PUBLIC MATTER—NOT DESIGNATED FOR PUBLICATION

Filed October 25, 2019

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Nos. 16-O-13399; 15-O-11271
	)	(Consolidated)
LOTTIE WOLFE COHEN,	)	
	)	OPINION
State Bar No. 94674.	)	[As Modified on November 15, 2019]
	)	

Lottie Wolfe Cohen was charged with eight counts of misconduct for improper handling of her client trust accounts (CTAs) in two client matters, the Calderon matter and the Calhoun matter, including checks returned for non-sufficient funds (NSF checks) and misappropriation. In 2015, the Office of Chief Trial Counsel of the State Bar (OCTC) investigated Cohen's alleged misconduct in the Calderon matter, which resulted in her attending State Bar Client Trust Accounting School (CTA School), pursuant to a conditional warning letter. About six months later, another NSF check was drawn from her CTA in a separate client matter. OCTC reopened its original investigation, filed charges against Cohen, and both cases were consolidated for trial.

The hearing judge found Cohen culpable, in both cases, of six counts of misconduct: two counts of moral turpitude for misappropriation; two counts of failing to maintain client funds in her CTA; and two counts of failing to maintain proper CTA records. The judge dismissed two counts of moral turpitude for the NSF checks, and recommended discipline including an actual suspension of six months. Cohen appeals, maintaining that she is not culpable as charged, and seeking an admonition, at most. She also asserts violations of her substantive and procedural rights in the Calderon matter, and seeks its dismissal. OCTC does not appeal the hearing judge's findings, and requests that we uphold her recommendation.

Upon our independent review of the record pursuant to California Rules of Court, rule 9.12, we reject Cohen's arguments and affirm the hearing judge's culpability findings and disciplinary recommendation. Unlike the judge, we also find Cohen culpable for two counts of moral turpitude for issuing the NSF checks.

I. PROCEDURAL BACKGROUND

A. Hearing Department Proceedings

On June 6, 2017, OCTC filed a four-count Notice of Disciplinary Charges (NDC) in the Calhoun matter, Case No. 16-O-13399, charging Cohen with (1) issuing an NSF check, in violation of Business and Professions Code section 6106;[1] (2) misappropriation, in violation of section 6106; (3) failing to maintain client funds in her CTA, in willful violation of rule 4-100(A) of the Rules of Professional Conduct;[2] and (4) failing to maintain records of client funds, in willful violation of rule 4-100(B)(3).[3] On September 19, 2017, the hearing judge granted OCTC's motion to dismiss the NDC in Case No. 16-O-13399 without prejudice.

On January 31, 2018, OCTC filed a second four-count NDC in Case No. 15-O-11271, relating to misconduct in the Calderon matter, charging Cohen with the same violations as in Case No. 16-O-13399. On March 8, OCTC filed an amended NDC in Case No. 16-O-13399, alleging the same four counts of culpability as those alleged in Case No. 15-O-11271. On April 5, the hearing judge consolidated the two cases for all purposes.

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[1] All further references to sections are to this source. Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

[2] All further references to rules are to the former California Rules of Professional Conduct that were in effect until November 1, 2018, unless otherwise noted. Rule 4-100(A) provides that all funds received or held for the benefit of a client shall be deposited into a CTA.

[3] Rule 4-100(B)(3) requires, in part, that attorneys must maintain complete records of all funds, securities, and other properties of a client, including, but not limited to, a client ledger, a written account journal, and monthly reconciliations of her CTA.

Trial was held on July 3, 5, 6, and 10. The hearing judge issued her decision on October 5, 2018.

B. Cohen's Procedural and Due Process Claims Fail

Before trial, Cohen sought interlocutory review of four orders issued by the hearing judge. After considering the petitions on the merits, we denied each one because Cohen did not show abuse of discretion or error of law by the judge. (Rules Proc. of State Bar, rule 5.150(K).) On April 25, 2018, we denied her request for review of the hearing judge's denial of her motion to dismiss Case No. 15-O-11271. On May 4, we denied her request for review of the judge's denial of her motion to quash, strike, and exclude an investigator's letter and to strike the NDC in the same case. On July 2, we denied her request for review of two orders by the judge granting motions in limine to preclude evidence of (1) OCTC's alleged violation of rule 2603 of the Rules of Procedure of the State Bar for failing to state good cause for reopening the Calderon matter and (2) alleged prosecutorial misconduct by OCTC.

Cohen argued extensively in the Hearing Department, in the petitions for interlocutory review before this court, and again in this appeal, that Case No. 15-O-11271 was improperly reopened and should have been dismissed. She contends that rule 2603 of the Rules of Procedure of the State Bar required OCTC to demonstrate good cause for reopening the matter. She maintains that the judge erred in rejecting her arguments, and that she was severely prejudiced by this error. Cohen has failed to offer any new arguments or evidence to support these previously reviewed and denied challenges, and we therefore decline to review them again. (*In the Matter of Carver* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 348, 355 [Review Department found no basis to reconsider hearing judge's refusal to set aside default where previously considered and rejected twice].)

II. FACTUAL BACKGROUND[4]

A. Case No. 15-O-11271—Calderon Matter

In December 2012, Maria Calderon hired Cohen to represent her in an employment discrimination matter, which settled for $98,000 on March 7, 2013. Calderon was entitled to $63,025 from the settlement, and the remaining $34,975 was Cohen's attorney fee. On October 30, 2014, Cohen deposited the $98,000 check into her CTA (CTA 0217) at JP Morgan Chase Bank (Chase Bank). To accommodate Calderon's request that she receive the $63,025 in installments, Cohen issued three checks to Calderon from her CTA: (1) no. 2189 for $20,000 on November 13, 2014, paid November 14; (2) no. 2187 for $20,000 on November 13, paid December 12; and (3) no. 2190 for $23,025 on January 2, 2015, presented to Chase Bank on January 5, and returned unpaid for insufficient funds ($23,025 NSF check). Cohen also paid the attorney fees she was entitled to by issuing two checks, one made out to herself and the second to Chase Bank: (1) no. 2192 for $30,000 on November 24, 2014, paid December 1; and (2) no. 2185 for $5,000 on November 11, paid December 5.[5] At trial, Cohen produced a one-page document entitled "Accounting for Client . . . Calderon," which detailed the checks paid to Calderon. She did not produce any other client ledger, account journal, or monthly reconciliation for her CTA.

As of December 12, 2014, after Calderon had cashed the first two of the three checks Cohen issued to her, Cohen's CTA should have had a balance of at least $23,025 for Calderon. However, on December 12, the CTA balance was $21,215.97. On January 5, 2015, Cohen transferred $20,197.97 from her CTA to her operating account, believing that it was her money.

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[4] We base the factual background on 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).) We also give great weight to the judge's credibility findings. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 [hearing judge best suited to resolve credibility issues "because [the judge] alone is able to observe the witnesses' demeanor and evaluate their veracity firsthand"].)

[5] Cohen explained to the State Bar investigator that the $5,000 check included the last $4,975 of her attorney fee.

As a result, the CTA balance was only $100 when the $23,025 check was presented for payment, also on January 5. On January 7, Chase Bank reported the $23,025 NSF check to the State Bar.

Calderon notified Cohen of the NSF check and Cohen issued four replacement checks from her general operating account: (1) no. 1707 for $7,000 on January 19, 2015, paid April 3 (with $25 added as reimbursement for bank fees incurred when the original check was returned); (2) no. 1524 for $3,050 on April 6, paid April 20; (3) no. 1709 for $6,000 on January 19, paid May 4; and (4) no. 1708 for $7,000 on January 19, paid June 3.

State Bar Investigation

OCTC initiated an investigation and sent Cohen a letter on March 13, 2015, requesting an explanation for the $23,025 NSF check. On March 16, Cohen responded to OCTC's letter that she issued several checks to Calderon, which Calderon requested so that she could cash them over time. Cohen further stated that she "did not know when [Calderon] would be cashing the checks." She also explained that around mid-December 2014, she wanted to reduce her CTA balance so she "transferred the funds to [herself], thinking the remaining were [her] proceeds from the case." By the time of trial, she changed her story, testifying that she transferred the money to accommodate a new request by Calderon to stagger the payments (the remaining uncashed $23,025 check) over time. The hearing judge discounted this testimony as lacking candor since it was inconsistent with Cohen's previous statements to the State Bar.[6] Lastly, Cohen's March letter to OCTC stated that Calderon "did receive the last payment of $23,025 in the manner she requested in January 2015."[7]

On September 17, 2015, OCTC sent Cohen a conditional warning letter informing her that it would close its investigation if she attended CTA School within six months. The letter advised

[6] *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 282 [we give great weight to hearing judge's ruling on candor].

[7] On June 10, 2015, Cohen was interviewed by a State Bar investigator. Her statements to him were consistent with her March written response. The investigator's memo of the interview states that "Calderon requested that the distribution of her settlement proceeds be staggered over the course of three months (November 2014 through January 2015)."

Cohen that OCTC "may reopen the matter if [it] discovers[s] new material evidence, or if the Chief Trial Counsel's designee, in his or her discretion, otherwise determines there is good cause to do so." OCTC's letter summarized Cohen's explanation of the NSF check: "You explained that the insufficient funds transaction occurred when your client waited approximately three (3) months to negotiate one of three settlement checks you issued on or about November 13, 2014. You further explained that you were unaware that the funds remaining in your [CTA] at the end of the year belonged to the client and that you mistakenly withdrew the funds believing them to be yours." Cohen received the conditional warning letter and did not dispute these statements.

Cohen successfully completed CTA School on October 23, 2015. After receiving notice from Chase Bank of another NSF check in March 2016, for $3,494.05, in the Calhoun matter, OCTC opened Case No. 16-O-13399, and reopened Case No. 15-O-11271. In a letter dated August 24, 2017, OCTC notified Cohen that it was reopening the earlier investigation.

B. Case No. 16-0-13399—Calhoun Matter

Adam Calhoun hired Cohen to represent him in a personal injury matter, which she settled in his favor for $15,000. The settlement was to be split between Calhoun, Cohen, and his medical providers, with Calhoun and Cohen each receiving $5,000 and Calhoun's three medical providers receiving $5,000 collectively. Cohen deposited the $15,000 settlement check into her then-current CTA at Chase Bank on February 11, 2016 (CTA 2063), after which its balance was $34,178.10.

On March 7, 2016, Cohen wrote five checks drawn on CTA 2063 in the Calhoun matter: (1) no. 6036 for $1,337.95 to The Rawlings Group; (2) no. 6037 for $170 to Eric M. W. Chen, M.D.; (3) no. 6038 for $3,494.05 to Hope Chiropractic Group; (4) no. 6039 for $5,000 to Calhoun; and (5) no. 6040 for $5,000 to the Law Office of Lottie Cohen.[8]

[8] These checks erroneously total $15,002 due to an overpayment of $2 in issuing the checks to the medical providers.

Check number 6040 to Cohen's office was paid on March 8, 2016. Check number 6039 to Calhoun was paid on March 10. After Cohen and Calhoun cashed their respective checks, Cohen was required to maintain a CTA balance of at least $5,000, the amount owed to the three medical providers. However, on March 15, the balance of CTA 2063 dropped to $3,155.63, or $1,844.37 below the required balance. On March 17, that balance dropped to $100. When Hope Chiropractic presented its check to Chase Bank for payment on March 16, it was returned as an NSF check. On March 18, Chase Bank reported this NSF check to the State Bar. On March 31, Cohen deposited funds into her CTA and issued a replacement check for $3,494.05 paid to Hope Chiropractic on May 2.

1. State Bar Investigation

On April 15, 2016, an OCTC investigator wrote to Cohen, requesting a written explanation of the $3,494.05 NSF check. Cohen responded that she had made a slight mistake in that she wrote the check on March 7, and assumed it had cleared by March 16. She also said that her math was incorrect and the account balance was off by a few hundred dollars. In July 2016, the investigator wrote to Cohen requesting further details, and asking her to provide the client ledger, monthly reconciliations, and written account journal for CTA 2063. Cohen did not comply.

2. Errors Contributing to Underfunding of CTA 2063

Based on trial testimony, the hearing judge found that four events contributed to the shortfall in CTA 2063. First, in December 2015, Cohen was a victim of identity theft/check fraud when someone fraudulently cashed a $700 check from her prior CTA at Chase Bank (CTA 5991). Chase Bank froze CTA 5991 and transferred the balance to CTA 2063. Calhoun's funds were never in CTA 5991, but only in CTA 2063. On January 28, 2016, Chase Bank refunded $700 to compensate Cohen for the forged check, depositing the $700 into CTA 5991. Cohen did not realize this deposit was made until March. On March 12, she asked Chase Bank to transfer

the $700 to CTA 2063. Cohen did not realize that the bank mistakenly deposited the money into her operating account, not into CTA 2063 as she had requested. Second, Chase Bank erred by withdrawing $337.94 in check printing charges from CTA 2063, which is not permitted by the State Bar's trust account requirements. Third, a client unrelated to Calhoun had been overpaid by $807.30 from CTA 5991. This overpayment was due to an error on Cohen's part and was only discovered by the accountant she hired to review her accounting records and testify as her expert at trial. Fourth, there was the $2 overpayment to Calhoun's medical providers.

III. CULPABILITY

A. Case No. 15-O-11271—Calderon Matter

1. Count One—Section 6106 (Moral Turpitude—Issuance of NSF Checks)[9]

The hearing judge dismissed count one stating that, while an attorney's practice of issuing checks that he or she knows will not be honored constitutes moral turpitude, OCTC failed to produce evidence that Cohen engaged in a practice of issuing checks that she knew would not be honored. Cohen asserts that the hearing judge's dismissal of count one was correct because OCTC did not produce clear and convincing evidence of a section 6106 violation, and that this count is duplicative of count two. OCTC asserts that Cohen is culpable of moral turpitude because she was grossly negligent in handling her trust accounts, and that she could not have reasonably believed that the checks would be honored.

We agree that an attorney's grossly negligent handling of a trust account that results in the issuance of NSF checks can constitute culpability for moral turpitude. Thus, if Cohen knew or should have known that CTA 0217 had insufficient funds to honor her checks to Calderon, she may be culpable of moral turpitude. (*In the Matter of Doran* (Review Dept. 1998) 3 Cal. State

[9] After oral argument, we noted that neither OCTC nor Cohen had addressed the hearing judge's dismissal of count one in both the 15-O-11271 and 16-O-13399 cases. On August 20, 2019, we vacated our submission to allow the parties to file supplemental briefs on the culpability issue in these counts. OCTC filed its brief on September 4; Cohen filed hers on September 6.

Bar Ct. Rptr. 871, 876; *In the Matter of Reiss* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 206, 211; see also *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 169.) Contrary to Cohen's assertions, OCTC did prove that Cohen's grossly negligent mishandling of her trust accounts constituted moral turpitude. Cohen did not keep client ledgers or trust account journals with sufficient detail to allow her to verify the amount of money on account for each client. She testified that she only monitored her CTA balance via her monthly bank statements, which she did not always see immediately. With respect to Calderon, she withdrew all but $100 from CTA 0217 when the $23,025 check she wrote to Calderon was still outstanding. Given these facts, we find that Cohen's prolonged failure to properly monitor and maintain accurate CTA records to ensure that the balance was sufficient to cover outstanding checks is gross negligence that supports a finding of moral turpitude. We also reject Cohen's argument that the elements of count one are duplicative of those in count two. Count one involves her grossly negligent mismanagement of her trust accounts which resulted in the issuance of NSF checks, while count two involves misappropriation of client funds by gross negligence. These are separate acts that are not duplicative.

2. Count Two—Section 6106 (Moral Turpitude—Misappropriation)
Count Three—Rule 4-100(A) (Failure to Keep Client Funds in Trust Account)

The hearing judge found Cohen culpable for moral turpitude for misappropriating $23,025 by gross negligence in the Calderon matter. Cohen contends that: OCTC did not prove culpability by clear and convincing evidence; she did not willfully commit misappropriation; she cannot be culpable of misappropriation because she never took the money for herself; and she properly followed her client's instructions to remove the money from her CTA. OCTC asks that we affirm the judge's culpability findings.

We find that Cohen is culpable of grossly negligent misappropriation and of failing to maintain client funds in her trust account. A finding of gross negligence supports a finding of

moral turpitude where an attorney's fiduciary obligations are involved, particularly related to her handling of a CTA. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410.) When the actual balance of a trust account drops below the amount that the attorney is required to hold for a client, a presumption of misappropriation arises, and the burden shifts to the attorney to show that misappropriation did not occur. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 37; *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618.)

After Calderon cashed the first two checks from Cohen, Cohen was required to maintain $23,025 in her CTA for Calderon. The actual balance of CTA 0217 fell below this amount at least twice—on December 12, 2014, it was $1,809.03 less than the $23,025 owed to Calderon, and by January 5, 2015, when the third check to Calderon was returned as NSF, it fell $22,925 below the required amount. Cohen cannot rebut the presumption of misappropriation because she transferred the money from her CTA to her operating account, and Calderon was deprived of the use of $23,025, which was not fully repaid until June 3, 2015. An attorney who returns misappropriated funds is still culpable for misappropriation. (*In the Matter of Elliott* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr 541, 544.) Like the hearing judge, we find Cohen culpable for failing to maintain funds in her trust account, but assign no additional weight in discipline because this count is duplicative of the misappropriation violation. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127.)

We also reject Cohen's argument that she is not culpable for failing to maintain funds in her CTA because her client directed her to distribute the final $23,025 in four installments. First, we agree with the hearing judge that Cohen's testimony about her client's instructions lacked candor.[10] Cohen told the State Bar investigator that she removed all but $100 from her trust account because she thought the money was hers. This is inconsistent with her trial testimony.

[10] *In the Matter of Dahlz, supra*, 4 Cal. State Bar Ct. Rptr. at p. 282 [great weight given to hearing judge's findings on candor].)

Further, even if this testimony were true, it would not excuse Cohen for transferring the CTA funds from her trust account into her operating account.

A client cannot waive his or her attorney's compliance with the State Bar Act or the Rules of Professional Conduct. (See *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 278 [client cannot waive fee limits required by § 6146].) Rule 4-100(A) requires client funds to be held in a trust account. The funds must be maintained until the outstanding balance owed to the client is settled. (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 277–278.)

3. Count Four—Rule 4-100(B)(3) (Failure to Maintain Records of Client Funds)

The hearing judge found that Cohen violated rule 4-100(B)(3) by failing to maintain a client ledger, a written journal for her CTA, and monthly reconciliations. Rule 4-100 includes Trust Account Record Keeping Standards adopted by the then-Board of Governors of the State Bar, effective January 1, 1993 (Trust Account Standards), which provide detailed guidance on required recordkeeping. The Trust Account Standards require attorneys to maintain the following records for their CTAs: (1) a written ledger for each client; (2) a written journal for each bank account; (3) all bank statements and canceled checks; and (4) monthly reconciliations of each account. (See also The State Bar of Cal., Handbook on Client Trust Accounting for California Attorneys (2018) (Handbook), § II, p. 3.) Cohen denies culpability but did not introduce the required documents into evidence at trial. She only introduced a one-page document that accounted for the $98,000 Calderon settlement, but is not a full client ledger meeting the requirements of the Trust Account Standards or the Handbook. She also did not produce journals or monthly reconciliations for her accounts. Accordingly, we agree with the hearing judge's culpability finding.

B. Case No. 16-0-13399—Calhoun Matter

1. Count One—Section 6106 (Moral Turpitude—Issuance of NSF Checks)

As with the Calderon matter, the hearing judge dismissed count one based on her finding that OCTC failed to produce evidence that Cohen engaged in an intentional practice of issuing checks that she knew would not be honored. Again, we look instead at whether Cohen's grossly negligent management of her trust accounts constitutes moral turpitude. Cohen argues that she cannot be culpable because the bank statements show that the account had sufficient funds on the date she wrote the check to Hope Chiropractic that was returned as NSF. However, Cohen's gross negligence in handling her trust account demonstrates moral turpitude. (*In the Matter of Hagen*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 169.) She did not keep a contemporaneous account journal to show the funds in her CTA. And she did not timely discover the errors that contributed to CTA 2063 being underfunded—the $700 reimbursement from Chase Bank deposited into the wrong account and her overpayment of $807.30 to another client. Notably, these errors occurred just months after Cohen completed CTA School, which demonstrates that she did not reform her conduct after her earlier CTA-related misconduct. In these circumstances, Cohen's grossly negligent handling of her CTA that resulted in checks that were returned unpaid constitutes moral turpitude. (*In the Matter of Doran*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 876.)

2. Count Two—Section 6106 (Moral Turpitude—Misappropriation) Count Three—Rule 4-100(A) (Failure to Keep Client Funds in Trust Account)

The hearing judge found Cohen culpable for moral turpitude for misappropriating $1,844.37 by gross negligence. As with the Calderon matter, Cohen reiterates that: OCTC did not prove culpability by clear and convincing evidence; she did not willfully commit misappropriation; she cannot be culpable of misappropriation because she never took the money for herself; and the shortfall resulted from the errors identified by her expert witness accountant. OCTC asks that we affirm the judge's culpability findings.

We find that Cohen is culpable of grossly negligent misappropriation and of failing to maintain client funds in her trust account. As stated above, and contrary to Cohen's assertions, a finding of gross negligence supports a finding of moral turpitude, especially when involving an attorney's handling of CTAs. (*In the Matter of Blum*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 410.) Here, a presumption of misappropriation arose when, on March 15, 2016, the balance of CTA 2063 dipped $1,844.37 below the $5,000 she was required to maintain to pay Calhoun's three medical care providers. (*Edwards v. State Bar*, *supra*, 52 Cal.3d at p. 37.) Cohen did not rebut that presumption. The evidence establishes that Cohen's failure to regularly monitor her accounts contributed to the deficit. She did not realize for over a month that the bank had deposited the reimbursement for the $700 fraudulent check into her previously frozen account; she also failed to promptly notice the $337.94 in check printing fees that the bank erroneously charged to her CTA; and she never knew she had overpaid another client by $807.30. Without these errors, her trust account would not have fallen below its required balance. This failure to properly monitor her CTA balance supports culpability for misappropriation by gross negligence under section 6106. (See *Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020 [moral turpitude finding proper for gross carelessness in failing to maintain CTA].) Like the hearing judge, we also find that Cohen failed to maintain funds in her CTA, but assign no additional weight in discipline. (*In the Matter of Sampson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 127.)

3. Count Four—Rule 4-100(B)(3) (Failure to Maintain Records of Client Funds)

The hearing judge properly found that Cohen violated rule 4-100(B)(3) by failing to maintain a client ledger, a written journal for her trust account, and monthly reconciliations. As with the Calderon matter, Cohen introduced two documents that she described as client ledgers for Calhoun, but they fail to reflect a running balance of her client's funds as checks were cashed. These so-called ledgers may suffice to document the settlement to her client, but they do

not meet the detailed recordkeeping requirements for CTAs of the Trust Account Standards and the Handbook. Since Cohen had recently completed CTA School at the time of her misconduct in the Calhoun matter, she should have known and complied with the requirements. We find that she is culpable of violating rule 4-100(B)(3).

IV. AGGRAVATION OUTWEIGHS MITIGATION

OCTC must establish aggravating circumstances by clear and convincing evidence. (Std. 1.5.[11]) Cohen has the same burden to establish mitigating circumstances. (Std. 1.6.) The hearing judge found three factors in aggravation—multiple acts, lack of candor, and indifference. She also found mitigation for no prior record of discipline, and good character. Cohen argues that OCTC failed to present clear and convincing evidence to support the judge's aggravation findings. We reject this argument because sufficient evidence was presented during the culpability phase of trial to support the factors in aggravation, and it was within the hearing judge's discretion to allow the presentation of evidence in this order. (Rules Proc. of State Bar, rule 5.102.1.) OCTC does not dispute the judge's findings in aggravation, but argues that the mitigation weight for both lack of prior discipline and good character was too generous and should be lessened. Cohen argues the opposite—that the mitigation for those two factors warrants greater weight. She also contends that she is entitled to additional mitigation for good faith belief, lack of harm, candor and cooperation, spontaneous remorse and recognition, and timely atonement. We reject Cohen's request for additional mitigation as unsupported by the evidence. Overall, we affirm the hearing judge's aggravation and mitigation findings, but find less mitigation for good character.

[11] Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. All further references to standards are to this source.

A. Aggravation

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

The hearing judge found aggravation for multiple acts of misconduct but did not assign weight. We agree and assign moderate weight for Cohen's multiple acts in two client matters. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646–647 [three wrongful acts considered multiple acts].)

2. Lack of Candor (Std. 1.5(l))

The hearing judge found that Cohen's lack of candor during part of her testimony at trial was a significant aggravating circumstance. As noted previously, we agree that her testimony at trial was inconsistent with repeated statements she made to State Bar investigators and assign substantial weight in aggravation. (*In the Matter of Dahlz, supra,* 4 Cal. State Bar Ct. Rptr. at p. 282; see also *Chang v. State Bar* (1989) 49 Cal.3d 114, 128 [fraudulent and contrived misrepresentations to State Bar may constitute greater offense than misappropriation].)

3. Indifference (Std. 1.5(k))

The hearing judge found moderate aggravation for Cohen's indifference. We agree that her misconduct is aggravated by her failure to accept responsibility for her actions. (Std. 1.5(k); *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511 [while law does not require attorney to be falsely penitent, it "does require that [she] accept responsibility for [her] acts and come to grips with [her] culpability. [Citation]."].) Rather than acknowledge her wrongdoing, Cohen tries to defend herself by offering the same unsuccessful arguments she raised in at least 10 motions in the Hearing Department and in three petitions for interlocutory review. (*In re Morse* (1995) 11 Cal.4th 184, 197–198 [repeated assertion of rejected arguments crossed line between zealous advocacy and recalcitrance].) She blames Calderon and Calderon's son for her own mistakes in handling the settlement funds. And she blames the bank errors instead of her

own failure to properly monitor her trust accounts. Her failure to accept responsibility is a moderate aggravating factor. (*Carter v. State Bar* (1988) 44 Cal.3d 1091, 1100–1101 [blanket refusal to acknowledge wrongful conduct constitutes indifference]; see *Gadda v. State Bar* (1990) 50 Cal.3d 344, 356 [lack of insight where attorney is reluctant to recognize seriousness of misconduct or accept responsibility for wrongdoing by attempting to blame others].)

B. Mitigation

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

Standard 1.6(a) provides that "absence of any prior record of discipline over many years of practice coupled with present misconduct, which is not likely to recur" is a mitigating circumstance. The hearing judge assigned moderate, not substantial, weight in mitigation for Cohen's 34 years of discipline-free practice because she did not find that Cohen was unlikely to commit similar misconduct again. We agree. (*Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [where misconduct is serious, long discipline-free practice is most relevant where misconduct is aberrational and unlikely to recur].)

Cohen argues that her misconduct will not recur because she hired an accountant to train her staff to handle trust accounts properly. However, it is not clear that she will refrain from making similar mistakes with her CTAs, given her grossly negligent management of them in two client matters during 2014 and 2016, especially since the 2016 misconduct occurred just months after she had completed CTA School. Cohen's explanations to the State Bar investigators for her NSF checks and failure to maintain required CTA balances differed from her trial testimony, which the judge found lacked candor. In the Calderon matter, she told the investigators that she had transferred most of the money in her CTA to her operating account because she believed she was entitled to the money, but at trial she testified that she moved the money so that she could

issue multiple checks as her client requested. These conflicting explanations, including her efforts to blame her client, do not convince us that her misconduct was aberrational.

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

Standard 1.6(f) provides that "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" is a mitigating circumstance. The hearing judge afforded significant mitigation for Cohen's 11 character witnesses, five of whom testified at trial. OCTC asserts that we should lessen this mitigation weight because most of Cohen's witnesses were not aware of the full extent of her misconduct. We agree.

Cohen's witnesses included an attorney, current and former clients, and friends. We agree with the hearing judge that serious consideration is given to the attorney's testimony because 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.) However, as noted by OCTC, most of the witnesses were unaware of the extent of her misconduct—only four witnesses had full knowledge of the misconduct in both disciplinary matters. (See *In re Aquino* (1989) 49 Cal.3d 1122, 1130–1131 [testimony of seven witnesses plus 20 letters affirming attorney's good character not entitled to significant weight in mitigation because most were unaware of details of attorney's misconduct].) All of the witnesses testified that she was trustworthy, reliable, dependable, diligent, ethical, and professional. We assign moderate weight for this mitigating circumstance.

3. Cohen's Request for Additional Mitigation

Cohen seeks additional mitigation for her good faith belief that she complied with her professional duties, as well as for lack of harm, spontaneous candor and cooperation, and

spontaneous remorse and timely atonement. She also asks for mitigation credit for the State Bar's delay in conducting disciplinary proceedings.

We do not find clear and convincing evidence to prove any additional mitigation. Cohen's belief that she could hold her client's money in her operating account is not a reasonable good faith belief since it violates the fundamental requirement to maintain client funds in a CTA, of which she was aware. We also affirm the hearing judge's finding that, in fact, she lacked candor in her testimony. And given our finding in aggravation for indifference, we cannot find that Cohen showed spontaneous remorse, recognition of her wrongdoing, and timely atonement.

V. 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 professional standards for attorneys. (Std. 1.1.) Our disciplinary analysis begins with the standards. While they are guidelines for discipline and are not mandatory, we give them great weight to promote consistency. (*In re Silverton* (2005) 36 Cal.4th 81, 91–92.) The Supreme Court has instructed us to follow the standards "whenever possible." (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) In determining an appropriate level of discipline, we also weigh factors in aggravation and mitigation. (Std. 1.7(b), (c).) Finally, we look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.)

We first determine which standard specifies the most severe sanction for the at-issue misconduct. (Std. 1.7(a) [most severe sanction must be imposed where multiple sanctions apply].) Here, standard 2.1(b) is the most severe and specific, providing that actual suspension is the presumed sanction for misappropriation involving gross negligence.[12] Applying standard 2.1(b) and relevant case law, the hearing judge recommended discipline including a six-month actual

[12] Standard 2.2(b) also applies to violations of rule 4-100(A) and 4-100(B)(3) and provides for suspension or reproval.

suspension and probation conditions including a requirement that Cohen's CTA handling be supervised by an accountant. OCTC asks that we affirm this recommended discipline. Cohen submits that an admonition is adequate discipline.

Weighing the totality of factors and considering comparable case law, we affirm the hearing judge's recommended discipline, including a six-month actual suspension.[13] Cohen's request for an admonition is not consistent with the standards or the case law. Admonitions are permissible for discipline matters not involving a serious offense and are not applicable here where Cohen is culpable for multiple counts of moral turpitude. (Rules Proc. of State Bar, rule 5.126(A).) The cases cited by Cohen, *In the Matter of Respondent V* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 442 and *In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439, are distinguishable because they each involved only single acts of misconduct. Rather, standard 2.1(b) provides that actual suspension is the presumed sanction. Like the hearing judge, we find that *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404 supports an actual suspension of six months. *Bouyer* also involved mishandling client trust funds, constituting moral turpitude in two client matters, aggravated by multiple acts, client harm, concealment, lack of candor, and uncharged misconduct, and mitigated by voluntarily improved office practices, and he received a six-month actual suspension.

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Lottie Wolfe Cohen, State Bar No. 94674, be suspended from the practice of law for one year, that execution of that suspension be stayed, and that she be placed on probation for one year with the following conditions:

[13] OCTC's supplemental brief indicates that although it believes the hearing judge should not have dismissed the two counts of moral turpitude for issuance of NSF checks, it does not argue that the level of discipline should be increased if those counts are reinstated.

1. Cohen must be suspended from the practice of law for the first six months of her probation.

2. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Cohen 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 her compliance with this requirement, to the State Bar's Office of Probation in Los Angeles (Office of Probation) with her first quarterly report.

3. Cohen must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of her probation.

4. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Cohen must make certain that the State Bar Attorney Regulation and Consumer Resources Office (ARCR) has her current office address, email address, and telephone number. If she does not maintain an office, she must provide the mailing address, email address, and telephone number to be used for State Bar purposes. Cohen 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. Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Cohen must schedule a meeting with her assigned probation case specialist to discuss the terms and conditions of her 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, she may meet with the probation case specialist in person or by telephone. During the probation period, Cohen 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. During Cohen's probation period, the State Bar Court retains jurisdiction over her to address issues concerning compliance with probation conditions. During this period, she must appear before the State Bar Court as required by the court or by the Office of Probation after written notice mailed to her official membership address, as provided above. Subject to the assertion of applicable privileges, she 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. Cohen 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, Cohen 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. Cohen must answer, under penalty of perjury, all inquiries contained in the quarterly report form provided by the Office of Probation, including stating whether she 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. Cohen is directed to maintain proof of her 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 her actual suspension has ended, whichever is longer. She is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

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

9. Cohen must comply with the following reporting requirements:

a. If Cohen possessed client funds, property, or securities at any time during the period covered by a required quarterly or final report, she must submit with the report for that period a statement from a California certified public accountant or other financial professional approved by the Office of Probation certifying that:

1. She handled all such client funds, property, and/or securities in compliance with rule 1.15 of the Rules of Professional Conduct effective November 1, 2018; and

2. She complied with the Trust Account Record Keeping Standards adopted by the State Bar Board of Trustees, pursuant to rule 1.15(e) of the Rules of Professional Conduct effective November 1, 2018.

b. If Cohen did not possess any client funds, property, or securities during the entire period covered by a quarterly or final report, she must so state under penalty of perjury in the report filed with the Office of Probation for that reporting period.

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

VII. MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Lottie Wolfe Cohen be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).) If Cohen provides satisfactory evidence of taking and passage of the MPRE after the date of this opinion but before the effective date of the Supreme Court's order in this matter, she will nonetheless receive credit for such evidence toward her duty to comply with this condition.

VIII. CALIFORNIA RULES OF COURT, RULE 9.20

We further recommend that Cohen 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. Failure to do so may result in disbarment or suspension.

IX. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment. Unless 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.

HONN, J.

WE CONCUR:

PURCELL, P. J.

McGILL, J.