

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

In the Matter of	)	Case No. 16-O-12255
	)	
ROGER SANDBERG HANSON,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 37966.	)	
_____	)	

Roger Sandberg Hanson, a criminal defense appellate attorney, is charged with two counts of misconduct in one client matter: appearing for a party without authority and engaging in moral turpitude for misrepresentations made during a disciplinary investigation.

The hearing judge found Hanson culpable of both charges and recommended that he be actually suspended for 90 days and placed on probation for two years. Hanson appeals the judge’s discipline recommendation, maintaining that he is not culpable as charged. The Office of Chief Trial Counsel of the State Bar (OCTC) does not appeal and asks this court to uphold the hearing judge’s recommendation.

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we find no clear and convincing evidence to support culpability as to the charged misconduct, and we further find that there appears from the facts to be no other alternative theory of culpability. The evidence fails to establish that Hanson appeared without authority or committed an act of moral turpitude. Accordingly, we dismiss this proceeding with prejudice.

## I. PROCEDURAL BACKGROUND

On December 19, 2016, OCTC filed a Notice of Disciplinary Charges (NDC), charging Hanson with two counts of misconduct.<sup>1</sup> Trial was held on October 31, 2017, and posttrial briefing followed. On January 29, 2018, the hearing judge issued her decision.

## II. FACTUAL BACKGROUND<sup>2</sup>

On May 23, 2015, the Avalos family met with and hired Dennis Patrick O'Connell to review Freddy Avalos's case to determine whether he could file a petition for a federal writ of habeas corpus. Avalos's mother signed an "attorney-client retainer agreement" on that date. At the time, Avalos was incarcerated. On June 4, 2015, O'Connell again met with the family, and Avalos's sister signed an agreement wherein O'Connell would pursue federal relief for Avalos. She testified at trial that she had a power of attorney and could hire an attorney for her brother. However, no other evidence of a power of attorney was produced at trial. Avalos's family believed that his case had a short deadline to file something and that O'Connell would contact Avalos promptly.

Sometime later, O'Connell hired Hanson to help him with the Avalos case, which he told Avalos's sister in late August 2015. On August 29, 2015, Hanson called Avalos's sister, who expressed her concerns regarding O'Connell's services. Specifically, she complained that O'Connell had not adequately answered her questions and that he had not yet contacted her brother. At no point during this call did Avalos's sister inform Hanson that the family wanted to terminate the representation.

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<sup>1</sup> Counts 1-5 and 8-21 of the NDC charged only Dennis Patrick O'Connell. (State Bar Court Case Nos. 15-O-13703 (16-O-12256; 16-O-12998; 16-O-13050).) O'Connell hired Hanson to assist him in the Freddy Avalos matter, the client matter at issue here. The counts charging O'Connell were severed from this proceeding.

<sup>2</sup> The factual background is based on the trial testimony, documentary evidence, and factual findings by the hearing judge, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).)

On September 1, 2015, O'Connell sent Avalos a letter detailing the initial case evaluation he and Hanson had conducted. O'Connell texted a copy of the letter to Avalos's sister on the same date. After receiving the letter, Avalos's sister sent O'Connell a letter via email in which she tried to terminate him on her brother's behalf and requested a refund of the unearned fees and a detailed accounting. She did not send a copy of this letter or a similar letter to Hanson. She was dissatisfied with the representation because O'Connell had not contacted Avalos sooner.

On that same date, O'Connell contacted Hanson to tell him that the family was attempting to terminate their representation. After speaking with O'Connell, Hanson called and spoke to Avalos's sister for 44 minutes. She told Hanson that she wanted to terminate O'Connell. Hanson indicated his willingness to handle the case himself, but Avalos's sister stated that she was not comfortable with either Hanson or O'Connell representing her brother. Hanson explained to her that she could not terminate the representation because she was not the client. On September 8, Avalos's sister sent O'Connell another letter attempting to terminate him on her brother's behalf and again requesting a refund of the unearned fees and a detailed accounting. Again, she did not send a copy or a similar letter to Hanson.

On September 9, O'Connell sent Avalos a letter in which he incorrectly stated that he and Hanson had filed a writ of habeas corpus in state court on Avalos's behalf. O'Connell and Hanson actually filed the petition for writ of habeas corpus on September 15, 2015, in San Joaquin County Superior Court. O'Connell noted in the September 9 letter to Avalos that his sister had tried to terminate their representation, but that only Avalos himself could do so.

In March 2016, Avalos complained to the State Bar that Hanson failed to file a federal habeas writ petition on his behalf, failed to communicate, and failed to do any meaningful work on his case. He claimed that the petition Hanson filed in superior court was frivolous. On September 26, 2016, an OCTC investigator sent Hanson a letter asking whether he had any

contact with either Avalos or his family and if he was “aware that [Avalos’s] family terminated the representation on September 1, 2015.”

On October 10, 2016, Hanson responded by letter that he had not received notice directly from the family to stop working on the case, but heard about the issue from O’Connell sometime after September 1, 2015. He also wrote that O’Connell told him that he had sent several requests to Avalos asking if they were to continue on the case, but did not receive a response until late October when he received a substitution of attorney from Avalos’s new lawyer. We find that Hanson’s October 10, 2016 letter is consistent with his trial testimony. He testified that he was aware that Avalos’s sister was endeavoring to terminate the representation, which is why he called her on September 1, 2015, to explain to her that she lacked the authority to do so.

When the senior trial counsel (STC) questioned Hanson at trial, her questions differed from both the language used in the investigator’s letter and the charges in the NDC. The investigator’s letter asked Hanson “whether you were aware that [Avalos’s] family *terminated* the representation on September 1, 2015.” (Italics added.) His response to that letter was that he “did not receive notice from the family directly to stop work on the case.” In the NDC, OCTC charged that Hanson had a telephone conversation with one of Avalos’s family members on September 1 during which the family member informed him that his services “*were terminated.*” (Italics added.)

At trial, the STC asked him if he was aware that the family was *attempting* or *trying* to terminate him on September 1. She then asked, “So your statement here that it was only after September 1 that you learned of the *intended termination* is false. Isn’t that correct, sir?” Hanson responded, “Yes, because I got all these letters afterwards on it.” The STC’s question, however, did not address whether Hanson was *actually* terminated on that date, as stated in the September 26 letter and charged in the NDC.

### **III. THE EVIDENCE DOES NOT SUPPORT THE HEARING JUDGE'S CULPABILITY FINDINGS**

#### **A. Count Six: Appearing Without Authority (Bus. & Prof. Code, § 6104)<sup>3</sup>**

In count six, OCTC alleges that Hanson violated section 6104 by corruptly or willfully, and without authority, causing a petition for a writ of habeas corpus to be filed on Avalos's behalf in the superior court. Section 6104 provides that an attorney can be disbarred or suspended for corruptly or willfully and without authority appearing as an attorney for a party to an action or proceeding. The hearing judge found that Avalos's sister was his representative and had authority to act on his behalf and terminate Hanson's representation. The judge then determined that Hanson violated section 6104 by filing the habeas corpus petition after Avalos's sister had twice terminated Hanson's employment.

We disagree. Although Avalos's sister did communicate with Hanson about the case, no evidence beyond her own testimony established that she had the authority to act on Avalos's behalf. Avalos was the client.<sup>4</sup> When Hanson learned from O'Connell that Avalos's sister was trying to terminate the representation, Hanson immediately called her to inform her that she did not have the authority to do so because only Avalos had the ability to confer such authority. (3 Witkin, Summary of Cal. Law (11th ed. 2017) Agency and Employment, § 144, pp. 197–199 [authority conferred on agent by words or acts of principal].) Hanson and O'Connell did not have notice from Avalos that he had given his free and intelligent consent for his sister to make decisions regarding his representation. O'Connell and Hanson had a duty to protect Avalos and his interests. (See *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525,

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<sup>3</sup> All further references to sections are to the Business and Professions Code unless otherwise noted.

<sup>4</sup> Avalos was aware that Hanson was working on his case because O'Connell told him so in the September 1, 2015 letter. O'Connell wrote to Avalos again on September 9, 2015, telling Avalos that he and Hanson had prepared his habeas corpus petition.

548 [attorney has duty to protect client in every possible way and it is violation of that duty to assume adverse position without client's free and intelligent consent]; see also *Sharp v. Next Entertainment, Inc.* (2008) 163 Cal.App.4th 410, 427 [Rule of Prof. Conduct, rule 3-310, and conflict of interest rules are designed to assure attorney's absolute and undivided loyalty and commitment to client].) Therefore, they filed the writ petition in superior court in order to preserve Avalos's rights.<sup>5</sup> (See *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 280 [attorney has obligation to avoid foreseeable prejudice to client's interest until substitution of counsel is filed].) They were aware that the representation was terminated only when they received the signed substitution of attorney form in late October 2015.

In this court's recent related decision in *In the Matter of Dennis Patrick O'Connell* (Review Dept. 2018) State Bar Court Case Nos. 15-O-13703 (16-O-12256; 16-O-12998; 16-O-13050), we determined that O'Connell was not culpable of appearing without authority, in violation of section 6104, because only Avalos could terminate the representation.<sup>6</sup> At oral argument on review, OCTC conceded that no facts or evidence in this matter relevant to count six supported a different conclusion than the one we reached in count eight of the O'Connell decision.

Because O'Connell filed the writ petition with proper authority, we find that OCTC failed to present clear and convincing evidence that Hanson filed the writ corruptly or willfully without authority, and we further find that there appears from the facts to be no other alternative theory

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<sup>5</sup> As evidenced in O'Connell's September 1, 2015 letter to Avalos, O'Connell and Hanson believed that filing the writ petition in state court tolled any approaching deadline Avalos had in federal court.

<sup>6</sup> We take judicial notice of our O'Connell opinion because it arose out of an NDC involving Hanson. (Rules Proc. of State Bar, rule 5.156(B).) Although unpublished, it may be cited and relied on here. (Cf., Cal. Rules of Court, rule 8.1115(b)(2) as to unpublished opinions of the Courts of Appeal or Superior Court appellate division.)

of culpability. Therefore, Hanson is not culpable of violating section 6104. We dismiss count six with prejudice.

**B. Count Seven: Moral Turpitude—Misrepresentation (§ 6106)**

As noted above, the September 26, 2016 letter by the OCTC investigator requested answers to several questions, including the following:

Please detail any contact you had with either Freddy Avalos or members of his family.

[¶]

Please advise as to whether you were aware that [Avalos's] family terminated the representation on September 1, 2015.

In count seven, OCTC alleges that Hanson violated section 6106<sup>7</sup> by stating in writing to the State Bar in response to an official investigation request (1) that he had not heard directly from Avalos's family that his and O'Connell's services were terminated and (2) that he was not so informed until after September 1, 2015.

The hearing judge found Hanson culpable because he had talked to Avalos's sister on September 1, 2015, and she told him that she was terminating the representation. The judge determined that Hanson falsely stated that he learned about the termination *after* September 1, 2015, from O'Connell and, therefore, violated section 6106 by knowingly making misrepresentations to OCTC.

We disagree with the hearing judge's culpability determination. Although Hanson did talk to Avalos's sister on September 1, 2015, as noted above, she did not have the authority to terminate the representation. The record clearly shows that at all times, Hanson believed that

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<sup>7</sup> Section 6106 states, "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." This section "applies to the misrepresentation and concealment of material facts." (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 353.)

only Avalos could terminate the representation, which he tried to make clear to Avalos's sister. Without authority from Avalos, his sister could not terminate either O'Connell or Hanson.

Count seven of the NDC charged Hanson with making false statements to the OCTC investigator in response to the September 26, 2016 letter. In fact, Hanson truthfully answered the investigator's questions in his October 10, 2016 letter to the investigator, stating:

I had no personal contact with the client. As an employee of Mr. O'Connell that was not my responsibility. [¶] I did have several telephone conversations with the clients [*sic*] family members. . . . [¶]

I did not receive notice from the family directly to stop work on the case. However, sometime after September 1, 2015 Mr. O'Connell made me aware of the issue. I know this because Mr. O'Connell sent a letter [to the] client on September 1, 2015 . . . .<sup>8</sup>

(Italics added.) Hanson went on to explain that he was informed by O'Connell that O'Connell had sent several requests to the client asking if he still wanted them to represent him. Hanson stated he was not aware of any response by the client until O'Connell received a signed substitution of attorney form about three weeks later. Hanson testified consistently in this regard at trial.

Hanson was not aware that he was terminated precisely because Avalos himself had not so advised him, and the other members of the Avalos family could not do so.<sup>9</sup> No facts in the record show that Hanson made any misrepresentations regarding his discussions with Avalos's sister. While he did write in his response to the investigator that he was "aware of the issue"

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<sup>8</sup> Whether he became aware of this issue either *on* or shortly *after* September 1 is immaterial. The clear import of Hanson's testimony was that he became aware sometime after the September 1 letter. (*Call v. State Bar* (1955) 45 Cal.2d 104, 108–109 [record must support finding that misrepresentation was material in order to violate section 6106.]; see also *In the Matter of Respondent K, supra*, 2 Cal. State Bar Ct. Rptr. at p. 353.)

<sup>9</sup> The hearing judge found that Hanson "falsely stated that he first learned about the termination when he spoke to O'Connell *after* September 1, 2015." Because there was no termination on September 1, we find that Hanson could not make such a false statement. Further, as discussed above, the September 1 date is immaterial.

sometime after September 1, this response must be read in context with the rest of his letter and the questions in the investigator's letter. Looking at the entirety of Hanson's October 10 letter, it is clear that he is attempting to explain that he never personally communicated with Avalos so no termination occurred on or around the September 1 date. Hanson believed that the representation was not terminated until sometime in October when he and O'Connell received the signed substitution of attorney form from Avalos's new attorney. Considering the context of Hanson's responses, we find that he did not make any misrepresentations to the investigator.

We find that OCTC failed to present clear and convincing evidence that Hanson made misrepresentations to OCTC or committed any charged act involving moral turpitude, and we further find that there appears from the facts to be no alternative theory of culpability. Therefore, Hanson is not culpable of violating section 6106. We dismiss count seven with prejudice.

#### **IV. ORDER**

As Roger Sandberg Hanson is not culpable of the charges alleged in the NDC, we order this case dismissed with prejudice. Hanson may move for reimbursement of costs in accordance with section 6086.10, subdivision (d), and rule 5.131 of the Rules of Procedure of the State Bar.

HONN, Acting P. J.

WE CONCUR:

McGILL, J.

STOVITZ, J.\*

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\* Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.