PUBLIC MATTER—NOT DESIGNATED FOR PUBLICATION

Filed April 14, 2020

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	17-O-01313
	)	
GREGORY HARPER,	)	OPINION AND ORDER
	)	[As Modified on September 25, 2020]
State Bar No. 146119.	)	
	)	

This is Gregory Harper's third discipline case, all involving client trust account (CTA) violations. He is charged with three counts of misconduct related to the improper handling of his CTA in one client matter, including misrepresentation to the State Bar. His client disputed the amount of his attorney fees and eventually complained to the State Bar. Instead of holding the disputed funds in his CTA, as required, Harper withdrew money, which caused his CTA balance to fall below the requisite amount. When asked by the State Bar about the complaint, he misrepresented that he had maintained the necessary funds in his CTA. The hearing judge found him culpable as charged and recommended he be disbarred.

Harper appeals, mainly disputing the factual basis for culpability. The Office of Chief Trial Counsel of the State Bar (OCTC) does not appeal and supports the hearing judge's decision. Upon independent review of the record (Cal. Rules of Court, rule 9.12), we affirm the judge's culpability, discipline, and most aggravating and mitigating findings. Harper committed acts of moral turpitude and did not prove compelling mitigation. Disbarment is therefore appropriate under our disciplinary standards to protect the public, the courts, and the legal profession.

I. PROCEDURAL BACKGROUND

On October 22, 2018, OCTC filed a three-count Notice of Disciplinary Charges (NDC) charging Harper with (1) failing to maintain client funds in his CTA, in violation of rule 4-100(A) of the Rules of Professional Conduct;[1] (2) misappropriation, in violation of Business and Professions Code section 6106;[2] and (3) misrepresentation, in violation of section 6106. On February 4, 2019, the parties filed a Stipulation as to Facts and Admission of Documents (Stipulation). Trial was held on February 19, 21, and 22, and posttrial closing briefs followed. The hearing judge issued her decision on May 23, 2019.

On April 14, 2020, we issued our opinion. On June 15, 2020, Harper filed a petition for review in the Supreme Court. On August 12, 2020, the Supreme Court remanded the matter to us to consider "Harper's unaddressed claim that his discipline is based on a theory of disparate impact." Pursuant to the remand, this modified opinion addresses Harper's claim.

II. FACTUAL BACKGROUND[3]

A. DeJoie Disputes Fee

In June 2015, Evigne DeJoie hired Harper to represent her in two matters relating to eviction proceedings, which Harper ultimately settled for a combined total of $59,000. On November 7, 2016, Harper received the settlement funds on DeJoie's behalf, and deposited them into his CTA on November 17. On November 23, he withdrew $37,913 from his CTA in the

[1] 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. Rule 4-100(A) provides, in part, that when a client disputes the portion of funds that an attorney has a right to receive, then the disputed portion "shall not be withdrawn until the dispute is finally resolved."

[2] All further references to sections are to this source. Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

[3] The factual background is based on the Stipulation, trial testimony, documentary evidence, and factual findings by the hearing judge, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).)

form of a cashier's check payable to DeJoie. Along with the check, he provided a settlement disbursement form that stated that he was withholding $19,667 of the funds for attorney fees and $1,420 for sanctions incurred during the litigation. DeJoie disputed these amounts. On November 30, Harper sent DeJoie notice of her right to request fee arbitration, which she submitted on February 7, 2017. DeJoie and Harper settled the matter after participating in arbitration on July 28, 2017.

B. Harper's Misrepresentation to the State Bar

On February 8, 2017, DeJoie submitted a complaint to the State Bar. On May 2, the State Bar sent Harper a letter, requesting his reply to the allegations. On June 13, Harper responded: "Evigne disputed my entitlement to any fee whatsoever. Thus, I have left the disputed amount of $21,087.00 ($19,667.00 in fees and $1,420.00 for payment of sanctions) in my trust account." However, his bank records show that his CTA balance repeatedly fell below $21,087 from December 2016 through June 2017.[4] On June 12, 2017, the balance was $5,600.22. At trial, Harper testified that he maintained the entire $21,087 in his CTA from November 23, 2016 through July 28, 2017, and he was unaware that his CTA dropped below the requisite amount. He also testified that he reviewed his CTA bank statements monthly.

The hearing judge found Harper's testimony not credible. We give this credibility finding great weight. (Rules Proc. of State Bar, rule 5.155(A).)

[4] On December 22, 2016, Harper's CTA balance was $20,598.85, and on December 23, it dropped to $16,368.85. While he had over $21,087 in the CTA in January and February 2017, it dipped to $18,271.67 on March 8, 2017, and was as low as $5,341.67 during the month of March. In April, it fell to $15,843.49, and to $493.61 in May.

III. CULPABILITY

A. Count One: Failure to Maintain Client Funds in CTA (Rule 4-100(A)) Count Two: Misappropriation (§ 6106)

The NDC alleges that DeJoie disputed the amount Harper was entitled to keep when he disbursed settlement funds to her on November 23, 2016. Count one charges Harper with violating rule 4-100(A) for failing to maintain a CTA balance of $21,087 on behalf of DeJoie. Count two charges Harper with a moral turpitude violation for misappropriation of $20,593.39 of DeJoie's funds between November 23, 2016, and May 8, 2017. The hearing judge found Harper culpable on both counts. We agree. The judge correctly determined that Harper should have maintained $21,087, and thus he misappropriated $20,593.39[5] through gross negligence.

When a trust account balance drops below the amount the attorney is required to hold for a client, a presumption of misappropriation arises. The burden then shifts to the attorney to show that misappropriation did not occur and that he was entitled to withdraw the funds. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 37; *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618.) After DeJoie disputed the attorney fees and sanctions on November 23, 2016, Harper was required to maintain $21,087 in his CTA for her.

On review, Harper argues that the Stipulation was ambiguous as to the date of the fee dispute. He asserts that it did not begin on November 23, 2016, as stated in the Stipulation and as found by the hearing judge. Harper contends that the dispute began in February 2017 when DeJoie requested fee arbitration. The Stipulation states, "On November 23, 2016, DeJoie met [Harper] at his residence, where [Harper] gave DeJoie the $37,913 cashier's check, and a settlement disbursement form. The disbursement form stated that [Harper] was withholding $19,667 of the settlement for attorney's fees and $1,420 for sanctions incurred during the

[5] This figure represents $21,087 (the disputed amount) minus $493.61 (the lowest CTA balance during the relevant time period).

litigation. DeJoie disputed the amount withheld for attorney's fees and the retention of funds to pay sanctions."

Harper concedes that the Stipulation states that DeJoie disputed the fees on November 23, 2016, but he argues that it was not Evigne DeJoie, but her father (with the same last name), who disputed the fees on that date. We reject Harper's argument as the record supports the factual finding that the fee dispute with DeJoie arose in November. DeJoie's father is not mentioned in the Stipulation, which is not ambiguous and clearly asserts that DeJoie disputed the fees on November 23, 2016. The hearing judge accepted the facts as stipulated by the parties, as do we. (*In the Matter of Rodriguez* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 884, 886 [unless parties' stipulation has been set aside, "it remains binding on the parties, and the facts recited in the stipulation are deemed established for purposes of this proceeding"].) In addition, Harper was directly asked at trial if the fee dispute occurred on November 23. He responded that Evigne DeJoie disputed the fees, as stated in the Stipulation.[6] Harper must accept these facts. (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 510–511 [attorney in disciplinary proceeding must accept facts to which he has stipulated].)[7]

The balance of the CTA fell below the required amount in December 2016 and in March, April, May, and June 2017. Harper did not rebut the presumption of misappropriation. He wrote several checks from the CTA, some to himself, which caused the CTA to dip below $21,087. Therefore, he is culpable of grossly negligent misappropriation under count two.

As to count one, we affirm the hearing judge's finding that Harper violated rule 4-100(A) by failing to maintain $21,087 in his CTA on behalf of DeJoie. Client funds in a CTA must be

[6] On the first day of trial, OCTC asked, "So I'd like you to explain now when you understood there to be a fee dispute between yourself and Evigne DeJoie." Harper replied, "Now I understand that it was on November 23rd, I believe, that we said in the stipulation."

[7] Harper also testified that he knew when he delivered the check to DeJoie that she was dissatisfied with the amount. One week later, he notified her of her right to seek fee arbitration.

maintained until the balance owed to the client is settled. (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 277–278.) Like the judge, we assign no additional weight in discipline because this count is duplicative of the misappropriation violation. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127.)

B. Count Three: Misrepresentation (§ 6106)

Count three alleges that Harper wrote to a State Bar investigator on or about June 13, 2017, maintaining that the $21,087 in disputed funds were kept in his CTA when he knew that statement was false and misleading. The NDC alleges that a violation of section 6106 may result from intentional conduct or grossly negligent conduct. The hearing judge found that Harper violated section 6106 by intentionally misrepresenting that the funds had remained in the CTA.[8] We agree.

In the statement attached to the June 13 letter, Harper wrote, ". . . I have left the disputed amount of $21,087 ($19,667.00 in fees and $1,420.00 for payment of sanctions) in my trust account."[9] He contends that he was referring to the amount in his CTA at the time of the State Bar's inquiry letter, May 2, 2017, not the entire time the fees were in dispute. Therefore, he asserts that he is not culpable of the misrepresentation charged in count three. We reject this argument. Harper testified that he reconciled his client ledgers and his bank statements every month. We agree with the hearing judge that if that were true, it "would have revealed that DeJoie's disputed funds did not remain in his account in December 2016, and March and April 2017." Harper also testified that he reviewed his bank statements before sending the June 13

[8] We give great weight to the hearing judge's finding as to intent. (*In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 155.)

[9] The June 13 letter was sent by Samuel C. Bellicini, Harper's attorney. It states that DeJoie "timely received her $37,913.00 share of the $59,000.00 settlement proceeds, and the balance in dispute, $21,087.00 has remained in Mr. Harper's CTA . . . ."

letter.[10] He claimed that even after doing so, he still believed that he was correct in asserting that he had maintained $21,087 on behalf of DeJoie since November 23, 2016. Harper's belief was not reasonable and he should have known that his statement was false and misleading. Harper's statement to the investigator was a misrepresentation that he knew was false and misleading, and constitutes moral turpitude. (*Grove v. State* Bar (1965) 63 Cal.2d 312, 315 [moral turpitude includes concealment as well as affirmative misrepresentations with no distinction to be drawn between "concealment, half-truth, and false statement of fact"].) Therefore, we find that his response to the State Bar's inquiry letter constituted intentional misconduct in violation of section 6106.

IV. AGGRAVATION AND MITIGATION

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

A. Aggravation

1. Prior Records of Discipline (Std. 1.5(a))

Harper has two prior records of discipline. On April 13, 1994, he received a stayed suspension of 90 days and an 18-month period of probation including conditions. (State Bar Court Nos. 91-O-04542; 92-O-20050; Supreme Court No. S037840.) Harper stipulated to misconduct in two matters. In the first matter, 16 checks drawn on Harper's CTA were returned for insufficient funds in 1991, he used his CTA as a personal account, and he failed to properly maintain his banking records. In the second matter, Harper failed to promptly deliver settlement funds, which had been removed from his CTA for approximately two months in 1992, and he commingled funds in his general account. He stipulated to violations of rule 4-100(A) in both matters. There were no aggravating circumstances and he received mitigation for lack of harm,

[10] On June 13, 2017, his CTA balance was around $5,600.

cooperation, extraordinary good character, and hiring an accountant to help him properly maintain his bank accounts.

His second discipline involved three client matters. On February 6, 2003, the Supreme Court ordered Harper actually suspended for six months and placed on probation for two years with conditions, including attending State Bar CTA School. (State Bar Court Nos. 99-O-10958; 99-O-12126; 01-O-03596; Supreme Court No. S111512.) In the first matter, two checks drawn on Harper's CTA were returned for insufficient funds in 1998, he commingled funds in his CTA, and wrote personal checks from his CTA. He stipulated to a rule 4-100(A) violation. In the second matter, he failed to adequately supervise an employee who stole over $10,000 of entrusted client funds. Harper stipulated to a violation of rule 3-110(A) for failing to perform legal services with competence. In the third matter, Harper failed to promptly deliver funds to which the client was entitled until almost six years after he had collected the funds, in violation of rule 4-100(B)(4). He received aggravation for his prior record of discipline, which included similar misconduct, and for multiple acts of misconduct. Harper was afforded mitigation for excessive delay of the disciplinary proceedings.

The hearing judge assigned aggravation for Harper's two prior records of discipline, but did not specify any weight. We conclude that they merit substantial aggravating weight. The two previous disciplinary matters involved misconduct similar to that in the current matter, and, in the second discipline, he was required to attend CTA School. This indicates that his prior disciplines did not rehabilitate him, causing concern about future misconduct. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443–444.)

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

Harper repeatedly allowed his CTA balance to drop below the amount he was required to maintain on behalf of DeJoie. The hearing judge assigned moderate aggravation and we agree.

(*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646–647 [three instances of misconduct considered multiple acts]; see also *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594 [multiple acts in aggravation for one count of moral turpitude where attorney made 11 misrepresentations over an 18-month period].)

3. Uncharged Misconduct (Std. 1.5(h))

Aggravating circumstances may include "uncharged violations of the Business and Professions Code or the Rules of Professional Conduct." (Std. 1.5(h).)[11] The hearing judge found uncharged misconduct for commingling under rule 4-100(A) and moral turpitude under section 6106 because Harper acknowledged at trial that he paid one client's obligations with another one's funds, believing the practice was ethical as long as the payments were documented. We find this analysis unclear as it does not point us to evidence that commingling occurred.

When funds of multiple clients are deposited into a CTA, they become fungible assets that are used regardless of their original ownership. The essence of commingling, however, is that the attorney is improperly combining his or her own funds with those of the clients. "Commingling is committed when a client's money is intermingled with that of the attorney and its separate identity lost." (*In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 123.)

Upon our independent review of the record, we do not find clear and convincing proof of uncharged misconduct. It was established at trial that Harper allowed his CTA to fall below the requisite amount, as charged under counts one and two. Since there is no other evidence of an additional commingling violation, we assign no aggravation under standard 1.5(h).

[11] OCTC argued in its closing brief at trial for aggravation under standard 1.5(h) because Harper used his CTA for "any desired purpose throughout the month" and left unearned fees in the account. However, it abandoned this argument in its responsive brief on review.

4. Pattern of Misconduct (Std. 1.5(c))

Though OCTC did not seek review, it argues in its responsive brief that we should find a pattern of misconduct because this is Harper's third disciplinary matter related to his handling of client funds. To establish aggravation for a pattern of misconduct, the pattern must involve serious misconduct with a common thread over an extended period of time. (Std. 1.5(c); *Young v. State Bar* (1990) 50 Cal.3d 1204, 1217.) OCTC seeks to include Harper's *prior* records of discipline in order to establish the pattern.[12] We decline to find a pattern as an additional factor in aggravation. We have considered Harper's prior records of discipline in aggravation under standard 1.5(a), and have recognized their similarity in determining the appropriate level of discipline. Further aggravation would be duplicative and an overemphasis of the import of the prior matters.

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

OCTC also argues on review that Harper should receive aggravation for failure to accept responsibility due to his attempt to disavow the Stipulation in his opening brief. Harper's denial of culpability despite the Stipulation establishes his indifference and lack of remorse regarding the consequences of his misconduct. (See *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 14 [finding of additional aggravation for indifference where attorney continued to deny culpability despite stipulation that established conduct as charged].) We assign substantial aggravation for Harper's indifference.

[12] OCTC cites *Twohy v. State Bar* (1989) 48 Cal.3d 502, 512–513 and *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 564, fn. 15. These cases are distinguishable from the present matter. In *Twohy*, a pattern was established due to the involvement of his drug addiction as a common thread in each instance of the past and present misconduct. In *Kaplan*, we recognized the holding in *Twohy*, but elected not to apply it as there was sufficient indicia of a pattern without reliance on prior discipline.

B. Mitigation

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

Harper 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).) Nine witnesses, including three attorneys, testified at trial regarding Harper's good character. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration given to attorneys' testimony due to their "strong interest in maintaining the honest administration of justice"].) All of the witnesses were aware of the full extent of the misconduct and attested that the charges in the NDC did not change their high opinion of Harper. In addition, most knew that he had been disciplined twice before. Each of the witnesses has known Harper for a considerable length of time, at least 25 years, and some for much longer. They praised his integrity, honesty, and skills as a lawyer. We affirm the hearing judge's determination that Harper is entitled to substantial mitigation for his good character.

2. Candor and Cooperation with State Bar (Std. 1.6(e))

Harper's Stipulation is a mitigating circumstance. (Std. 1.6(e) [spontaneous candor and cooperation with State Bar is mitigating].) The hearing judge assigned nominal weight for the Stipulation. She stated that "the timing and nature of the stipulation, which admitted facts that were easily proven, obviated very little in terms of OCTC's preparation for trial." (Cf. *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50 [stipulation to easily provable facts mitigating if facts assisted prosecution of case].) On review, Harper asserts that the Stipulation is ambiguous as to the date of the fee dispute and contradicts his trial testimony. As found above, this argument is without merit. His challenge of the facts in the Stipulation causes concern and, therefore, we assign no mitigation under standard 1.6(e).

3. Community Service

Community service is a mitigating circumstance. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) Harper testified that he mentored young attorneys and represented juveniles in criminal proceedings by court appointment. He stated that he invites high schoolers to intern at his law practice, particularly those with criminal records who faced difficulty in finding employment. Harper also testified that he has dedicated himself to his community by serving on various Berkeley city and neighborhood commissions. As chairman of the Housing Advisory Committee, he oversaw housing funds, developed policy, and lobbied for the city. Harper testified that he currently serves on Berkeley's Fair Campaign Commission, and has done so for three years, where he reviews campaign contribution complaints and develops rules for campaign finance in Berkeley. His character witnesses also highlighted his commitment to Berkeley and his neighborhood, and two testified that they served on city commissions with him. Harper also stated that he has served on the California Lawyers Association's Tax Procedure and Litigation Committee since 2009 and was a published author in the California Journal of Tax Litigation. We find that he is entitled to substantial weight in mitigation for his community service. (Cf. *Rose v. State Bar* (1989) 49 Cal.3d 646, 667 [mitigation for legal abilities, dedication, and zeal in pro bono work].)

V. 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 analyzing 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].) Considering Harper's record of two prior disciplinary matters, we also look to standard 1.8(b),[13] which states that disbarment is appropriate where an attorney has two or more prior records of discipline if (1) an actual suspension was ordered in any prior disciplinary matter; (2) the prior and current disciplinary matters demonstrate a pattern of misconduct; or (3) the prior and current disciplinary matters demonstrate the attorney's unwillingness or inability to conform to ethical responsibilities. Harper's case meets two of these criteria. First, he was actually suspended for six months in his second disciplinary matter. Second, we find that the similarity of his misconduct in his prior and current disciplinary matters demonstrates his unwillingness or inability to conform to his ethical responsibilities.[14]

Standard 1.8(b) does not apply if (1) the most compelling mitigating circumstances clearly predominate; or (2) the misconduct underlying the prior discipline occurred during the same time period as the current misconduct. These exceptions do not apply here. Harper has considerable mitigation, particularly his good character evidence and community service, but it does not clearly predominate over the serious aggravating circumstances. And the misconduct in the present matter occurred over ten years after his previous misconduct.

We next consider whether any reason exists to depart from the discipline called for by standard 1.8(b). We acknowledge that disbarment is not mandatory in a third disciplinary matter, even where compelling mitigating circumstances do not clearly predominate. (*Conroy v.*

[13] Standards 2.1(b) and 2.11 are also applicable. Standard 2.1 provides for actual suspension for misappropriation involving gross negligence. Standard 2.11 provides for disbarment or actual suspension for an act of moral turpitude.

[14] All three of Harper's disciplinary matters involve violations related to his CTA.

State Bar (1991) 53 Cal.3d 495, 506-507 [analysis under former std. 1.7(b)]; *In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136 [to fulfill purposes of attorney discipline, "nature and chronology" of prior record must be examined].) Standard 1.8(b) is not applied reflexively, but "with an eye to the nature and extent of the prior record. [Citations.]" (*In the Matter of Jensen* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 283, 289.) Deviating from standard 1.8(b) requires the court to articulate clear reasons for doing so. (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.)

Harper has not identified an adequate reason for us to depart from applying standard 1.8(b), and we cannot discern any. His present misconduct is similar to his past wrongdoing. His misconduct does not overlap with his prior violations, demonstrating that he fails to adhere to his professional duties after being disciplined twice. Further, even after attending CTA School, he has committed another CTA violation. Unlike his priors, however, Harper's present misconduct involves moral turpitude violations. His misappropriation of client 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.) Moreover, his misrepresentation to the State Bar is of serious concern. (See *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 157 [misleading statements are troubling and oppose fundamental rules of ethics—common honesty—without which profession is "worse than valueless" in administration of justice].) When an attorney makes a misrepresentation, it "diminishes the public's confidence in the integrity of the legal profession." (*Ibid.*)

Given the nature and chronology of Harper's violations, we find no reason to depart from the presumptive discipline of disbarment under standard 1.8(b). The State Bar Court has had to intervene three times to ensure that Harper adheres to the professional standards required of

those who are licensed to practice law in California. He has failed to meet his professional obligations since the early 1990s and did not present compelling mitigation. We conclude that further probation and suspension would be inadequate to prevent him from committing future misconduct that would endanger the public and the profession.

VI. CONSIDERATION OF CLAIM OF DISPARATE IMPACT ON REMAND

In a footnote near the end of his rebuttal brief on review, Harper argues against disbarment, stating that such a discipline would be "indicative of the State Bar's study showing the discriminatory and *disparate* impact of discipline on Black male attorneys."[15] He concludes by asserting that disbarment would be "disproportionately harsh especially considering no harm was suffered and payment was made immediately." We did not address these claims in our original opinion, but we do so here as ordered by the Supreme Court.[16]

Harper presents no credible evidence of disparate impact as he alleges in several arguments within his footnote. First, he argues the hearing judge based her adverse credibility determination on her "subjective feelings" about him, even though he asserts he testified "honestly" and "truthfully." This argument is without merit. We give great weight to the hearing judge's credibility findings because that judge is best suited to resolve credibility having observed and assessed the witnesses' demeanor and veracity firsthand. (See *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032.) Our record reveals that the judge made a specific determination that Harper was not credible when he stated that he maintained the disputed funds

[15] Harper did not attach this study to his rebuttal brief or move to augment the record to include the study. The study is not a part of the record. On our own motion, we take judicial notice of the fact that in November 2019 the State Bar released a "Report on Disparities in the Discipline System." (Rules Proc. of State Bar, rule 5.156(B). The report was released after Harper filed his opening brief on review on October 17, 2019.

[16] We interpret the Supreme Court's remand order as an order to the Review Department to address Harper's unaddressed claims on the record before us and not as an order to remand the matter to the Hearing Department for further evidentiary hearings.

in his CTA and was unaware that it dipped below the requisite amount. The judge explained her finding, noting that Harper stated that he had reviewed his monthly statements; yet, the statements plainly show that he had not retained the disputed funds in his CTA.

Next, Harper argues that he was "never allowed to testify as to monitoring his trust accounts." In disciplinary proceedings, an accused attorney is obligated to appear and present evidence. (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 792.) We find nothing in the record that suggests Harper was denied the opportunity to do so. He testified in his own defense and presented character testimony from nine witnesses. At the end of this testimony, the judge asked Harper's attorney whether he had anything further to present and he stated that he did not.

Harper also makes the argument that the remoteness of his prior disciplines was "ignored by non[-]African American judges," and his disbarment was largely based on his prior discipline cases that were "20 and 16 years old." The applicable standard here, standard 1.8(b), is not based on an analysis of whether the prior discipline was remote in time. As such, the hearing judge was not required to address remoteness.[17] Therefore, Harper's argument is without merit.

Harper further asserts that the "initial" judge, an African American, recommended dismissal while a "second" non-African American judge recommended disbarment, and did not permit the prosecutor to negotiate a lesser sanction. Harper's claim regarding the purported actions of the two judges is completely unsupported by the record. (*In re Morse* (1995) 11 Cal.4th 184, 207 [Review Department must independently review the record].)

Finally, Harper stated that he provided explanations and documentation from his banker and "worked to comply with the Trust accounting handbook" in defense to the charges in this

[17] Remoteness of a prior is only considered under standard 1.8(a) where there is a single prior record of discipline. Harper had two prior records of discipline, therefore, standard 1.8(b) is the controlling standard.

case. He argues that these "extraordinary circumstances" justify a lesser sanction, if any. We disagree as disbarment is appropriate.

It is well established that respondents are entitled to a fair hearing in disciplinary proceedings. (*Rosenthal v. State Bar* (1987) 43 Cal.3d 612, 634.) Harper received a fair hearing, the result of which was our recommendation that he be disbarred in his third disciplinary case, based on the evidence, the arguments, the case law, and our disciplinary standards. There is no evidence in the record that supports his claims that the discipline recommendation here was based on the disparate impact of discipline on Black male attorneys. Accordingly, Harper's claims of disparate impact are rejected.

VII. RECOMMENDATION

We recommend that Gregory Harper be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice law in California.

We further recommend that Harper comply with rule 9.20 of the California Rules of Court and 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 matter.

We further recommend that costs be awarded to the State Bar in accordance with section 6086.10, such costs being enforceable as provided in section 6140.7 and as a money judgment. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against a member who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

VIII. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

The order that Gregory Harper be involuntarily enrolled as an inactive attorney of the State Bar pursuant to section 6007, subdivision (c)(4), effective May 26, 2019, will remain in effect pending consideration and decision of the Supreme Court on this recommendation.

HONN, J.

WE CONCUR:

PURCELL, P. J.

McGILL, J.