FILED APRIL 12, 2011

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **Zhen Xiang Wang** **Member No. 229114** A Member of the State Bar.	)	Case Nos.: **08-O-14709-DFM** (09-O-12911) **DECISION**

INTRODUCTION

In this default disciplinary matter, respondent **Zhen Xiang Wang** is charged with five counts of professional misconduct in two matters, including (1) failing to perform competently; (2) making misrepresentations to the court; (3) committing acts of moral turpitude; and (4) two counts of failing to cooperate with the State Bar.

The court finds, by clear and convincing evidence, that Respondent is culpable of four of the five counts of misconduct. In view of Respondent's misconduct and the evidence in aggravation, the court recommends, among other things, that Respondent be suspended from the practice of law in California for eighteen (18) months, that execution of suspension be stayed, and that he be suspended for a minimum of 90 days and until the State Bar Court grants a motion to terminate his suspension.

PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on October 28, 2010, and was properly served on Respondent on that same date at his official membership records address (official address), by certified mail, return receipt requested, as provided in Business and Professions Code section 6002.1, subdivision (c). Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) On November 1, 2010, the return receipt for the October 28, 2010 mailing was received by the State Bar, bearing the signature "Amit." Respondent did not thereafter file a response to the NDC or make any other appearance in the proceeding.

Before the State Bar filed its motion for entry of Respondent's default, State Bar attorneys made extensive efforts to make Respondent aware of the pendency of the action and to persuade him to participate in it. Letters, faxes, and emails were sent; telephone calls were made; messages were left; and a copy of the NDC was even sent to an address that Respondent had previously listed with the State Bar as his official address.

On December 7, 2010, the State Bar filed its motion for entry of default. The motion was properly served on Respondent at his official address by certified mail, return receipt requested. A courtesy copy of the motion for entry of default was also sent also sent to Respondent at his official address via first-class mail. The properly served copy of the default motion was signed for on December 8, 2010, according to the return receipt received by the State Bar. The courtesy copy of the motion sent by first-class mail to Respondent's official address was not returned as undeliverable or for any other reason. Respondent did not file a response to the motion for entry of default.

Respondent's default was entered on December 27, 2010. The court at that time concluded that Respondent was given sufficient notice of the pendency of this proceeding to

satisfy the requirements of due process. (*Jones v. Flowers* (2006) 547 U.S. 220, 224-227, 234.) A copy of the default order was properly served on Respondent on December 27, 2010, by certified mail, return receipt requested, addressed to Respondent at his official membership address. Respondent was then enrolled as an inactive member under section 6007, subd. (e), effective December 30, 2010.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All factual allegations of the NDC are deemed admitted upon entry of Respondent's default unless otherwise ordered by the court based on contrary evidence. (Former Rules Proc. of State Bar, rule 200(d)(1)(A).)[1]

Jurisdiction

Respondent was admitted to the practice of law in California on December 25, 2003, and has been a member of the State Bar of California at all times since that date.

Case No. 08-O-14709 [The Yang Sui Matter]

On or about August 8, 2005, Respondent was employed by Yang Sui (Sui) to represent Sui in his immigration matters.

On or about May 24, 2006, Respondent filed Sui's I-140 Immigrant Petition for Alien Worker (petition), which included as supporting evidence for Sui's petition research papers that Sui did not author. Respondent represented in the petition that Sui had authored the research papers. The true author of the papers was Huai Gao (Gao). Gao had been Respondent's client before Sui's petition was filed. Sui did not provide the Gao research papers to Respondent;

[1] Effective January 1, 2011, the Rules of Procedure of the State Bar of California were amended. The court, however, orders the application of the former Rules of Procedure in this hearing department matter based on its determination that injustice would otherwise result. (See Rules Proc. of State Bar (eff. January 1, 2011), Preface.) Therefore, all references to the Rules of Procedure in this decision are to the former rules of procedure, which were in effect prior to January 1, 2011, unless otherwise stated.

rather, Sui provided Respondent with other research papers that Sui had authored in support of his petition.

On or about August 11, 2007, the Nebraska Service Center, US-CIS, denied the petition which Respondent filed for Sui. On or about September 7, 2007, Respondent filed Sui's I-290B appeal notice with attachments in response to the government's denial. On or about October 20, 2008, the Administrative Appeals Office (AAO) made a finding that Sui submitted false information in his appeal record. Based on the false information, the AAO issued a notice of intent to deny, stating that the AAO intended to issue a finding of fraud and willful misrepresentation of a material fact. The AAO allowed 18 days for Sui to respond.

Before November 5, 2008, Sui hired new counsel, Susan Fortino-Brown (Fortino-Brown). On or about November 5, 2008, Fortino-Brown filed a response to the AAO's notice of intent to deny and a request to withdraw Sui's petition based on ineffective assistance of counsel, alleging that Respondent physically altered the documents provided to the AAO by removing the name of the original author and writing in Sui's name.

Despite his receipt of the AAO's notice of intent to deny, and Fortino-Brown's response to the notice of intent to deny and request to withdraw Sui's petition, Respondent did not respond to the allegations.

On or about December 19, 2008, the AAO denied Sui's request to withdraw his petition. In that denial, the AAO stated that it could not make a fair and impartial assessment of the actions attributed to Respondent without a response from Respondent or an explanation for why there was no such response. The AAO issued a finding of fraud and willful misrepresentation of material fact against Sui.

On or about January 20, 2009, Fortino-Brown filed Form I-290B and a motion to reconsider the fraud finding against Sui. In the motion, Fortino-Brown claimed that

Respondent's fee agreement with Sui specifically provided that Respondent did not need to provide copies of documents to his clients, including Sui. Sui was thereby rendered unable to obtain copies of the documents, which had been submitted by Respondent to the AAO on his behalf, without traveling from Indiana to California to inspect the originals.

On or about June 9, 2009, the AAO issued a decision to withdraw its finding of fraud and misrepresentation, finding that Sui was not responsible for the misrepresentation of the authorship of the research papers submitted with his petition.

On December 16, 2008, the State Bar of California opened an investigation of Respondent's handling of the Sui matter.

On or about December 23, 2008, the State Bar wrote to Respondent at his membership address, requesting a written response to Sui's allegations of misconduct by January 13, 2009. Respondent received the December 23, 2008 letter but failed to file a timely response.

On or about January 14, 2009, the State Bar again wrote to the Respondent, requesting a written response in the Sui investigation by January 28, 2009. Respondent received the January 14, 2009 letter, but still failed to timely respond.

On or about June 10, 2009, the State Bar wrote to Respondent at his current membership address and provided copies of the prior State Bar letters sent to him. The State Bar requested a written response by June 24, 2009. The same letter was also transmitted via facsimile to the number listed on the Respondent's membership records. Respondent received the June 10, 2009 fax and June 10, 2009 letter. Respondent failed to timely respond.

On or about June 22, 2010, the State Bar again wrote to Respondent and sent an e-mail to him at the e-mail address listed in the State Bar membership records, requesting a response by July 6, 2010. Respondent received the June 22, 2010 letter and June 22, 2010 e-mail. He failed to respond.

Count 1 – Rule 3-110(A) [Failure to Perform with Competence][2]

Rule 3-110(A) provides that a member must not intentionally, recklessly or repeatedly fail to perform legal services with competence. By filing Sui's petition with research papers that Sui did not author, by representing in the petition that the research papers filed with that petition were authored by Sui, and by failing to submit the research papers that Sui had actually authored, Respondent intentionally and recklessly failed to perform with competence in willful violation of rule 3-110(A).

Count 3 – Section 6106 [Moral Turpitude]

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. A finding of gross negligence in creating a false impression, like an intentional misrepresentation, is a well-established basis for finding an act of moral turpitude sufficient for finding a violation of section 6106. (*In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9, 15.)

Respondent's filing of Sui's immigration petition with research authored by a different client, while representing in the petition that the work was Sui's, was the result of either an intentional fraud on Respondent's part or gross negligence.[3] Whichever may be the case, his conduct constituted an act of moral turpitude, in willful violation of Business and Professions Code section 6106.

[2] All further references to rule(s) are to the Rules of Professional Conduct, unless otherwise stated.

[3] The fact that Respondent has not come forward in either the immigration court or this court to explain the situation provides a strong inference that his explanation would not be favorable to his cause.

Count 2 - Bus. & Prof. Code, Section 6068, subd. (d)[4] [Seeking to Mislead Judge]

Section 6068, subdivision (d), prohibits an attorney from seeking to mislead a judge or any judicial officer by an artifice or false statement of fact or law.

In this count, the State Bar charges that Respondent sought to mislead the judge by filing research papers not authored by Sui with Sui's petition and by falsely representing in the petition that the research papers were Sui's work product. The misconduct underlying this section 6068, subdivision (d) charge, however, is already covered by the section 6106 charge. Under such circumstances, because the section 6106 charge supports identical or even greater discipline than the section 6068 charge, it is appropriate to dismiss the section 6068, subdivision (d) count. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 786-787; *In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.) This court so recommends.

Count 4 – Section 6068, subd. (i) [Failure to Cooperate in State Bar Investigation]

Section 6068, subdivision (i), provides that an attorney must cooperate and participate in any disciplinary investigation or proceeding pending against the attorney. By not providing a response to the State Bar's December 23, 2008, January 14, 2009, June 10, 2009, and June 22, 2010 letters, as well as the State Bar's June 10, 2009 facsimile and June 22, 2010 e-mail, Respondent failed to cooperate and participate in a disciplinary investigation pending against him, in willful violation of section 6068, subdivision (i).

Case No. 09-O-12911 [The Yifeng Li Matter]

On or about May 14, 2009, the State Bar opened an investigation, pursuant to a complaint received from Yifeng Li (Li) regarding Respondent.

[4] All further references to section(s) are to the Business and Professions Code, unless otherwise stated.

On or about June 17, 2009, the State Bar wrote to Respondent at his official membership address, requesting his written response to Li's allegations of misconduct by June 30, 2009. Respondent received the June 17, 2009 letter. Respondent failed to respond.

On or about July 1, 2009, the State Bar wrote to Respondent at his official membership address, requesting a written response by July 17, 2009, to the allegations in the Li investigation. Respondent received the July 1, 1009 letter. Respondent again failed to respond.

On or about June 22, 2010, the State Bar wrote to Respondent at his updated official membership address and sent an e-mail to him at the e-mail address listed in AS/400, requesting a response by July 6, 2010. Respondent received the June 22, 2010 e-mail and letter. Respondent failed to respond.

Count 5: Failure to Cooperate with the State Bar (§ 6068, Subd. (i))

By not providing a response to the State Bar's June 17, 2009, July 1, 2009, and June 22, 2010 letters, as well as the State Bar's June 22, 2010 e-mail, Respondent failed to cooperate and participate in a disciplinary investigation pending against him, in willful violation of section 6068, subdivision (i).

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,[5] std. 1.2(b).) The court finds the following aggravating factors.

Multiple Acts of Misconduct

Respondent has been found culpable of multiple counts of misconduct in the present proceeding by failing to perform competently, committing an act of moral turpitude, and failing

[5] All further references to standard(s) or std. are to this source.

to cooperate in State Bar disciplinary investigations. The existence of multiple acts of misconduct is an aggravating factor. (Std. 1.2(b)(ii).)

Failure to Participate in Disciplinary Proceeding

Respondent's failure to participate in this disciplinary proceeding before the entry of his default is an aggravating factor. (Std. 1.2(b)(vi).) However, because the conduct relied on for finding this aggravating factor closely equals the misconduct giving rise to the finding of culpability under section 6068, subdivision (i) and the entry of Respondent's default, the court gives this aggravating circumstance only slight weight. (*In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) No mitigating factors were shown by the evidence presented to this court. (Standard 1.2(e)(i).) Although Respondent has no prior record of discipline, his misconduct began in May 2006, slightly less than two and one-half years after he was admitted to the practice of law on December 25, 2003. Thus, Respondent's discipline-free practice at the time of his misconduct in 2006 is not mitigating. (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 473 [where a respondent had practiced for only four years prior to his misconduct, his lack of prior misconduct was not mitigating].)

DISCUSSION

The primary purposes of attorney discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.3; *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.) 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, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender.' [Citations.]" (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994, quoting *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the courts consider relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 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 1.6(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.

Standards 2.3, 2.4 and 2.6 apply in this matter.

Standard 2.3 provides that culpability of moral turpitude and intentional dishonesty toward a court or a client must result in actual suspension or disbarment.

Standard 2.4 provides that culpability of a member's willful failure to perform services and willful failure to communicate with a client must result in reproval or suspension, depending upon the extent of the misconduct and the degree of harm to the client.

Standard 2.6 provides that culpability of certain provisions of the Business and Professions Code must result in disbarment or suspension depending on the gravity of the offense or the harm to the victim.

The State Bar recommends that the discipline here include at least a one-year stayed suspension and an actual suspension for 90 days and until the State Bar Court grants a motion to terminate Respondent's suspension under rule 205 of the Rules of Procedure of the State Bar. This court agrees and concludes that the appropriate discipline is an 18-month stayed suspension and an actual suspension for 90 days and until the State Bar Court grants a motion to terminate Respondent's suspension under rule 205. (See *In the Matter of Greenwood* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 831.)

RECOMMENDED DISCIPLINE

Suspension Recommended

The court hereby recommends that **Zhen Xiang Wang** be suspended from the practice of law in California for eighteen (18) months; that execution of that period of suspension be stayed; and that Respondent be suspended from the practice of law for a minimum of 90 days and will remain suspended until he files and the State Bar Court grants a motion to terminate his suspension pursuant to rule 205 of the Rules of Procedure of the State Bar of California.

Conditional Standard 1.4(c)(ii)

The court also recommends that if Respondent remains suspended for two years or more as a result of not satisfying the preceding condition, he must also provide proof to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law before his suspension will be terminated. (Std. 1.4(c)(ii).)

Future Probation

It is recommended that Respondent be ordered to comply with any probation conditions hereinafter imposed by the State Bar Court as a condition for terminating his suspension.

Multistate Professional Responsibility Examination

It is further recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court order imposing discipline in this matter, or during the period of his suspension, whichever is longer, and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.) Failure to do so may result in suspension. (Cal. Rules of Court, rule 9.10(b).)

California Rules of Court, Rule 9.20

The court recommends that Respondent be ordered to comply with rule 9.20 of the California Rules of Court, and 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.[6]

Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: April _____, 2011

DONALD F. MILES
Judge of the State Bar Court

[6] Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)