

PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

FILED

JUL 25 2018

STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

In the Matter of) Case Nos.: 16-J-15775, 17-J-04119 - DFM
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WILFRED I. AKA,) DECISION
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A Member of the State Bar, No. 263973.)

INTRODUCTION

This disciplinary proceeding is based on professional misconduct by respondent Wilfred Aka (Respondent) in the United States Tax Court. That misconduct resulted in two different disciplines of Respondent by that court, including Respondent's eventual disbarment from that court in 2015.

As discussed more fully below, in view of Respondent's serious misconduct and the evidence in aggravation and mitigating, the court recommends discipline as set forth below.

Significant Procedural History

The State Bar initiated this proceeding by filing a notice of disciplinary charges (NDC) on December 28, 2017. On January 22, 2018, Respondent, then acting as counsel for himself, filed a response to the NDC. In that response, he alleged that the proceedings of the Tax Court lacked fundamental constitutional protection.

A one-day trial was held on April 26, 2018. The State Bar was represented by Deputy Trial Counsel David Aigboboh and Senior Trial Counsel Hugh Radigan. Respondent was represented by attorney David Clare.

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Statutory Overview

This proceeding is governed by Business and Professions Code¹ section 6049.1. Section 6049.1, subdivision (a), provides, in pertinent part, that a certified copy of a final order by a court of record of the United States, determining that a member of the State Bar committed professional misconduct in that jurisdiction, shall be conclusive evidence that the member is culpable of professional misconduct in this state. After the receipt by the court of such evidence, the issues in this streamlined proceeding are limited to: (1) whether the disciplinary proceedings in the United States Tax Court lacked fundamental constitutional protection; (2) whether, as a matter of law, Respondent's culpability in the underlying two proceedings would not warrant the imposition of discipline in California under applicable California laws and rules; and (3) the degree of discipline to be imposed on Respondent in California. (Bus. & Prof. Code, section 6049.1, subd. (b); *In the Matter of Freydl* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 349, 353.) The burden of proof with regard to the first two issues is on Respondent. (Section 6049.1, subd. (b).)

Findings of Fact and Conclusions of Law

The following findings of fact are based on Respondent's response to the NDC, the findings in the Tax Court proceedings, and the testimony and documentary evidence admitted at trial in this proceeding.

Jurisdiction

Respondent was admitted to the practice of law in California on June 21, 2009, and has been a member of the State Bar at all relevant times.

¹ Unless otherwise indicated, all references to rules refer to the California Rules of Professional Conduct. Further, all references to sections are to the Business and Professions Code, unless otherwise indicated.

Background

Case No. 16-J-15775

On September 27, 2011, Respondent was publically reprimanded by order of the Chief Judge of the United States Tax Court (Tax Court). This reprimand came as a result of Respondent's misconduct in his representation of a client in the matter entitled *Kyere v. Commissioner*, docket No. 27398-09, filed by Respondent in the Tax Court. The discipline came after the Tax Court had directed an order at Respondent, requiring him to show cause why he should not be disciplined as a result of his conduct in that matter. Although Respondent could have appealed the reprimand order after it was issued by the Tax Court, he did not do so.

In the Tax Court's findings supporting the public reproof, the court provided the following history and findings:

Background

The events leading to the issuance of the Order to Show Cause are these. On November 18, 2009, Mr. Aka filed a petition for redetermination on behalf of the petitioner in Martin K. Kyere, Docket No. 27398-09. The petition was signed by petitioner, but it was accompanied by Mr. Aka's Entry of Appearance, as petitioner's attorney. See Rule 24(a) of the Tax Court Rules of Practice and Procedure.

When the case was called for trial, approximately one year later, on December 13, 2010, there was no appearance by Mr. Aka or petitioner. The case was recalled on December 16, 2010, but again, there was no appearance by Mr. Aka. At the recall, petitioner's tax return preparer approached the bench and informally advised the Court that petitioner had been unable to appear, and he had been unable to contact his attorney, Mr. Aka, who was believed to be out of the country.

The Commissioner's attorney appeared at the recall and filed Motion to Dismiss for Lack of Prosecution which represented that Mr. Aka had not returned voice messages left on his telephone by the Commissioner's attorney on July 27, 2010, August 19, 2010, September 27, 2010, November 2, 2010, and December 2, 2010. The motion further represented that Mr. Aka had failed to reply to a letter of August 23, 2010, scheduling a Branerton conference, and requesting substantiation of the tax deduction at issue in the case, and that Mr. Aka had failed to appear for the Branerton conference on the scheduled date. Furthermore, the Commissioner's motion described an "impromptu" meeting that had been

held with Mr. Aka on October 13, 2010, when he was in the Commissioner's office on another case. During that meeting, Mr. Aka discussed the Kyere case with the Commissioner's attorney, and Mr. Aka "promised to submit substantiation to support the claims raised in the Petition", but he never did so.

The Commissioner's attorney orally represented to the Court that, after the calendar call on December 13, 2010, she had again attempted to reach Mr. Aka by telephone. She said that she had been unable to do so, and she had been unable to leave a voice message for Mr. Aka because his voice mail mailbox was full. On the other hand, the Commissioner's attorney said that she was able to contact petitioner, whom she informed about the recall of his case and her intention to file a Motion to Dismiss for Lack of Prosecution. Apparently, that contact prompted petitioner to ask his tax return preparer to appear at the recall.

Subsequently, on January 7, 2011, the presiding Judge issued an Order to Show Cause in Kyere v. Commissioner directing petitioner to show cause why the Court should not grant respondent's Motion to Dismiss for Lack of Prosecution, and further ordering that, in addition to regular service, a copy of the Order should be served directly on petitioner. In due course, petitioner responded to the Order to Show Cause and stated that he had hired Mr. Aka to represent him in the matter, that he was unaware that Mr. Aka would not appear on December 13 and December 16, 2010, and that, henceforth, he would represent himself in the case. In light of that response, the Court discharged the Order to Show Cause, denied respondent's Motion to Dismiss for Lack of Prosecution, withdrew Mr. Aka as attorney of record, and continued the case.

Response to Order to Show Cause

Based upon the above facts, the Court issued the subject Order to Show Cause to Mr. Aka. Mr. Aka submitted his Response to Order to Show Cause (Mr. Aka's response) on June 3, 2011. Approximately, two weeks later, on June 16, 2011, he informed the Court that he would not appear at the hearing scheduled for June 21, 2011, and, thus, he waived his right to a hearing on the Order to Show Cause.

In his response, Mr. Aka does not raise an issue with any of the facts set forth in respondent's Motion to Dismiss for Lack of Prosecution. Mr. Aka's response states that he first met with Mr. Kyere on November 9, 2009, and he prepared a petition for redetermination of the deficiency that had been determined in Mr. Kyere's income tax for 2007. Mr. Aka mailed the petition to the Court on Mr. Kyere's behalf on the following day, and included Mr. Aka's Entry of Appearance to represent Mr. Kyere in the case.

Those facts notwithstanding, Mr. Aka asserts that he did not represent Mr. Kyere, that he was not required to appear on Mr. Kyere's behalf when the case was called for trial and, presumably, that he was not required to provide any other representation to Mr. Kyere. According to

Mr. Aka, this is true because Mr. Kyere had failed to make a deposit of \$1,000 of the total fees of \$1,500 on or before November 30, 2009, as they had agreed. Mr. Aka says that he had mailed a reminder invoice to Mr. Kyere on November 25, 2009, and when he failed to receive any payment from Mr. Kyere, he "assumed" that Mr. Kyere did not wish to retain him.

Subsequently, when Mr. Aka received the Notice Setting Case for Trial and the Standing Pre-Trial Order that were served by the Court on July 9, 2010, he wrote a letter to Mr. Kyere dated July 18, 2010, forwarding the Standing Pre-Trial Order to Mr. Kyere and stating as follows:

It is necessary that you inform the Court that you have not retained [sic] such that I may be not served with any more papers in your case. Or should I inform them? Since you failed to make the required retainer per my November 25, 2009 invoice, I have not been retained. If you still make the deposit, I may still be able to mount an effective defense on your behalf.

Mr. Aka acknowledges that he had an impromptu meeting with the Commissioner's attorney on October 13, 2010, and that he discussed the Kyere case with her, including her request for documents to substantiate the tax deduction at issue in the case. Mr. Aka also acknowledges that, during that meeting, he did not tell the Commissioner's attorney that he did not consider himself to have been retained by Mr. Kyere. According to Mr. Aka, he did not want to divulge the fact that he had not been paid, and had not been retained "in fear of violating other professional ethics rule of confidentiality." Rather, he claims to have telephoned Mr. Kyere after the meeting with the Commissioner's attorney, and to have left a voice message for Mr. Kyere regarding the substance of his conversation with the Commissioner's attorney.

Mr. Aka's response explains that he was

under the impression, that Respondent [Mr. Aka] would be subjected to violating attorney-client privilege by revealing the fact and circumstances that Respondent [Mr. Aka] was not actually retained because of non-payment of any fees, even retainer deposit. Instead, Respondent [Mr. Aka] had encouraged KYERE to inform the Court of that fact.

Mr. Aka's response does not mention the August 23, 2010, letter from the Commissioner's attorney scheduling a Branerton Conference and requesting substantiation for the disallowed home mortgage interest deduction. Mr. Aka's response also does not mention the Pre-Trial Memorandum for Respondent that was served on him by mailing on November 24, 2010, and that contains the following warning: "If petitioner or his counsel failed to appear at the calendar call, respondent will file a Motion to Dismiss for Lack of Prosecution."

Mr. Aka claims that he received respondent's Motion to Dismiss for Lack of Prosecution filed December 16, 2010, while he was traveling out of the country. After he returned, he sent the motion to Mr. Kyere with a letter that stated as follows:

I received the attached "motion [sic] to Dismiss for Lack of Prosecution" while I was out of the country. It was my understanding that you had informed them all along that you did not retain me in the case. Again, please, if you have not done so, please do so as soon as possible.

If you have any questions, please feel • free to contact me.

During the time that he was out of the country, the Court served on Mr. Aka the Order to Show Cause that was issued by the Presiding Judge in the Kyere case on January 7, 2011. There is nothing in the record to suggest that Mr. Aka took any action in response to that Order.

Discussion

In effect, Mr. Aka claims that he had no lawyer-client relationship with Mr. Kyere and, thus, he cannot be held to account for the fact that he failed to appear when the case was called for trial, pursuant to the Notice Setting Case for Trial served by the Court on Mr. Aka, or for his failure to provide competent and diligent representation to Mr. Kyere. The premise of Mr. Aka's position, that he had no lawyer-client relationship with Mr. Kyere, is not established by the facts. First, the client, Mr. Kyere, stated his belief that he had hired Mr. Aka to represent him before the Court in Petitioner's Response to Order to Show Cause filed January 25, 2010. Second, while the letter that Mr. Aka sent to Mr. Kyere on July 18, 2010, states, "I have not been retained," it also offers to "mount an effective defense", if the fee deposit were paid. Thus, the letter seems to leave open the time for the payment of his fee. Third, during the entire time the Kyere case was pending, Mr. Aka never advised the Court, or the opposing party, of his position that he had not been retained by Mr. Kyere. In fact, to the contrary, as described above, Mr. Aka met with the Commissioner's attorney on October 13, 2010, and, during that meeting, he gave the Commissioner's attorney every impression that he represented Mr. Kyere. He not only undertook to discuss Mr. Kyere's case with the Commissioner's attorney, but he also agreed to provide the substantiation for the tax deduction at issue in the case.

Findings

In summary, Mr. Aka prepared a Petition for Redetermination on behalf of Martin K. Kyere, he filed the petition in this Court, and he entered his appearance in the case on November 18, 2009. The case was called for trial approximately one year later on December 13, 2010. During that time period, Mr. Aka felt that he had no obligation to perform legal services on behalf of Mr. Kyere, other than leaving several voice mail messages and sending him a letter with a copy of the Notice Setting Case for Trial and Standing Pre-Trial Order. The Court finds that Mr.

Aka's conduct violated the Model Rules of Professional Conduct in that he failed to provide competent representation to his client, as required by Model Rule 1.1, he failed to act with reasonable diligence and promptness in representing his client, as required by Model Rule 1.3, and he failed to adequately communicate with his client, as required by Model Rule 1.4. In making these findings, the Committee notes the fact that Mr. Aka had put his client on notice that he did not consider himself to have been retained because Mr. Kyere had not paid the agreed retainer. There is no evidence that Mr. Kyere sought an explanation from Mr. Aka about his letter of July 18, 2010, or sought to confirm that Mr. Aka was representing him.

Even if, as Mr. Aka's response suggests, he owed no obligation to Mr. Kyere, Mr. Aka undertook obligations to the Court and to the opposing party in the case by reason of the fact that he entered his appearance in Kyere v. Commissioner. By neglecting those obligations, he failed to take reasonable steps to expedite litigation, as required by Model Rule 3.2, he failed to treat the opposing party and counsel with fairness, as required by Model Rule 3.4, he engaged in conduct prejudicial to the administration of justice, in violation of Model Rule 8.4(d), and he engaged in conduct unbecoming a member of the Bar of the Court, in violation of Rule 202(a)(4) of the Tax Court Rules of Practice and Procedure.

As to Mr. Aka's assertion that he was forced to stand mute about the fact that he did not believe he had been retained to represent Mr. Kyere because Mr. Kyere had not paid the agreed retainer, he is clearly wrong. Model Rule 1.16(b)(5) expressly provides that a lawyer may withdraw from representing a client if "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled". [tax Court's reference to Comment to Rule is omitted]

In deciding that the appropriate discipline for Respondent's misconduct was a public reprimand, the Tax Court concluded that Respondent had not "maliciously or intentionally failed the legal system;" that his misconduct resulted from his failure "to take into account his obligations to the Court and to the opposing party and counsel for the opposing party;" that no harm resulted to the client because of the court's subsequent conduct; and there were several mitigating factors, to wit, Respondent's then "absence of a prior disciplinary record, the absence of a dishonest or selfish motive, and a cooperative attitude toward these proceedings."

In the NDC, the OCTC alleges that Respondent's misconduct in the *Kyere* matter violated sections 6068, subdivision (b); section 6068, subdivision (m); and rule 3-110(A). This court agrees.

Case No. 17-J-04119

In November 2014, the Tax Court commenced a second disciplinary proceeding against Respondent by issuing an Order to Show Cause (OSC) to him, directing him to show cause why he should not be suspended or disbarred from practice before that court or otherwise disciplined based on Respondent's "behavior as counsel in seven docketed cases" before that court ("the seven cases"). The OSC summarized Respondent's conduct in the seven cases as follows:

Your conduct in * * * the [seven] cases is characterized by your failure to follow the rules and orders of the Court and it appears that your conduct caused damage to your clients. It also appears that your conduct in the * * * summarized cases violated Rule 1.1 (competence), Rule 1.3 (diligence), Rule 1.4 (communication), Rule 3.2 (expediting litigation), Rule 3.4 (fairness to opposing party and counsel), Rule 8.4(a) (conduct that violates the Rules of Professional Conduct), and Rule 8.4(d) (conduct that is prejudicial to the administration of justice) of the ABA Model Rules of Professional Conduct, and Rules 202(a)(3) (conduct which violates the letter and spirit of the ABA Model Rules of Professional Conduct, the Rules of the Court, or orders or other instructions of the Court) and 202(a)(4) (any other conduct unbecoming a member of the Bar of the Court) of the Tax Court Rules of Practice and Procedure.

The OSC describes Mr. Aka's conduct in each of the seven cases as follows:

1. Brown v. Commissioner, T.C. Memo. 2014-167: You filed your entry of appearance in this case on the same day the petition was filed. The Court's opinion, at *11 through 13, describes your failure to cooperate in the preparation of the case for trial, by not responding to the government's motion to compel stipulation under Rule 91(f), by failing to respond to the Court's order to show cause why matters should not be deemed stipulated, and by not responding to the government's informal request for production of documents. The Court's opinion also points out that you did not comply with the Court's order to file a post-trial brief, and you did not comply with the Court's order to file a post-trial brief by an extended due date. Furthermore, you did not comply with the Court's order directing you to supplement petitioners' October 17, 2013, motion [to extend the due date of petitioners' opening brief] with additional information and answers to specific questions concerning the circumstances of petitioners'

failures to timely file a brief. As a result, the Court denied petitioners' October 17, 2013, motion and did not accept petitioners' opening brief.

2. Adiele P. Ohiaeri, docket no. 28882-09: You signed the petition in this case. When the case was called from the calendar of the trial session that began in Los Angeles, CA, on November 30, 2010, neither you nor petitioner appeared. On November 30, 2010, you e-filed, to Washington, D.C., Petitioners' [sic] Motion to Continue For Calendar Call As To 2006 Taxable Year. In that motion, you stated that you were involved in a prolonged trial through October 5, 2010 and you were unsuccessful in meeting with, or conferring with the government's attorney after that date. On November 30, 2010 the government's attorney filed Motion to Dismiss for Lack of Prosecution detailing her unsuccessful attempts to meet with you from and after November 1, 2010. On December 8, 2010, the Court entered Order of Dismissal and Decision in which it denied petitioner's motion to continue, granted the government's motion to dismiss for lack of prosecution, and entered decision against petitioner for the deficiency in income tax determined in the notice of deficiency.
3. Andrew O. Onaghise, docket no. 3631-10: You signed the petition in this case. When the case was called from the calendar of the trial session that began in Los Angeles, CA, on March 7, 2011, neither you nor petitioner appeared. You also failed to appear when the case was recalled on March 10, 2011. Petitioner failed to appear when the case was recalled, but he contacted the Court's trial clerk and advised her that he did not know that the case had been set for trial and he thought that you were handling the case. Petitioner said that he wanted to proceed with the case. On March 10, 2011, the Court issued an Order to Show Cause why respondent's motion to dismiss for lack of prosecution should not be granted. Neither you nor petitioner responded to the Order to Show Cause. Accordingly, on June 14, 2011, the Court issued Order of Dismissal and Decision in which the Court granted respondent's motion to dismiss for lack of prosecution and entered decision against petitioner for the deficiency in income tax determined in the notice of deficiency.
4. Ugwuala v. Commissioner, T.C. Memo. 2013-105: You signed the petition in this case. The Court's opinion describes your conduct during these proceedings, as follows (at *4-5):

Wilfred I. Aka represented petitioners in this matter. Mr. Aka ignored respondent's request to conduct a Branerton conference. See Branerton Corp. v. Commissioner, 61 T.C. 691 (1974). Respondent filed motions to compel production of documents and responses to interrogatories. Again Mr. Aka failed to respond on petitioners' behalf. We then granted respondent's motion to impose sanctions under Rule 104(c). Petitioners moved for us to reconsider the sanctions. Mr. Aka indicated he was abroad and had not taken appropriate steps to act on behalf of his clients. We

granted the motion.

* * * * *

We note that petitioners' counsel has delayed and impeded this matter by being generally unresponsive and unprofessional. Petitioners' counsel has consistently ignored our Rules. This caused respondent to file, and the Court to decide, motions that should have been unnecessary. We determined that petitioners' counsel had failed to respond on their behalf and vacated sanctions imposed against them.

This is not the first time that Mr. Aka has violated our Rules. See Akanno v. Commissioner, T.C. Summary Opinion 2009-168

5. Maria G. Odim, docket no. 29591-11: You signed the petition in this case. When the case was called from the calendar of the trial session that began in Los Angeles, CA, on December 17, 2012, neither you nor petitioner appeared. Both you and petitioner failed to appear when the case was recalled on December 19, 2012. Government counsel appeared and filed Motion to Dismiss for Failure to Properly Prosecute. In response, the Court issued an Order to Show Cause why the case should not be dismissed for failure to properly prosecute. You failed to respond to the Order to Show Cause. As a result, the Court granted the government's motion to dismiss and entered decision against petitioner for the deficiency in income tax determined in the notice of deficiency.
6. Eunice Bisong Nkongho, docket no. 18002-12: You signed the petition in this case. Prior to trial, the Court issued an Order to Show Cause granting the government's Motion for Order to Show Cause Why Proposed Facts and Evidence Should Not Be Accepted As Established. The government's motion was based upon allegations that you had failed or refused to confer with respect to entering into a stipulation in accordance with Rule 91. You did not respond to the Court's Order to Show Cause. When the case was called and recalled from the calendar of the trial session that began in Los Angeles, CA, on June 24, 2013, neither you nor petitioner appeared, and the government's counsel made an oral motion to dismiss for failure to prosecute. By Order and Order of Dismissal and Decision entered on July 5, 2013, the Court made its Order to Show Cause under Rule 91(f) absolute, granted the government's motion to dismiss, and entered decision against petitioner for the deficiency in income tax in the amount determined in the notice of deficiency.

7. Emmanuel C. Acholonu & Shawn Y. Acholonu, docket no. 17237-13:
You signed the petition in this case. You failed to file a status report, as ordered by the Court, in which you were to describe the status of the case in advance of a hearing on the government's motion to dismiss for lack of jurisdiction as supplemented. Neither you nor petitioners appeared for the hearing. After considering your response to an order to show cause, the Court issued an order on July 17, 2014, by which you were withdrawn as counsel for petitioners.

Notwithstanding the fact that the Court withdrew you as counsel for petitioners, you electronically filed an entry of appearance as petitioners' counsel without first seeking leave of the Court. As a result, by Order dated September 5, 2014, the Court ordered that your entry of appearance was stricken from the record, and the Court again withdrew you as counsel of record for petitioners.

Respondent provided a written defense to the accusations made against him. A hearing was then conducted on March 31, 2015. During that hearing, Respondent both testified on his own behalf and called a supporting witness.

As part of Respondent's defense to the OSC, he indicated that he had modified his practices since the prior reprimand and contended that the problems in the seven cited cases were aberrational. As a result of that contention, the Tax Court then reviewed all of the "post-reprimand" cases in which Respondent has appeared, attached an appendix of those cases to its findings, and made the following overall assessment:

Mr. Aka appeared to handle some post-reprimand cases without incident, other cases that were not included in the OSC suffered from Mr. Aka's failure to comply with Rules and orders of the Court. Almost all of the post-reprimand cases (with the exception of cases closed quickly by stipulated decision) illustrate one or more of the following problems endemic to Mr. Aka's practice before this Court: (1) failure to communicate with opposing counsel; (2) failure to appear; and (3) failure to respond to Court orders. . . . The post-reprimand cases summarized in Appendix II amply illustrate that Mr. Aka's failure to follow Court Rules and to comply with Court orders is chronic and appears to be incurable.

On July 23, 2015, the Committee on Admission, Ethics and Discipline of the United States Tax Court issued the following written findings of misconduct:

Mr. Aka's conduct in each of the seven cases identified in the OSC is categorized by the egregious and willful disregard of the Rules and Orders of this Court. Without excuse or reasonable explanation, Mr. Aka failed to appear when four of the cases were called for trial or for hearing. See Ohiaeri, Onaghise, Odim, and Acholonu. Without excuse or reasonable explanation, Mr. Aka ignored the requests of opposing counsel for a Branerton conference (See Branerton Corp. v. Commissioner, 61 T.C. 691 (1974)), ignored the requests and motions of opposing counsel for production of documents and answers to interrogatories, and even disregarded the Court's Order to Show Cause why matters covered in discovery motions should not be deemed admitted. See Ugwuala, Odim, and Nkongho. Without excuse or reasonable explanation, Mr. Aka disregarded and failed to respond to a variety of Orders of this Court, including Orders to Show Cause why the case should not be dismissed for failure to prosecute, an order to file a status report, and orders to file a post-trial brief by a due date or by an extended due date. See Brown, Onaghise, Odim, Nkongho, and Acholonu.

We find clear and convincing evidence that Mr. Aka engaged in misconduct warranting the imposition of discipline. We find that Mr. Aka failed to provide competent representation to the clients in the subject seven cases, contrary to the requirements of Rule 1.1 of the Model Rules. We find that Mr. Aka did not act with reasonable diligence and competence in representing those clients contrary to the requirements of Rule 1.3 of the Model Rules of Professional Conduct. Furthermore, we find that Mr. Aka failed to take reasonable steps to expedite litigation, as required by Model Rule 3.2, he failed to treat opposing party and counsel with fairness, as required by Model Rule 3.4, he engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d), and he engaged in conduct unbecoming of member of the Bar of this Court, in violation of Rule 202(a)(4) of Tax Court Rule of Practice and Procedure. Based upon the record in this disciplinary case, we do not find that Mr. Aka's conduct violated Model Rule 1.4 (Communication).

In recommending what discipline to impose as a result of Respondent's misconduct in the seven cases, the Tax Court treated as significant aggravating factors Respondent's prior discipline in the *Kyere* matter, his failure to acknowledge and take responsibility for his misconduct, his efforts to shift blame for the misconduct to his clients, and his discredited claim that he had amended his practices since the first discipline and that the problems in the seven cases were aberrational.

As a result of the findings of misconduct and the attendant aggravating factors, the Tax Court's Committee on Admissions, Ethics and Discipline recommended that Respondent be disbarred:

Mr. Aka has a long history of being unresponsive to Court orders and attempts by opposing counsel to contact him. Neither the public reprimand in 2011 nor the issuance of the November 5, 2014, OSC has significantly changed Mr. Aka's approach to the practice of law before this Court. Often, but not always, he acts after significant delay and prodding. His behavior disrupts the timely disposition of cases in which he has entered an appearance. His unresponsiveness on behalf of clients stands in sharp contrast to his promptness and diligence in protecting his own interest in this proceeding (even here he failed to follow through with his promise to provide additional information).

Mr. Aka has not acknowledged that his actions as counsel are in any way deficient nor has he expressed any contrition. Indeed, Mr. Aka describes his clients in the seven cases identified in the OSC as "very difficult and very uncooperative" and he blames them for the problems in those cases. He has not demonstrated to the Court that he understands and accepts his duty as a member of the Bar of this Court. His written responses to the November 5, 2014, OSC, and his testimony at the March 31, 2015, disciplinary hearing focused on his communications with his clients and with opposing counsel. He failed to acknowledge his duty to the Court. This is inexcusable after his public reprimand in 2011. His continued disruptive behavior after his reprimand in 2011 is a significant aggravating factor regarding possible discipline. Furthermore, his statements at the hearing that his performance in the post-reprimand cases was not deficient further aggravates his situation. At best, his statements show that he still does not understand what is required of him as a member of this Bar, even after two orders to show cause and a public reprimand. At worst, they show that he is attempting to mislead the Court.

...
It is unlikely that another public reprimand would have any effect on Mr. Aka's behavior as counsel and his lack of respect for his obligations to the legal system and this tribunal. If Mr. Aka's transgressions after the 2011 reprimand were isolated as he testified, we would consider a suspension, but unfortunately, his failure to timely respond to this Court's orders is chronic. He shows an arrogant disregard for his basic obligations as counsel. He cannot dispute that he knows his obligation to this tribunal and to his opposing counsel, after his explicit public reprimand for similar

failures. The summaries set forth in Appendix II of cases in which Mr. Aka appeared before this Court since his reprimand chronicle how his failure to communicate with opposing counsel and his failure to comply with Court orders have interfered with this Court's proceedings and have imposed additional burdens on opposing counsel. The fact that Mr. Aka's failures are chronic and extend over the entire period that he has been admitted to this Bar, continuing even after his most recent disciplinary hearing, compel us to conclude that they are done knowingly. Mr. Aka's conduct has also caused serious or potentially serious interference with many proceedings before this Court. In the absence of any plausible explanation, we conclude that his violations of our Rules and orders were intended for his benefit. Accordingly, taking into account the aggravating factors discussed above, we recommend that Mr. Aka be disbarred.

On August 6, 2015, the Tax Court ordered that Respondent be disbarred as an attorney authorized to practice before that court.

Respondent then appealed the Tax Court's disciplinary decision to the United States Court of Appeals for the District of Columbia. On April 14, 2017, the Circuit Court affirmed the Tax Court's disbarment decision, concluding *inter alia*, that "Aka's substantive due process claims are so 'completely devoid of merit' that they do not trigger our jurisdiction to consider claims made under federal law." (Ex. 11, p. 8.)

The State Bar alleges in the NDC that Respondent's misconduct violated rule 3-110(A); section 6068, subdivisions (b) and (m); and section 6103.

This court agrees that the Tax Court's findings of misconduct by Respondent also constitute violations by Respondent of rule 3-110(A); section 6068, subdivision (b); and section 6103. However, there is no basis for a finding by this court that the misconduct also violated section 6068, subdivision (m). That statutory obligation relates to an attorney's obligation to communicate with the client. The Tax Court expressly declined to find "that Mr. Aka's conduct violated Model Rule 1.4 (Communication)."

In Respondent's post-trial brief, it is acknowledged that the misconduct found by the Tax Court would constitute violations of section 6068, subdivision (b), and section 6103. However, the following contention is made that the evidence does not show a violation of rule 3-110(A):

As Respondent has admitted in this proceeding, most of the misconduct found by the Tax Court is also a disciplinary offense in California, although some of the misconduct, such as failing to meet and confer with opposing counsel (Branerton conference), would not seem to amount to a disciplinary offense by itself, but might warrant a sanction. We do contend that the misconduct here is confined to acts of misconduct toward the court, namely, violations of court orders, which would fall under both Business and Professions Code section 6103, and 6068(b). There was no other possible violation proven against Respondent that would stand up to due process scrutiny in the State Bar Court.

In this regard, there was no reliable evidence, and really no admissible evidence, to support a finding that Respondent's conduct in the Tax Court included any violation of rule 3-110(A), or Business and Professions Code section 6068(m), in Respondent's representation and performance of services for these eight clients. There is no indication that any of the eight clients testified in the Tax Court disciplinary proceedings, and although there are a few hearsay, or double hearsay, references in the decisions to indicate contacts were made with some of them, the purported statements of those particular clients, as indicated in the decisions, were not evidence, and thus cannot support any adverse finding against Respondent. Since the clients didn't testify, and were not subject to cross-examination, whatever second or third hand statements they made that appear in these decisions were hearsay and inherently unreliable, particularly where the taxpayer/client was more than likely intimidated at the time the IRS and/or the Tax Court made the contact, and is likely to have made self-serving statements when confronted. Clearly, in at least six of these cases, Kyere v. Commissioner, Brown v. Commissioner, Adiele P. Ohiaeri, Andrew O. Onaghise, Ugwaula [sic] v. Commissioner, and Bunice [sic] Bisong Nkongho, the client failed to cooperate with Respondent and failed to produce the necessary records to support their claims despite his requests for same and the client's knowledge that their petition would be dismissed without such records.

There was also no reliable evidence that Respondent's conduct harmed any of these clients, including those whose petitions were dismissed.

In aggravation, Respondent's misconduct harmed the administration of justice by causing delays and unnecessary work for the Tax Court and opposing counsel.

As noted above, the burden is on the Respondent in this proceeding to establish that the prior disciplinary proceeding lacked due process. Although Respondent argues that the evidence

in that proceeding would not “stand up to due process scrutiny in the State Bar Court,” this court has not been provided with the actual evidentiary record of the Tax Court proceedings in order to enable it to make any such determination. Accordingly, Respondent’s challenges to the evidentiary/due process sufficiency of the Tax Court’s findings are unavailing. Those findings, in turn, clearly evidence misconduct that would violate the prohibition of rule 3-110(A) against reckless and repeated failures to act with competence.

Aggravation/Mitigation

Although the findings of culpability are subject to the process set forth in section 6049.1, such is not true with regard to issues of aggravation and mitigation. Instead, the burdens of proof with regard to those issues are the same as in any other case. (*In the Matter of Jenkins* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 157, 163-164.) The State Bar had the burden of proving aggravating circumstances by clear and convincing evidence; Respondent had the burden of proving mitigating circumstances. (Rules Proc. of State Bar, Stds. for Atty. Sanctions for Prof. Misconduct,² stds. 1.5 and 1.6.) The court finds the following with regard to those issues:

Aggravation

Prior Discipline

Although Respondent has not previously been disciplined in this state for his misconduct in the Tax Court, he had been disciplined in that court in 2011 before the subsequent misconduct resulting in his second discipline by that court. Just as that prior discipline was an aggravating factor in the Tax Court, it is an aggravating factor here, since it reflects Respondent’s failure to modify his conduct to comply with professional standards notwithstanding the prior imposition of discipline.

² All further references to standard(s) or std. are to this source.

Multiple Acts of Misconduct

Respondent's multiple acts of misconduct is an aggravating factor. (Std. 1.5(b).)

Significant Harm

Respondent's misconduct caused significant harm to the administration of justice. (Std. 1.5(j).)

Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.6.) The court finds the following with regard to mitigating factors.

No Prior Discipline

Although Respondent has not previously been disciplined in California, this court declines to treat that fact as a mitigating factor. Respondent has been disciplined twice by the U.S. Tax Court. Moreover, although Respondent was only admitted to the bar in California in June 2009, his misconduct began in July 2010, barely more than a year later, and continued despite the first imposition of discipline in 2011.

Character Evidence

Respondent presented good character testimony from more than 25 witnesses, including five attorneys, a former attorney, and numerous current and former clients, regarding Respondent's integrity and his fine qualities as an attorney. Two of these character witnesses were clients in matters for which Respondent was disciplined by the Tax Court. Respondent is entitled to substantial mitigation for this character evidence. (Std. 1.6(f).)

Community Service

Respondent presented significant evidence of community service, which is "a mitigating factor that is entitled to 'considerable weight.' [Citation.]" (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) Respondent is the leader of the Los Angeles Chapel One of the All Christian

Practical Praying Band (ACPPB), the Regional Leader of the Overseas Region of that organization,³ and a recognized leader of the Nigerian community in Los Angeles. In addition, Respondent presented persuasive evidence that he devotes significant time performing pro bono work.

Rehabilitation/Remediation

While Respondent inexplicably did not take steps to remedy his deficient practice habits after his reprimand by the Tax Court, he now acknowledges the inappropriateness of his conduct in the Tax Court matters, and he has taken significant steps since his second discipline by the Tax Court to stop and prevent any future misconduct. Among these steps, he has voluntarily completed nearly 250 hours of continuing legal education since his second discipline by the Tax Court, including several classes on law practice management and numerous courses focused on legal ethics and professionalism. These prophylactic measures by Respondent appear to be working. There is no evidence of any misconduct by Respondent since his discipline in July 2015, and the laudatory comments in the many character letters by attorneys and happy clients suggest that Respondent is now conducting himself in a manner that is both competent and professional. (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 49, citing *Amante v. State Bar* (1990) 50 Cal.3d 247, 256, and *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 305, 308, 316-317.)

DISCUSSION

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

³ The ACPPB is a non-profit organization addressing the needs of Africans of Nigerian descent. It is an international organization based in Nigeria. The “Overseas Region” includes all chapels/branches outside of Nigeria and includes the United Kingdom and North America.

111.) In determining the appropriate level of discipline, the 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.) Although the standards are not binding, they are to be afforded great weight because “they promote the consistent and uniform application of disciplinary measures.” (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, the court is permitted to temper the letter of the law with considerations peculiar to the offense and the offender. (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994; *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the court considers relevant decisional law for guidance. (See *Snyder v. State Bar, supra*, 49 Cal.3d at pp. 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) 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; *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. In the present proceeding, the most severe sanctions for Respondent's misconduct are found in standards 2.7(b) and 2.12(a). Standard 2.7(b) provides: “Actual suspension is the presumed sanction for performance, communication, or withdrawal violations in multiple client matters, not demonstrating habitual disregard of client interests.”⁴ Standard 2.12(a) provides: “Disbarment or actual suspension is

⁴ In contrast, standard 2.7(c) provides: “Suspension or reproof is the presumed sanction for performance, communication, or withdrawal violations, which are limited in scope or time.

the presumed sanction for disobedience or violation of a court order related to the member's practice of law, the attorney's oath, or the duties required of an attorney under Business and Professions Code section 6068(a),(b),(d),(e),(f) or (h)."

The State Bar argues that disbarment is the appropriate discipline in this matter. That contention fails to take into account the fact that Respondent's misconduct occurred very early in his career and he appears to have remedied the causes of it.⁵ Indeed, two of the clients involved in his prior misconduct have provided this court with glowing testimonials about Respondent and another still uses Respondent as his attorney. To disbar Respondent for his prior deficient practices is no longer necessary to protect the public, the profession or the courts. Today, it would only be punitive.

That assessment, however, does not mean that significant discipline is not warranted for Respondent's many prior instances of misconduct affecting the court, opposing counsel and his clients. It is this court's conclusion that a lengthy probation, with conditions including six months of actual suspension and a requirement that Respondent provide proof of passage of the State Bar Ethics School, is appropriate. Such a discipline would be consistent with the standards and case law (cf. *In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774 [90 day suspension for comparable conduct, plus acts of moral turpitude, in a single matter], and it would reflect the seriousness of Respondent's conduct continuing for a number of years.

The degree of sanction depends on the extent of the misconduct and the degree of harm to the client or clients."

⁵ In a proceeding under section 6049.1, the appropriate discipline is not presumed by the other jurisdiction's discipline, but is open for determination in this state. (*In the Matter of Kauffman* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 213, 217.)

Recommendations

Discipline

It is recommended that **Wilfred I. Aka**, State Bar Number 263973, be suspended from the practice of law for one year, that execution of that suspension be stayed, and that Respondent be placed on probation for three years with the following conditions.

Conditions of Probation

Actual Suspension

Respondent must be suspended from the practice of law for the first six months of Respondent's probation.

Review Rules of Professional Conduct

Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must (1) read the California Rules of Professional Conduct (Rules of Professional Conduct) and California Business and Professions Code sections 6067, 6068, and 6103 through 6126 and (2) provide a declaration, under penalty of perjury, attesting to Respondent's compliance with this requirement, to the State Bar's Office of Probation in Los Angeles (Office of Probation) with Respondent's first quarterly report.

Comply with State Bar Act, Rules of Professional Conduct, and Probation Conditions

Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of Respondent's probation.

Maintain Valid Official Membership Address and Other Required Contact Information

Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must make certain that the State Bar Attorney Regulation and Consumer Resources Office (ARCR) has Respondent's current office address, email address, and telephone

number. If Respondent does not maintain an office, Respondent must provide the mailing address, email address, and telephone number to be used for State Bar purposes. Respondent must report, in writing, any change in the above information to ARCR, within ten (10) days after such change, in the manner required by that office.

Meet and Cooperate with Office of Probation

Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must schedule a meeting with Respondent's assigned probation case specialist to discuss the terms and conditions of Respondent's discipline and, within 30 days after the effective date of the court's order, must participate in such meeting. Unless otherwise instructed by the Office of Probation, Respondent may meet with the probation case specialist in person or by telephone. During the probation period, Respondent must promptly meet with representatives of the Office of Probation as requested by it and, subject to the assertion of applicable privileges, must fully, promptly, and truthfully answer any inquiries by it and provide to it any other information requested by it.

State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court

During Respondent's probation period, the State Bar Court retains jurisdiction over Respondent to address issues concerning compliance with probation conditions. During this period, Respondent must appear before the State Bar Court as required by the court or by the Office of Probation after written notice mailed to Respondent's official membership address, as provided above. Subject to the assertion of applicable privileges, Respondent must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

Quarterly and Final Reports

a. Deadlines for Reports. Respondent must submit written quarterly reports to the Office of Probation no later than each January 10 (covering October 1 through December 31 of the prior year), April 10 (covering January 1 through March 31), July 10 (covering April 1 through June 30), and October 10 (covering July 1 through September 30) within the period of probation. If the first report would cover less than 30 days, that report must be submitted on the next quarter date and cover the extended deadline. In addition to all quarterly reports, Respondent must submit a final report no earlier than ten (10) days before the last day of the probation period and no later than the last day of the probation period.

b. Contents of Reports. Respondent must answer, under penalty of perjury, all inquiries contained in the quarterly report form provided by the Office of Probation, including stating whether Respondent has complied with the State Bar Act and the Rules of Professional Conduct during the applicable quarter or period. All reports must be: (1) submitted on the form provided by the Office of Probation; (2) signed and dated after the completion of the period for which the report is being submitted (except for the final report); (3) filled out completely and signed under penalty of perjury; and (4) submitted to the Office of Probation on or before each report's due date.

c. Submission of Reports. All reports must be submitted by: (1) fax or email to the Office of Probation; (2) personal delivery to the Office of Probation; (3) certified mail, return receipt requested, to the Office of Probation (postmarked on or before the due date); or (4) other tracked-service provider, such as Federal Express or United Parcel Service, etc. (physically delivered to such provider on or before the due date).

d. Proof of Compliance. Respondent is directed to maintain proof of Respondent's compliance with the above requirements for each such report for a minimum of one year after

either the period of probation or the period of Respondent's actual suspension has ended, whichever is longer. Respondent is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

State Bar Ethics School

Within one year after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar Ethics School and passage of the test given at the end of that session. This requirement is separate from any MCLE requirement, and Respondent will not receive MCLE credit for this activity. If Respondent provides satisfactory evidence of completion of the Ethics School, completed after the date of this decision but before the effective date of the Supreme Court's order in this matter, Respondent will nonetheless receive credit for such evidence toward Respondent's duty to comply with this condition.

Commencement of Probation

The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the probation period, if Respondent has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

Multistate Professional Responsibility Examination

It is further recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court order imposing discipline in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation within the same period. Failure to do so may result in suspension. (Cal. Rules of Court, rule 9.10(b).) If Respondent provides satisfactory evidence of the passage of the

above examination, taken after the date of this decision but before the effective date of the Supreme Court's order in this matter, Respondent will nonetheless receive credit for such evidence toward her duty to comply with this condition.

California Rules of Court, Rule 9.20

The court further recommends that Respondent be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

Costs

The court further recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment. Respondent must also reimburse the Client Security Fund to the extent that the misconduct in this matter results in the payment of funds, and such payment is enforceable as provided under Business and Professions Code section 6140.5.

Dated: July 25, 2018.



DONALD F. MILES
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 Court Specialist 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 July 25, 2018, I deposited a true copy of the following document(s):

DECISION

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:

DAVID ALAN CLARE
DAVID A CLARE, ATTORNEY AT LAW
444 W OCEAN BLVD STE 800
LONG BEACH, CA 90802

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

DAVID E. AIGBOBOH, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on July 25, 2018.



Marc Krause
Court Specialist
State Bar Court