

Filed April 22, 2024

STATE BAR COURT OF CALIFORNIA
REVIEW DEPARTMENT

In the Matter of) SBC-22-O-XXXXX
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RESPONDENT DD,) OPINION AND ORDER
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RESPONDENT DD (Respondent)¹ has been a licensed California attorney since June 1992. In his first disciplinary matter, the hearing judge found Respondent culpable of a single count of commingling by writing 14 checks from his trust account for personal and business expenses during the first 16 months of the COVID-19 pandemic. The judge dismissed the remaining four counts. No harm occurred to any client and the judge declined to impose discipline; instead, she ordered an admonition. On review, OCTC challenges the judge’s issuance of an admonition and maintains that discipline is warranted.

Upon our independent review (Cal. Rules of Court, rule 9.12), we find Respondent culpable for a single violation of rule 1.15(c) of the Rules of Professional Conduct.² We affirm

¹ As we do not identify respondent by name, publication of this opinion and order is in accordance with rules 5.126(C) and 5.159(G) of the Rules of Procedure of the State Bar. (Cf. *In the Matter of Respondent BB* (Review Dept. 2021) 5 Cal. State Bar Ct. Rptr. 835, 841, fns. 1, 2.)

² OCTC does not challenge the hearing judge’s dismissal of the remaining counts. Based upon our independent review of the record, we affirm the dismissal of those counts. (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 843 [dismissal of charges for want of proof after trial on merits is with prejudice].)

the hearing judge's conclusion that discipline is not warranted and an admonition is appropriate. We publish this case to clarify that the existence of aggravating circumstances does not automatically preclude a finding that admonition is an appropriate alternative to discipline. However, we caution that our findings are based on the particular facts of this case, which include extensive mitigating circumstances.

I. PROCEDURAL BACKGROUND

In October 2022, the Office of Chief Trial Counsel of the State Bar (OCTC) filed a notice of disciplinary charges (NDC) against Respondent. The NDC alleged five counts of various violations of rule 1.15 that occurred between February 2020 and July 2021. Respondent filed a response in December 2022, and on February 6, 2023, the parties filed a Stipulation as to Facts (stipulation). A two-day trial occurred on February 15 and 16. The parties submitted closing briefs on March 2. The hearing judge issued her decision on May 19, 2023, finding Respondent culpable of a single count of rule 1.15(c), and she recommended an admonition in lieu of discipline. OCTC timely requested review, Respondent filed a responsive brief, and OCTC filed a rebuttal brief. Following submission of the parties' briefs, we sought additional briefing prior to oral argument regarding aggravating and mitigating circumstances. (Rules Proc. of State Bar, rule 5.155(C).) Oral argument was heard on January 25, 2024, and the matter was submitted the same day.

II. FACTUAL BACKGROUND AND CULPABILITY

The facts are based on the stipulation, 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).) Based on the record, we affirm and find that culpability for count three is supported by clear and convincing evidence.

A. Respondent's Practice Prior to 2020

The first in his family to receive a higher education, Respondent became a licensed attorney in Maryland and Pennsylvania in 1988 or 1989, after graduating from Howard University School of Law. For the first three and a half years of his career, Respondent was employed by a Maryland law firm where he did appellate work and handled legal matters for a professional baseball team. After moving to California, but before passing the California bar exam, Respondent worked for Immigration Legal Resource Center, a non-profit organization, where he practiced immigration law, which did not require him to be licensed in California. When Respondent became a member of the California bar in 1992, he continued handling immigration asylum matters and began advising boxing promotion companies on immigration issues pertaining to international boxers, later expanding his practice to include negotiating boxing match contracts on behalf of a paid television network company. After successfully assisting a friend with a bankruptcy matter in 2013 or 2014, Respondent segued into a bankruptcy law practice. Since 2016, Respondent's solo practice has consisted primarily of representing small businesses and individuals concerning a variety of legal issues, with a mixture of contingency fee matters and those he bills hourly.

In 2016, Respondent opened his Interest on Lawyer's Trust Account, which is a client trust account (CTA), with Bank of the West to handle client funds. (See Bus. & Prof Code, § 6211; rule 2.110 of the Rules of State Bar, title 2, Rights and Responsibilities of Licensees.) It was his first CTA as the cases he handled previously did not require the use of a CTA. Former

rule 4-100 of the Rules of Professional Conduct (preserving identity of client funds and property of a client) was in effect at the time Respondent opened his CTA.³

Beginning in 2015, Respondent contracted with R.P., a bookkeeper who later became an accountant, to perform bookkeeping work for his law practice.⁴ With Respondent's practice, R.P. used QuickBooks Enterprise software and provided a full range of bookkeeping services that included billing clients, paying vendors, reconciling accounts, and issuing financial statements. Respondent and R.P. communicated regularly, and R.P. was the contact person for clients and vendors to obtain complete billing information.

B. Respondent's Practice During the COVID-19 Pandemic

Bank of the West closed its branches in early March 2020 due to the onset of the COVID-19 pandemic and precluded online banking for any CTA. Respondent had only physical checks for his CTA, although he was able to access ATM and online banking services for his other accounts at JPMorgan Chase and Bank of America. The pandemic adversely impacted Respondent's law practice, as it reduced the number of his hourly fee clients to a point where they were almost nonexistent. A close friend, W.H., loaned Respondent several thousand dollars, which helped keep Respondent's practice afloat.⁵ Due to rising rent costs and the financial strain on his law practice, Respondent was forced to move his office from Burlingame to San Jose by November 2020. Respondent experienced personal challenges when his father

³ The former California Rules of Professional Conduct were in effect from September 14, 1992, through October 31, 2018. Former rule 4-100(A) provided: "All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labeled 'Trust Account,' 'Client's Funds Account' or words of similar import" It further provided: "No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled"

⁴ In December 2021, R.P. obtained her Bachelor of Science degree in accounting.

⁵ W.H. is a 30-year friend of Respondent, and they have a long-term history of loaning each other money when needed.

passed away in September 2020 and his mother had a stroke the following month. A couple of months later in early 2021, Respondent was briefly hospitalized with high blood pressure.

Meanwhile, R.P. suffered a miscarriage in 2020. She ceased working full time in early March 2020 due to the pandemic, medical challenges that periodically required hospitalization, the birth of her son in March 2021, and other family matters. She worked remotely and sporadically until she returned to work full time in September 2021 to assist Respondent in responding to an investigation by the State Bar. During the period that she worked part time, R.P. was unable to fulfill all her duties for Respondent and relinquished the check-writing responsibilities to him. Respondent had no other office staff to assist him.

From March 3, 2020, through June 23, 2021, Respondent issued 14 checks to various individuals and companies from his CTA to pay non-client related expenses. The total amount was \$30,366.97. The CTA held Respondent's earned and undisputed fees, which was sufficient to cover all 14 checks, as well as client funds. Ten of the CTA checks were payments to Respondent's credit card, which he had used to pay operational expenses, and one check was to repay the W.H. loan. At the time he wrote the CTA checks, Respondent did not understand it was a violation to pay these expenses directly from that account, as he had sufficient earned fees in the CTA.

Approximately two weeks after the October 25, 2022 NDC was filed, Respondent completed both State Bar Ethics School (Ethics School) and CTA School.⁶ R.P. also attended CTA School with Respondent to fully understand his ethical responsibilities regarding a CTA. Together, Respondent and R.P. reviewed and discussed the State Bar's CTA Handbook. Both testified that management of the financial side of Respondent's practice had changed since the

⁶ Respondent completed these courses on November 8 and 9, 2022, respectively.

filing of the NDC. For example, to ensure accuracy, R.P., instead of Respondent, notates the memo lines on checks, and she and Respondent discuss disbursements and billing on a regular basis.

C. Respondent is Culpable of Violating Rule 1.15(c) of the Rules of Professional Conduct⁷

Count three is the only count that remains before us. In this count, OCTC charged Respondent with a single violation of rule 1.15(c) when he wrote 17 checks from his CTA between March 2020 and June 2021 “for the payment of personal or business expenses.” OCTC dismissed allegations related to three of the 17 checks, and the hearing judge found Respondent culpable of the remaining 14 checks alleged in the count. OCTC has the burden of proving culpability by clear and convincing evidence. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552 [clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command unhesitating assent of every reasonable mind].)

Aside from two exceptions not applicable here, rule 1.15(c) provides: “Funds belonging to the lawyer or the law firm shall not be deposited or otherwise commingled with funds held in a trust account” If attorney funds are deposited into a trust account, those funds “must be withdrawn at the earliest reasonable time after the lawyer or law firm’s interest in that portion becomes fixed.” (Rule 1.15(c)(2).)⁸

The prohibition against commingling of funds is a bedrock principle contained in the multiple iterations of California’s professional conduct rules, including rule 1.15(c). The earliest version of the rule prohibiting commingling “was adopted to provide against the probability in

⁷ All further references to rules are to the Rules of Professional Conduct unless otherwise noted.

⁸ “Law firm” and “reasonable” are separately defined at rule 1.0.1(c) and (h).

some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money.” (*Peck v. State Bar* (1932) 217 Cal. 47, 51 [analysis of initial rule 9].)⁹ A rule 1.15(c) violation, as with earlier versions of the rule, occurs 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].”” (*In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 123 [analysis of previous rule 8-101(A)].)¹⁰ An attorney violates rule 1.15(c) even if a client’s money is never at risk and always available, and there has been no harm to a client. (*Bernstein v. State Bar* (1972) 6 Cal.3d 909, 916-917 [application of initial rule 9].) Additionally, a violation of rule 1.15(c) does not require an intent to deceive. (*Hamilton v. State Bar* (1979) 23 Cal 3d 868, 876 [previous rule 8-101(A) “is violated merely by the attorney’s . . . failure to deposit and manage such money in the manner designated by the rule”].) We recently reiterated these principles in finding a respondent culpable for two commingling violations of former rule 4-100(A). (*In the Matter of Rubin* (Review Dept. 2021) 5 Cal. State Bar Ct. Rptr. 797, 813-814.)

Neither party challenges the factual findings of the hearing judge in support of count three, and Respondent did not challenge culpability for this count at trial or on review. As the judge found, the evidence clearly and convincingly establishes that Respondent violated rule 1.15(c). Instead of first moving the totality of his earned fees to a different account, Respondent paid non-client expenses directly from his earned fees in the CTA. Although no client was

⁹ Initial rule 9 was effective May 24, 1928, through December 1974, and prohibited the commingling of attorney funds with client funds. The rule did not discuss the use of funds in a CTA to pay bank charges, the need to withdraw an attorney’s fixed interest in the portion of funds belonging to the attorney or law firm, or the prohibition from withdrawing disputed funds, which are issues addressed in subsequent versions of the rule.

¹⁰ Previous rule 8-101(A) was in effect from January 1, 1975, through September 13, 1992.

harmed, Respondent's attorney fees were undisputed, and client funds were available, Respondent's actions nevertheless caused the client funds to lose their separate identity, which is a violation of the rule prohibiting commingling. (*In the Matter of Bleecker, supra*, 1 Cal. State Bar Ct. Rptr. at p. 123.)

III. DISCIPLINE IS NOT WARRANTED AND ADMONITION IS APPROPRIATE

The commingling of client and attorney funds is a violation of rule 1.15(c); however, the analysis of what discipline to impose in this case, if any, is nuanced. Typically, our disciplinary analysis begins with the Standards provided in the Rules of Procedure of the State Bar.¹¹ (*In re Silvertown* (2005) 36 Cal.4th 81, 91-92.) However, an analysis of the Standards is not required where a non-disciplinary disposition, such as an admonition, is imposed. (Std. 1.1 [standards do not apply to non-disciplinary dispositions such as admonitions].) Even though the Standards do not apply when an admonition is issued, a commingling violation contains a presumptive discipline of a three-month actual suspension pursuant to standard 2.2(a). Accordingly, we believe a discussion of the mitigating and aggravating circumstances contained in the Standards that compel deviation from the presumed sanction is in order.

The hearing judge found that a lesser sanction was called for and determined that an admonition, pursuant to rule 5.126(A) of the Rules of Procedure of the State Bar, was appropriate. OCTC does not dispute that Respondent is deserving of a lesser sanction than the presumptive three-month actual suspension. Yet, OCTC argues that discipline must be imposed, urging us to read into rule 5.126 requirements that an admonition can only occur with "very minor" misconduct and in the absence of aggravating circumstances.

¹¹ All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

A. Downward Departure from the Presumed Sanction is Warranted

We first consider the mitigating and aggravating circumstances and then we address standard 1.7(c). OCTC must establish aggravating circumstances by clear and convincing evidence. (Std. 1.5.) Respondent has the same burden to prove mitigation. (Std. 1.6.)

1. Mitigation and Aggravation

In mitigation, the hearing judge assigned compelling weight to the absence of discipline during Respondent's many years of practice and the aberrational nature of his misconduct. (Std. 1.6(a).) She credited Respondent with substantial weight for lack of harm to clients, the public, or the administration of justice, and for extraordinary good character. (Std.1.6(c), (f).) She accorded moderate weight for extreme emotional difficulties and for spontaneous candor and cooperation with the State Bar. (Std. 1.6(d), (e).) Next, the judge found limited weight for Respondent's remorse and recognition of wrongdoing. (Std. 1.6(g).) Finally, in aggravation, the judge concluded that limited weight was appropriate for multiple acts of wrongdoing. (Std. 1.5 (b).)

Respondent argues that he should be entitled to greater weight for his candor and cooperation with the State Bar but otherwise does not challenge the hearing judge's findings. OCTC contends that moderate weight is appropriate for multiple acts of wrongdoing, the absence of prior discipline is significant but not compelling, there should be no weight or reduced weight applied to lack of harm, and there should be no credit for emotional and personal difficulties or for remorse and recognition of wrongdoing.

Except for one mitigating circumstance, we agree with the hearing judge's findings.

a. Lack of Prior Discipline (Std. 1.6(a))

Respondent had been a licensed attorney in California for approximately 28 years when his misconduct occurred. Prior to his California licensure, he was licensed in two other

jurisdictions. Given that his career, until the instant misconduct, was discipline-free, we find his misconduct was aberrational and agree with the compelling weight the judge assigned to Respondent's lack of prior discipline. (See *Friedman v. State Bar* (1990) 50 Cal.3d 235, 245 [20 years of practice without discipline "highly significant" mitigation].) Moreover, because Respondent is no longer ignorant of the requirements of rule 1.15(c), and he and his accountant have made changes to the accounting aspects of his law practice, we find a violation recurrence is unlikely.

b. Lack of Harm (Std. 1.6(c))

OCTC argues that because client funds were in Respondent's CTA, there was a risk of harm; therefore, mitigation for this factor is not appropriate. The checks Respondent wrote from his CTA were drawn from his earned and undisputed attorney fees that fully covered the amounts at issue, making any risk to a client remote. (*In the Matter of Jensen* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 283, 290 [no aggravation for speculative harm].) For this reason, we believe the hearing judge properly found substantial weight was warranted for lack of harm to clients, the public, or the administration of justice. (*In the Matter of Martin* (Review Dept. 2020) 5 Cal State Bar Ct. Rptr. 753, 762 [substantial weight where there was no harm to client, the public, or the administration of justice caused by improper use of a CTA].)

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

Similarly, substantial weight was appropriately credited for Respondent's extraordinary good character where five witnesses with varied backgrounds, who have known him between 8 and 30 years, testified on his behalf. The individuals who testified were two former clients, including an individual who Respondent mentored, an attorney, W.H., and his accountant. The two former clients testified about Respondent's trustworthiness, stating they would hire him again and have referred other clients to him. One of his clients testified that she was so saddened

and worried by the allegations against Respondent that she could not sleep and said, “[Respondent] was an honest, a truthful person, especially during the financial crisis. He really helped me, and I cannot forget everything he did for me. He did not [take] advantage of me during the financial crisis.”

The attorney, D.W., has had a professional relationship and personal friendship with Respondent for over 30 years. She has referred clients to him without incident, and she opined in a declaration that he is a “person of high moral character who will continue to be an asset to the legal community[.]” We confer great weight to D.W.’s declaration and testimony, as an attorney is presumed to “possess a keen sense of responsibility for the integrity of the legal profession. [Citations.]” (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1053.)

Given the nature of Respondent’s commingling violation, we also give significant consideration to the testimony of the accountant, who worked for certified public accountants and who we infer was subject to professional ethical standards. She testified about Respondent’s honesty and his now close attention to accounting details, as well as his dedication and generosity to his clients by discounting his fees even as his law practice struggled. Similarly, W.H.’s testimony regarding Respondent’s candor and honesty about finances, which included Respondent insisting he repay W.H. a loan that W.H. did not even recall making, warrants greater attention due to his considerable familiarity with Respondent’s demonstrated ethical behavior in financial matters.

None of the witnesses’ opinions about Respondent changed notwithstanding the charges, and they all spoke highly of his honesty. We agree with the hearing judge’s finding that, while the number of witnesses presented was limited, all had a longstanding knowledge of Respondent’s work habits and professional skills justifying substantial weight for his extraordinary good character. (*In the Matter of Davis* (Review Dept. 2003))

4 Cal. State Bar Ct. Rptr. 576, 591-592 [significant weight given to testimony from three witnesses who had broad knowledge of attorney's good character, work habits, and professional skills].)

d. Extreme Emotional and Personal Difficulties (Std. 1.6(d))

To receive mitigation for extreme emotional difficulties, standard 1.6(d) requires that Respondent show he suffered from them at the time of his misconduct, they were directly responsible for his misconduct as established by expert testimony, and they no longer pose a risk that he will commit future misconduct. (*In the Matter of Amponsah* (Review Dept. 2019) 5 Cal. State Bar Ct. Rptr. 646, 654.) However, we have held that expert testimony is not always required to show that these challenges were directly responsible for the attorney's misconduct. (*In the Matter of Shkolnikov* (Review Dept. 2021) 5 Cal. State Bar Ct. Rptr. 852, 865-866; *In the Matter of Mitchell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332, 341.)

OCTC argues that Respondent did not establish that his stressful life events—the COVID-19 pandemic, R.P.'s health issues and absence, his father's death, his mother's stroke, and his own hospitalization—were directly responsible for his misconduct because his misconduct was caused by his unawareness of the rule. While the health issues of Respondent and his mother, as well as his father's death, are naturally extremely stressful circumstances, we agree with OCTC that he did not prove they were responsible for his misconduct. But we find the other personal challenges were responsible, in part, for his misconduct. The only reason Respondent was unexpectedly placed in the position of having to write checks for expenses and did so is because of an unprecedented pandemic and the sudden absence of his accountant (due to her part-time status as well as the fact that she was periodically hospitalized). We also do not ignore the other complications compounded by the pandemic and shutdown that played a role in the commingling violation, such as Respondent's inability to conduct online banking with his

CTA, the lack of physical access to Bank of the West, and his only access to physical checks were from his CTA. We further find that it is unlikely a subsequent pandemic with widespread business closures will occur during the remainder of Respondent's career, especially because he testified that he was 64 years of age and nearing retirement. If it does happen, we are confident it will not pose a risk due to the changes Respondent and his accountant made to the accounting side of his law practice and their education of the rules governing trust accounts. Under the circumstances of this case, we agree with the hearing judge that moderate weight is warranted.

e. Spontaneous Candor and Cooperation (Std. 1.6(e))

Respondent fully cooperated with OCTC, which included returning his accountant to full-time status to address the State Bar's inquiries. We note that Respondent's factual stipulations were not extensive and involved easily provable facts and such stipulations would typically result in minimal or limited weight in mitigation. (*In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 318; *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 567 [limited mitigation for stipulating to easily provable facts].) However, all charges were dismissed save the one count to which Respondent admitted culpability, and Respondent was entitled to defend himself against the charges. Given the single count of culpability, the effort he underwent to faithfully respond to the State Bar investigation, as discussed below, and his forthright and candid testimony during his disciplinary trial, we agree with the hearing judge and find moderate weight appropriate for this factor.

f. Remorse and Recognition of Wrongdoing (Std. 1.6(g))

Mitigation applies if Respondent has taken "prompt objective steps, demonstrating spontaneous remorse and recognition of the wrongdoing and timely atonement." (Std 1.6(g).) OCTC argues that because Respondent attended CTA School and Ethics School after the NDC was filed, he has not demonstrated the spontaneity required by the rule. Respondent testified that

when he wrote the 14 checks, he did not understand it was a violation. The State Bar investigation lasted about a year, which Respondent described as follows: “[T]hey kept asking more questions, [and] it seemed as though they were trying to catch me doing something. I said, ‘I haven’t done anything,’ but, at some point, given the nature of the questions, I began to understand what was going on[.]” The improper check-writing ceased by June 23, 2021, and R.P. returned to work full time in September 2021 to assist Respondent with responding to the State Bar inquiry, which she described as an all-consuming process.

Respondent testified that it was only after attending CTA School that he fully understood his error. Although Respondent did not attend CTA School or Ethics School until shortly after the NDC was filed, we do not believe this obviates mitigation. Respondent was under no obligation at that time to attend CTA School or Ethics School. He also was not required to have R.P. attend CTA School, but she did. Respondent repeatedly expressed remorse throughout the trial, and D.W. testified about Respondent’s remorse and embarrassment over his ethics breach. Moreover, he and his accountant have implemented specific and timely changes to the accounting side of his law practice with no additional violations occurring, demonstrating atonement. We believe that mitigation is satisfied, but unlike the hearing judge’s finding of limited weight, find moderate weight is appropriate given the circumstances under which his understanding of the offense was realized, his readily expressed regret, and the corrective measures he took.

g. One Aggravating Circumstance for Multiple Acts of Wrongdoing (Std. 1.5(b))

Aggravation includes multiple acts of wrongdoing. (Std 1.5(b).) The 14 checks that Respondent wrote directly from his CTA to pay for business and personal expenses occurred

over 16 months and is aggravating. OCTC seeks moderate weight for this circumstance. In assigning limited weight, the hearing judge considered *In the Matter of Martin, supra*, 5 Cal. State Bar Ct. Rptr. 753 where moderate weight was assigned for 168 separate financial transactions in a CTA over 10 months constituting two counts of commingling. We agree with the judge that the improper check writing here was related, comprising a single count of commingling, and was confined in time, warranting limited weight.

2. Full Consideration of Standard 1.7(c)

Part of standard 1.7(c) instructs that a lesser sanction than provided by a particular standard is appropriate if demonstrated by the net effect of mitigation and aggravation. OCTC concedes that a departure from the presumptive three-month actual suspension, as set forth in standard 2.2(a), for commingling is warranted. We agree, noting that the Standards are guidelines and do not dictate a particular result. (*In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 371 [Standards not to be rigidly applied].) Here, the lone and limited aggravating circumstance is heavily outweighed by six mitigating circumstances in which compelling, substantial, and moderate weights have been assigned.

In explaining the deviation from the presumed sanction, the hearing judge determined this was a “‘case[] of minor misconduct, where there is little or no injury to a client, the public, the legal system, or the profession and where the record demonstrates that the lawyer is willing and has the ability to conform to ethical responsibilities in the future.’ (Std. 1.7(c).)” Applying this aspect of standard 1.7(c), the judge considered that Respondent committed a “technical violation,” it arose from his inexperience with trust accounts and his misunderstanding of the rules, he demonstrated his ability to conform to his responsibilities, he had a lengthy blemish-free practice, and the supervision imposed by discipline was not necessary to fulfill the purposes of attorney discipline.

We agree and find that not only does the net balance of mitigating and aggravating circumstances favor divergence, but the facts of this case show that the commingling violation was ultimately minor, no harm occurred to anyone or the legal system, and Respondent has already conformed his conduct to meet his ethical responsibilities now and in the future. The full panoply of standard 1.7(c) considerations is satisfied and justifies a sanction less than the presumed discipline.

B. The Requirements of Rule 5.126(A) of the Rules of Procedure of the State Bar

Rule 5.126(A) of the Rules of Procedure of the State Bar permits the resolution of “a matter by an admonition to the attorney if the subject matter of a pending disciplinary proceeding does not involve a Client Security Fund matter or a serious offense, and the Court concludes that the violation(s) were not intentional or occurred under mitigating circumstances, and no significant harm resulted.” We find the requirements of rule 5.126(A) are fulfilled here.

1. Respondent’s misconduct did not involve a Client Security Fund matter, did not constitute a serious offense, and caused no harm.

It is undisputed that Respondent’s commingling offense did not involve a Client Security Fund matter. On review, OCTC sets forth a policy argument that a violation of rule 1.15(c) is necessarily risky, and, thus, more serious. It relies on *Hamilton v. State Bar, supra*, 23 Cal. 3d at p. 876, stating the significance of rule 1.15(c) is to “provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of client’s money.” [Citation].”

Implicit in OCTC’s argument is that any commingling offense is inherently serious such that an admonition can never be permitted. To address this factor, we turn to the admonition rule, which defines a “serious offense” as one that involves “dishonesty, moral turpitude, or corruption, including bribery, forgery, perjury, extortion, obstruction of justice, burglary or

related offenses, intentional fraud, and intentional breach of a fiduciary relationship.” (Rules Proc. of State Bar, rule 5.126(B).) Rule 5.126(B) could have been drafted to include a commingling offense, but it was not. While there certainly may be commingling violations that include these identified characteristics, Respondent’s rule 1.15(c) violation did not, and, therefore, falls outside the scope of the definition. We also disagree with OCTC’s position that since client funds were present in the CTA, Respondent’s offense was necessarily serious. The focus of rule 5.126(B) is on malintent and deceitful conduct, which is absent from Respondent’s conduct.

With respect to the third requirement, while it is undisputed that no significant harm, let alone any harm, resulted from Respondent’s violation, OCTC asserts that the *risk* of harm, due to the presence of client funds, is enough to preclude an admonition. First, Respondent’s earned and undisputed fees in his CTA were sufficient to cover the 14 checks he issued; thus, the risk to client funds was diminished. Second, the mere possibility of harm is insufficient to prohibit an admonition since admonitions are authorized “when no significant harm *resulted*.” (Rules Proc. of State Bar, rule 5.126(A), italics added.) Thus, if significant harm is in fact realized, admonition is off the table; otherwise, an admonition can fairly be considered so long as the other requirements of the rule are met, which is the case here.

As a final matter, we decline to adopt OCTC’s argument that an admonition can only be issued with “very minor” offenses. The rule is clear that the types of offenses excluded from consideration are those that are serious offenses, as defined by the rule, and we find no basis to lower the ceiling from those violations that are not serious to only those that are very minor. As a practical matter, the full application of the requirements of rule 5.126 of the Rules of Procedure of the State Bar eliminates from consideration misconduct that is truly troublesome.

2. There is considerable mitigation surrounding Respondent's misconduct.

We next consider if Respondent's "violation(s) were not intentional or occurred under mitigating circumstances" (Rules Proc. of State Bar, rule 5.126(A)), and we find that, while Respondent's misconduct was intentional, it was the result of his unawareness of the rule and occurred under considerable mitigating circumstances.

As discussed above, the unprecedented pandemic and shutdown along with the absence of R.P. placed Respondent in the unexpected position of writing checks. Bank of the West did not allow online CTA transactions and provided little to no access to its brick-and-mortar branches. The improper check writing was temporally confined and had stopped by the time R.P. returned to the office. No client was harmed because Respondent was conscientious about ensuring that his earned and undisputed attorney fees covered the expenses.

Additionally, Respondent did not understand proper management of his CTA. While there is no excuse for this, we are mindful that for much of his career, Respondent did not engage in the type of practice that would require the use of a CTA. In fact, Respondent's lengthy legal career spanned three jurisdictions without any discipline until now. His very interesting and diverse career has included working with a non-profit organization and assisting small businesses and individuals. It is a career that even OCTC described during oral argument as "impressive." Once Respondent understood the nature of the problem, he took affirmative steps to educate himself on how to properly utilize a CTA and improve record keeping. Respondent testified he realized he needed to become "an attorney who understands trust accounts to the same degree" he understood the practice of law. The fact that he required R.P. to complete CTA School demonstrates the importance Respondent placed on both of them having a clear understanding of Respondent's ethical obligations. We are mindful that since his awareness of the full requirements of rule 1.15(c), Respondent has not challenged culpability as to count three, has

expressed genuine remorse, and has provided a substantial showing of extraordinary good character under standard 1.6(f).

Indeed, his honesty with finances and complete lack of a corrupt or immoral intent are extraordinary qualities, as attested to by his character witnesses. We are impressed by the longstanding loyalty of his clients and the high regard all character witnesses have of Respondent's veracity and trustworthiness, particularly when it comes to his handling of financial matters.

We agreed with OCTC, *ante*, that Respondent's hospitalization, his mother's stroke, and his father's death did not directly cause his misconduct when considering a deviation from the presumed discipline under the Standards. However, the Standards do not apply in considering an admonition, and rule 5.126(A) of the Rules of Procedure of the State Bar does not require these factors to be causally related to the misconduct. Accordingly, we find these personal challenges provide context for his misconduct and are relevant to our decision in the case before us. (See *Howard v. State Bar* (1990) 51 Cal.3d 215, 222 (appropriate to "temper the letter of the law with considerations peculiar to the offense and the offender").) We are convinced that the sum of all these mitigating facts supports issuing an admonition for Respondent. (Cf. *In the Matter of Smithwick* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 320, 328 [totality of mitigating circumstances "compelling" even though individually only significant and moderate weight given to applicable mitigation factors warranting 60-day rather than six-month suspension].)

C. The Presence of Aggravating Circumstances Does Not Automatically Preclude the Issuance of an Admonition

OCTC acknowledges the strength of Respondent's mitigation but argues that admonitions are not permitted when any aggravating factor is established. The sole aggravating circumstance, which is limited, does not persuade us to preclude admonition. We view

Respondent's repetition of the same misconduct as a reflection of his ignorance of the rule that he has now remedied.

In addition, rule 5.126(A) of the Rules of Procedure of the State Bar refers to "violation(s)," which contemplates that an admonition may be appropriate in cases where there is more than one act of misconduct, as we found, for example, in *In the Matter of Respondent BB* (Review Dept. 2021) 5 Cal. State Bar Ct. Rptr. 835, where that attorney was found culpable of three separate counts of misconduct. We do not rule out the possibility that there may be cases in which multiple acts of misconduct would be a sufficiently aggravating factor as to prevent the issuance of an admonition, but Respondent's payments from his CTA, constituting a single commingling violation and resulting from his ignorance of the rule, is not one of those cases. Moreover, the result advocated by OCTC would serve to unduly limit judicial discretion. We decline to read into rule 5.126 a requirement that an admonition is proper only in cases where no aggravating circumstances are present.¹²

In the cases cited by OCTC, the absence of aggravation was noted but not outcome determinative. For example, *In the Matter of Respondent BB* involved a deputy public defender who acted inappropriately twice in court within three months. (*In the Matter of Respondent BB, supra*, 5 Cal. State Bar Ct. Rptr. at pp. 841-843.) Initially, Respondent BB challenged a jury selection ruling, and a few months later, he momentarily interfered with the in-court arrest of his client who had a history of mental health issues. (*Ibid.*) Respondent BB was culpable of three violations of Business and Professions Code section 6068, subdivision (b). (*Id.* at p. 843.) Our conclusion that admonition was appropriate for Respondent BB was "[b]ased on the record as a

¹² To the extent OCTC is arguing that risk of harm is an aggravating factor in this case, we have previously found that the possibility of harm is not an aggravating circumstance. (*In the Matter of Jensen, supra*, 5 Cal. State Bar Ct. Rptr. at p. 290 [no aggravation for speculative harm].)

whole, given the unique circumstances established, no aggravation, and the extensive and compelling mitigation” (*Id.* at p. 851.) Our conclusion in the instant case is consistent in that no *single* factor is the basis for imposing an admonition, which is also in accord with the analysis undertaken in the two additional admonition cases cited by OCTC. (See *In the Matter of Respondent V* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 442 [admonition for respondent’s reckless use of state seal where offense was not serious, there was no harm or specific intent to mislead, and respondent terminated the responsible employee and closed his California office]; *In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439 [admonition for single violation of failing to communicate with client where respondent had lengthy discipline-free record, there was no client harm, and no intent to deceive].)

We disagree with OCTC’s remaining contention that the hearing judge did not properly analyze or apply *In the Matter of Martin* to the facts of this case. In that case, we ordered a public reproof due to Martin’s use of his CTA solely for non-client related deposits in excess of \$52,000 and non-client related withdrawals of more than \$46,000. (*In the Matter of Martin, supra*, 5 Cal. State Bar Ct. Rptr. at p. 759.) We determined Martin used his CTA as a private checking account and never held any client funds in that account. Martin’s combined dollar amount was two-thirds more than the \$30,366.97 involved here and involved 168 transactions, as opposed to Respondent’s 14 checks. (*Id.* at p. 761.) Martin was culpable of two counts, while Respondent was culpable of one count. Martin practiced 15 years without discipline (*id.* at p. 762), whereas Respondent had a 28-year discipline free record in California prior to March 2020, and no evidence of discipline in the two other jurisdictions where he was licensed to practice law. Unlike Respondent, there was no showing that Martin had voluntarily completed Ethics School or CTA School.

Importantly, Martin used his CTA for five months even after he had direct knowledge that his use of the CTA was a violation of his ethical obligations. Martin's counsel told OCTC that Martin had opened a regular checking account, when he had not, and planned to close the CTA at the conclusion of OCTC's investigation. (*In the Matter of Martin, supra*, 5 State Bar Ct. Rptr. at p. 759.) Contrary to these representations, Martin continued his improper use of his CTA for months. (*Ibid.*) Here, there is no evidence that OCTC informed Respondent during its investigation that his use of his CTA violated rule 1.15(c). Respondent had fielded OCTC inquiries for a year, but it was not until he attended CTA School that he clearly understood the issue. These factual differences, combined with other unique circumstances, make this case distinguishable from *In the Matter of Martin*.

IV. CONCLUSION

We recognize that this is a close case but find the requirements of rule 5.126 of the Rules of Procedure of the State Bar are satisfied, and that discipline is not necessary to protect the public, the courts, or the legal profession. Given Respondent's and his accountant's completion of CTA School, and the changes they implemented in his law office's accounting practices, we find the risk that Respondent would reoffend to be particularly remote.

While we resolve this matter by admonition instead of discipline, it is not quite a "Get Out of Jail Free Card," as OCTC would have us believe. Respondent's disciplinary proceeding and the facts underlying his culpability are a matter of public record, and, if within two years of the effective date of the admonition Respondent commits misconduct resulting in another disciplinary proceeding, OCTC may request this matter be reopened. (Rules Proc. of State Bar, rule 5.126(D), (F).) We find this exposure is sufficient to impress upon Respondent the need to be scrupulous in meeting his professional and ethical obligations through the remainder of his legal career.

V. ORDER

Respondent is issued an admonition upon the filing of this opinion. (Rules Proc. of State Bar, rule 5.126(A).) Because an admonition does not constitute the imposition of discipline (Rules Proc. of State Bar, rule 5.126(D)), the State Bar is not entitled to an award of costs under Business and Professions Code section 6086.10, subdivision (a). In addition, because Respondent has not been exonerated of all charges, he is not entitled to an award of costs under Business and Professions Code section 6086.10, subdivision (d).

RIBAS, J.

WE CONCUR:

HONN, P. J.

McGILL, J.

No. SBC-22-O-XXXXX

In the Matter of
RESPONDENT DD

Hearing Judge
Hon. Manjari Chawla

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