PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

Filed May 18, 2015

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 12-O-12167
	)	
ALDON LOUIS BOLANOS,	)	OPINION
	)	
A Member of the State Bar, No. 233915	)	
	)	

The primary issue before us is whether Aldon Louis Bolanos's improper handling of client monies constituted misappropriation involving moral turpitude or a fee dispute. After a three-day trial, the hearing judge dismissed the moral turpitude charge, characterizing the case as "a fee dispute that got out of control." Giving great weight to the hearing judge's factual findings, we agree.

Bolanos represented Victoria McCarthy and co-plaintiff Katherine Schmitt in their employment discrimination lawsuit against R. J. Reynolds Tobacco Company (Reynolds). The relationship between McCarthy and Bolanos deteriorated following her settlement on appeal with Reynolds. McCarthy filed a legal malpractice lawsuit against Bolanos and, ultimately, a State Bar complaint.

The hearing judge found that Bolanos committed misconduct when he: (1) represented clients with a potential conflict without their informed written consent; (2) failed to notify McCarthy promptly of the receipt of settlement funds; (3) improperly withdrew disputed funds from his client trust account (CTA); and (4) failed to promptly return McCarthy's file at her request. Finding significant aggravation and significant mitigation, the hearing judge recommended discipline, including a 90-day actual suspension.

The Office of the Chief Trial Counsel of the State Bar (OCTC) appeals. It argues Bolanos is culpable of moral turpitude by intentional misappropriation, and renews its trial request that he be disbarred. Bolanos did not appeal, concedes his culpability as found by the hearing judge, and accepts the recommended discipline.

After independently reviewing the record under rule 9.12 of the California Rules of Court, we affirm the hearing judge's culpability findings. We also find that Bolanos's mishandling of client funds in ignorance of his fiduciary obligations constitutes a negligent misappropriation, as provided for in new standard 2.1(c).[1] Balancing the serious aggravation with the significant mitigation, we agree with the hearing judge that a one-year suspension, stayed, a 90-day actual suspension, and a one-year probation period is appropriate discipline under the standards and the applicable case law.

I. PROCEDURAL BACKGROUND

On December 21, 2012, OCTC filed a six-count Notice of Disciplinary Charges (NDC). The parties entered into a pretrial stipulation as to facts. At trial, OCTC offered the testimony of Bolanos and McCarthy. In his defense, Bolanos testified, presented seven character witnesses, and submitted the declarations of seven others.

[1] Former standard 2.2(a) addressed *any* misappropriation, and suggested the same presumptive discipline. Effective January 1, 2014, standard 2.1 replaced former standard 2.2(a), and now calls for differing levels of discipline depending on the type of wrongdoing that constituted the misappropriation, including: intentional or dishonest misconduct (std. 2.1(a) [disbarment]); grossly negligent misconduct (std. 2.1(b) [disbarment or actual suspension]); or misconduct that does not involve either intentional acts or gross negligence (std. 2.1(c) [suspension or reproval]). Further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

II. FACTUAL BACKGROUND[2]

The factual findings are largely undisputed and the hearing judge's 25-page decision provides a detailed summary of the factual issues. We adopt these findings, except where noted, and summarize and expand those relevant to our analysis.[3]

A. Fee Agreement

In April 2009, Bolanos began representing McCarthy and Schmitt in their employment dispute against Reynolds. An April 8, 2009 written fee agreement with McCarthy established that: (1) Bolanos would receive as his fees 25 percent of the proceeds from any settlement, judgment, or resolution of the Reynolds matter; (2) any statutory fees awarded would belong solely to Bolanos; and (3) McCarthy would reimburse Bolanos for costs. This was Bolanos's first case as a solo practitioner after working in various law firms since his admission.

While both Schmitt and McCarthy intended to sue Reynolds for discrimination, their hopes for the case differed. McCarthy was focused on moral vindication, and a monetary award was secondary; she was willing to go to trial. Schmitt wanted to settle and avoid trial. Bolanos admits he never advised McCarthy concerning any possible conflict of interest with Schmitt, nor did he obtain McCarthy's informed written consent to his representation of Schmitt.

B. Verdict Following Jury Trial

After a two-week trial in the summer of 2011, a United States District Court (Eastern District of California) jury found Reynolds liable on federal discrimination and retaliation

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[2] This is Bolanos's first disciplinary proceeding since his admission to the Bar in 2004.

[3] Rule 5.155(A) of the Rules of Procedure of the State Bar provides that the "findings of fact of the hearing judge are entitled to great weight." In particular, we accord great deference to findings based on credibility evaluations. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025,1032 [hearing judge "is best suited to resolving credibility questions, because [she] alone is able to observe the witnesses' demeanor and evaluate their veracity firsthand"].)

claims.[4] It awarded McCarthy and Schmitt each $400,000 in compensatory and punitive damages. The district court judge reduced the damages as to each plaintiff to $300,000 to conform to the statutory cap. The plaintiffs were also awarded a combined $181,738 in attorney fees.

C. Fee Modification

Reynolds appealed to the U. S. Court of Appeals for the Ninth Circuit, which referred the case to mediation. Prior to mediation, Bolanos sought to increase his contingency fee from 25 percent to 33 percent for the additional work the appeal would require. He sent each plaintiff a new fee agreement, which Schmitt promptly signed. However, McCarthy did not sign because she was dissatisfied with Bolanos and was considering her options. Bolanos testified that McCarthy later agreed over the phone to a 30 percent contingency fee and signed a new agreement to that effect. The hearing judge, however, did not believe that McCarthy did so because Bolanos "was unable to produce any evidence of a new retainer."[5]

Both plaintiffs were present at the mediation on December 1, 2011, and the case settled. McCarthy signed an agreement providing for a recovery of $337,695.40, payable by one check to McCarthy and Bolanos, to be mailed to his office.

Bolanos admits he agreed to modify his fee agreement at the mediation so that McCarthy would receive $250,000, rather than a percentage, from the settlement. McCarthy testified that

[4] The plaintiffs also alleged state law claims of disability discrimination and tortious adverse employment actions. The district court judge granted Reynolds's summary judgment motion on the disability claims, and the plaintiffs abandoned the remaining state law claims before submitting the case to the jury. This caused friction between Bolanos and McCarthy, who felt that Bolanos failed to properly advise her about the disadvantages of such action.

[5] When Bolanos could not produce proof that McCarthy had agreed to a 30 percent contingency fee, he retracted this claim, and thereafter maintained he was owed a 25 percent contingency pursuant to the original fee agreement.

her willingness to settle was contingent on the modification. At all relevant times thereafter, Bolanos knew McCarthy believed she was entitled to $250,000.[6]

The hearing judge found that, after the mediation, Bolanos "came to the conclusion that the modification was invalid because there was no consideration for the alteration of the April 8, 2009 fee agreement." The judge also found he "believed that McCarthy's claim of $250,000 was unreasonable and invalid and that he was entitled to the disputed funds given his hard work." Bolanos testified he thought the modification was not valid because $250,000 was more than McCarthy would have received under the original contract if Reynolds had not appealed.[7]

D. Fee Dispute

On December 9, 2011, Bolanos received the $337,695.40 settlement check, but did not tell McCarthy. The check was issued to both McCarthy and Bolanos. On December 14, he signed McCarthy's name on the check without her knowledge and deposited it into his CTA. He testified that, as her attorney, he believed he was acting properly: "There was no intention on my part to try and forge or make her signature to appear to have been on the check. My sole purpose was to sign the check on behalf of myself and my client and put it in my trust account, because that's what I thought I was supposed to do." He admitted at trial that he had been mistaken and that his actions violated ethical rules.

Around December 23, Bolanos removed $61,775.50 in disputed funds from his CTA. He testified that he believed at the time that he was entitled to 30 percent of the settlement as his

[6] At trial, the hearing judge excluded all evidence concerning this modified fee agreement as being subject to mediation confidentiality. OCTC renews its trial argument that it was prejudiced because it could not submit evidence establishing that Bolanos agreed to reduce his fees. We reject this argument since most evidence about which OCTC complains became part of the record and proved that Bolanos agreed to the $250,000 modification. Further, the hearing judge took into account that Bolanos agreed to reduce his fee, and Bolanos concedes the point on review. (See *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 241 [absent actual prejudice, party not entitled to relief on evidentiary ruling].)

[7] In that scenario, McCarthy would have received $225,000 less costs.

fees plus costs because McCarthy had agreed to this increase before mediation and the $250,000 mediation agreement was unenforceable. However, he also candidly testified he was aware that McCarthy disputed the amount of his fees: "I knew that she would disagree with me, and I took the funds out of the trust account anyway . . . . I didn't know about [the rule requiring disputed funds to remain in his CTA], and I thought she was suing me for malpractice, and it was a mistake, and I'm aware of the rule now. I mean, it was a mistake."

On December 27, McCarthy emailed Bolanos asking if he had received the settlement check. The same day, Bolanos sent her a cashier's check for $188,224.50 with a letter dated December 26, 2011, explaining his position and providing an accounting as follows:[8]

> You will recall that previously you demanded that we deviate from the express provision in our attorney-client contract which provided for attorneys' fees equal to one-third of the judgment, decree, or settlement amount. However, such a demand is invalid as a matter of law because there is no mutual consideration for the alteration of the contract . . . . Therefore, enclosed please find settlement funds in the **full amount of the judgment**, *less* the contractual attorneys' fee and expenses incurred in prosecuting this case up to and through trial. The accounting breakdown is as follows:
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> |---|---|
> | Judgment Amount | $300,000.00 |
> | Contractual Contingent Attorneys' Fee | ($90,000.00) |
> | Litigation Costs Incurred | ($17,554.50) |
> | Trial Costs Incurred | ($3,776.00) |
> | Post-Trial Costs Incurred | ($445.00) |

McCarthy received the check on December 28, and emailed Bolanos demanding the balance of the $250,000, which was $61,775.50 ($250,000 - $188,224.50). After a heated series of emails, McCarthy fired Bolanos on January 3, 2012, and hired malpractice counsel. She demanded a copy of her file and that the disputed funds be placed in a trust account. In response, Bolanos demanded that she pay $5,000 into escrow to defray reproduction costs, promising to

[8] The record does not indicate whether Bolanos sent the letter and check before or after he received the email from McCarthy. He did not send an email in response to hers.

return the unused portion, and refused to put the disputed funds into escrow unless she returned the settlement funds paid to her.

The parties were at a stalemate until March 6 when Bolanos offered to pay McCarthy $70,000, which was $8,224.50 more than she would have received under the $250,000 settlement. She rejected the offer and filed suit alleging fraud and malpractice. Bolanos then returned her client file. The lawsuit was settled and McCarthy testified she was "made whole."

III. CULPABILITY

Count 1: Failure to Obtain Informed Written Consent Regarding the Potential Conflict

Bolanos concedes he violated rule 3-310(C)(1) of the Rules of Professional Conduct[9] by failing to advise McCarthy that she might want separate counsel from Schmitt's given their differing goals and approaches to the Reynolds litigation. We find Bolanos culpable as charged for accepting dual representation of McCarthy and Schmitt, where their interests were in potential conflict, without obtaining their informed written consent.

Count 2: Failure to Promptly Notify Client of Receipt of Client Property

Bolanos concedes that he violated rule 4-100(B)(1)[10] when he failed to promptly notify McCarthy that he had received the settlement check. He received it on December 9 but did not notify her until December 28, and his notice did not state the exact amount received. The three-week delay and incomplete notice constitutes a violation of the rule. (See *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033 [rule violation where attorney failed to notify client within three weeks of receipt of settlement funds and failed to specify exact amount received].)

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[9] Rule 3-310(C)(1) provides: "A member shall not, without the informed written consent of each client, accept representation of more than one client in a matter in which the interests of the clients potentially conflict." All further references to rules are to this source.

[10] Rule 4-100(B)(1) provides that a member shall "[p]romptly notify a client of the receipt of the client's funds, securities, or other properties."

Counts 3: Failure to Maintain Disputed Funds in Trust

Both at trial and on review, Bolanos conceded he violated rule 4-100(A)[11] by removing $61,775.50 in disputed funds from his CTA. We find him culpable as charged. (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar. Ct. Rptr. 335, 349 [disputed funds must be retained in trust account pending resolution of dispute].)

Count 4: No Misappropriation Involving Moral Turpitude

OCTC alleges Bolanos "knew that he had agreed to accept $87,695.04 in attorney fees [$337,695.04 - $250,000] and that he paid himself $61,775.50 in excess of his agreement." Therefore, when he "took $61,775.50 of funds he owed McCarthy and used them for his own use and benefit and not for the use and benefit of his client," he committed misappropriation involving moral turpitude in violation of Business and Professions Code section 6106.[12]

The hearing judge dismissed this charge, finding that Bolanos's removal of "trust funds based on a good faith but unreasonable belief of entitlement to such funds did not constitute misappropriation and did not violate section 6106." OCTC insists Bolanos engaged in intentional fee grabbing, and that he acted dishonestly because he took the disputed funds knowing McCarthy had not given him permission. Neither party has argued that this case involved a grossly negligent misappropriation, and the hearing judge did not discuss it in the decision. For reasons detailed below, we affirm the hearing judge's dismissal of Count 4.

First, the hearing judge "was in an appropriate position to assess the issues of [Bolanos's] intent, state of mind, good faith, and reasonable beliefs and actions — all important issues bearing on whether moral turpitude was involved in this matter . . . . [Thus, we] are obligated to

[11] Rule 4-100(A)(2) provides: "when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved."

[12] Section 6106 provides, in part: "The commission of any act involving moral turpitude, dishonesty, or corruption . . . constitutes a cause for disbarment or suspension."

give great weight to the hearing judge's findings and conclusions on this subject." (*In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 241.) Further, in challenging the credibility finding that Bolanos believed he had an honest claim to the disputed funds, OCTC "must demonstrate that the findings are not sustained by convincing proof and to a reasonable certainty. Merely repeating conflicts in the evidence does not satisfy this burden. [Citations.]" (*McKnight v. State Bar*, *supra*, 53 Cal.3d at p.1032.) Finally, we are mindful that all reasonable inferences must be resolved in Bolanos's favor. (*Kapelus v. State Bar* (1987) 44 Cal.3d 179, 200.)

Applying these legal principles and considering the factual findings the hearing judge made, OCTC has not met its burden of proving moral turpitude (misappropriation) 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].) While Bolanos knew McCarthy would dispute his fee claim, it is *uncontested* he was ignorant of the rule that he must maintain the disputed funds in his CTA. Therefore, the withdrawal by itself does not show Bolanos acted dishonestly, although his actions were clearly negligent. In addition, he testified, and his December 26th letter corroborates, that he subsequently came to believe the $250,000 agreement was invalid for lack of consideration. This belief may have been unreasonable, but the hearing judge found it was honestly held. Moreover, OCTC stipulated the funds were in fact *disputed* — foreclosing any argument that they were indisputably McCarthy's. Finally, during the dispute and before the State Bar became involved, Bolanos explained his position to McCarthy, stayed in contact with her and her attorney, and offered to settle for $70,000. These actions are consistent with the hearing judge's view that this case was a bitter fee dispute — not an intentional misappropriation. We decline to disturb the hearing judge's finding.

Contrary to our colleague's dissent, we have not "fashioned a defense to the moral turpitude charge" that would permit attorneys to unilaterally take their fees based on a belief in their entitlement to them. Rather, we have deferred to the hearing judge's credibility determination, as we *must* under our rules and Supreme Court precedent, that Bolanos acted without moral turpitude when he held disputed fees outside of his CTA during the brief pendency of the dispute, given his ignorance of the governing rule and his honest belief that the fee modification was unenforceable.

As set forth in her detailed decision, the hearing judge found Bolanos's conduct to be an example of aggravated mishandling of disputed fees based on a totality of the facts. The record supports viewing the misconduct as the hearing judge saw it, and relevant case law supports the judge's finding.[13]

The dissent, however, sees it differently. Our colleague has declared that the hearing judge's finding that Bolanos acted in good faith is irrelevant or, as she states, "simply beside the point." Instead, the dissenting judge attributes a dishonest motive to Bolanos, ignoring the hearing judge's credibility finding. But this finding is, by law, entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A) [great weight given to hearing judge's factual findings]; *McKnight v. State Bar*, *supra,* 53 Cal.3d at p. 1032 [hearing judge best suited to resolve credibility questions "because [she] alone is able to observe the witnesses' demeanor and evaluate their veracity firsthand"].) We are limited on review to the examination of a cold record

[13] An honest but mistaken belief may provide a defense to a moral turpitude charge in cases involving attorneys who know the funds are in dispute. In *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, an attorney and former client were in a fee dispute when entrusted funds held by the attorney were awarded to the former client's ex-husband pursuant to a settlement agreement. The agreement provided that the husband would pay the wife a sizeable sum. The attorney viewed the agreement as a ploy to frustrate his ability to collect fees and relied on this belief to justify paying himself from the funds held in trust. Relying on *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 321-332, we found the attorney unreasonably withdrew fees, but was not culpable of moral turpitude because he honestly believed he was justified.

and must rely on the hearing judge's assessment of Bolanos's demeanor and the nature and quality of his testimony. The hearing judge was in an appreciably better position than we are to attribute intent or motive to Bolanos and the record is devoid of sufficient evidence to depart from the judge's well-reasoned conclusion. Accordingly, there is no basis to overturn the hearing judge's finding that Bolanos acted on a good faith but unreasonable belief of entitlement to the settlement funds and, thus, without a dishonest intent or moral turpitude. (*McKnight v. State Bar*, *supra*, 53 Cal.3d at p. 1032; *In the Matter of Respondent H*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 241.)[14]

Nevertheless, we recognize that Bolanos's ignorance of the rules for safekeeping client funds was wholly unreasonable. (*Palomo v. State* Bar (1984) 36 Cal.3d 785, 840 ["attorneys assume a personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds [citations]"].) Even without specific knowledge of the rules, Bolanos should have fulfilled his *fundamental* responsibilities as McCarthy's fiduciary by maintaining the disputed amount in trust.

Like the hearing judge, we find that Bolanos's honest mistake, albeit unreasonable, does not constitute moral turpitude by intentional misappropriation. (See *Sternlieb v. State Bar, supra,* 52 Cal.3d 317; *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 589 ["honest belief, even if mistaken and unreasonable, [of] right to entrusted funds may be asserted as a defense to a charge of misappropriation involving moral turpitude or dishonesty"]; *In the Matter of Respondent K, supra,* 2 Cal. State Bar Ct. Rptr. 335 [attorney who knew client

[14] Further, we find that the dissent's reliance on *Grossman v. State Bar* (1983) 34 Cal.3d 73 is misplaced. In *Grossman*, the Supreme Court affirmed a State Bar Court finding that in withholding a fee in excess of that set forth in a retainer agreement, an attorney had, under the circumstances of that case, committed misappropriation involving moral turpitude. We note that the attorney in *Grossman* made this argument for *the first time* on petition for review. Also, the record contained "no testimony by petitioner or any other witness that the fee overcharge" was a mistake, and the record otherwise belied the assertion. (*Id.* at p. 78.)

objected to his taking fee from settlement committed rule violation but not moral turpitude].) However, we find that his unilateral taking of those funds under the circumstances presented here amounts to negligent misappropriation.

Count 5: No Failure to Promptly Pay Funds Owed to McCarthy

OCTC does not challenge the dismissal of the charge that Bolanos failed to promptly pay the $61,775.50 he owed McCarthy, in violation of rule 4-100(B)(4).[15] We affirm the dismissal because Bolanos promptly paid McCarthy $188,224.50, the amount he believed she was owed, and was not obligated to pay her the remainder until the dispute was resolved. Guided by new standard 2.1(c), as discussed *post*, the mishandling of client funds here amounts to negligent misappropriation.

Count 6: Failure to Promptly Release Client File

We affirm the hearing judge's finding that, in violation of rule 3-700(D)(1),[16] Bolanos failed to promptly release McCarthy's file upon his termination.

IV. SERIOUS AGGRAVATION AND COMPELLING MITIGATION[17]

A. Aggravation

The hearing judge found two factors in aggravation. First, as Bolanos concedes, he committed multiple acts of misconduct. (Std. 1.5(b).) Second, the hearing judge found the misconduct was "surrounded by bad faith, dishonesty, concealment, and overreaching,"

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[15] Rule 4-100(B)(4) provides an attorney must "[p]romptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive."

[16] Rule 3-700(D)(1) requires an attorney, upon termination of employment, to promptly release, at the client's request, all client papers and property.

[17] Standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Bolanos to meet the same burden to prove mitigation.

warranting serious aggravation. (Std. 1.5(d).) Bolanos contests this finding and correctly observes that honestly asserting a fee claim is not bad faith.

At the same time, we find he engaged in serious overreaching. He agreed to a fee modification and then attempted to renege on that agreement. He also provided an incomplete accounting to McCarthy. Though he thought he had a legitimate claim to $37,000 as fees in light of the original fee agreement, he should have clearly accounted for that amount in his letter.[18] Finally, he improperly conditioned delivery of McCarthy's file on her placing money in escrow to defray copying expenses. We assign these acts of overreaching significant weight in aggravation. In light of these findings, we disagree with the dissent that we have given only "summary" recognition to the aggravation in this case.

B. Mitigation

The hearing judge found four factors in mitigation, but we assign credit to only three.[19] Even so, we agree with the dissenting judge that Bolanos's overall mitigation is compelling.

First, Bolanos is entitled to significant mitigation for stipulating to facts, including those establishing his culpability for the trust account violation, and conceding that culpability on review. Further, he fully cooperated in these proceedings and offered to pay McCarthy more than the amount of disputed funds before the State Bar became involved. (Std. 1.6(e) [mitigation for spontaneous cooperation to victims of misconduct or to State Bar].)

Second, Bolanos presented the testimony of 14 strong character witnesses. They included: Schmitt, the co-plaintiff in the Reynolds lawsuit; a law clerk who worked for Bolanos

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[18] We do not find Bolanos was attempting to hide the amount he had received from Reynolds given that McCarthy knew the settlement was for $337,000.

[19] The hearing judge gave "nominal" mitigating weight to good faith. We disagree and find that Bolanos's ignorance of the rules was unreasonable from the outset and precludes a finding of *any* good faith mitigation. (Std. 1.6(b) [mitigation for "good faith belief that is honestly held and reasonable"]; *In the Matter of Thomson* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966, 976.)

on the Reynolds case; a law student and mentee of Bolanos; a San Francisco superior court judge (related by marriage); former clients; and several attorneys. We particularly note that a special master in a matter handled by Bolanos's former law firm declared that Bolanos disclosed important information that otherwise would not have come to light. The disclosure demonstrated his "courage and integrity" because it threatened Bolanos's current and future employment. We find the quality and quantity of Bolanos's character evidence warrants significant mitigating weight, especially for the testimony of attorneys and a judge, who have a "strong interest in maintaining the honest administration of justice." (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319; std. 1.6(f) [mitigation for extraordinary good character attested to by wide range of references in legal and general community who are aware of misconduct].)

Third, we assign significant credit to Bolanos's remorse and recognition of his wrongdoing. (Std. 1.6(g) [mitigation for prompt objective steps that demonstrate spontaneous remorse and recognition of wrongdoing and timely atonement].) At trial, he admitted he acted unethically and violated rules in the McCarthy matter. He also stated his intent to avoid repeating his past mistakes: "I want to take every step I can to make sure that I'm never in this position again, and that I always adhere to the letter of our ethical rules." Consistent with this sentiment, he conceded culpability on appeal and accepted a 90-day suspension and probation. He acknowledged that it would ensure that he "understands the seriousness of his actions and will take steps to avoid similar mistakes in the future." Importantly, he has retained his appellate counsel to provide ethics counseling to avoid future missteps.

V. A 90-DAY ACTUAL SUSPENSION IS APPROPRIATE DISCIPLINE[20]

Our analysis begins with the standards, which promote consistent and uniform application of disciplinary measures. (*In re Silverton* (2005) 36 Cal.4th 81, 91 [Supreme Court will not reject recommendation arising from standards unless grave doubts as to propriety of recommended discipline].) Both new standards 2.1(c) and 2.2(b) apply and provide that suspension or reproval is appropriate discipline for negligent misappropriation and for a rule 4-100 violation.[21]

With no case law to guide us in analyzing these new standards, we look to past cases addressing trust account violations and misappropriations not involving moral turpitude. The mishandling of disputed fees has typically resulted in a reproval rather than an actual suspension. (*Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, *In the Matter of Respondent K, supra,* 2 Cal. State Bar Ct. Rptr. 335; *In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716.) In misappropriation cases, the Supreme Court and this court have recommended a six-month suspension or less in similar cases involving grossly negligent misappropriation, even when the attorney committed other misconduct or serious aggravation has been found.[22] While

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[20] 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.)

[21] Standard 2.1(c) establishes the appropriate discipline for negligent misappropriation, and standard 2.2(b) for rule 4-100 violations other than misappropriation, commingling, and the failure to promptly pay out entrusted funds.

[22] See, e.g., *Brockway v. State Bar* (1991) 53 Cal.3d 51 (three-month suspension for $500 grossly negligent misappropriation and failure to return client funds, misconduct in second matter for acquiring adverse interest in client's property; mitigated by 13 years of discipline-free practice in California and five in Iowa, and favorable character evidence; aggravated by questionable candor and indifference); *Howard v. State Bar* (1990) 51 Cal.3d 215 (six-month suspension for $2,500 willful misappropriation while under influence of chemical dependency; limited mitigation for three years' practice, restitution made under threat of discipline, alcoholism under control, and hearing held four years after misconduct).

Bolanos did not intentionally or by gross negligence misappropriate client funds, his unreasonable handling of disputed funds is a negligent misappropriation.

In sum, Bolanos acted unreasonably and overreached in handling the fee dispute. But as the hearing judge found, he did not act dishonestly and offered to pay McCarthy the disputed funds within two months. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 38 ["An attorney who deliberately takes a client's funds, intending to keep them permanently, and answers the client's inquiries with lies and evasions, is deserving of more severe discipline than an attorney who has acted negligently, without intent to deprive and without acts of deception"].) Further, his misconduct is significantly mitigated by his good character evidence, cooperation with the State Bar, and remorse. He has also demonstrated insight by taking concrete steps to ensure his future conduct will conform to the rules of the profession. This evidence demonstrates, and our dissenting colleague agrees, Bolanos is not a risk for future misconduct. Further, we recommend a 90-day actual suspension, as did the hearing judge, which is far more significant than a reproval, the minimum discipline permitted by the standards and imposed in cases such as *Dudugjian*, *supra*, 52 Cal.3d 1092, and *Respondent K*, *supra*, 2 Cal. State Bar Ct. Rptr. 335. Considering all relevant factors, we affirm the hearing judge's recommendation as being in accordance with the standards and the case law. We also recommend that Bolanos attend trust accounting school to ensure he properly handles client funds in the future.

To clarify, in no way do we condone Bolanos's unreasonable ignorance of the rules or his poor judgment while embroiled in a fee dispute. It is of paramount importance in a fee dispute that an attorney strictly adhere to the rules and act in accordance with his or her client's interests — not his or her own. Considering new standard 2.1, which signals us to carefully parse the level of intentionality in a misappropriation (dishonesty, grossly negligence, or something less), we have found that Bolanos in fact misappropriated his client's funds through negligent

misconduct (std. 2.1(c)). We believe that our recommendation, based on both a fee dispute and a negligent misappropriation, will advance the goals of the discipline system, and impress on Bolanos the "high degree of care and fiduciary duty he owes to those he represents." (*Stuart v. State Bar* (1985) 40 Cal.3d 838, 847.)

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Aldon Louis Bolanos be suspended from the practice of law for one year, that execution of that suspension be stayed, and that he be placed on probation for one year on the following conditions:

1. He must be suspended from the practice of law for the first 90 days of his probation.

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

4. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation deputy either in person or by telephone. During the period of probation, he must promptly meet with the probation deputy as directed and upon request.

5. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

6. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and

of the State Bar's Client Trust Accounting School and passage of the tests given at the end of those sessions. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics and Client Trust Accounting Schools. (Rules Proc. of State Bar, rule 3201.)

8. The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if he has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We recommend that Bolanos be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court order in this proceeding and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

VIII. CALIFORNIA RULES OF COURT, RULE 9.20

We recommend that Bolanos be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension

IX. COSTS

We recommend that costs be awarded to the State Bar in accordance with section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

PURCELL, P. J.

I CONCUR:

HONN, J.

I respectfully dissent.

The majority's description of this case as a mere "fee dispute" mischaracterizes the nature and extent of the misconduct. This is not a case where the attorney honestly believed that the client had given him *permission* to retain the disputed fees, as was the case in *Dudugjian v. State* Bar (1991) 52 Cal.3d 1092, 1099. Indeed, Bolanos testified that he "*knew* [McCarthy] would disagree with me, and I took the funds out of the trust account anyway." Nevertheless, the majority feels compelled to give great deference to the hearing judge's finding that Bolanos held an honest albeit unreasonable belief that "he was *entitled* to the funds given his hard work."

To be clear, I do not take issue with the hearing judge's finding. It simply is beside the point. In *Most v. State Bar* (1967) 67 Cal.2d 589, 597, the Supreme Court held that the attorney was culpable of serious misconduct, even though they accepted "his dubious assertion that he withdrew . . . the settlement funds in payment of what he considered to be a proper fee. While petitioner may have been justified in concluding that he should have been paid more than [the amount] agreed to by [the client], an attorney may not unilaterally determine his own fee and withdraw funds held in trust for his client in order to satisfy it, without the knowledge or consent of the client." This is precisely what occurred in this case.

To permit attorneys to unilaterally appropriate fees, which they know are disputed, merely because of an honest belief in their *entitlement* to the funds, whether due to their hard work or their interpretation of a fee agreement, sets a dangerous precedent and is unsupported in the law. In *Grossman v. State Bar* (1983) 34 Cal.3d 73, the Supreme Court found that the attorney's conduct in unilaterally setting his fee constituted a misappropriation of the difference between the amount taken by the attorney and the agreed-upon fee. The attorney in *Grossman* negotiated a settlement for his client and then decided he was entitled to a larger sum than that authorized by the retainer agreement. The Court was unimpressed with the attorney's

justification for charging the higher fee merely because it was consistent with his "normal practice." (*Id*. at p. 78.) The Court viewed the attorney's explanation as no more than "a *deliberate*, unilateral determination that such a fee was fair payment for [the attorney's] services." (*Ibid*., italics added.)

The Supreme Court also rejected the attorney's assertion that he was acting on an "honest misunderstanding" or a "mistake" about the terms of his retainer agreement because the record belied such an assertion. (*Ibid*.) As with the instant case, the attorney in *Grossman* did not immediately report receipt of the funds to his client and he signed her name to the settlement check without her authorization. He also waited several months to send her an accounting.

So, too, the record in the instant matter belies Bolanos's assertion that at the time he took the settlement funds from his CTA, he held an honest good faith belief that his agreement to reduce his fee was unenforceable. By his own admission, he took the additional fee: (1) *before* he advised McCarthy he was reneging on their agreement; (2) without telling her he had removed the funds; (3) without telling her he had co-signed her name to the settlement check; and (4) without even telling her he had *received* the funds. I thus find his after-the-fact assertion that he took the fees in reliance on the advice of an unnamed attorney, who told him that his agreement to reduce his fees was unenforceable, is pretextual at best.

In view of his certain knowledge that McCarthy did not agree to the higher fee or to his removal of the funds from his CTA, I conclude that Bolanos intentionally misappropriated $61,775 from his CTA for his own purposes, thereby violating section 6106.

Furthermore, I take issue with the majority's summary recognition of Bolanos's additional acts of dishonesty and overreaching. Under standard 1.5(d), the nature and extent of this aggravation is very serious and is reason enough to impose discipline far more significant than 90 days, to wit: (1) Bolanos's misrepresentation of the amount of the judgment and the

amount of the fees owing under his fee agreement in his accounting to McCarthy; (2) his failure to return the funds to his CTA after McCarthy disputed them;[23] (3) Bolanos's threats of a lawsuit if McCarthy did not pay him additional fees in quantum meruit; (4) Bolanos's additional threatening and intimidating communications with McCarthy, which were lacking in professionalism and amounted to overreaching; and (5) holding McCarthy's files hostage until she paid him for copying costs.

Based on the finding that Bolanos's misappropriation was intentional, standard 2.1(a) and relevant decisional law provide guidance as to the appropriate discipline. Standard 2.1(a) provides that disbarment is appropriate "unless the amount misappropriated is insignificantly small or the most compelling mitigating circumstances clearly predominate, in which case actual suspension of one year is appropriate."

Here, the amount misappropriated is significant — $61,775 — but it only occurred once with one client. Also, there are compelling mitigating circumstances that suggest that disbarment is not warranted. In particular, Bolanos's sincere recognition of his wrongdoing and his remorse are strong indicia that his misconduct is unlikely to recur. Furthermore, the testimony of his 14 character witnesses provided clear and convincing evidence that his misconduct is aberrational. Under such circumstances, a one-year suspension, as provided by standard 2.1(a), should adequately protect the public, the courts, and the profession.

The decisional law also supports a one-year suspension, given the nature and quality of the mitigation evidence. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025 [attorney failed to notify client of receipt of $17,000 and without authorization took $ 8,665 as attorney fees and withdrew

[23] The majority wrongly gives mitigative weight to Bolanos's offer to settle the dispute for $70,000 in March 2012. That offer came nearly three months after he had misappropriated the funds and then only after McCarthy had hired a malpractice attorney to vindicate her claims against Bolanos. In fact, McCarthy ultimately sued Bolanos in superior court for fraud and malpractice and McCarthy was made whole when they settled that case.

remaining $ 8,500 as improper business loan, aggravated by lack of remorse or understanding of misconduct but with "sufficiently compelling mitigation" to warrant one-year suspension, including no prior record in 10 years, "isolated and aberrational" misconduct, good character references, and undiagnosed mental illness, all justifying one-year suspension under former std. 2.2(a)]; compare *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576 [attorney engaged in protracted acts of concealment and duplicity to cover up receipt of $79,875 settlement on behalf of corporate client and intentional misappropriation $29,875 as unauthorized attorney fee, aggravated by overreaching, indifference, and conflicts of interest, but mitigated by strength of good character].) Accordingly, I dissent from the majority's recommendation of a 90-day suspension, and believe more significant discipline is warranted due to Bolanos's intentional misappropriation.

EPSTEIN, J.