STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of DAX YEOPHANTONG CRAVEN, A Member of the State Bar, No. 248583.	)	Case No. 16-O-10291-PEM DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

Introduction[1]

In this contested disciplinary proceeding, respondent Dax Yeophantong Craven is charged with four counts of professional misconduct in one client matter. The charged misconduct includes making false statements, failing to maintain client funds in a trust account, and breaching his fiduciary duty by misappropriating entrusted funds of $100,000.

The court finds, by clear and convincing evidence, that respondent is culpable of four counts of misconduct. Respondent has harmed the public, damaged public confidence in the legal profession, and failed to maintain the high professional standards demanded of attorneys. In light of the serious nature and extent of respondent's misconduct, as well as the aggravating circumstances, the court recommends that respondent be disbarred from the practice of law.

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[1] 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.

Significant Procedural History

The Office of Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on July 11, 2017. On July 24, 2017, respondent filed a response to the NDC.

Trial was held on December 5 and 6, 2017. The State Bar was represented by Senior Trial Counsel Esther Rogers and Deputy Trial Counsel Carla Cheung. Respondent represented himself. On December 6, 2017, following closing arguments, the court took this matter under submission.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on March 16, 2007, and has been a member of the State Bar of California at all times since that date.

Case No. 16-O-10291 – The Hensley Matter

Facts

Respondent has a law firm and also runs a separate consulting business in which respondent provides consulting services regarding 1031 real estate exchanges.[2] On October 7, 2014, respondent sent complaining witness, Michael Hensley (Hensley), an email attaching a consultant fee agreement with respect to a 1031 real estate exchange for Hensley's review and consideration. The consultant agreement was not an agreement for legal services for attorney's fees. In fact, the consultant agreement states that the consultant has agreed to provide legal services to Hensley regarding Hensley's 1031 exchange at no additional cost to the client. Hensley did not sign that agreement because he was unwilling to pay the 2 percent commission to respondent called for in the agreement.

[2] Section 1031 of the Internal Revenue Code allows a taxpayer to postpone tax liability on a capital gain if the taxpayer reinvests the proceeds in similar property as part of a qualifying like-kind exchange.

From October 2014 to March 2015, respondent went about analyzing properties for Hensley. Respondent's work in identifying and analyzing properties was under the umbrella of real estate consulting services. The documentary evidence and testimony at trial establishes that by April 2015, Hensley retained respondent to act as his consultant for a 1031 real estate exchange. Hensley's consulting agreement with respondent specifically excluded the provision that the client would pay additional attorney's fees for legal services. The evidence and Hensley's believable testimony also establishes that Hensley only agreed to pay respondent 1 percent of the property purchase price as commission for his real estate consulting services.[3]

Among the properties that respondent identified as possible exchanges were a CVS store property in Detroit, Michigan (Detroit property). Hensley agreed to proceed with initiating a 1031 exchange on this property.[4] An escrow agreement was entered into between Chicago Title Company (Chicago Title), Hensley, and the seller of the Detroit property in March 2015. On March 18, 2015, Hensley deposited $100,000 in earnest money with Chicago Title for the purpose of securing his ability to purchase the Detroit property. In mid-April 2015, the deal faltered, resulting in Chicago Title processing the return of Hensley's $100,000. Chicago Title sought instructions from respondent regarding to whom the $100,000 should be sent. On April

[3] Respondent wants this court to believe that Hensley rejected the initial consulting agreement offering free legal services and then later offered to pay more than $100,000 in attorney's fees. Hensley credibly testified, and the court finds, that respondent never provided him with an invoice for the legal services he claims to have done for him. Moreover, it is clear that Hensley never signed the attorney-client fee agreement that respondent presented to him. As a result, this court finds respondent's testimony that Hensley agreed to pay $100,000 in attorney's fees to respondent inherently unbelievable.

[4] Respondent also agreed to initiate 1031 exchanges on other properties, but they are not the subject of this disciplinary proceeding.

20, 2015, Chicago Title, per instructions from respondent, wired $100,000 to respondent's client trust account (CTA) at Citibank.[5]

On April 16, 2015, the deal to purchase the Detroit property was resurrected, but the cancellation had already resulted in Chicago Title processing the return of Hensley's earnest money deposit to respondent's CTA. The evidence is clear that once the $100,000 was deposited in respondent's CTA, respondent began transferring it out to his general account. By the completion of the new deal, respondent had only $89,000 of Hensley's funds in his CTA due to his unauthorized withdrawals between April 21 and 29, 2015.

Rather than admit that he no longer had the $100,000 to re-deposit in escrow once the deal was resurrected, respondent induced Hensley to wire him an additional $100,000. On April 29, 2015, respondent sent Hensley an email informing him that Wells Fargo required him to fund the Buddy Hensley Properties LLC to the tune of $100,000 to "verify" his net worth. On April 30, 2015, Hensley wired an additional $100,000 to respondent's CTA. At trial, the facts established that Wells Fargo never requested or required Hensley to fund the Buddy Hensley Properties LLC and that the $100,000 was not deposited in the Buddy Hensley Properties LLC, but instead went into respondent's CTA. Respondent provided Chicago Title with the first $100,000 on April 30, 2015.

The deal on the Detroit property closed on May 15, 2015. Under the terms of the closing, respondent received $65,150 as part of his 1 percent commission paid by Hensley; $57,282.17 as part of the 1 percent commission paid by the seller; and $65,150 in "legal fees."[6]

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[5] When the deal fell through, the $100,000 earnest money should have gone back to the 1031 exchange account to avoid being taxable and/or gone back to Hensley and not to respondent's CTA.

[6] Hensley credibly testified, and the court finds, that that the $65,150 in "legal fees" consisted of what was actually left over in the 1031 account and, rather than be taxed on it, it would go to respondent as income and Hensley would pay the $15,000 in taxes on it for

On June 15, 2015, Jim Martinez, a financial advisor to Hensley, requested a bank account number for the Buddy Hensley Properties LLC so that Hensley could access the $100,000 Hensley thought he had sent to that account. Respondent's response to the request was to lie and state that the LLC account was an escrow account and the funds were not available for six months from the date of sale per the certifications signed as required by Wells Fargo to assume the note.

In August 2015, Hensley requested the return of the second $100,000 payment. Respondent, through a paralegal in his office, falsely represented that the funds were being maintained in an escrow account under Buddy Hensley Properties LLC and that the escrow account had an account balance of $100,000 as of August 10, 2015. However, it is clear that the $100,000 that was supposedly in the Buddy Hensley Properties LLC account was actually deposited in respondent's Citibank CTA which as of August 10, 2015, had a balance of 86 cents. Respondent never returned any of the $100,000 to Hensley.

In December 2015, Hensley, through his attorney, filed a complaint with the State Bar against respondent. Respondent claimed for the first time in his response to the State Bar's investigation letter that he was entitled to the additional $100,000 as payment for attorney's fees. Respondent attached an invoice of attorney's fees to the response. The invoice was dated May 22, 2015. The invoice stated that Hensley was charged $113,160 in attorney's fees. Hensley credibly testified, and the court finds, that respondent never gave him this invoice and that he never agreed to pay attorney's fees to respondent. It is clear to this court that Hensley never employed respondent to do work for attorney's fees. Moreover, respondent has not produced any proof that Hensley agreed to pay him attorney's fees.

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respondent. This second $65,150, while described as "legal fees," was not a part of the consultant agreement or any agreement for Hensley to do additional paid work for attorney's fees.

Conclusions

Count One – Section 6106 [Moral Turpitude – Misappropriation]

Section 6106 provides, in part, that the commission of any act involving moral turpitude, dishonesty, or corruption constitutes cause for disbarment or suspension. "[A]n attorney's failure to use entrusted funds for the purpose for which they were entrusted constitutes misappropriation. [Citation.]" (*Baca v. State Bar* (1990) 52 Cal.3d 294, 304.) Between about April 20, 2015 and April 30, 2015, respondent received $200,000 on behalf of Hensley for a 1031 property exchange in which respondent was acting as a consultant to Hensley. On April 30, 2015, respondent transferred $100,000 to Chicago Title on behalf of Hensley. Respondent failed to transfer the additional $100,000 he collected in earnest money to Chicago Title and, instead, deposited it in his CTA and misappropriated nearly $100,000 of Hensley's funds for his own purposes, and thereby committed acts involving moral turpitude and dishonesty in willful violation of Business and Professions Code section 6106.

Count Two – Section 6106 [Moral Turpitude – Misrepresentation]

On April 29, 2015, respondent stated to Hensley that he was required to deposit another $100,000 by April 30, 2015, to fund the Buddy Hensley LLC so that the lender could verify his net worth. Respondent knew this statement was false. Furthermore, on August 10, 2015, respondent caused an email to be sent to Hensley stating that the "Buddy Hensley account has a balance of $100,000 as of today." Respondent knew that this statement was also false. Therefore, these misrepresentations constitute acts involving moral turpitude and dishonesty in willful violation of section 6106.

Count Three – Section 6068, subdivision (a) [Attorney's Duty to Support Constitution and Laws of United States and California]

Section 6068, subdivision (a), provides that an attorney has a duty to support the Constitution and laws of the United States and California. Between April 2015 and in or about

August 2015, respondent breached the common law fiduciary duties he owed Hensley as Hensley's "consultant" for a real estate deal, thereby violating section 6068, subdivision (a), as follows: 1) On April 30, 2015, falsely claiming that Hensley was required to deposit an additional $100,000; 2) Misappropriating nearly $100,000 of Hensley's funds which respondent collected on April 30, 2015; 3) Between April 2015 and December 2015, covering up the misappropriation by falsely claiming that Chicago Title required respondent to maintain the $100,000 in an escrow account for six months following the May 15, 2015, closing of the real estate deal; and 4) On August 10, 2015, falsely stating to Hensley that the "Buddy Hensley account has a balance of $100,000 as of today," when there was no "Buddy Hensley account" and when respondent maintained only 86 cents of Hensley's funds in respondent's CTA. As the misconduct found in count three is mostly duplicative of the misconduct found in the other counts, this count is not given additional weight in determining the appropriate discipline. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 175 [not giving section 6106 violation any weight after finding of violation of section 6068, subd. (d)].)

Count Four – Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account]

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in a trust account and no funds belonging to the attorney or law firm must be deposited therein or otherwise commingled therewith, except for limited exceptions. Between April 2015 and May 2015, respondent received on behalf of Hensley, client funds of $200,000 for a 1031 property exchange in which respondent was acting as a real estate consultant to Hensley.

On April 20, 2015, respondent accepted a $100,000 wire from Chicago Title for the benefit of Hensley that was deposited into respondent's Citibank CTA, account ending in 6686. On April 30, 2015, respondent deposited another $100,000 wire transfer from Hensley into his Citibank CTA. On May 14, 2015, $100,000 was disbursed as part of the earnest money

requirement. However, most of the remainder of the $100,000 was used by respondent without any authorization or consent by Hensley. As of August 10, 2015, respondent's CTA on behalf of Hensley had a balance of 86 cents. Therefore, respondent failed to maintain a balance of $100,000 on behalf of Hensley in his CTA, in willful violation of rule 4-100(A).

Aggravation[7]

Multiple Acts (Std. 1.5(b).)

Respondent's multiple acts of misconduct, including stealing money and lying on numerous occasions about the money, constitute an aggravating factor. The court assigns this factor significant weight in aggravation.

Significant Harm to Client/Public/Administration of Justice (Std. 1.5(j).)

Respondent's misconduct resulted in significant harm to Hensley. Respondent deprived Hensley of a significant amount of money that respondent never earned. Accordingly, the significant harm respondent caused Hensley warrants substantial consideration in aggravation.

Indifference Toward Rectification/Atonement (Std. 1.5(k).)

Respondent demonstrated indifference towards rectification of or atonement for the consequences of his misconduct. "The law does not require false penitence. [Citation.] But it does require that the respondent accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Respondent continues to insist that this matter is ultimately a fee dispute with Hensley and that the case should be dismissed. Respondent has no insight regarding his unethical behavior and fails to demonstrate any acceptance of responsibility. Therefore, his inability to recognize his misconduct is considered a significant aggravating factor.

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[7] All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Failure to Make Restitution (Std. 1.5(m).)

Respondent's failure to make restitution of $100,000 to Hensley is a serious aggravating factor. To date, Respondent has not returned any portion of the $100,000 respondent received from Hensley.

Mitigation

No Prior Record (Std. 1. 6(a).)

Respondent was admitted to practice law in California in 2007 and has no prior record of discipline. An absence of a prior record over many years of practice is normally entitled to be considered in mitigation. (Std. 1.6(a); *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [attorney's practice of law for more than 10 years worth significant weight in mitigation]; *In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80, 88 ["entitled to full credit" for 10 years of discipline-free practice].) However, where the misconduct is serious, as here, the lack of a prior discipline record is most relevant if the misconduct is aberrational and unlikely to recur. (*Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029; *In the Matter of Reiss* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 206, 218.) As previously noted, respondent's continued insistence that his conduct was justified is particularly troubling because it suggests his conduct may recur. The seriousness of respondent's misconduct and his indifference towards it warrant no weight in mitigation for his years of discipline-free practice.

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. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar, supra*, 43 Cal.3d at p. 1025; Std. 1.1.)

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). Standard 1.7(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. Here, the most severe of the applicable standards is standard 2.1(a). Standard 2.1(a) provides that "[d]isbarment is the presumed sanction for intentional or dishonest misappropriation of entrusted funds or property, unless the amount misappropriated is insignificantly small or sufficiently compelling mitigating circumstances clearly predominate, in which case actual suspension is appropriate."

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) The standards are not mandatory, and may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

The State Bar urges the court to disbar respondent from the legal profession. Respondent, on the other hand, argues that this is a fee dispute and hence the case should be dismissed. The court rejects respondent's contentions. A misappropriation case of such a significant amount ($100,000) generally calls for disbarment under standard 2.1(a) unless "sufficiently compelling mitigating circumstances clearly predominate." (See *In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 276 [discussing former standard 2.2].) This standard "correctly recognizes that willful misappropriation is grave misconduct for which

disbarment is the usual form of discipline." (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 38.) Here, there are no mitigating circumstances.

While the misappropriation of client funds is extremely serious misconduct, the court is equally concerned by respondent's willingness to lie to his client to mask his misconduct. Honesty is the fundamental rule of ethics, "without which the profession is worse than valueless in the place it holds in the administration of justice' [citation]." (*Rhodes v. State Bar* (1989) 49 Cal.3d 50, 60.) The Supreme Court has regularly and consistently condemned attorney dishonesty. (*Sevin v. State Bar* (1973) 8 Cal.3d 641, 645-646 [misappropriation and fabricated loan agreement]; *Chang v. State Bar* (1989) 49 Cal.3d 114, 128 [misappropriation with fraudulent and contrived misrepresentations]; *Marquette v. State Bar* (1988) 44 Cal.3d 253, 263 [insufficiently funded checks].)

Cases involving client deceit, misappropriation, and lack of insight have been known to warrant disbarment. (*Kelly v. State Bar* (1988) 45 Cal.3d 649 [disbarment for $20,000 misappropriation, moral turpitude, dishonesty, and improper communication with adverse party with no prior record in mitigation and no aggravation]; *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511 [disbarment for $40,000 misappropriation, intentionally misleading client with mitigation for emotional problems, repayment of money, 15 years of discipline-free practice, strong character evidence, and candor and cooperation with State Bar]; and *Chang v. State Bar*, *supra*, 49 Cal.3d 114 [disbarment for $7,900 misappropriation with fraudulent and contrived misrepresentations].) The Supreme Court has even imposed disbarment on attorneys with no prior record of discipline in cases involving a single misappropriation. (See, e.g., *In re Abbott* (1977) 19 Cal.3d 249 [taking of $29,500, showing of manic-depressive condition, prognosis uncertain].) In *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, an attorney with over 11 years of practice and no prior record of discipline was disbarred for misappropriating

approximately $29,000 in law firm funds over an eight month period. (See also *In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170 [no prior record of discipline, misappropriation of approximately $55,000 from a single client]; *In the Matter of Spaith*, *supra*, 3 Cal. State Bar Ct. Rptr. 511 [15 years of discipline-free practice, misappropriation of $40,000]; *Kennedy v. State Bar* (1989) 48 Cal.3d 610 [disbarment for misappropriation in excess of $10,000 from multiple clients and failure to return files with no prior misconduct in eight years]; and *Kelly v. State Bar*, *supra*, 45 Cal.3d 649 [no prior record of discipline, misappropriation of $20,000].) Here, respondent misappropriated at least $100,000 from Hensley. Respondent did not take any steps to return the money to Hensley and insists that he is owed that money in attorney's fees. These factors indicate that there is a high likelihood of recidivism and a considerable threat to public protection. Respondent's serious misappropriation of $100,000 along with his deceit and lack of insight make disbarment appropriate in this matter.

Having considered the misconduct, the aggravating circumstances, as well as the case law and the standards, this court concludes that a disbarment recommendation is necessary to adequately protect the public and preserve the integrity of the legal profession.

Recommendations

It is recommended that respondent Dax Yeophantong Craven, State Bar Number 248583, be disbarred from the practice of law in California and respondent's name be stricken from the roll of attorneys.

Restitution

The court also recommends that respondent must make restitution to Michael Hensley in the amount of $100,000 plus 10 percent interest per year from April 30, 2015. Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

California Rules of Court, Rule 9.20

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

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.

Order of Involuntary Inactive Enrollment

Respondent is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Respondent's inactive enrollment will be effective three calendar days after this order is served by mail and will terminate upon the effective date of the Supreme Court's order imposing discipline herein, or as provided for by rule 5.111(D)(2) of the State Bar Rules of Procedure, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: January 30, 2018

Pat McElroy

PAT McELROY
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on January 30, 2018, I deposited a true copy of the following document(s):

DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

DAX Y. CRAVEN
548 MARKET ST # 68695
SAN FRANCISCO, CA 94104 - 5401

☐ by certified mail, No. , with return receipt requested, through the United States Postal Service at , California, addressed as follows:

☐ by overnight mail at , California, addressed as follows:

☐ by fax transmission, at fax number . No error was reported by the fax machine that I used.

☐ By personal service by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

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

Esther Rogers, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on January 30, 2018.

George Hue
Case Administrator
State Bar Court