

PUBLIC MATTER

FILED
MAY 02 2016
STATE BAR COURT
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LOS ANGELES

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 14-O-04993-WKM
)	
ANN A. HULL,)	DECISION AND ORDER OF
)	DISMISSAL WITH PREJUDICE
Member No. 252855,)	
)	
<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 ANN A. HULL with two counts of misconduct involving a single client matter. Specifically, respondent is charged with willfully violating (1) rule 4-100(A)(2) of the State Bar Rules of Professional Conduct¹ (improper withdrawal of disputed client funds) and (2) section 6106 of the Business and Professions Code² (moral turpitude – misappropriation of client funds).

As set forth *post*, the court finds that OCTC has failed to establish, by clear and convincing evidence (Rules Proc. of State Bar, rule 5.103), that respondent is culpable of the charged violations of either rule 4-100(A)(2) or section 6106. Accordingly, the court will dismiss this proceeding with prejudice.

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.



Pertinent Procedural History

OCTC filed the notice of disciplinary charges (NDC) in this matter on September 25, 2015. Thereafter, respondent filed her response to the NDC on October 20, 2015.

The parties filed a partial stipulation of facts and admission of documents on January 21, 2016, the day of trial. Both parties filed post trial briefs, and the court took the matter under submission for decision on February 4, 2016.

OCTC was represented at trial by Senior Trial Counsel William Todd. Respondent was represented at trial by Attorney Megan Zavieh.

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, and the documentary and testimonial evidence admitted at trial. OCTC must prove culpability by clear and convincing evidence. (Rules Proc. of State Bar, rule 5.103.)

Jurisdiction

Respondent was admitted to the practice of law in California on December 3, 2007. She has continuously been a member of the State Bar of California since that time.

Case Number 14-O-04993

Credibility Determinations

Respondent

After carefully observing respondent testify before it and after carefully considering, among other things, respondent's demeanor while testifying; the manner in which she testified; the character of her testimony; her interest in the outcome in this proceeding; her capacity to perceive, recollect, and communicate the matters on which she testified; and after carefully reflecting on the record as a whole, the court finds that respondent's testimony in this proceeding

to be exceptionally credible, honest, forthright, direct, and specific. (See, generally, *In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725, 736-737; see also *Brockway v. State Bar* (1974) 53 Cal.3d 51, 66; *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 959.)

Kenneth MacKenzie

In stark contrast to respondent's exceptionally credible and honest testimony, is Kenneth MacKenzie's testimony. After carefully observing MacKenzie testify before it and after carefully considering, among other things, MacKenzie's demeanor while testifying; the manner in which he testified; the character of his testimony; his interest in the outcome in this proceeding; his capacity to perceive, recollect, and communicate the matters on which he testified; and after carefully reflecting on the record as a whole, the court finds that MacKenzie's testimony on almost every disputed fact lacks credibility, *if not candor*. Often times, MacKenzie's testimony was not merely self-serving, it was also insincere, if not contrived and deliberately false.

The court's adverse credibility determination is supported by MacKenzie's "selective memory," under which he could not recall anything that did not completely support or corroborate his version of the events, but could recall with clarity and certainty everything that supported or corroborated his version of the events. In short, MacKenzie's testimony was not even remotely credible.³

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³ Of course, the court's rejection of much of MacKenzie's testimony " 'does not reveal the truth itself or warrant an inference that the truth is the direct converse of the rejected testimony.' " (*Edmondson v. State Bar* (1981) 29 Cal.3d 339, 343, quoting *Estate of Bould* (1955) 135 Cal.App.2d 260, 265; see also *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 749.)

Facts

Kenneth MacKenzie owns and operates multiple businesses (two night clubs, a mud wrestling event producing company, and an adult newspaper). In addition, he owns and manages residential and commercial properties valued in excess of \$10 million. On July 8, 2008, MacKenzie retained respondent to represent one of his businesses as the plaintiff in a lawsuit, entitled *Richar, Inc. v. T-Mobile, USA, Inc., et al.* in the Los Angeles Superior Court. In the *T-Mobile* case, MacKenzie sought to recover a large sum of money from T-Mobile for damage T-Mobile allegedly caused to one of Mackenzie's properties. Respondent and MacKenzie entered into a written legal service agreement (LSA) for this legal matter.

Over the next six years, and until Mackenzie terminated respondent's employment in June 2014, MacKenzie repeatedly retained respondent to represent him and his businesses on other legal matters. In some of those matters, significant legal representation was performed gratis by respondent. In those matters in which respondent did not provide representation gratis, respondent and MacKenzie either entered into separate, written LSA's or relied on implied fee agreements to establish the terms of respondent's representation since the legal services were of the same general kind as those previously rendered to MacKenzie (see § 6148, subd. (d)(2)). MacKenzie, an obviously sophisticated businessman, testified that he does not review any of the agreements he signs, such as the LSA's he signed with respondent, because he "trusts" the people with whom he conducts business.

Over the years, MacKenzie repeatedly amassed numerous unpaid and past due bills for legal work that respondent performed for him and for reimbursable expenses that respondent had incurred on his behalf. At one point, MacKenzie's past due bills totaled more than \$130,000. When respondent would discuss the unpaid bills with MacKenzie, MacKenzie

routinely bemoaned of lacking the available cash to pay them and would insist that he had other more pressing bills that he had to pay first.

MacKenzie made at least three sporadic payments to respondent on his unpaid legal bills. In 2011, when respondent was having one of her unpaid-bills discussions with MacKenzie, MacKenzie offered to make a large payment using the proceeds from a judgment that respondent had obtained for him against the Tropicana Inn Motel (Tropicana). MacKenzie made that offer to ensure that respondent would continue to represent him in a lawsuit in which the trial date was fast approaching. Respondent accepted MacKenzie's offer and tried the other lawsuit for MacKenzie. When she received the judgment proceeds of \$18,109.42 from the Tropicana, she deposited the \$18,109.42 into her client trust account (CTA) and then withdrew it and applied it to MacKenzie's unpaid legal bills.

Respondent also represented MacKenzie as a defendant in a lawsuit, entitled *El Rey De Oros Nightclub, LLC v. Kenneth MacKenzie, et al.* in the Los Angeles Superior Court (the *El Rey De Oros* case). The plaintiff won at trial in the *El Rey De Oros* case, and, on January 31, 2012, a judgment in the amount of \$256,471 was entered against MacKenzie. Respondent and MacKenzie did not execute a separate LSA in the *El Rey De Oros* case until respondent agreed to handle the appeal in that case for MacKenzie, as the appeal was a new legal service respondent was providing to MacKenzie. With respect to the appeal, MacKenzie was required to make a cash deposit with the Los Angeles Superior Court (*El Rey De Oros* appeal deposit). As of April 21, 2014, the amount of the *El Rey De Oros* appeal deposit was \$384,706.60.

In the summer of 2013, as the *T-Mobile* case approached trial, respondent became increasingly concerned about representing MacKenzie at the trial, given his repeated rebuffs to pay her legal bills. Respondent was also concerned because, by this time in her relationship with MacKenzie, respondent had seen MacKenzie delay paying many of the vendors from whom he

purchased goods and supplies for his businesses and then fire the vendors without paying them once cumulative unpaid invoices reached a certain high level.

By the summer of 2013, respondent had billed MacKenzie more than \$100,000 in legal fees and reimbursable expenses, which MacKenzie had not paid. At one point, while they were attending a hearing on another case in the Stanley Mosk Courthouse, respondent asked MacKenzie if he had brought a check to pay on his legal bills as she had previously requested that he do. When MacKenzie told respondent that he had no check for her, she informed him that she was withdrawing from representation in the *T-Mobile* case because she could not afford to continue representing him without payment. Respondent specifically advised MacKenzie to promptly find another attorney to represent him in the upcoming trial in the *T-Mobile* case, which was scheduled to last for at least two weeks.

To prevent respondent from withdrawing from representing him and to convince respondent to try the *T-Mobile* case for him, MacKenzie asked respondent if he could make a payment on his outstanding legal bills using the partial refund they anticipated receiving on the *El Rey De Oros* appeal deposit (similar to the prior arrangement in the *Tropicana* case) if he had not paid all of his legal bills before the refund on that deposit was issued. Despite her misgivings, respondent accepted MacKenzie's offer. Respondent performed her part of that contract by continuing to represent MacKenzie and by trying the *T-Mobile* case from October 23, 2013, through November 5, 2013. The trial resulted in a verdict for the defense.⁴

⁴ MacKenzie testified that respondent was completely unprepared for trial in both the *T-Mobile* case and the *El Rey De Oros* case. Like MacKenzie's testimony on the other contested issues in this proceeding, the court rejects for want of credibility MacKenzie's testimony on respondent's preparedness for trial in those two cases. Moreover, respondent credibly testified that she advised MacKenzie to dismiss the *T-Mobile* case before trial because there were serious problems in proving the allegation that T-Mobile caused, or was otherwise responsible for, the damage done to MacKenzie's property.

At a dinner meeting on December 18, 2013, respondent had another unpaid-bills discussion with MacKenzie. During that discussion, MacKenzie reaffirmed the parties' agreement to apply the anticipated refund on the *El Rey De Oros* appeal deposit to MacKenzie's unpaid legal bills.

In the early part of 2014, Attorney Craig Fields, who represented MacKenzie before respondent began representing him in 2008, contacted respondent at the request of MacKenzie. Fields's initial contacts with respondent were regarding, at least in part, the *T-Mobile* case and the *El Rey De Oros* case. The purpose of Fields's contact was to review the two cases to see if respondent had committed malpractice and to see if Fields should take those cases over from respondent. In April 2014, Fields replaced respondent as MacKenzie's attorney of record in the *T-Mobile* case. However, Fields did not replace respondent as MacKenzie's attorney in the *El Rey De Oros* case.

On June 2, 2014, respondent received the anticipated refund on the *El Rey De Oros* appeal deposit from the Los Angeles Superior Court. The amount of the refund was \$80,247.35. On June 3, 2014, respondent deposited the refund into her CTA. That same day, respondent also notified MacKenzie that she had received the refund and deposited it into her CTA.

On June 26, 2014, Fields emailed respondent, apparently without having knowledge of the agreement between MacKenzie and respondent under which respondent was to retain the refund on the *El Rey De Oros* appeal deposit as payment towards MacKenzie's unpaid legal bills. In his email, Fields indicated he wanted to talk to her "about the return of the deposit, including an accounting." Fields stated that MacKenzie needed the money to repay a mortgage,

and Fields also requested information about how much money was refunded and how the refund was calculated.⁵

Later that same day, respondent replied to Fields's email. In her email, respondent informed Fields of a conversation that she and MacKenzie had two weeks earlier, whereby MacKenzie acknowledged their prior agreement. She further informed him about a conversation that MacKenzie and she had on June 24, 2014, in which she reminded MacKenzie that he still owed her a large sum of money even after the \$80,247.35 refund had been used to reduce his unpaid legal bills, and that MacKenzie became angry at her. She explained to Fields that, because she was owed significantly more than the \$80,247.35 that was refunded by the superior court, she thought it was appropriate that they discuss options for the payment of the remainder of what she was due.

Four days later, on June 30, 2014, Fields again emailed respondent. In that email, Fields stated that "[i]t sounds like you are withholding [the refund on the *El Rey De Oros*] appeal deposit because you feel you are owed legal fees." Fields further stated that he would like "to try to resolve this immediately," as he claimed MacKenzie needed the refund to redeem a mortgage. Fields also requested to see the written fee agreements and to know the terms of her fee agreements that allowed respondent to withhold the refund. Fields ended his email stating that, while he did not want to evaluate respondent's fee claim, he needed enough information so "we can deal with the [*El Rey De Oros* appeal deposit]."

A few hours later on June 30, 2014, respondent sent Fields an email stating that she had contacted MacKenzie's bookkeeper to ascertain how to apply MacKenzie's previously issued checks to the various matters on which she had represented him. About four hours later that

⁵ To satisfy Fields's request for how the amount of the refund was calculated, respondent contacted the Los Angeles County Superior Court over multiple days and obtained the information on how the appeal deposit refund was calculated. Respondent sent this information to both MacKenzie and Fields while the appeal deposit refund was in her CTA.

same day, Fields sent respondent another email noting he had seen a letter respondent had faxed to MacKenzie and instructing respondent that she needed to be the one who accounts properly for MacKenzie's legal fees. Fields then states that "I would like you to send ME an accounting of your bills to [Mackenzie]." (Original capitalization.) Fields ends the email by requesting the accounting of the *El Rey De Oros* appeal deposit and the fee agreements.

On July 1, 2014, respondent prepared and sent to both MacKenzie and Fields a statement compiling all of the previous invoices related to unpaid legal work that respondent had performed for MacKenzie. The statement included a notation showing that the \$80,247.36 refund on the *El Rey De Oros* appeal deposit would be deducted from respondent's CTA and applied to MacKenzie's unpaid legal bills on July 10, 2014.

On July 10, 2014, because respondent had not heard or received any objection to her July 1, 2014, statement from MacKenzie or Fields, respondent withdrew \$80,247.35 from her CTA and applied the \$80,247.35 to MacKenzie's unpaid legal bills. That same day, respondent also sent MacKenzie a letter notifying him of her action and stating that he still owed her \$111,289.16 for her legal services and expenses. Included with that letter were copies of all of MacKenzie's unpaid invoices that detailed her work, along with copies of the bills for the expenses she incurred on his behalf (deposition and interpreter fees, etc.) and for which he had not yet reimbursed her.

Conclusions of Law

Count One – Rule 4-100(A) (Maintain Client Funds in Trust Account)

Rule 4-100(A)(2) in relevant part provides that when the right of an attorney to receive a portion of trust funds on deposit in the attorney's CTA is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved. In count one, OCTC charges that respondent willfully violated rule 4-100(A)(2) by withdrawing \$80,247.35 from her CTA on

about June 10, 2014, when the client disputed respondent's right to receive the funds.⁶ The record fails to establish the charged violation of rule 4-100(A)(2) by clear and convincing evidence. In that regard, when reviewing the evidence to determine whether the record establishes respondent's culpability the court is to resolve all reasonable doubts in respondent's favor. (*Young v. State Bar* (1990) 50 Cal.3d 1204, 1216.) Thus, when equally reasonable inferences may be drawn from the facts, the court is required to accept the inference that leads to a conclusion of innocence. (*In re Aquino* (1989) 49 Cal.3d 1122, 1130; *Himmel v. State Bar* (1971) 4 Cal.3d 786, 793-794.)

Without question, in light of MacKenzie and respondent's oral contact that provided that the refund from the *El Rey De Oros* appeal deposit was to be applied to MacKenzie's unpaid legal bills, respondent did not violate rule 4-100(A)(2) when she withdrew the \$80,247.35 refund from her CTA and applied to MacKenzie's unpaid bills on July 10, 2014. The only evidence that OCTC introduced to establish otherwise was the series of emails between Fields and respondent, as summarized *ante*. Those emails, particularly Fields's emails, are confusing and vague. Apparently, Fields wrote his emails not knowing of MacKenzie and respondent's oral agreement to apply the refund to MacKenzie's unpaid legal bills. Nonetheless, respondent's first email to Fields made clear that respondent was applying the refund to MacKenzie's unpaid bills. Yet, Fields did not actually make a demand that respondent pay out the \$80,247.25 refund to MacKenzie before respondent withdrew it from her CTA on July 10, 2014. Further, Fields did not clearly communicate to respondent that her right to withdraw and apply the refund to

⁶ In respondent's response to the NDC, respondent aptly noted a number of erroneous factual allegations. One such error was the allegation that respondent withdrew the \$80,247.35 from her CTA on June 10, 2014. As note *ante*, respondent withdrew the \$80,247.35 on July 10, 2014. OCTC failed to file an amended NDC to correct the errors, and OCTC failed to seek to amend the NDC to conform to proof at the trial. Even though the court does not condone OCTC's inaccurate allegations or OCTC's failure to correct them, no due process violation is shown as respondent was not misled by the variance between the pleading and the proof.

MacKenzie's unpaid bills was disputed before she withdrew and applied the refund on July 10, 2014, in accordance with the notation in the accounting that she sent to Fields and MacKenzie on July 1, 2014.⁷

When respondent withdrew the \$80,247.25 refund from her CTA and applied it to MacKenzie's unpaid legal bills on July 10, 2014, she was unaware that MacKenzie had repudiated their agreement authorizing her to do so or that her right to withdraw the deposit and apply it to MacKenzie's unpaid bills was otherwise disputed. Stated differently, when respondent withdrew the deposit and applied it to MacKenzie's unpaid bills, respondent honestly believed that she was authorized to do so. Moreover, after carefully reviewing and analyzing Fields's emails as they are written without considering Fields's alleged intent behind them (as proffered at trial) and after carefully reviewing and analyzing respondent's reply emails to Fields as they are written, the court finds that the emails fail to establish by clear and convincing evidence that respondent knew that her right to withdraw and apply the refund to MacKenzie's unpaid legal bills was disputed before she withdrew and applied the refund on July 10, 2014. Therefore, count one is DISMISSED with prejudice for want of proof.

Count Two – Section 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. In count two, OCTC charges that respondent engaged in an act involving moral turpitude in willful violation of section 6106 by unilaterally withdrawing the \$80,247.35 from her CTA on about June 10, 2014, after a dispute arose regarding the rights to the funds.

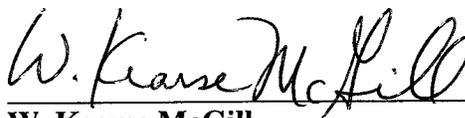
⁷ The court rejects for want of credibility Fields's testimony regarding his initial attempts to reach respondent by telephone, his leaving voicemail messages for respondent, and respondent's failure to return his calls, given respondent's otherwise prompt replies to Fields's emails as shown in the trial exhibits.

Respondent's honest belief that she was entitled to withdraw the \$80,247.35 on July 10, 2014, even if erroneous and unreasonable, precludes a finding of culpability under section 6106. (*In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 9-11 [An honestly held belief in the justifiability of one's actions, even if objectively unreasonable, precludes a finding of moral turpitude and a violation of section 6106.].) Therefore, count two is DISMISSED with prejudice for want of proof.

Order of Dismissal with Prejudice

The court orders that the present proceeding is DISMISSED WITH PREJUDICE for want of proof. (Rules Proc. of State Bar, rule 5.123(A); *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 843 [a dismissal after a trial on the merits is always with prejudice].) Because respondent ANN A. HULL has been EXONERATED of all charges following a trial on the merits, she may, upon the finality of this decision and order, file a motion seeking reimbursement for costs under Business and Professions Code section 6086.10, subdivision (d). (See Rules Proc. of State Bar, rule 5.131.)

Dated: May 2, 2016



W. Kearse McGill
Judge of the State Bar Court

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 2, 2016, I deposited a true copy of the following document(s):

DECISION AND ORDER OF DISMISSAL WITH PREJUDICE

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

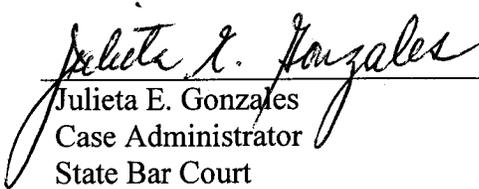
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

MEGAN E. ZAVIEH
12460 CRABAPPLE RD STE 202-272
ALPHARETTA, GA 30004

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

William S. Todd, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on May 2, 2016.



Julieta E. Gonzales
Case Administrator
State Bar Court