

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of ) Case No.: **13-O-12052-LMA**  
)  
**MICHAEL SCOTT KECK,** ) **DECISION AND ORDER OF**  
) **INVOLUNTARY INACTIVE**  
) **ENROLLMENT**  
)  
Member No. **124536,** )  
)  
A Member of the State Bar. )

**Introduction**<sup>1</sup>

In this disciplinary proceeding, respondent Michael Scott Keck is charged with four acts of misconduct. The charged misconduct includes two counts of misappropriation in the amounts of \$30,000 and \$25,000, respectively. Respondent is also charged with commingling personal funds in his client trust account and paying personal or business expenses from that same account.

The court finds, by clear and convincing evidence, that respondent is culpable of the four counts of the charged misconduct. Based on the nature and extent of culpability, as well as the applicable aggravating and mitigating circumstances, in conjunction with meeting the goals of attorney discipline, the court recommends that respondent be disbarred.

**Significant Procedural History**

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on September 22, 2014.

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<sup>1</sup> Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

Respondent filed his response to the NDC on October 14, 2014. The parties filed a Stipulation as to Facts and Admission of Documents on January 21, 2015.

A three-day trial was commenced on January 21, 2015. The State Bar was represented by Senior Trial Counsel Sherrie B. McLetchie. Attorney Samuel C. Bellicini represented respondent. On February 9, 2015, after the parties had submitted their closing briefs, the court took this matter under submission for decision.

### **Findings of Fact and Conclusions of Law**

Respondent was admitted to the practice of law in California on December 11, 1986, and has been a member of the State Bar of California at all times since that date.

#### **The Hereford/Mason Irrevocable Trust Matter**

##### **Facts**

In or about 2005, Harvey Hereford (Hereford) was convicted of a felony and imprisoned as a result of killing one bicyclist and rendering another, Jill Mason (Mason), a quadriplegic in a DUI accident. Hereford's assets were sold off to compensate the victims. Of the proceeds from the sale of Hereford's home, \$150,000 became the corpus of a trust, of which Hereford was the primary beneficiary. If Hereford did not survive his imprisonment, Mason or her heirs were the residuary beneficiaries. Hereford had been diagnosed with cancer prior to the accident.

On April 25, 2006, respondent was named as trustee of the Harvey Hereford/Jill Mason Irrevocable Trust (Trust), and thereafter respondent assumed the obligations of the trustee under the Trust. On June 9, 2006, respondent, on behalf of the Trust, executed an investment advisory agreement with Protected Investors of America (PIA). PIA appointed Rick Sanford (Sanford) as PIA's investment advisor for the Trust. Respondent had known Sanford for approximately two years prior to the establishment of the Trust.

On June 15, 2006, respondent deposited \$150,200.75 of the Trust funds, via check, into a PIA investment account (Trust Account). For the next six years, Trust Account statements were sent only to respondent as trustee.

Between 2006 and 2009, respondent communicated with Hereford in prison via letters and collect calls. On occasion, respondent also visited Hereford in prison.

In 2009, respondent needed money. Respondent owed another client, Constantine Georges, about \$55,000 that he mishandled in a separate matter.<sup>2</sup> On March 27, 2009, respondent issued a trust account check to himself in the amount of \$30,000. Respondent deposited this check into his client trust account at Wells Fargo Bank (CTA). These funds were used for the benefit of respondent, and not for Hereford or the Trust.

On April 10, 2009, respondent issued to himself another Trust Account check in the amount of \$25,000, and deposited it into his CTA. These funds were also used for the benefit of respondent, and not for Hereford or the Trust.

At no time did respondent seek or obtain permission from Hereford or Mason to issue the Trust Account checks to himself. Respondent visited Hereford in prison at some point between April 11 and September 1, 2009. During this visit, respondent did not tell Hereford that he took the \$55,000.

On June 24, 2009, respondent made a \$625 payment to the Trust toward the \$55,000 taken. On October 1, 2009 and January 6, 2010, respondent made two additional \$625 payments to the Trust toward the \$55,000 taken.

On February 3, 2010, respondent filed for bankruptcy. Respondent did not list Hereford or the Hereford/Mason Irrevocable Trust as creditors.

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<sup>2</sup> Respondent testified to this fact; however, the specific facts and circumstances surrounding Ms. Georges and the monies owed to her remain unclear.

On March 6, 2010, Sanford died. Thereafter, James Frediani (Frediani) was assigned by PIA to be the financial advisor/representative to the Trust.

Hereford was released from prison on September 28, 2011. Beginning in July 2012, at Hereford's request, Frediani provided Hereford with information regarding the Trust Account. At no time prior to Hereford's contact with Frediani had respondent informed Hereford that he had issued two Trust Account checks to himself, totaling \$55,000. When Hereford questioned why the account balance was so low, respondent led Hereford and Frediani to believe that it was the result of the 2008 financial crisis.

Frediani further investigated and discovered that the \$55,000 had been removed. Frediani could see that the money was withdrawn, but could not tell where it actually went. He therefore asked respondent what the \$55,000 removal was for and respondent replied that he did not know. Respondent further stated that he had moved his offices and his check registers had been misplaced. At no time did respondent ever inform Frediani that he had taken the \$55,000 from the Trust.

When Hereford asked respondent about the \$55,000 in Trust Account checks respondent had issued to himself, respondent did not acknowledge issuing them and denied knowledge of them. By letter dated April 4, 2013, Hereford complained to the State Bar about respondent.

On May 2, 2013, respondent was contacted by the State Bar regarding Hereford's complaint. On May 23, 2013, respondent wrote Hereford's attorney, George Engler (Engler), and stated "I am ... willing to sit down with both [Hereford] and you to discuss what I think happened, but I am somewhat constrained to do so with a State Bar Complaint hanging over my head..." As of that date, respondent still had not told Hereford or Engler that he took the \$55,000.

On June 8, 2013, respondent repaid Hereford \$55,000. That same day, Hereford executed a general release in favor of respondent.

## **Conclusions**

### ***Count One – § 6106 [Moral Turpitude – Misappropriation]***

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. While moral turpitude generally requires a certain level of intent, guilty knowledge, or willfulness, the law is clear that where an attorney's fiduciary obligations are involved, particularly trust account duties, a finding of gross negligence will support such a charge. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410.)

“Misappropriation” is defined as “[t]he application of another's property or money dishonestly to one's own use.” (Black's Law Dict. (8th ed. 2004) p. 1019, col. 1.) “[A]n attorney's failure to use entrusted funds for the purpose for which they were entrusted constitutes misappropriation. [Citation.]” (*Baca v. State Bar* (1990) 52 Cal.3d 294, 304.)

Here, respondent testified that the \$55,000 he removed from the Trust was a “loan” authorized by Sanford. The court finds respondent's testimony on this subject lacked credibility. It's inconceivable that respondent, as an experienced attorney, could believe that an investment account manager had the authority to permit a trustee to borrow against trust assets.

To better understand respondent's true intent, the court looks to his actions rather than words. Desperate for money, respondent took \$55,000 in trust proceeds without Hereford's or Mason's knowledge or consent. Respondent subsequently concealed the taking from Hereford, Frediani, and his attorney. When directly questioned about the money, respondent denied any knowledge. Between March 2009 and May 2013, respondent made nominal efforts to reimburse the “borrowed” monies. During this time period, respondent made only three payments, totaling

\$1,875. He made no payments between February 2010 and May 2013. Accordingly, the evidence clearly establishes that this was not a loan.

By intentionally misappropriating for his own purposes \$30,000 from the Trust on March 27, 2009, respondent committed an act involving moral turpitude, dishonesty, or corruption, in willful violation of section 6106.

***Count Two – § 6106 [Moral Turpitude – Misappropriation]***

As laid out above, the State Bar established Count Two by clear and convincing evidence. By intentionally misappropriating for his own purposes \$25,000 from the Trust on April 10, 2009, respondent committed an act involving moral turpitude, dishonesty, or corruption, in willful violation of section 6106.

**The Client Trust Account Matter**

**Facts**

On December 10, 2009, respondent deposited \$18,000 into his CTA. Respondent received these funds from his mother for payment of his son's private school tuition at Star Academy. Respondent's son was not a client.

Between January 12, 2007 and February 22, 2013, respondent issued the following checks from funds in his CTA for the payment of personal or business expenses:

<u>CHECK NO.</u>	<u>CHECK DATE</u>	<u>CHECK AMT</u>	<u>PAYEE</u>	<u>MEMO NOTES</u>
1118	07/26/07	\$1,060.50	Betty Kohlenberg & Assoc.	Kohlenberg & Assoc. v. Keck-In Full
1125	09/11/07	\$923.75	American Express	3715-387463-21009 <sup>3</sup>
1319	06/18/10	\$6,598.00	Wells Fargo Bank	ING Direct #902180378

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<sup>3</sup> Respondent's testimony that he paid bills for his clients with funds he was holding on their behalf in his CTA was not credible.

1351	12/10/10	\$4,854.64	Michael J. Smith Tax Collector	180-452-03
1364	01/05/11	\$10,000.00	Star Academy	James Keck
1368	01/07/11	\$500.00	The Olympic Club	378525
1371	02/11/11	\$500.00	The Olympic Club	378525
1380	04/08/11	\$500.00	The Olympic Club	378525
1390	05/18/11	\$500.00	The Olympic Club	378525
1409	10/20/11	\$10,000.00	Star Academy	James Keck - Tuition
1422	12/07/11	\$1,802.00	Star Academy	James Keck - Specialist

**Conclusions**

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

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in a client trust account and no funds belonging to the attorney or law firm may be deposited therein or otherwise commingled therewith, except for limited exceptions. By depositing \$18,000 into the CTA to pay his son’s private school tuition, respondent deposited non-client funds into his CTA for his own personal benefit, in willful violation of rule 4-100(A).

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

By issuing the above listed checks from his CTA for the payment of personal or business expenses, respondent used his client trust account to pay personal or business expenses, in willful violation of rule 4-100(A).

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## **Aggravation<sup>4</sup>**

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

Respondent committed four acts of misconduct. Respondent's multiple acts of misconduct are an aggravating factor.

### **Bad Faith, Concealment, and Dishonesty (Std. 1.5(d).)**

Respondent's misconduct was intentional. He knew he was misappropriating funds belonging to Hereford and/or Mason. Despite many opportunities to tell Hereford about the misappropriation, respondent did not. In 2009, respondent visited Hereford in prison, but did not reveal that he took the \$55,000.<sup>5</sup>

Respondent allowed Hereford to believe that the missing money was possibly the result of the stock market crash in 2008. Even as late as May 2013, after respondent knew the State Bar was investigating the matter, he still did not tell Hereford and Engler that he took the money. Instead, respondent wrote to Engler stating, "I am ... willing to ... discuss what I think happened...." Obviously, respondent knew exactly what happened to the \$55,000 when he wrote to Engler.

In sum, respondent was dishonest, concealed material facts from Hereford and others, and acted in bad faith. His dishonesty and efforts to conceal his misconduct warrant significant consideration in aggravation.

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<sup>4</sup> All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

<sup>5</sup> Respondent testified that he did not discuss the "loan" with Hereford in prison in fear that other inmates would learn that Hereford had money on the outside and target him. Respondent's testimony on this subject was not credible. Respondent could have discussed this matter discretely with Hereford in prison. And respondent's explanation is further discredited by his failure to immediately and fully apprise Hereford upon his release from prison.

**Harm to Client/Public/Administration of Justice (Std. 1.5(f).)**

Respondent's misconduct caused significant financial harm to Hereford. Respondent's misappropriation deprived Hereford of the use of his money. Respondent ultimately reimbursed the \$55,000; however, that money was not returned until June 2013, more than four years after it was misappropriated. The financial harm respondent caused Hereford warrants some consideration in aggravation.

**Lack of Insight**

Respondent demonstrated a lack of insight regarding his misconduct. (See *In the Matter of Wyshak* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 70, 83.) Even at trial, respondent refused to accept responsibility for his conduct. Instead, he repeatedly asserted that he simply "borrowed" the money, and was authorized to do so by Sanford. "The law does not require false penitence. [Citation.] But it does require that the respondent accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Respondent's lack of insight into his misconduct warrants significant consideration in aggravation.

**Uncharged Misconduct (Std. 1.5(d).)**

Although evidence of uncharged misconduct may not be used as an independent ground of discipline, it may be considered in aggravation where the "evidence was elicited for the relevant purpose of inquiring into the cause of the charged misconduct [and where the finding of uncharged misconduct] was based on [the respondent's] own testimony. . . ." (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 36.) Here, respondent testified that he took the Trust funds to reimburse another client whose funds he had mismanaged. Clearly, respondent mishandled a previous client's funds; however, there is not any specific evidence regarding the facts and circumstances surrounding this event. Accordingly, the court lacks the evidence necessary to

conclude that respondent's admitted mishandling of a previous client's funds constitutes uncharged misconduct.

### **Mitigation**

#### **No Prior Record (Std. 1.6(a).)**

Respondent has no prior record of discipline in over 20 years of practice prior to the first act of misconduct in this matter. Respondent's lack of a prior record of discipline warrants significant consideration in mitigation; however, this mitigation is somewhat reduced due to the serious nature of the present misconduct. (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 49.)

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

Respondent presented testimony from eight character witness and one statement from a declarant. Respondent's character witnesses came from a wide range of references in the legal and general communities. They had some understanding of the charges against respondent; however, some were convinced that respondent had "borrowed," rather than misappropriated, the Trust funds. Respondent's character witnesses attested to his honesty, trustworthiness, and integrity. Some of his witnesses also described his volunteer activities, including his work with the swim team at the Olympic Club. Respondent's good character evidence warrants some consideration in mitigation, but is somewhat diminished by the fact that several of his witnesses relied on their belief that he was simply borrowing the misappropriated funds.

#### **Candor/Cooperation to Victims/State Bar (Std. 1.6(e).)**

Respondent entered into a partial stipulation to facts and admission of documents. Respondent's candor and cooperation with the State Bar warrant some consideration in mitigation.

### **Restitution (Std. 1.6(j).)**

Although respondent ultimately paid restitution, he did not do so prior to the State Bar's initiation of a disciplinary investigation. And before the initiation of the State Bar's investigation, respondent steadfastly denied any knowledge of where the misappropriated money had gone. Accordingly, the court assigns nominal mitigation for respondent's payment of restitution.

### **Discussion**

The primary purposes of attorney discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; std. 1.1.)

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.) 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. And, if two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.7(a).)

However, standard 1.7(b) provides that if aggravating circumstances are found, they should be considered alone and in balance with any mitigating circumstances, and if the net effect demonstrates that a greater sanction is needed to fulfill the primary purposes of discipline, it is appropriate to impose or recommend a greater sanction than what is otherwise specified in a given standard. On balance, a greater sanction is appropriate in cases where there is serious harm to the client, the public, the legal system, or the profession and where the record

demonstrates that the member is unwilling or unable to conform to ethical responsibilities in the future.

Standards 2.1(a), 2.2(a), and 2.7, among others, apply in this matter. The most severe sanction is found at standard 2.1(a) which recommends disbarment for intentional or dishonest misappropriation of entrusted funds unless the amount misappropriated is insignificantly small or unless the most compelling mitigating circumstances clearly predominate, in which case actual suspension of one year is appropriate.

The Supreme Court gives the standards “great weight” and will reject a recommendation consistent with the standards only where the court entertains “grave doubts” as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) As the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

The State Bar urges the court to disbar respondent from the legal profession under standard 2.1(a) and the case law. Respondent, on the other hand, argued that he should be actually suspended for no more than six months.

The Supreme Court has repeatedly held that disbarment is the usual discipline for the willful misappropriation of client funds. (See *Edwards v. State Bar, supra*, 52 Cal.3d 28, 37; and *Howard v. State Bar* (1990) 51 Cal.3d 215, 221.) “In a society where the use of a lawyer is often essential to vindicate rights and redress injury, clients are compelled to entrust their claims, money, and property to the custody and control of lawyers. In exchange for their privileged positions, lawyers are rightly expected to exercise extraordinary care and fidelity in dealing with money and property belonging to their clients. [Citation.] Thus, taking a client’s money is not

only a violation of the moral and legal standards applicable to all individuals in society, it is one of the most serious breaches of professional trust that a lawyer can commit.” (*Ibid.*)

Moreover, cases involving client deceit, misappropriation, and lack of insight have been known to warrant disbarment. (*Kelly v. State Bar* (1988) 45 Cal.3d 649 [disbarment for \$20,000 misappropriation, moral turpitude, dishonesty, and improper communication with adverse party with no prior record in mitigation and no aggravation]).

Here, the court finds *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, to be particularly instructive. In *Spaith*, the attorney was found culpable of misappropriating approximately \$40,000 from a client and misleading the client regarding the status of the money for over a year. In mitigation, the attorney demonstrated good character; provided community service and other pro bono activities; and cooperated with the State Bar by admitting his wrongdoing and stipulating to the facts and culpability. In addition, the attorney had no prior record of discipline in over 15 years of practicing law. In aggravation, the attorney’s misconduct involved multiple acts of wrongdoing. The Review Department ultimately found that the mitigating circumstances were not sufficiently compelling to justify a lesser sanction than disbarment when weighed against the attorney’s misconduct and aggravating circumstances. (*Id.* at p. 522.)

The present case is more egregious than *Spaith*. Here, respondent misappropriated \$55,000. He concealed his misappropriation for about four years, until the State Bar initiated an investigation. Further, respondent continues to irrationally assert that he simply “borrowed” the entrusted funds.

The court acknowledges respondent’s mitigation, including, but not limited to, a lengthy career with no prior record of discipline and evidence of good character. While the court gives significant consideration to respondent’s mitigation evidence, the magnitude of the present

misconduct and his present lack of insight into his misconduct are particularly troubling. Moreover, respondent's overall mitigation, is not "the most compelling," nor does it "clearly predominate" when considered against his extensive misconduct and the aggravating factors. (Std. 2.1(a).)

Therefore, after weighing the evidence, including the factors in aggravation and mitigation, the court finds no compelling reason to recommend a level of discipline short of disbarment. Additionally, the court finds that the interests of public protection mandate a recommendation of disbarment.

### **Recommendations**

It is recommended that respondent Michael Scott Keck, State Bar Number 124536, be disbarred from the practice of law in California and respondent's name be stricken from the roll of attorneys.

### **California Rules of Court, Rule 9.20**

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, 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 in this proceeding.

### **Costs**

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

### **Order of Involuntary Inactive Enrollment**

Respondent is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Respondent's inactive enrollment will be

effective three calendar days after this order is served by mail and will terminate upon the effective date of the Supreme Court's order imposing discipline herein, or as provided for by rule 5.111(D)(2) of the State Bar Rules of Procedure, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: April \_\_\_\_\_, 2015

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LUCY ARMENDARIZ  
Judge of the State Bar Court