FILED JUNE 16, 2014

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **KEITH BREGMAN,** **Member No. 70257,** A Member of the State Bar.	)	**Case No.: 13-O-11692-DFM** **DECISION**

INTRODUCTION

Respondent Keith Bregman (Respondent) is charged here with a single count of misconduct, involving writing personal checks on his client trust account, in violation of the prohibition against commingling set forth in rule 4-100(A) of the Rules of Professional Conduct.[1] Respondent stipulated to both the acts of misconduct and his culpability for violating rule 4-100(A). The court finds culpability and recommends discipline as set forth below.

PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed in this matter by the State Bar of California on November 14, 2013. While the NDC contains three counts of misconduct, Counts Two and Three were dismissed at the State Bar's request prior to the commencement of the trial in this matter. On December 5, 2013, Respondent filed his response to the NDC, denying that "he did not promptly remove funds" he had earned and denying any violation of rule 4-100(A).

[1] Unless otherwise noted, all future references to rule(s) will be to the Rules of Professional Conduct.

On December 16, 2013, the initial status conference was held. Trial was scheduled to begin on March 18, 2014, with a three-day trial estimate.

After being trailed for two days because of the continuation of another trial in the instant court, trial was commenced and completed in this matter on March 20, 2014. Prior to the commencement of trial in this matter, Respondent stipulated to culpability with regard to Count One. The only issue in dispute was the appropriate level of discipline and facts related to that issue.

The State Bar was represented at trial by Deputy Trial Counsel Susan Jackson. Respondent was represented at trial by Glen Bregman.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on Respondent's response to the NDC, the stipulation of undisputed facts and conclusions of law previously filed by the parties, and the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent is a member of the State Bar of California, admitted December 22, 1976.

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From January 1, 2009, through November 30, 2011, Respondent did not promptly remove funds from his client trust account (CTA) that he had earned as fees. Further, th e parties have stipulated, and the court finds, that Respondent paid the following personal expenses from his fees still deposited in his CTA:

> On February 3, 2009, Respondent issued check number 1436, drawn upon his CTA and made payable to Verizon Wireless in the amount of $162.66 for payment of a bill issued to Sandra Bregman, who was then Respondent's wife. The check posted on February 5, 2009.
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> On February 6, 2009, Respondent issued check number 1441, drawn upon his CTA and made payable to American Express in the amount of $50.00 for

payment of Sandra Bregman's American Express Jet Blue Card bill. The check posted on February 9, 2009.

On February 6, 2009, Respondent issued check number 1443, drawn upon his CTA and made payable to American Express in the amount of $220.00 for payment of Sandra Bregman's American Express Costco Card bill. The check posted on February 9, 2009.

On February 3, 2009, Respondent issued check number 1437, drawn upon his CTA and made payable to The Gas Company, in the amount of $94.11 for payment of the utility bill for his home serviced by Southern California Gas. The check posted on February 10, 2009.

On February 6, 2009, Respondent issued check number 1444, drawn upon his CTA and made payable to Citicard in the amount of $50.00 for payment of his Citbank Diamond Preferred card bill. The check posted on February 10, 2009.

On February 6, 2009, Respondent issued check number 1442, drawn upon his CTA and made payable to Chase, in the amount of $40.00 for payment of his credit card bill. The check posted on February 11, 2009.

On February 7, 2009, Respondent issued check number 1445, drawn upon his CTA and made payable to Newhall Valencia Mini Storage, in the amount of $79.00 for payment of his family's storage unit. The check posted on February 11, 2009.

On May 13, 2009, Respondent issued check number 1520, drawn upon his CTA and made payable to McMullen Landscape in the amount of $175.00 for payment of gardening services at Respondent's home. The check posted on May 30, 2009.

On May 13, 2009, Respondent issued check number 1519, drawn upon his CTA and made payable to Tom Emerson in the amount of $160.00 for payment of pool cleaning services at Respondent's home. The check posted on May 20, 2009.

On December 9, 2010, Respondent issued check number 1499, drawn upon his CTA and made payable to Miller Nissan in the amount of $3,000.00 as the down payment for a Nissan Altima used by Respondent and his family. The check posted on December 10, 2010.

On November 22, 2011, Respondent issued check number 1601, drawn upon his CTA and made payable to Allstate Insurance in the amount of $150.00 as the payment for fire insurance for Respondent's home, billed at $152.28.[2] The check posted on November 28, 2011.

[2] The parties stipulated to these figures, but the minor difference between the amount paid and the amount billed was not explained.

On November 22, 2011, Respondent issued check number 1602, drawn upon his CTA and made payable to Allstate Insurance in the amount of $108.00 as the payment for earthquake insurance for Respondent's home, billed at $108.56.[3] The check posted on November 28, 2011.

On November 22, 2011, Respondent issued check number 1603 drawn upon his CTA and made payable to Mazda American Credit in the amount of $273.72 for Respondent's son's car payment. The check posted on November 29, 2011.

On November 22, 2011, Respondent issued check number 1604 drawn upon his CTA and made payable to AT&T Services in the amount of $36.48 as the payment for Respondent's home phone bill. The check posted on November 29, 2011.

At trial, Respondent explained his decision, to retain earned fees in his CTA and use that account to pay personal expenses, by presenting evidence that he was in a broken marriage at the time with a fiscally irresponsible wife. He testified that the marriage had effectively ended by 2005, with the parties agreeing in principle that they would eventually file for a formal dissolution. However, because they had young children, they agreed to live together in the same home, although maintaining separate rooms in the house and living separate lives.

Respondent viewed himself as being fiscally conservative, committed to the view that the couple needed to create and maintain a "reserve" of funds because of the economic uncertainty inherent in his self-employed status. Over time, he formed the opinion that his wife lacked any commitment to that same goal. As he characterized his wife during his trial testimony: if she was aware that there were family funds available to be spent, she would spend them. As a result, in an effort to create and maintain the financial reserve that he desired, Respondent initially stopped moving all of his law firm's profits into the couples' joint banking account. Instead, he began leaving those surplus funds in his law firm's operating account. He followed that practice until his wife began to withdraw funds from the firm's operating account, despite her not being a

[3] The parties stipulated to these figures, but the minor difference between the amount paid and the amount billed was not explained.

signatory on the account or having any authority from Respondent to make the withdrawals.[4] In response to those actions by his wife, Respondent then opened a second operating account, albeit in the same bank, into which he continued his efforts to retain the profits of his business. To Respondent's dismay, Respondent's wife eventually learned of that account as well and again succeeded in making withdrawals from it.

Respondent made the decision sometime before 2009, possibly as early as 2007, to use his client trust account as the vessel in which he would build and maintain his financial reserve. Rather than withdraw from his CTA the fees that he had earned at the earliest reasonable time after his interest in those fees had become fixed, as required by the specific language of rule 4-100(A), Respondent intentionally allowed those fees to remain in the account, even though he knew that such conduct was improper.

In January 2010, Respondent filed in the Los Angeles County Superior Court a petition seeking dissolution of his marriage. While he promptly "showed" the legal document to his wife, he did not serve her with it until late 2011 or early 2012. Instead, they continued to cohabit as they had previously done. At about this same time, Respondent's wife made an online transfer from Respondent's CTA of $42,000. When Respondent learned of the withdrawal of funds by his wife, he confronted her about the transfer and told her that she "had to" put the funds back into the client trust account. He did not tell her that the funds in his client trust account were actually community property funds. His wife then returned the funds to the account.

[4] All of Respondent's accounts, including his CTA, his operating accounts, and the couples' joint account, were with the same bank and were linked online. As a result, his wife was able to make withdrawals from all of the accounts, even though her name was not on all of them. (Resp. Exh. 1001.)

Over time the amount of personal funds Respondent accumulated in his CTA became quite significant. On December 1, 2010, the balance in his CTA was over $82,000, with the bulk (and possibly all) of those funds representing earned fees that had accumulated in the account.

As previously mentioned, Respondent finally served his wife with the petition for marital dissolution in late 2011 or early 2012.[5] While Respondent testified on his own behalf that he had voluntarily turned over the bank statements for his CTA to his wife's attorneys after serving the dissolution action, on cross-examination by DTC Jackson, he acknowledged that he did so without disclosing that the CTA contained community property funds.

Count One – Rule 4-100(A) [Commingling]

Rule 4-100(A) prohibits attorneys from maintaining personal funds in client trust accounts, as follows: "No funds belonging to the member or law firm shall be deposited therein or otherwise commingled …." Where advanced fees are deposited into a client trust account, rule 4-100(A)(2) requires that earned fees "must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed." The failure to timely withdraw earned fees from a client trust account constitutes grounds for discipline. (See, e.g., *Arm v. State Bar* (1990) 50 Cal.3d 763, 776-777; *Silver v. State Bar* (1974) 13 Cal.3d 134, 145, fn. 7 [maintenance of "buffer" funds in CTA to prevent checks being returned for insufficient funds constituted prohibited commingling].) Finally, "[t]he rule absolutely bars use of the trust account for personal purposes, even if client funds are not on deposit." (*Doyle v. State Bar* (1982) 32 Cal.3d 12, 22-23; see also *In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 54 ["Trust accounts, open or closed, are never to be used for personal purposes …."].)

[5] The dissolution judgment states that the date of separation was January 25, 2012.

In the NDC, the State Bar alleged that Respondent violated rule 4-100(A) by allowing his earned fees to accumulate in his CTA and by writing personal checks on that account. The parties have stipulated, and this court finds, "By using his CTA to pay personal expenses, Respondent deposited or commingled funds belonging to Respondent in a bank account labeled "Trust Account," "Client's Funds Account" or words of similar import in willful violation of Rules of Professional Conduct, rule 4-100(A)." In addition, this court finds that Respondent violated rule 4-100(A) by allowing substantial amounts of earned fees to accumulate in his CTA, rather than withdraw them at the earliest reasonable time after Respondent's interest in those fees became fixed.

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.5.)[6] The court finds the following with regard to aggravating factors.

Multiple Acts of Misconduct

Respondent's repeated failures to comply with his obligations to withdraw earned fees from his CTA and his multiple acts over an extended period of writing checks for personal expenses on that CTA represent multiple acts of misconduct. This is an aggravating factor. (Std. 1.5(b).[7])

Dishonesty and Concealment

Respondent's purpose in commingling funds in his client trust account was to conceal those assets from his wife. Such an improper purpose for committing acts that were themselves improper is an aggravating factor. (Std. 1.5(d).[8])

[6] All further references to standard(s) or std. are to this source.
[7] Previously standard 1.2(b)(ii).
[8] Previously standard 1.2(b)(iii).

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.6.[9]) The court finds the following with regard to mitigating factors.

No Prior Discipline

Respondent had practiced law in California for 33 years prior to the commencement of the instant misconduct. During that span, Respondent had no prior record of discipline. Respondent's tenure of discipline-free practice is a significant mitigating factor. (Std. 1.6(a).[10])

No Harm

Respondent is entitled to some mitigation credit because his misconduct caused no actual harm to the client, the public, or the administration of justice. (Std. 1.6(c).[11])

Cooperation

Respondent entered into an extensive stipulation of facts and freely admitted the trust account violations in this case, for which conduct Respondent is entitled to some mitigation. (Std. 1.6(e);[12] see also *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443; *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [where appropriate, more extensive weight in mitigation is accorded those who admit to culpability as well as facts].)

Character Evidence/Community Service

Respondent presented declaration statements from four character witnesses. Each of these declarants has found Respondent to be hard-working, attentive, honest, and trustworthy. They also demonstrated a clear understanding of the present misconduct.

[9] Previously standard 1.2(e).
[10] Previously standard 1.2(e)(i).
[11] Previously standard 1.2(e)(iii).
[12] Previously standard 1.2(e)(v).

In addition, Respondent testified that he had provided service to the Los Angeles Superior Court in the past as a pro tem judge and mediator.

Respondent's community service and good character evidence are mitigating factors. (Std. 1.6(f).[13])

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession, and maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are not binding, they are to be afforded great weight because "they promote the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, the court is permitted to temper the letter of the law with considerations peculiar to the offense and the offender. (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994; *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the court considers relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

[13] Previously standard 1.2(e)(vi).

Standard 1.7 provides that if aggravating or mitigating circumstances are found, they should be considered alone and in balance with any other aggravating or mitigating factors.

Standard 2.2(a) provides that actual suspension of three months is appropriate for commingling or failing to promptly pay out entrusted funds.

The State Bar recommended, among other things, that Respondent be suspended from the practice of law for 30 days. Respondent, on the other hand, argued for a reproval or stayed suspension.

In support of its discipline recommendation, the State Bar cited *Sternlieb v. State* Bar (1990) 52 Cal.3d 317; *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403; and *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354. While none of those decisions is directly on point, they all support discipline here of less than the three months suggested in standard 2.2(a). In addition, the court finds some guidance in *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, and *In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420.

In *Dudugjian*, the attorneys retained client settlement funds in their general account and refused to pay them to clients in the mistaken belief that said funds were partial payment of the attorneys' fee. The attorneys were found culpable of depositing client funds into a non-trust account and failing to promptly payout said funds. In mitigation, the attorneys honestly believed that their clients had given them permission to retain the settlement funds, the misconduct was unlikely to reoccur, and the attorneys had exhibited good moral character. No aggravating circumstances were found. The California Supreme Court ordered that the attorneys receive a public reproval.

In *McKiernan*, the attorney agreed to let his long-time friend use his law firm's client trust account for business purposes. During this same time period, the attorney failed to maintain

and supervise his client trust account and commingled his own funds within the account. Additionally, the attorney issued two client trust account checks when he knew there were insufficient funds to cover them. The Review Department found that the attorney's repeated misuse and neglect of his client trust account constituted a violation of rule 4-100(A). Additionally, the Review Department found that by issuing checks without a reasonable expectation that they would be honored upon presentation, the attorney's actions, at best, were the result of his gross negligence and therefore involved moral turpitude in violation of section 6106. In mitigation, the attorney had no prior record of discipline for over 21 years prior to the start of his misconduct.[14] In aggravation, the attorney demonstrated indifference toward rectification and atonement for his misconduct. The Review Department ultimately concluded that there was no compelling reason to depart from the three-month minimum suspension called for by former standard 2.2(b). As a result, it was recommended that the attorney be suspended for two years, stayed, and that he be placed on probation for two years, including the condition that he be actually suspended for 90 days.

The present misconduct falls in between *Dudugjian* and *McKiernan*. Respondent's actions were less egregious than *McKiernan* and did not involve moral turpitude. Further, Respondent has presented extensive mitigation, spanning beyond that evidenced in *McKiernan*.

Respondent's misconduct, however, was more serious than *Dudugjian*, where the attorneys' violation of rule 4-100(A) was unintentional and involved no factors in aggravation. Here, Respondent's misconduct was shrouded in dishonesty, as his plan was devised to conceal funds from his estranged wife and to have her believe that the funds could not be removed from the CTA. Further, Respondent engaged in this misconduct for nearly three years, despite

[14] The weight of this mitigation was discounted by the fact that the attorney's inattention to the maintenance and supervision of his client trust account began before the charged misconduct.

knowing it was improper. Accordingly, the court concludes that some period of actual suspension is warranted.

Therefore, the court recommends, among other things, that Respondent be suspended from the practice of law for one year, that execution of that period of suspension be stayed, and that he be placed on probation for two years, including a 30-day period of actual suspension.

RECOMMENDED DISCIPLINE

For all of the above reasons, it is recommended that Keith Bregman, Member number 70257, be suspended from the practice of law for one year; that execution of that suspension be stayed; and that Respondent be placed on probation for two years, with the following conditions:

1. Respondent must be actually suspended from the practice of law for the first thirty (30) days of probation.
2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation.
3. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation, his current office address and telephone number or, *if no office is maintained,* an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation, his current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent 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.

4. Within thirty (30) days after the effective date of discipline, Respondent must contact the Office of Probation and schedule a meeting with Respondent's assigned probation deputy to discuss these terms and conditions of probation and must meet with the probation deputy either in-person or by telephone. During the period of probation, Respondent must promptly meet with the probation deputy as directed and upon request.

5. Respondent must report, in writing, to the State Bar's Office of Probation no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which Respondent is on probation (reporting dates).[15] However, if Respondent's probation begins less than 30 days before a reporting date, Respondent may submit the first report no later than the second reporting date after the beginning of his probation. In each report, Respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

    (a) in the first report, whether Respondent 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

    (b) in each subsequent report, whether Respondent 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, Respondent 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, Respondent must certify to

[15] To comply with this requirement, the required report, duly completed, signed and dated, must be received by the Office of Probation on or before the reporting deadline.

the matters set forth in subparagraph (b) 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, Respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to Respondent, whether orally or in writing, relating to whether Respondent 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, Respondent must attend and satisfactorily complete the State Bar's Ethics School and the State Bar's Client Trust Accounting School and provide satisfactory proof of such completion to the State Bar's Office of Probation. This condition of probation is separate and apart from Respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, Respondent is ordered not to claim any MCLE credit for attending and completing this course. (Rules Proc. of State Bar, rule 3201.)

8. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter.

9. At the termination of the probation period, if Respondent has complied with all of the terms of his probation, the one-year period of stayed suspension will be satisfied and the suspension will be terminated.

Multistate Professional Responsibility Examination

It is further recommended that Respondent take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court order imposing discipline in this matter and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within that same period. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.)

Costs

It is further recommended that costs be awarded to the State Bar in accordance with section 6086.10 and that such costs be enforceable both as provided in section 6140.7 and as a money judgment. It is also recommended that Respondent be ordered to reimburse the Client Security Fund to the extent that the misconduct in this matter results in the payment of funds and that such payment obligation be enforceable as provided for under Business and Professions Code section 6140.5.

Dated: June _____, 2014

DONALD F. MILES
Judge of the State Bar Court