

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of ) Case No.: **10-O-09103-PEM**  
)  
**ANTHONY JAMES PALIK,** )  
) **DECISION & PRIVATE REPROVAL**  
**Member No. 190971,** )  
)  
A Member of the State Bar. )

**Introduction**<sup>1</sup>

In this disciplinary proceeding, respondent **ANTHONY JAMES PALIK** was originally charged with six counts of misconduct in a single client matter, but as noted *post*, the court dismissed two of the six counts at trial on the motion of the Office of the Chief Trial Counsel of the State Bar of California (State Bar). The four counts on which the case was tried charge respondent with (1) failing to respond to the client’s reasonable status inquiries; (2) entering into a business transaction with the client without complying with the requirements under the law; (3) failing to competently perform legal services; and (4) improperly accepting employment adverse to the client.

The court finds, by clear and convincing evidence, that respondent is culpable only on the last count charging respondent with improperly accepting employment adverse to the client. In light of the limited nature and extent of the found misconduct, the two mitigating circumstances,

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<sup>1</sup> Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code unless otherwise indicated.

and the absence of any aggravating circumstances, the court will impose, on respondent, a private reproof with a condition attached requiring that respondent attend and successfully complete the State Bar's Ethics School within one year.

### **Significant Procedural History**

The State Bar initiated this proceeding by filing a notice of disciplinary charges (NDC) against respondent on November 21, 2011. On December 22, 2011, respondent filed a response to the NDC. A three-day hearing was held on June 21, 28, and 29, 2012. At trial, the court dismissed counts one and three of the NDC on the motion of the State Bar. Furthermore, the court allowed the State Bar to amend count six to charge respondent with violating rule 3-310(E) (accepting employment adverse to a client or former client).

The State Bar was represented by Deputy Trial Counsel Maria Oropeza. Respondent was represented by Attorney Scott J. Drexel. Following closing arguments on June 29, 2012, the court took the matter under submission for decision.

### **Findings of Fact and Conclusions of Law**

Respondent was admitted to the practice of law in California on December 2, 1997, and has been a member of the State Bar of California since that time.

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##### **Facts**

##### **Respondent's Representation of John Nichols**

On January 26, 2007, John Nichols employed Attorney Fernando F. Chavez and his law firm on a contingent fee basis to represent Nichols as the plaintiff in a wrongful-employment-termination lawsuit that was then pending in the Sacramento County Superior Court. At that time, respondent was employed by Attorney Chavez's law firm as an associate attorney.

Respondent worked for Attorney Chavez until the beginning of March 2009 when he was laid

off. Even after respondent was laid off, both respondent and Attorney Chavez continued to jointly represent Nichols on his wrongful-termination claims. Respondent, however, acted as Nichols's primary counsel as respondent's name is on all the relevant pleadings. (See exhibits 2 & 3.)

In November 2007, respondent dismissed Nichols's superior court wrongful-termination lawsuit. And, in December 2007, respondent filed a new wrongful-termination lawsuit for Nichols in the United States District Court for the Eastern District of California. The defendants in the federal lawsuit noticed Nichols's deposition for March 17, 2009. That March 17, 2009 deposition was later reset for July 7, 2009, at respondent's request. The July 7, 2009 deposition, however, was cancelled because there was some confusion over who was representing Nichols (i.e., respondent or Attorney Chavez).

Apparently Nichols was never notified that his July 7, 2009 deposition had been cancelled as he appeared by himself for his deposition on July 7. Thereafter, Nichols's deposition was noticed for September 4, 2009. According to respondent, he confirmed with the defendants that Nichols would appear for his September 4, 2009 deposition. Nonetheless, on July 30, 2009, the defendants filed a motion to compel Nichols's deposition and a request for monetary sanctions against Nichols "and/or" Nichols's attorney.

On August 19, 2009, the defendants sent Nichols a fourth amended notice of deposition, resetting Nichols's September 4, 2009 deposition for September 17, 2009. At that point, the Chavez law firm confirmed, with the defendants, that it would produce Nichols for his deposition on September 17, 2009. (Exhibit 7 at p. 2.)

Neither respondent, Attorney Chavez, nor the Chavez law firm filed a response to the defendants' July 30, 2009 motion to compel and request for sanctions. Nor did any of them appear at the September 2, 2009 hearing on that motion and request. On September 4, 2009, the

federal court granted the defendants' motion to compel and ordered respondent and Attorney Chavez to show cause in writing why Nichols's lawsuit should not be dismissed for want of prosecution and why they should not be sanctioned. Thereafter, respondent and Attorney Chavez filed affidavits in response to the federal court's September 4, 2009 order to show cause (OSC).

On September 17, 2009, respondent and Nichols appeared for Nichols's noticed deposition and were ready and willing to proceed, but the defense counsel refused to proceed in light of the federal court's September 4, 2009 OSC.<sup>2</sup>

On October 9, 2009, the federal court filed an order discharging its September 4, 2009 OSC. Even though the federal court found that respondent and Attorney Chavez violated the court's local rules by failing to file a response to the defendants' motion to compel and request for sanctions and by failing to appear at the September 2 hearing on the defendants' motion and request without establishing any justification for their noncompliance, the federal court discharged its OSC without sanctioning respondent or Attorney Chavez because the defendants withdrew their request for sanctions.

Respondent told the defendants that he would be on vacation from about December 23, 2009, through early January 2010. Nonetheless, on December 23, 2009, the defendants filed a motion of summary judgment on all of Nichols's claims. Instead of filing an opposition to the defendants' summary judgment motion when respondent returned from vacation in January 2010, respondent filed an ex parte motion to continue the hearing on the defendant's summary judgment motion, essentially requesting an extension of time to file Nichols's opposition, which was granted.

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<sup>2</sup> Defense counsel claimed to have sent a letter, to the Chavez firm, cancelling the September 17 deposition, but she could not produce a copy of the letter to verify her claim.

Respondent filed Nichols's opposition to the defendant's summary judgment motion on February 22 and 23, 2010. The opposition respondent filed did not include a response to the defendants' statement of undisputed facts as required by the federal court's local rules. In addition, the opposition contained unauthenticated exhibits and argument that did not cite facts. On February 26, 2010, respondent filed a request for an extension of time to file an untimely separate statement of disputed facts, another affidavit, and Nichols's amended declaration. (See exhibit 11, at p. 1.) Even though the federal court did not formally rule on respondent's February 26, 2010 request for extension of time, the federal court effectively granted respondent's request by considering the untimely separate statement of disputed facts, affidavit, and Nichols's amended declaration that respondent filed when the court ruled on the defendants' motion for summary judgment.

On May 3, 2010, the federal court granted the defendants' motion for summary judgment and ordered that judgment be entered for the defendants and that Nicholas's lawsuit be closed.

### **Respondent's Living Situation**

The state bar alleges that respondent, after being employed by Nichols, told Nichols that he was homeless and that he and his girlfriend/legal assistant, Michele Foley-Koder, needed a place to live. The bar further alleges that Nichols thereafter arranged for respondent and Foley-Koder to stay rent-free in a one-bedroom condominium owned by Nichols's wife, Sue Nichols, from about December 2009 until about May 25, 2010.

The record establishes that Nichols had no ownership in the condominium as it belonged to Sue Nichols as her separate property and that the condominium had been in foreclosure for about two years before Nichols employed respondent. The record further establishes that Sue Nichols and Foley-Koder entered into an agreement for Foley-Koder to live in the condominium. (See, e.g., exhibits C at p. 3, Q.) The record further establishes that respondent never lived in the

condominium even though he may have stored, in the condominium, some boxes of files relating to Nichols's wrongful-termination claims and even though respondent may have attended a meeting of the condominium association's neighborhood watch committee. Only Foley-Koder and her college-age daughter lived in the condominium from about October 2009 until May 2010.<sup>3</sup>

In about April 2010, Sue Nichols asked Foley-Koder to vacate her condominium by May 31, 2010. After the federal court granted the defendants' summary judgment motion in Nichols's wrongful-termination lawsuit on May 3, 2010, the relationship between Nichols and respondent deteriorated rapidly as did the relationship between Sue Nichols and Foley-Koder. By mid-May 2010, Sue Nichols accelerated the date by which Foley-Koder had to vacate her condominium. About that same time, Nichols made statements about guns, which made Foley-Koder very nervous and caused her to vacate Sue Nichols's condominium in haste.

In her haste to vacate the condominium, Foley-Koder left various items of personal property, which she believes that Nichols and his wife improperly disposed of. In May 2010, respondent agreed to act as Foley-Koder's attorney in connection with her claims that Nichols and his wife unlawfully entered the condominium and converted items of Foley-Koder's personal property. And, on May 26, 2010, respondent sent a demand letter to Nichols and his wife, identifying himself as the attorney for Foley-Koder and effectively threatening them with a lawsuit.

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<sup>3</sup> This finding is supported by credible testimony from respondent, Foley-Koder, Kathy Tong, and Hau Bui. Tong, who is respondent's landlord in San Francisco, testified that, except for the month of February 2010, respondent had been her tenant since February 2009. Bui, who has known respondent for 15 years, testified that respondent stayed with him for 15-20 days in February and March 2010.

On May 26, 2010, respondent also sent his former client Nichols two emails. In one of the emails, respondent accused Nichols of having taken bribes. After May 26, 2010, respondent took no further action against Nichols or Nichols's wife on behalf of Foley-Koder.

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### **Conclusions of Law**

#### ***Count One (§ 6106 [Moral Turpitude])***

As noted *ante*, count one was dismissed at trial on the motion of the State Bar.

#### ***Count Two (§ 6068, subd. (m) [Failure to Communicate])***

In count two, the State Bar charges that respondent willfully violated section 6068, subdivision (m), which provides that an attorney has a duty to promptly respond to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services. Specifically, the State Bar charges that respondent violated section 6068, subdivision (m) because respondent allegedly failed to respond to Nichols's January 12, 2010 emails asking respondent when a responsive pleading was due on the defendants' motion for summary judgment. The record fails to establish the charged violation by clear and convincing evidence. Accordingly, count two is DISMISSED with prejudice.

#### ***Count Three (§ 6068, subd. (a) [Comply with Laws])***

As noted *ante*, count three was dismissed at trial on the motion of the State Bar.

#### ***Count Four (Rule 3-300 [Avoiding Interests Adverse to a Client])***

In count four, the State Bar charges that respondent willfully violated rule 3-300, which provides that an attorney must not enter into a business transaction with a client or knowingly acquire an ownership, security, possessory, or other pecuniary interest adverse to a client unless the transaction/acquisition and its terms are reasonable and fair to the client and are fully

disclosed and transmitted in writing to the client in a reasonably understandable manner; the client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to do so; and the client thereafter consents in writing to the terms of the transaction/acquisition.

Count four fails to clearly set forth what business transaction respondent entered into with Nichols or what pecuniary interest respondent acquired that was adverse to Nichols. In fact, the factual allegations in count four, if proved, would not establish a rule 3-300 violation; instead, they would establish that respondent accepted, as a gift, condominium lodging from Sue Nichols, whom respondent never represented.<sup>4</sup> More important, the record fails to establish a rule 3-300 violation.

The record establishes that respondent never lived in the condominium and that Foley-Koder's made her condominium living arrangements with Sue Nichols. To establish a rule 3-300 violation, the State Bar must, at a minimum, establish that the attorney either was a party to or financially gained from the business transaction or acquisition. (*In the Matter of Casey* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 117, 123-124, citing *In the Matter of Fandey* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767, 776-778.) The State Bar has failed to prove that respondent was a party to the condominium living arrangements that Foley-Koder made with Sue Nichols or that respondent financially gained from those arrangements.

In short, the record fails to establish, by clear and convincing evidence, that respondent entered into a business transaction with his client Nichols or that respondent acquired an

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<sup>4</sup> Moreover, even if respondent had represented Sue Nichols, the rules do not prohibit attorneys accepting gifts from their clients. (See, generally, Official Discussion to rule 4-400 ["A member may accept a gift from a member's client, subject to general standards of fairness and absence of undue influence."].)



ownership, possessory, security, or other pecuniary interest adverse to Nichols within the meaning of rule 3-300.<sup>5</sup> Accordingly, count four is DISMISSED with prejudice.

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***Count Five (Rule 3-110(A) [Failure to Perform Legal Services Competently])***

In count five, the State Bar charges that respondent willfully violated rule 3-110(A), which provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. Specifically, the State Bar charges that respondent violated rule 3-110(A) “when he failed to respond to opposing counsel’s request to confirm that he would appear at Nichols’ March 17, 2009 deposition, failed to notify Nichols of the deposition, failed to respond to a July 22, 2009 meet and confer letter sent by opposing counsel in an attempt to reschedule the deposition, failed to respond to the opposing party’s July 30, 2009 motion for sanctions, and failed to appear at the September 2, 2009 hearing on the motion for sanctions.” The State Bar further charges that respondent violated rule 3-110(A) when he failed to comply with the federal court’s local rules and submitted untimely documents in opposition to the defendants’ motion for summary judgment.

Whether respondent failed to respond to opposing counsel’s request to confirm Nichols’s March 17, 2009 deposition and whether respondent failed to notify Nichols of the March 17 2009 deposition are irrelevant in light of the fact that the opposing counsel rescheduled the March 17, 2009 deposition at respondent’s request. Moreover, even though respondent did not timely file Nichols’s opposition to the defendants’ motion for summary judgment, the federal court considered all of respondent’s pleadings when it ruled on the merits of the defendants’

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<sup>5</sup> Nor does the record establish, by clear and convincing evidence, that respondent somehow engaged in overreaching or conflict of interest with respect to the condominium living arrangements that Foley-Koder made with Sue Nichols.

motion. In addition, the fact that the federal court ruled in favor of the defendants and against Nichols on the summary judgment motion does not suggest, much less establish, that respondent's legal representation of Nichols was incompetent in willful violation of rule 3-110(A).

The remaining alleged failures deal with miscommunications between counsel regarding Nichols's deposition and with respondent's failures to respond to the defendants' motion to compel and request for sanctions and to appear at the September 2, 2009 hearing on that motion and request. These remaining failures fall short of establishing that respondent intentionally, recklessly, or repeatedly failed to perform legal services competently in willful violation of rule 3-110(A). At best, they establish negligent legal representation. However, as the review department has repeatedly held, "negligent legal representation, even that amounting to legal malpractice, does not establish a rule 3-110(A) violation. [Citation.]" (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 149.) In sum, count five is DISMISSED with prejudice.

***Count Six (Rule 3-310(E) [Accepting Adverse Employment])***

In count six, the State Bar charges that respondent willfully violated rule 3-310(E), which provides that an attorney must not, without the informed written consent of a client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the attorney obtained confidential information material to the new employment.

In his May 26, 2010 letter to Nichols and Nichols's wife, respondent clearly identified himself as the attorney for Foley-Koder and threatened legal action against Nichols and his wife on Foley-Koder's behalf. (Exhibit 12, at p. 26.)

Moreover, the accusation that Nichols had taken bribes in one of respondent's May 26, 2010 emails to Nichols had to come from information respondent received while representing Nichols in Nichols's wrongful-termination lawsuit. In that lawsuit, the defendants alleged that one of the reasons they terminated Nichols's employment was because he had accepted bribes.

This court finds that respondent used confidential information material to his prior representation of Nichols in the sending of his May 26, 2010 demand letter and emails to Nichols. In sum, the court finds that respondent willfully violated rule 3-310(E) when he accepted employment from Foley-Koder without first obtaining Nichols's informed written consent.

#### **Aggravation<sup>6</sup>**

The State Bar did not establish any aggravating circumstances.

#### **Mitigation**

Respondent has no prior record of discipline. His more than 12 years of misconduct-free practice from December 1997 through May 2010 is a strong mitigating circumstance. (Std. 1.2(e)(i); see also Rules Proc. of State Bar, rule 5.106(B)(5).) Moreover, respondent's misconduct did not cause any client harm, which is also a mitigating circumstance. (Std. 1.2(e)(iii).)

#### **Discussion**

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Second, the court looks to decisional law.

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<sup>6</sup> All references to standards (Stds.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

(*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.)

Standard 2.10 is applicable to respondent's willful violation of rule 3-310(E). Standard 2.10 provides:

Culpability of a member of a violation of any provision of the Business and Professions Code not specified in these standards or of a wilful violation of any Rule of Professional Conduct not specified in these standards shall result in reproof 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.

Standard 1.3 provides:

The primary purposes of disciplinary proceedings conducted by the State Bar of California and of sanctions imposed upon a finding or acknowledgment of a member's professional misconduct are the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession. Rehabilitation of a member is a permissible object of a sanction imposed upon the member but only if the imposition of rehabilitative sanctions is consistent with the above-stated primary purposes of sanctions for professional misconduct.

“The imposition of attorney discipline does not issue from a fixed formula but from a balanced consideration of all relevant factors, including aggravating and mitigating circumstances.” (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 316.) The court is unaware of any case involving similar misconduct. Accordingly, the court looks to other cases involving conflicting interests. Specifically, the court finds that *Connor v. State Bar* (1990) 50 Cal.3d 1047 and *Ames v. State Bar* (1973) 8 Cal.3d 910, which respondent cites and in which the attorneys improperly acquired pecuniary interests adverse to their clients, are instructive on discipline.

In *Connor v. State Bar*, the attorney acquired title to his clients' property without complying with former rule 5-101 (the predecessor to rule 3-300) in order to help the client avoid foreclosure. No aggravating circumstance is articulated. In mitigation, the attorney had 16

years of misconduct-free practice. In addition, the client consented to the transaction. The Supreme Court imposed a public reproof on the attorney.

In *Ames v. State Bar*, the attorneys, who represented the holders of a junior encumbrance on real property involved in litigation, purchased the senior encumbrance in order to allow the clients more time to raise money to prevent foreclosure by the senior encumbrance. At that time, however, former rule 4 provided that “A member of the State Bar shall not acquire an interest adverse to his client.” No aggravating circumstance is articulated. In mitigation, the attorneys had no prior discipline, acted in what they thought were the best interests of the clients, and had no intent to deceive or defraud. In addition, the clients consented to the transaction. The Supreme Court imposed a private reproof on the attorneys.

Even though respondent’s conduct was not altruistic like the conduct of the attorneys in *Connor v. State Bar* and *Ames v. State Bar*, respondent did not acquire a pecuniary interest adverse to Nichols. On balance, the court concludes that the appropriate level of discipline for respondent’s rule 3-310(E) violation is a private reproof with an Ethics-School condition attached.

### **Private Reproof**

The court orders that respondent **ANTHONY JAMES PALIK** is **PRIVATELY REPROVED** for engaging in the professional misconduct found in this proceeding.<sup>7</sup> (Bus. & Prof. Code, §§ 6077, 6078; Rules Proc. of State Bar, rule 5.127(A)&(D).) This reproof is

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<sup>7</sup> Even though the State Bar will not publish this private reproof in the California Bar Journal, the reproof is part of Palik’s official State Bar membership records (including those records maintained on the State Bar’s web page) and, as such, will be disclosed in response to public inquiries. (Rules Proc. of State Bar, rule 5.127(D).) The State Bar may notify any complainant as to Palik’s misconduct (whether a former client, other attorney, court personnel, or member of the public) of the imposition of this private reproof. (*Ibid.*) Moreover, the record of this proceeding remains public and, therefore, available for public inspection upon request. Finally, because respondent has been privately reproofed for his misconduct, neither party is entitled to costs. (§ 6086.10, subd. (a); Rules Proc. of State Bar, rules 5.127(D), 5.131(A)&(D).)

effective upon the finality of this decision. (Rules Proc. of State Bar, rule 5.127(A); see also Rules Proc. of State Bar, rules 5.112-5.115, 5.151.) The following condition, which the court finds will serve both to protect the public and to further Palik's interests, is attached to the reproof. (Cal. Rules of Court, rule 9.19(a); Rules Proc. of State Bar, rule 5.128.) Palik's failure to comply with the following condition is punishable as a willful violation of rule 1-110 of the Rules of Professional Conduct of the State Bar of California. (Cal. Rules of Court, rule 9.19.)

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### **Reproof Condition**

Within one year after the effective date of his reproof, Anthony James Palik is to attend and satisfactorily complete the State Bar's Ethics School and to provide satisfactory proof of his successful completion of that program to the State Bar's Office of Probation in Los Angeles. The program is offered periodically both at 180 Howard Street, San Francisco, California 94105-1639 and at 1149 South Hill Street, Los Angeles, California 90015-2299. Arrangements to attend the program must be made in advance by calling (213) 765-1287 and by paying the required fee. This reproof condition is separate and apart from Palik's Minimum Continuing Legal Education (MCLE) requirements; accordingly, he is ordered not to claim any MCLE credit for attending and completing this program. (Accord, Rules Proc. of State Bar, rule 3201.)

Dated: September \_\_\_\_\_, 2012.

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PAT E. McELROY  
Judge of the State Bar Court