

Filed September 30, 2020

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of)	No. 16-O-17714
)	
JOSEPH EARL MARTIN,)	OPINION AND ORDER
)	
State Bar No. 189752.)	
_____)	

In his first disciplinary matter, Joseph Earl Martin was charged with two counts of misconduct, both based on violations of former rule 4-100(A) of the California Rules of Professional Conduct.¹ Specifically, the Notice of Disciplinary Charges (NDC) alleges Martin deposited personal funds into, and paid personal expenses from, his client trust account (CTA) on multiple occasions, and thus improperly commingled those funds. The hearing judge found Martin culpable of both counts. In recommending a 90-day actual suspension, the judge determined that Martin failed to demonstrate that a lesser sanction under standard 2.2(a)² was warranted.

Martin appeals. He argues that he did not commingle his personal funds in the CTA because no client money was ever deposited into it. Further, he asserts he had a good faith belief that his actions did not violate any ethical rule and that, because the State Bar never provided him notice that he was violating rule 4-100(A) before charges were filed, he was not afforded

¹ All further references to rules are to the Rules of Professional Conduct that were in effect from September 14, 1992, to October 31, 2018, unless otherwise noted.

² Standard 2.2(a) of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, provides that “Actual suspension of three months is the presumed sanction for . . . commingling” Further references to standards are to this source.

due process and thus should not be found culpable for violating the rule. Finally, Martin also asserts he has sufficient mitigation to warrant less discipline and seeks a private reproof. The Office of Chief Trial Counsel of the State Bar (OCTC) does not appeal the hearing judge's findings and requests that we uphold her recommendation.

Based on our independent review of the record (Cal. Rules of Court, rule 9.12), we affirm the hearing judge's culpability findings because commingling within the meaning of rule 4-100(A) occurs when an attorney maintains personal funds in a CTA even if no client funds are in the account. (*Doyle v. State Bar* (1982) 32 Cal.3d 12, 22–23.) We do, however, find aggravation for only one of the two aggravating circumstances found by the judge and give more weight to Martin's mitigating circumstances. Overall, the mitigation clearly outweighs the aggravation and, therefore, we conclude the record supports a downward departure under the standards. We order Martin be publicly reproofed with conditions, which will, under the circumstances established here, be sufficient to protect the public, the courts, and the legal profession.

I. PROCEDURAL BACKGROUND

OCTC filed a NDC on December 6, 2018, alleging two counts of misconduct against Martin, both charging violations of rule 4-100(A). A one-day trial took place on April 5, 2019. Before the trial, on April 4, the parties filed a pretrial Stipulation as to Facts and Admission of Documents (Stipulation).³ The hearing judge issued her decision on July 15, 2019, following a period for posttrial briefing.

³ At the beginning of the trial, the hearing judge granted Martin's request to withdraw from stipulating to the admission of bank records as exhibits, based on his argument that his stipulation of facts rendered those records unnecessary. A review of the transcript shows many exhibits were only partially admitted, with OCTC agreeing that some records that had been contained in the Stipulation did not need to be admitted.

II. FACTUAL BACKGROUND⁴

Martin was admitted to practice law in California on August 27, 1997. At some point in 2004, he opened a CTA at JP Morgan Chase Bank (Chase Bank), which he never used to accept, hold, or disburse client funds. OCTC and Martin stipulated that, between October 1, 2016, and July 26, 2017, Martin made several deposits into, and multiple withdrawals from, his CTA, totaling \$52,188.63 in deposits and \$46,869.39 in withdrawals.⁵ All deposit and withdrawal activities were personal in nature.

Between October 2016 and July 2017, OCTC received copies of six non-sufficient fund (NSF) notices sent to Martin from Chase Bank pertaining to his CTA. OCTC's receipt of these notices prompted it to contact Martin. Specifically, OCTC sent Martin investigative letters seeking information about at least two NSF checks (check nos. 1161 and 1307). In three of these letters, one each sent on December 13, 2016, May 19, 2017, and July 11, 2017, the following warning was included: "**FAILURE TO PROVIDE THE DOCUMENTS REQUESTED [...]** **WHICH [YOU ARE] REQUIRED TO MAINTAIN PURSUANT TO RULE 4-100(C) [...]** **MAY BE CONSIDERED A VIOLATION OF RULE 4-100(B)(3).**" A complete copy of rule 4-100 was enclosed with each letter.⁶

⁴ The facts included in this opinion are based on the Stipulation, trial testimony, documentary evidence, and the hearing judge's factual findings, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).)

⁵ As established by the Stipulation, Martin made the following deposits into his CTA: 20 deposits from Legal Management Quickbooks (paychecks), six deposits from Spaulding Campri LLC (payments for his work as an independent contractor), and two cash deposits. Martin made the following payments from his CTA: 68 checks to K. Martin (his ex-wife), 49 cash withdrawals, 11 payments to Target, seven payments to V. Paul (his landlord), three checks to the Department of Motor Vehicles, and two payments to Kaiser Pharmacy.

⁶ Rule 4-100 provides, in relevant part, that, "(A) All funds received or held for the benefit of clients by a member . . . shall be deposited in a [CTA] No funds belonging to the member . . . shall be deposited [into the CTA] or otherwise commingled

(B) A member shall . . . (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member

Martin testified he reviewed the letters from OCTC as he received them, along with the enclosures that set forth rule 4-100 in its entirety. His understanding of the warnings in the letters was that OCTC was seeking records from him to prove he did not have client money in his CTA, which he was using for personal funds. His assessment of OCTC's letters comported with his belief at the time that a violation under rule 4-100 would occur only if he was combining his personal money with client money in the CTA. His belief was based on subsection (A)'s phrase "or otherwise commingled," which he interpreted to mean that all the language of subsection (A)'s prohibition applied only where mixing of client money and personal money occurred in the CTA. Because he never had client funds in his CTA, he concluded the rule's prohibition did not apply to him.

Martin obtained counsel, who answered questions from the OCTC investigator and provided CTA records on February 7, 2017, after receiving an extension. On March 10, his counsel sent an email to OCTC stating Martin told him that he had opened a regular checking account and planned to close his CTA once OCTC's investigation concluded. Martin's attorney also attached additional financial records from the CTA. The email pointed out that, as a criminal defense attorney, Martin did not receive, administer, or disburse client funds. At trial, Martin testified he intended to open a regular checking account at the time his counsel wrote the email. However, on March 17, he started a serious child molestation case in Sacramento that ended a few days before he suffered a heart attack on April 5. He continued to use the CTA for personal purposes until July 26, 2017.

(C) The Board of [Trustees] . . . shall have the authority to formulate and adopt standards as to what 'records' shall be maintained by members . . . in accordance with subparagraph (B)(3). The standards formulated and adopted by the Board . . . shall be effective and binding on all members."

III. MARTIN IS CULPABLE ON BOTH COUNTS

Count one of the NDC alleges that between October 1, 2016, and July 26, 2017, Martin deposited or commingled funds belonging to him in his CTA, in willful violation of rule 4-100(A). In count two, the NDC alleges that Martin issued checks and made electronic withdrawals from his CTA to pay personal expenses during the same time period, in willful violation of the same rule. The hearing judge found that, by placing \$52,188.63 of personal funds in his CTA (count one) and paying \$46,869.39 in personal expenses from his CTA (count two), Martin was culpable as charged. We agree.

On review, Martin first argues due process requires he be given notice during any investigation that his conduct violates a specific rule before OCTC can charge him with a violation. He is mistaken. Generally, “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner. [Citations.]’” (*Matthews v. Eldridge* (1976) 424 U.S. 319, 333.) In California disciplinary proceedings, “adequate notice requires only that the attorney be fairly apprised of the precise nature of the charges before the proceedings commence.” (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 929.) In the NDC filed in this case, notice of the specific facts comprising the violation and the specific rule violated were pleaded for both counts as required under rule 5.41(B) of the Rules of Procedure of the State Bar; thus, on the issue of notice, Martin received due process.

As for Martin’s second argument, that the language of rule 4-100(A) and case law failed to give him adequate notice his acts of depositing only his personal funds in his CTA and payment of his personal expenses from it were improper, this argument also fails. Contrary to his assertion, rule 4-100(A) is explicit in that personal funds cannot be placed into a CTA: “No funds belonging to the member or the law firm shall be deposited [into the CTA] or otherwise commingled” Martin’s testimony that the phrase “or otherwise commingled” led him to

believe he was not violating rule 4-100(A), when only his personal funds were deposited into the CTA, is simply an unreasonable interpretation of the rule, given the language before that phrase clearly prohibits such an action. To his point that case law did not provide him adequate notice, we first note his testimony at trial was quite clear that he did not do any case research on the issue when the State Bar contacted him about his NSF checks. Nonetheless, the Supreme Court has interpreted rule 4-100(A) as a bright-line rule that “absolutely bars use of the trust account for personal purposes, even if client funds are not on deposit.” (*Doyle v. State Bar, supra*, 32 Cal.3d at pp. 22–23.) Martin’s argument that the *Doyle* case is inapplicable because the attorney had client funds in the CTA at some point that he later misappropriated, simply ignores the salient point the Supreme Court was making concerning the rule. Thus, by depositing personal funds into a CTA and paying personal expenses from it, Martin willfully violated the express language of rule 4-100(A) and the Supreme Court’s clear declaration of how the rule applies.⁷ Accordingly, his misuse of his CTA establishes culpability under counts one and two.⁸

⁷ The State Bar’s Handbook on Client Trust Accounting also describes the prohibition against using a CTA for personal use: “You *can’t* make payments out of your client trust bank account to cover your own expenses, personal or business, or for any other purpose that isn’t directly related to carrying out your duties to an individual client.” (The State Bar of Cal., Handbook on Client Trust Accounting for California Attorneys (2018) (“Handbook”), § VI, p. 17.) The Handbook is available online at the following website: <http://www.calbar.ca.gov/Portals/0/documents/ethics/Publications/CTA-Handbook.pdf>.

⁸ Additionally, Martin briefly argues he had a good faith belief that he was not violating rule 4-100(A). Even if true, his good faith belief does not excuse his culpability. (*Heavey v. State Bar* (1976) 17 Cal.3d 553, 558 [good faith is not defense to commingling charge].)

IV. MITIGATION OUTWEIGHS AGGRAVATION⁹

Standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence.¹⁰ Standard 1.6 requires Martin to meet the same burden to prove mitigation.

A. Aggravation

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

The hearing judge found Martin's multiple commingling violations over an eight-month period¹¹ to be an aggravating circumstance under standard 1.5(b) and assigned moderate weight because these acts did not occur over a lengthy period. Martin challenges this finding by arguing that his multiple improper CTA transactions constitute only one continuous act in the course of conduct. While not appealing, OCTC nonetheless urges us to assign significant weight in aggravation for this factor because Martin improperly used his CTA on at least 168 occasions.

We agree with the hearing judge's approach and reject both Martin's and OCTC's arguments. We have held that "multiple acts of misconduct as aggravation are not limited to the counts pleaded. [Citation.]" (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 279.) Here, Martin's culpability is for two counts of misconduct that encompass 168 separate acts as established by the Stipulation. However, based on case law, we do not find that his conduct warrants substantial aggravation for multiple acts because his misconduct occurred

⁹ Martin requests "a de novo reconsideration of aggravating and mitigating factors." For all issues in this proceeding, including aggravating and mitigating factors, we "independently review the record and may make findings, conclusions, or a decision or recommendation different from those of the hearing judge." (Rules Proc. of State Bar, rule 5.155(A).)

¹⁰ Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

¹¹ The hearing judge incorrectly stated that Martin's misconduct occurred over an eight-month period. The Stipulation states that Martin's commingling violations happened over a 10-month period from October 1, 2016, through July 26, 2017.

over only 10 months. (See *In the Matter of Song*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 279 [significant aggravation for 65 improper CTA violations involving client harm over three-year period]; see also *In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 317 [significant weight in aggravation for 24 counts of misconduct involving harm to multiple clients over four-year period].)

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

Under standard 1.5(h), aggravating circumstances may include “uncharged violations of the Business and Professions Code or the Rules of Professional Conduct.” The hearing judge found significant aggravation based on an uncharged violation of rule 4–100(A) in concluding that Martin’s testimony revealed he had been commingling since 2004, not just from October 2016 through July 2017 as charged in the NDC.

Martin objects to this finding, arguing that the hearing judge’s conclusion is based upon an erroneous factual conclusion drawn from his testimony. While Martin acknowledged at trial that he opened his CTA in 2004, he further testified he did not use it at all until 2012 when setting up direct deposit for his Legal Management Quickbooks paychecks. Despite this testimony, OCTC never raised uncharged misconduct during trial or in its posttrial closing brief. Consequently, Martin did not have an opportunity to defend himself during trial against this uncharged violation. Accordingly, we decline to find additional aggravation. (See *In the Matter of Lenard* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 250, 260 [no aggravation for uncharged misconduct where attorney did not have sufficient notice or opportunity to defend after OCTC became aware of relevant facts].)

B. Mitigation

1. No Prior Record of Discipline (Std. 1.6(a))

Mitigation is available under standard 1.6(a) where no prior record of discipline exists over many years of practice, coupled with present misconduct that is not likely to recur. The hearing judge determined Martin's misconduct began in 2004, finding only seven years of discipline-free practice and affording him minimal mitigation. Martin requests that significant weight be given; OCTC agrees with the judge's assignment of minimal weight.

While we do not adopt the hearing judge's finding of uncharged misconduct in aggravation, our independent review of the record reveals that Martin's misconduct began in 2012, which equates to 15 years of discipline-free practice.¹² The record also reflects that Martin's misconduct was aberrational. (*Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [prior record of discipline-free practice is most relevant where misconduct is aberrational and unlikely to recur].) He testified he understands now that personal funds can never be deposited into a CTA and that personal expenses cannot be paid from a CTA. Further, he asserts that, if he were required to maintain client funds in the future, he would associate with an attorney who would be fully responsible for managing the CTA. Thus, Martin's 15 years of discipline-free practice are entitled to substantial weight in mitigation. (*In the Matter of Yee* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 330, 335 [significant weight in mitigation for 10 and one-half years of discipline-free practice]; *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [significant weight in mitigation for over 10 years of discipline-free practice].)

¹² The hearing judge erroneously concluded that Martin began using his CTA for personal deposits in 2004, when in fact, based on his unrebutted testimony, he opened the CTA in 2004 and began to use it in 2012.

2. No Client Harm (Std. 1.6(c))

Standard 1.6(c) provides for mitigation where lack of harm to clients, the public, or the administration of justice can be established. The hearing judge found Martin's use of his CTA as a personal checking account did not cause any client harm and afforded moderate weight.

Martin requests that a greater weight be given to this circumstance. OCTC does not object to the finding of moderate weight, but it argues that greater weight should not be given because "[t]here is always the potential for harm." OCTC's argument is, at best, speculative. We find substantial weight should be given because no evidence in the record demonstrates any harm was caused to clients, the public, or the administration of justice.

3. Good Faith (Std. 1.6(b))

An attorney may be entitled to mitigation credit if he can establish a "good faith belief that is honestly held and objectively reasonable." (Std. 1.6(b); see also *In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653.) The hearing judge found Martin was not entitled to mitigation for his good faith belief that he was not violating any trust accounting rule by using his CTA as a personal account where the account did not hold client funds. Martin contends he honestly believed his CTA activities were proper and not an ethical violation. He also argues that his interactions with OCTC during its investigation made his reliance on his beliefs objectively reasonable. OCTC argues that Martin is not entitled to any good faith mitigation because his ignorance of rule 4-100 is objectively unreasonable, particularly since he was provided with copies of the rule on multiple occasions.

Martin acknowledged receiving a copy of the complete text of rule 4-100 when OCTC mailed its first investigative letter to him in December 2016; Martin also testified that he reviewed the rule after receiving it. Even if he honestly believed his CTA usage did not run afoul of rule 4-100(A), it was objectively unreasonable for him to continue to use his CTA for

personal matters until July 2017 in light of the clear language of the rule. We therefore assign no mitigation credit for good faith. (*Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 331 [attorney's honest belief not mitigating because belief was unreasonable].)

4. Extraordinary Good Character (Std. 1.6(f))

Martin is entitled to mitigation if he establishes “extraordinary good character attested to by a wide range of references in the legal and general communities, who are aware of the full extent of the misconduct.” (Std. 1.6(f).) Three witnesses, including his son and two attorneys, testified at trial regarding Martin’s good character. The hearing judge reduced the weight accorded to two of his character references based upon a finding of “obvious bias” and assigned minimal weight to this mitigating circumstance; OCTC agrees with the judge’s determination. We disagree with the judge’s approach and assign moderate weight.

All three witnesses were fully aware of the charges against Martin and praised his excellent reputation as a criminal defense attorney. In fact, one of the attorney witnesses represented Martin during the OCTC investigation and trial in this matter. The other attorney witness had previously worked with Martin and attested to his strong work ethic and commitment to serve others. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration given to attorneys’ testimony due to their “strong interest in maintaining the honest administration of justice”].)

Although some of Martin’s good character testimony was offered by a family member and his former counsel, any bias they might have due to their connections should not be disqualifying, but considered in weighing the evidence. (*In the Matter of Davis, supra*, 4 Cal. State Bar Ct. Rptr. at p. 592 [testimony of acquaintances, neighbors, friends, associates, employers, and family members, who had broad knowledge of attorney’s good character, work habits, and professional skills, entitled to great weight].) However, Martin’s son was only 20

years old when he testified, one attorney witness had known Martin for 10 years, and the other had only known him for five years, which is factually different than the three witnesses in *Davis*, who each had been acquainted with that attorney for 10 years or more. Therefore, we find Martin is entitled to moderate weight for establishing good character.

5. Cooperation (Std. 1.6(e))

Mitigation may be assigned under standard 1.6(e) for cooperation with the State Bar. The hearing judge afforded significant mitigation for this circumstance, which Martin agrees is appropriate. OCTC requests we reduce the weight for this circumstance because Martin did not stipulate to culpability. Before trial, Martin stipulated to facts central to establishing the two charged counts, as well as the admission of documents. However, he did not admit culpability and “more extensive weight in mitigation is accorded those who, where appropriate, willingly admit their culpability as well as the facts.” (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190.) Since Martin stipulated only to facts, and not to culpability, we reduce the weight given here to moderate for his cooperation.

6. Martin’s Requests for Additional Mitigation (Stds. 1.6(g), (h), (i), and (j))

Martin seeks additional mitigation, arguing that he took prompt action to rectify ethical issues and that the State Bar delayed for over a year in bringing charges. He also argues he should receive mitigation because he voluntarily closed his CTA before charges were brought. We do not find clear and convincing evidence supporting the additional mitigation Martin requests. His actions were not prompt because he continued to use his CTA improperly until July 2017, even though the State Bar contacted him months earlier. Further, Martin showed no delay, and no prejudice, by OCTC waiting 17 months to file the NDC. Finally, we fail to see how the fact that Martin closed the CTA before charges were filed qualifies under any standard 1.6 mitigating circumstances.

V. PUBLIC REPROVAL IS APPROPRIATE DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts and the legal profession; to preserve public confidence in the profession; and to maintain high standards for attorneys. (Std. 1.1.) Our analysis begins with the standards, which, although not binding, are entitled to great weight. (*In re Silvertown* (2005) 36 Cal.4th 81, 92.) If we depart from the standards, we must articulate clear reasons for doing so. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.) In determining the appropriate discipline, we also look to case law for guidance (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311) and observe, “The well-settled rule is that the degree of professional discipline is not derived from a fixed formula but from a balanced consideration of all factors.” (*In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 605.)

Standard 2.2(a) is the applicable standard as it specifies, “Actual suspension of three months is the presumed sanction for . . . commingling . . .” The hearing judge recommended a 90-day actual suspension, which reflects the presumed sanction, and OCTC urges us to affirm the judge’s recommendation. Martin asks that we impose a private reproof, arguing his misconduct does not fall squarely within standard 2.2(a) but is more adequately addressed by standard 2.2(b)¹³ regarding “other trust account violations.” Since we found Martin culpable of commingling, we reject this argument.

Martin also argues standard 1.7(c)¹⁴ applies here to justify a downward departure from the presumed discipline under standard 2.2(a). He argues the record demonstrates that he meets

¹³ Standard 2.2(b) provides that “Suspension or reproof is the presumed sanction for any other violation of [rule 4-100].”

¹⁴ Standard 1.7(c) provides, “If mitigating circumstances are found, they should be considered alone and in balance with any aggravating circumstances, and if the net effect demonstrates that a lesser sanction is needed to fulfill the primary purposes of discipline, it is appropriate to impose or recommend a lesser sanction than what is otherwise specified in a given

the criteria of the standard and, therefore, a reproof is warranted. While OCTC does not specifically respond to Martin's argument that standard 1.7(c) applies in this case, OCTC points to the case relied upon by the hearing judge, along with other cases, to support its conclusion that the judge's recommendation of a 90-day actual suspension should be upheld.

The hearing judge considered *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113 to be the most applicable. In *Bleecker*, an attorney received a 60-day actual suspension for commingling and two counts of moral turpitude for his grossly negligent misappropriation of \$270 and misusing his CTA to conceal assets from levy by the Internal Revenue Service. The judge determined that, while not as serious as the misconduct in *Bleecker*, Martin's misconduct nonetheless warranted greater discipline than the discipline recommended in *Bleecker* as that attorney had "a far greater amount of mitigation [and] an absence of any aggravation."¹⁵ Further, the judge found the attorney's misconduct in *Bleecker* "took place over a limited time period" (five months), as opposed to Martin's misconduct (10 months).

First, we find that a five-month difference in length of misconduct between these two cases does not merit the distinction the hearing judge found. Additionally, because we only find one aggravating circumstance instead of two as the judge found, and provide more weight overall to Martin's mitigating circumstances, we do not agree with the judge that for these reasons Martin's discipline should be greater than in *Bleecker*. Further, the focus of the disciplinary analysis in *Bleecker* was on that attorney's misappropriation and concealment of his assets, and not

Standard. On balance, a lesser sanction is appropriate in cases of minor misconduct, where there is little or no injury to a client, the public, the legal system, or the profession and where the record demonstrates that the member is willing and has the ability to conform to ethical responsibilities in the future."

¹⁵ The opinion provides that the attorney in *Bleecker* established five mitigating circumstances: financial pressures leading to a cash shortage; the attorney hired a business consultant to remedy his business practices; no client was harmed; the attorney admitted misuse of his CTA; and five years had passed since the misconduct had occurred.

commingling, which led to the 60-day actual suspension recommendation.¹⁶ For these reasons, we decline to apply *Bleecker* to Martin’s relatively limited misconduct of commingling.

OCTC also urges us to consider three additional cases: *In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420,¹⁷ *In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47,¹⁸ and *In the Matter of Doran* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 871.¹⁹ In considering *McKiernan*, in which we recommended the same

¹⁶ In *Bleecker*, because of multiple culpability findings, the disciplinary standard applied was the “most severe” pursuant to former standard 1.6(a), which was determined to be former standard 2.2(a). That standard provided for disbarment for misappropriation of entrusted funds unless the amount of funds misappropriated was insignificantly small or the most compelling mitigating circumstances clearly predominated, in which case a minimum of a one-year actual suspension should be imposed. We decided to also apply former standard 1.6(b)(2), which is substantially similar to standard 1.7(c), to go below former standard 2.2(a)’s one-year minimum because of the attorney’s mitigation and that he was “not a venal person and his misconduct was aberrational.” (*In the Matter of Bleecker, supra*, 1 Cal. State Bar Ct. Rptr. at p. 127.)

¹⁷ In *McKiernan*, we recommended a 90-day actual suspension for an attorney culpable of commingling and moral turpitude by gross negligence for issuing two NSF checks to a business when he knew insufficient funds were in the CTA to cover payment. The attorney took over three years to finally pay the amount owed to the business, and only after it had filed a complaint with the State Bar, for which moral turpitude was also found. The attorney’s misconduct was aggravated by indifference for failing to repay at least part of the money, for a pattern of misconduct given he repeatedly misused his CTA over a prolonged period of time, and multiple acts, but mitigated by candor and cooperation, remorse and recognition of wrongdoing, 21 years of discipline-free practice (reduced because for 18 years he never managed his CTA), and limited weight for good character evidence.

¹⁸ In *Heiser*, we recommended that the attorney be actually suspended for six months. He was found culpable for commingling and for moral turpitude by writing NSF checks from his personal account and his closed CTA. His multiple aggravating circumstances outweighed his one mitigating circumstance. Further, the attorney did not pay two of his NSF checks, and the other two were not paid until the police were involved and legal proceedings commenced, thus causing those two people added expense to obtain their funds. Finally, the attorney in *Heiser* did not cooperate with the State Bar investigators and also did not appear for his disciplinary trial.

¹⁹ In *Doran*, we also recommended that the attorney be actually suspended for six months. The attorney commingled for a period of almost three years and engaged in acts of moral turpitude by gross negligence when he issued 17 NSF checks. He testified he had no understanding of the purpose of a trust account, nor did he understand the concept of commingling. He also was found culpable for acting incompetently when he abandoned a client in one matter and took a position against a client in order to avoid being sanctioned in another uncharged matter. His multiple aggravating circumstances outweighed his one mitigating circumstance. Central to the recommended discipline was our observation from the entire record

discipline of 90 days' actual suspension as OCTC argues is appropriate here, we do not find that case sufficiently analogous due to the more extensive misconduct found beyond commingling, and the mitigating circumstances not clearly outweighing the aggravating circumstances as they do for Martin. For the same reasons, we find even less guidance from *Heiser* or *Doran*, where, in each case, the misconduct was more extensive and the aggravation outweighed the mitigation, resulting in a recommendation of six months' actual suspension.

Most notably, in all three cases cited by OCTC, clients were harmed; in Martin's case, no client was harmed or in danger of being harmed because Martin's un rebutted testimony is that he had always understood his personal funds could not be in the CTA if client money was there. Therefore, contrary to the hearing judge's conclusion, Martin was not "wholly oblivious to his ethical obligations in handling his CTA;" Martin honestly²⁰ but unreasonably misunderstood that rule 4-100(A) did not permit him to have personal funds in the CTA at any time, except under two strict conditions not involved here. His misunderstanding resulted in his misconduct continuing after receiving multiple investigative letters from the State Bar for his NSF charges, and OCTC argues this point repeatedly in asserting its position that Martin's misconduct deserves an actual suspension of 90 days. However, if OCTC had simply and clearly pointed out early in the investigative phase how Martin's actions ran afoul of rule 4-100(A), he might have made the necessary changes earlier than he did.²¹

that the attorney demonstrated he was "totally oblivious" to his obligations as a lawyer, and we had great concern his lack of understanding of his obligations as an attorney posed a risk to the public. (*In the Matter of Doran, supra*, 3 Cal. State Bar Ct. Rptr. at p. 881.)

²⁰ During its questioning of Martin during trial, OCTC failed to establish he was placing his personal money into the CTA for a dishonest motive, including that he was hiding his money from lien collection efforts or from his ex-wife.

²¹ The record shows that, as early as February 7, 2017, his then-counsel wrote the OCTC investigator and disclosed Martin was depositing his paychecks into the CTA and paying personal expenses from it.

We agree with Martin that the requirements of standard 1.7(c) have been met, and the overall record supports a downward departure from the 90-day actual suspension as the presumed sanction under standard 2.2(a). His multiple mitigating circumstances, including a 15-year discipline-free record, no client harm, character witnesses who credibly testified to his reputation for integrity, and his cooperation, candor, and honesty during the investigation and disciplinary trial, clearly outweigh his one aggravating circumstance of multiple acts. The net effect demonstrates that a lesser discipline is warranted to fulfill the primary purposes of discipline. Further, Martin's rule violations are minor misconduct as no client was harmed, and his actions were honest and aberrational, demonstrating that he has the ability to conform to ethical responsibilities in the future. Given these findings, a public reproof with the conditions that Martin attend and successfully complete the State Bar's Ethics School and Client Trust Accounting School is appropriate discipline to protect the public, the courts, and the legal profession.²²

VI. ORDER

Joseph Earl Martin is ordered publicly reproofed, to be effective 15 days after service of this opinion and order. (Rules Proc. of State Bar, rule 5.127(A).) He must comply with the specified conditions attached to the public reproof. (Rules Proc. of State Bar, rule 5.128.) Failure to comply with this condition may constitute cause for a separate proceeding for willful breach of rule 8.1.1 of the Rules of Professional Conduct that are currently in effect.

Martin is ordered to comply with the following conditions: Within one year of the effective date of this public reproof, he must submit to the Office of Probation satisfactory evidence of completion of Ethics School and passage of the test given at the end of that

²² Rule 5.127(B) of the Rules of Procedure of the State Bar provides: "A public reproof is part of the attorney's official State Bar attorney records, is disclosed in response to public inquiries, and is reported as a record of public discipline on the State Bar's web page. The record of the proceeding in which the public reproof was imposed is also public."

session. Within one year of the effective date of this public reproof, he must also submit to the Office of Probation satisfactory evidence of completion of Client Trust Accounting School and passage of the test given at the end of that session. Both requirements are separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending either Ethics School or Client Trust Accounting School. (Rules Proc. of State Bar, rule 3201.)

VII. COSTS

Costs are 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.

McGILL, J.

WE CONCUR:

PURCELL, P. J.

HONN, J.

No. 16-O-17714

In the Matter of
JOSEPH EARL MARTIN

Hearing Judge

Hon. Manjari Chawla

Counsel for the Parties

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