PUBLIC MATTER

FILED
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STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **ROGER WILLIAM SHPALL,** **Member No. 47142,** A Member of the State Bar.	**Case No.: 15-O-12637-WKM** **DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT (Bus. & Prof. Code, § 6007, subd. (c)(4).)**

Introduction

The Office of the Chief Trial Counsel of the State Bar of California (OCTC) charges respondent **ROGER WILLIAM SHPALL** with five counts of misconduct involving a single client matter in which respondent represented the plaintiff in a personal injury lawsuit. Specifically, respondent is charged with willfully violating: (1) rule 4-100(A) of the State Bar Rules of Professional Conduct[1] (failure to maintain client funds in a trust account); (2) rule 4-100(C) (failure to maintain required trust account records); (3) section 6106 of the Business and Professions Code[2] (moral turpitude – misappropriation); (4) rule 4-100(A) (commingling – payment of personal expenses from client trust account); and (5) rule 4-100(A) (commingling – depositing personal funds into client trust account).

[1] Unless otherwise noted, all future references to rules are to the State Bar Rules of Professional Conduct.

[2] Unless otherwise noted, all future references to sections are to the Business and Professions Code.

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As set forth *post*, the court dismisses count one and part of count two; consolidates count five into count four; and then finds respondent culpable on part of count two and on counts three and four. In addition, the court finds that respondent is culpable on one count of *uncharged*, but proved misconduct, which the court considers only for purposes of aggravation.[3] (See, e.g., *Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36 [uncharged, but proved misconduct may not be used as an independent ground of discipline, but may be considered, in appropriate circumstances, for other purposes such as aggravation].)

In light of the fact that the multiple aggravating circumstances significantly out weigh the single mitigating circumstance, the court finds that the appropriate level of discipline for the serious found misconduct, which includes the dishonest misappropriation of at least $8,815.11, is disbarment. Because the court will recommend that respondent be disbarred, the court will order respondent's involuntary inactive enrollment pending the final disposition of this proceeding. (§ 6007, subd. (c)(4).)

Pertinent Procedural History

OCTC filed the notice of disciplinary charges (NDC) in this matter on December 15, 2015. Thereafter, respondent filed his response to the NDC on January 4, 2016.

On April 5, 2016, OCTC filed its pretrial statement. On April 6, 2016, the parties filed a partial stipulation as to facts and to the admissibility of OCTC's exhibits 1 to 34 (parties' April 6, 2016, stipulation).[4] On April 13, 2016, respondent filed his pretrial statement, which he titled as

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[3] "Aggravation" or "aggravating circumstances" are factors surrounding [an attorney's] misconduct that demonstrate that the primary purposes of discipline warrant a greater sanction than what is otherwise specified in a given Standard. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(h) [all further references to standards are to this source].)

[4] The parties' April 6, 2016, stipulation is inartfully titled as a "Stipulation as to Counts, Facts and Admission of Documents." Even though the parties' April 6, 2016, stipulation

a trial brief. In his pretrial statement, respondent notes, inter alia, that he has "admitted full responsibility for my conduct" and "cooperated with the State Bar by entering into the stipulation admitting all facts, exhibits, and counts without attempting to negotiate the discipline to be imposed as pre-condition to signing." A one-day trial was held on April 14, 2016. The court took the matter under submission for decision at the conclusion of the trial on April 14, 2016.

At trial, the State Bar was represented by Senior Trial Counsel Charles T. Calix. Respondent represented himself.

Findings of Fact and Conclusions of Law

The following findings of fact are based on respondent's response to the NDC, the parties' April 6, 2016, stipulation, and the documentary and testimonial evidence admitted at trial. Where the court has found culpability, OCTC has proven culpability by clear and convincing evidence. (Rules Proc. of State Bar, rule 5.103.)

Jurisdiction

Respondent was admitted to the practice of law in California on June 26, 1970. He has been a member of the State Bar of California since that time.

Case Number 15-O-12637-WKM (Hoffenberg Matter)

Facts

On June 30, 2006, Stuart Hoffenberg (Hoffenberg) employed respondent to represent him in a personal injury action against The Home Depot.[5] The parties executed an attorney retainer

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expressly states that it is filed in accordance with Rules of Procedure of the State Bar, rule 5.54 (stipulations as to facts only), the parties purport to stipulate to respondent's culpability without complying with Rules of Procedure of the State Bar, rule 5.55 (stipulations as to facts and conclusions of law) and without seeking and obtaining court approval as required under Rules of Procedure of the State Bar, rule 5.58(A).

[5] In the parties' April 6, 2016, stipulation, the parties stipulate that respondent and Hoffenberg signed the retainer agreement on June 6, 2006. The court rejects that stipulated fact because it is incorrect. First, Hoffenberg was not injured until June 27, 2006. (See State Bar

agreement, in which Hoffenberg agreed to pay respondent 40 percent of any amount collected after legal proceedings were commenced.

On July 13, 2006, Hoffenberg and respondent executed a medical lien in favor of Sobol Orthopedic Medical Group (SOMG). On July 17, 2006, Hoffenberg executed a medical lien in favor of Southern California Sports Rehabilitation (SCSR), which respondent signed on July 20, 2006.

On May 3, 2007, respondent filed a civil complaint on behalf of Hoffenberg in Los Angeles County Superior Court, entitled *Stuart Hoffenberg v. The Home Depot, USA*, case number LC07751 (the civil complaint). Sometime in December 2007, the parties settled the matter for $80,000. On December 20, 2007, respondent sent Hoffenberg an initial "Statement re Settlement Distribution" showing deductions from the $80,000 settlement proceeds for respondent's contingent fee of $32,000 and $642.85 in costs. Additionally, that initial statement indicates that Hoffenberg owed "approximately $11,000" in related medical expenses, which were "subject to negotiation."

In early January 2008, Home Depot sent respondent an $80,000 check made payable to Hoffenberg, respondent, and Attorney Jeffrey Steinberger (Steinberger), and the civil complaint was dismissed with prejudice based on a request for dismissal signed by respondent. On January 4, 2008, respondent deposited the $80,000 check into his client trust account (CTA) at Wells Fargo Bank.

On January 14, 2008, respondent provided Hoffenberg with a second "Statement re Settlement Distribution" showing deductions from the $80,000 settlement proceeds for

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exhibit 8.) Second, the actual agreement (State Bar exhibit 5) itself clearly reflects that it was signed on June 30, 2006.

respondent's contingency fees of $32,000; $1,007.35 in costs;[6] SOMG's bill/lien of $4,093.70; SCSR's bill/lien of $4,757; Danchik Physical Therapy's bill of $535; and Dr. Borden's bill of $792, with a remaining balance of $36,814.95 owed to Hoffenberg. On the same date, respondent issued five CTA checks totaling $36,814.95 to Hoffenberg.

Because respondent had not yet paid anything to Hoffenberg's medical providers, respondent was required to maintain the remaining $10,177.70 ($80,000 less $32,000 less $1,007.35 less $36,814.95) in his CTA for the benefit of Hoffenberg and his medical providers. Thereafter, respondent paid Dr. Borden's $792 bill. Assuming that respondent also thereafter paid Danchik Physical Therapy's $535 bill,[7] respondent was required to hold at least $8,850.70 ($10,177.70 less $792 less $535) in his CTA for the medical lienholders SOMG and SCSR and for Hoffenberg.

After January 4, 2008, respondent's CTA balance fell below the $8,850.70 that he held in trust for lienholders SOMG and SCSR and for Hoffenberg on 19 occasions. As respondent admits, the balance in his CTA dropped below $8,850.70 because he deliberately misappropriated, for his own use and benefit, funds that he held in trust for lienholders SOMG and SCSR and for Hoffenberg. On January 27, 2011, the balance in respondent's CTA fell to $35.59 even though respondent had not paid any portion of either SOMG's or SCSR's bills/liens or paid any additional sums to Hoffenberg. In other words, as respondent admits, by January 27,

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[6] Included in the $1,007.35 in costs was a $320 filing fee for Hoffenberg's civil complaint, which respondent paid from his CTA without having received any money from Hoffenberg. Therefore, respondent paid Hoffenberg's filing fee either with money that respondent held in his CTA for the benefit of his other clients (which would establish an additional instance of uncharged misappropriation in violation of section 6106) or with respondent's own money that respondent improperly had on deposit in his CTA (which would establish an additional improper use of respondent's CTA in violation of rule 4-100(A)). Respondent's improper payment of Hoffenberg's filing fee from respondent's CTA is addressed, *post*, as an aggravating factor for discipline.

[7] According to the parties' April 6, 2016, stipulation, "the State Bar has been unable to determine if [r]espondent paid Danchick Physical Therapy its claim for $535."

2011, respondent had deliberately misappropriated all but $35.59 of the $8,850.70 or $8,815.11 ($8,850.70 less $35.59).

Beginning on about March 2, 2010, Steinberger and Hoffenberg sent respondent numerous emails demanding that respondent pay SOMG's and SCSR's bills/liens. In addition, Hoffenberg notified respondent that he had been contacted by a collection agency and demanded that respondent either pay the outstanding bills/liens or explain his lack of action in paying them.

Except for a perfunctory reply email that respondent sent to Hoffenberg on May 25, 2010, requesting information about a lien notice that Hoffenberg had received from a collection agency, respondent did not reply to any of Steinberger's or Hoffenberg's emails even though he received all of them. Nor did respondent ever pay any portion of either SOMG's bill/lien or SCSR's bill/lien.

Between July 2010 and July 2015, respondent made and directed others to make a total of about 77 deposits of respondent's personal funds into his CTA. Those 77 deposits totaled more than $78,000. Additionally, between March 2010 and July 2015, respondent paid personal expenses directly from his CTA on about 1,422 occasions. Many of the expenses were for clearly discretionary (as opposed to necessary) expenses. Notably, respondent continued to deposit personal funds into and to pay personal expenses directly from his CTA after he attended and successfully completed the State Bar's Ethics School in December 2014.[8] Respondent admits that, during Ethics School, he was specifically taught that, except for one limited exception not relevant here, rule 4-100 proscribes both an attorney's depositing personal funds into a CTA and an attorney's paying personal expenses directly from a CTA. Specifically, 8 of the 77 deposits of personal funds into respondent's CTA were made after respondent completed

[8] Respondent was required to attend and successfully complete Ethics School in his prior record of discipline, which is discussed *post*.

Ethics School. In addition, at least 58 of the 1,422 instances in which respondent paid personal expenses directly from his CTA were made after respondent completed Ethics School.

Conclusions of Law

Count One - Rule 4-100(A) (Failure to Maintain Client Funds in Trust Account)

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 must be deposited therein or otherwise commingled therewith, except for limited exceptions. In count one, OCTC charges that respondent willfully violated rule 4-100(A) by failing to maintain at least $8,850.70 in his CTA for the benefit of lienholders SOMG and SCSR and for respondent's client. The rule 4-100(A) charge in count one, however, is duplicative of the section 6106 charge in count three, "which supports identical or greater discipline." (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127, 130.) Accordingly, count one is DISMISSED with prejudice as DUPLICATIVE.

Count Two - Rule 4-100(C) (Failure to Maintain Required Trust Account Records)

In count two, OCTC charges that respondent willfully violated rule 4-100(C) because he willfully failed to comply with Trust Account Record Keeping Standards as adopted by the Board of Trustees under rule 4–100(C), in that respondent did not prepare a client ledger for the $80,000 in settlement proceeds he received on behalf of his client and did not prepare monthly reconciliations on his CTA. The record, however, clearly establishes that respondent prepared and updated (i.e., maintained) a written ledger for the $80,000 settlement proceeds when respondent prepared the initial "Statement re Settlement Distribution" and the second "Statement re Settlement Distribution" that respondent sent to the client on December 20, 2007, and January 14, 2008, respectively. Thus, regarding the portion of the charged violation of rule 4-100(C)

based on respondent's alleged failure to maintain a client ledger for the $80,000, such is DISMISSED with prejudice; however, in light of the parties stipulation that respondent failed to prepare monthly reconciliations of his CTA, the court finds respondent culpable of willfully violating rule 4-100(C) by failing to reconcile his CTA.

Count Three – Section 6106 (Moral Turpitude, Dishonesty, or Corruption)

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. In count three, OCTC charges that respondent willfully violated section 6106 because he "dishonestly or grossly negligently [sic] misappropriated for his own purposes at least $8,815.11 that his client or [the lienholders SOMG and SCSR] were entitled to receive." The record clearly establishes that respondent engaged in acts involving not only moral turpitude, but also dishonesty in willful violation of section 6106 when he deliberately misappropriated at least $8,815.11 of the $80,000 settlement proceeds for his own use and benefit between January 4, 2008, and January 27, 2011.

Count Four - Rule 4-100(A) (Commingling – Depositing Personal Funds into CTA and Paying Personal Expenses Directly from CTA)

OCTC improperly charged respondent with commingling in violation of rule 4-100(A) in two separate counts (i.e., in counts four and five). OCTC should have charged respondent with only one count of commingling in violation of rule 4-100(A). (Cf. *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480, 494.) In lieu of dismissing one of the counts, the court CONSOLIDATES the charged misconduct in count five into count four so that respondent is charged with commingling in violation of rule 4-100(A) by depositing his own funds into his CTA and by paying personal expenses directly from his CTA.

Respondent stipulated that, at a times when client funds were in his CTA, he used his CTA as his personal checking account by depositing and directing others to deposit his own funds into his CTA and by paying personal expenses directly from his CTA. To be sure,

"commingling is committed when a client's money is intermingled with that of his attorney and its separate identity lost so that it may be used for the attorney's personal expenses .... [Citations.]" (*Clark v. State Bar* (1952) 39 Cal.2d 161, 167-168.) Moreover, rule 4-100 "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.) Accordingly, the court finds respondent culpable for willfully violating rule 4-100(A) as charged in court four (as consolidated) because he improperly used his CTA as his personal checking account by making or directing others to make 77 deposits of his personal funds into his CTA and by paying personal expenses directly from his CTA on 1,422 occasions.

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Std. 1.5.) As set forth *post*, the court finds five separate aggravating circumstances.

Prior Record of Discipline (Std. 1.5(a).)

Respondent has one prior record of discipline. In an order filed on February 11, 2014, in *In re Roger William Shpall on Discipline*, case number S215046 (State Bar Court case number 13-O-10282) (*Shpall* I), the Supreme Court placed respondent on two years' stayed suspension and two years' probation on conditions, including a 90-day period of actual suspension. The Supreme Court imposed that discipline on respondent in accordance with a stipulation as to facts, conclusions of law, and disposition that respondent entered into with OCTC and that was approved by the State Bar Court on October 15, 2013.

The parties' stipulation in *Shpall* I establishes that respondent was culpable on the following four counts of misconduct in a single client matter in which respondent again represented the plaintiff in a personal injury lawsuit: (1) respondent failed to account to the

client for the settlement proceeds respondent received for the client's benefit (rule 4-100(B)(3); (2) respondent failed to pay, out of the settlement proceeds, a $2,542 medical lien for more than four years from July 2009 through August 2013 (rule 4-100(B)(4); (3) failed to respond to client's reasonable status inquires (§ 6068, subd. (m)); and (4) failed to cooperate with OCTC's disciplinary investigation (§ 6068, subd. (m)).

Multiple Acts (Std. 1.5(b).)

Respondent's present misconduct evidences multiple acts of wrongdoing. Respondent's improper use of his CTA for personal purposes and commingling violations alone involved a total of almost 1,500 separate violations of rule 4-100(A).

Failure to Make Restitution

Even though respondent deposited more than $78,000 of his personal funds into his client trust account respondent did not use any of those funds to make restitution by paying SOMG's and SCSR's bills/liens, which totaled $8,850.70. Instead, respondent chose to use most of the more than $78,000 on discretionary and unnecessary expenses.

Proved, but Uncharged Misconduct (Std. 1.5(h).)

As discussed in detail in footnote 6, *ante*, respondent improperly paid Hoffenberg's $320 filing fee from his CTA. The court considers this proved, but uncharged, misconduct as an aggravating circumstance. (*Edwards v. State Bar, supra*, 52 Cal.3d at pp. 35-36.)

Significant Harm (Std. 1.5(j).)

Respondent's misconduct significantly harmed lienholders SOMG and SCSR because it deprived them of the $8,850.70 that he was required to hold in trust for them and over which they held perfected liens.

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Mitigating Circumstances

The member bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.5.) Respondent is entitled to limited mitigation for his remorse as established by his apology to Hoffenberg during the disciplinary trial on April 14, 2016.

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney but 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. (Std. 1.1; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate level of discipline, this 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.) The court then looks to the decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) As the Review Department noted more than two decades ago in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, even though the standards are not to be applied in a talismanic fashion, they are to be followed unless there is a compelling reason that justifies not doing so. (Accord, *In re Silverton* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) 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; *Gary v. State Bar* (1988) 44 Cal.3d 820, 828; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Standard 1.7(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended

sanction is to be the most severe of the different sanctions. The most severe sanction for the found misconduct is found in standard 2.1(a), which provides:

> Disbarment is the presumed sanction for intentional or dishonest misappropriation of entrusted funds or property, unless the amount misappropriated is insignificantly small or sufficiently compelling mitigating circumstances clearly predominate, in which case actual suspension is appropriate.

Also relevant is standard 1.8(a), which provides:

> If a member has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust.

As determined previously, the amount respondent misappropriated is not insignificantly small and no compelling mitigating circumstances exist. Accordingly, the standards clearly provide for disbarment.

Misappropriation of funds held in trust has long been viewed as a particularly serious ethical violation because it breaches the fiduciary duty of loyalty, violates basic notions of honesty, and endangers public confidence in the profession. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1035; *Kelly v. State Bar* (1988) 45 Cal.3d 649, 656.) Therefore, "misappropriation of [client] funds ... warrants disbarment unless the most compelling mitigating circumstances clearly predominate. [Citations.]" (*In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 518.) This is true even in cases involving a single misappropriation by an attorney who has no prior record of discipline. (E.g., *In re Abbott* (1977) 19 Cal.3d 249, 253-254 [disbarment for misappropriation of $29,500 in a single client matter despite substantial mitigation for attorney's 13 years of discipline-free practice and for attorney undergoing treatment to address emotional problems]; *Chang v. State Bar* (1989) 49 Cal.3d 114, 128-129 [disbarment for single isolated misappropriation of less than $7,900 by attorney with no prior

record of discipline; the attorney offered no mitigating evidence, never acknowledged the wrongfulness of his conduct, made no effort to reimburse the client, and displayed a lack of candor to the State Bar].)

Notwithstanding respondent's acknowledged remorse, the record provides no reason for the court to depart from the sanction of disbarment under standard 2.1(a). Accordingly, the court will recommend that respondent be disbarred. In addition, even though the State Bar did not clearly address the issue of who is owed restitution, either at trial or in posttrial briefing; nonetheless, based on the perfected liens, the court will recommend that respondent be required to make restitution to the lienholders SOMG and SCSR for the amount of their liens together with interest thereon beginning 30 days after respondent sent the second "Statement re Settlement Distribution" to Hoffenberg on January 14, 2008

RECOMMENDATIONS

Discipline

The court recommends that respondent **ROGER WILLIAM SHPALL,** State Bar member number 47142, be disbarred from the practice of law in California and that his name be stricken from the Roll of Attorneys of all persons admitted to practice in this state.

The court further recommends that respondent **ROGER WILLIAM SHPALL** be ordered to make restitution to (1) Sobol Orthopedic Medical Group in the amount of $4,093.70 plus 10 percent interest per year from February 13, 2008, and (2) Southern California Sports Rehabilitation in the amount of $4,757 plus 10 percent interest per year from February 13, 2008. Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

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California Rules of Court, Rule 9.20

The court further recommends that respondent **ROGER WILLIAM SHPALL** be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding.

Costs

Finally, the court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that the costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Order of Involuntary Inactive Enrollment

In accordance with Business and Professions Code section 6007, subdivision (c)(4), the court orders that **ROGER WILLIAM SHPALL** be involuntarily enrolled as an inactive member of the State Bar of California, effective three calendar days after the service of this decision and order by mail (Rules Proc. of State Bar, rule 5.111(D)).

Dated: July 8, 2016

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 8, 2016, I deposited a true copy of the following document(s):

DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT (Bus. & Prof. Code, § 6007, subd. (d)(4).)

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:

ROGER WILLIAM SHPALL
LAW OFFICES OF ROGER W. SHPALL, APC
210 N CLARK DR APT 1
BEVERLY HILLS, CA 90211

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

CHARLES T. CALIX, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on July 8, 2016.

Paul Barona

Paul Barona
Case Administrator
State Bar Court