

PUBLIC MATTER

FILED

**STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES**

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES**

In the Matter of

Case No.:

[Redacted Name]

**DECISION AND ORDER OF
DISMISSAL WITH PREJUDICE**

A Member of the State Bar.

Introduction

The Office of the Chief Trial Counsel of the State Bar of California (OCTC) charges respondent [Redacted Name] 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 [REDACTED]

[REDACTED] Thereafter, respondent filed her response to the NDC on [REDACTED]

The parties filed a partial stipulation of facts and admission of documents on [REDACTED] [REDACTED] the day of trial. Both parties filed post trial briefs, and the court took the matter under submission for decision on [REDACTED]

OCTC was represented at trial by Senior Trial Counsel [REDACTED] Respondent was represented at trial by [REDACTED]

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 [REDACTED] She has continuously been a member of the State Bar of California since that time.

Case Number [REDACTED]

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.)

[REDACTED]

In stark contrast to respondent's exceptionally credible and honest testimony, is [REDACTED] testimony. After carefully observing [REDACTED] testify before it and after carefully considering, among other things, [REDACTED] 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 [REDACTED] testimony on almost every disputed fact lacks credibility, *if not candor*. Often times, [REDACTED] 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 [REDACTED] "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, [REDACTED] testimony was not even remotely credible.³

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³ Of course, the court's rejection of much of [REDACTED] 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

owns and operates multiple businesses (). In addition, he owns and manages residential and commercial properties valued in excess of \$10 million. On (), () retained respondent to represent one of his businesses as the plaintiff in a lawsuit, entitled () in the Los Angeles Superior Court. In the () case, () sought to recover a large sum of money from () for damage () allegedly caused to one of ()'s properties. Respondent and () entered into a written legal service agreement (LSA) for this legal matter.

Over the next six years, and until () terminated respondent's employment in (), () 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 () 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 () (see § 6148, subd. (d)(2)). () 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, () 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, () past due bills totaled more than \$130,000. When respondent would discuss the unpaid bills with ()

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.

██████████ made at least three sporadic payments to respondent on his unpaid legal bills. In ██████████ when respondent was having one of her unpaid-bills discussions with ██████████ ██████████ offered to make a large payment using the proceeds from a judgment that respondent had obtained for him against the ██████████). ██████████ 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 ██████████ offer and tried the other lawsuit for ██████████. When she received the judgment proceeds of \$18,109.42 from the ██████████, she deposited the \$18,109.42 into her client trust account (CTA) and then withdrew it and applied it to ██████████ unpaid legal bills.

Respondent also represented ██████████ as a defendant in a lawsuit, entitled ██████████ ██████████ in the Los Angeles Superior Court (the ██████████ case). The plaintiff won at trial in the ██████████ case, and, on ██████████, a judgment in the amount of \$256,471 was entered against ██████████. Respondent and ██████████ did not execute a separate LSA in the ██████████ case until respondent agreed to handle the appeal in that case for ██████████ as the appeal was a new legal service respondent was providing to ██████████. With respect to the appeal, ██████████ was required to make a cash deposit with the Los Angeles Superior Court (██████████ appeal deposit). As of ██████████, the amount of the ██████████ appeal deposit was \$384,706.60.

In the summer of ██████████, as the ██████████ case approached trial, respondent became increasingly concerned about representing ██████████ at the trial, given his repeated rebuffs to pay her legal bills. Respondent was also concerned because, by this time in her relationship with ██████████ respondent had seen ██████████ 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 [REDACTED] respondent had billed [REDACTED] more than \$100,000 in legal fees and reimbursable expenses, which [REDACTED] had not paid. At one point, while they were attending a hearing on another case in the Stanley Mosk Courthouse, respondent asked [REDACTED] if he had brought a check to pay on his legal bills as she had previously requested that he do. When [REDACTED] told respondent that he had no check for her, she informed him that she was withdrawing from representation in the [REDACTED] case because she could not afford to continue representing him without payment. Respondent specifically advised [REDACTED] to promptly find another attorney to represent him in the upcoming trial in the [REDACTED] 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 [REDACTED] case for him, [REDACTED] asked respondent if he could make a payment on his outstanding legal bills using the partial refund they anticipated receiving on the [REDACTED] appeal deposit (similar to the prior arrangement in the [REDACTED] case) if he had not paid all of his legal bills before the refund on that deposit was issued. Despite her misgivings, respondent accepted [REDACTED] offer. Respondent performed her part of that contract by continuing to represent [REDACTED] and by trying the [REDACTED] case from [REDACTED]. The trial resulted in a verdict for the defense.⁴

⁴ [REDACTED] testified that respondent was completely unprepared for trial in both the [REDACTED] case and the [REDACTED] case. Like [REDACTED] testimony on the other contested issues in this proceeding, the court rejects for want of credibility [REDACTED] testimony on respondent's preparedness for trial in those two cases. Moreover, respondent credibly testified that she advised [REDACTED] to dismiss the [REDACTED] case before trial because there were serious problems in proving the allegation that [REDACTED] caused, or was otherwise responsible for, the damage done to [REDACTED] property.

At a dinner meeting on December 18, 2013, respondent had another unpaid-bills discussion with [REDACTED]. During that discussion, [REDACTED] reaffirmed the parties' agreement to apply the anticipated refund on the [REDACTED] appeal deposit to [REDACTED]'s unpaid legal bills.

In the early part of [REDACTED], Attorney [REDACTED], who represented [REDACTED] before respondent began representing him in [REDACTED], contacted respondent at the request of [REDACTED]. [REDACTED]'s initial contacts with respondent were regarding, at least in part, the [REDACTED] case and the [REDACTED] case. The purpose of [REDACTED]'s contact was to review the two cases to see if respondent had committed malpractice and to see if [REDACTED] should take those cases over from respondent. In [REDACTED], [REDACTED] replaced respondent as [REDACTED]'s attorney of record in the [REDACTED] case. However, [REDACTED] did not replace respondent as [REDACTED]'s attorney in the [REDACTED] case.

On [REDACTED], respondent received the anticipated refund on the [REDACTED] appeal deposit from the Los Angeles Superior Court. The amount of the refund was \$80,247.35. On [REDACTED], respondent deposited the refund into her CTA. That same day, respondent also notified [REDACTED] that she had received the refund and deposited it into her CTA.

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

and [REDACTED] also requested information about how much money was refunded and how the refund was calculated.⁵

Later that same day, respondent replied to [REDACTED]'s email. In her email, respondent informed [REDACTED] of a conversation that she and [REDACTED] had two weeks earlier, whereby [REDACTED] acknowledged their prior agreement. She further informed him about a conversation that [REDACTED] and she had on [REDACTED], in which she reminded [REDACTED] 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 [REDACTED] became angry at her. She explained to [REDACTED] 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 [REDACTED], [REDACTED] again emailed respondent. In that email, [REDACTED] stated that "[i]t sounds like you are withholding [the refund on the [REDACTED] appeal deposit because you feel you are owed legal fees." [REDACTED] further stated that he would like "to try to resolve this immediately," as he claimed [REDACTED] needed the refund to redeem a mortgage. [REDACTED] also requested to see the written fee agreements and to know the terms of her fee agreements that allowed respondent to withhold the refund. [REDACTED] 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 [REDACTED] appeal deposit]."

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

⁵ To satisfy [REDACTED]'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 [REDACTED] and [REDACTED] while the appeal deposit refund was in her CTA.

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

On [REDACTED] respondent prepared and sent to both [REDACTED] and [REDACTED] a statement compiling all of the previous invoices related to unpaid legal work that respondent had performed for [REDACTED]. The statement included a notation showing that the \$80,247.36 refund on the [REDACTED] appeal deposit would be deducted from respondent's CTA and applied to [REDACTED]'s unpaid legal bills on [REDACTED].

On [REDACTED], because respondent had not heard or received any objection to her [REDACTED] statement from [REDACTED] or [REDACTED], respondent withdrew \$80,247.35 from her CTA and applied the \$80,247.35 to [REDACTED]'s unpaid legal bills. That same day, respondent also sent [REDACTED] 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 [REDACTED]'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 [REDACTED], 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 [REDACTED] and respondent's oral contact that provided that the refund from the [REDACTED] appeal deposit was to be applied to [REDACTED]'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 [REDACTED]'s unpaid bills on July 10, 2014. The only evidence that OCTC introduced to establish otherwise was the series of emails between [REDACTED] and respondent, as summarized *ante*. Those emails, particularly [REDACTED]'s emails, are confusing and vague. Apparently, [REDACTED] wrote his emails not knowing of [REDACTED] and respondent's oral agreement to apply the refund to [REDACTED]'s unpaid legal bills. Nonetheless, respondent's first email to [REDACTED] made clear that respondent was applying the refund to [REDACTED]'s unpaid bills. Yet, [REDACTED] did not actually make a demand that respondent pay out the \$80,247.25 refund to [REDACTED] before respondent withdrew it from her CTA on [REDACTED]. Further, [REDACTED] 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 [REDACTED]. As note *ante*, respondent withdrew the \$80,247.35 on [REDACTED]. 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.

██████████'s unpaid bills was disputed before she withdrew and applied the refund on ██████████
██████████, in accordance with the notation in the accounting that she sent to ██████████ and ██████████ on
██████████⁷

When respondent withdrew the \$80,247.25 refund from her CTA and applied it to ██████████'s unpaid legal bills on ██████████, she was unaware that ██████████ had repudiated their agreement authorizing her to do so or that her right to withdraw the deposit and apply it to ██████████'s unpaid bills was otherwise disputed. Stated differently, when respondent withdrew the deposit and applied it to ██████████'s unpaid bills, respondent honestly believed that she was authorized to do so. Moreover, after carefully reviewing and analyzing ██████████'s emails as they are written without considering ██████████'s alleged intent behind them (as proffered at trial) and after carefully reviewing and analyzing respondent's reply emails to ██████████ 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 ██████████'s unpaid legal bills was disputed before she withdrew and applied the refund on ██████████. 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 ██████████, after a dispute arose regarding the rights to the funds.

⁷ The court rejects for want of credibility ██████████'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 ██████████'s emails as shown in the trial exhibits.

Respondent's honest belief that she was entitled to withdraw the \$80,247.35 on [REDACTED] [REDACTED], 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 [REDACTED] 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: [REDACTED]

[REDACTED]
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 [REDACTED] 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:

[REDACTED]

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

[REDACTED] Enforcement, Los Angeles

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

[REDACTED]

[REDACTED]

Case Administrator
State Bar Court