

Filed April 25, 2017

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of)	Case No. 14-O-03483
)	
DAVID DOE-OOK KIM,)	OPINION AND ORDER
)	
A Member of the State Bar, No. 128030.)	
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David Doe-Ook Kim appeals a hearing judge’s decision recommending disbarment for failing to notify his clients of his receipt of their funds, failing to maintain client funds in a client trust account (CTA), making misrepresentations to his clients, and intentionally misappropriating \$85,200. At trial, Kim stipulated to culpability for all four counts of misconduct charged by the Office of Chief Trial Counsel of the State Bar (OCTC). He does not contest culpability on review, but requests discipline less than disbarment, claiming compelling mitigation. As at trial, Kim argues on review that he believed, in good faith, that his actions were defensible and that he never intended to take more fees than he was entitled to under his fee agreement with his clients. OCTC asks that we affirm the hearing judge’s findings and disbarment recommendation.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we affirm the hearing judge’s culpability findings and aggravation and mitigation findings except as noted. We also assign limited mitigation for community service, as requested by Kim, but reject his other requests for further mitigation and find additional aggravation for Kim’s lack of candor. Under these circumstances, the applicable disciplinary standard calls for disbarment. We find no reason to depart from this standard, and therefore affirm the hearing judge’s disbarment recommendation.

I. PROCEDURAL BACKGROUND

On November 18, 2014, OCTC filed a four-count Notice of Disciplinary Charges (NDC) alleging that Kim: (1) failed to notify his clients of receipt of six settlement checks totaling \$180,000, in violation of rule 4-100(B)(1) of the Rules of Professional Conduct;¹ (2) failed to maintain \$90,000 of his clients' funds in his CTA, in violation of rule 4-100(A);² (3) misappropriated client funds of \$90,000, an act involving moral turpitude, dishonesty, or corruption, in violation of section 6106 of the Business and Professions Code;³ and (4) misrepresented to his clients that their settlement agreement had failed and that they would need to file a new lawsuit, an act involving moral turpitude, dishonesty, or corruption, in violation of section 6106.

A two-day trial was held on February 16 and 17, 2016. On the first day of trial, the parties filed a partial stipulation as to facts and admission of documents. On the second day, the parties filed a stipulation as to the testimony of Alecsi Carrillo, one of Kim's former clients. Also on the second day, Kim stipulated on the record to culpability for all four counts of charged misconduct. The hearing judge issued his decision on May 12, 2016.

¹ All further references to rules are to this source unless otherwise noted. Under rule 4-100(B)(1), a member shall "[p]romptly notify a client of the receipt of the client's funds"

² Under rule 4-100(A), "[a]ll funds received or held for the benefit of clients by a member . . . shall be deposited in one or more identifiable bank accounts labeled 'Trust Account,' 'Client's Funds Account' or words of similar import"

³ All further references to sections are to this source. Under section 6106, "[t]he 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 . . . constitutes a cause for disbarment or suspension."

II. FACTUAL BACKGROUND⁴

A. Carrillo and Tzunux Hire Kim and Settlement Agreement Is Prepared

The facts, as summarized below, support the hearing judge's uncontested culpability findings. Kim was admitted to the practice of law in California on June 17, 1987.

On December 15, 2011, Alecsi Carrillo and Mario Tzunux retained Kim to represent them in a lawsuit involving wage and hour claims against the restaurant where they worked, H.K. Seafood, and their employer, Il Yoon Kwon. Carrillo and Tzunux signed a retainer agreement that provided that Kim was to receive "forty percent (40%) of the net recovery, after deducting costs and expenses advanced by" Kim or the clients. Kim filed a first amended complaint in Los Angeles Superior Court against H.K. Seafood, Kwon, and others on July 27, 2012. On the first day of trial, the parties agreed to settle the lawsuit for \$425,000 payable to plaintiffs.

On or about September 16, 2013, Daniel Lee, the attorney for H.K. Seafood and Kwon, prepared a Confidential Settlement Agreement and Release (settlement agreement). It provided that Carrillo and Tzunux would receive \$425,000 from the defendants on the following schedule: (1) \$50,000 within 30 days of execution of the agreement; (2) \$50,000 within 60 days of execution of the agreement; and (3) the balance of \$325,000 payable in installments of \$20,000 every 30 days until paid in full. The settlement agreement included that the parties would keep the existence and terms of the agreement confidential, and that the payments would be made to Kim's CTA. The agreement also stated that an Internal Revenue Service Form 1099 (1099) would be issued to DDK Law Corp, Kim's law firm, and that Carrillo and Tzunux would be "solely and ultimately responsible for all tax obligations" arising from the settlement. Carrillo

⁴ The facts are based on the Stipulation as to Facts and Admission of Documents, the Stipulation as to the Testimony of Alecsi Carrillo, trial testimony, documentary evidence, and the hearing judge's factual findings, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).)

testified that it was his understanding that Kwon and H.K. Seafood would pay any taxes that Carrillo and Tzunux incurred because of the settlement. Lee testified that his clients had not agreed to pay the taxes, but that he agreed with Kim that he would issue a 1099 to him rather than to Carrillo and Tzunux.

Carrillo and Tzunux initially refused to sign the settlement agreement because of its provision making them responsible for all tax liabilities. Kim met with them on September 24, 2013. Kim admitted at trial that, in order to induce them to sign the settlement agreement, he prepared and signed a letter documenting the distribution of the settlement proceeds. The letter provided that Kim would take his advance costs and expenses of approximately \$38,000 from the first \$50,000 payment, and that the balance of all remaining payments be distributed with 60 percent going to Carrillo and Tzunux and 40 percent to Kim. The letter stated that Carrillo and Tzunux would each receive no less than \$118,000 “[i]rrespective of what the final amount of costs is.” This promised amount was mathematically impossible to achieve under the distribution plan outlined in the letter.⁵ After Kim provided this letter, Carrillo and Tzunux signed the settlement agreement.

On September 26, 2013, Lee sent Kim an email accusing Carrillo and Tzunux of breaching the settlement agreement’s confidentiality provision by disclosing the terms to a Korean newspaper. Lee told Kim that he and Kwon might seek to have the settlement agreement nullified or sue Kim’s clients for breach of contract. Despite these threats, Lee ultimately took no action, and his clients honored the settlement agreement.

⁵ Carrillo and Tzunux’s 60 percent share after deducting Kim’s \$38,000 in costs totaled \$232,200, not \$236,000 (\$118,000 x 2). Further, neither of these figures takes into account the applicable taxes.

B. Kim Misrepresents Status of Settlement and Misappropriates Sizeable Client Funds

After signing the settlement agreement, Carrillo spoke with Kim on the phone to ask about the first settlement payment. During this call, Kim told Carrillo that the defendants might not pay because of the allegations of breach of confidentiality. Carrillo and Tzunux then sent two emails, dated November 12 and November 17, 2013, again asking for an update.

Kim responded by email on November 20, telling Carrillo and Tzunux that he was in Korea, but “went in to see the judge” regarding the alleged breach of confidentiality before he left. He informed them the judge could not decide the issue, and they had “to bring a new lawsuit” to enforce the agreement. He also told them “[o]bviously I am very upset you lied to me and ruined the settlement” and that he was no longer their attorney since their case had been dismissed. In the email, Kim did not provide any update to his clients about settlement payments even though he had deposited the first \$50,000 payment into his CTA on November 7, 2013. He never notified his clients of his receipt of these funds and kept the entire amount for himself. We adopt the hearing judge’s finding that Kim’s statements to his clients in the November 20, 2013 email were “utterly false” and that he knew they were false when he made them. (Rules Proc. of State Bar, rule 5.155(A) [great weight given to hearing judge’s factual findings].)

By November 20, Kim had decided not to adhere to the payment schedule he set forth in the September 24 letter. Kim testified that he was concerned that Carrillo and Tzunux were undocumented workers and had fraudulent social security numbers. Kim felt that he could not lawfully issue a 1099 using these social security numbers, and he was concerned that his clients did not plan to pay taxes on the settlement proceeds. Kim did not seek advice on resolving this perceived tax problem. Nor did he ask his clients if they had alternate tax identification numbers, although Carrillo testified that he and Tzunux did have tax identification numbers at the time they signed the settlement agreement. Kim testified that he was also worried that he

would lose his fee if he withdrew from representing Carrillo and Tzunux because he “was already overextended.” His solution, which he also saw as a way to mitigate his damages, was to collect all of his money up front, without informing his clients that he had begun to receive settlement payments. Kim testified that he needed the funds quickly because of a \$40,000 debt that he owed. He also testified that after he had taken his costs and his full contingent fee, he planned to ask Lee to issue all remaining payments to Carrillo and Tzunux.

In accordance with this new plan, Kim deposited each settlement payment into his CTA without disclosing to his clients that he had received the money. Between December 5, 2013 and April 7, 2014, Kim deposited five checks into his CTA, which totaled \$180,000 in settlement payments, including the first \$50,000 deposit. He kept the entire amount as his contingency fee. Had he followed the distribution plan in his letter, he should have paid \$85,200⁶ of this amount to Carrillo and Tzunux.

C. Carrillo and Tzunux Hire Lawyers to Assist Them in Obtaining Settlement Funds

By spring 2014, Carrillo and Tzunux had not heard from Kim since November 20, 2013, and had not received any payments from the settlement funds that he had received. They believed Kim’s statements that they would have to file a new lawsuit to collect the settlement funds. On April 9, 2014, Carrillo and Tzunux retained J. S. Kim, who substituted into the civil matter as their attorney of record. After speaking with Lee, J. S. Kim discovered that Kim had been cashing the settlement checks. J. S. Kim apprised Carrillo and Tzunux of the situation and arranged for future checks to be delivered to Carrillo and Tzunux.

In May of 2014, Carrillo and Tzunux retained Alex Cha as their attorney to replace J. S. Kim and Cha substituted into the lawsuit against H.K. Seafood and Kwon on May 19, 2014. Thereafter, Cha collected 11 of the \$20,000 monthly installment settlement checks (\$220,000).

⁶ Although the NDC charged misappropriation of \$90,000, Kim actually owed his clients \$85,200 (\$180,000 - \$38,000 in expenses = \$142,000; 60 percent of \$142,000 = \$85,200).

Of this amount, Cha paid J. S. Kim \$10,000 and took 15 percent of the remaining funds as his fee (\$31,500). This left \$178,500 of the settlement funds for Carrillo and Tzunux. In July 2015, Lee sent Cha a \$25,000 check as the final payment of the \$425,000 settlement. Because Kim had told Lee he had an attorney's lien on the final check, Lee made the check payable to Cha, Carrillo, Tzunux, and Kim. Since Kim has refused to endorse that check, Carrillo and Kim had not received their share of the final \$25,000 check at the time of the trial in this matter.

III. KIM IS CULPABLE ON ALL COUNTS

Based on Kim's stipulation and the trial evidence, the hearing judge found him culpable on all counts alleged in the NDC: failing to notify his clients of his receipt of their funds; failing to maintain client funds in a CTA; making misrepresentations to his clients; and willful misappropriation of \$85,200. Kim stipulated to culpability on all four counts of the NDC.

While the judge in analyzing culpability did not expressly determine that Kim's misappropriation was intentional,⁷ we find that clear and convincing evidence⁸ supports a finding of culpability for intentional misappropriation, given Kim's misrepresentations to his clients, his failure to inform them that he was receiving their settlement checks, and his failure to pay them their share of the six settlement checks that he cashed. We adopt the hearing judge's unchallenged findings as supported by the record, and focus on the issues Kim raises on review: aggravation, mitigation, and level of discipline.

⁷ However, the hearing judge's opinion reflected his view that Kim's misappropriation resembled the properties of intentionality: "[r]espondent deliberately breached his fiduciary duties to his clients and put his interests above those of his clients." And the judge analyzed the matter as an intentional misappropriation in recommending discipline.

⁸ Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

IV. AGGRAVATION AND MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct⁹ requires OCTC to establish aggravating circumstances by clear and convincing evidence. Under standard 1.6, Kim has the same burden to prove mitigation.

A. Aggravation

1. Prior Record of Discipline (Std. 1.5(a))

We agree with the hearing judge that Kim's prior record of discipline is an aggravating factor and assign it significant weight. Kim received a private reproof effective August 16, 2011, with conditions continuing for one year. The discipline was based on Kim's stipulation that he knowingly acquired an interest adverse to his client by negotiating an amended attorney-client fee agreement that was neither reasonable nor fair to his client. He also failed to inform his client that he had the right to seek the advice of an independent attorney and failed to give his client the opportunity to seek such advice. Kim attempts to minimize his past discipline by limiting it to the failure to advise his client to seek independent counsel and by unconvincingly arguing in his brief that his prior wrongdoing is "completely unrelated to the case at bar." Notably, the reproof became effective just a few months before Kim began representing Carrillo and Tzunux, and the included conditions required that Kim take the Multistate Professional Responsibility Examination and attend State Bar Ethics School.

We agree with the hearing judge's finding that Kim's prior record of discipline is "particularly aggravating . . . because it also involved [Kim's] overreaching and placing his own interests above those of his clients." (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443-444 [similarities between prior and current misconduct render previous

⁹ All further references to standards are to this source.

discipline more serious, as they indicate prior discipline did not rehabilitate]; see also *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 841 [great weight placed on common thread among attorney's past and present misconduct].)

2. Multiple Acts (Std. 1.5(b))

We agree with the hearing judge that Kim's multiple acts of misconduct are an aggravating factor, to which we assign moderate weight as Kim is culpable of four counts of varied misconduct that continued for months. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646-647 [three instances of misconduct considered multiple acts].) Kim argues that his misuse of six checks should not result in aggravation and unpersuasively argues for less aggravation by minimizing his misconduct.

3. No Additional Aggravation for Dishonesty and Overreaching (Std. 1.5(d))

The hearing judge found aggravation for dishonesty and overreaching based specifically on Kim's representation to his clients regarding the settlement amount they would receive. This finding is based on the September 24, 2013 letter Kim prepared to convince his clients to sign the settlement agreement. The letter provided that each of his clients would receive not less than \$118,000 from the total \$425,000 settlement "after deducting all costs, expenses, and taxes." However, we do not affirm this aggravation finding due to Kim's conflicting testimony as to whether he intended, at the time he wrote the September 24 letter, to pay each client \$118,000. He testified both that he planned to honor the letter even if it meant reducing his costs and also that he simply wrote the letter to appease his clients, never intending to honor its terms. Thus, the evidence in the record is not clear and convincing that Kim was dishonest or overreached when he drafted the letter.

4. Uncharged Misconduct (Std. 1.5(h))

The hearing judge found aggravation based on uncharged violations of section 6106 (misrepresentation in letter to State Bar regarding destruction of client files), rule 5-100(A) (threatening criminal action to obtain advantage in civil dispute), and rule 4-100(B)(4) (failing to endorse last settlement check, resulting in failure to deliver settlement funds to his clients). Kim argues that including this uncharged misconduct as aggravation is unfair because these charges were not raised at trial and he had no opportunity to explain or defend against them.¹⁰ OCTC contends that these violations may be considered in aggravation because they can be proved based on Kim's own testimony and the exhibits admitted at trial.

We decline to find additional aggravation for the uncharged misconduct because OCTC had ample opportunity but failed to amend the NDC to include additional charges. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35 [attorney may not be disciplined for violation not alleged in NDC]; *In the Matter of Lenard* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 250, 260.)

Further, while *Edwards* provides that allegations not set forth in the NDC may be considered in aggravation, the allegations must be raised through Kim's own testimony, elicited for the relevant purpose of inquiring into the cause of the charged misconduct. (*Edwards v. State Bar, supra*, 52 Cal.3d 28 at p. 36.) These requirements are not met here. None of the necessary proof was elicited through Kim's testimony. Rather, the evidence of the threat of criminal action was brought up through an exhibit introduced by OCTC. OCTC also introduced the letter from Kim to the State Bar containing the misrepresentation, and Lee testified regarding the final

¹⁰ We note that, for the first time at oral argument, Kim's counsel raised the issue of lack of due process generally during the trial proceedings. She asserted that the hearing judge rushed her presentation and seemed impatient. Upon independent review of the record, we find no due process violations. The record does not show any instances of the judge rushing the proceedings or of Kim's counsel objecting on that basis. Moreover, the Supreme Court has made clear that a respondent's "only due process entitlement is to a fair hearing overall. [Citations.]" (*Dahlman v. State Bar* (1990) 50 Cal.3d 1088, 1094-1095.) Here, the judge provided Kim with a fair hearing, as required.

\$25,000 check that Kim refused to sign. OCTC's failure to charge these violations in the NDC resulted in an inadequate opportunity for Kim to address the violations at trial.

5. Lack of Candor (Std. 1.5(l))

While we do not find aggravation for an uncharged violation of section 6106 based on Kim's misrepresentation in a letter to the State Bar that he had destroyed his clients' files, we assign limited aggravation for this conduct as demonstrating a lack of candor to the State Bar. In response to a letter from a State Bar investigator asking why Kim did not provide J. S. Kim with Carrillo's and Tzunux's files as requested, Kim told the State Bar that he had destroyed the files. At trial, Kim admitted that he had not destroyed all the files, but retained the trial exhibits and discovery files. This misrepresentation to the State Bar is aggravating because it demonstrates lack of candor. (*In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, 522 [fraudulent or misleading statements to State Bar constitute aggravating circumstance].)

6. Significant Client Harm (Std. 1.5(j))

We agree with the hearing judge that Kim's misconduct significantly harmed his clients, and we assign substantial weight to this factor. His misappropriation deprived Carrillo and Tzunux of the use of \$85,200 for at least five months. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 409, 413 [significant client harm for six-month delay in distributing \$5,618 in medical malpractice settlement proceeds].) Moreover, his misrepresentations that they would have to file a lawsuit to get their settlement funds and that he was no longer their attorney also harmed them because they had to retain new counsel to assist them in obtaining their funds. They incurred attorney fees of \$41,505 that would not have been necessary if Kim had properly distributed their settlement proceeds.

B. Mitigation

1. Cooperation (Std. 1.6(e))

The hearing judge assigned significant weight in mitigation to Kim's stipulation to culpability on all counts at trial, finding that it showed Kim's recognition of his wrongdoing. We agree that mitigation should be assigned but attribute it to Kim's cooperation with the State Bar, not for recognition of wrongdoing. Although stipulations to culpability are generally assigned more weight, we assign moderate, rather than significant, weight because the trial was already into its second day when Kim entered into the stipulation, which did not substantially shorten the trial. (Compare *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more mitigating weight accorded where culpability as well as facts admitted] with *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 567 [limited mitigating weight for belated stipulation concerning easily provable facts where respondent failed to show significant shortening of trial time].)

2. Emotional Difficulties (Std. 1.6(d))

We also agree with the hearing judge that only minimal mitigation should be afforded for emotional difficulties suffered by Kim. Mitigation is available for emotional difficulties if: (1) an attorney suffered from them at the time of his misconduct; (2) the difficulties are established by expert testimony as being directly responsible for the misconduct; and (3) the difficulties no longer pose a risk of future misconduct. (Std. 1.6(d); see *In re Naney* (1990) 51 Cal.3d 186, 197 [emotional distress from marital difficulties and similar problems not mitigating unless directly responsible for misconduct].) Kim testified that his wife was attacked in South Korea and that his mother suffered from cancer. However, he did not establish more than minimal mitigation under the standard because he did not prove that these emotional

difficulties caused him to commit his misconduct or that his difficulties no longer pose a risk of future misconduct.

3. Limited Additional Mitigation

Kim argues that the hearing judge erred in not finding compelling mitigation and requests that we assign additional mitigation for community service (std. 1.6(f)), his good faith belief that he was acting correctly (std. 1.6(b)), and the fact that his clients ultimately received all their funds. The hearing judge did not assign mitigation for any of these factors. We assign only limited mitigation for Kim's community service. Kim testified that he has a long history of service to the Korean American community, including serving as Vice-President of the Korean Chamber of Commerce, working with the community during the Los Angeles riots in 1992, producing a documentary to document the "Korean American narrative on the LA riots," and doing pro bono work. However, Kim did not establish sufficient proof of the extent of his service because he only offered his own testimony, a biography that he drafted regarding this community service, and the fact that he produced a documentary on the riots that occurred in Los Angeles involving the Korean American and African American communities. (*In the Matter of Shalant, supra*, 4 Cal. State Bar Ct. Rptr. at p. 840 [limited mitigation weight assigned for community service established only by attorney's own testimony].)

Kim also testified that he had a good faith belief that "when somebody does [an] unconscionable or unethical or inequitable act, then you can use that as a defense." However, his attempt to justify his misconduct on this basis because his clients were undocumented immigrants and he feared that they would not pay taxes on their settlement funds is unsupported and unreasonable. His clients' concerns about having a 1099 issued to them did not give Kim permission to engage in misconduct against them. Inexcusably, Kim disregarded his clients' interests in favor of protecting himself. (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State

Bar Ct. Rptr. 646, 653 [“In order to establish good faith as a mitigating circumstance, an attorney must prove that his or her beliefs were both honestly held and reasonable”]; std. 1.6(b).] Finally, Kim’s claim that his clients received all the funds they were entitled to is false. He has refused to endorse the last \$25,000 settlement check, thus preventing Carrillo and Tzunux from receiving their share of this money.

V. DISBARMENT IS APPROPRIATE DISCIPLINE

Our disciplinary analysis begins with the standards which, although not binding, are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) The Supreme Court has instructed us to follow them whenever possible (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11), and to look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

Here, several standards apply, but standard 2.1(a) is the most severe, providing that disbarment is the presumed sanction for intentional misappropriation “unless the amount misappropriated is insignificantly small or sufficiently compelling mitigating circumstances clearly predominate, in which case actual suspension is appropriate.” (Std. 1.7(a) [most severe sanction shall be imposed where multiple sanctions apply].) Kim intentionally misappropriated \$85,200, a significant amount. (*Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1361, 1368 [\$1,355.75 held to be significant amount].) Further, the limited mitigation we assigned to his cooperation, emotional difficulties, and community service is neither compelling nor does it clearly predominate over his serious misconduct and aggravation for his prior record of discipline, significant client harm, multiple acts of misconduct, and lack of candor to the State Bar.

Misappropriation of client funds “breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the profession.

[Citations.]” (*Kelly v. State Bar* (1988) 45 Cal.3d 649, 656.) The Supreme Court has held that attorneys have a “personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds.” (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 795.) Misappropriation is grave misconduct for which disbarment is the usual discipline. (*Edwards v. State Bar, supra*, 52 Cal.3d at p. 38.) “Even a single ‘first-time’ act of misappropriation has warranted such stern treatment.” (*Kelly v. State Bar, supra*, 45 Cal.3d at p. 657.)

Kim chose to accept his clients’ settlement funds without informing them, and proceeded to take his entire share in advance to pay his own debts at the expense of his fiduciary duties to his clients. Kim’s personal debt and fear that he could not lawfully issue a 1099 do not justify his misconduct. Many attorneys experience financial and emotional difficulties comparable to those that Kim faced. “While these stresses are never easy, we must expect attorneys to cope with them without engaging in dishonest activities, as did [Kim].” (*In the Matter of Spaitth* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 522.) “Misappropriation of a client’s funds simply cannot be excused or substantially mitigated because of an attorney’s needs, no matter how compelling.” (*Hitchcock v. State Bar* (1989) 48 Cal.3d 690, 709.)

We also acknowledge Kim’s argument that we should consider his lengthy period of discipline-free practice prior to his 2011 reproof as evidence that he is unlikely to again engage in misconduct. However, the fact that Kim made misrepresentations to and misappropriated from his clients at a time when he had personal financial stresses prompts a concern that similar stresses in the future may trigger similar behavior. (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 279, 282 [disbarment appropriate even with 12-year record of discipline-free practice where respondent misappropriated significant sum to satisfy his personal obligations and showed lack of insight by offering ill-founded explanations for misconduct].)

Kim argues that an actual suspension is appropriate, and cites several cases where discipline less than disbarment was imposed, even for an intentional misappropriation. However, many of these cases are older, predate adoption of the standards, and are otherwise distinguishable from Kim's intentional and dishonest misconduct. *Grossman v. State Bar* (1983) 34 Cal.3d 73 involved an attorney who took a higher percentage of his client's settlement funds than he had agreed to, resulting in a misappropriation of about \$1,100. The *Grossman* court stressed that misappropriation was a serious breach of ethical duties, but found that extenuating circumstances precluded disbarment. Specifically, the attorney promptly paid the client's share of the distribution, paid the client's creditors at the client's request, and promptly provided an accounting that included the actual fee the attorney claimed. *McKnight v. State Bar* (1991) 53 Cal.3d 1025 involved an attorney who misappropriated over \$8,000 but was credited with significant mitigation for lack of prior discipline and the attorney's bipolar disorder that contributed to his financial difficulties. *Murray v. State Bar* (1985) 40 Cal.3d 575 involved misappropriation of \$5,600 with some mitigation for emotional difficulties and lack of prior discipline. *Carter v. State Bar* (1988) 44 Cal.3d 1091 and *Blair v. State Bar* (1989) 49 Cal.3d 762 did not involve misappropriation and so required application of different discipline standards.

Despite Kim's request, we do not recommend a more lenient sanction than disbarment given Kim's culpability for moral turpitude for intentional misappropriation, the harm he caused his clients, his multiple acts of misconduct, his limited mitigation, and his ongoing failure to authorize release of his clients' share of the final \$25,000 settlement payment. (Stds. 1.2(i), 1.7(c) [lesser sanction than recommended in standard may be warranted where misconduct is minor, little or no injury to client, public, or profession, and attorney able to conform to ethical responsibilities in future]; see *Blair v. State Bar, supra*, 49 Cal.3d at p. 776, fn. 5 [clear reasons

for departure from standards should be shown].) We agree with the hearing judge that disbarment is warranted by the facts of this case and under relevant case precedent in order to protect the public, the courts, and the legal profession.¹¹

We do not, however, affirm the hearing judge's order of restitution for the \$41,500 in attorney fees that Carrillo and Tzunux paid J. S. Kim and Cha to assist them in obtaining their settlement funds. We view these attorney fees as damages that are not appropriately ordered as restitution. (*In the Matter of Bach, supra*, 1 Cal. State Bar Ct. Rptr. at p. 650, citing *Sorenson v. State Bar* (1991) 52 Cal.3d 1036, 1044 [inappropriate to use restitution as means of awarding unliquidated tort damages for malpractice].) The hearing judge cited *Sorensen v. State Bar, supra*, 52 Cal.3d 1036 in support of his restitution order. But *Sorensen* provides only a limited exception to the established law that prohibits awarding damages in a disciplinary proceeding. *Sorensen* reiterated this legal precedent, stating that the court does not "approve imposition of restitution as a means of compensating the victim of wrongdoing." (*Id.* at p. 1044.) However, in analyzing the particular facts before them, the court ordered restitution to a private citizen who was forced to incur attorney fees to defend against a frivolous and harassing lawsuit brought by an attorney who was disciplined for violating his duties under section 6068, subdivisions (c) and (g). (*Ibid.*) Notably, the attorney in *Sorensen* did not oppose the restitution order.

However, we do order that Kim pay \$15,000 to his clients as restitution to provide them their 60 percent share of the final \$25,000 settlement check that he has refused to endorse.

¹¹ E.g., *Kelly v. State Bar, supra*, 45 Cal.3d 649 (disbarment for \$20,000 misappropriation, moral turpitude, dishonesty, and improper communication with adverse party, despite no prior record and no aggravation); *Gordon v. State Bar* (1982) 31 Cal.3d 748 (disbarment for \$27,000 misappropriation, even though 13 years of discipline-free practice, financial difficulties, emotional difficulties due to divorce, remorse, and lack of harm); *In the Matter of Spaitth, supra*, 3 Cal. State Bar Ct. Rptr. 511 (disbarment for \$40,000 misappropriation, intentionally misleading client about funds, mitigation including emotional problems, repayment of money, 15 years of discipline-free practice, strong character evidence, and candor and cooperation with State Bar not sufficiently compelling).

VI. RECOMMENDATION

We recommend that David Doe-Ook Kim be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice in California.

We further recommend that Kim be ordered to make restitution to Alecsi Carrillo and Mario Tzunux in the amount of \$15,000 plus 10 percent interest per year from July 31, 2015 (or reimburse the Client Security Fund to the extent of any payment from the Fund to Alecsi Carrillo and Mario Tzunux, in accordance with Business and Professions Code, section 6140.5) and furnish satisfactory proof to the State Bar Office of Probation in Los Angeles.

We further recommend that Kim must 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 days, respectively, after the effective date of the Supreme Court order in this matter.

We further recommend that costs be awarded to the State Bar in accordance with section 6086.10, such costs being enforceable as provided in section 6140.7 and as a money judgment.

VII. ORDER

The order that David Doe-Ook Kim be involuntarily enrolled as an inactive member of the State Bar pursuant to section 6007, subdivision (c)(4), effective May 15, 2016, will continue, pending the consideration and decision of the Supreme Court on this recommendation.

HONN, J.

WE CONCUR:

PURCELL, P. J.

STOVITZ, J.*

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