PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **HERMAN JASON COHEN,** **Member No. 188783,** A Member of the State Bar.	**Case No.: 13-O-15706-DFM** **DECISION**

INTRODUCTION

Respondent **Herman Jason Cohen** (Respondent) is charged here with using his client trust account to pay business expenses, in violation of the prohibition against commingling set forth in rule 4-100(A) of the Rules of Professional Conduct.[1] Respondent has consistently acknowledged his improper use of his client trust account, and he stipulated to culpability in this matter. The only disputed issues in this proceeding are those related to the appropriate level of discipline. The court's findings and recommendations regarding discipline are set forth below.

PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed in this matter by the State Bar of California on December 5, 2014. The NDC contains only a single count, alleging that Respondent made 11 disbursements from his client trust account (CTA) for personal expenses in

[1] Unless otherwise noted, all future references to rule(s) will be to the Rules of Professional Conduct.

willful violation of the prohibition of rule 4-100(A) against commingling. On January 22, 2015, Respondent filed his response to the NDC, admitting culpability and virtually all of the factual allegations of the NDC.[2]

An initial status conference was held on January 12, 2015. At that time, the case was given a trial date of March 17, 2015, with a two-day trial estimate. At the request of the parties, the matter was also sent to a voluntary settlement conference conducted by Judge Pro Tem George Scott. At that settlement conference, Respondent made a request to be considered for this court's Alternative Discipline Program (ADP), and Judge Scott issued an order on January 30, 2015, referring the matter to a Program Judge for ADP evaluation.

On March 5, 2015, the previously-established pretrial and trial dates were vacated by the Program Judge.

On September 17, 2015, the Program Judge issued an order, finding that Respondent was not eligible for inclusion in the ADP and referring the matter back to the undersigned for trial. A new trial-setting conference was then held on October 5, 2015, at which time a January 6, 2016, trial date and a January 4, 2016, pretrial conference were scheduled.

At the January 4, 2016, pretrial conference, counsel for the State Bar complained about the lack of timely disclosure by Respondent's counsel of information regarding Respondent's anticipated witnesses and exhibits and the lack of any meet-and-confer session regarding undisputed facts and exhibits. In turn, Respondent filed a substitution of counsel, by which he removed his former counsel and became counsel for himself in this proceeding. He then asked for additional time to prepare the case for trial. Good cause appearing, the trial was then

[2] The only quarrel raised by Respondent with the allegations of the NDC was with the allegation that his disbursements from the client trust account had been for "personal expenses." In his response, he stated that the disbursements were for "business expenses." Nonetheless, the response acknowledged Respondent's culpability under rule 4-100(A) for the 11 disbursements.

continued to January 28, 2016, with Respondent being ordered to file a supplemental pretrial conference statement complying with this court's prior trial-setting order and the Rules of Practice.

Trial was commenced and completed on January 28, 2016. Both sides subsequently filed briefs regarding any authorities governing the appropriate discipline for Respondent's admitted culpability. The State Bar was represented at trial by Senior Trial Counsel Anand Kumar. Respondent acted at trial as counsel for himself.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on Respondent's response to the NDC, the two stipulations of undisputed facts and conclusions of law previously filed by the parties, and the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in California on June 3, 1997, and has been a member of the State Bar at all relevant times.

Case No. 13-O-15706

This matter arises out of an "NSF" check issued by Respondent on his client trust account. On July 22, 2013, Respondent issued a $838.50 check to USA Express to pay for costs incurred by him on behalf of his client, Noune Serobian. The client had previously agreed to immediately provide the funds to cover those costs, and the owner of USA Express had agreed to delay cashing the check in order for the client's funds to be deposited into Respondent's client trust account. Unfortunately, the client was delinquent in providing the funds and did not do so

until July 31, 2013.[3] By the time that Respondent deposited the cash provided by Serobian into his CTA on August 1, 2013, his check to USA Express had already been both deposited and returned by the bank for insufficient funds. When the owner of USA Express contacted Respondent about the bounced check, the situation was immediately rectified.

By law, the bank was required to notify the State Bar of the NSF check issued on Respondent's client trust account. When it did so, the State Bar contacted Respondent regarding the overdraft, received Respondent's explanation for it, and concluded that no charges should be filed because of the NSF check. However, during the course of the State Bar's investigation of the NSF check, the record of disbursements from Respondent's CTA was reviewed, and it was noted that 11 of the disbursements appeared to be for non-client related expenses. Those 11 disbursements are the basis for the instant proceeding.

Between on or about April 2013 and October 2013, Respondent issued the following checks from funds in Respondent's client trust account for the payment of his firm's business expenses and a parking ticket while client funds were held in Respondent's client trust account:

Posting Date	Check No.	Payee	Amount	Purpose of Payment
4/2/2013	3595	Yelena Vasina	$2,500	Employee
4/30/2013	3603	Copy to Go	$106.82	Attorney Service
5/1/2013	3602	Yelena Vasina	$2,000	Employee
5/10/2013	3609	Yelena Vasina	$2,000	Employee
6/12/2013	3616	Yelena Vasina	$4,500	Employee
6/14/2013	3617	Copy to Go	$106.82	Attorney Service
7/2/2013	3621	Yelena Vasina	$2,000	Employee
8/7/2013	3623	Yelena Vasina	$3,000	Employee
8/30/2013	3630	City of Los Angeles	$68	Parking ticket
9/10/2013	3632	Yelena Vasina	$4,500	Employee
9/16/2013	3636	Yelena Vasina	$3,210	Employee

[3] Serobian provided a sworn declaration to the State Bar in 2014, acknowledging responsibility for being delinquent in providing the requested funds to Respondent. This declaration also praised Respondent for his honesty, his hard work, and for the successful resolution he had achieved on the client's behalf.

It is undisputed that none of these 11 disbursements were made by Respondent using funds of any client. Instead, the 11 disbursements were made by Respondent using his own funds to cover business expenses of his law firm, primarily the salary of his secretary. Nor is there any evidence or contention in this proceeding of any misappropriation by Respondent of any other funds of any client at any time.

Respondent has readily conceded his use of his client trust account to pay business expenses of his law practice and he had stipulated that his use of the CTA for that purpose violated the prohibition of rule 4-100(A). His unchallenged explanation for this improper conduct is that, when he resumed his own private legal practice in 2013, the banks were unwilling to allow him to open a new bank account because of an adverse credit report that had been issued by his prior bank. While Respondent is at a loss to explain completely the circumstances resulting in the prior adverse credit report, he described and provided other evidence showing that he had been involved for a number of years in an extremely acrimonious litigation with his former spouse, in which he had been repeatedly, and possibly unjustly, charged by her attorney with failing to make required support payments. These allegations, in turn, also prompted the Los Angeles County Child Social Services Department (CSSD) to initiate collection procedures against Respondent, even though Respondent had full physical custody of the children. Because Respondent needed to have access to a bank account from which disbursements could be made for expenses of his newly-resumed private legal practice, he elected - out of perceived necessity - to use as his operating account the client trust account he had kept open from his prior years of private practice.

During the trial of this matter, Respondent presented documents confirming that his dispute with his former spouse had now been fully resolved and that the collection efforts of the

CSSD have now been terminated and its file closed. More importantly, Respondent has now been able to open a bank account to use as his operating account, eliminating any perceived or possible need for him to use his CTA for that purpose in the future.

Count 1 – Rule 4-100(A) [Commingling – Payment of Personal Expenses From Client Trust Account]

Prior to commencement of the instant trial, the parties stipulated, and this court now finds: By issuing 11 checks from his client trust account to pay for his firm's expenses and a parking ticket between April 2, 2013, and September 16, 2013, while client funds were held in his client account, Respondent deposited and commingled funds belonging to Respondent in a bank account labeled "Trust Account," "Client's Funds Account" or words of similar import, in willful violation of Rules of Professional Conduct, rule 4-100(A).

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.5.)[4] The court finds the following with regard to aggravating factors.

Multiple Acts of Misconduct

Respondent's many acts of depositing and disbursing personal funds from his client trust account constitute multiple acts of misconduct, an aggravating factor. (Std. 1.5(b).)

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) The court finds the following with regard to mitigating factors.

[4] All further references to standard(s) or std. are to this source.

No Prior Discipline

Respondent had practiced law in California for over 15 years prior to the commencement of the instant misconduct. During that span, Respondent had no prior record of discipline. Respondent's lengthy tenure of discipline-free practice is entitled to significant weight in mitigation. (Std. 1.6(a); *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 520; *In the Matter of Brazil* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 679, 688; *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594.).)

Cooperation

Respondent entered into an extensive stipulation of facts and freely admitted the trust account violations in this case, for which conduct Respondent is entitled to mitigation credit. (Std. 1.6(e); see also *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443.)

Remorse/Remedial Measures

Respondent has credibly expressed his remorse for his improper use of his client trust account. He has also taken steps to avoid any repetition of such misconduct in the future, including succeeding in opening a new bank account to use for his personal and operating purposes. Further, in October 2014, Respondent attended both the State Bar Ethics and Client Trust Accounting Schools and passed the tests given at the end of the two programs.

No Harm

Respondent is entitled to mitigation credit because his misconduct caused no actual harm to any client or person. (Std. 1.6(c).)

Candor

Respondent demonstrated candor to the State Bar and this court regarding the circumstances showing his misconduct. Such is a mitigating factor. (Std. 1.6(e).)

Character Evidence

Respondent presented good character evidence from numerous individuals, representing a wide range of references in the legal and general communities, regarding Respondent's integrity, his fine qualities as an attorney, his good character, his pro bono activities, and his commitment to his clients and two children. Most, but not all, of the witnesses acknowledged their awareness of the full extent of Respondent's misconduct and described the difficult personal circumstances under which he was operating at the time. The declarants included attorneys, former clients, former staff, and members of the business community. Respondent is entitled to substantial mitigation for this character evidence. (Std. 1.6(f).)

Financial/Family Problems

Clear and convincing evidence that a respondent's misconduct was caused by now-resolved family and/or financial problems may be treated as a mitigating factor. (*In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81, 87; *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 44; *In the Matter of Mitchell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332, 340-341.) Such is the case here. As previously discussed, Respondent's inappropriate use of his client trust account resulted from the refusal of the banks to allow him to open a new bank account when he resumed his private practice in 2013. That problem resulted from an extremely acrimonious dissolution proceeding between Respondent and his former spouse, resulting in numerous claims that Respondent was not paying required support payments and an adverse credit report in 2010. The difficulties with Respondent's

former spouse have now been resolved; there are no ongoing claims or concerns regarding Respondent's support payments; and he has now succeeded in opening a bank account to use for his personal and business operating purposes.

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) 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.) Although the standards are not binding, they are to be afforded great weight because "they promote the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, the court is permitted to temper the letter of the law with considerations peculiar to the offense and the offender. (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994; *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the court considers relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Standard 2.2(a) provides that an actual suspension of three months is the presumed sanction for commingling entrusted funds. Despite the presumption of that standard, neither the State Bar nor Respondent argues that a three-month actual suspension should be imposed here as a result of Respondent's misconduct. (Accord: *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 30 [expressly declining to follow prior standard purportedly mandating minimum three-month actual suspension for any misappropriation].) Instead, at the completion of the instant trial, the State Bar asked that the recommended discipline include a 30-day actual suspension. In turn, Respondent requested that a "stayed" suspension, with no actual suspension, be recommended.

Turning to the case law, neither the State Bar nor this court has been able to identify any prior decision of either the Supreme Court or the Review Department in which any period of actual suspension was imposed for misconduct consisting solely of a commingling violation without any misappropriation of client funds. In contrast, there are numerous cases in which misconduct including commingling has resulted in either a stayed suspension (with no actual suspension) or merely a reproval. (See, e.g., *Waysman v. State Bar* (1986) 41 Cal.3d 452; *Palomo v. State Bar* (1984) 36 Cal.3d 785; *Vaughn v. State Bar* (1972) 6 Cal.3d 847; *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716; see also *In the Matter of Respondent F, supra,* 2 Cal. State Bar Ct. Rptr. at pp. 29-30 [discussing and following the preceding cases despite the intervening adoption of contrary standards].)

As did the Review Department in *Respondent F*, this court finds that there is no need here for any actual suspension of Respondent "as a sanction to protect the public, the courts, and the legal profession, to maintain the high professional standards, and to preserve public confidence." (*Id.* at p. 29.) In sum, the evidence is clear that Respondent's misuse of his CTA resulted from

circumstances that no longer exist, that Respondent's past violation of a single standard regulating the legal profession was aberrational, and that his past misconduct does not represent or reflect any risk of future misconduct by him. This conclusion is especially buttressed by the significant mitigating factors listed above.

However, because Respondent's past misuse of his client trust account was not only willful but also intentional, albeit under circumstances of perceived necessity, this court declines to recommend discipline consisting merely of a reproval, as did several of the courts in the cases cited above. Instead, it recommends that a period of stayed suspension, coupled with a lengthy period of probation, be imposed. Such discipline will make clear to one and all that any intentional misuse of a client trust account, no matter how well-intentioned, will be viewed and treated as misconduct warranting serious discipline.

RECOMMENDED DISCIPLINE

Stayed Suspension/Probation

For all of the above reasons, it is recommended that **Herman Jason Cohen,** State Bar No. 188783, be suspended from the practice of law for one year; that execution of that suspension be stayed; and that Respondent be placed on probation for two years, with the following conditions:

1. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.
2. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must

meet with the probation deputy either in person or by telephone. During the period of probation, he must promptly meet with the probation deputy as directed and upon request.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

4. He must submit written quarterly reports to the Office of Probation on or before each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

5. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating

to whether he is complying or has complied with the conditions contained herein.

6. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics and Client Trust Accounting Schools and passage of the tests given at the end of those sessions. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending those schools. (Rules Proc. of State Bar, rule 3201.)[5]

The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if Respondent has complied with all conditions of probation, the stayed suspension will be satisfied and that suspension will be terminated.

MPRE

It is further recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court order imposing discipline in this matter, or during the period of his suspension, whichever is longer, and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.) Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

[5] In making this recommendation, the court is aware that Respondent took and passed both of those schools in October 2014. However, because of the length of time since he did so and the considerable value to be derived by any attorney, including Respondent, from attending those schools, it is recommended that this prophylactic educational measure be repeated.

Costs

It is further recommended that costs be awarded to the State Bar in accordance with section 6086.10 and that such costs be enforceable both as provided in section 6140.7 and as a money judgment. It is also recommended that Respondent be ordered to reimburse the Client Security Fund to the extent that the misconduct in this matter results in the payment of funds and that such payment obligation be enforceable as provided for under Business and Professions Code section 6140.5.

Dated: April 25, 2016

DONALD F. MILES
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 Los Angeles, on April 25, 2016, I deposited a true copy of the following document(s):

DECISION

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 Los Angeles, California, addressed as follows:

HERMAN J. COHEN
COHEN LAW GROUP
2300 WESTWOOD BLVD FL 2
LOS ANGELES, CA 90064

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

ANAND KUMAR, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on April 25, 2016.

/Cleaver

Tammy Cleaver
Case Administrator
State Bar Court