



# PUBLIC MATTER

**FILED**  
JUL 28 2016 P.B.  
STATE BAR COURT  
CLERK'S OFFICE  
LOS ANGELES

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – LOS ANGELES

In the Matter of	)	Case No.: 14-O-05339-WKM
	)	
<b>KRISTIN MARIE SCHUH,</b>	)	<b>ORDER DENYING MOTION FOR</b>
	)	<b>RECONSIDERATION IN PART</b>
<b>Member No. 241554,</b>	)	<b>AND GRANTING MOTION FOR</b>
	)	<b>RECONSIDERATION IN PART</b>
<u>A Member of the State Bar.</u>	)	

This matter is before the court on the June 24, 2016, motion of the State Bar's Office of Chief Trial Counsel (OCTC) seeking reconsideration of this court's June 10, 2016, decision. In its motion, OCTC contends that the court erred when it dismissed counts two, three, and four in the notice of disciplinary charges (NDC). Alternatively, OCTC contends that the court erred when it dismissed the three counts with prejudice, as opposed to without prejudice. Finally, OCTC seeks to have the court correct four minor typographical/clerical errors in its decision.

The court will deny the motion in part because no error of law is shown in the dismissal with prejudice regarding counts two, three, and four, but will grant the motion in part to correct the four minor typographical/clerical errors OCTC points out. Contemporaneously with the filing of this order, the court has filed a correction order correcting the four minor errors.

In its June 10, 2016, decision, the court found that counts two, three, and four failed to comport with due process because they do not contain sufficient factual allegations to give respondent or the court adequate notice of the charges against respondent. The court also found,

in each of those three counts, that the factual allegations, which were deemed admitted by respondent's default, did not support a finding that respondent is culpable of the charged misconduct (i.e., that the factual allegations did not support a finding that respondent violated a statute, rule, or court order that would warrant the imposition of discipline (Rules Proc. of State Bar, rule 5.85(F)(1)(d)).<sup>1</sup> In light of these findings, the court dismissed counts two, three, and four with prejudice.

First, OCTC contends that the court erred in dismissing count two, which charged respondent with violating State Bar Rules of Professional Conduct, rule 4-100(A)(1) (failure to maintain client funds in trust account), because the "allegations put respondent on sufficient notice that there was a balance required to be maintained for her client and [that] she failed in that regard." The fact remains that the allegations in count two must do more than provide respondent with notice that she was required to maintain a balance for her client and that she failed in that regard.

Second, OCTC contends that the court erred in dismissing count three, which charged respondent with violating Business and Professions Code section 6106<sup>2</sup> (moral turpitude – misappropriation of client funds), because the "allegations were sufficient to put respondent on notice that it was alleged that she improperly took money that her client was entitled to receive." The fact remains that the allegations in count three must do more that provide respondent with notice that it was alleged that she improperly took money that her client was entitled to receive.

Third, OCTC contends that the court erred in dismissing count four, which charged respondent with violating 6106 (moral turpitude – making false statements to a client), because

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<sup>1</sup> Except where otherwise indicated, all further references to "rules" are to these Rules of Procedure of the State Bar.

<sup>2</sup> Except where otherwise indicated, all further statutory references are to the Business and Professions Code.

the court erroneously concluded “that the fact that [respondent] was grossly negligent in not knowing the statements were false was not a basis for a finding of moral turpitude.” The court’s June 10, 2016, decision makes clear that one of the reasons why it dismissed count four was because the factual allegations in count four, which were deemed admitted by the entry of respondent’s default, failed to support the charge/conclusion of law that respondent was grossly negligent in not knowing that her statements were false. Thus, regardless of whether the fact that respondent was grossly negligent in not knowing the statements were false is a basis for a finding of moral turpitude, the factual allegations in count four do not support a finding that respondent was in fact grossly negligent.

The allegations in counts two, three, and four must recite sufficient specific factual details to provide respondent with “fair, adequate, and reasonable notice” of the charges against her. (§ 6085.) Moreover, providing respondent with the specific factual details underlying the charges is a prerequisite to providing respondent with “a fair, adequate, and reasonable opportunity and right” to defend against the charges. (§ 6085, subd. (a).) This is particularly true in light of the fact that the rules no longer provide the parties with the “full panoply of discovery procedures” that the Review Department cited in *In the Matter of Dixon* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23, 40.

The Review Department first addressed the importance of specific charging in *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163. The Review Department again addressed specific charging in *In the Matter of Respondent D* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 517, 523 where it stated:

specific charging prevents respondent from having to guess at the charges. In addition, since the standard for a culpability finding in attorney discipline matters is clear and convincing evidence, the State Bar has the burden to correctly charge the alleged misconduct so that this standard can be met. ... [The] requirement of a complete charge does not necessitate a lengthy detailed pleading but does necessitate particularity to provide sufficient notice. As a result of specific

charging the State Bar Court hearing judge is then provided with a proper framework within which to decide the issues raised.

Moreover, as the court noted in its June 10, 2016, decision, due process mandates that OCTC alleges sufficient specific factual detail in the NDC so that respondent is not taken by surprise by the evidence offered at her trial. (*In the Matter of Glasser, supra*, 1 Cal. State Bar Ct. Rptr. at p. 168.) Even in a default disciplinary proceeding OCTC “is obligated to produce sufficient evidence...to permit the State Bar Court to make adequate determinations and, when required, appropriate recommendations to the Supreme Court as to discipline. [Citation.]” (*In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 54.) Under the current rules, the only evidence in a default disciplinary proceeding is the respondent’s admissions by default under section 6088 and rule 5.82(2). Without question, under section 6088 and rule 5.82(2), only *facts* (i.e., the well-pleaded factual allegations in the NDC, and not conclusions of law or the charge) are deemed admitted by the entry of the respondent’s default.

The court rejects OCTC's contention that the appropriate remedy for the NDC’s failure to provide respondent with “fair, adequate, and reasonable notice” of the charges against her as required under section 6085, subdivision (a) “would have been [for the court] to either let the parties know of [its] apprehensions or dismiss the count without prejudice.” OCTC relies on rule 5.124(C) to support its contention, but rule 5.124(C) is not applicable here because the rule deals with pleading deficiencies raised *before trial*. When OCTC filed its petition for disbarment after default, the court took the matter under submission for decision. At that point, the pleading phase of the proceeding had concluded, and the matter proceeded to trial under rule 5.85(F) based on the evidence that OCTC provided to the court. Of course, the only evidence OCTC provided to the court was the factual allegations in the NDC and these allegations were deemed admitted upon the entry of respondent’s default. (§ 6088; rule 5.82(2); *In the Matter of Heiser*,

*supra*, 1 Cal. State Bar Ct. Rptr. at p. 54 [in default proceedings, the respondent's admissions by default are in evidence]).

As the Review Department made clear almost 20 years ago, the role of the hearing judge in a State Bar Court disciplinary proceeding:

is to decide the issues on the evidence presented. If that process leads the hearing judge to conclude that the party bearing the burden of proof had not prevailed, then the judge's duty is to find against the particular party on that issue or to recommend only that degree of discipline, if any, which is warranted by the evidence presented. The party failing in its burden runs the very risk that the judge will so act.

We also appreciate that a "hornbook" purpose of attorney regulation is the protection of the public. [Citation.] Yet, absent extraordinary circumstances, we do not view this purpose as authorizing a hearing judge to require the production of added evidence beyond which the parties have chosen to present. ...

(*In the Matter of Bouyer* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 888, 892.)

Similarly, this court does not view this foregoing "hornbook" purpose of attorney regulation as authorizing this court (1) to provide OCTC with an advisory opinion that its charges and evidence were insufficient to establish respondent's culpability on three counts (e.g., the factual allegations in counts two, three, and four do not support a finding that respondent has violated the statute, rule, or court order as charged) or (2) to dismiss counts two, three, and four without prejudice so as to provide OCTC with a second opportunity to prove the charged misconduct (cf. *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 843 [the dismissal of a count/charge after trial is always with prejudice]). "It is not only incumbent upon the Office of Trial Counsel to determine which specific conduct of the respondent is at issue, *but to articulate the nature of the conduct with particularity in the [NDC,]* correlating the alleged misconduct with the rule or statute allegedly violated thereby. [Citations.]" (*In the Matter of Glasser, supra*, 1 Cal. State Bar Ct. Rptr. at p. 172, italics added.)

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The court rejects OCTC's contentions that the court's dismissal of count three:

raises potential Client Security Fund concerns for the complaining witness [Damon Thomas] who did nothing wrong except trust respondent with his money and also ramifications if respondent seeks reinstatement in the future[,] and the State Bar is precluded from making inquires at that time into respondent's transactions with her client. It would be patently unfair for the respondent who refused to participate in these proceedings to, in essence, benefit by not being required to make restitution to her client. ...

The Rules of Professional Conduct regulate the professional conduct of its members. The stated purpose is to protect the public and promote respect and confidence in the legal profession while providing ethical standards to guide its members. It is difficult to see where the profession as a whole or respondent specifically would be served by the actions taken by this court.

OCTC failed to cite any authority to support either its claim of "potential Client Security Fund concerns" or its claim of potential preclusion from making inquires into respondent's transactions with her former client Damon Thomas should respondent seek reinstatement to the practice of law. The court is unaware of any authority that supports OCTC's claims. It is, however, aware of authorities which negate these claims. First, no potential Client Security Fund (CSF) concern is raised by the court's adjudication that OCTC failed to properly charge and prove the misappropriation of \$19,327.70 in client funds that OCTC alleged in count three. A client's application for reimbursement from CSF for funds lost because of the dishonest conduct of an attorney is not contingent upon a finding of a section 6106 misappropriation in a corresponding amount by the State Bar Court. Under Rules of the State Bar of California, rule 3.432(A)(2), it is sufficient for the client to establish that the attorney has "been disbarred, disciplined, or voluntarily resigned from the State Bar." Upon the finality of the Supreme Court's order in this proceeding, respondent will have been both disciplined and disbarred.

Furthermore, in *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 572, the Supreme Court made clear that the State Bar administers the Client Security Fund "for the benefit of wronged clients." Such wronged clients who file applications for reimbursement from CSF are never parties to the

State Bar Court disciplinary proceeding resulting from their complaints to the State Bar. In fact, such wronged clients have due process rights of their own and may seek review of CSF's decisions on their applications by mandamus (Code Civ. Proc., § 1094.5) in the superior courts. (*Saleeby v. State Bar, supra*, 39 Cal.3d at p. 575.)

Second, as the Review Department held more than 20 years ago, except for two instances not applicable here, any act or conduct bearing on a reinstatement petitioner's " 'qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the laws of the state and the nation and respect for the rights of others and for the judicial process' [Citation.]" is relevant and thus admissible in a reinstatement proceeding. (*In the Matter of Kirwan* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 630, 634-635.) Thus, even though rule 5.123(B) will preclude OCTC from again seeking to impose discipline on respondent for the alleged misappropriation from Damon Thomas, that rule will not preclude OCTC from investigating or raising the same alleged misconduct in a reinstatement proceeding should respondent ever file one.

In sum, OCTC has not shown an error of law with respect to the court's dismissals of counts two, three, or four. However, as noted *ante*, OCTC correctly notes four minor errors in the court's June 10, 2016, decision, which the court will correct.

### **ORDER**

The court orders that the Office of Chief Trial Counsel's June 24, 2016, motion for reconsideration of this court's June 10, 2016, decision is DENIED in part as no error of law or fact and no new or different fact, circumstance, or law having being shown with respect to counts two, three, or four. However, the Office of Chief Trial Counsel's June 24, 2016, motion

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for reconsideration is GRANTED in part as it aptly notes four minor errors in the court's June 10, 2016, decision, which the court corrects in a separate correction order filed contemporaneously with the present order.

Dated: June 28, 2016

A handwritten signature in black ink, appearing to read "W. Kearse McGill". The signature is written in a cursive style with a horizontal line underneath it.

**W. KEARSE MCGILL**  
Judge of the State Bar Court



**CERTIFICATE OF SERVICE**

[Rules Proc. of State Bar; Rule 5.27(B); 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 28, 2016, I deposited a true copy of the following document(s):

**ORDER DENYING MOTION FOR RECONSIDERATION IN PART AND GRANTING MOTION FOR RECONSIDERATION IN PART**

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:

**KRISTIN M. SCHUH  
7080 HOLLYWOOD BLVD STE 1100  
LOS ANGELES, CA 90028**

**Courtesy copies:**

**KRISTIN MARIE SCHUH  
1003 HANCOCK AVENUE  
WEST HOLLYWOOD, CA 90069**

**KRISTIN MARIE SCHUH  
1003 1/2 HANCOCK AVENUE  
WEST HOLLYWOOD, CA 90069**

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

**MURRAY B. GREENBERG, Enforcement, Los Angeles**

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on July 28, 2016.



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Paul Barona  
Case Administrator  
State Bar Court