PUBLIC MATTER



**STATE BAR COURT OF CALIFORNIA**

**HEARING DEPARTMENT - LOS ANGELES**

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| In the Matter of | ) | Case No. 18-O-12028-MC |
| | ) | |
| | ) | DECISION |
| WALTER ROY MITCHELL, | ) | |
| | ) | |
| | ) | |
| State Bar No. 165834. | ) | |

## Introduction

Respondent Walter Roy Mitchell is charged with two counts of willfully violating former rule 4-100(A) of the State Bar Rules of Professional Conduct which sets forth an attorney's duties when handling client funds and maintaining a client trust account (CTA).[1] The court finds by clear and convincing evidence that Respondent willfully violated former rule 4-100(A) by improperly depositing his own funds into his CTA and by improperly paying personal expenses from his CTA. The court recommends that the appropriate level of discipline for the misconduct is two years' stayed suspension from the practice of law and two years' probation on conditions, including a ninety-day actual suspension from practice.

## Significant Procedural History

The Office of Chief Trial Counsel of the State Bar of California (OCTC) filed a notice of disciplinary charges (NDC) on December 10, 2018. Respondent filed his response to the NDC

[1] The former State Bar Rules of Professional Conduct were in effect through October 31, 2018.

on January 7, 2019. On March 18, the parties filed a copy of their March 11, 2019, partial stipulation as to facts and admission of documents. Trial was held on March 28 and parties thereafter filed closing argument briefs. The court took the matter under submission on April 11.

## Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in the State of California on September 17, 1993, and has been licensed to practice law in California since that time.

**Findings of Facts**

Respondent is charged with repeatedly violating former rule 4-100(A) during the six-month period from November 2017 through April 2018 by (1) improperly depositing a total of $42,900 of his own funds into his CTA through a series of fifteen separate deposits and (2) improperly paying eight personal expenses totaling $18,376.30 from his CTA. Respondent denies that he is culpable of willfully violating former rule 4-100(A). Moreover, Respondent contends that, if he is culpable of these violations, they were unintentional. Respondent claims that he previously reviewed the State Bar's Handbook on Client Trust Accounting for California Attorneys and that he *might* have attended the State Bar's Client Trust Account Record Keeping School. Respondent's assertions, however, are not credible.

Respondent's claim that he previously reviewed the State Bar's CTA handbook is belied by the two warning letters and two resource letters, discussed below, that OCTC issued to Respondent between 2012 and 2018 and by the twelve trust account violations found in the present proceeding. In short, an attorney who has reviewed the State Bar's handbook would not have engaged in the extensive trust account misconduct found here. Moreover, even if Respondent did review the handbook and the present misconduct was unintentional, such facts do not establish a defense to the charged misconduct or a mitigating circumstance. An attorney 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.) This obligation/duty is nondelegable. (*Coppock v. State Bar* (1988) 44 Cal.3d 665, 680.)

**Respondent Deposited His Own Funds Into His CTA**

The parties stipulated that, during the six-month period from November 2017 through April 2018, Respondent deposited funds into his CTA on 15 separate occasions. As set forth below, the record establishes that, in nine of those fifteen deposits, Respondent deposited a total of $33,300 of his own funds into his CTA.

Respondent has a fee agreement with his client, Kenneth Stuart, under which Stuart sends Respondent a $3,000 check at the beginning of each month. Those monthly checks are for Respondent's representation of Stuart in an on-going civil lawsuit. On November 3, 2017; December 4, 2017; January 8, 2018; February 6, 2018; March 2, 2018; and April 3, 2018, Respondent deposited a $3,000 check that he received from Stuart into his CTA.

Stuart testified credibly that these $3,000 monthly checks are earned fees for legal services that Respondent performed and for which no monthly accounting by Respondent is required. On the advice of his financial adviser, Stuart instructed Respondent to deposit each of the monthly checks into Respondent's CTA.

Despite Stuart's credible testimony that the checks were for earned fees, Respondent claims, in an odd twist of logic, that the $3,000 monthly checks are not earned, but "quasi earned" fees. According to Respondent, the checks are unearned until they are deposited into his CTA and have cleared the banking system so that the proceeds from the checks are actually on deposit in his CTA. The court rejects Respondent's baseless explanation.

In light of Stuart's testimony that the checks were for earned fees and Respondent's counsel's admission, set forth below, that Respondent "regularly processed all fee checks from his client through his trust account, whether already earned or yet to be earned," the court finds

that the $3,000 checks Respondent deposited into his CTA on November 3, 2017; December 4, 2017; January 8, 2018; February 6, 2018; March 2, 2018; and April 3, 2018, were for earned fees, totaling $18,000.

Separate from the $18,000 from Stuart, Respondent made the following two online transfers of his own funds from his general/business operating account into his CTA: (1) on January 24, 2018, Respondent transferred $1,300 from his operating account into his CTA; and (2) on March 16, 2018, Respondent transferred $9,000 from his operating account into his CTA. Respondent does not recall why he made these transfers, but admits they were mistakes.

On December 19, 2017, a client's check in the amount of $5,000 was deposited into Respondent's CTA. Respondent testified that the $5,000 check was for fees and that he was "98 percent" sure that part of the $5,000 was for earned fees and that part of it was for fees paid in advance. Even though there is no direct evidence to the contrary in the record, Respondent's testimony is inconsistent with the admission against interest that his counsel made in a letter he sent to OCTC on July 2, 2018. The letter, discussed further below, stated that in November and December 2017, there were no client funds on deposit in Respondent's CTA. Accordingly, the court rejects Respondent's testimony and finds that the $5,000 client check was entirely for earned fees, which should never have been deposited into Respondent's CTA.

There are, however, certain transactions that OCTC failed to prove by clear and convincing evidence were personal funds belonging to Respondent. On March 1, 2018, a $2,500 client check was deposited into Respondent's CTA. That check itself indicates that it is for a "retainer," and there is no direct evidence establishing that the $2,500 were Respondent's personal funds. Because the court must resolve all reasonable doubts in Respondent's favor (*In the Matter of Frazier* (Review Dept.1991) 1 Cal. State Bar Ct. Rptr. 676, 694, citing *Kapelus v. State Bar* (1987) 44 Cal.3d 179, 183), the court finds that the $2,500 client check was fees paid

in advance. In addition, on January 10, February 21, April 5, 10, and 19, 2018, Respondent deposited $1,000, $1,500, $1,500, $2,500, and $600, respectively, into his CTA. The record fails to establish by clear and convincing evidence that these deposits were Respondent's own funds.

In sum, the record clearly establishes that Respondent deposited a total of $33,300 of his own funds into his CTA through nine separate deposits during the specified six-month period.

**Respondent Paid Personal Expenses From His CTA**

During the six-month period between November 2017 and April 2018, Respondent issued CTA check numbers 1584, 1585, 1586, and 1588, in the amounts of $70, $100, $2,500, and $1,000, respectively, and authorized an electronic withdrawal for $250.50 on January 4, 2018, to pay five of his personal expenses. Those five expenses totaled $3,920.50.[2] Respondent used earned fees still on deposit in his CTA to pay these expenses. According to Respondent, he issued these CTA checks and authorized the electronic withdrawal to eliminate the extra step of withdrawing the earned fees, depositing them into his personal bank account, and then paying the expenses from his personal bank account.

Respondent issued CTA check number 1586 for $2,500 to his landlord, Elliott Management, for rent. Elliott Management has never been Respondent's client. When check number 1586 was presented to Respondent's bank for payment in early January 2018, the bank did not pay it because it was not sufficiently funded (NSF). There was only $43.64 in Respondent's CTA at the time. The bank returned the check unpaid to Elliot Management. Respondent's bank also reported the NSF activity involving check number 1586 to the State Bar. (Bus. & Prof. Code, § 6091.1.)

Respondent was relying on the proceeds from Stuart's monthly $3,000 check to pay check number 1586. Stuart, however, mistakenly stopped payment on the January 2018 check

[2] As noted below, Respondent's bank did not pay CTA check number 1586 in the amount of $2,500, but returned the check unpaid to the payee because it was insufficiently funded.

which resulted in the NSF when the Elliot Management check was presented for payment. Respondent evidently did not wait for that $3,000 check to clear the banking system before Respondent issued check number 1586.

On January 26, 2018, OCTC sent a letter to Respondent at his official State Bar record address requesting an explanation for the NSF activity in his CTA involving check number 1586. Respondent received the letter, but did not respond. OCTC thereafter sent Respondent three more letters requesting an explanation for the NSF activity. Even though Respondent received all the letters, he did not respond. However, on July 2, 2018, Respondent's counsel sent a letter to OCTC explaining that Respondent had erroneously "deposited earned fees into his trust account," and it was under this scenario that CTA check number 1586 was not paid.

In his July 2, 2018 letter, Respondent's counsel also stated: "No other client funds were on deposit for November and December 2017, except for earned fees due to [Respondent's] erroneous practice of processing earned fees through his trust account." OCTC asserts that this statement is an admission against interest because Respondent authorized his counsel to send the letter to OCTC. The court agrees. The court also finds that the following statement from counsel's July 2 letter to be an admission: "[Respondent's] error has been that he regularly processed all fee checks from clients through his trust account, whether already earned or yet to be earned. He has since corrected this practice, after the advice of his counsel."

Prior to the investigation in the present matter, OCTC had already issued two warning letters and two resource letters to Respondent because of his failure to properly maintain his CTA. The first warning letter was sent on October 22, 2012, after OCTC determined there was substantial evidence that Respondent had violated former rule 4-100 by improperly using a CTA as a business operating account. Respondent received the October 22 warning letter. This first warning letter specifically informed Respondent: "no funds belonging to an attorney are to be

deposited or otherwise commingled in the client trust account, except for funds reasonably sufficient to pay bank charges. In the case of funds belonging in part presently or potentially to the attorney, the portion belonging to the attorney must be withdrawn at the earliest reasonable time after the attorney's interest in that portion becomes fixed, except for any portion disputed by the client pending final resolution." The terms "earned fees" are not used in this correspondence.

On November 18, 2015, OCTC sent the first resource letter to Respondent after his bank paid a $75 NSF check drawn on Respondent's CTA. The November 18 letter suggested that Respondent review former rule 4-100, that he attend the State Bar's Client Trust Account Record Keeping School, and obtain a copy of the State Bar's Handbook on Client Trust Accounting. Respondent received the November 18 letter.

On May 18, 2017, OCTC sent the second resource letter to Respondent after Respondent's bank paid a $300 NSF online transaction from Respondent's CTA and paid a $400 NSF check Respondent issued from his CTA. The May 18 letter again suggested that Respondent review former rule 4-100, that he attend the State Bar's Client Trust Account Record Keeping School, and that he obtain a copy of the State Bar's Handbook on Client Trust Accounting. Respondent received the May 18 letter.

OCTC sent the second warning letter to Respondent on January 10, 2018, after OCTC determined there was substantial evidence that Respondent had yet again violated former rule 4-100 by issuing a $56.51 NSF check drawn on his CTA. Respondent received the January 10 warning letter. After receipt of the two warning letters and the two resource letters, Respondent continued to issue NSF checks drawn on his CTA and continued to deposit his own money into the CTA.

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**Conclusions of Law**

***Count One – Former Rule 4-100(A) (Deposited Personal Funds into CTA)***

Former rule 4-100(A) required that all funds received or held for the benefit of a client must be deposited into a CTA. The rule expressly prohibited attorneys from depositing their own funds into their CTA's and from commingling their funds with those of their clients' except that attorneys may deposit their own funds for the limited purpose of paying bank charges. Moreover, the rule expressly required that, when funds belonging in part to a client and in part presently or potentially to the attorney were deposited into a CTA, the portion of the deposit belonging to the attorney had to be withdrawn "at the earliest reasonable time after the attorney's interest in that portion became fixed." However, if the client disputed the attorney's right to the funds, the disputed funds were not to be withdrawn until the dispute was resolved.

In count one, OCTC charges that, during the six-month period between November 2017 and April 2018, Respondent deposited or commingled funds belonging to Respondent into his CTA in willful violation of former rule 4-100(A) as follows:

| DATE OF DEPOSIT | AMT. DEPOSITED | FORM OF DEPOSIT |
|---|---|---|
| 11/03/2017 | $3,000 | Check |
| 12/04/2017 | $3,000 | Check |
| 12/19/2017 | $5,000 | Check |
| 01/08/2018 | $3,000 | Check |
| 01/10/2018 | $1,000 | Cash |
| 01/24/2018 | $1,300 | Online Transfer |
| 02/06/2018 | $3,000 | Check |
| 02/21/2018 | $1,500 | Cash |
| 03/01/2018 | $2,500 | Check |
| 03/02/2018 | $3,000 | Check |
| 03/16/2018 | $9,000 | Online Transfer |
| 04/03/2018 | $3,000 | Check |
| 04/05/2018 | $1,500 | Cash |
| 04/10/2018 | $2,500 | Cash |
| 04/19/2018 | $600 | Cash |
| Total | $42,900[3] | |

[3] This total was added by the court.

The record clearly establishes that Respondent willfully violated former rule 4-100(A) on November 3, 2017; December 4, 2017; January 8, 2018; February 6, 2018; March 2, 2018; and April 3, 2018, when he deposited checks he received from Stuart into his CTA because the checks were for earned fees. The fact that Stuart instructed Respondent to deposit the checks into the CTA is no defense the charged violations of former rule 4-100(A). A client simply cannot authorize an attorney to violate former rule 4-100(A). (See, e.g., *In the Matter of Lilly* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 185, 191 [attorney cannot deposit client funds into a nontrust account even if the client authorizes it].)

The record also clearly establishes that Respondent willfully violated former rule 4-100(A) on January 24, 2018, and March 16, 2018, when Respondent transferred $1,300 and $9,000, respectively, of his own funds from his operating account into his CTA. The record further clearly establishes that on December 19, 2017, Respondent deposited $5,000 check that he received from a client for earned fees, which are funds that Respondent owns.

The record does not establish, by clear and convincing evidence, that: (1) on March 1, 2018, Respondent deposited $2,500 of his own funds into his CTA; or (2) on January 10, February 21, and April 5, 10, and 19, 2018, Respondent deposited $1,000, $1,500, $1,500, $2,500, and $600, respectively, of his own funds into his CTA as charged in count one. These six charged violations of former rule 4-100(A) are dismissed with prejudice.

***Count Two – Former Rule 4-100(A) (Improper Personal Use of CTA)***

In count two, OCTC charges that Respondent "issued the following checks and/or electronic withdrawals from funds in respondent's CTA for the payment of personal expenses."

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| TRANSACTION DATE | CHECK NO. | PAYEE | $ AMT CHECK/WITH |
|---|---|---|---|
| 11/27/2017 | 1585 | Jamie Gresh | $100 |
| 11/29/2017 | 1584 | Nathaniel Gorham | $70 |
| 01/01/2018 | 1586 | Elliott Management | $2,500 |
| 01/04/2018 | N/A | Time Warner Cable | $250.50 |
| 01/10/2018 | N/A | Elliott Management | $2,675 |
| 01/24/2018 | N/A | Newport Office Center | $1,220.80 |
| 02/06/2018 | 1588 | Lawrence J. Larocca | $1,000 |
| 04/10/2018 | N/A | Jeepster Auto Sales | $10,560 |
| | | Total | $18,376.30[4] |

There is no dispute that Respondent used his own funds, not client funds, on deposit in his CTA to pay these charged personal expenses.

The court rejects the parties' partial stipulation of facts to the extent that it stipulates that, on January 10, January 24, and April 10, 2018, Respondent issued checks and/or electronic withdrawals from funds in his CTA in the amounts of $2,675, $1,220.80, and $10,500, respectively, to pay personal expenses. Exhibit 4, which was admitted pursuant to the parties' partial stipulation, conclusively establishes that no such checks were paid and no such electronic withdrawals were made from Respondent's CTA. Accordingly, those three charged violations of rule 4-100(A) are dismissed with prejudice.

Respondent was not charged with violating former rule 4-100(A) by withdrawing cash from his CTA, purchasing cashier's checks with the cash, and then using the cashier's checks to pay his personal expenses. Exhibit 4 conclusively establishes that is exactly what Respondent did. On January 10, January 24, and April 10, 2018, Respondent withdrew $2,675, $1,220.80,

[4] This total was calculated by the court.

and $10,500, respectively, from his CTA in cash and then purchased cashier's checks in those same amounts with the cash. Withdrawal of earned legal fees from a CTA in cash at a bank does not violate former rule 4-100(A). (See *In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 317 [Rule of Professional Conduct governing client funds and attorney trust accounts does not preclude an attorney from withdrawing earned legal fees from a CTA in cash using an ATM card].) In these transactions, Respondent did not improperly pay his personal expenses from his CTA.

However, the record clearly establishes that Respondent willfully violated former rule 4-100(A) when he issued CTA check numbers 1584, 1585, 1586, and 1588 for $70, $100, $2,500, and $1,000, respectively, and when he authorized an electronic withdrawal of $250.50 on January 4, 2018, to pay five personal expenses totaling $4,171.50. At the time Respondent issued each of those four checks and authorized the electronic withdrawal to pay the five personal expenses, Respondent understood that former rule 4-100(A) required that he withdraw any attorney's fees paid in advance that were on deposit in his CTA "at the earliest reasonable time after" the fees were earned.

Respondent believed that his actions were proper because former rule 4-100(A) did not expressly provide the manner in which an attorney was required to withdraw advanced fees from a CTA once the advanced fees were earned. Further, former rule 4-100(A) did not expressly prohibit an attorney from withdrawing the earned fees from a CTA by issuing checks drawn on the CTA to pay the attorney's personal or business expenses. Notwithstanding former rule 4-100(A)'s failure to reflect these requirements/prohibitions, the Supreme Court has long held that the Rules of Professional Conduct governing client funds and attorney trust accounts prohibits an attorney from paying personal expense directly from a CTA, even when there are earned fees on deposit in the account. (*Segal v. State Bar* (1988) 44 Cal.3d 1077, 1087; see also

*In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420, 426.) In addition, the Supreme Court has long held that the rule governing client funds and attorney trust accounts "absolutely bars use of the [client] trust account for personal purposes, even if client funds are not on deposit" in it. (*Doyle v. State Bar* (1982) 32 Cal.3d 12, 22-23.)[5]

When an attorney pays his or her personal expenses with CTA checks,

> the attorney cloaks the transaction with the care and soundness represented by the account and its relationship to the confidential bond between attorney and client. Trading on the "aura" of the trust account, the attorney seeks to offer the check recipient added assurance as to the validity of the instrument. More significantly, if client funds *are* in the account, invading the trust account to satisfy personal debts puts the client funds in outright jeopardy, contrary to the very therapeutic purpose of [former rule 4-100(A)], designed to prevent such risk.

(*In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 54.)

**Aggravation**

OCTC bears the burden of proving aggravating circumstances by clear and convincing evidence. (Std. 1.5.)[6] The court finds the following with respect to aggravating circumstances.

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

Respondent has one prior record of discipline, the Supreme Court's December 19, 2012, order in *In re Walter Roy Mitchell on Discipline*, case number S205954 (State Bar Court case number 11-O-19540) placing Respondent on two years' stayed suspension and two years' probation on conditions, including a 30-day actual suspension. The discipline was in accordance

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[5] Likewise, new rule 1.15, the successor rule to former rule 4-100, does not either expressly specify the proper ways for an attorney to withdraw advanced fees from a CTA once the fees are earned or expressly prohibit an attorney from withdrawing the earned fees from a CTA by paying personal expenses directly from the CTA. Nor does new rule 1.15 expressly prohibit the use of a CTA for personal purposes regardless of whether client funds are in the account.

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

with the parties' stipulation regarding facts, conclusions of law, and disposition that the State Bar Court approved on September 11, 2012.

The parties' stipulation established that, in August 2011, while Respondent was suspended for not paying his annual license fee, he engaged in the unauthorized practice of law in willful violation of section 6068, subdivision (a) (obey the law); sections 6125 and 6126 (unauthorized practice of law), and section 6106 (moral turpitude). In mitigation, Respondent had no prior record of discipline in 19 years of practice and cooperated with the State Bar by stipulating to the misconduct.

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

Respondent's present misconduct involves 14 separate CTA violations during a six month period. Respondent's multiple acts of misconduct warrant significant consideration in aggravation particularly since they followed Respondent's receipt of two warning letters and two resource letters from the State Bar for the same or similar misconduct.

**Lack of Insight (Std. 1.5(k))**

Respondent demonstrated little insight or understanding of his own wrongdoing. He blames his misconduct on OCTC because it did not specifically warn him about handling earned fees. He fails to appreciate the importance of complying with the rule on client funds and attorney trust accounts. Moreover, he fails to understand that he, not OCTC or the State Bar, has the nondelegable duty to handle client funds and his CTA in strict compliance with former rule 4-100 and now with the new rule 1.15. He continues to issue NSF checks because he does not call his bank to verify whether the checks he has deposited into his CTA have cleared the banking system so that proceeds of the checks are in his CTA before he issues checks. Respondent's demonstrated lack of insight into the seriousness of his misconduct is particularly

troubling to this court because it strongly suggests that it may reoccur. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 781-782.) Thus, the court assigns here significant weight in aggravation.

**Mitigation**

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.6.) The court finds the following with respect to mitigating circumstances.

**Cooperation with the State Bar (Std. 1.6(e))**

Respondent's cooperation with OCTC in entering into the partial stipulation as to facts warrants moderate mitigation credit. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive weight in mitigation accorded stipulations involving culpability as well as facts].)

**Good Character (Std. 1.6(f))**

Respondent presented the good character testimony from five credible live witnesses. All of the witnesses had a general understanding of the charges and still find Respondent to be honest. While almost all of the witnesses have known Respondent for a significant period of time, one rarely associates with Respondent and another is solely a business associate. The most significant witness was Superior Court Judge Todd Irby, who met Respondent in law school decades ago, and they are good friends. Judge Irby has no doubt that Respondent is a consistently honest person. The judge's testimony was very credible and the court gives it significant weight in establishing Respondent's good character. Overall, the court gives moderate weight to this factor.

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**Personal Difficulties**

The court gives Respondent limited mitigating weight to his domestic difficulties involving his three children, one of whom is battling drug addiction, and to the heart attack Respondent suffered last year.

## 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.) 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). Second, the court looks to decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

The standards do not mandate a specific level of discipline, and the State Bar Court is not bound to apply them talismanically. (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Ct. Rptr. 980, 994.) It well established that "[a]s the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.)

The applicable standard is standard 2.2(a), which advocates an actual suspension of three months for commingling or failing to promptly pay out entrusted funds. Also relevant is standard 1.8(a), which provides: "If an attorney has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so

remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust."

OCTC contends that Respondent should be actually suspended for six months, but the cases OCTC relies on involve significantly greater misconduct than found here. Instead, the court finds the three cases below persuasive. Even though these matters involve more misconduct than in the present proceeding, the attorneys in them did not have the prior extensive involvement with OCTC that Respondent had, including two warning letters and two resource letters for previously engaging in the same or similar misconduct. Respondent's on-going failure to appreciate the weight of his misconduct also justifies the level of discipline in these cases.

In *In the Matter of Ward* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 47, the attorney was placed on three years' stayed suspension and three years' probation on conditions, including 90 days' actual suspension, for numerous CTA violations including negligent misappropriation of $12,000. In addition, the attorney was culpable of failing to communicate and failing to perform competently, which resulted in loss of the client's claim.

In *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, the attorney was placed on one year's stayed suspension and three years' probation on conditions, including a 90-day actual suspension, for CTA violations spanning more than over five years with an attitude of indifference and serious client misconduct, including intentionally failing to appear at his client's deposition knowing that the client would be unrepresented.

In *In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420, 428, the attorney was placed on two years' stayed suspension and two years' probation on conditions, including a 90-day actual suspension for his "serious and prolonged" misuse of his CTA. The attorney allowed a friend to use his CTA as his business checking account, commingled his own

funds within the account, and issued two NSF CTA checks knowing that there were not sufficient funds in the account to cover them, which involved moral turpitude.

After considering the above three cases, standard 2.2(a), and the appropriate factors, the court finds that the appropriate level of discipline for misconduct in the present proceeding is two years' stayed suspension and two years' probation on conditions, including ninety days' actual suspension.

## Recommendations

It is recommended that WALTER ROY MITCHELL (Respondent), State Bar number 165834, 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 on the following conditions.

**Conditions of Probation**

1. **Actual Suspension**

Respondent must be suspended from the practice of law for the first 90 days 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 State Bar Records 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 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 State Bar records

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 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 and Client Trust Accounting Schools**

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. Proof of Compliance with Rule 9.20**

Respondent is directed to maintain, for a minimum of one year after 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**

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 the 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 requirement.

**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.[7] 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 that the costs be 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 an attorney who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

Dated: July 9, 2019

**MANJARI CHAWLA**
Judge of the State Bar Court

[7] 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 San Francisco, on July 9, 2019, 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 San Francisco, California, addressed as follows:

KENNETH CHARLES KOCOUREK
736 CENTER DRIVE, NO. 125
SAN MARCOS, CA 92069

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

CINDY W.Y. CHAN, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on July 9, 2019.

Bernadette Molina
Court Specialist
State Bar Court