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STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **WAYNE WINROW**, **Member No. 153632,** A Member of the State Bar.	)	**Case No. 05-O-05357-LMA** **DECISION AND ORDER OF INVOLUNARTY INACTIVE ENROLLMENT**

I. Introduction

In this contested disciplinary proceeding, respondent **WAYNE WINROW** is charged with three counts of misconduct. The court finds, by clear and convincing evidence, that respondent is culpable on two counts, involving (1) commingling personal funds in his client trust account and (2) committing moral turpitude for creating a client trust account for the purpose of concealing personal assets from creditors.

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) urges that respondent be disbarred from the practice of law. Respondent argues that the maximum level of recommended discipline should not exceed three months of actual suspension. But, in view of respondent's misconduct, his three prior records of discipline and other evidence in aggravation, the court concludes and recommends that respondent be disbarred from the practice of law.

II. Pertinent Procedural History

The State Bar initiated this proceeding by filing an Amended Notice of Disciplinary Charges (NDC) on July 12, 2007. The State Bar was represented by Deputy Trial Counsel Susan Kagan. Respondent was represented by attorney William M. Simpich.

Trial was held on October 9 and 10, 2007. A posttrial briefing schedule was established, and the matter was thereafter submitted for decision on November 5, 2007.

III. Findings of Fact and Conclusions of Law

The following findings of fact are based on the evidence and testimony introduced at this proceeding and are based in large part on credibility determinations.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on July 3, 1991, and since that time has been a member of the State Bar of California.

B. Client Trust Account

On March 31, 2004, respondent opened a client trust account (CTA) at Washington Mutual Bank, account number 0970699660, entitled "Wayne Winrow Attorney Trust Account FBO [for benefit of] Markus J. Douglas."[1]

Although the account was held in the title of a client trust account, respondent admitted that he intended this account to be used as his own personal and business bank account and indeed used it as such. He also admitted that he created it for privacy reasons and because he wanted to conceal his assets from creditors. But no client funds were ever maintained in this CTA. He finally stopped using the CTA in June 2007, a few months before trial.

The bank statements confirmed his usage of the account for personal and business purposes. He regularly withdrew cash from the CTA, issued checks to pay for stamps, utilities, auto expenses, the cleaners, phone bills and books, and deposited personal funds into the CTA.

For examples, respondent (1) made at least 22 cash withdrawals, ranging in the amount of $50 to $1,221, between October 5, 2005, through February 15, 2006; (2) deposited $900 of his personal funds into the CTA on November 3, 2005; and (3) issued two insufficiently funded checks – one on October 27, 2005, in the amount of $106.71 made payable to P.G. & E. and another on November 8, 2005, in the amount of $25, made payable to the State Bar of California.

Respondent admitted that he did not keep a ledger showing the balance in the account. As a result of his failure to balance his account, he was repeatedly charged with non-sufficient

[1]Markus J. Douglas is respondent's adult nephew.

funds charges. For example, he incurred at least 11 insufficient funds charges between September 22, 2005, and January 4, 2006.

Count 1: Commingling (Rules Prof. Conduct, Rule 4-100(A))[2]

Rule 4-100(A) provides that all funds received for the benefit of clients must be deposited in a client trust account and that no funds belonging to the attorney must be deposited therein or otherwise commingled therewith.

Respondent argues that based on his years of experience in the banking business before becoming an attorney, he believes he had the right to name the account as a client trust account without treating the account as a client trust account and thus was justified in using the account as his personal account to protect his assets and to prevent creditors from filing a lien on the account. He contends that no client funds were on deposit and therefore, no commingling occurred. He now denies that the account was a client trust account at all. But instead, he claims that it was actually a Totten trust account[3] for his nephew's benefit and that he was acting as a trustee for the trust.

Respondent's contentions lack merit. The account is clearly labeled as a "client trust account" and not a "Totten trust," "tentative trust," "bank- account trust," "savings-account trust," or "savings-bank trust."

Furthermore, given respondent's claimed banking knowledge, he knew or should have known "that no funds belonging to the attorney must be deposited therein or otherwise commingled therewith." (Rules Prof. Conduct, rule 4-100(A).) "The rule absolutely bars use of the trust account for personal purposes, even if client funds are not on deposit. Because [respondent] used the account while it was ... denominated a trust account, even if he [did not intend] ... to use for trust purposes, rule [4-100(A)] was violated. The rule leaves no room for

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[2]References to rules are to the Rules of Professional Conduct, unless otherwise noted.

[3]Totten trust is a "revocable trust created by one's deposit of money in one's own name as a trustee for another. A Totten trust is commonly used to indicate a successor to the account without having to create a will. – Also termed *tentative trust; bank-account trust*; *savings-account trust; savings-bank trust.*" (Black's Law Dict. (7th ed. 1999) p. 1518, col.1.)

inquiry into the depositor's intent." (*Doyle v. State Bar* (1982) 32 Cal.3d 12, 22-23.) Hence, respondent's intent was no defense to commingling.

Therefore, by using the CTA as his personal and business account and depositing personal funds into and issuing checks for his personal expenses from his CTA, respondent's personal use of the trust account and the commingling of his personal funds in the CTA were clear and convincing evidence of violations of rule 4-100(A).

Count 2: Moral Turpitude (Bus. & Prof. Code, § 6106)[4]

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption.

The State Bar alleges that respondent violated section 6106 by issuing two checks insufficiently funded for $25 and $106.71 when respondent knew or should have known that there were insufficient funds in his account to cover the checks.

It is well settled that the "conduct of issuing numerous checks with insufficient funds 'manifests an abiding disregard of the fundamental rule of ethics – that of common honesty – without which the profession is worse than valueless in the place it holds in the administration of justice.'" (*Bambic v. State Bar* (1985) 40 Cal.3d 314, 324, citing *Tomlinson v. State Bar* (1975) 13 Cal.3d 567, 577.)

In order for the court to conclude that these checks was made to deceive clients beyond the level of suspicion, there must be clear and convincing evidence of respondent's deliberate dishonesty or corruption or an act involving moral turpitude. Here, the alleged facts demonstrate that respondent wrote two bounced checks and not numerous checks with insufficient funds. There is no evidence of deception or dishonesty. Thus, respondent's issuance of two bad checks is not clear and convincing evidence of moral turpitude or dishonesty with an intent to mislead clients. Such an error does not rise to the level of moral turpitude in violation of section 6106.

However, the mismanagement of the CTA which resulted in numerous non-sufficient funds charges is an aggravating factor, as discussed below.

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[4]References to section are to the provisions of the Business and Professions Code.

Moreover, since respondent has been found culpable of moral turpitude in count 3, charging him for issuing two insufficiently funded checks in violation of section 6106 is duplicative, which serves little purpose. (*Bates v. State Bar* (1990) 51 Cal.3d 1056.)

Count 3: Moral Turpitude (Bus. & Prof. Code, § 6106)

By respondent's own admission, the use of the trust account was designed to conceal his assets from creditors and operate as a personal bank account. Concealment is an act of dishonesty, involving moral turpitude. (*Crane v. State Bar* (1981) 30 Cal.3d 117, 124; *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 125.) Thus, respondent violated section 6106.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)[5]

There is no clear and convincing evidence that respondent suffered emotional difficulties at the time of his misconduct which expert testimony establishes was directly responsible for the misconduct and that respondent no longer suffers from such difficulties. (Std. 1.2(e)(iv.)

Respondent performed significant pro bono work in his community including work serving on the Board of Directors for the following organizations: East Bay Center for Performing Arts, the Center for Youth Leadership and Community Development, the Ethiopia Foundation, the Opportunity Children's Center, and the former Contra Costa County Legal Aid. Respondent had also contributed his time and resources as an attorney on a pro bono basis in various cases. However, the weight to be accorded to this community work is diminished somewhat since most of these community service projects occurred in the 1990's. (Std. 1.2(e)(vi).)

B. Aggravation

[5]All further references to standards are to this source.

The record establishes several aggravating circumstances by clear and convincing evidence. (Std. 1.2(b).)

Respondent has previously been disciplined for misconduct in three instances, which is a serious aggravating factor. (Std. 1.2(b)(i).)

1. On August 21, 2001, the Supreme Court ordered that respondent be suspended for two years and until he complied with standard 1.4(c)(ii), execution stayed, and that he be placed on probation for 30 months with conditions, including 75 days of actual suspension. Respondent stipulated to failing to perform services competently, failing to return client files, failing to promptly refund client fees and failing to communicate with clients in two matters. Also, based on respondent's unauthorized practice of law in three matters, he was culpable of violating sections 6068, subdivision (a), 6125 and 6126. The misconduct spanned from 1998 to 2000. (Supreme Court order No. S098010; State Bar Court case Nos. 99-O-12264; 00-O-14511; 00-O-11063; 00-O-13811 (Cons.).) The imposition of disciplinary suspension was delayed to November 15, 2001.
2. On June 27, 2006, the Supreme Court ordered that respondent be suspended for one year, execution stayed, and that he be placed on probation for three years with conditions, including 120 days' actual suspension and until he satisfied restitution. Respondent stipulated to misconduct in three client matters, which misconduct occurred from 2000 through 2004, including recklessly failing to pursue an appeal and failing to respond to reasonable status inquires of his client in the first matter; recklessly failing to appear at three court-ordered status conferences in the second matter; and failing to respond to his client's repeated telephone calls in the third matter. This court recommended a higher level of discipline to the Supreme Court as a result of respondent's termination from the State Bar Court's Alternative Discipline Program.[6] (Supreme Court order No. S142778; State Bar Court case Nos. 02-O-11244; 02-O-14970; 03-O-01102; 04-O-15652 (Cons.).)
3. On January 18, 2007, the Supreme Court suspended respondent from the practice of law for two years, that execution of that suspension be stayed, and actually suspended him for

[6]This program is also known as the State Bar Court's Program for Respondents with Substance Abuse and Mental Health Issues.

two years and until the State Bar Court grants a motion to terminate his actual suspension under rule 205 of the Rules of Procedure of the State Bar. (Respondent defaulted in the matter.) Respondent was convicted of engaging in the unauthorized practice of law in November 2001 during his suspension in his first prior record of discipline. (Supreme Court order No. S148086; State Bar Court case No. 04-C-12004.)

Respondent's regular use of his CTA to conduct his personal and business matters for more than three years and his repeated failures to maintain sufficient funds in the account establish a pattern of misconduct. (Std. 1.2(b)(ii).)

Respondent's misconduct was surrounded by bad faith, dishonesty and concealment. Respondent made no effort to determine his responsibilities relating to his trust account, or did he exercise any effort to determine the balance in the trust account or maintain a ledger, which resulted in repeated non-sufficient funds charges. Such a total abdication of responsibility can be attributed to no less than gross negligence and constitutes bad faith. (Std. 1.2(b)(iii).) Because respondent's intent to conceal his personals assets from creditors has already been found to constitute moral turpitude in violation of section 6106 in count 3, it cannot be considered as an additional aggravating factor.

Respondent demonstrated indifference toward rectification or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) He lacks an appreciation or understanding of his misconduct. "Respondent's use of specious and unsupported arguments in an attempt to evade culpability in this matter reveals a lack of appreciation both for his misconduct and for his obligations as an attorney." (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 647.) "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.) Here, respondent failed to come to grips with his culpability in asserting that he had merely opened a client trust account to protect his assets from creditors and used the account as his personal account. Instead of contrition, respondent went to great lengths during his testimony to justify his behavior.

V. 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* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

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.)

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.) Although the standards are not mandatory, they 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.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions.

Standard 1.7(b) provides "If a member is found culpable of professional misconduct in any proceeding which discipline may be imposed and the member has a record of two prior impositions of discipline as defined by Standard 1.2(f), the degree of discipline in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate." Respondent has three prior records of discipline and some mitigation.

Standards 2.2(b) and 2.3 apply in this matter.

Standard 2.2(b) provides that the commission of a violation of rule 4-100 must result in at least a three month actual suspension, irrespective of mitigating circumstances.

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

depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law.

Respondent has been found culpable of serious misconduct involving his CTA. This case presents no compelling mitigating factors, only substantial aggravating factors, including prior discipline, a pattern of misconduct, bad faith and lack of recognition of wrongdoing.

Respondent argues that he "should not be forced to suffer more than a three-month actual suspension" under standard 2.2(b). Refusing to recognize the malfeasance of operating a client trust account as a personal account and to conceal assets from creditors, respondent maintains that the overdrafts were simply a misunderstanding and that no client funds were involved. The court rejects respondent's contentions.

The State Bar urges disbarment, citing *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63 in support of its recommendation.

In *Hunter*, the attorney was disbarred for probation violations and misconduct in four client criminal law matters, which included failure to make nine scheduled court appearances, failure to file pleadings, failure to comply with six court orders, failure to perform services competently, and failure to refund an unearned fee. He was held in contempt four times and had body attachments and/or arrest warrants issued against him three times. The Review Department did not find that the attorney's wrongdoing constituted a pattern of misconduct, but it did find that the attorney's prior and present misconduct demonstrated his extreme indifference to complying with court orders. The court found that the attorney's prior discipline had very little impact on his behavior and demonstrated his inability to conform his conduct to ethical norms. Accordingly, application of standard calling for disbarment (std 1.7(b)) for third imposition of discipline was appropriate.

Similarly, respondent has not learned from his mistakes and is incapable of conforming his conduct to ethical standards.

The court also finds guidance in *Morgan v. State Bar* (1990) 51 Cal.3d 598. The Supreme Court disbarred an attorney who engaged in the unauthorized practice of law. The court

held that disbarment was the appropriate level of discipline, noting that he had been found culpable in four disciplinary proceedings, his misconduct demonstrated an indifference to the Supreme Court's disciplinary orders, had been under suspension for an accumulated period of two years and on probation for an accumulated period of 11 years during his 31 years as an attorney. Although he had five good character witnesses and made contributions to his community, he did not demonstrate that compelling mitigating circumstances predominated in the case. Disbarment is particularly appropriate when a respondent repeatedly demonstrates indifference to successive disciplinary orders of the Supreme Court. (*Id.* at p. 607.) The attorney was thus disbarred.

In determining the degree of discipline, the Supreme Court considers an attorney's prior disciplinary record and the harm resulting from his misconduct. "Significantly, in examining the combined record of this disciplinary proceeding and [the attorney's] prior discipline, we are confronted not by isolated or uncharacteristic acts but by 'a continuing course of serious professional misconduct extending over a period of several years.' [Citation.] We are therefore concerned with what appears to have become an habitual course of misconduct. We believe that the risk of [the attorney] repeating this misconduct would be considerable if he were permitted to continue in practice. [Citation.] As [the attorney] has previously demonstrated, the public and the legal profession would not be sufficiently protected if we merely, once again, suspended [him] from the practice of law. [Citation.]" (*McMorris v. State Bar* (1983) 35 Cal.3d 77, 85.) The Supreme Court's reasoning is equally applicable in this case.

Respondent here is not a candidate for suspension and/or probation. He refuses to accept responsibility for his trust accounting violations and believes he was justified in operating the client trust account as his personal and business account. Such trivialization of his failure to comply with his professional obligations and refusal to recognize his wrongdoing are indeed troubling and reflect his inability to learn from his prior misconduct that began in 1998 and continued to 2004. His current malfeasance took place from 2004 to 2007. Viewed together, respondent has engaged in a continuous course of misconduct in the past nine years involving more than five client matters, probation violations, conviction for unauthorized practice of law and trust accounting violations. In fact, he has been on probation for a period of seven years

during his 17 years as an attorney. Like *McMorris*, the risk of respondent repeating this misconduct would be considerable if he were permitted to continue in practice.

Moreover, respondent's failure to comply with his professional duties has repeatedly burdened the resources of this court and the State Bar disciplinary system, also a matter of great concern to the court. Respondent had ample opportunity to conform his conduct to the ethical requirements of the profession, but has repeatedly failed or refused to do so. Probation and suspension have proven inadequate in the past to prevent continued misconduct. (See *In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646.)

Lesser discipline than disbarment is inadequate because there are no extenuating circumstances that clearly predominate in this case. The serious, similar and prolonged nature of the misconduct in this and the three prior instances of discipline suggest that he is capable of future wrongdoing and raise concerns about his ability or willingness to comply with his ethical responsibilities to the public and to the State Bar. Moreover, it is evident that the prior instances of discipline have not served to rehabilitate respondent or to deter him from further misconduct. He has not learned from the past despite repeated opportunities to do so. Having considered the evidence, the standards and other relevant law, the court believes that disbarment is the only adequate means of protecting the public from further wrongdoing by respondent. Accordingly, the court so recommends.

VI. Recommendations

The court recommends that respondent **WAYNE WINROW** be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state.

The court recommends that respondent be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

Finally, the court recommends 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.

VII. Order of Inactive Enrollment

In accordance with Business and Professions Code section 6007, subdivision (c)(4), it is ordered that respondent be involuntarily enrolled as an inactive member of the State Bar of California effective three days after service of this decision and order by mail (Rules Proc. of State Bar, rule 220(c)).

Dated: January ___, 2008

LUCY ARMENDARIZ
Judge of the State Bar Court