PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	**06-O-15373**
WAYNE K. D. McINTOSH	**OPINION ON REVIEW**
A Member of the State Bar.	

This case illustrates the perils an attorney faces when asked by an opposing party to handle funds in a contested matter. Respondent, Wayne K. D. McIntosh, who represented the wife in dissolution proceedings, deposited two checks into his client trust account (CTA), which he received from the husband: 1) a $20,000 check payable to McIntosh as a retainer fee to represent the wife; and 2) a $10,000 check payable to a forensic accountant as his fee to value the marital property on behalf of the wife. Shortly thereafter, without the husband's agreement or knowledge, McIntosh distributed the entire $30,000 from his CTA to the wife after she demanded the funds.

The hearing judge found McIntosh culpable of misappropriating the accountant's $10,000 fee and concluded that this conduct involved moral turpitude in violation of Business and Professions Code section 6106.[1] The hearing judge recommended that McIntosh be suspended for 60 days.

McIntosh seeks review, contending the evidence is insufficient to prove culpability, and that even if culpable, he should only receive a reproval because he acted in good faith. The State

[1]All further references to "section(s)" are to the Business and Professions Code, unless expressly noted.

Bar has not appealed, but it contends that McIntosh's misconduct warrants a one-year suspension.

Upon our de novo review (*In re Morse* (1995) 11 Cal.4th 184, 207), we find McIntosh culpable of willful misappropriation because he disbursed the $10,000, which was intended for the accountant, to his client without authorization from the husband to do so. He compounded his error when he did not accede to the husband's repeated demands to return the accountant's fee. Even though we find McIntosh's misconduct was not dishonest, it was grossly negligent, and as such, we find it constitutes moral turpitude. We agree with the hearing judge's recommended discipline, based on our consideration of all relevant circumstances, as well as the standards[2] and guiding case law.

I. FACTUAL AND PROCEDURAL BACKGROUND

McIntosh was admitted to practice law in California on June 4, 2002. Before his admission in California, he practiced family law in Australia for over 15 years. He has no prior record of discipline in California or Australia.

In October 2005, Jane Morrissey Norman (Wife) hired McIntosh to represent her in a dissolution proceeding. Wife was an attorney who had previously practiced family law. She paid McIntosh a total of $15,000 from her own funds and those of her boyfriend for McIntosh's retainer and for a fee for a forensic accountant, who would value the business assets of her husband, Jeremy Norman (Husband). McIntosh deposited these funds into his CTA.

In November 2005, McIntosh negotiated with Husband's attorney, Paul Sloan, for a $30,000 advance from Husband for McIntosh's fees and for a retainer fee for James Walker, who was the accountant McIntosh planned to hire as a valuation expert. Sloan agreed to hire Walker because he had previously worked with him. Sloan confirmed by letter dated November 30,

[2]All further references to "standard(s)" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, unless expressly noted.

2005, that Husband "has agreed to advance $20,000 to you [McIntosh] as a retainer and $10,000 to Jim Walker for the same purpose, both sums to be regarded as partial distributions to your client of her share of the community estate." Wife objected to the characterization of the funds as community property.

After further negotiations and exchange of various draft letter agreements, Husband agreed "in the spirit of cooperation" to advance the $30,000 and reserve for a later date the characterization "of the funds as either community or separate property." On December 7, 2005, Sloan sent a letter agreement stating: "With this letter I am handing you two checks, one in the amount of $20,000 made payable to you and the second in the amount of $10,000, made payable to James Walker. Our agreement is that the sums of these check represent [sic] are being paid without present characterization. . . .[Para.] If I have accurately described our agreement, could you please so indicate by signing in the space below. . . ." McIntosh signed the letter and returned it to Sloan. In total, there were six letters between Sloan and McIntosh, all of which expressly stated that the $10,000 was intended solely as a retainer for Walker.

McIntosh's wife picked up the two checks from Sloan and she deposited them into McIntosh's CTA on December 8, 2005, after McIntosh endorsed Walker's check by signing and clearly printing his own name, along with the instruction: "Deposit Only [¶] Marin Family Lawyers [¶] Atty-Client Trust Acct." McIntosh was given no specific instructions by Sloan about the handling of the $10,000 check for Walker, and he neither sought permission to deposit the check into his CTA, nor informed Wife, Husband, Sloan, or Walker about this deposit. However, McIntosh testified without contradiction that he had an ongoing understanding with his bank that he could sign third party checks in his own name when funds were to be deposited into his CTA. He also testified that the reason he deposited the Walker check into his CTA was because "Mr. Walker hadn't been retained, and I thought that was the safest place to put the

check." He further testified that he "did not know if we would use all of the $10,000 in any event or if we would need more" and that he would pay Walker from his CTA as Walker earned the fees.

Shortly after the two checks were deposited, McIntosh advised Wife that the funds were in his CTA. She demanded that McIntosh give her the $30,000 so that she could keep it in her own account, earn interest thereon, and pay the fees to McIntosh and Walker as they became due. Eleven days after the deposit of the checks into his CTA, McIntosh paid over the entire $30,000 to Wife. His check to her contained the following notation: "advance for costs from Norman." McIntosh testified that his "understanding at the time was that the $30,000 that [he] was handing over to Jane Morrissey Norman was the $30,000 that [he] had received as an advance for fees and costs from Jeremy Norman." McIntosh further testified that he consulted with another attorney about the propriety of distributing the funds to Wife, and as a result of that conversation, as well as his own research on the subject, he believed Wife was entitled to hold the funds and he was required to comply with her demand for the money.[3] Wife deposited the $30,000 into her own account.

Three months later, in March 2006, Wife terminated McIntosh and retained a new attorney. She never hired Walker as an expert.

When Sloan learned in May 2006 that Walker had not been hired or paid and that McIntosh had deposited the $10,000 check into his CTA, he sent McIntosh a series of three letters demanding immediate reimbursement of the money. McIntosh replied to Sloan: "I certainly do not have the $10,000 as you have since found out, Ms. Morrissey does." McIntosh did not accede to Sloan's demand for reimbursement, and said that he could not discuss the

[3]McIntosh's testimony disclosed that his research may have been defective because he framed the issue to the attorney he consulted so as to assume that McIntosh was returning the money to Wife rather than releasing money received from Husband that was subject to instructions regarding its use.

matter because he had acted pursuant to Wife's instructions and their discussions were confidential. McIntosh also rejected the demand by Wife's new attorney to pay the $10,000 to Husband. In a letter to Wife's attorney, dated May 2, 2006, McIntosh asserted: "I do not have the $10,000 for Jim Walker, Jane does and has had it since December 19th 2005."

Subsequently, a dispute arose between McIntosh and Wife as to McIntosh's fees, and the intended purpose of the $30,000 he had distributed to her, as well as the appropriate distribution of the remaining funds in his CTA. McIntosh and Wife proceeded to a fee arbitration, which resulted in an award on August 22, 2006. McIntosh then filed a breach of contract action against Wife in Marin County Superior Court on December 13, 2006, seeking the fees he alleged he earned during his representation of her. On January 12, 2007, Wife filed a cross-complaint to have the funds remaining in the CTA awarded to her.

On March 14, 2007, the State Bar filed a Notice of Disciplinary Charges (NDC) alleging three counts of misconduct: 1) failure to support the laws of California in violation of section 6068, subdivision (a) by embezzling Walker's check in violation of Penal Code section 506, and by breaching fiduciary duties owed to Husband; 2) moral turpitude in violation of section 6106 arising from the same misconduct alleged in Count One; and 3) moral turpitude in violation of section 6106 by conspiring with Wife to defraud Husband.

While the discipline matter proceeded, in October, 2007, McIntosh moved for leave to file a cross-complaint against Husband in the breach of contract action, alleging he had claimed an interest in the funds in the CTA. On January 4, 2008, almost two years after Sloan demanded return of the money, McIntosh filed a complaint in interpleader with the Marin County Superior Court. This complaint named both Wife and Husband as defendants, and alleged they both claimed to have an interest in the $10,000 remaining in his CTA. Concurrently, he deposited the $10,000 with the court.

In a decision filed on June 5, 2008, the hearing judge found McIntosh culpable of a single violation of section 6106 under Count Two for misappropriating the $10,000 intended for Walker. She dismissed Count One because she found it was duplicative of Count Two, and she dismissed Count Three on the State Bar's motion to dismiss this count.[4]

The hearing judge rejected as not credible McIntosh's good faith claim in defense of the moral turpitude charge, although she found no evidence that he acted in bad faith. The hearing judge found in mitigation that McIntosh had no prior record of discipline, cooperated with the State Bar in these proceedings, and presented evidence of good character and pro bono work. In aggravation, McIntosh significantly harmed Husband by depriving him of $10,000. The hearing judge recommended discipline including a 60-day actual suspension and payment of $10,000 in restitution to Husband.

II. CULPABILITY DISCUSSION

A. Count One: Failure to Comply with Laws (Section 6068, subdivision (a))

Section 6068, subdivision (a) creates a duty of attorneys in California to uphold the laws of this state. The State Bar alleged in Count One that McIntosh's deposit of Walker's check into his CTA without Husband's authorization constituted embezzlement in violation of Penal Code section 506.[5]

The State Bar failed to prove by clear and convincing evidence that McIntosh appropriated or converted the $10,000 for his own use or purpose, which is an element of the

---

[4]After independently reviewing the record, we see no reason to reverse the dismissal of Count Three.

[5]Penal Code section 506 provides that: "Every . . . attorney . . . or person otherwise entrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose . . . is guilty of embezzlement . . . ."

crime of embezzlement.[6] (CALJIC No. 14.07; *People v. Stein* (1979) 94 Cal.App.3d 235, 241 [embezzlement involves fraudulent intent "to deprive the owner of the property or devoté the same to his own use"].) McIntosh did not forge Husband's name, but instead signed the check in his own name and then clearly printed his own name next to his signature. He also did not conceal the funds, since he clearly earmarked the $10,000 on his monthly CTA reconciliation and on his monthly statement to Wife as "Norman advance for costs of J. Walker." When he distributed the $30,000 to Wife, he noted on the check that the funds were the "advance for costs from Norman." Moreover, McIntosh placed the funds in his CTA, not his personal account. Trust accounts differ in character from other accounts because the funds are not to be utilized for the attorney's personal use and they bear the imprimatur of "care and soundness represented by the account and its relationship to the confidential bond between attorney and client." (*In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 54.) On this record, we do not find a violation of Penal Code section 506.

The State Bar also alleged under Count One that McIntosh failed to support the laws of California because he breached his fiduciary duty to Husband. The hearing judge erred in finding that no such duty existed. It has long been established that "[w]hen an attorney receives money on behalf of a third party who is not his client, he nevertheless is a fiduciary as to such third party." (*Johnstone v. State Bar* (1966) 64 Cal.2d 153, 155; see also *Guzzetta v. State* Bar (1987) 43 Cal.3d 962, 979; *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 330, fn. 7; *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 469-470.) However, the misconduct underlying McIntosh's breach of a fiduciary duty also is alleged in Count Two; therefore, we dismiss Count One as duplicative.

---

[6]Because we find there is no clear and convincing evidence of a violation of Penal Code section 506, we do not address whether the constitutionally required proof "beyond a reasonable doubt" for violation of a *criminal* statute is applicable here. (See *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 903 fn. 11.)

As an independent basis for misconduct in Count One, the hearing judge found, sua sponte, that McIntosh's endorsement of the Walker check constituted a failure to support the laws of California under California Uniform Commercial Code, section 3417, subdivision (a)(1), which governs the warranty of good title. A violation of section 3417(a)(1) involves a very specific inquiry: " '[D]oes the instrument presented contain all necessary indorsements and are such indorsements genuine or otherwise deemed effective?' " (*Fireman's Fund Insurance Company v. Security Pacific National Bank* (1978) 85 Cal.App.3d 797, 809-810, citing *Sun 'N Sand Inc. v. United California Bank* (1978) 21 Cal.3d 671, 687.) No evidence was presented below establishing a violation of the commercial code section, nor was it alleged in the NDC or raised in the State Bar's pretrial statement. We therefore reverse the hearing judge's finding as to the section 3417, subdivision (a)(1) violation as a basis for culpability under Count One.

B. Count Two: Misappropriation/Breach of Fiduciary Duty/Moral Turpitude

In Count Two, the State Bar incorporated by reference the allegations of misappropriation by embezzlement and breach of fiduciary duty in Count One and further alleged this misconduct constituted a violation of section 6106.[7] Although we have concluded that no embezzlement occurred, we nevertheless find that the charge of moral turpitude was clearly raised by the NDC. (See *Sternlieb v. State Bar, supra,* 52 Cal.3d at p. 321; *In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 25 ["An allegation of a section 6106 violation encompasses the lesser allegation of a former rule 8-101(A) violation where . . . the pleading clearly raises the issue of misuse of trust funds."].)

We further find the mere deposit by McIntosh of Walker's $10,000 *into* his CTA is not clear and convincing evidence that this conduct constitutes a disciplinable offense. McIntosh did not receive any specific instructions from Sloan about processing the check. Although the wiser

[7]Section 6106 proscribes "any act involving moral turpitude, dishonesty or corruption."

practice would have been to consult with Sloan first, it was not unreasonable for McIntosh to believe he should deposit the funds intended for Walker into his CTA for safekeeping, given that Walker had not yet been hired and the amount of his fee had not been ascertained. (See State Bar of California, *Handbook on Client Trust Accounting for California Attorneys* (2003 ed.) (Handbook) p. 13 [money not belonging to client but held in connection with representation of client must be held in CTA].)

Nonetheless, it clearly was unreasonable for McIntosh to believe he could disburse the $10,000 *from* his CTA to Wife, knowing that the money was intended as payment for Walker's fees. The check was made payable only to Walker, and not to McIntosh or his law firm as co-payees. McIntosh's own financial records denoted the deposit of the $10,000 as "J. Norman advance for costs of J. Walker," which confirms his understanding of the intended use of the funds. Finally, when McIntosh distributed the money to Wife, he noted on Wife's check that the source of the funds was from Husband and the intended purpose was for costs of litigation.[8]

Once he released the funds to Wife, McIntosh relinquished dominion and control of the $10,000, and he was no longer able to ensure the safekeeping of these entrusted funds. McIntosh argues in vain that because the funds were intended for Wife's benefit, he is somehow relieved of his duty to use the $10,000 as instructed by Husband. The simple fact is that the money was not hers to do with as she pleased.[9] Given the contentious nature of the divorce, it was foreseeable that a dispute might arise about the proper distribution of the $10,000, and it did. "[A]n attorney's failure to use entrusted funds for the purpose for which they were entrusted

---

[8]McIntosh's financial records contradict his argument that the $10,000 deposited in the CTA was "fungible" with other funds remaining in that account since the fee was clearly earmarked when it was deposited and maintained in the CTA, and it also was identified when it was disbursed to Wife.

[9]McIntosh's arguments based on community property and marital law are equally unavailing. The parties agreed that the $10,000 would not be characterized as either community or separate property at the time it was deposited and/or withdrawn.

constitutes misappropriation. [Citation.]" (*Baca v. State Bar* (1990) 52 Cal.3d 294, 304.) Moreover, misappropriation may occur where, as here, third-party funds are deposited into an attorney's CTA and then withdrawn without the permission of the third party. (*Sternlieb v. State Bar, supra,* 52 Cal.3d at p. 330.)

In the final analysis, McIntosh's belief that he could distribute Walker's $10,000 to Wife after having received several express written instructions from Husband about its intended use as Walker's fee was unreasonable and grossly negligent.[10] (*Brockway v. State Bar* (1991) 53 Cal.3d 51, 59.) Misappropriation involving gross negligence under these circumstances is sufficient to establish moral turpitude. (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474-475.) This finding is underscored by McIntosh's breach of his fiduciary duty to Husband. We accordingly find McIntosh culpable of moral turpitude in violation of section 6106. (*In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 123.)

III. DISCIPLINE

The primary purpose of disciplinary proceedings is not to punish the attorney but to protect the public, the courts, and the legal profession. (Std. 1.3.) No fixed formula applies in determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Rather, we determine the appropriate discipline in light of all relevant factors, including mitigating and aggravating circumstances. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

---

[10]Although an unreasonable but honest belief may be asserted as a good faith defense to a moral turpitude charge (*In the Matter of Tindall* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 652, 662), we reject McIntosh's assertion of a good faith belief that he was obligated to give the money to Wife upon her demand based on his conversation with another attorney and his own research. The hearing judge found his "testimony regarding his claims of good faith and honest mistake lack credibility," and we give this credibility finding great deference. (*In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423, 429.)

A. Mitigation

The hearing judge found in mitigation that McIntosh had no prior record of discipline. (Std. 1.2(e)(i).) The State Bar challenges this finding because McIntosh had been licensed in California less than four years at the time of the misappropriation, and he presented no evidence that attorneys in Australia are subject to a disciplinary system similar to that of California. We agree and assign this factor only slight weight in mitigation. (See *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32, 44 [finding slight mitigation for seven years of discipline-free practice in California, but no evidence that 15 years of practice without discipline in Philippine bar was comparable].)

McIntosh also presented four witnesses who testified about his good moral character. (Std. 1.2(e)(vi).) The testimony of these witnesses was impressive and three of them were members of the bar, who presumably have a "strong interest in maintaining the administration of justice." (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319.) But, four character witnesses do not constitute a wide range of members of the community, and we accordingly assign only modest weight in mitigation for McIntosh's good character evidence. (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 359.)

McIntosh also presented evidence of extensive community service, which we consider as "a mitigating factor that is entitled to 'considerable weight.' [Citation.]" (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) Most significantly, since moving to Marin County, he has been active in the Rotary Club, serving as treasurer of his local branch, in which capacity he handled thousands of dollars per week. McIntosh also has organized charity benefits on behalf of the Easter Seals and has performed pro bono work in family law matters and for the Australian Consulate.

We also find as an additional but modest factor in mitigation that McIntosh has taken objective steps demonstrating attempts to atone for his misconduct because he no longer deposits third-party checks into his CTA without the consent of the issuer. (Std. 1.2(e)(vii).)

We do not adopt the hearing judge's mitigation finding for cooperation with the State Bar (std. 1.2(e)(v)), because we do not find clear and convincing evidence that McIntosh did anything in these proceedings beyond that which he was statutorily obligated to do.

B. Aggravation

In aggravation, the hearing judge found that McIntosh significantly harmed Husband by depriving him of $10,000. (Std. 1.2(b)(iv).) We adopt this finding because Husband was denied his funds for more than a year and a half.

We also find, in aggravation as uncharged misconduct (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36), a violation of rule 4-100(B)(4) for McIntosh's refusal to reimburse the $10,000 to Husband after his attorney repeatedly demanded the money. (*In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 9.) Added to these demands were the instructions of Wife's new attorney to pay the $10,000 to Husband. McIntosh's argument that he was obliged under rule 4-100(A)(2)[11] to maintain the funds in trust when a fee dispute arose with Wife is unavailing since he had already released the $10,000 to Wife prior to his fee dispute with her. At the point that Husband's attorney demanded the return of his $10,000, McIntosh should have promptly repaid him and sought reimbursement from Wife.

Finally, we reject the State Bar's argument that McIntosh committed uncharged misconduct by depositing additional third-party checks into his CTA, as there is not sufficient evidence to support this claim. We also do not agree with the State Bar's contention that

---

[11]Rule 4-100(A)(2) provides in relevant part: "[W]hen the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved."

McIntosh lacked remorse about depositing the accountant's check *into* his CTA since we have found there is no culpability based on this conduct.

C. Level of Discipline

We start with the standards in determining the appropriate discipline to recommend. Using the guidance of standard 1.6(a), we consider the most severe discipline provided by the standards applicable to the misconduct here at issue. Standard 2.3 provides for actual suspension or disbarment for an act of moral turpitude, while standard 2.2(a) suggests disbarment for willful misappropriation unless "the most compelling mitigating circumstances clearly predominate," in which case a one-year actual suspension is warranted. However, the Supreme Court does not apply the standards in a "talismanic fashion." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221.) In fact, with respect to standard 2.2(a), the Supreme Court has stated that the recommended sanctions are not faithful to the teachings of its decisions. (*Kelly v. State Bar* (1991) 53 Cal.3d 509, 518.)

Thus, in evaluating the appropriate discipline in this case, we have tempered "the letter of the law with considerations peculiar to the offense and the offender. [Citations omitted.]." (*Howard v. State Bar, supra,* 51 Cal.3d at p. 222.) The nature of McIntosh's misappropriation is such that applying the disbarment recommendation in standard 2.2(a) would be unduly harsh. "As used in attorney discipline cases, the term willful misappropriation covers 'a broad range of conduct varying significantly in the degree of culpability.' [Citation.]" (*Kelly v. State Bar, supra* 53 Cal.3d at p. 518.) McIntosh's misconduct was grossly negligent but did not involve dishonesty, nor did he keep the $10,000 for his personal use. Rather, his intent in depositing the check into his CTA was for the safekeeping of the funds. He did not hide the funds or commingle them. On the contrary, he clearly identified them by their source and intended purpose both on his own reconciliation of the account and on a statement sent to Wife. He also

did not hide the fact that he had distributed the funds to Wife, having advised Husband and Wife's attorneys of the distribution. "An attorney who deliberately takes a client's funds, intending to keep them permanently, and answers the client's inquiries with lies and evasions, is deserving of more severe discipline than an attorney who has acted negligently, without intent to deprive and without acts of deception." (*Edwards v. State Bar*, *supra*, 52 Cal.3d at p. 38.)

Moreover, McIntosh's misconduct appears to be aberrational in view of the absence of prior discipline or subsequent misconduct. He testified that he no longer deposits third-party checks into his CTA without the consent of the issuer. In addition, his community involvement demonstrates his trustworthiness to handle funds since he handled thousands of dollars per week in his position as treasurer of his local Rotary Club. Although these considerations do not constitute compelling evidence in mitigation, they do demonstrate "that the public, courts and legal profession would be adequately protected by a more lenient degree of sanction than set forth in these standards. . . ." (Std. 1.2(e).)

Accordingly, our discipline recommendation here departs from standard 2.2(a) because disbarment will "rarely, if ever, be an appropriate discipline for an attorney whose only misconduct was a single act of negligent misappropriation, unaccompanied by acts of deceit or other aggravating factors." (*Edwards v. State Bar, supra,* 52 Cal.3d at p. 38.) In cases such as this one, which involve a single willful misappropriation, and where there has been no finding of intentional misconduct or dishonesty, the courts have been willing to impose a far less severe sanction than even the one-year minimum specified in standard 2.2(a). (See *Sternlieb v. State Bar*, *supra,* 52 Cal.3d 317 [30-day actual suspension for willful misappropriation of community property funds held in trust account which were applied to attorney's fees without consent of opposing counsel or her client]; *In the Matter of Bleecker, supra,* 1 Cal State Bar Ct. Rptr. 113, [60 days' actual suspension for misappropriation involving moral turpitude due to gross

carelessness in comingling trust funds and using CTA as operating account, plus additional act of moral turpitude due to use of CTA to conceal assets from IRS levy].)

We believe that McIntosh's misconduct is aberrational and therefore unlikely to recur. Nonetheless, he was grossly negligent in distributing a substantial sum of money to his client in an adversarial matter without obtaining permission from the person whose funds he held in trust and to whom he held a fiduciary duty. Taking a holistic view of the record, and having considered the case law construing standard 2.2(a), we conclude the 60-day suspension recommended by the hearing judge is the appropriate discipline, which is supported by prior decisions and satisfies the disciplinary goals of protecting the public, the courts and the legal profession.

IV. RECOMMENDATION

For the foregoing reasons, we recommend that respondent Wayne K. D. McIntosh be suspended from the practice of law in the State of California for two years, that execution of that suspension by stayed, and that he be placed on probation for two years on the following conditions:

1. McIntosh is to be suspended for the first 60 days of his probation.

2. He must submit satisfactory proof within 90 days of the effective date of the Supreme Court order in this matter that Jeremy Norman has received $10,000, plus 10% interest per annum, said interest to accrue from December 19, 2005.

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

4. He must maintain, with the State Bar's Membership Records Office and the State Bar's Office of Probation in Los Angeles, his current office address and telephone number, or *if no office is maintained*, an address to be used for State Bar purposes. He must also maintain, with the State Bar's Membership Records Office and the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. His home address and telephone number will *not* be made available to the general public. He must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

5. He must report, in writing, to the State Bar's Office of Probation in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which he is on probation (reporting dates). However, if his probation begins less than 30 days before a reporting date, he may submit the first report no later than the second reporting date after the beginning of his probation. In each report, he must state that it covers the preceding calendar quarter or applicable portion thereof and must certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

(1) in the first report, whether he has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

(2) in each subsequent report, whether he has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

During the last 20 days of this probation, he must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, he must certify to the matters set forth in subparagraph (2) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

6. Subject to the proper or good faith assertion of any applicable privilege, he must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to him, whether orally or in writing, relating to whether he is complying or has complied with the conditions of this probation.

7. Within one year after the effective date of the Supreme Court order in this matter, he must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation in Los Angeles. This condition of probation is separate and apart from his California Minimum Continuing Legal Education (MCLE) requirements; accordingly, he is ordered not to claim any MCLE credit for attending and completing this course.

8. Within one year after the effective date of the Supreme Court order in this matter, he must attend and satisfactorily complete the State Bar's Ethics School – Client Trust Accounting School; and to provide satisfactory proof of such completion to the State Bar's Office of Probation in Los Angeles. This condition of probation is separate and apart from his California Minimum Continuing Legal Education (MCLE) requirements; accordingly, he is ordered not to claim any MCLE credit for attending and completing this course.

9. His probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the end of the probationary term, if he has complied with the conditions of probation, the two-year period of stayed suspension will be satisfied, and that suspension will be terminated.

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that McIntosh be ordered to take and pass the Multistate Professional Responsibility Examination 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 State Bar's Office of Probation in Los Angeles within the same period.

VI. 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.

EPSTEIN, J.

We concur:

REMKE, P. J.

PURCELL, J.

CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on July 9, 2009, I deposited a true copy of the following document(s):

OPINION ON REVIEW FILED JULY 9, 2009

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

WILLIAM M BALIN
345 FRANKLIN ST
SAN FRANCISCO, CA 94102

☐ by certified mail, No. , with return receipt requested, through the United States Postal Service at , California, addressed as follows:

☐ by overnight mail at , California, addressed as follows:

☐ by fax transmission, at fax number . No error was reported by the fax machine that I used.

☐ By personal service by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

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

Cydney Tabor Batchelor, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on July 9, 2009.

Milagro del R. Salmeron
Case Administrator
State Bar Court