FILED DECEMBER 2, 2009

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **DANIEL TZU-KEN HUANG,** **Member No. 185948,** A Member of the State Bar.	)	Case No.: **06-O-15355-RAH** **DECISION & PRIVATE REPROVAL**

1. INTRODUCTION

In this three-count disciplinary proceeding involving a single client matter, the Office of the Chief Trial Counsel of the State Bar of California (hereafter "OCTC ") was represented by Deputy Trial Counsel Ashod Mooradian, and respondent **DANIEL TZU-KEN HUANG** was represented by Attorney Edward O. Lear. The matter arises out of respondent's representation of Guo Ying Wang (also known as Guoying Wang), who had an immigration petition pending before the United States Citizenship and Immigration Services (hereafter "USCIS"). Respondent's representation of Wang was limited to representing her in a federal district court action (a declaratory relief action that is in the nature of a writ of mandamus) alleging that the USCIS had improperly delayed issuing a decision on Wang's petition and seeking an order to compel the USCIS to act on Wang's petition.

For the reasons set forth below, the court finds respondent culpable on only one of the three counts charged against him in the notice of disciplinary charges (hereafter "NDC") and

concludes that the appropriate level of discipline is a private reproval with an Ethics School condition attached to it.

2. PROCEDURAL HISTORY

On September 3, 2009, which was the first day of trial in this disciplinary proceeding, the parties filed a stipulation as to facts and admission of documents.

In his pretrial statement, respondent listed Karen Pennington as an expert witness on the requirements of Federal Rules of Civil Procedure, rule 11(b)(2) in federal court mandamus proceedings. Thereafter, OCTC filed a motion in limine to exclude Pennington's testimony. The court granted the Bar's motion in limine on the first day of trial.

Also, on the first day of trial, OCTC filed a pleading titled "Offer of Proof re 'Uncharged Misconduct' Aggravation" in which OCTC requested leave to present additional evidence that would allegedly establish that respondent is also culpable of uncharged violations of Business and Professions Code sections 6103.5, subdivision (a)[1] and Rules of Professional Conduct, rule 3-510(A)(2),[2] both of which require an attorney to communicate all written settlement offers to a client, and uncharged violations of section 6068, subdivision (m) and rule 3-500, both of which require that an attorney notify a client of all significant developments in the client's case. According to OCTC, these uncharged violations could be considered as proved-but-uncharged-misconduct aggravation. This court denied OCTC's request to present this additional evidence or to allege such uncharged violations because OCTC's request was untimely and because granting the request would likely result in significant delays in the adjudication of this disciplinary proceeding (e.g., a continuance of the trial). Moreover, there is nothing that suggests that the

[1] Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

[2] Unless otherwise indicated, all further references to rules are to these Rules of Professional Conduct.

USCIS ever made a written settlement offer that respondent was required to communicate to Wang under section 6103.5, subdivision (a); rule 3-510(A)(2); section 6068, subdivision (m); or rule 3-500. In fact, it is hard to imagine an instance when the USCIS would make a written offer to settle a mandamus-type proceeding like the one respondent filed against it for Wang.

Sometime shortly after the trial in this proceeding began, OCTC notified the court that it wished to proffer into evidence a number of requests for admissions and respondent's responses to them. The court indicated that it would address that issue later in the trial, when the relevance could be determined in the context of the other admitted evidence. The State Bar did not object to the court's delay in admitting the requests for admission into evidence at the beginning of trial. Moreover, during trial, OCTC did not object to the admission of evidence on the grounds that the evidence was inconsistent with or contradicted one or more of respondent's responses to OCTC's requests for admission.

Right before the court made its tentative culpability findings, OCTC again proffered its requests for admission and respondent's responses to them into evidence. At that time, the court admitted the requests and responses into evidence as exhibits 27 and 28, respectively. In his response to request for admission number 57, respondent admitted with qualification that Wang never gave him "authority" to dismiss her case in federal court.[3] The precise meanings of the request and of respondent's qualified admission response are unclear.[4] Given this lack of clarity, the court has the **"**discretion to determine the scope and effect of the admission so that it

[3] The full text of the request and respondent's response is as follows: Request: "Admit that Mrs. Wang's [sic] never gave YOU authority to dismiss her case in federal court." Response: "Admit, but Respondent contends that he has a duty to the court to dismiss frivolous lawsuits." (Exs. 27 & 28, request/response for admission number 57.)

[4] For example, it is unclear if the parties were referring to express or implied authority. If the parties were both referring to implied authority, it is further unclear if they were referring to authority implied in fact or in law.

accurately reflects what facts are admitted in the light of other evidence." (*Fredericks v. Kontos Industries, Inc*. (1987) 189 Cal.App.3d 272, 277; *Milton v. Montgomery Ward & Co*. (1973) 33 Cal.App.3d 133, 138.) In the present case, both OCTC and respondent elicited testimonial evidence which established that respondent had the authority to dismiss the federal court action. Therefore, the court need not, and does not, determine the actual meaning of respondent's qualified admission.[5]

3. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 10, 1996, and has been a member of the State Bar of California since that time.

B. Credibility Determinations.

After carefully considering, among other things, Guo Ying Wang's and Attorney Yao Sue's individual demeanor while testifying in this disciplinary proceeding; the manner in which they each testified; the character of their individual testimony; their relatively low individual interests in the outcome in this proceeding; and their individual capacity to perceive, recollect, and communicate the matters on which they testified and after carefully reflecting on the record as a whole, the court finds that both Wang's and Sue's testimony in this proceeding repeatedly lacked credibility. (See, generally, Evid. Code, § 780; *In the Matter of Berg* (Review Dept.

[5] In other contexts, when the State Bar offers or elicits evidence at a default hearing that negates the allegations deemed admitted in the notice of disciplinary charges, it is the evidence and not the admitted allegations that control the court's findings of fact. (*In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 318, citing *Remainders, Inc. v. Bartlett* (1963) 215 Cal.App.2d 295.) Implicit in this holding that the evidence and not the admitted allegations controls the court's findings is the principle that the State Bar Court will not find an attorney culpable of misconduct that the court knows the attorney did not commit. Thus, by analogy, when the evidence offered by the State Bar or admitted without objection in a contested proceeding contradicts a respondent's response to a request for admission, it is the evidence (and not the response to the request for admission) that controls the court's findings of fact.

1997) 3 Cal. State Bar Ct. Rptr. 725, 736-737.) Trial courts are not bound to accept as true the sworn testimony of a witness even in the absence of evidence contradicting it. (*REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 498, fn. 7.)

Wang speaks both Shanghainese and Mandarin fluently. However, because she does not speak English, Wang testified through a qualified Shanghainese-English translator.[6] Wang insists that respondent made serious mistakes in his representation of her and remains very angry at, if not hostile towards, respondent. Wang's testimony was driven more by her anger, hostility, and spite than by a desire or willingness to testify truthfully and openly. In short, the court finds that Wang's testimony on virtually every disputed issue lacked credibility.

Attorney Sue is Wang's cousin. Attorney Sue does not have any experience in federal court actions similar to the one respondent filed for Wang. Nor does Attorney Sue have a basic understanding of the procedural and substantive issues in federal court mandamus-type proceedings. Unfortunately, even as of the day of trial, Sue had not familiarized herself with such proceedings. Sue's testimony regarding respondent's handling of the federal court action he filed for Wang was generally uninformed, emotional and defensive, and based primarily on her own generalized opinions of what respondent should have done in the federal court action.

In rather sharp contrast to its findings regarding Wang's and Sue's testimony, are the court's findings regarding respondent's and Abby Xu's testimony. Xu is married to respondent and works as his office manager. Both respondent and Xu speak both Mandarin and English fluently. They both testified in English. After carefully considering respondent's and Xu's individual demeanor, the manner and character of their individual testimony, their very strong

[6] There was some concern over the fact that the translator speaks a dialect of Shanghainese that is slightly different from the dialect that Wang speaks. However, after carefully observing the reactions and responses of Wang to the translations, the court is convinced that Wang fully understood the matters translated.

individual interests in the outcome in this proceeding, and their individual capacity to perceive, recollect, and communicate the matters on which they testified and after carefully reflecting on the record as a whole, the court finds respondent's and Xu's testimony in this proceeding to be very credible and forthright. (See, generally, Evid. Code, § 780.) They each testified clearly, directly, and convincingly.

Finally, the court finds the testimony of Assistant United States Attorney Marcus Matthew Kerner (hereafter "AUSA Kerner") to be highly credible and forthright. He is very knowledgeable about and has extensive experience in federal court mandamus proceedings and federal court mandamus-type proceeds such as the proceeding that respondent filed for Wang. AUSA Kerner, who is the "most" disinterested witness in this proceeding, was an impressive witness who testified clearly and without hesitation and responded directly to the questions asked.[7]

C. <u>Relevant Background Facts.</u>

In February 2005, Wang submitted, to the USCIS, an I-751 petition in which she sought to change her immigration status from that of a "conditional permanent resident alien" to a "permanent resident alien" based on her marriage to an 82-year-old United States citizen.[8]

In December 2005, the USCIS issued a request for evidence (hereafter "RFE") to Wang. In that RFE, the USCIS requested that Wang provide it with (1) two color photographs of Wang's Alien Registration Card and (2) "Any documents that would help establish that [she has] a valid marriage" to a United States citizen. The RFE clearly warned Wang that her "Failure to

[7] Even though AUSA Kerner sometimes provided what may be classified as expert testimony, the State Bar never objected to his testimony on that ground. His "expert testimony" was relevant and appropriate in order to provide context to the evaluation of respondent's character.

[8] At times, Wang's I-751 petition is referred to by the parties and in various exhibits as an application. In this decision, however, the court consistently refers to it as a petition.

provide the requested documents within 12 weeks from the date of this notice may result in the denial of your application. Inquiries of your case will not be accepted until 180 days after the date of this notice."

According to the testimony of Wang and Attorney Sue, Wang responded to the December 2005 RFE by submitting the requested documents to the USCIS in January 2006. The court, however, does not find either Wang's or Sue's testimony on this point to be credible. Moreover, according to Sue, the requested documents were again submitted to the USCIS in April 2006 when she submitted a Form G-28 identifying her as Wang's attorney of record on Wang's I-751 petition. Even though the court accepts as true Sue's testimony that she submitted a Form G-28 to the USCIS in April 2006, the court does not find credible Sue's testimony that the requested documents were again submitted to the USCIS in April 2006. Of course, the court's rejection of Wang's and Sue's testimony " 'does not reveal the truth itself or warrant an inference that the truth is the direct converse of the rejected testimony.' " (*Edmondson v. State Bar* (1981) 29 Cal.3d 339, 343, quoting *Estate of Bould* (1955) 135 Cal.App.2d 260, 265; see also *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 749.) Nonetheless, the court's adverse credibility determinations are supported by the fact that, even though Sue's Form G-28 promptly made it into Wang's file, the documents requested in the December 2005 RFE were still not in Wang's file as of November 2006.

When Wang failed to hear whether her I-751 petition had been approved, Wang contacted respondent.[9] On September 13, 2006, Wang retained respondent and executed a retainer agreement with respondent. That retainer agreement clearly limits respondent's employment to preparing and filing a mandamus lawsuit and clearly states that any "other legal

[9] Wang's husband was very ill, and she was concerned that she would not get her alien status adjusted before he died. In fact, he died in 2007.

service requires a separate retainer agreement." The retainer agreement provides that respondent is to be paid a flat fee of $2,000; that Wang is to promptly pay $1,000 of the flat fee and advance $380 for "court filing fee" to respondent; and that Wang is to pay the $1,000 balance due on the flat fee within one month after respondent files the action for Wang in the United States District Court.

During respondent's and Xu's first meeting with Wang on September 13, 2006, respondent and Xu fully explained to Wang the retainer agreement and how respondent used mandamus-type proceedings in federal district court to assist his immigration clients. Respondent and Xu explained to Wang that, even though the complaint in the federal court action would request a court order directing the USCIS to issue a decision on her I-751 petition, neither obtaining such an order nor compelling the USCIS to act on her petition was the primary purpose for bringing the action. They further explained to Wang that the primary reasons for bringing the action were to learn (1) the status of Wang's I-751 petition (e.g., whether the USCIS had, in fact, improperly or unreasonably delayed ruling on the petition) and (2) whether there was something that Wang could do to advance the petition so as to increase the chances of it being granted (e.g., supply the USCIS with missing information, explain some unfavorable evidence in the file, or correct an error in the file). They further explained to Wang that, once respondent learned these things, it was respondent's practice to dismiss the action. In fact, it would be improper for respondent (or any other attorney) to maintain a mandamus-type action seeking an order compelling the USCIS to rule if he learns that the USCIS had not improperly or unreasonably delayed ruling on a client's petition or application.[10]

[10] Respondent and AUSA Kerner credibly testified that dismissal of such an action was appropriate, if not mandatory, if (1) the plaintiff's attorney learned that the news as to the USCIS's ruling was adverse to the plaintiff (in which case the plaintiff would *not* want to expedite the adverse ruling); (2) the plaintiff's attorney learned that there was something that the plaintiff could do to advance the petition/application before the USCIS (e.g., file a missing form

At the meeting, respondent, Xu, and Wang spoke to each other in Mandarin, and Wang fully understood everything that was discussed.

Wang promptly paid respondent the initial $1,380 in accordance with the retainer agreement. On September 15, 2006, only two days after Wang signed the retainer agreement, respondent filed, for Wang, a complaint for declaratory relief in the nature of a mandamus in United States District Court for the Central District of California. Respondent had the complaint served the same day.

Not long after respondent filed Wang's complaint, respondent discussed the case with an Assistant United States Attorney (the United States Attorney's Office represents the USCIS in federal court), and respondent agreed to stipulate to a 45-day extension of time for the USCIS to file its answer to Wang's complaint.[11] Later, in early November 2006, the United States Attorney's Office faxed respondent a proposed stipulation granting the USCIS a 45-day

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or supply additional information to correct the administrative record); or (3) the plaintiff's attorney learned that the USCIS had not improperly or unreasonably delayed ruling on the plaintiff's petition/application (e.g., the delay was the plaintiff's fault because he or she had not supplied all the requested documentation to the USCIS). AUSA Kerner further credibly testified that, if an plaintiff's attorney learned that the delay in ruling on the plaintiff's petition/application was primarily the plaintiff's fault (and not that of the USCIS), the attorney would violate rule 11 of the Federal Rules of Civil Procedure if he or she did not promptly dismiss the action. The court agrees.

[11] Respondent credibly testified that the granting of such extensions was a common practice among plaintiffs' counsel in federal court mandamus-type actions, that respondent personally followed that practice, and that respondent had a good working relationship with the United States Attorney's Office. Attorney Sue's complaint that respondent should not have agreed to this extension of time, but should have instead sought the entry of USCIS's default is not well taken. (See, e.g., California Attorney Guidelines of Civility and Professionalism, section 6; *Farrar v. Steenbergh* (1916) 173 Cal. 94, 98; *Bellm v. Bellia* (1984) 150 Cal.App.3d 1036, 1038); *Zurich G. A. & L. Ins. Co., Ltd., v. Kinsler* (1938) 12 Cal.2d 98, 105-107; *Armstrong v. Brown* (1936) 12 Cal.App.2d 22, 28.)

extension of time to answer. Respondent never signed or filed the proposed stipulation presumably because, as noted below, respondent dismissed the action.[12]

In mid-October 2006, Xu contacted Wang about the final payment of $1,000, which was then due. Again, Xu and Wang spoke to each other in Mandarin. Xu also told Wang that they had not yet learned anything about her I-751 petition from the government. Wang requested additional time to make the final payment. Xu agreed to give her more time to raise the money.

Meanwhile, respondent had additional discussions with the United States Attorney's Office. Respondent also spoke with Immigration Officer P. W. Lomelli and learned that the reason for the delay on Wang's petition was that the USCIS had never received the additional documents it requested from Wang in the December 2005 RFE. Accordingly, it was clear to respondent that, contrary to the allegations in Wang's complaint, the USCIS had not improperly delayed issuing a decision on her I-751 petition.[13]

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[12] The proposed stipulation contains the following statement: "The parties believe that there is a substantial likelihood that if the extension of time is granted, the [USCIS] will be able to adjudicate the underlying application for naturalization, which will render this action moot." The State Bar places significant value on this statement as supporting its contention that respondent improperly dismissed Wang's federal court action. The court, however, disregards the statement. Obviously, the United States Attorney's Office included the statement in the stipulation by mistake. The statement incorrectly refers to an "application for naturalization" and not an I-751 petition for a change in status to a permanent resident alien.

[13] Moreover, even assuming that Wang and Attorney Sue had previously sent the requested documents to the USCIS, the documents were, for whatever reason, still not in Wang's file. Therefore, unless respondent had some reason to believe that the USCIS had deliberately failed to put the documents in Wang's file, respondent would have to know that it would be extremely difficult, if not impossible, to prove that the USCIS either improperly or unreasonably delayed ruling on Wang's petition.

In what respondent described as "an act of grace," Officer Lomelli agreed to give Wang another opportunity to provide the information requested in the December 2005 RFE and thereby complete her file.[14]

On November 2, 2006, Xu and Wang met at respondent's law office. Xu told Wang that Wang "had gotten a second chance" to provide the USCIS with the documents it requested in the December 2005 RFE. Xu then spent about an hour explaining to Wang what types of documents Wang needed to file with the USCIS to effectively respond to the RFE and thus complete the file on her I-751 petition. Wang then asked that respondent's office prepare and file the necessary documents for her.[15] Xu told Wang that, to do so, would require an additional retainer agreement because the services under her September 13, 2006, retainer agreement with respondent were limited to the preparation and filing of a mandamus-type action. Wang became upset because she thought respondent's office should do the extra work without charge. Xu explained that, if Wang did not want to pay for the additional services, Wang could take the documents to the USCIS herself and file them at the window. When Wang complained that her English was not proficient enough to accomplish that simple task, Xu generously offered to help Wang and stated that, if Wang took a cell phone with her to the USCIS, Wang could call Xu when she was at the filing window and give the phone to the filing clerk, and Xu would explain the filing to the clerk. Not happy with Xu's offer, Wang left respondent's office. On November 13, 2006, Wang returned to respondent's office, but this time Wang was accompanied by

[14] It is unclear whether Officer Lomelli issued a new RFE requesting the same information from Wang again or merely extended the time for Wang to comply with the December 2005 RFE. This uncertainty is immaterial to disposition of the disciplinary charges. Thus, for purposes of clarity, the court continues to refer to the December 2005 RFE as if it were the only RFE issued on Wang's petition.

[15] The necessity of such a lengthy explanation adds further support to this court's adverse credibility determinations as to Wang's and Attorney Sue's testimony regarding Wang's alleged responses to the RFE in January and April 2006.

Attorney Sue. Wang sat in the reception area with her head down and said nothing. The entire conversation was between Attorney Sue and Xu and, later, respondent, and it was conducted only in English. Initially, Xu thought Sue was there to act as support for Wang, and not as her attorney. Sue complained to Xu about respondent's office's refusal to submit the documents requested in the December 2005 RFE without additional charge. Xu gave Sue a copy of Wang's retainer agreement with respondent and explained the fee arrangement to Sue. Not satisfied with Xu's explanation, Sue demanded Wang's file. Xu hesitated and asked who Sue was, correctly stating that the demand for the file should come from Wang, the client, who had said nothing. In response, Sue "flashed" before Xu a Form G-28,[16] which had some writing on it. Sue put the form away quickly, so Xu could not clearly read its contents. Once Xu realized that Sue claimed to be Wang's new attorney, Xu left the reception area and discussed the matter with respondent.

Respondent told Xu to give, to Attorney Sue, Wang's entire file except for four or five pages out of the middle of the federal court complaint. Respondent withheld those pages because he had concerns over Sue's failure to provide him with any evidence that she was authorized to "substitute in" as Wang's attorney of record in the federal court action or that she was even admitted to practice in the federal district court. Xu then gave Wang's entire file, excluding a few pages from the middle of the complaint, to Sue. Sue noticed that there were a few pages missing. Xu stated that she provided the file to Sue in accordance with respondent's

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[16] As noted above, a Form G-28 documents an alien's attorney of record in a USCIS proceeding. Form G-28 applies only to matters before the USCIS; it has no affect on an alien's attorney of record in federal court. The only Form G-28 in evidence is signed by Attorney Sue, but not by Wang. (Exhibit 11.) As such, the document in evidence fails to establish that Sue was authorized to appear for Wang before the USCIS. (8 C.F.R. §292.4(a).)

instructions. In addition, Xu told Sue that Sue could get a copy of the entire complaint from PACER, the electronic database for the federal district court.[17]

Xu asked Sue if she was going to substitute into the federal court action because, as Xu repeatedly told Sue, "the case was ready to dismiss" and respondent's office was "going to dismiss the case." Eventually, Sue's and Xu's conversation in the reception area became very "heated." Respondent came out of his office and attempted to calm things down. He was unsuccessful and forced to instruct Sue to leave.[18] As Sue and Wang were leaving, Sue stated something to the effect that respondent should not do anything to negatively affect "the case." Moreover, Sue did not object to the stated intention of dismissing the federal court case/action. Nor did Sue even inquire as to why the federal court case/action was ready to be dismissed.

As noted above, once respondent learned that the reason for the delay on Wang's I-751 petition was that the USCIS had never received the additional documents it requested from Wang in the December 2005 RFE, it was clear to respondent that the USCIS had not improperly or unreasonably delayed ruling on the petition and that the federal court action was, therefore, moot and needed to be dismissed. Thus, on November 13, 2006, respondent submitted a notice of dismissal in Wang's action to the federal district court. Thereafter the court dismissed the action. Of course, that dismissal was <u>without</u> prejudice. (Fed. Rules Civ. Proc., rule 41(a)(1)(B).) Moreover, because there is no statute of limitation to bar Wang from refiling the mandamus-type action, respondent's dismissal neither harmed nor prejudiced his client.

[17] In fact, Attorney Sue obtained a copy of the complete federal court complaint a few days later from PACER.

[18] At this time, Xu was almost 9 months pregnant, and after observing how upset Xu was, respondent became concerned over the intensity of the argument and demanded that Sue leave or he would call the police. Xu gave birth to her baby less than two weeks later.

On December 4, 2006, Attorney Sue sent Immigration Officer Lomelli, whose name Sue got from respondent's file, a letter and the various documents that Xu had previously instructed Wang to personally take to the USCIS filing window.

Attorney Sue and respondent corresponded regarding the case for a short time. In February 2007, Wang's husband died. By Attorney Sue's own admission, despite being the attorney of record on Wang's I-751 petition before the USCIS, Sue simply stopped paying attention to Wang's petition in early 2007.[19] Later, in Spring 2007, the USCIS granted Wang the change she sought in her immigration status.

D. Alleged Misconduct

1. Count 1 – Appearing Without Authority (§ 6104)

In count 1, OCTC charges that respondent willfully violated section 6104, which provides that "Corruptly or wilfully and without authority appearing as attorney for a party to an action or proceeding constitutes a cause for disbarment or suspension." Specifically, OCTC charges that "By filing a motion to dismiss Mrs. Wang's case, and causing her case to be dismissed, after Mrs. Wang had told Respondent that she had retained new counsel and demanded that Respondent return her file, Respondent corruptly or wilfully, and without authority, appeared as attorney for a party to an action or proceeding." As the court understands it, OCTC asserts that respondent did not have Wang's authority to dismiss the federal court action so that when respondent dismissed it, he corruptly or willfully and without authority appeared as an attorney for a party.

[19] According to Attorney Sue, she became involved in unrelated business ventures in early 2007. In addition, Sue stated that she had advised Wang to go to the USCIS office on her own and to ask about the status of her I-751 petition at the USCIS information window. When Attorney Sue was confronted with the irony that this was the very thing that she criticized respondent's office for doing, Sue asserted that there was a real difference between sending Wang to the public information window and sending Wang to the filing window with a cell phone. The court is unable to discern any meaningful difference.

The federal court action Wang retained respondent to file for her was of a unique type. It sought to compel a decision from the USCIS. Such a mandamus-type action can act to expedite a petition or application languishing in the USCIS's bureaucracy. However, had the federal court action continued and had the USCIS been compelled to rule on Wang's petition, the USCIS would have (1) ruled on Wang's petition on the record as it existed when respondent filed the action (i.e., without any of the documents requested in the December 2005 RFE) and (2) denied the petition because the file did not contain the documentation necessary to establish that Wang's marriage to a United States citizen was a valid marriage. Respondent's actions dramatically increased Wang's chances of success. By filing and later timely dismissing the federal court action, respondent was able to alert Wang of the problem with her petition, Wang was able to correct the problem, and Wang obtained the status adjustment she wanted.

Federal court mandamus-type actions, like the one respondent filed for Wang, may be filed, dismissed, and refiled, if necessary. Thus, none of Wang's rights was impacted by the dismissal. To the contrary, her rights were preserved. It was not necessary, under the facts of this case, for respondent to obtain any new authority to file the notice of dismissal of Wang's action on November 13, 2006, other than that which he already had by virtue of the type of case this was and by virtue of his and Xu's discussions with Wang on September 13, 2006, in which they informed Wang of the process involved in mandamus-type proceedings. Moreover, even after Attorney Sue was repeatedly told that Wang's federal court action was ready to be dismissed and would be dismissed, Sue did not object or direct respondent not to dismiss the action.

In sum, OCTC has failed to prove, by clear and convincing evidence, that respondent willfully violated section 6104 as charged in count 1. Accordingly, count 1 is dismissed with prejudice.

2. Count 2 -- Failure to Communicate (§ 6068, subd. (m))

In count 2, OCTC charges that respondent willfully violated his duty, under section 6068, subdivision (m), to notify Wang of any significant developments in her case. The State Bar alleges that respondent failed to inform Wang that he "had" filed the notice of dismissal or that the federal court "had" thereafter dismissed Wang's case. According to OCTC, the duty imposed on an attorney by section 6068, subdivision (m) is not to advise a client that he was "intending" to file a dismissal (which was done in this case), but rather notifying the client that he "had" dismissed the case. The court finds no material difference in these two scenarios, especially where, as here, the dismissal followed on the heels of the notification of intent to dismiss.

Finally, OCTC seems to contend that a "dismissal" is, *ipso facto*, a "significant development" within the meaning of section 6068, subdivision (m). No such hard and fast rule exists. "What is 'significant' depends on the nature of the matter involved and the particular client's needs." (Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2008) ¶ 6:128, p. 6-26.)

As noted above, this was a unique type of case. Dismissal of Wang's case was compelled by the circumstances in order to preserve the status quo and to allow Wang to file the requested documents. Other than the generally uninformed testimony of Attorney Sue, OCTC has offered no evidence to the contrary. The State Bar has failed to prove, by clear and convincing evidence, that respondent willfully violated section 6068, subdivision (m) as charged in count 2. Accordingly, count 2 is dismissed with prejudice.

3. Count 3 – Failure to Release File (Rule 3-700(D)(1))

In count 3, OCTC alleges that respondent willfully violated rule 3-700(D)(1), which requires that an attorney provide his file to the client upon the termination of the attorney's

employment and the client's request. This count arises from respondent's failure to give Wang's entire client file to Attorney Sue on November 13, 2006. Respondent admits that he did not give Sue all of the pages of the federal court complaint. The fact that respondent's client was able, within a few days, to obtain the missing pages off of PACER does not vitiate respondent's admitted violation of rule 3-700(D)(1). The State Bar has sustained its burden with respect to count 3.

4. LEVEL OF DISCIPLINE

A. Factors in Aggravation

The court finds no aggravating factors. Much of the testimony in this regard concerned Wang's perception that respondent's dismissal of the federal court action was inappropriate. The language used in Wang's testimony in aggravation escalated to excessive hyperbole, with Wang calling respondent "ruthless" and "fraudulent." The anxiety suffered by Wang was apparently fostered by her attorney/cousin Yao Sue's lack of understanding of federal court mandamus proceedings. Had Sue made herself aware of the purpose of respondent's use of mandamus-type proceedings in immigration cases, she could have more appropriately counseled Wang and dealt with Xu more effectively and professionally.

The State Bar's contention that respondent's misconduct is aggravated by the fact that respondent went to the USCIS office is without merit. He went there to look at Wang's I-751 petition and the file, after Wang terminated his employment. Rules of Procedure of the State Bar, rule 2406 provides: "A client or former client who complains against a member thereby waives the attorney-client privilege and any other applicable privilege, as between the complainant and the member, to the extent necessary for the investigation and prosecution of the allegations." Moreover, respondent had the right to defend himself against Wang's and Attorney Sue's allegations of misconduct. Therefore, if the USCIS did not voluntarily allow respondent to

review Wang's I-751 petition and its file, respondent could have compelled the USCIS to produce them by way of subpoena. (Bus. & Prof. Code, § 6085.)

B. Factors in Mitigation

Respondent has no prior record of discipline. (Std. 1.2(e)(i).) He is entitled to significant mitigation for his 10 years' of misconduct free practice (from 1996 to 2006).

Respondent acted in good faith. (Std. 1.2(e)(ii).)

Respondent's client suffered no appreciable harm from respondent's misconduct, since she received a complete copy of the federal court complaint within days of receiving the balance of respondent's file. (Std. 1.2(e)(iii).)

Respondent promptly complied with his client's request for the file, and cooperated with OCTC in its investigation. (Std. 1.2(e)(v).)

Respondent presented multiple witnesses who credibly testified and attested to respondent's professionalism and good character. (Std. 1.2(e)(vi); *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591-592 [significant weight given to good character testimony from only three witnesses].) Each was aware of the charges against respondent and indicated that, even with the pending charges, he or she felt strongly that respondent was a person of good character. Included among the character witnesses were Attorney Stella P. Lai and AUSA Kerner. Attorney Lai and respondent went to the same law school and refer each other cases, approximately two to three times a year. In particular, the court was impressed by the testimony of AUSA Kerner. Despite a serious family emergency and despite being on leave during the week of his testimony for that emergency, he appeared in court to offer his views of respondent's character. In addition to being an AUSA, Kerner is a Lieutenant Colonel in the Air Force Reserve. He considers respondent a professional colleague who is "exceedingly good at working through" his clients' problems. AUSA Kerner has litigated

over 100 cases with respondent, and Kerner has handled hundreds of federal court mandamus actions. He holds the highest opinion of respondent's moral character and integrity. He "trusts what he says to be his word and his bond." He notes that the two of them work together seamlessly, and many of the cases they have had together ended in the same way that Wang's did, by dismissal after respondent learns the status of the immigration matter for his client.

Good character testimonials from attorneys are given great weight because such individuals " 'possess a [keen] sense of responsibility for the integrity of the legal profession.' " (*In re Menna* (1995) 11 Cal.4th 975, 988, quoting *Warbasse v. The State Bar* (1933) 219 Cal. 566, 571.) Accordingly, this Court gives significant weight to the testimony of these attorneys and of respondent's other character witnesses.

Respondent made changes in his practice to reduce the chances of the found misconduct from recurring, and he understands and regrets his misconduct. (Std. 1.2(e)(vii).)

Respondent has also contributed to his community in significant ways over the years. He has performed extensive charitable and pro bono services. Respondent acts as a translator in his church, has handled cases for the Legal Aid Foundation on a pro bono basis, gives free advice to indigent citizens at the Chinatown Service Center, assists at the Asian Youth Center in San Gabriel, and participates in Law Day activities through the Taiwanese American Lawyers Association. In addition, he participates in the Los Angeles County Bar Association Immigration Section and, under the auspices of this group, also provides free immigration clinics. He also appears regularly on television in various public service capacities, informing the Chinese community of issues relevant to them. He does not receive compensation for these appearances. These activities constitute a significant mitigating factor.

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5. DISCIPLINE DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 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.) Second, the court considers relevant decisional law for guidance. (*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.)

The relevant standard for respondent's violation of rule 3-700(D)(1) is standard 2.10, which provides: "Culpability of a member . . . of a wilful violation of any Rule of Professional Conduct not specified in these standards shall result in reproval or suspension according to the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3."

The gravity of respondent's offense is not great and there was very little, if any, harm to the victim/client. Accordingly, the court concludes that the purposes of attorney discipline will be best served by privately reproving respondent for his misconduct and by attaching an Ethics School condition to that reproval. In that regard, the court finds that the following cases support the imposition of a private reproval in the present case: *Ames v. State Bar* (1973) 8 Cal.3d 910 (private reproval for violation of former rule 4 [now rule 3-300] was appropriate in light of attorneys' belief they were acting in clients' best interests and no intent to deceive); *In the Matter of Lindmark* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 668 (private reproval for failing to refund unearned fee in violation of rule 3-700 was appropriate in light of attorney's good faith

and limited harm); and *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716 (because there was no significant client harm, private reproval [not the 90-day suspension in standard 2.2(a)] was appropriate discipline for commingling clients funds in violation of former rule 8-101(A) [now rule 4-100(A)]).

Finally, the court notes that costs are not awarded to the State Bar in private reproval cases. (§ 6086.10, subd. (a).)

6. PRIVATE REPROVAL

The court orders that respondent **DANIEL TZU-KEN HUANG** is privately reproved for committing the professional misconduct found hereinabove.[20] (Bus. & Prof. Code, §§ 6077, 6078; Rules Proc. of State Bar, rule 270(a)&(c).) This reproval is effective upon the finality of this decision. (Rules Proc. of State Bar, rule 270(a); see also Rules Proc. of State Bar, rules 221-224, 301.)

The following Ethics School condition, which the court finds will serve both to protect the public and to further Huang's interests, is attached to the reproval. (Cal. Rules of Court, rule 9.19; Rules Proc. of State Bar, rule 271.) Within one year after the effective date of the reproval, Huang must attend and successfully complete the State Bar's Ethics School and provide satisfactory proof of his successful completion to the State Bar's Office of Probation in Los Angeles. This Ethics School condition is separate and apart from Huang's California Minimum Continuing Legal Education (hereafter "MCLE") requirements; accordingly, he is ordered not to

[20] Even though the State Bar will not publish this private reproval in the California Bar Journal, the reproval is part of Huang's official State Bar membership records (including those records maintained on the State Bar's Web site) and, as such, will be disclosed in response to public inquiries. (Rules Proc. of State Bar, rule 270(c).) The State Bar may notify any complainant as to Huang's misconduct (whether a former client, other attorney, court personnel, or member of the public) of the imposition of this private reproval. (*Ibid.*) Moreover, the record of this proceeding remains public and, therefore, available for public inspection upon request.

claim any MCLE credit for attending or completing Ethics School. (Accord, Rules Proc. of State Bar, rule 3201.)

Huang's failure to comply with this Ethics School condition is punishable as a willful breach of rule 1-110 of the Rules of Professional Conduct of the State Bar of California. (Cal. Rules of Court, rule 9.19.)

Dated: December 2, 2009.

RICHARD A. HONN
Judge of the State Bar Court