

PUBLIC MATTER

FILED
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STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 15-O-12919-WKM
)	
CHUKWUDUM NDUBUISI EMENIKE,)	DECISION AND ORDER OF
)	INVOLUNTARY INACTIVE ENROLLMENT
Member No. 194873,)	(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 **CHUKWUDUM NDUBUISI EMENIKE** with three counts of misconduct involving a single client matter. Specifically, OCTC charges respondent with willfully violating: (1) section 6106 of the Business and Professions Code¹ (moral turpitude – misappropriation); (2) rule 4-100(A) of the State Bar Rules of Professional Conduct² (failure to maintain client funds in trust account); and (3) section 6068, subdivision (i) (failure to cooperate in State Bar investigation). As set forth *post*, the court finds that respondent is culpable on all three counts of charged misconduct and that the appropriate level of discipline for the serious found misconduct, which includes the misappropriation of more than \$134,000 in client funds, is disbarment.

¹ Unless otherwise noted, all future references to sections are to the Business and Professions Code.

² Unless otherwise noted, all future references to rules are to the State Bar Rules of Professional Conduct.

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).)

At trial, OCTC was represented by Acting Senior Trial Counsel Agustin Hernandez. Respondent was represented by Attorney Edward O. Lear.

Pertinent Procedural History

OCTC filed the notice of disciplinary charges (NDC) in this matter on December 4, 2015. Thereafter, respondent filed his response to the NDC on January 4, 2016.

On January 11, 2016, an initial status conference was held, in which OCTC and respondent's counsel appeared. Respondent, however, did not personally appear at the status conference because he has been out of the United States (in Nigeria) since December 2014. Following the initial status conference, the court filed and served on the parties a scheduling order on January 13, 2016.

In that January 13, 2016, scheduling order, the court, inter alia, (1) ordered the parties to file pretrial statements and to "prepare, execute, and file with the court an executed STIPULATION OF UNDISPUTED FACTS" no later than March 11, 2016 (see State Bar Ct. Rules of Prac., rule 1223(c) [on statements of undisputed facts]); (2) set the matter for a pretrial conference on March 18, 2016; and (3) set the matter for trial on March 28, 2016.

Even though each party filed their own pretrial statement, both pretrial statements were filed late. Further, the parties failed to file a stipulation of undisputed facts as the court ordered them to do. Even though OCTC properly prepared and provided respondent with an initial draft of such a stipulation, respondent never executed or responded to OCTC's initial draft.

At the pretrial conference on March 18, 2016, respondent's counsel informed the court that respondent was still in Nigeria. Respondent's counsel also told the court that he had

received an email from respondent the night before the pretrial conference in which respondent stated, without explanation or reason, that respondent was not attending the trial in this matter. Respondent's counsel asked that respondent be permitted to testify by telephone, but the court denied the request when OCTC objected to it.

Even though OCTC properly served respondent with a notice to appear at trial (Rules Proc. of State Bar, rule 5-100; Code Civ. Proc., § 1987), respondent failed to personally appear at trial on March 28, 2016. At trial, respondent appeared only through his attorney of record (i.e., Attorney Lear). On the morning of March 28, 2016, respondent sent his counsel an email from Nigeria contending that he was too ill to travel from Nigeria to Los Angeles for the trial. In light of that email, respondent's counsel made an oral motion to continue the trial. OCTC opposed respondent's motion to continue the trial, and the court denied the motion because, inter alia, respondent failed to present any evidence to corroborate his unsworn claim of illness in the email he sent his counsel on the morning of trial. (State Bar Ct. Rules of Prac., rule 1131(a) ["Continuances are disfavored. Dates set for all settlement conferences, hearings and oral arguments shall be firm and must be regarded by counsel as definite court appointments."]; State Bar Ct. Rules of Prac., rule 1131(c) ["A continuance will be granted *only upon an affirmative showing of good cause requiring the continuance.*" (Italics added.)].)

OCTC made an oral motion to enter respondent's default based on respondent's failure to attend the trial, despite being served with a notice to appear. The court denied the motion for entry of default. Finally, respondent's counsel made an oral motion to withdraw as counsel of record, based on his client's failure to appear at trial. The court denied respondent's counsel's motion to withdraw. The case went forward and, during respondent's counsel's presentation of respondent's defense, respondent's counsel again made an oral motion for respondent to testify

by telephone. OCTC objected, and the court denied the motion. At the conclusion of the trial, the court took the matter under submission for decision.

Findings of Fact and Conclusions of Law

The following findings of fact are based on the admissions in respondent's response to the NDC and in respondent's pretrial statement 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 May 14, 1998. He has continuously been a member of the State Bar of California since that time.

Case Number 15-O-12919 – Chavez Client Matter

Facts

On July 19, 2011, Daniel Chavez (Chavez) retained respondent to represent him in a wrongful termination case against his former employer IAP World Services, Inc. (IAP). The terms of representation between Chavez and respondent were contained in a written "contingent fee contract," which they executed on July 19, 2011. On November 6, 2014, respondent settled Chavez's claims against IAP for a total of \$233,500, which was paid in two installments. Out of the \$233,500 settlement proceeds, respondent was entitled to collect a total of \$98,492 (\$93,400 as his 40 percent contingent fee plus \$5,092 in reimbursements for advanced costs).

On November 7, 2014, respondent filed with the San Bernardino Superior Court a notice of settlement. On November 25, 2014, IAP sent respondent, as the first installment, a \$33,842.64 check made payable to respondent's client trust account (CTA). Respondent deposited that check into his CTA on November 26, 2014. At the time of the deposit,

respondent's CTA had a balance of \$14.52. On November 28, 2014, respondent withdrew \$9,000 from his CTA leaving a balance in the CTA of \$24,857.16.

Then, on December 1, 2014, respondent made two withdrawals from his CTA, each for \$9,000, reducing the balance in the CTA to \$6,857.16. On December 2, 2014, respondent deposited \$2,100 into his CTA and withdrew \$3,000, reducing the balance in his CTA by \$900 to \$5,957.16. On December 4, 2014, respondent withdrew \$3,500 from the CTA, reducing the balance in his CTA to \$2,457.16.

In early December 2014, IAP's insurance carrier made the second installment by sending respondent a check for the remaining \$199,657.36 (\$233,500 less \$33,842.64) that was also made payable to respondent's CTA. Respondent deposited this check into his CTA on December 6, 2014, and the deposit was credited to the CTA on December 8, 2014, increasing the CTA balance to \$202,114.52. The next day, on December 9, 2014, respondent withdrew \$195,000 from his CTA, thus reducing the CTA balance to \$7,114.52. On December 10, 2014, respondent filed a request for dismissal of Chavez's case against IAP.

On January 3, 2015, respondent sent Chavez an email in response to an email from Chavez, who was seeking information about another case that Chavez was interested in pursuing against his union. In respondent's reply email, respondent lied to Chavez by telling Chavez that he did not receive a settlement check from IAP until "late December" 2014 and that IAP had deceived both respondent and IAP's own attorney. Respondent also lied to Chavez by telling Chavez that he was in the process of depositing the settlement check.

On February 4, 2015, Chavez sent respondent an email seeking information on the status of the IAP settlement proceeds. On February 5, 2015, respondent withdrew \$7,000 from his CTA, reducing the balance in the CTA to \$114.52.

On February 13, 2015, respondent replied to Chavez's February 4, 2015, email, claiming that he was unable to return to the United States from Nigeria as he had had his passport stolen, along with his laptop, phone, and money. Respondent requested that Chavez "be patient" as respondent was trying to return to the United States as soon as possible.

Similarly, during the period from late March 2015 through early June 2015, Chavez emailed respondent three times and respondent's secretary once, in each instance seeking information regarding respondent's failure to disburse Chavez's share of the IAP settlement proceeds. Each time, Chavez received a response that respondent was attempting to return to the United States and requesting that Chavez remain patient.

On June 24, 2015, State Bar investigator Benson T. Hom (Hom) sent a letter to respondent both by mail and by email asking respondent to respond to a complaint Chavez had filed against him. In his letter to respondent, Hom noted that respondent settled Chavez's wrongful termination case against IAP for \$233,500 in early November 2014, but that, as of June 1, 2015, Chavez had not received any of the settlement proceeds. Hom insisted that respondent provide him with a written response to Chavez's complaint and any requested documentation no later than July 9, 2015.

On June 26, 2015, respondent telephoned Chavez. In that phone conversation, respondent asked Chavez how much of the \$233,500 settlement proceeds he thought he should receive to fairly compensate him for his having to wait so long to get his share of the proceeds. Chavez told respondent that he would give respondent an answer after he discussed the matter with his wife. Later that day, Chavez sent respondent an email indicating that he wanted to receive \$200,000 of the \$233,500 settlement. Also, pursuant to respondent's request, Chavez included his banking information in that email so that respondent could wire the settlement proceeds directly into Chavez's bank account.

On July 1 and 4, 2015, Chavez emailed respondent twice, again seeking any information about payment. On July 8, 2015, respondent sent Hom a request for a 60-day extension of time to submit his written response to Chavez's bar complaint and to provide any requested documents. Notably, respondent attempted to justify his request for more time by claiming that his luggage, along with his travel documents, had been stolen and that he was trying to obtain new travel documents so that he could return to the United States.³ Hom extended respondent's deadline from July 9, 2015, to July 23, 2015. Hom specifically declined respondent's request to extend the deadline by 60 days.

On July 9, 2015, Chavez emailed respondent's secretary and requested information on the settlement proceeds. On July 11, 2015, Chavez emailed respondent directly, seeking the same information. Respondent replied on July 14, 2015, indicating that he was getting the accounting paperwork from his secretary to send to Chavez for his approval. He further told Chavez once Chavez approved the accounting, he would wire the settlement proceeds into Chavez's bank account.

On July 15, 2015, Chavez emailed respondent a letter with copies of the two settlement checks respondent deposited into his CTA in late 2014. Chavez received copies of the checks from IAP the day before. On July 16, 2015, Chavez emailed respondent and complained that he still had not received payment as respondent promised him on June 26, 2015.

On July 28, 2015, respondent telephoned Chavez and complained about the problems the State Bar was causing him as a result of Chavez's filing a complaint against him with the State Bar. Respondent again asked Chavez to tell him the amount of money he could pay Chavez to compensate Chavez for the long wait for payment. Chavez told him this time that he wanted to receive \$170,000.

³ As noted *ante*, respondent made a very similar assertion to Chavez five months earlier on February 13, 2015.

Respondent sent Chavez an accounting of the settlement proceeds, which respondent entitled "Settlement Breakdown," that correctly distributed the \$233,500 in IAP settlement proceeds between Chavez and respondent in accordance with their July 19, 2011, contingent fee contract. The accounting correctly allocated \$98,492 of the proceeds to respondent, calculated as follows: \$93,400 as respondent's 40 percent contingent fee plus \$5,092 as reimbursement for costs that respondent had advanced on Chavez's behalf. The accounting correctly allocated the remaining balance of \$135,008 (\$233,500 less \$98,492) to Chavez. Even though the accounting correctly stated that the "Client's Net Settlement Amount" was \$135,008, Chavez properly refused to approve the accounting because it falsely stated that Chavez had already been paid the \$135,008 to which he was entitled.

Thereafter, respondent sent Chavez a revised accounting, which is identical to the original accounting except that the revised accounting (1) increased the "Client's Net Settlement Amount" by \$34,992 from \$135,008 to \$170,000, without indicating where the additional \$34,992 would come from and (2) correctly indicated that Chavez had not been paid any of the settlement proceeds. Chavez refused to approve the revised accounting because it failed to specify when respondent would pay him the \$170,000.

On August 27, 2015, Hom sent respondent a letter noting that OCTC had still not received his written response to Chavez's complaint and that respondent's failure to cooperate in the State Bar's investigation could subject him to discipline under section 6068, subdivision (i) (attorneys have a duty to cooperate with State Bar disciplinary investigations). Hom received no response to this letter from respondent.

On October 16, 2015, respondent wired \$30,000 into Chavez's bank account. There is no evidence in the record suggesting that respondent has made any further payments to Chavez.

Conclusions of Law⁴

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 that no funds belonging to the attorney or law firm are to be deposited therein or otherwise commingled therewith, except for limited exceptions not relevant here. In count two, OCTC charges that respondent willfully violated rule 4-100(A) by failing to maintain \$140,100 of the \$233,500 in IAP settlement proceeds in his CTA. The record, however, clearly establishes that respondent willfully violated rule 4-100(A) by failing to maintain only \$135,008 (not \$140,100) of the \$233,500 in his CTA.

Count One -- § 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. In count one, OCTC charges that “[b]etween about December 1, 2014, and February 5, 2015, respondent dishonestly or grossly negligently [sic] misappropriated for respondent’s own purposes \$139,985.48 that respondent’s client, [sic] was entitled to receive....” The record clearly establishes that respondent dishonestly misappropriated money that he held in trust and that his client Chavez was entitled to receive. However, the record does not clearly establish that respondent misappropriated \$139,985.48. Instead, the record clearly establishes that respondent misappropriated only \$134,893.48 (\$135,008 less the \$114.52 that remained in respondent’s CTA on February 5, 2015). In light of respondent’s failures to promptly notify Chavez when he received the \$33,842.64 check from IAP in late November 2014 and the \$199,657.36 check from IPA’s insurer in early December 2014, and in light of respondent’s lies to Chavez that he did not receive a settlement check from IAP until late December 2014 and that IAP had deceived both

⁴ The court addresses count two before count one because count one includes the misconduct found in count two.

respondent and IAP's own attorney, the court finds that respondent's willful misappropriation of \$134,893.48 from Chavez involved not only moral turpitude, but also dishonesty.

Count Three -- § 6068, subd. (i) (Failure to Cooperate)

Section 6068, subdivision (i), provides that an attorney has a duty to cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against the attorney. The record clearly establishes that respondent willfully violated section 6068, subdivision (i) by failing to provide a substantive, written response to the letters Hom mailed to him in June and August 2015.

Aggravating Circumstances

OCTC bears the burden of proving aggravating circumstances by clear and convincing evidence. (Std. 1.5.) As set forth *post*, the court finds four 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 willfully violated rule 4-100(A) by depositing and commingling more than \$271,000 belonging to respondent into his CTA.

Multiple Acts (Std. 1.5(b).)

Respondent's misconduct involves six acts of misconduct. Each of the following five withdrawals that respondent made from his CTA involved either a partial or a complete misappropriation of client funds: (1) the second \$9,000 withdrawal on December 1, 2014; (2) the \$3,000 withdrawal on December 2, 2014; (3) the \$3,500 withdrawal on December 4, 2014; (4) the \$195,000 withdrawal on December 9, 2014; and (5) the \$7,000 withdrawal on February 5, 2015. In addition, respondent failed to respond to Hom's request for information by the extended deadline.

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Client Harm (Std. 1.5(i).)

Without question, respondent's misconduct caused significant harm to Chavez. Even though respondent has now paid Chavez \$30,000, Chavez is still owed \$104,893.48 (\$134,893.48 less \$30,000).

Lack of Cooperation During Disciplinary Proceeding (Std. 1.5(l).)

Respondent's failure to cooperate and participate in this proceeding by not appearing at the March 28, 2016, trial is a very serious aggravating circumstance. This failure clearly establishes that "respondent comprehends neither the seriousness of the charges against him nor his duty as an officer of the court to participate in disciplinary proceedings. [Citations.]" (*In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 702.) In fact, respondent's failure to appear at trial is particularly aggravating because, "in addition to being given notice of the trial [by the State Bar Court], OCTC served on respondent a notice to appear in lieu of subpoena" (*Id.* at p. 703.) "The service of a notice to appear on a party to a proceeding has the same effect as the service of a subpoena on a witness to appear before the court. [Citation.] Thus, respondent, in effect, disobeyed a subpoena to appear before the State Bar Court." (*Ibid.*)

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.5.) Respondent has failed to establish any mitigating circumstance.

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.)

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 is found in standard 2.1(a), which applies to respondent's intentional and dishonest misappropriation of more than \$134,000 from Chavez. 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 there is no mitigating circumstance. 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 [client] 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 the State Bar].)

The record provides no reason for the court to depart from the sanction of disbarment under 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 to Chavez for the \$104,893.48 that he still owes Chavez, together with interest thereon.

Recommendations

Discipline

The court recommends that respondent **CHUKWUDUM NDUBUISI EMENIKE**, State Bar member number 194873, 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 **CHUKWUDUM NDUBUISI EMENIKE** be ordered to make restitution to Daniel Chavez in the amount of \$104,893.48 plus 10 percent interest per year from February 5, 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 **CHUKWUDUM NDUBUISI EMENIKE** 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 **CHUKWUDUM NDUBUISI EMENIKE** 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: June 10, 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 June 10, 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:

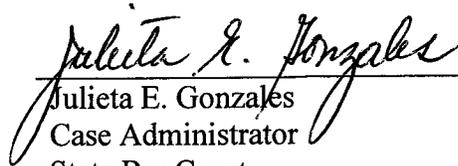
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

EDWARD O. LEAR
CENTURY LAW GROUP LLP
5200 W CENTURY BLVD #345
LOS ANGELES, CA 90045

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

Agustin Hernandez, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on June 10, 2016.



Julieta E. Gonzales
Case Administrator
State Bar Court