respondent was privately reprimanded because he knowingly acquired an interest adverse to a client without complying with the requirements of rule 3-300. Specifically, respondent obtained an adverse interest to his client when he negotiated an amended fee agreement with the client. Moreover, the terms of the amended fee agreement were not fair or reasonable to the client. And respondent did not disclose to the client in writing the fact that he may seek advice from an independent attorney. Finally, respondent did not provide the client with a reasonable opportunity to seek such independent advice. Without question, respondent's prior record of discipline is particularly aggravating in the present proceeding because it also involved respondent's overreaching and placing his own interests above those of his clients.

Multiple Acts (Std. 1.5(b).)

Respondent's present misconduct involves multiple acts of very serious wrongdoing. Respondent failed to notify his clients when he received six settlement checks totaling \$180,000; respondent intentionally misappropriated his clients' shares of those six checks, which totaled \$85,200; and respondent deliberately misrepresented the status of the civil matter to his clients.

Dishonesty and Overreaching (Std. 1.5(d).)

In his September 24, 2013, letter to his clients setting forth the terms of the settlement disbursement agreement, which respondent admitted preparing to convince his clients to sign the \$425,000 settlement agreement, respondent falsely stated that each client's portion of the \$425,000 settlement would be no less than \$118,000 "after deducting all costs, expenses and

taxes.” At the time respondent sent that letter to his clients, respondent knew his statement was false. In short, respondent knowingly made a false statement of fact to convince his clients to enter into the \$425,000 settlement agreement. Such conduct involves not only moral turpitude, but also dishonesty and amounts to overreaching, if not fraud. Respondent fails to appreciate that the client is the one who decides whether to accept a settlement. Again, respondent placed his own interest in collecting almost \$200,000 in attorney’s fees and above the interests of his clients and effectively defrauded them into accepting the \$425,000 settlement.

Uncharged, but Proved Misconduct (Std. 1.5(h).)

§ 6106 (Moral Turpitude-- Misrepresentation)

The record establishes that respondent willfully violated section 6106’s proscription of acts involving moral turpitude and dishonesty when he falsely stated, in his June 30, 2014, letter to the State Bar, that Tzunux and Carrillo’s client “files were subsequently disposed of when I vacated my offices last year.” This too is a very serious aggravating circumstance and is yet another instance in which respondent has deliberately lied. Moreover, the Supreme Court has repeatedly held that false testimony and misrepresentations in a disciplinary proceeding may constitute a greater offense than that of misappropriation, which itself ordinarily warrants disbarment. (*Middleton v. State Bar* (1990) 51 Cal.3d 548, 560.)

Rule 5-100(A) (Threatening Criminal Charges)

Rule 5-100(A) provides that an attorney must not threaten to present administrative, criminal, or disciplinary charges to obtain an advantage in a civil dispute. The record clearly establishes that respondent willfully violated rule 5-100(A) by threatening to present criminal charges against Kwon in his July 22 and 23, 2013, emails to Attorney Lee. Respondent’s admission to previously warning/threatening Attorney Lee with complaints to criminal authorities if respondent were forced to try the civil matter in respondent’s declaration in support

of plaintiffs' opposition to defendants' motion to disqualify respondent makes clear that respondent was, in his July 22 and 23, 2013, emails to Attorney Lee, threatening criminal charges against Kwon in an attempt to gain an advantage in a civil dispute.¹²

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 had a duty under rule 4-100(B)(4) to promptly endorse the \$25,000 check that Cha received from the defendants in July 2015. (*In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, 521-522.) The record clearly establishes that he violated that duty and that his misconduct continued through trial in this proceeding. Respondent failed to establish that he possess a valid written lien on Tzunux's and Carrillo's recovery in the civil matter, which would be a defense to the violation. (See *In the Matter of Feldsott* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 754, 758.)

Moreover, even if respondent possesses a written lien on Tzunux's and Carrillo's recovery in the civil matter, its continued validity would be questionable in light of respondent's effective withdrawal from employment on November 20, 2013, when he sent them an email making clear that he would not be performing any more work on the civil matter and would no longer communicate with them. (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 536 [an attorney effectively withdraws from employment by ceasing to work on a client's matter and stops communicating with the client]; *In the Matter of Lazarus* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 387, 399-400 ["When an attorney withdraws from a contingent fee case, the attorney's entitlement to enforce a pre-existing lien for fees depends on whether the

¹² Further, respondent's "offer" not to file any more actions against Kwon in civil or criminal court for \$1 million sounds of extortion, and respondent's solicitation of employment from the defendant he sued (Kwon) suggests conflicts of interest with respect to Tzunux, Carrillo, and Dr. An.

attorney had justifiable cause for withdrawing.”].) “It appears inescapable that in the event of a withdrawal of an attorney from a contingent fee case, the attorney's right to enforce his lien and the extent of his recovery cannot be determined unilaterally by the attorney, any more than the fees could be so determined if there had never been a contractual lien in the first place. If the attorney and client cannot reach a new agreement, then the attorney's sole recourse is to an independent tribunal with the funds remaining in trust in the interim.” (*In the Matter of Lazarus, supra*, 1 Cal. State Bar Ct. Rptr. at p. 400.)

Client Harm (Std. 1.5(i).)

Without question, respondent's misconduct caused significant harm to both Tzunux and Carrillo. First, respondent's misappropriation of the clients' \$85,200 share of the first six settlement checks totaling \$180,000 deprived his clients of the use of that \$85,200 for many months. Second, respondent's multiple acts of misconduct and the statement in his November 20, 2013, email to his clients that he was no longer their attorney strongly suggest, if not establish, that respondent abandoned Tzunux and Carrillo resulting in their paying Attorney Jae Kim and Attorney Cha a total of \$41,500 (\$10,000 plus \$31,500) in attorney's fees to complete the work that respondent failed to perform. (*In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 46 [attorney who abandoned his clients required to make restitution for the sum clients had to pay to successor counsel].)

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.5.) Respondent has established only one mitigating circumstance, which is recognition of wrongdoing. As noted *ante*, on the last day of trial, respondent finally recognized the wrongfulness of his misconduct and admitted his clear culpability on each of the four counts of charged misconduct. Respondent is entitled to significant mitigation for his

belated recognition. The court also affords respondent some limited mitigation based on the stressful personal difficulties he incurred at the time of the misconduct even though there is no expert testimony to show that those difficulties were directly responsible for the misconduct as required under standard 1.6(d).

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney but to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.1; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate level of discipline, this court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The court then looks to the decisional law. (*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.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *Gary v. State Bar* (1988) 44 Cal.3d 820, 828; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

As the Review Department noted more than two decades ago in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, even though the standards are not to be applied in a talismanic fashion, they are to be followed unless there is a compelling reason that justifies not doing so. (Accord, *In re Silverton* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors.

(*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *Gary v. State Bar* (1988) 44 Cal.3d 820, 828; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Standard 1.7(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. The most severe sanction for the found misconduct in found in standard 2.1(a), which applies to respondent's six intentional misappropriations which involved moral turpitude and dishonesty and that totaled \$85,200. Standard 2.1(a) provides: "Disbarment is appropriate for intentional or dishonest misappropriation of entrusted funds or property, unless the amount misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate, in which case actual suspension of one year is appropriate."

The amount respondent misappropriated is by no means insignificantly small, and the mitigating circumstances are by no means compelling. Accordingly, under standard 2.1(a), disbarment is the presumed sanction. Respondent's other acts involving moral turpitude and dishonesty as discussed *ante* also strongly support a disbarment recommendation. (*Lebbos v. State Bar* (1991) 53 Cal.3d 37, 45 ["Multiple acts of misconduct involving moral turpitude and dishonesty warrant disbarment.].)

Moreover, misappropriation of funds held in trust has long been viewed as a particularly serious ethical violation because it breaches the fiduciary duty of loyalty, violates basic notions of honesty, and endangers public confidence in the profession. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1035; *Kelly v. State Bar* (1988) 45 Cal.3d 649, 656.) Therefore, "misappropriation of [trust] funds ... warrants disbarment unless the most compelling mitigating circumstances clearly predominate. [Citations.]" (*In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 518.) This is true even in cases involving a single misappropriation by an attorney

who has no prior record of discipline. (E.g., *In re Abbott* (1977) 19 Cal.3d 249, 253-254 [disbarment for misappropriation of \$29,500 in a single client matter despite substantial mitigation for attorney's 13 years of discipline-free practice and for attorney undergoing treatment to address emotional problems]; *Chang v. State Bar* (1989) 49 Cal.3d 114, 128-129 [disbarment for single isolated misappropriation of less than \$7,900 by attorney with no prior record of discipline; the attorney offered no mitigating evidence, never acknowledged the wrongfulness of his conduct, made no effort to reimburse the client, and displayed a lack of candor to State Bar].)

The record in this proceeding clearly establishes the disturbing conclusion that, after more than 30 years of practicing law, respondent has no meaningful understanding of basic fiduciary law. Finally, the record provides no reason for the court to depart from the presumed sanction of disbarment provided for in standard 2.1(a). Accordingly, the court will recommend that respondent be disbarred. In addition, the court will recommend that respondent be required to make restitution for the \$41,500 in attorney's fees that Tzunux and Carrillo actually paid their successor counsel. Like the victim of the attorney misconduct in *Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1045, Tzunux and Carrillo "have incurred specific out-of-pocket losses directly resulting from attorney misconduct. Restitution of these amounts emphasizes the professional responsibility of lawyers to account for their misconduct, and thereby serves to both protect the public and instill public confidence in the bar."

Recommendations

Discipline

The court recommends that respondent **DAVID DOE-OOK KIM**, State Bar member number 128030, be disbarred from the practice of law in California and that his name be stricken from the Roll of Attorneys of all persons admitted to practice in this state.

The court further recommends that respondent David Doe-Ook Kim be ordered to make restitution to the following payees:

- (1) Mario Tzunux in the amount of \$20,750¹³ plus 10 percent interest per year from July 1, 2015; and
- (2) Alecsi Carrillo in the amount of \$20,750 plus 10 percent interest per year from July 1, 2015.

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

California Rules of Court, Rule 9.20

The court further recommends that respondent **DAVID DOE-OOK KIM** 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 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding.

Costs

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

Order of Involuntary Inactive Enrollment

In accordance with Business and Professions Code section 6007, subdivision (c)(4), the court orders that **DAVID DOE-OOK KIM** be involuntarily enrolled as an inactive member of the State Bar of California effective three calendar days after the service of this decision and order by mail (Rules Proc. of State Bar, rule 5.111(D)).

Dated: May 12, 2016



W. KEARSE MCGILL
Judge of the State Bar Court

¹³ \$20,750 is one-half of \$41,500.

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on May 12, 2016, I deposited a true copy of the following document(s):

DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

in a sealed envelope for collection and mailing on that date as follows:

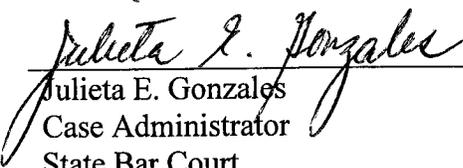
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

KENDALL T. JONES
KENDALL T. JONES P.A.
1076 CALLE CONTENTO
THOUSAND OAKS, CA 91360

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

Eli D. Morgenstern, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on May 12, 2016.



Julieta E. Gonzales
Case Administrator
State Bar Court