State Bar Court - No. 16-O-17503

S273733

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re DEREK JAMES JONES on Discipline.

The petition for rehearing is denied.

CANTIL-SAKAUYE

Chief Justice

State Bar Court - No. 16-O-17503

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IN THE SUPREME COURT OF CALIFORNIA

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In re DEREK JAMES JONES on Discipline.

The petition for review is denied.

The court orders that Derek James Jones (Respondent), State Bar Number 219803, is disbarred from the practice of law in California and that Respondent's name is stricken from the roll of attorneys.

Respondent must comply with California Rules of Court, rule 9.20, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of this order.

Costs are 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, and may be collected by the State Bar through any means permitted by law.

CANTIL-SAKAUYE

Chief Justice

PUBLIC MATTER—DESIGNATED FOR PUBLICATION

Filed February 11, 2022

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	16-O-17503
	)	
DEREK JAMES JONES	)	OPINION
	)	[As Modified on April 22, 2022]
State Bar No. 219803.	)	
	)	

This matter addresses important aspects of the attorney-client relationship, including the fundamental requirements to carefully maintain client funds in the client trust account (CTA) and deal honestly in interactions with clients, opposing counsel, and the court. It also reemphasizes the duties of an attorney acting in the role of a fiduciary.

Derek James Jones is charged with 11 counts of professional misconduct including failure to deposit client funds in a trust account (three counts), misappropriation of client funds (three counts), breach of fiduciary duty, misrepresentation to a party owed a fiduciary duty, issuance of non-sufficient funds (NSF) checks, misrepresentation to the court and opposing counsel, and misrepresentation to the Office of Chief Trial Counsel of the State Bar (OCTC). A hearing judge found Jones culpable of all of the charged misconduct and recommended his disbarment. Jones appeals, denying all culpability and asserting several factual and procedural arguments. OCTC does not appeal and asks us to uphold the hearing judge's recommendation.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we find Jones culpable of 11 counts of misconduct. Unlike the hearing judge, we find that Jones intentionally misappropriated client funds, rather than doing so by gross negligence. Jones's professional misconduct and his arguments during these disciplinary proceedings exhibit a propensity for

dishonesty. He committed serious misconduct, including several moral turpitude violations, and has displayed indifference that is very concerning. Therefore, we affirm the hearing judge's recommendation of disbarment and find it is necessary here to protect the public, the courts, and the legal profession.

I. PROCEDURAL BACKGROUND

OCTC filed a Notice of Disciplinary Charges (NDC) on December 5, 2018. Jones did not file a timely response to the NDC. Jones asserts he delivered an answer to OCTC on January 28, 2019, but admits the answer was never filed with the court. OCTC then filed a motion for default. The court granted the motion and entered default on February 14, 2019. Jones filed a motion to set aside the default, which was granted on June 26, 2019. On that same date, Jones filed an answer to the NDC denying all charges.

Trial was held on November 12, 18, 21, and 25 and December 2 and 11, 2019. During trial, the hearing judge granted OCTC's motion to delete paragraph 38 of the NDC. The parties submitted closing briefs and the judge issued his decision on February 21, 2020. Jones filed a request for review on March 27, 2020. After briefing was completed, we heard oral argument on November 17, 2021. During oral argument, we ordered supplemental briefing related to the misappropriation charges. Both parties filed supplemental briefing and the matter was submitted on December 8, 2021.

II. FACTUAL BACKGROUND[1]

Jones was admitted to practice law in California on June 4, 2002. After working for a large law firm in the areas of land use, public works projects, and development agreements, Jones began working for Legado Companies (Legado) in November 2007. Legado's current chief executive officer, Edward Czuker, hired Jones as an independent contractor to work on Legado real estate projects, including obtaining entitlements and permits. Legado is a family-owned business and has operated under various names including EMC Financial and JDC Management.[2] Jones was to work exclusively for Legado. Eventually, Jones acted as Legado's in-house counsel, used the title of chief operating officer (COO), and was paid as an employee through "Jones PLC."

The allegations in the NDC involve Jones's actions in negotiating the lease of a commercial property in Marina Del Rey controlled by Legado.[3] Killer Shrimp Marina del Rey LP (Killer Shrimp), owned by Kevin Michaels, sought to lease the property from Legado to operate a restaurant. Jones drafted a letter outlining the terms that he and Michaels had agreed would be incorporated into a sublease. The final sublease was to be drafted later. The letter provided for Killer Shrimp to pay a $50,000 security deposit and $50,000 for ownership of the furniture, fixtures, and equipment (FF&E). The agreement stated that the security deposit and

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[1] The facts are based on trial testimony, documentary evidence, and the hearing judge's factual and credibility findings, which are entitled to great weight, unless we have found differently based on the record. (Rules Proc. of State Bar, rule 5.155(A); *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 748 [Review Department may decline to adopt hearing judge's findings if insufficient evidence exists in record to support them].)

[2] Jones disagrees with the NDC, as it charged he worked for Legado, rather than other Czuker-owned companies. Jones claims Legado did not exist as a corporation until July 26, 2011. The record contradicts his assertion. For example, the April 29, 2011 letter drafted by Jones was written on Legado letterhead with Legado identified as the landlord.

[3] The property was owned by Los Angeles County and Legado controlled the master lease.

the FF&E would be "held in the Jones PLC Attorney-Client Trust Account." The letter referred to Jones as Legado's counsel and COO. Michaels signed the letter on April 29, 2011, agreeing to the terms in the letter. The letter contained an acknowledgement and receipt signed by Jones, which stated Killer Shrimp had placed $100,000 "in care of the Jones PLC Attorney-Client Trust Account, which sum shall be released to [Legado] only upon [Killer Shrimp's] written consent . . . ."[4]

Prior to the signing of the letter, Killer Shrimp had issued a check to Jones PLC dated April 8, 2011, for the $50,000 security deposit. Jones deposited the money into his business checking account at Bank of America, not a CTA, on April 8. The bank account balance dropped to $49,971.04 due to a negative starting balance for the month. The balance stayed below $50,000, dropping to a low of $109.62 by April 28. Many of the withdrawals made from the account that month were for Jones's personal expenses.

On April 29, 2011, Killer Shrimp issued a check to Jones PLC for payment of the $50,000 FF&E. Killer Shrimp's bank account showed the check posting on May 2, 2011, with Jones endorsing the check. The evidence at trial did not show where Jones deposited the check and no credible evidence showed that the money was deposited into a CTA controlled by Jones. In his answer to the NDC, Jones stated he deposited the $50,000 in a Bank of America account. No evidence was produced that this was a CTA.

Negotiations regarding the lease continued through 2011 and 2012. Michaels decided to occupy a larger space at the property and to purchase a liquor license so Killer Shrimp could serve alcohol. Killer Shrimp agreed to purchase the liquor license associated with the property for $75,000. Jones agreed to keep the $75,000 in escrow and to see that the license was

[4] The letter agreement was styled in all capital letters with some bold-faced words, which we have omitted.

transferred to Killer Shrimp. Jones received a $75,000 cashier's check from Killer Shrimp, made out to Jones PLC, which was deposited into Jones's business checking account at Bank of America and credited on February 10, 2012. During the month of February, the account balance fell to a low of negative $15.80. The bank records show that Jones used this account to make personal expenditures. On February 23, 2012, Jones memorialized the terms of the negotiations in another letter, which Michaels signed, and which was intended to be incorporated into a sublease. The terms regarding the $50,000 security deposit and the $50,000 for FF&E remained the same. The agreement regarding the $75,000 for the liquor license was also included in the letter.

On May 21, 2012, Jones executed a form to transfer the liquor license to Killer Shrimp. The form indicated that Jones PLC was the escrow holder/guarantor. The form also stated that Killer Shrimp paid $125,000 in consideration, which was comprised of the $50,000 FF&E and the $75,000 for the liquor license.

On August 28, 2012, Legado terminated Jones's employment. After the termination, Legado's chief financial officer, Gary Lubin, requested Jones return $125,000. Jones did not immediately return the funds. Subsequently, on September 14, 2012, Legado filed a complaint against Jones in Los Angeles County Superior Court (*Legado v. Jones*), which alleged 19 causes of action, including misappropriation of $125,000 of the $175,000 paid by Killer Shrimp.[5]

On September 4, 2012, Jones opened a personal checking account at Citibank. Between September 4 and 20, the Citibank account never maintained a balance of more than $11,000. However, on September 20, Jones issued a check for $65,000 from the Citibank account, made payable to "Jones PLC Client Trust Acct," a new CTA that had just recently been opened by

[5] The hearing judge determined Jones had returned the $50,000 security deposit prior to September 14, 2012, as the issue was not discussed in a letter from Jones's attorney regarding the return of the $125,000, nor was it an issue in the subsequent *Legado v. Jones* litigation.

Jones on September 17, on the advice of counsel. The $65,000 check issued from the Citibank account was returned for non-sufficient funds on September 24.

On September 18, 2012, the day after opening the new CTA, Jones issued two checks from the account, payable to Legado for "ABC Escrow Killer Shrimp / FF&E," one for $50,000 and one for $75,000. The CTA contained only $100 on the day the checks were issued. On September 19, $60,000 was wired into the CTA. The $50,000 check cleared, but the $75,000 check was returned for non-sufficient funds. On September 20, several deposits were made into the CTA. Legado redeposited the $75,000 check and it cleared on September 24. The ending balance in the CTA for September was negative $3,400; this balance remained through December 31.

In the civil suit, Jones signed a declaration under penalty of perjury on January 24, 2013, which provided, in part:

> "It was agreed by Killer Shrimp and Legado that the transfer would be coordinated by and through Jones PLC, a professional law corporation. Accordingly, with the knowledge and consent of the parties, the funds were deposited (in at least two separate tranches) into a Jones PLC Attorney Client Trust Account. [¶] During this period of time, Jones PLC maintained two attorney-client trust accounts. Regrettably in the process of transferring funds from one account to the other, one of two checks made out to Legado Companies was returned unpaid. On the very same date this issue was discovered (Friday, September 21, 2012), the remaining funds were successfully transferred by wire from a Jones PLC Attorney Client Trust Account. [¶] The Jones PLC trust accounts have at various times, contained funds for clients who are unrelated to Legado, Mr. Czuker, or the present lawsuit."

A third amended complaint was filed in the civil suit on July 26, 2013. On May 28, 2014, Legado filed a notice of settlement, advising the court that a conditional settlement had been reached. On July 3, 2014, the parties filed a joint stipulation regarding the settlement, which included a resolution of the third amended complaint and Jones's cross-complaint. The parties obtained an order allowing the court to retain jurisdiction over the execution of the settlement. On December 4, 2014, Legado moved the court to enter the stipulated judgment as a

result of Jones's breach of the settlement agreement. On March 16, 2015, the court entered judgment, which provided that Jones had defaulted in making payments pursuant to the settlement agreement.[6] Of the $2.4 million settlement, Jones owed the plaintiffs $1.53 million plus attorney fees and post-judgment interest. Jones appealed the judgment. On July 21, 2016, the Court of Appeal affirmed the judgment.

On May 30, 2017, OCTC sent Jones a letter requesting information about the funds from the Killer Shrimp lease. Jones responded on June 16, stating he placed the $175,000 from Killer Shrimp into a trust account in the name of Jones PLC or with Jones PLC as trustee pursuant to the lease agreement. He stated that "each and all of these three installments were paid into the Trust Account" and further, that he deposited the $125,000 (for the FF&E and the liquor license) in a trust account and disbursed it from the same. He also admitted that the $50,000 security deposit was deposited into a business account and also disbursed from that account, which he called an administrative oversight that was timely acknowledged and corrected.

III. JONES'S FACTUAL DISPUTES[7]

Rule 5.152(C) of the Rules of Procedure of the State Bar provides that disputed factual issues on review must be raised by an appellant in the opening brief; factual errors not raised on review are waived. Jones raises several factual disputes. To start, we address Jones's claims that he was not engaged in the practice of law when he worked for Legado and that there was no attorney-client relationship between him and any Legado entity. An attorney-client relationship "can only be created by contract, express or implied." (*Koo v. Rubio's Restaurants Inc.* (2003)

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[6] The settlement agreement covered allegations related to those charged in the NDC as well as several other claims.

[7] We have independently reviewed all of Jones's factual arguments, many of which are not outcome determinative as to culpability. Any arguments not specifically addressed have been considered and are rejected as without merit.

109 Cal.App.4th 719, 729.) The hearing judge found Jones and Legado had an attorney-client relationship because he did legal work for them, which Jones also admitted in the *Legado v. Jones* litigation. We affirm this finding because the record establishes Jones was hired to do legal work at Legado and Legado officials considered him to be acting as a company attorney.[8] (See *Lister v. State Bar* (1990) 51 Cal.3d 1117, 1126 [conduct of parties can create an attorney-client relationship].) Jones did legal work at Legado, including negotiating the Killer Shrimp lease, drafting lease terms, and agreeing to hold the money in escrow as part of the deal. Czuker and Lubin described Jones's duties for Legado as "in-house counsel," Jones referred to himself as counsel in the April 29, 2011 letter agreement with Killer Shrimp, he filed the ABC form as an escrow holder, and he declared in the *Legado v. Jones* litigation that he performed legal work for Legado.

We reject Jones's argument he was not doing work for Legado, but "Jones PLC" was doing so as a "contractor." Jones, doing work as an attorney, is required to uphold his ethical duties. We also reject his related argument that he was not hired by Legado, but that Jones PLC was hired by EMC Development. As discussed in the factual background section, Legado was a family-owned business, which was associated with several different entities, including EMC Development. EMC Development came to be known as Legado. Jones was on notice that his employment with Legado related to the Killer Shrimp lease was the subject of the alleged professional misconduct.

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[8] Jones points to testimony from Michaels of Killer Shrimp and Timothy Martin, one of Jones's character witnesses, both of whom did not characterize Jones as working as an attorney in his role with Legado. However, the hearing judge weighed the testimony of these witnesses and credited the testimony of the Legado officials over these two individuals—both outsiders to the Legado organization. While Michaels had some understanding of Jones's role within Legado due to his interactions with Jones in negotiating the lease, his understanding does not override the credible evidence regarding Jones's relationship with Legado. Michaels had no firsthand knowledge of Jones's role within Legado. We affirm the hearing judge's finding.

IV. JONES'S PROCEDURAL ARGUMENTS

A. OCTC Acted Within Its Discretion in Reopening the Case

The hearing judge rejected Jones's argument that OCTC violated rule 2603 of the Rules of Procedure of the State Bar because OCTC has discretion to reopen a matter. OCTC has exclusive jurisdiction to determine whether to file charges against an attorney. (Rules Proc. of State Bar, rule 2101.) Under rule 2603, OCTC may reopen investigations or complaints if (1) there is new material evidence, or (2) if the Chief Trial Counsel determines that there is good cause. The rule also provides that the Office of General Counsel (OGC) may review investigations and complaints that OCTC has closed. After review, OGC may recommend to OCTC to reopen a case for investigation.

Jones argues OCTC acted without proper authority in reopening an investigation against him because (1) OCTC did not show good cause to reopen, and (2) OCTC did not obtain OGC approval to reopen. Jones misreads and misapplies the rule. First, rule 2603 does not require OCTC to make a showing of good cause at trial or the hearing judge to make such a finding to reopen a case. That decision is within OCTC's prosecutorial discretion. Furthermore, OCTC warned Jones in an October 30, 2013 letter that the case was closed "without prejudice to further proceedings as appropriate pursuant to rule 2603 of the Rules of Procedure of the State Bar of California." The letter provided notice that the case may be reopened. Therefore, the case was not closed "on the merits" as Jones insists. Second, rule 2603 does not require OGC approval to reopen a case. Rather, OGC has the ability to review closed cases and then recommend to OCTC to reopen. OCTC is not required to get OGC approval to reopen a case.[9]

[9] Jones cites to OGC's request for public comment regarding the amendment of rule 2603 to add "second look" review by OGC, which is found at https://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2016-Public-Comment/2016-05. Jones misreads this posting as well, which contains no discussion that would require OCTC to obtain OGC's permission to reopen a matter. The plain language of the

B. No Violation of Rule 2604

Rule 2604 of the Rules of Procedure of the State Bar provides, in part, that OCTC may file an NDC when "the attorney has received a fair, adequate and reasonable opportunity to deny or explain the matters which are the subject of the notice of disciplinary charges." Jones argues OCTC violated rule 2604 because it had no "actual communication" with him between June 16, 2017, and the filing of the NDC on December 5, 2018. He also complains he was denied the opportunity to have an early neutral evaluation conference (ENEC) and that the hearing judge did not mention this in the decision.

Rule 5.30 of the Rules of Procedure of the State Bar requires OCTC to notify an attorney before an NDC is filed of the right to request an ENEC. OCTC mailed this notice to Jones's membership address, but Jones did not receive the notice because he had not updated his membership address, which he admits. It is undisputed that Jones failed to update his membership records address as is his responsibility. (Bus. & Prof. Code, §§ 6002.1, subd. (a)(1) & 6068, subd. (j).) OCTC also maintains it attempted to contact Jones by phone and email. We agree with OCTC that Jones cannot complain that OCTC failed to give him a "reasonable opportunity" to address this case with OCTC or participate in an ENEC when he failed to maintain his contact information with the State Bar. We find no procedural violation of rule 2604 here and certainly no error by the hearing judge for not mentioning there was no ENEC in the procedural history, as Jones was not entitled to one due to his own lapse in responsibility for updating his membership address.

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discussion states that proposed rule 2603 would provide an avenue for closed disciplinary complaints to be reviewed by OGC.

C. No Error in Denial of Jones's Motion to Compel

The hearing judge denied Jones's motion to compel discovery of OCTC's 2013 investigation file because Jones (1) did not timely request discovery pursuant to rule 5.65(B) of the Rules of Procedure of the State Bar and (2) failed to articulate how the file would have helped his case.[10] The judge found that OCTC halted the investigation while *Legado v. Jones* was pending and pursued charges after it received notice the litigation was completed. In addition, OCTC stated it had not viewed the 2013 file in pursuing the current charges. The judge found Jones did not show what additional documents would have assisted in his defense and that the request for the file was "more of a delay tactic than a legitimate request for discovery." We review the denial of the motion to compel under an abuse of discretion standard. (*In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, 695 [abuse of discretion used for procedural rulings].) Therefore, we evaluate whether or not the hearing judge exceeded the bounds of reason. (See *In the Matter of Geyer* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 74, 78.)

Rule 5.65(B) provides that, generally, discovery requests "must be made in writing and served on the other party within 10 days after service of the answer to the notice of disciplinary charges, or within 10 days after service of any amendment to the notice." To receive additional discovery, a party must file a motion within 45 days after service of the answer to the NDC. The motion must be supported by a declaration describing the relevancy of the discovery to the allegations or defenses. (Rules Proc. of State Bar, rule 5.66.)

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[10] After hearing testimony, the hearing judge opined on the fifth day of trial that the 2013 case file was relevant. Even though relevant, the judge still found Jones's motion to compel was untimely. Therefore, the judge denied Jones's motion to reconsider the denial of the motion to compel.

Jones did not request the 2013 case file until October 9, 2019, which was one month before trial and 10 months after the NDC was filed. His motion to compel was not filed until five days before trial. There is no dispute that Jones was aware of the 2013 investigation in 2013. He has offered no evidence or valid reason why he failed to comply with State Bar discovery rules. Jones had ample opportunity to seek this discovery earlier in the case. (See Rules Proc. of State Bar, rule 5.66(D)(3).) Jones also argues he timely filed the motion to compel under rule 5.69 of the Rules of Procedure of the State Bar, which states, "A party may move to compel compliance with discovery requests within 15 days after the date on which the discovery response was due or served." However, Jones never made a timely request for discovery, so he could not then properly make a motion to compel. For all of these reasons, we find the hearing judge did not abuse his discretion by denying Jones's motion to compel as untimely.

Jones's other arguments regarding the motion to compel have been considered and are denied as lacking good cause. OCTC did not "waive" the discovery timing rules when it proposed a late discovery exchange, especially as Jones did not accept the proposal nor did he provide OCTC any discovery responses or provide any timely exhibits. Further, OCTC's amendment of the NDC on the first day of trial would not trigger additional discovery or extend the timing of discovery under the Rules of Procedure because OCTC *eliminated* allegations. Finally, Jones's argument that *Brady v. Maryland* (1963) 373 U.S. 83 was violated is also unavailing as *Brady* relates to criminal procedure, not State Bar disciplinary procedure.

D. Exclusion of Jones's Exhibits was Proper

Unless otherwise ordered by the court, parties are required to exchange exhibits at least 10 days prior to the pretrial conference. (Rules Proc. of State Bar, rule 5.101.1(B).) Failure to comply, without good cause, may constitute grounds for exclusion of exhibits. (Rules Proc. of

State Bar, rule 5.101.1(I).) Jones failed to exchange exhibits prior to trial as required by the rule and ordered by the court. The hearing judge found no good cause for Jones's failure to comply and excluded certain exhibits. However, the judge admitted some of Jones's exhibits.

Jones argues the hearing judge erred in excluding his exhibits. He complains that he did not exchange exhibits because he was awaiting receipt of the 2013 case file. Jones cannot hold OCTC responsible for his own failure to exchange the exhibits he had in his possession or was capable of attaining. Jones believes he established good cause by demonstrating that he was experiencing personal problems, that he lacked litigation experience and had no experience with State Bar Court matters, and that his counsel withdrew from the case 12 days before the start of trial. None of these reasons establishes good cause for his failure to exchange exhibits with OCTC prior to trial. Therefore, we affirm the hearing judge's finding excluding the exhibits from evidence.[11]

Finally, Jones argues the hearing judge violated rule 5.104 by failing to admit relevant evidence and requests that we admit his exhibits into the record.[12] His argument is unavailing. The judge properly excluded the exhibits under rule 5.101.1(I). Therefore, the relevance of Jones's evidence was not at issue because Jones had already failed to comply under rule 5.101.1. For these reasons, we find Jones has failed to show that the hearing judge abused his discretion in excluding some of Jones's exhibits for his failure to comply with the Rules of Procedure. Therefore, we reject Jones's request to admit the excluded exhibits into the record.

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[11] In addition, Jones failed to explain how the exclusion of the exhibits prejudiced him. (*In the Matter of Aulakh, supra*, 3 Cal. State Bar Ct. Rptr. at p. 695 [on appeal, party must show the procedural error was so prejudicial as to result in miscarriage of justice].) Instead, he posits in his responsive brief that OCTC would not be prejudiced if the exhibits were admitted. That is not the proper analysis in order to prevail.

[12] Rule 5.104(C) of the Rules of Procedure of the State Bar requires the admission of relevant evidence "if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs."

In his opening brief, Jones states that he had filed a motion to augment the record to include a declaration from Charles Colby. No such motion was filed at the time.[13] We decline to augment the record as Jones has not established that the record on review is incomplete or incorrect. (Rules Proc. of State Bar, Rule 5.156(E).) Jones also requests that we reopen the record pursuant to rule 5.113 of the Rules of Procedure. That rule requires such a motion to be made in the Hearing Department before review is requested. Accordingly, that request is denied.

E. The NDC Was Filed Within the Limitations Period

Rule 5.21 of the Rules of Procedure of the State Bar provides, generally, that a disciplinary proceeding must begin within five years from the date of the violation. The five-year limit is tolled while civil proceedings "based on the same acts or circumstances as the violation" are pending in any court. (Rules Proc. of State Bar, rule 5.21(C)(3).) The hearing judge found that counts one through 10 were tolled during the *Legado v. Jones* litigation (Rules Proc. of State Bar, rule 5.21(C)(3)) and the alleged misconduct in count 11 occurred within five years of filing the NDC.

For counts one through eight, Jones argues that *Legado v. Jones* should not trigger the tolling provision of rule 5.21(C)(3) of the Rules of Procedure of the State Bar because the issues relating to Killer Shrimp only comprised a small part of the complaint. Even if the litigation tolls the five-year limit under rule 5.21, Jones argues it should be tolled for only 20 months—from the time the complaint was filed in September 2012 until May 2014 when the settlement was reached. He asserts that the appeal should not be counted in the tolling period because the only issue in the appeal related to the amount due under the settlement agreement. He believes *In the Matter of Saxon* (Review Dept. 2020) 5 Cal. State Bar Ct. Rptr. 728 supports his position: the

[13] Jones later filed a motion to augment on November 16, 2021, which we denied on November 17, 2021.

appeal was based only on the enforceability of a single provision of the settlement agreement and did not extend the tolling period. As to counts nine and ten, Jones argues that they are unrelated to the civil litigation and, therefore, the allegations cannot be tolled.

The alleged misconduct began in April 2011, when Jones was employed by Legado. OCTC argues the limitations period was tolled during Jones's employment under rule 5.21(C)(1), which provides for tolling "while the attorney represents the complainant." Like the attorney in *Saxon*, Jones was acting as a fiduciary in holding the funds in escrow. And while he did so, the five-year period did not commence. (*In the Matter of Saxon, supra*, 5 Cal. State Bar Ct. Rptr. at pp. 734-735.) Jones did not deliver all of the funds until after Legado filed suit against him. Therefore, the limitations did not begin to run prior to the start of the lawsuit. We find that counts one through 10 relate to circumstances alleged in *Legado v. Jones*. While the violation in count nine occurred after Legado sued Jones, the violation alleged relates to the misconduct in the complaint. Count 10 alleges a violation that occurred in connection with the suit, therefore this count is also tolled as it relates to the ongoing civil proceeding.

We reject Jones's argument that *Legado v. Jones* did not toll the limitations period because the Killer Shrimp issues related only to a small part of the complaint. Part of the complaint was based on "the same acts or circumstances" as the alleged violations. No authority requires the entire lawsuit or a certain percentage of the lawsuit to relate to the alleged violations. The conduct related to the violations alleged in the NDC was clearly the same conduct alleged as part of *Legado v. Jones*.

We also reject Jones's claim that his appeal did not toll the limitations period because it addressed a "derivative" issue relating to the amount of damages owed. In *Saxon*, we found that two actions were "derivative" and did not toll the limitations period because they were separate actions filed to enforce an outstanding debt and not based on the same acts or circumstances as

the violation. (*In the Matter of Saxon, supra*, 5 Cal. State Bar Ct. Rptr. at p. 735.) Here, Jones's appeal was of a lawsuit that was based on the same acts of the violation.

We agree with OCTC that while *Legado v. Jones* was pending, including the appeal, the limitations period was tolled. Even if the appeal period was not tolled, the NDC was still filed within the limitations period because judgment in the civil case was entered on March 16, 2015, and the NDC was filed on December 5, 2018, well under five years from the judgment.

V. CULPABILITY

A. Counts One through Six: Misappropriation (Bus. & Prof. Code, § 6106) and Failure to Maintain Funds in CTA (Rules Prof. Conduct, rule 4-100(A))

Counts one through six allege misappropriation and CTA violations regarding the three checks Jones received from Killer Shrimp. The hearing judge found culpability as charged for these counts.

Business and Professions Code section 6106[14] provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. Willful misappropriation of a client's funds involves moral turpitude. (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 278.) An attorney who knowingly converts client funds for his or her own purpose, clearly violates section 6106. (*Ibid.*) When an account balance drops below the amount the attorney is required to hold for a client, a presumption of misappropriation arises. (See *Edwards v. State Bar* (1990) 52 Cal.3d 28, 37.) The burden then shifts to the attorney to show that misappropriation did not occur and that he was entitled to withdraw the funds. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618.) In the supplemental briefing, the parties addressed whether there was evidence of intentional misconduct for the section 6106 charges (counts four, five, and six).

[14] All further references to sections are to this source, unless otherwise noted.

OCTC argued Jones intentionally misappropriated the funds, while Jones maintained there is no evidence of any misappropriation, much less any intentional misappropriation.

Rule 4-100(A) of the Rules of Professional Conduct[15] provides, in part, that client funds held by an attorney must be deposited in a CTA and maintained until the amount owed to the client is settled. (See *In the Matter of Song*, *supra*, 5 Cal. State Bar Ct. Rptr. at pp. 277-278.)

1. Security Deposit: Counts One and Four

Count four alleges Jones misappropriated the April 8, 2011 $50,000 security deposit check. The bank records show that after Jones deposited the $50,000 for the security deposit into his business account, he failed to maintain those amounts. The hearing judge found Jones failed to rebut the presumption of misappropriation, as the account dipped below $50,000, and Jones did not show he was entitled to use the money. We agree there is clear and convincing evidence Jones is culpable of misappropriation of the security deposit.[16] In addition, we find that Jones acted intentionally when he put entrusted funds into his business account instead of a CTA.[17] He then immediately began to make personal withdrawals using the funds. He knew at the time he deposited the money that he had agreed to keep the funds in his CTA, yet he failed to do so. Additionally, he knew that he was not authorized to use the money for his personal expenses. Therefore, we find that Jones intentionally misappropriated the $50,000 security deposit. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 792 [intent may be proved by direct or circumstantial

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[15] All further references to rules are to the former California Rules of Professional Conduct that were in effect until November 1, 2018, unless otherwise noted.

[16] Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

[17] We decline to adopt the hearing judge's finding that Jones misappropriated the $50,000 through gross negligence as we find his actions were intentional.

evidence]; *Grim v. State Bar* (1991) 53 Cal.3d 21, 30 [misappropriation where attorney acted deliberately and with full knowledge that funds did not belong to him].)[18]

Jones argues on review that count four improperly charges him with requiring to hold the $50,000 security deposit in escrow when no such obligation arose until at least spring 2012, when the business asset sale was finalized. We reject this argument as Jones's April 29, 2011 letter clearly states that he [Jones] had placed the security deposit in a CTA and had agreed to hold the funds until Killer Shrimp consented to the release of the funds.

Count one alleges Jones failed to deposit the $50,000 security deposit check from Killer Shrimp in his CTA in violation of rule 4-100(A). The hearing judge found culpability as Jones was required to hold these funds in a CTA and did not do so. Instead, he deposited the security deposit in his business account. Therefore, he violated rule 4-100(A) as charged in count one. (See *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 976 [rule is violated when attorney fails to deposit funds in manner designated by the rule].) We agree and find culpability for count one, but assign no additional weight in discipline as culpability is based on the same facts underlying count four. (See *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127 [no additional disciplinary weight for rule 4-100(A) violation duplicative of moral turpitude violation].)

Jones argues on review that Legado was not a "client" of his under rule 4-100(A).[19] As discussed *ante*, we find that Jones and Legado did have an attorney-client relationship.

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[18] In the supplemental briefing, Jones asserts his conduct was not intentional. He compares his case to *In the Matter of Sklar*, *supra*, 2 Cal. State Bar Ct. Rptr. 602, *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, and *In the Matter of Song*, *supra*, 5 Cal. State Bar Ct. Rptr. 273. None of those cases dissuades us from our decision that Jones acted intentionally, especially in light of the other misappropriations discussed in this section (counts five and six). In addition, his argument that due process and controlling precedent militate against finding intentional misappropriation is unsupported.

[19] Jones repeats this argument for counts two and three, which we similarly reject.

Additionally, he asserts all the funds were not for his "client," Legado, since they were not held for the benefit of Legado. Jones misunderstands his role as a fiduciary in this situation. He had a duty to Legado as its attorney doing legal work, but he also created fiduciary duties under the lease to both Legado and Killer Shrimp. An attorney can create a fiduciary relationship with a non-client when he receives money on behalf of the non-client. (See *Johnstone v. State Bar* (1966) 64 Cal.2d 153, 155-156.) The attorney "must comply with the same fiduciary duties in dealing with such funds as if an attorney-client relationship existed." (*In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632.) An attorney who breaches fiduciary duties that would justify discipline if there was an attorney-client relationship may be disciplined for such misconduct. (*In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, 373.) There is no question that Jones agreed to hold the money from the Killer Shrimp lease and keep it in a CTA until it was appropriate to release it to the proper parties. Under rule 4-100, he was required to deposit all of the money received from Killer Shrimp in a CTA. He failed to do so and thereby violated his fiduciary duties to Killer Shrimp, even if it was not his client. (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813 [violation of fiduciary duty warrants discipline even in absence of attorney-client relationship]; *In the Matter of Lilly* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 185, 191 [even if no attorney-client relationship, attorney held to same fiduciary duties to non-client as if there were an attorney-client relationship].)

Jones asserts at the time of the alleged misconduct, April 8, 2011, there was no written agreement regarding the use of the $50,000 security deposit. Therefore, he claims he cannot be culpable under count one. We reject his argument. There is no evidence in the record regarding a *written* agreement at the time the check was delivered on April 8. However, the conduct of the parties when viewed in light of the April 29 letter are strong evidence that Jones was to keep the

security deposit in a CTA. The April 29 letter memorializes the terms agreed upon by Michaels and Legado, which included holding the funds in a CTA. No evidence suggests Jones could do what he wished with the $50,000 security deposit.

2. Liquor License: Counts Three and Six

Count six alleges Jones misappropriated the $75,000 he held for the liquor license. Like the security deposit funds, Jones deposited the $75,000 for the liquor license into his business account and failed to maintain that amount. He failed to rebut the presumption of misappropriation as the business account dipped below $75,000 and Jones used that money when he was not entitled to do so. Accordingly, we find culpability for intentional misappropriation of the liquor license funds.[20] He deposited both the security deposit funds and the liquor license funds in his business account instead of a CTA. This was not a one-time mistake, but a repeated practice.

Under count six, Jones complains that the NDC should not charge that he was required to hold the funds for "Legado and Killer Shrimp" as no Legado entity had a claim to the funds. We reject this argument as explained *ante*—Jones had an obligation to Killer Shrimp to hold the funds, even if it was not a client.[21] Further, even if the money would not have gone to Legado in the end, according to his agreement, Jones was required to maintain that money in trust, not to use it as he wished. This is the essence of a fiduciary relationship in an escrow.

Count three alleges Jones failed to deposit the $75,000 check for the liquor license from Killer Shrimp in his CTA in violation of rule 4-100(A). We agree with the hearing judge that Jones was required to hold these funds in a CTA and did not do so. Instead, he deposited the

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[20] We decline to adopt the hearing judge's finding that Jones misappropriated the $75,000 through gross negligence as we find his actions were intentional.

[21] Jones makes the same argument for count five, which we also reject.

funds in his business account. Therefore, he violated rule 4-100(A) as charged in count three. (*Guzzetta v. State Bar*, *supra*, 43 Cal.3d at p. 976.) However, we assign no additional weight in discipline as culpability is based on the same facts underlying count six. (*In the Matter of Sampson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 127.)

3. FF&E: Counts Two and Five

Count five alleges Jones misappropriated the April 29, 2011 check for $50,000 for the FF&E. The hearing judge found that Jones could not show where he deposited the money, nor could he rebut the presumption that these funds were also misappropriated. We agree. Jones received the check for the FF&E and negotiated it, but there is no evidence showing he deposited and kept the funds in a CTA as he had agreed to do. Accordingly, we find culpability for intentional misappropriation of the FF&E funds.[22]

Jones asserts he cannot be held culpable under count five for misappropriation because there was no evidence as to where the FF&E money was initially deposited or how it was used. The evidence shows the $50,000 check for the FF&E was endorsed by Jones and the money was taken out of Killer Shrimp's account, which establishes a presumption that Jones misappropriated the money. Therefore, Jones must rebut the presumption to avoid culpability for misappropriation. He did not do so. In addition, the repayment of the FF&E came from Jones's CTA he opened in September 2012. Funds were transferred into that CTA from an account that was not a CTA. This is further evidence that Jones misappropriated the money. Accordingly, we affirm culpability for count five.

Count two alleges Jones failed to deposit the $50,000 check for the FF&E from Killer Shrimp in his CTA in violation of rule 4-100(A). No evidence was presented that Jones deposited

[22] We decline to adopt the hearing judge's finding that Jones misappropriated the $50,000 through gross negligence as we find his actions were intentional.

these funds into a CTA.[23] He was required to hold these funds in a CTA and did not do so. Therefore, we agree with the hearing judge that Jones is culpable as charged in count two. (*Guzzetta v. State Bar*, *supra*, 43 Cal.3d at p. 976.) We assign no additional weight in discipline as culpability is based on the same facts underlying count five. (*In the Matter of Sampson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 127.)

For culpability under count two, Jones believes there was no evidence suggesting he mishandled the $50,000 FF&E deposit. We disagree. The record shows the check was deposited, but there are no records as to where it was deposited. Jones could not produce any records that would confirm the FF&E deposit was placed in a CTA at that time. The only account records he produced from this time period were for a Wells Fargo account, which was not a CTA. In September 2012, Jones opened a new CTA, transferred money into that account from an account that was not a CTA, and then disbursed the money for the FF&E and the liquor license. This is evidence that Jones never put the funds in a CTA to begin with or, at the least, he did not maintain the funds in a CTA as the source of the transferred money was not from a CTA.

B. Count Seven: Failure to Comply with Laws – Breach of Fiduciary Duty (§ 6068, subd. (a))

Count seven alleges Jones breached the fiduciary duty he owed to Legado and Killer Shrimp when he mishandled the $175,000 in funds and disbursed the money without knowledge or consent from Legado and Killer Shrimp, in violation of section 6068, subdivision (a). That section provides that it is the duty of an attorney to support the Constitution and laws of the United States and of this state. An escrow holder owes fiduciary duties to the escrow parties and "must comply strictly with the instructions of the parties." (*Summit Fin. Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711.) The hearing judge found Jones

[23] Jones states he had Wells Fargo accounts during the relevant time period. No evidence was introduced that any of these accounts was a CTA.

culpable under count seven, but assigned no additional weight in discipline as culpability was based on the same facts underlying counts four, five, and six. (*In the Matter of Sampson, supra*, 3 Cal. State Bar Ct. Rptr. at p. 127.)

Under count seven, Jones repeats his arguments made under counts one through six, which we have rejected above. He further argues that culpability under count seven requires a finding that he disbursed the funds and enriched himself, which the record does not support. We reject this argument as there is clear and convincing evidence Jones violated his fiduciary duties to both Legado and Killer Shrimp. Jones deposited the funds into his business account and instead of safekeeping the funds, he used the money to make personal, unauthorized purchases. Jones agreed to act as an escrow holder and violated his duties when he distributed the money in a way not contemplated by the parties. Therefore, we find culpability under count seven. (*Crooks v. State Bar* (1970) 3 Cal.3d 346, 355-356 [professional misconduct and violation of fiduciary duties when attorney acted without authority in distributing escrow funds].) We decline to assign additional disciplinary weight as Jones's breach of his fiduciary duties is based on the same facts underlying the moral turpitude charges in counts four, five, and six. (*In the Matter of Sampson, supra*, 3 Cal. State Bar Ct. Rptr. at p. 127.)

C. Count Eight: Moral Turpitude – Misrepresentation (§ 6106)

Count eight alleges Jones made misrepresentations in writing in the April 29, 2011 letter regarding holding the funds from Killer Shrimp in his CTA. The hearing judge found Jones culpable for misrepresenting to Killer Shrimp that he would hold the funds in a CTA. At the time of the letter, Jones had already deposited the security deposit in his business account and had misappropriated the money.

Regarding culpability under count eight, Jones argues there was no fiduciary duty to Killer Shrimp as Michaels testified he did not believe Jones agreed to act as a fiduciary for him

or Killer Shrimp. First, Michaels's belief about Jones's duties does not supersede the duties Jones has under the law as an escrow holder and fiduciary. Michaels also testified he understood that Jones held the money in escrow and had a duty not to take the money. Second, whether or not Jones was a fiduciary to Killer Shrimp is irrelevant to this moral turpitude charge. (*In the Matter of Lilly, supra*, 2 Cal. State Bar Ct. Rptr. at pp. 191-192 ["section 6106 prohibits *any* act of attorney dishonesty, whether or not committed while acting as an attorney"].) "[A] member of the State Bar should not under any circumstances attempt to deceive another person. [Citations.]" (*McKinney v. State Bar* (1964) 62 Cal.2d 194, 196.) Jones's deception about holding the money in a CTA rises to moral turpitude misrepresentation as it was material and intentional. Therefore, we find culpability under count eight. (See *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 910 [moral turpitude includes affirmative misrepresentations].)

We also reject Jones's argument he was not culpable under count eight because the April 29, 2011 letter was not a "lease agreement." In count eight, the NDC quoted language from the letter and then in a subsequent paragraph referred to the letter as a "lease agreement." The misrepresentation charge relates to the false statements in the letter, not whether or not the letter was a "lease agreement."

D. Count Nine: Moral Turpitude – Issuance of NSF Checks (§ 6106)

Count nine alleges Jones issued three checks when there were insufficient funds in his accounts to pay the checks. An attorney's practice of issuing such insufficiently funded checks involves moral turpitude. (*In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 54; see also *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 169 [gross negligence in handling entrusted funds, which results in issuance of NSF checks due to insufficient funds, supports moral turpitude conclusion].) On September 18, 2012, Jones

issued two checks to Legado from his newly created CTA, one for $50,000 and one for $75,000. On that date, the CTA balance was $100. Funds were eventually deposited into the account to cover the checks, but the $75,000 check was initially returned. On September 20, Jones issued a check for $65,000 from his Citibank account payable to his CTA when there were insufficient funds to cover the check. This check was returned on September 24. The hearing judge found Jones was grossly negligent in handling these funds and culpable of moral turpitude as charged in count nine.

In contesting culpability under count nine, Jones seems to argue that his counsel sent out the checks before Jones had given the authorization. No evidence in the record supports this allegation. Jones also asserts the hearing judge found that the $50,000 check was returned. The judge made no such finding. Instead, the judge found that when Jones wrote the $50,000 check, he did not have sufficient funds to cover the check. The record makes clear Jones issued checks when the funds were not available to cover the amounts, resulting in two checks returned for insufficient funds. Therefore, we affirm the hearing judge's culpability determination under count nine.

E. Count Ten: Moral Turpitude – Misrepresentation to the Court and Opposing Counsel (§ 6106)

Count 10 alleges Jones made misrepresentations in a declaration filed in *Legado v. Jones*. The hearing judge found Jones's statements were clearly intended to, and did, in fact, give the false impression he had deposited the funds from Killer Shrimp into a CTA immediately upon receipt of the funds. Therefore, he was found culpable of a moral turpitude violation. We agree and reject Jones's argument that his declaration represented a mistaken recollection, instead of a misrepresentation.

F. Count Eleven: Moral Turpitude – Misrepresentation to OCTC (§ 6106)

Count 11 alleges Jones made misrepresentations to OCTC in a June 16, 2017 letter regarding what he did with the $175,000 in funds he received from Killer Shrimp. The hearing judge found Jones falsely stated in the letter that he had placed $175,000 in a CTA. The record showed that only $125,000 was placed in a CTA, which was done in September 2012, and not when the funds were received. Therefore, the judge found culpability for moral turpitude under count 11. We agree and, like count 10, reject Jones's argument that he is being penalized for "having an incomplete recollection of events." The record supports the finding that Jones was intentionally misleading the State Bar in an attempt to hide that he failed to deposit the funds from Killer Shrimp in a CTA when they were received.

VI. AGGRAVATION AND MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, Title IV, Standards for Attorney Sanctions for Professional Misconduct[24] requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Jones to meet the same burden to prove mitigation.

A. Aggravation[25]

1. Multiple Acts of Wrongdoing (Std. 1.5(b))

On three separate occasions, Jones was required to deposit funds into his CTA, but he failed to do so and, instead, misappropriated the funds. He was also culpable of three violations for his moral turpitude misrepresentations. In addition, he issued three checks when there were insufficient funds to cover them, two of which were returned. The hearing judge found aggravation for Jones's multiple acts of misconduct. We agree and assign moderate weight in

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[24] All further references to standards are to this source.

[25] Jones made no specific arguments in his briefs regarding aggravation.

aggravation. (Cf. *In the Matter of Song*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 279 [65 improper CTA withdrawals constitute significant aggravation]; *In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 317 [significant weight in aggravation for 24 counts of misconduct involving harm to clients over four-year period].)

2. Indifference Toward Rectification or Atonement for the Consequences of the Misconduct (Std. 1.5(k))

We agree with the hearing judge that Jones's lack of insight into his misconduct calls for aggravation. While the law does not require false penitence, it does require that an attorney accept responsibility for wrongful acts and show some understanding of his culpability. (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Jones attempts to skirt responsibility by testifying that he was not hired as an attorney for Legado, when the record shows he was and did legal work while there. He asserts that even if he did legal work for Legado, it was "Jones PLC" doing the work, which would limit his liability. This attempt to avoid responsibility for his actions as an attorney shows his inability to conform to professional standards.

Jones initially testified that he did not recall whether the funds were placed in a CTA. He subsequently acknowledged that he deposited $125,000 in his business account, not his CTA. In his reply brief, he describes his actions as simply "clumsy accounting mistakes." He fails to comprehend that he is culpable of misappropriation. He believes the charges are so implausible that no "Hollywood studio" would buy the screenplay and refers to the proceedings as an "absurd scenario." His testimony and arguments on review clearly show he lacks remorse for, or any insight into his misconduct.

Jones's failure to accept responsibility is established in the blame he attempts to place on the complainant for these disciplinary proceedings. An attorney who does not accept responsibility for his actions and instead seeks to shift it to others demonstrates indifference and

lack of remorse. (*In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 14.) Jones states, "these proceedings were initiated at the unflagging insistence of a single vexatious complainant named Edward Czuker who already got much more than the proverbial pound of flesh from [Jones] through expensive civil litigation and extensive and strategic infliction of reputational damage." He finds fault in Czuker for complaining to the State Bar after the settlement agreement was executed. This blame-shifting is deserving of aggravation.

Further, Jones believes he should not be held responsible for a disciplinary violation because he later reimbursed the funds from another source. Jones's attempts to emphasize that "no harm resulted," but does not admit any failure of his professional responsibilities. These facts are troubling and cause concern that future misconduct will recur. (*In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 380.) For these reasons, we assign substantial aggravation under standard 1.5(k).

B. Mitigation[26]

1. No Prior Record of Discipline (Std. 1.6(a))

Mitigation includes "absence of any prior record of discipline over many years coupled with present misconduct, which is not likely to recur." (Std. 1.6(a).) The hearing judge assigned limited mitigation for Jones's lack of prior discipline because Jones failed to establish that his misconduct was not likely to recur. (See *Cooper v. State Bar* (1987) 43 Cal. 3d 1016, 1029 [when misconduct is serious, long record without discipline is most relevant when misconduct is aberrational].) Jones failed to acknowledge any wrongdoing or demonstrate that he has learned how to properly handle entrusted funds. Given Jones's complete lack of insight into his

[26] Jones argues, generally, that the hearing judge underweighted the assigned mitigation, but fails to offer any specific supporting analysis.

misconduct, we view his misconduct as likely to recur. Therefore, we assign only nominal weight in mitigation for his nine years of discipline-free practice.

2. Extraordinary Good Character (Std. 1.6(f))

Jones may obtain mitigation for "extraordinary good character attested to by a wide range of references in the legal and general communities, who are aware of the full extent of the misconduct." (Std. 1.6(f).) Three witnesses, including two attorneys, testified at trial and described Jones as honest and trustworthy. They had known Jones for at least 10 years and had read the NDC. The hearing judge determined that Jones's character witnesses were not from "a wide range" as the standard requires and assigned limited weight in mitigation. We agree. (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 387 [three attorneys and three clients did not constitute wide range of references].)

3. Excessive Delay (Std. 1.6(i))

Excessive delay by the State Bar in conducting disciplinary proceedings causing prejudice to the attorney is a mitigating circumstance. (Std. 1.6(i).) In order for a delay to constitute a mitigating circumstance, "an attorney must demonstrate that the delay impeded the preparation or presentation of an effective defense. [Citation.]" (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 361.) The hearing judge did not assign mitigation as Jones did not establish how he was prejudiced by the delay. We agree. Jones was put on notice regarding potential disciplinary proceedings as early as 2013, which was very close in time to the alleged misconduct. He argued that bank records could have aided him in his defense, but it was Jones who failed to obtain and keep these records, which is surprising in light of the ongoing *Legado v. Jones* litigation. We find Jones has not presented sufficient evidence to suggest that OCTC's delay affected his ability to present a proper defense.

4. Pro Bono Work and Community Service

An attorney's pro bono work and community service can be a mitigating circumstance. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) Jones testified he has taken on pro bono work and has volunteered his services for various organizations. The hearing judge assigned limited weight in mitigation due to Jones's lack of evidence to support his own claims regarding his good deeds. We agree. Further, his testimony did not detail the hours he has dedicated to community service or the actual work he did for these organizations. Therefore, he has failed to prove a dedication to pro bono work or community service that would deserve any more mitigation than that given by the hearing judge. (Cf. *Rose v. State Bar* (1989) 49 Cal.3d 646, 667 [mitigation for legal abilities, dedication, and zeal in pro bono work].)

5. No Additional Mitigation

Jones declares in his opening brief that he is entitled to mitigation for lack of harm (std. 1.6(c)) and remoteness in time of the misconduct and subsequent rehabilitation (std. 1.6(h)). However, he offers no evidence to support these claims. We have independently reviewed the record and find there is no clear and convincing evidence that would support additional mitigation under the standards.

VII. DISBARMENT IS THE APPROPRIATE DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to preserve public confidence in the profession; and to maintain high professional standards for attorneys. (Std. 1.1.) Our disciplinary analysis begins with the standards. While they are guidelines for discipline and are not mandatory, we give them great weight to promote consistency. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) The Supreme Court has instructed us to follow the standards "whenever possible." (*In re Young*

(1989) 49 Cal.3d 257, 267, fn. 11.) We also look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

In considering the applicable standards, we first determine which standard specifies the most severe sanction for the at-issue misconduct. (Std. 1.7(a) [most severe sanction shall be imposed where multiple sanctions apply].) Here, standard 2.1(a) is the most severe and provides for disbarment for Jones's intentional misappropriation of entrusted funds.[27] Misappropriation of trust funds "breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the profession. [Citations.]" (*Kelly v. State Bar* (1988) 45 Cal.3d 649, 656.) It is grave misconduct for which disbarment is the usual discipline. (*Edwards v. State Bar*, *supra*, 52 Cal.3d at p. 37.) "Even a single 'first-time' act of misappropriation has warranted such stern treatment." (*Kelly v. State Bar*, *supra*, 45 Cal.3d at p. 657.)

Standard 2.1(a) also provides that an attorney may avoid disbarment if the amount misappropriated is "insignificantly small" or "sufficiently compelling mitigating circumstances clearly predominate." Neither of those conditions applies here. Jones misappropriated $175,000, a very significant amount of money. (See *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1361, 1368 [$1,355.75 held to be significant amount]; *In the Matter of Spaith*, *supra*, 3 Cal. State Bar. Ct. Rptr. 511 [disbarment for intentional misappropriation of nearly $40,000 in single client matter].)[28] Three mitigating circumstances are present here, but their mitigating

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[27] We decline to analyze discipline under standard 2.1(b) as the hearing judge did because we find Jones's misappropriation was intentional, not grossly negligent. Standards 2.2(a), 2.11, and 2.12(a) are also applicable.

[28] The hearing judge also looked to *Spaith* and found that Jones's misconduct was more serious and extensive in comparison to Spaith's and that Jones had less mitigation than Spaith. We agree. Spaith received little weight in mitigation for his financial and emotional problems and his confession and repayment of the money. He also received some mitigation for 15 years of discipline-free practice, however, that was tempered by concerns of future misconduct. In addition, Spaith had strong character evidence and displayed candor and cooperation to the State

weight is limited. Therefore, Jones's mitigation is clearly not compelling, nor does it predominate over the serious misconduct and two aggravating circumstances.

We also consider whether any reason exists to depart from the discipline in standard 2.1(a). We acknowledge that disbarment is not mandatory in every case of attorney misappropriation. (See, e.g., *Edwards v. State Bar*, *supra*, 52 Cal.3d 28 [12 years' discipline-free practice, no acts of deceit, full repayment made before aware of complaint to State Bar; one-year actual suspension]; *Howard v. State Bar* (1990) 51 Cal.3d 215 ["relatively small sum" of $1,300 misappropriated and rehabilitation from alcoholism and drug dependency; six-month actual suspension].) However, if we deviate from recommending disbarment, we must articulate clear reasons for doing so. (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons for departure from standards].) Here, we find no reason to deviate from the presumed sanction. Jones failed to deposit $175,000 in client funds into his CTA, instead depositing a portion of the money in a business account where he used the money for personal expenses without authority. He failed to keep the $175,000 in trust as he was required to do. In addition, he is culpable of three moral turpitude violations for his misrepresentations to Killer Shrimp, to the court and opposing counsel in the *Legado v. Jones* litigation, and to OCTC. When he tried to cover up his mistakes by opening up a CTA to disburse the funds, he wrote checks when there were insufficient funds to cover the checks and two were returned.

Finally, we address Jones's arguments on review regarding discipline. Jones contends on review that disbarment is not justifiable based on the facts of the case. He complains the hearing judge "has answered the prayers of a complainant fixed on maximizing harm to [him]." This attempt to shift blame shows a failure to take responsibility for his actions, which is very

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Bar. Spaith's mitigation was not compelling enough to justify a sanction less than disbarment. Jones's mitigation is limited or nominal for his nine years of discipline-free practice, good character, and pro bono work and community service.

concerning. He minimizes his behavior as "clumsy accounting mistakes" and argues that the agreement to hold funds in a CTA was nonbinding. He maintains he had no duty to hold the funds in a trust account, as Legado was not his client. He fails to appreciate that he had fiduciary duties to both Legado and Killer Shrimp. Jones also defends his actions by claiming the money was returned, despite clear precedent that an attorney who returns misappropriated funds is still culpable of misappropriation. (*In the Matter of Elliott* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr 541, 544.)

The prevalent aspect of this proceeding is Jones's dishonesty. As noted above, he attempts to mislead us regarding the nature of his work at Legado, claiming he did not do legal or attorney work at Legado, "Jones PLC" was the actual Legado contractor and should be held responsible, and he did not actually work for Legado, but some other entity. His misconduct is also rife with misrepresentations: to the court and opposing counsel, to OCTC, and to Killer Shrimp. He agreed to place three separate checks into a CTA and he did not do so. He then misappropriated the money, used it for personal expenses, and did not maintain the funds in his accounts. Jones attempted to cover up his misconduct by opening up a CTA and transferring funds into it so he could pay out the funds from the CTA. His professional misconduct, including misappropriation and multiple misrepresentations, along with his indifference regarding his misconduct demonstrates he is unfit to practice law. Accordingly, disbarment is appropriate and necessary to protect the public, the courts, and the legal profession.

VIII. RECOMMENDATIONS

We recommend that Derek James Jones, State Bar Number 219803, be disbarred from the practice of law in California and that his name be stricken from the roll of attorneys.

CALIFORNIA RULES OF COURT, RULE 9.20

We further recommend that Derek James Jones be ordered to comply with the requirements of 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 imposing discipline in this matter.[29]

COSTS

We further recommend 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, and may be collected by the State Bar through any means permitted by law. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against an attorney who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

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[29] For purposes of compliance with rule 9.20(a), the operative date for identification of "clients being represented in pending matters" and others to be notified is the filing date of the Supreme Court order, not any later "effective" date of the order. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45.) Further, Jones is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or contempt, an attorney's failure to comply with rule 9.20 is, inter alia, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)

MONETARY SANCTIONS

We do not recommend the imposition of monetary sanctions in this matter, as this matter was commenced before April 1, 2020. (Rules Proc. of State Bar, rule 5.137(H).)

IX. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

The order that Derek James Jones be involuntarily enrolled as an inactive attorney of the State Bar pursuant to section 6007, subdivision (c)(4), effective February 24, 2020, will remain in effect pending consideration and decision of the Supreme Court on this recommendation.

HONN, J.

WE CONCUR:

McGILL, Acting P.J.

STOVITZ, J.*

* Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

Additional material from this filing is available in the Clerk's Office.