

PUBLIC MATTER

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STATE BAR COURT
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LOS ANGELES

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of)	Case No. 16-O-13443-CV
)	
THOMAS MATTHEW GIESER,)	DECISION
)	
A Member of the State Bar, No. 65916.)	
_____)	

INTRODUCTION¹

In this contested disciplinary proceeding, respondent Thomas Matthew Gieser (Respondent) is charged with two counts of misconduct: misappropriation and failure to maintain client funds in trust.

This court finds, by clear and convincing evidence, that Respondent is culpable on both counts. In view of his misconduct, as well as the evidence in aggravation and mitigation, the court recommends, among other things, that Respondent be suspended from the practice of law for two years, that execution of suspension be stayed, that he be placed on probation for two years, and that he be actually suspended for nine months.

SIGNIFICANT PROCEDURAL HISTORY

The Office of Chief Trial Counsel of the State Bar of California (OCTC) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on November 28, 2017. On December 15, 2017, Respondent filed his response to the NDC.

¹ Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

A one-day hearing was held before this court on March 22, 2018. The matter was submitted at the conclusion of the trial.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent was admitted to the practice of law in California on December 19, 1975, and has been a member of the State Bar of California at all times since that date.

The following facts are based on the parties' partial stipulation as to facts filed March 12, 2018, and the evidence and testimony admitted at trial. The court finds Respondent's testimony to be credible.

Facts

On January 28, 2014, Bernice E. Bellinger (Decedent) died testate. In her will, Decedent named two of her nieces, cousins Monica Coney (Coney) and Willene Ford (Ford), as co-executors of her estate. Coney is the complaining witness in the OCTC's case and Ford died during Respondent's handling of the probate case.

On March 27, 2014, Coney hired Respondent to handle the probate of Decedent's estate (Estate) and signed the retainer agreement with Respondent. On March 28, 2014, Respondent filed a petition to administer the Estate in *In Re Estate of Bernice E. Bellinger*, Los Angeles County Superior Court, case number BP150692, on behalf of Coney as the petitioner. Both Coney and Ford were named as the co-executors in the petition. Thereafter, Respondent obtained Letters of Administration granting Coney and Ford full authority to administer the Estate under the Independent Administration of Estates Act.

On January 15, 2015, escrow closed and the Estate received proceeds from the sale of Decedent's house, which was the main asset of the Estate.

On February 24, 2015, Respondent sent Ford an email, with a copy to Coney, requesting that Ford issue seven checks from the proceeds in the Estate's account. Respondent directed

Ford to make one of the checks payable to his client trust account for \$26,920. Respondent also stated that the funds would be for payment of executor's fees, attorney's fees, and a reserve.

Ford issued the checks as Respondent requested, including check No. 202 from the Estate's account, payable to Respondent's client trust account in the amount of \$26,920. In the memo section of the check was written "Bellinger estate." On February 26, 2015, Respondent deposited this check into his Wells Fargo Bank client trust account No. xxxxxx7483 (CTA).

As Respondent acknowledged in the retainer agreement signed by Coney, Respondent was only entitled to ordinary and/or extraordinary fees as permitted by the probate court. At no time between February 2015 and February 2016 did Respondent obtain probate court approval to take any portion of the \$26,920 as his attorney fees.

On March 30, 2015, because of an electronic transfer of \$2,500 from the CTA to Respondent's Wells Fargo Bank general account No. xxxxxx0070 (general account), the CTA balance was lowered to \$25,361.98.

From April 15 through May 28, 2015, six additional electronic transfers of varying amounts totaling \$19,000 were made from the CTA to Respondent's general account. None of these transfers were related to the Estate. This lowered the balance in the CTA to \$18,861.98. Excluding two deposits made on April 1, 2015, and April 15, 2015, totaling \$12,500, which were unrelated to the Estate, the actual amount available for the Estate was \$6,361.98. There were several debits and credits thereafter, but none were related to the Estate.

On May 12, 2015, Ford died.

On June 2, 2015, on the probate court's own motion, an order to show cause (OSC) hearing was set for December 18, 2015, regarding the failure to file a status report or petition for

final distribution. Respondent did not appear at the December 18, 2015 hearing.² The hearing was reschedule to February 19, 2016.

Meanwhile, Coney hired attorney Desiree V. Causey (Causey). On October 12, 2015, attorney Causey sent Respondent a letter with a substitution of attorney form to sign and return, and also asked him when the client file would be available. Instead of signing the substitution, on October 15, 2015, Respondent sent Coney a letter enclosing a draft of the First and Final Account for Coney's review. In this document, Respondent stated that the Decedent's house was sold, that the Decedent's car was sold to Ford's daughter, and that Respondent's law firm should be paid \$10,405 "as statutory fees, none of which has been paid."

On January 8, 2016, after attorney Causey received the client file from Respondent, she filed a Notice of Motion and Motion to Enter Substitution of Counsel and Order Other Actions (substitution motion). Attached as an exhibit to the substitution motion was a copy of a State Bar complaint filed by Coney against Respondent primarily alleging failure to communicate and concerns regarding disclosure of confidential information and joint representation.

Respondent admitted that receipt of the substitution motion and attached State Bar complaint, focused him on the CTA and he attempted to transfer the funds from his CTA to successor attorney Causey. It was only then that he realized that the estate funds were not there. Immediately upon investigation and discovery of the prohibited transfers and the unintentional misappropriation, Respondent transferred funds from personal savings to replenish the CTA. Respondent testified that he had \$75,000 in liquid assets at all times during the time period of the misconduct.

² Had Respondent been present at the hearing, or even having had notice of the hearing, Respondent should have been on alert that he had to account for the funds on behalf of the Estate. This should have triggered him to reconcile the balance of the CTA at that time.

On January 27, 2016, the probate court again ordered an OSC hearing regarding the failure to file a status report or petition for final distribution. The OSC hearing was set for February 19, 2016.

As of February 2, 2016, the CTA dipped to a low balance of \$3,770.77. The bank records for the general account did not reveal any payments made on behalf of the Estate, but only revealed payments for various office and personal expenses. Between March 30, 2015 and February 2, 2016, Respondent made a total of between 10-12 electronic transfers from his CTA.

On February 17, 2016, Respondent filed the required status report in probate court. He attached a declaration stating that he learned of the OSC hearing from attorney Causey. Respondent declared that the "estate is bankrupt" and that the paid creditor's claims totaled \$259,259, of which \$250,000 was paid to the State of California. Respondent added that the total funds remaining were \$26,920, of which \$23,500 was for executor's fees, attorney's fees, and extraordinary fees of \$2,500. The court continued the OSC hearing to May 2016.

On February 22, 2016, Respondent sent a cashier's check to attorney Causey in the amount of \$26,920, which he stated was from his firm's "attorney/client trust account." The cashier's check was issued from Respondent's Bank of America client trust account No. xxxxxx0210 (B of A account) and not the Wells Fargo Bank CTA.

In order to obtain the cashier's check from his B of A account, Respondent made multiple transfers of funds, as follows:³

- On February 16, 2016, Respondent's wife, Colette Gieser ("Colette"), deposited \$24,858 via cashier's check into Respondent's Wells Fargo Bank CTA, bringing the balance to \$28,828.77.

³ On cross examination at trial, Respondent credibly testified that he structured the payment in the manner as noted because he wanted to get the funds to successor counsel immediately, and Wells Fargo promised a delay in processing while Bank of America did not.

- On February 17, 2016, Respondent then issued check No. 1016 from his Wells Fargo Bank CTA and deposited it into his B of A account.
- On February 22, 2016, Respondent purchased a cashier's check in the amount of \$26,920 from his B of A account, which he then delivered to attorney Causey.

Between February 2015 and February 17, 2016, Respondent's B of A account had \$203.40 in it, except for when there were a few deposits on behalf of other clients.

Respondent's sole office employee, Colette, his paralegal/office manager and wife of 35 years, was responsible for reconciling the monthly bank statements. However, during the relevant time period, Colette was distracted due to family problems. As a result, the bank statements were not reconciled.

On May 18, 2016, attorney Causey appeared at the scheduled OSC hearing. The court discharged the OSC and continued the regular hearing to July 20, 2016. On July 20, 2016, Causey appeared and the court continued the hearing to October 20, 2016. On October 13, 2016, Causey filed a First and Final Account and Report of Surviving Executor and Petition for Approval of Claims Paid, Statutory Executor's Commissions, Statutory Attorney's Fees, Final Distribution, and Court Order Releasing Funds in Attorney Client Trust Account in Payment of Statutory Compensation and Distribution. On October 19, 2016, the hearing was taken off calendar as the final distribution had been filed. The probate court did not make any express findings about Respondent's actions.

Conclusions of Law

Count One – Section 6106 [Moral Turpitude – Misappropriation]

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

On February 26, 2015, Respondent deposited the \$26,920 check into his CTA to be held as a reserve and to pay executor and attorney fees. However, a year later, by February 2, 2016, the balance of his CTA fell to \$3,770.77, before Respondent reimbursed the Estate.

Respondent credibly testified that this was not due to any nefarious motive on his part. Rather, he admitted that he was "extremely careless." He delegated reconciliation of the various bank accounts to his wife/paralegal/office manager. He did not supervise her, and merely assumed that she was keeping proper and accurate financial records. Whether she was or not is unclear, but, in any event, when she was distracted by family problems Respondent took responsibility over the bank accounts and financial transactions. In addition to not consulting his client ledgers, account journals, monthly reconciliations and check book registers before or at the time of the transfers, he made the transfers electronically which further complicated and compounded problem. Consequently, there was a complete failure on his part to reconcile the accounts. Respondent claimed that he did not realize that the account from which he was transferring the funds was the CTA, and that his intent was to transfer funds as between his personal accounts. Respondent testified that the same mistake was repeated over and over again because he had not established any regular procedures for reconciling bank records.

While Respondent's reliance on his office manager/wife may have explained his mismanagement and inattention to the CTA, it does not relieve him from the professional responsibility to properly maintain funds in that account. He has 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.) These duties are nondelegable. (*Coppock v. State Bar* (1988) 44 Cal.3d 665, 680.) "[I]n the handling of client funds, an attorney has a direct professional responsibility to his or her client, and the attorney

does not avoid that direct professional responsibility by, even reasonable, reliance on a partner, associate or responsible employee." (Cf. *Ibid.*)

Respondent further claimed that at all times, he had sufficient funds (\$75,000 in liquid assets) to replenish the misappropriated funds. Although he provided no evidence to support the claim, he did, in fact, replenish the missing funds as soon as he discovered the CTA's deficiency. As discussed above, whether he had personal liquid assets to cover the CTA funds is irrelevant to his nondelegable duty to monitor the client funds and his CTA.

Respondent's misconduct need not be in bad faith to be willful. To be deemed a willful misappropriation, "all that is required is 'a general purpose or willingness to commit the act or permit the omission.' [Citation.]" (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 37.) The mere fact that the balance in an attorney's trust account has fallen below the total of amounts deposited in and purportedly held in trust, supports a conclusion of misappropriation. (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474-475.) If the misappropriation was caused by inexcusable violations of an attorney's duties to oversee client funds entrusted to his care, the violation is deemed willful even in the absence of deliberate wrongdoing. (*Edwards v. State Bar, supra*, 52 Cal.3d 28, 37.)

And, it is well settled that "[t]here is no doubt that the wilful misappropriation of a client's funds involves moral turpitude. [Citations.]" (*Bates v. State Bar* (1983) 34 Cal.3d 920, 923.) "Gross negligence or recklessness in discharging one's duties as an attorney involves moral turpitude." (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127.) As Respondent admitted, he was extremely careless in his handling of his CTA.

Therefore, the mere fact that his CTA's balance fell to \$3,770.77 on February 2, 2016, which was below the entrusted sum of \$26,920, established that Respondent had grossly and

negligently misappropriated \$23,149.23 (\$26,920 - \$3,770.77). Accordingly, his mishandling of the trust funds amounted to moral turpitude, in willful violation of section 6106.

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

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

As found in count one, Respondent allowed the amount in the CTA to drop below the amount of client funds deposited therein. Thus, Respondent failed to maintain funds received for the benefit of the Estate, in willful violation of rule 4-100(A).

Although Respondent violated both rule 4-100(A) and section 6106, the court assigns no additional weight to the rule violation in the discipline analysis because the misconduct underlying the section 6106 violation supports the same or greater discipline. (*In the Matter of Sampson, supra*, 3 Cal. State Bar Ct. Rptr. 119, 127 [no additional weight given to rule 4-100(A) violation when same misconduct addressed by section 6106].)

Aggravation⁴

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Std. 1.5.) There is one aggravating factor.

Multiple Acts of Wrongdoing (Std. 1.5(b).)

Respondent's misconduct within one year involving 10-12 instances of improper CTA withdrawals constitutes moderate weight in aggravation. (See *In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273 [attorney's 65 improper CTA withdrawals constituted significant aggravation].)

⁴ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.6.) Respondent has four significant mitigating factors.

No Prior Record (Std. 1.6(a).)

Respondent's lack of a prior record of discipline in 39 years of practice at the time of his misconduct in March 2015, when the balance in his CTA dropped from \$26,920 to \$25,361.98, is a significant mitigating factor. (*In the Matter of Smithwick* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 320 [attorney's 30-year discipline-free practice is given significant weight in mitigation].)

Candor/Cooperation to Victims/State Bar (Std. 1.6(e).)

Respondent cooperated by entering into a stipulation of facts and admission of documents, which is a mitigating factor.

Good Character (Std. 1.6(f).)

Respondent presented evidence of good character and community work through the testimony of eight witnesses. Respondent's character witnesses consisted of a superior court judge, three attorneys, a retired law enforcement officer, the current and past president of Servite High School, and the president of the board of directors for a non-profit school for special needs children. Favorable character testimony from employers and attorneys is entitled to considerable weight. (*Feinstein v. State Bar* (1952) 39 Cal.2d 541, 547.) Because judges and attorneys have a "strong interest in maintaining the honest administration of justice" (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319), "[t]estimony of members of the bar . . . is entitled to great consideration." (*Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403.)

Respondent's character witnesses demonstrated a general understanding of the alleged misconduct and attested to his honesty, good character, trustworthiness, and integrity. They also

praised his compassion and dedication to serving the community. Several of the witnesses have known respondent for more than 20 years; their high opinion of him has not changed even though they were aware of his misconduct. They opined that Respondent's reputation in the community is that he possesses the highest degree of integrity and honesty.

For example, Orange County Superior Court Judge David L. Belz attested to Respondent's personal and professional integrity as he has known Respondent for more than 60 years. Judge Belz testified that Respondent would never put a client at risk, and is committed to serving the best interest of his clients.

Attorney David P. Lee declared that Respondent's "conduct seems to be obviously an honest mistake, attributable to inadvertence and oversight." He opined that Respondent "would have had no reason to intentionally take funds out of a client trust account and such an action would not be consistent with his character or trustworthiness."

Howard S. Platte, president of the board of directors of Speech and Language Development Center, declared: "This isolated incident, from an otherwise long and flawless record, should not be viewed as representative of his character or trustworthiness."

Respondent's good character evidence warrants considerable weight in mitigation.

Respondent's community work is also a mitigating factor. Respondent has long volunteered his time and services to educational and charitable organizations such as the Knights of Columbus, Servite High School, the Servite Order, and the Speech and Language Development Center. Specifically, he participates on the board of directors and provides guidance and advice to these organizations. He is strongly committed to charity and helping others. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [service to community is mitigating factor entitled to considerable weight].)

Remorse/Recognition of Wrongdoing (Std. 1.6(g).)

Respondent is extremely remorseful for his oversight and mistake in managing his CTA. He recognizes that he is not technologically savvy and that engaging in electronic transfers further enabled the misappropriation. He now has a system for reconciling accounts, and he no longer makes electronic transfers from his CTAs. Instead, he now withdraws CTA funds by check. He does electronic transfers for his personal accounts, but has someone double-check his work before completing the transaction.

DISCUSSION

The primary purposes of attorney discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; std. 1.1.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) 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.) Standards 1.7, 2.1(b), and 2.11 apply.

Standard 1.7 provides that if aggravating or mitigating circumstances are found, they should be considered alone and in balance with any other aggravating or mitigating factors. And, if two or more acts of professional misconduct are found in a single disciplinary

proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.7(a).)

Standard 2.1(b) provides that “[a]ctual suspension is the presumed sanction for misappropriation involving gross negligence.”

Standard 2.11 provides that “[d]isbarment or actual suspension is the presumed sanction for an act of moral turpitude, dishonesty, fraud, corruption, intentional or grossly negligent misrepresentation, or concealment of a material fact. The degree of sanction depends on the magnitude of the misconduct; the extent to which the misconduct harmed or misled the victim, which may include the adjudicator; the impact on the administration of justice, if any; and the extent to which the misconduct related to the member’s practice of law.”

The OCTC argues that Respondent should be disbarred for his intentional misappropriation of \$23,149.23 from the CTA, citing *Chang v. State Bar* (1989) 49 Cal.3d 114; *Kelly v. State Bar* (1988) 45 Cal.3d 649; *Kaplan v. State Bar* (1991) 52 Cal.3d 1067; and *Grim v. State Bar* (1991) 53 Cal.3d 21 in support of its recommendation.

Respondent asserts that disbarment is not the appropriate degree of discipline in view of his unintentional misappropriation and his strong mitigation. He maintained that he unknowingly committed errors when making online electronic transfers as between his CTA and general accounts. He argues that he has no prior discipline, there were no acts of deceit, full repayment was made before he was contacted by the OCTC, the conduct was aberrational and he took steps to improve his management of entrusted funds. Finally, he contends that his reputation for honesty and integrity is of the highest degree. He urges a public reproof, as he is now 68 years old and nearing retirement.

Contrary to the misconduct found in the cases cited by OCTC, Respondent did not engage in intentional misappropriation. “Disbarment would rarely, if ever, be an appropriate

discipline for an attorney whose only misconduct was a single act of negligent misappropriation, unaccompanied by acts of deceit or other aggravating factors.” (*Edwards v. State Bar, supra*, 52 Cal.3d 28, 38.)

The court agrees that, in this matter, a lesser sanction than disbarment is appropriate since the record demonstrates that Respondent is willing and has the ability to conform to ethical responsibilities in the future. Disbarment will not be recommended where there is no evidence that a sanction short of disbarment is inadequate to deter future misconduct and protect the public. (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 472.)

Respondent's mitigating circumstances significantly outweigh the one aggravating factor of multiple acts of trust account violations, demonstrating that he is able “to adhere to acceptable standards of professional behavior.” (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 316-317.) He has no prior record of discipline in 39 years of practice. He has exhibited good moral character and extensive pro bono activities. Respondent has accepted responsibility for his misconduct and cooperated with the OCTC, as demonstrated by his stipulation of facts. Moreover, his misconduct did not involve dishonesty, fraud, corruption, misrepresentation, or concealment.

But, a discipline of public reproof is insufficient in view of his multiple acts of misappropriation totaling more than \$23,000, albeit by gross negligence. Under standards 2.1(b) and 2.11, a period of actual suspension is the appropriate sanction.

Cases relevant to the current proceeding include *Heavey v. State Bar* (1976) 17 Cal.3d 553, *Kelly v. State Bar* (1991) 53 Cal.3d 509, *Edwards v. State Bar, supra*, 52 Cal.3d 28, and *In the Matter of Sampson, supra*, 3 Cal. State Bar Ct. Rptr. 119. The level of discipline ranges from a period of 30 days to 18 months of actual suspension. In addition, great weight must be given to the mitigation in assessing the appropriate level of discipline.

In *Heavey*, the Supreme Court imposed a two-year stayed suspension, two years' probation and 30 days' actual suspension for the attorney's misappropriation of \$350 (client trust account was overdrawn 13 times in one year) and commingling of client funds. The attorney was in practice for 30 years with no prior discipline.

In *Kelly*, the Supreme Court imposed a four-month actual suspension for failure to deposit trust funds into the proper account, commingling those funds with personal funds, failure to promptly pay the funds and willful misappropriation of \$750 of trust funds and failure to pay them for two years. The Supreme Court found that there was a lack of clear evidence of either serious injury to Kelly's clients or wrongful intent and that Kelly's 13 years of practice without prior discipline was a strong mitigating factor.

Like *Heavey*, Respondent was also discipline-free for a significant period of time. And like *Kelly*, there was neither serious injury to Respondent's client, the Estate, nor wrongful intent to misappropriate the entrusted funds in the CTA.

In *Edwards*, the Supreme Court imposed a one-year actual suspension for misappropriating \$3,000 of client funds. Edwards acknowledged a practice of commingling his own funds in his client trust account and failing to keep proper records. He also used trust account funds to prevent foreclosure on his residence when he knew the funds were not his, and to refund unearned fees to a former client whose fee payments had never been deposited in the trust account. In mitigation, the court found that the attorney made full repayment within three months of the misappropriation, was candid with the client and the State Bar and took voluntary steps to improve his handling of entrusted funds. He had practiced law for 12 years without prior discipline.

Like *Edwards*, Respondent failed to keep proper records. But, unlike *Edwards*, Respondent did not knowingly misuse the CTA funds for his own benefit.

In *Sampson*, an 18-month actual suspension, and until he made restitution of about \$25,000, was imposed on respondent for failing to supervise his personal injury cases and recklessly disregarding his trust account obligations for almost a year, failing to retain \$34,000 in settlement funds in the trust account and failing to provide competent legal services. He had no prior record of discipline in 13 years of practice. Aggravating factors included multiple instances of misconduct and significant harm to a medical lienholder. His wrongdoing was not aberrational in that his misconduct lasted at least three and a half years.

In this matter, although the amount of misappropriated funds involved was significantly more than that in *Heavey* (\$350), *Kelly* (\$750), and *Edwards* (\$3,000), Respondent's misconduct is less serious and mitigation is far more significant than that of those attorneys. Respondent has expressed extreme remorsefulness for being so careless and inattentive in managing his CTA. Unlike *Sampson*, Respondent's misappropriation was aberrational; and he made full restitution within one month of discovering the problem. His good character is beyond reproach. And above all, his lack of a prior record in 39 years of practice is a compelling mitigating factor.

The court is mindful that the proper objectives of attorney discipline do not include punishment of the errant attorney; rather, they are "protection of the public, the profession, and the courts, maintenance of high professional standards, and preservation of public confidence in the legal profession." (*Rose v. State Bar* (1989) 49 Cal.3d 646, 666.)

Therefore, having considered the misconduct, the aggravating and mitigating circumstances, as well as the case law and the standards, this court concludes that a nine-month actual suspension recommendation is sufficient to adequately protect the public and preserve the integrity of the legal profession.

RECOMMENDATIONS

It is recommended that Thomas Matthew Gieser, State Bar Number 65916, be suspended from the practice of law for two years, that execution of that suspension be stayed, and that Respondent be placed on probation for two years with the following conditions.

Conditions of Probation

1. Actual Suspension

Respondent is suspended from the practice of law for the first nine months of the period of Respondent's probation.

2. Review Rules of Professional Conduct

Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must (1) read the California Rules of Professional Conduct (Rules of Professional Conduct) and Business and Professions Code sections 6067, 6068, and 6103 through 6126, and (2) provide a declaration, under penalty of perjury, attesting to Respondent's compliance with this requirement, to the State Bar's Office of Probation in Los Angeles (Office of Probation) with Respondent's first quarterly report.

3. Comply with State Bar Act, Rules of Professional Conduct, and Probation Conditions

Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of Respondent's probation.

4. Maintain Valid Official Membership Address and Other Required Contact Information

Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must make certain that the State Bar Attorney Regulation and Consumer Resources Office (ARCR) has Respondent's current office address, email address, and telephone number. If Respondent does not maintain an office, Respondent must provide the mailing

address, email address, and telephone number to be used for State Bar purposes. Respondent must report, in writing, any change in the above information to ARCR, within ten (10) days after such change, in the manner required by that office.

5. Meet and Cooperate with Office of Probation

Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must schedule a meeting with Respondent's assigned probation case specialist to discuss the terms and conditions of Respondent's discipline and, within 30 days after the effective date of the court's order, must participate in such meeting. Unless otherwise instructed by the Office of Probation, Respondent may meet with the probation case specialist in person or by telephone. During the probation period, Respondent must promptly meet with representatives of the Office of Probation as requested by it and, subject to the assertion of applicable privileges, must fully, promptly, and truthfully answer any inquiries by it and provide to it any other information requested by it.

6. State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court

During Respondent's probation period, the State Bar Court retains jurisdiction over Respondent to address issues concerning compliance with probation conditions. During this period, Respondent must appear before the State Bar Court as required by the court or by the Office of Probation after written notice mailed to Respondent's official membership address, as provided above. Subject to the assertion of applicable privileges, Respondent must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

7. Quarterly and Final Reports

a. Deadlines for Reports. Respondent must submit written quarterly reports to the Office of Probation no later than each January 10 (covering October 1 through December 31 of

the prior year), April 10 (covering January 1 through March 31), July 10 (covering April 1 through June 30), and October 10 (covering July 1 through September 30) within the period of probation. If the first report would cover less than 30 days, that report must be submitted on the next quarter date and cover the extended deadline. In addition to all quarterly reports, Respondent must submit a final report no earlier than ten (10) days before the last day of the probation period and no later than the last day of the probation period.

b. Contents of Reports. Respondent must answer, under penalty of perjury, all inquiries contained in the quarterly report form provided by the Office of Probation, including stating whether Respondent has complied with the State Bar Act and the Rules of Professional Conduct during the applicable quarter or period. All reports must be: (1) submitted on the form provided by the Office of Probation; (2) signed and dated after the completion of the period for which the report is being submitted (except for the final report); (3) filled out completely and signed under penalty of perjury; and (4) submitted to the Office of Probation on or before each report's due date.

c. Submission of Reports. All reports must be submitted by: (1) fax or email to the Office of Probation; (2) personal delivery to the Office of Probation; (3) certified mail, return receipt requested, to the Office of Probation (postmarked on or before the due date); or (4) other tracked-service provider, such as Federal Express or United Parcel Service, etc. (physically delivered to such provider on or before the due date).

d. Proof of Compliance. Respondent is directed to maintain proof of Respondent's compliance with the above requirements for each such report for a minimum of one year after either the period of probation or the period of Respondent's actual suspension has ended, whichever is longer. Respondent is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

8. State Bar Ethics School and Client Trust Accounting School

Within one year after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar Ethics School and of the State Bar Client Trust Accounting School 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 Respondent will not receive MCLE credit for attending these sessions. If Respondent provides satisfactory evidence of completion of the Ethics School and/or the Client Trust Accounting School after the date of this decision but before the effective date of the Supreme Court's order in this matter, Respondent will nonetheless receive credit for such evidence toward his duty to comply with this condition.

9. Reporting re Proper Handling of Entrusted Client Funds, Property, or Securities

Respondent must comply with the following reporting requirements:

- a. If Respondent possessed client funds, property, or securities at any time during the period covered by a required quarterly or final report, Respondent must submit with the report for that period a statement made by Respondent under penalty of perjury that:
 - i. Respondent handled all such client funds, property, and/or securities in compliance with rule 4-100 of the Rules of Professional Conduct; and
 - ii. Respondent complied with the "Trust Account Record Keeping Standards" adopted by the State Bar Board of Trustees, pursuant to rule 4-100(C) of the Rules of Professional Conduct.
- b. If Respondent did not possess any client funds, property, or securities during the entire period covered by a quarterly or final report, Respondent must so state under penalty of perjury in the report filed with the Office of Probation for that reporting period.

10. Proof of Compliance with Rule 9.20 Obligations

Respondent is directed to maintain, for a minimum of one year after the commencement of probation, proof of compliance with the Supreme Court's order that Respondent comply with the requirements of California Rules of Court, rule 9.20, subdivisions (a) and (c). Such proof must include: the names and addresses of all individuals and entities to whom Respondent sent notification pursuant to rule 9.20; a copy of each notification letter sent to each recipient; the original receipt or postal authority tracking document for each notification sent; the originals of all returned receipts and notifications of non-delivery; and a copy of the completed compliance affidavit filed by Respondent with the State Bar Court. Respondent is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

Commencement of Probation/Compliance with Probation Conditions

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 probation period, if Respondent has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

Multistate Professional Responsibility Examination Within One Year

It is further recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court order imposing discipline in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation within the same period. Failure to do so may result in suspension. (Cal. Rules of Court, rule 9.10(b).) If Respondent provides satisfactory evidence of the taking and passage of the above examination after the date of this decision but before the effective date of

the Supreme Court's order in this matter, Respondent will nonetheless receive credit for such evidence toward his duty to comply with this condition.

California Rules of Court, Rule 9.20

It is further recommended that Respondent be ordered to comply with the requirements of 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 days, respectively, after the effective date of the Supreme Court order imposing discipline in this matter.⁵ Failure to do so may result in disbarment or suspension.

Costs

It is further recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against a member who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

Dated: June 19, 2018


CYNTHIA VALENZUELA
Judge of the State Bar Court

⁵ For purposes of compliance with rule 9.20(a), the operative date for identification of "clients being represented in pending matters" and others to be notified is the filing date of the Supreme Court order, not any later "effective" date of the order. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45.) Further, Respondent is required to file a rule 9.20(c) affidavit even if Respondent has no clients to notify on the date the Supreme Court filed its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or contempt, an attorney's failure to comply with rule 9.20 is, inter alia, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)

CERTIFICATE OF SERVICE

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

I am a Court Specialist 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 June 19, 2018, 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:

KENNETH CHARLES KOCOUREK
1260 COUNTRY CLUB DR
RIVERSIDE, CA 92506

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

KIMBERLY G. ANDERSON, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on June 19, 2018.



Paul Barona
Court Specialist
State Bar Court