

Filed September 9, 2014

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

In the Matter of	)	Case No. 11-O-18556
	)	
CYNTHIA S. HERNANDEZ,	)	OPINION
	)	
A Member of the State Bar, No. 133915.	)	
_____	)	

A hearing judge recommended that Cynthia S. Hernandez receive a 30-day actual suspension because she failed to competently perform, disobeyed court orders, and did not timely release a client’s file. Hernandez appeals and argues the Office of the Chief Trial Counsel of the State Bar (OCTC) failed to sufficiently prove any misconduct. She also contends that OCTC did not prove all the aggravation the hearing judge found and believes she should have received additional mitigation. She requests that the matter be dismissed or that the recommended discipline be reduced.

We have independently reviewed the record under rule 9.12 of the California Rules of Court, and adopt the hearing judge’s culpability findings. Although we find fewer factors in aggravation and afford less weight to Hernandez’s good character evidence, we nevertheless concur with and adopt the hearing judge’s recommended discipline.<sup>1</sup>

**I. FACTS**

In late 2008, Melinda Costello hired a contractor to perform approximately \$31,000 in repairs to her home. Upon completion, Costello discovered defects in the repairs, concluded the

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<sup>1</sup> Having independently reviewed all arguments set forth by Hernandez, those not specifically addressed have been considered and are rejected as having no merit.

contractor charged her for work not performed, and sought a refund of the money she had paid him. She filed a complaint with the Contractors State License Board, which resulted in its recommendation of a nominal refund and additional repair work.

**A. Civil Proceedings**

Not satisfied with the Board's recommendation, Costello hired Hernandez in August 2010 to pursue personal injury and property damage claims against the contractor. Costello agreed to pay Hernandez a \$2,500 non-refundable retainer plus one-third of any settlement reached before trial, or 40% of any recovery obtained after arbitration, default, or trial. Because Costello waited two years before hiring Hernandez, she acknowledged in the retainer agreement that Hernandez might be unable to preserve all of her claims due to the statute of limitations.

On August 13, 2010, Hernandez filed a complaint against the contractor in San Francisco County Superior Court. She alleged nine causes of action including fraud, negligence, breach of contract, and discrimination. The discrimination claim was included because Costello felt the contractor preyed upon her due to her gender, age, and marital status. Hernandez thought Costello was in her 50s. To support the discrimination claim, she alleged that Costello was an "elderly female" who was discriminated against based on her "senior age." Costello testified she was 47 when she hired the contractor.

Although Hernandez spelled the contractor's name correctly in the summons, she misspelled it in the complaint. The superior court refused to issue the summons due to this discrepancy. Hernandez never amended the complaint to correct the spelling of the contractor's name. Without this amendment she could not obtain a properly issued summons for service upon the contractor. Therefore, Hernandez failed to serve the complaint in a timely fashion and failed to file proof of service of the summons and complaint by the October 12, 2010 court-ordered deadline.

On October 27, 2010, the court issued an order to show cause (OSC) that required Hernandez to appear on December 7, 2010, to explain why sanctions should not be imposed for her failure to timely serve the defendant. The court also ordered Hernandez to file a proof of service no later than one week before the hearing on December 7, 2010. Although Hernandez received the order, she did not file the required proof of service. She also failed to appear at the hearing, and instead left the court a voice message saying she was ill.

On January 4, 2011, the court issued a second OSC. This one required Hernandez to appear on February 28, 2011, to explain why the court should not dismiss the case or impose sanctions for her failure to file a proof of service, obtain an answer, or enter a default. Again, Hernandez received the order but did not appear at the hearing on February 28, 2011.

On February 28, 2011, the court issued a third OSC, requiring Hernandez to appear on May 2, 2011, to again explain why the case should not be dismissed for the same reasons given in the second OSC. The court also issued an order directing Hernandez to pay \$350 in sanctions by March 15, 2011. Hernandez received both orders.

In April 2011, Costello decided to dismiss the complaint, and so informed Hernandez. However, Hernandez did not file a dismissal and did not appear at the May hearing. On May 2, 2011, the court dismissed the case. Hernandez did not pay the court-ordered sanctions until March 2, 2012 — nearly one year late and only after OCTC began investigating her.

#### **B. Contractor's License Bond Demand**

In addition to the civil complaint, Hernandez filed a claim against the contractor's license bond on behalf of Costello in August 2010. She wrote several demand letters to the bond company detailing Costello's complaints, and drafted witness declarations to support Costello's claim. Hernandez also conducted an inspection of Costello's home with the bond company's expert. After the inspection, the bond company offered to settle Costello's claim in November

2010 for a sum substantially lower than Costello's demand. Before Costello agreed on a settlement amount, third parties filed claims against the bond, which, combined with Costello's claim, exceeded the bond limit. The parties could not agree on a fair allocation of the bond proceeds, so the bond company filed an interpleader action in September 2011 and deposited funds with the court.

**C. Hernandez's Termination**

Costello decided to pursue the bond claim herself and ultimately fired Hernandez in June 2011. She sent Hernandez confirmed-delivery letters on June 21 and August 1, 2011, each requesting her file. Hernandez received the letters, but did not immediately forward the file. She claimed that she had already given Costello her file on April 22, and June 6, 2011. Finally, on February 27, 2012, Hernandez gave Costello a copy of her file after a State Bar investigator directed her to do so.

**II. CULPABILITY**

OCTC charged Hernandez with four counts of misconduct. The hearing judge found Hernandez culpable of counts one through three, but for lack of evidence, dismissed count four, which alleged a violation of rule 3-700(D)(2) of the Rules of Professional Conduct (failure to refund unearned fees.)<sup>2</sup> Hernandez argues that OCTC failed to sufficiently prove any of the charges. We agree with the hearing judge's culpability findings, and adopt them.

**A. Count One: Rule 3-110(A) (Failing to Competently Perform)**

OCTC charged Hernandez with violating rule 3-110(A) for failing to competently perform by: (1) not obtaining an issued summons; (2) not serving the complaint; (3) not filing a proof of service; and (4) causing the case to be dismissed. Under this rule, an attorney "shall not

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<sup>2</sup> All further references to rules are to this source unless otherwise noted. On appeal, OCTC does not contest the hearing judge's dismissal of this count with prejudice, and we adopt this ruling.

intentionally, recklessly, or repeatedly fail to perform legal services with competence.” The hearing judge correctly found culpability on this charge because Hernandez’s conduct resulted in the court’s dismissal of Costello’s lawsuit for lack of prosecution. (*In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, 588-589 [attorney violated rule 3-110(A) when he filed complaint but failed to serve defendant or perform additional work].)

We reject Hernandez’s argument that her conduct did not violate rule 3-110(A) because Costello ultimately decided to dismiss the complaint. Costello did not make this decision until April 2011 — eight months after Hernandez filed the complaint. During those eight months, Hernandez never accomplished the amendment of the complaint, had the summons issued, served the defendant, or filed a proof of service.<sup>3</sup> When Costello eventually decided to dismiss the complaint, the case was already in a precarious procedural position due to Hernandez’s inaction.

We also reject Hernandez’s claim that she had no choice but to allow the court to dismiss the complaint since Costello withdrew Hernandez’s authority to appear on her behalf. In fact, Hernandez advised Costello that a voluntary dismissal would create the impression that the case lacked merit, which might weaken her claim against the bond, while an involuntary court dismissal would be less likely to do so. Thus, Hernandez’s decision to let the court dismiss the complaint was based on maintaining negotiating leverage against the bond, not because Costello withdrew Hernandez’s authority. We agree with the hearing judge that Hernandez’s acts sufficiently prove a violation of rule 3-110(A). (See *In the Matter of Kaplan* (Review Dept.

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<sup>3</sup> Hernandez presented evidence that she submitted an amendment in January 2011 to correct the contractor’s name on the complaint. She claims the hearing judge wrongly excluded evidence that the superior court rejected the amendment on May 5, 2011, but fails to show how the hearing judge’s decision prejudiced her. (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].) Hernandez made no effort to ensure the superior court accepted the amendment to the complaint for filing before the case was dismissed at the May 2, 2011 OSC.

1996) 3 Cal. State Bar Ct. Rptr. 547, 554 [attorney who filed complaint but took no substantive action thereafter violated rule 3-110(A)].)

**B. Count Two: Business and Professions Code Section 6103 (Disobeying Court Order)<sup>4</sup>**

Under section 6103, an attorney's "willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear . . . constitute[ ] causes for disbarment or suspension." OCTC alleged that Hernandez willfully disobeyed court orders because she did not file a proof of service (first order), repeatedly failed to appear (second and third orders), and did not timely pay sanctions (fourth order). The hearing judge correctly found Hernandez culpable as charged.

Hernandez admits she did not file a proof of service as ordered on October 12, 2010; appear as ordered on December 7, 2010, February 28, 2011, or May 2, 2011; or timely pay sanctions as ordered on February 28, 2011. Her failure to pay the sanctions for almost a year alone establishes her culpability, and she offered no defense for that charge. (See *In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 867-868 [failure to pay sanctions more than one year after issuance of order violated § 6103].)

Hernandez asserts two defenses regarding her failures to appear. First, she contends that her appearances as ordered were optional. Second, she claims she could not comply because Costello withdrew her authority to appear.<sup>5</sup> Hernandez's first argument ignores the record since the orders explicitly directed her to be in court at a specified date and time. They did not permit Hernandez to decide whether or not she should appear. Her second argument also fails since she

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<sup>4</sup> All further references to sections are to the Business and Professions Code.

<sup>5</sup> Under section 6104, it is a cause for disbarment or suspension for an attorney to willfully appear for a party to an action without authority to do so.

had a duty either to obey the court's orders or withdraw from the case; she did neither. (See *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 77, fn. 9 [attorney ineligible to practice law required to appear as ordered and "was obligated to do everything in his power to obey the court's order" including being physically present and providing explanation to court]; rule 3-700(B)(2) [attorney "shall withdraw" from employment if failure to do so will result in violation of State Bar Act].) We find Hernandez culpable of violating court orders as charged. (See *In the Matter of Hunter, supra*, 3 Cal. State Bar Ct. Rptr. at pp. 71-72 [attorney's failure to appear at hearing as ordered by court violated § 6103].)

**C. Count Three: Rule 3-700(D)(1) (Failing to Release Client File)**

Rule 3-700(D)(1) requires an attorney whose employment has terminated to "promptly release to the client, at the request of the client, all the client papers and property." OCTC alleged that Hernandez violated this rule when she failed to provide the file for eight months after Costello requested it on June 21, 2011. The hearing judge correctly found Hernandez culpable as charged.

We reject Hernandez's claim that the hearing judge improperly resolved conflicting evidence on this charge. Hernandez admitted she provided Costello a copy of her file in February 2012, but claimed that she also sent Costello copies in April and June 2011. Hernandez corroborated her testimony with two cover letters to Costello dated April 22 and June 6, 2011, which stated that she had enclosed the entire file. However, Costello denied ever receiving either letter from Hernandez. Costello also testified that she did not request her file until after she fired Hernandez in June 2011, and that she did not receive it until early 2012. The hearing judge did not believe Hernandez's testimony, and resolved this evidentiary conflict in Costello's favor. The hearing judge's findings as to facts and credibility are entitled to great weight (Rules

Proc. of State Bar, rule 5.155(A); *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 638), and we adopt them.

### III. AGGRAVATION AND MITIGATION

We recommend “the appropriate discipline in light of all relevant circumstances. [Citation.]” (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) This includes consideration of aggravating and mitigating circumstances. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,<sup>6</sup> stds. 1.2(f) [aggravating circumstances demonstrate need for greater degree of sanction] and 1.2(g) [mitigating circumstances demonstrate more lenient degree of sanction would be adequate].) OCTC must prove aggravating circumstances by clear and convincing evidence.<sup>7</sup> (Std. 1.5.) Similarly, Hernandez must meet the same burden to prove mitigating circumstances. (Std. 1.6.)

#### A. Aggravating Circumstances

The hearing judge made five findings in aggravation: (1) prior record of discipline; (2) multiple acts of misconduct; (3) misconduct surrounded by dishonesty; (4) harm to the administration of justice; and (5) indifference. Hernandez contests the findings that her misconduct was surrounded by dishonesty and significantly harmed the administration of justice. We agree, and adopt only three of the hearing judge’s aggravation findings.

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<sup>6</sup> All further references to standards are to this source and reflect modifications effective January 1, 2014.

<sup>7</sup> Clear and convincing evidence must leave no substantial doubt and must be sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)



### **1. Prior Record of Discipline (Std. 1.5(a))**

***In the Matter of Cynthia S. Hernandez* (November 1, 1994, Cal. State Bar Ct. Nos. 92-O-17839, 93-O-19063)**

In November 1994, the State Bar Court privately reprimanded Hernandez with conditions for misconduct committed in 1992. Hernandez stipulated that she violated a court order (§6103) and failed to maintain respect due to the court (§6068, subd. (b)) in a family law matter. In a second matter, Hernandez agreed that she did not perform competently (rule 3-110(A)) when she failed to communicate with a client and failed to file a lawsuit for the client's personal injuries within the statute of limitations. Hernandez received mitigation credit for her cooperation and there were no aggravating circumstances. Although this prior misconduct was remote in time, we give it aggravating weight because it is similar to the misconduct in the present matter, involving failure to perform with competence and failure to obey a court order. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443-444 [prior discipline considered because similar to present misconduct though argued to be remote in time].)

### **2. Multiple Acts of Misconduct (Std. 1.5(b))**

We agree with the hearing judge's aggravation finding that Hernandez committed multiple acts of misconduct. (See *In the Matter of Bach, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 646-647 [three instances of misconduct considered aggravating as multiple acts of misconduct].)

### **3. No Misconduct Surrounded by Dishonesty (Std. 1.5(d))**

Aggravating circumstances may include intentional misconduct and dishonesty. (Std. 1.5(d).) The hearing judge found Hernandez "misled the court and opposing counsel by stating [in the complaint] that Costello was elderly when, in fact, she was not." Hernandez correctly argues that no evidence shows that the court or opposing counsel were misled. In addition, OCTC did not rebut Hernandez's belief that Costello was in her 50s and was

discriminated against due to her age. Furthermore, nothing in the record nor any legal authority deems it improper to describe a plaintiff in her late 40s or early 50s as elderly to support an age discrimination claim. (See, e.g., Cal. Code Regs., tit. 2, §11074 [law prohibiting age discrimination guarantees employment protection for persons 40 or older].) Therefore, we do not adopt this finding in aggravation.

#### **4. No Significant Harm to Administration of Justice (Std. 1.5(f))**

Significant harm to the administration of justice may constitute aggravation. (Std. 1.5(f).) Hernandez contends that even if her misconduct harmed the administration of justice, OCTC did not prove it was significant. We agree. Although she disobeyed four separate court orders, OCTC failed to demonstrate that this caused the court to expend significant judicial resources. (See *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 133 [where misconduct caused unnecessary sanction motions and hearings, this alone did not establish significant harm to administration of justice].)

#### **5. Indifference (Std. 1.5(g))**

The hearing judge found indifference because Hernandez blamed Costello for her misconduct, as evidenced by her references to Costello as mentally unstable, delusional, and schizophrenic.<sup>8</sup> Hernandez does not challenge this finding, and we agree that she showed indifference, albeit for a different reason than the hearing judge found.

While Hernandez may have inartfully attempted to convey that Costello frequently vacillated in her decision-making process, no clear and convincing evidence revealed that Hernandez meant these characterizations in their clinical or medical sense. As such, we do not find that these references represent indifference.

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<sup>8</sup> Under standard 1.5(g), aggravating circumstances may include “indifference toward rectification or atonement for consequences of the misconduct.”

However, we find that Hernandez displayed indifference when she testified that Costello's action in withdrawing Hernandez's authority to appear caused her to disobey the court orders. (*In the Matter of Aguiluz* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 41, 50 [blaming others, including clients, for failure to follow Rules of Professional Conduct shows indifference and lack of insight].)

## **B. Mitigating Circumstances**

The hearing judge found Hernandez's good character and community service were mitigating circumstances. We adopt these findings, with minor modifications.

### **1. Good Character (Std. 1.6(f))**

Under standard 1.6(f), we afford 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." Hernandez's three character witnesses — a retired member of the Mendocino County Board of Supervisors, an investigator for the Franchise Tax Board, and a former client who works in construction — have known her between 12 and 29 years. Despite their knowledge of the charges against Hernandez, they believe she is a competent lawyer with impeccable honesty.

OCTC argues that Hernandez's character evidence does not deserve the "great weight" the hearing judge found. We agree. Three character witnesses do not constitute a sufficiently wide range of references. Therefore, we assign limited weight to this mitigation. (See *In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 476-477 [character evidence entitled to limited weight since it was not from wide range of references].)

Hernandez argues she did not receive a fair trial because the hearing judge prevented the live testimony of two character witnesses. This claim is meritless. When these witnesses arrived at court, the hearing judge did not allow their testimony because OCTC was still presenting its

case-in-chief. (*Jones v. State Bar* (1989) 49 Cal.3d 273, 287 [hearing judge “has discretion to exercise reasonable control over the proceedings”].) Hernandez’s attorney did not ask that these witnesses be allowed to return at a later date but instead requested permission to offer their declarations. The hearing judge granted the request, and Hernandez’s attorney agreed to provide them by February 28, 2013. However, Hernandez unsuccessfully attempted to submit the declarations in March 2013, after the record was closed and the matter had been submitted for decision. Under these circumstances, we find that the hearing judge did not abuse her discretion or deny Hernandez a fair trial.<sup>9</sup>

## **2. Community Service/Pro Bono Work**

Community service and pro bono work are mitigating circumstances recognized by case law. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [community service and pro bono activities are mitigating factors that may be entitled to considerable weight].) Since 1999, Hernandez provided pro bono services to individuals at the Sonoma County Law Library. She also worked as a missionary for a few weeks and continues to regularly volunteer at two churches. We agree with the hearing judge that Hernandez’s pro bono work and community service warrant mitigation credit, and we adopt this finding.

## **3. No Additional Mitigation**

Hernandez contends she should receive additional mitigation because: (1) she acted in good faith in light of Costello’s withdrawal of authority to represent her (std. 1.6(b)); (2) she caused no loss to Costello (std. 1.6(c)); and (3) Costello was a difficult and dishonest client.

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<sup>9</sup> We also reject Hernandez’s claim that OCTC’s post-trial submission of a victim’s impact statement and its purported failure to disclose documents in discovery precluded her from receiving a fair trial. Since the hearing judge did not find client harm, Hernandez failed to establish that OCTC’s post-trial submission of a victim’s impact statement prejudiced her. Hernandez also failed to show how OCTC’s purported failure to disclose documents in discovery prejudiced her. (*Stuart v. State Bar* (1985) 40 Cal.3d 838, 845 [showing of specific prejudice before procedural errors will invalidate determination of hearing panel].)

(*Chefsky v. State Bar* (1984) 36 Cal.3d 116, 132 [“The difficulty of dealing with such clients has been acknowledged as a mitigating factor. [Citation.]”]) Her claims for additional mitigation are unavailing. Even if Hernandez honestly believed Costello withdrew her authority to appear, thus preventing her from obeying the court’s orders, her actions were unreasonable because she had a duty to withdraw from employment in such circumstances. (Std. 1.6(b) [for mitigation, good faith belief must be “honestly held and reasonable”].) Hernandez also inconvenienced Costello when she did not promptly return her file. Although there is no evidence this inconvenience rose to the level of cognizable harm in aggravation, it clearly rebuts a finding of no harm in mitigation. (See *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 156 [where attorney’s conduct did not constitute harm to administration of justice, but was sufficient to repudiate finding of no harm in mitigation].) Finally, Hernandez failed to prove Costello was a difficult and lying client. She testified that Costello was ambivalent about filing the lawsuit and suffered from delusions and mental instability. However, Costello claimed that she never wanted to file a lawsuit and denied having mental health issues. In light of this conflicting testimony, we cannot conclude that there is clear and convincing evidence that Costello was a difficult or dishonest client. Accordingly, we reject Hernandez’s claim for additional mitigation.

#### **IV. LEVEL OF DISCIPLINE**

When recommending discipline for ethical misconduct, our primary purposes are to protect the public, the courts, and legal profession, maintain high professional standards and preserve public confidence in the legal profession. (Std. 1.1.) In arriving at an appropriate discipline, “we must consider the underlying conduct and review all relevant aggravating and mitigating circumstances. [Citation.]” (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 932.)

We begin our discipline analysis with the standards, which the Supreme Court instructs us to follow “whenever possible.” (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) Although not binding on us, we give them great weight to promote “the consistent and uniform application of disciplinary measures.” (*In re Silverton* (2005) 36 Cal.4th 81, 91, internal quotations and citations omitted.)

Of the multiple standards applicable in this case, we consider standard 2.8(a) most relevant since it allows the most severe sanction.<sup>10</sup> Under this standard, we can recommend a broad range of discipline from actual suspension to disbarment. Therefore, in order to further refine our discipline analysis, we review comparable case law for additional guidance. (See *In the Matter of Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160, 168 [where standards provided for suspension to disbarment, disciplinary decisions looked to for guidance].)

We reject Hernandez’s request at oral argument for a public reproof. The purpose of progressive discipline under standard 1.8(a) is to deter future misconduct by addressing a recidivist’s current wrongdoing with *appropriate* discipline that is greater than in the previous case. The policy behind such a rule is especially pronounced when the prior and current misconduct are similar in nature. To illustrate, in *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 371, we recommended a six-month suspension as progressive discipline for an attorney’s failure to perform competently where a 30-day suspension had been imposed for past similar misconduct. We justified imposing “significantly greater discipline” because the attorney did not appreciate his misconduct, which presented a concern for future wrongdoing. (*Id.* at pp. 380-381.) The same principle applies here. Hernandez’s misconduct in

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<sup>10</sup> See, e.g., standards 1.7 (when multiple sanctions apply, most severe shall be imposed); 1.8(a) (when attorney has prior record, present sanction must be greater than sanction previously imposed); 2.5(c) (reproof is appropriate for failing to perform in single client matter); 2.8(a) (disbarment or actual suspension is appropriate for disobedience of court order related to attorney’s practice of law); and 2.15 (reproof or suspension imposed for violation of rule 3-700).

her prior discipline is similar to that in the current matter. Her request for another reproof fails to address the similarity of her two disciplinary proceedings. Progressive discipline is necessary to impress upon her the importance of refraining from further misconduct.

Since the gravamen of Hernandez's misconduct involves issues of competent performance, which underlie her violation of court orders, we have reviewed cases that involve an attorney's failure either to perform in a single client matter or to obey court orders. Such cases imposed discipline ranging from reproof to 90 days' actual suspension.<sup>11</sup>

In determining our recommended level of discipline, we examined *Stuart v. State Bar* (1985) 40 Cal.3d 838, where the Supreme Court imposed a 30-day actual suspension for an attorney's misconduct surrounding a single client abandonment. Shortly before this misconduct, he had been privately reproofed. The attorney in *Stuart* failed to comply with his ethical duties by not communicating with his client and opposing counsel, not informing the client of the consequences of not participating in discovery, and not informing the client of significant developments in his case. The court found that he had violated his oath (§ 6067) and duties as an attorney (§ 6068), committed acts of moral turpitude (§ 6106), failed to perform with competence (former rule 6-101, now 3-110(A)), and failed to properly withdraw from his employment (former rule 2-111, now 3-700.) In reviewing our recommendation of stayed suspension, the Supreme Court concluded that it was too lenient, and that "[s]ome actual suspension is necessary to bring home to petitioner the high degree of care and fiduciary duty he owes to those he represents." (*Stuart, supra*, at p. 847.)

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<sup>11</sup> See *In the Matter of Respondent Y, supra*, 3 Cal. State Bar Ct. Rptr. 862 (private reproof where attorney violated sanctions order and did not report sanctions; misconduct mitigated by absence of priors); *Van Sloten v. State Bar, supra*, 48 Cal.3d 921 (six-month stayed suspension for failing to perform in one client matter aggravated by failure to appear at oral argument); and *Harris v. State Bar* (1990) 51 Cal.3d 1082 (90-day actual suspension for failing to competently perform and improper withdrawal from employment in single client matter aggravated by client harm and lack of remorse, mitigated by illness).

Also instructive in our analysis is *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41. The attorney in that case received a six-month stayed suspension after he failed to obey two Supreme Court orders, to competently perform, and to report judicial sanctions. His misconduct involved multiple acts and harmed the administration of justice, but was mitigated by a 17-year discipline-free career, almost four years post-misconduct without discipline, cooperation, and nominal good character.

Hernandez's misconduct warrants a sanction more severe than in *Riordan* because her mitigation is not as extensive, she has shown no remorse, and she has a prior record of discipline that involves similar misconduct. Considering the unique circumstances of this case, the standards, and relevant case law, we adopt the hearing judge's recommendation of a 30-day actual suspension as appropriate progressive discipline.

#### **V. RECOMMENDATION**

For the foregoing reasons, we recommend that Cynthia S. Hernandez be suspended from the practice of law for one year, that execution of that suspension be stayed, and that she be placed on probation for two years on the following conditions:

1. She must be suspended from the practice of law for a minimum of the first 30 days of probation.
2. She must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of her probation.
3. Within 30 days after the effective date of discipline, she must contact the Office of Probation and schedule a meeting with her assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, she must meet with the probation deputy either in person or by telephone. During the period of probation, she must promptly meet with the probation deputy as directed and upon request.
4. 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 her current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, she must report such change in writing to the Membership Records Office and the State Bar Office of Probation.



5. She 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, she must state whether she has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his 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.
6. Subject to the assertion of applicable privileges, she must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to her personally or in writing, relating to whether she is complying or has complied with the conditions contained herein.
7. Within one year after the effective date of the discipline herein, she must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and she shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

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 Hernandez has complied with all conditions of probation, the stayed suspension will be satisfied and that suspension will be terminated.

## **VI. PROFESSIONAL RESPONSIBILITY EXAMINATION**

We further recommend that Hernandez 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 imposing discipline in this matter 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).)

## VII. COSTS

We further 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

HONN, J.\*

WE CONCUR:

EPSTEIN, Acting P. J.

PURCELL, J.

\*Hearing Judge of the State Bar Court, assigned by the Presiding Judge pursuant to rule 5.155(F) of the Rules of Procedure of the State Bar.