

STATE BAR COURT OF CALIFORNIA
REVIEW DEPARTMENT

In the Matter of) Case No. 12-O-16226
)
ANTHONY ROBERT LOPEZ, JR.,) OPINION
)
A Member of the State Bar, No. 137401.)
_____)

Anthony Robert Lopez, Jr., and the Office of the Chief Trial Counsel of the State Bar (OCTC) seek review of a hearing judge’s decision finding Lopez culpable of two counts of misconduct for his failure to maintain sufficient funds in trust for three medical providers (rule 4-100(A))¹ and his failure to obtain written conflict waivers (rule 3-310(C)(2)). The hearing judge dismissed three additional counts alleging the failure to perform competently (rule 3-110(A)), to inform clients of significant developments (§ 6068, subd. (m)), and to respond to status inquiries (*ibid*). All of the charges stem from Lopez’s representation of two brothers in a personal injury matter. Due largely to Lopez’s two prior discipline records, the hearing judge recommended a two-year actual suspension, conditioned upon proof of rehabilitation.

On appeal, Lopez challenges the two culpability findings and seeks less discipline. OCTC asks that two of the dismissed charges be reinstated and requests disbarment. Having reviewed the record independently (Cal. Rules of Court, rule 9.12), we conclude that the hearing judge erred in finding a trust account violation because the record does not establish that Lopez

¹ All references to rules refer to the Rules of Professional Conduct, and all references to sections refer to the Business and Professions Code, unless otherwise noted.

failed to maintain adequate settlement funds in trust for the benefit of the medical providers. We affirm the judge's determinations as to the remaining four counts.

Our disagreement with the judge's culpability finding of a trust account violation considerably impacts our discipline analysis. We view the single remaining count for which Lopez is culpable—the failure to obtain conflict waivers— as “relatively minor” misconduct since it did not result in client harm. (*In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 7.) Indeed, the attorney who succeeded Lopez in representing the two clients described Lopez's actions as “zealously representing the [clients] and helping them to obtain as much of their recovery as possible” This attorney advised the State Bar that Lopez “should be publicly praised for getting a great result for his clients.”

Equally important to our analysis are the facts that Lopez's misconduct occurred two and a half years *before* his second discipline proceeding was initiated and is entirely unrelated to his prior misconduct. As such, we find Lopez's prior discipline to be less consequential than did the hearing judge. Finding more mitigation and less aggravation, we conclude that a 30-day actual suspension is sufficient to protect the public, the courts, and the profession.

I. PROCEDURAL HISTORY

In June 2013, OCTC filed a five-count notice of disciplinary charges (NDC) against Lopez. In April 2014, the parties filed pretrial stipulations as to facts and admission of documents, and the matter proceeded to a three-day trial.

II. FACTUAL BACKGROUND

Our factual findings are based on the hearing judge's determinations, to which we afford great weight (see Rules Proc. of State Bar, rule 5.155(A)), the parties' stipulations, the trial testimony, and the documents in evidence. We note that the hearing judge made express credibility findings in favor of Lopez and his witnesses. Such findings are entitled to particular

deference because the hearing judge who heard the testimony was in the best position to evaluate the demeanor of the testifying witnesses. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032.)

The complainants, Lopez's former clients, David and Miguel Baez, did not testify.²

A. Lopez Accepts Joint Representation Without Obtaining Written Conflict Waivers

Lopez was admitted to the State Bar of California in 1988. In July 2007, David and Miguel retained him to pursue claims for personal injuries they suffered in a May 2007 car accident while David was driving and Miguel was a passenger. When the brothers retained him, Lopez knew that David did not have a driver's license or insurance when he rear-ended another vehicle. Yet Lopez did not warn the brothers of actual or potential conflicts of interest nor obtain their informed written consent to the joint representation.

In late summer of 2007, Lopez received the police report of the accident, which included a finding that David caused the collision by speeding. Lopez also received medical records indicating that David was under the influence of drugs at the time of the accident. Upon reviewing these documents, Lopez explained to David and Miguel the actual and reasonably foreseeable risks relating to their joint representation, but he did not obtain written conflicts waivers from them.

B. Lopez Received Lien Documents from David's Medical Providers

Multiple medical providers treated David, whose bills exceeded \$200,000.³ In October 2007, Lopez received lien forms from two of those providers: Dr. Cervantes and Sunnyvale MRI (Sunnyvale). Lopez signed the forms, but added the following proviso next to his signature:

WARNING: Law Office of Anthony R. Lopez & Assoc. will only agree to withhold 33% of the Bodily Injury Portion of the client's settlement to pay all the client's

² Miguel Baez was subpoenaed to testify at trial, but failed to appear. Hereafter, we refer to the Baez brothers by their first names for clarity.

³ The NDC alleged trust account violations relating only to the liens for David, and the evidence offered was limited to David's medical providers.

medical providers. If this amount is not acceptable, this lien is void. (Emphasis in the original.)⁴

There is no evidence that either provider rejected the lien form with this limitation. In fact, Cervantes continued to perform chiropractic services after he received the lien, although he testified he did not notice the restriction added by Lopez.

In February 2008, Lopez received a lien form from another of David's medical providers, Bay Area Surgical Group (Bay Area). When he signed Bay Area's form, he did not add the 33-percent limitation. The Bay Area form provided that David would authorize Lopez to "withhold such sums from settlement . . . as may be necessary to protect [Bay Area] adequately," but David did not sign the lien document.⁵

C. Lopez Settles Baezes' Claims and Distributes Portions of Recovery to Clients

In December of 2009, Lopez settled David's and Miguel's claims against the driver of the other vehicle for \$40,000 and \$72,500, respectively. He deposited both settlement checks in his client trust account (CTA). In January 2010, Lopez withdrew his fees and costs. He also distributed \$5,000 from his CTA to David and \$7,000 to Miguel. However, he maintained \$13,712.14 of David's settlement funds in trust, which was more than the 33 percent of David's \$40,000 settlement required to satisfy the medical liens.

⁴ The record contains a second lien form from Sunnyvale that shows Lopez's signature but no 33-percent limitation. Lopez testified that this version was a duplicate he kept for his file but never sent to Sunnyvale. This testimony was unrefuted.

⁵ At trial, OCTC offered another lien form produced by Bay Area which purportedly was signed by David. The form was undated, contained a virtually illegible signature, and Lopez had not signed it. Bay Area's custodian of records, who assumed that position long after David had been a patient of the medical group, did not authenticate the signature. She also was unable to provide any proof that the second lien form had been sent to Lopez for his signature. Lopez's unrefuted testimony is that he never received the second form, and was unaware of it.

When David and Miguel picked up their settlement checks, Lopez's office manager, Yesenia Lopez,⁶ explained that Lopez intended to negotiate reductions in their outstanding medical bills before further funds could be distributed. Before leaving, David and Miguel informed Yesenia that they planned to return to their home in Mexico. Yesenia instructed them to keep Lopez's office apprised of their contact information. Although David and Miguel came to the office frequently prior to the settlement, they seemed disinterested in further contact after they collected their checks.

D. Lopez Attempts to Resolve David's and Miguel's Medical Bills

After settling David's and Miguel's lawsuits, Lopez and his staff made numerous calls and sent many letters to the medical providers, attempting to negotiate their bills. The hearing judge found Lopez and his staff credibly testified about their persistent efforts to negotiate with the providers, which is supported by documentary evidence including, inter alia, numerous batches of letters sent to providers on:

- May 14, 2010
- August 17, 2010
- September 22, 2010
- November 16, 2010
- February 18, 2011
- April 5, 2011
- August 12, 2011
- November 16, 2011

Lopez testified that they sent letters because they "weren't getting a lot of cooperation" in their telephonic efforts. One staff member testified she regularly followed up with providers within five to 30 days after sending the letters. She also testified that none of the letters was returned as undeliverable. Another staff member said she would "make endless calls" and send

⁶ We refer to office manager Lopez by her first name for clarity.

letters in an effort to communicate with the providers. Additionally, Lopez testified to his own specific recollection that he continued to call providers, at least through the summer of 2012.

Other than Sunnyvale, which eventually agreed to settle its bill for \$1,000, the providers remained generally unresponsive. Lopez believed they were not interested in expending resources to collect on the debts, given the small amount of settlement funds available to each provider. Their disinterest was later confirmed by the fact that only two providers appeared in the interpleader action Lopez eventually filed.

E. Lopez Is Unable to Contact David and Miguel

From the time they picked up their checks in January 2010 through April or May of 2010, neither David nor Miguel contacted Lopez's office. Lopez was not surprised since Yesenia had explained to them that resolving their outstanding bills could take quite some time. In April or May of 2010, Marty Estrada, a self-described local community activist, twice came to Lopez's office unannounced, once with David and Miguel, and a second time with Miguel only. Estrada was threatening, demeaning, and used profanity toward the staff when asking about the distribution of the remaining settlement funds. He prohibited Miguel and David from responding when Yesenia asked for contact information so that Lopez could answer their questions.

In June of 2010, Lopez received a letter from attorney Michael Millen on behalf of David and Miguel, requesting information about the status of their case. Lopez sent Millen a written update, and in June and July of 2010, they also discussed by phone the challenges involved in resolving the matters, given the considerable disparity between the settlement amounts and the outstanding medical bills. They conferred about filing an interpleader to resolve the interested parties' rights to the settlement funds. They also talked about possibly waiting out the statutes of limitations on the medical providers' claims to obtain a greater recovery for the Baezes.

In July 2010, Millen sent Lopez a letter thanking him for his “hard work” on the Baezes’ case and requesting an accounting of the funds paid to medical providers to date. In a prompt response, Lopez clarified that he had not yet distributed any funds to the providers, given his difficulties negotiating the liens. He advised Millen that he intended in all likelihood to file an interpleader to distribute the remaining monies.

After his communications with Millen during the summer of 2010, Lopez received no further contact from him or from David, Miguel, or Estrada. During the next two and a half years, Lopez’s office was unable to contact Miguel and David, even though his staff made repeated attempts to do so, using the addresses and phone numbers provided by the two brothers.⁷ Yesenia testified that she personally visited the various addresses Lopez’s office had on file in trying to locate them.

F. Lopez Files Interpleader Complaint to Resolve Claims to Settlement Funds

In November of 2012, Lopez learned that Miguel and David had complained to the State Bar about his failure to disburse their settlement funds. Following communications with the Bar, he filed an interpleader complaint on December 7, 2012 in state court, naming David, Miguel, and their medical providers as defendants and seeking a judgment distributing the settlement funds.⁸ Because neither brother had a Social Security number, driver’s license, or other form of identification, Lopez was unable to locate them to inform them of the complaint before he filed it. However, in May of 2013, after receiving the State Bar’s discovery responses, Lopez

⁷ The phone numbers were either disconnected or rang repeatedly without answer, and their letters to Miguel and David were unanswered.

⁸ Lopez deposited \$38,212.14 from Miguel’s settlement and \$17,712.14 from David’s with the superior court for the interpleader. These were the amounts of funds Lopez held in his CTA on behalf of each brother, plus an additional \$7,000 for Miguel and \$5,000 for David, which Lopez contributed to replenish the amounts he had distributed to Miguel and David in January 2010.

obtained the needed information and effected service.⁹ Yesenia then went to Miguel's new address personally and informed him of the interpleader. At that time, Miguel informed Yesenia that David had been deported. Once he had Miguel's address, Lopez sent multiple letters advising Miguel to speak with counsel promptly to preserve his and David's rights to make a claim to the remaining funds.

Ultimately, Miguel and David retained attorney Millen to represent them in the interpleader. Pursuant to the interpleader judgment, Miguel received \$28,659, and David received \$14,783.94. The judgment allocated the remainder of the funds among Lopez and the two medical providers who appeared in the case.

III. CULPABILITY

A. **Count 5: Failure to Maintain Funds in Client Trust Account (Rule 4-100(A))**

The issue of Lopez's culpability for a trust account violation, as alleged in Count Five, is the most significant to our discipline analysis, and therefore we address it first.

The hearing judge found Lopez violated rule 4-100(A)¹⁰ because he disbursed \$5,000 to David in January 2010 from his settlement before paying David's medical lien holders. This finding was predicated on the judge's determination that Lopez assumed a fiduciary duty to the medical providers when he signed their lien forms, thus requiring him to "maintain the *entire* \$18,712.86 in his CTA until it was properly disbursed" (Italics added.) However, the hearing judge erred in finding a violation of rule 4-100(A) because he overlooked the contractual

⁹ OCTC was an impediment to the timely service of the interpleader complaint. Despite being in contact with Miguel and David as early as May 2012, it did not provide their addresses when requested by Lopez's attorney. Instead, the deputy trial counsel merely told Lopez's counsel to search through voluminous discovery produced by OCTC.

¹⁰ Rule 4-100(A) provides in relevant part: "All funds received or held for the benefit of clients by a member . . . shall be deposited" into a trust account or similarly identifiable bank account.

limitation in the lien forms that circumscribed the amount of funds Lopez was required to maintain in trust.

When, as in this instance, the obligation to maintain funds is premised on a non-statutory medical lien, the scope of an attorney's duty to a medical provider depends on the lien terms, which create a contractual obligation to withhold client funds to the extent specified therein. (*Gilman v. Dalby* (2009) 176 Cal.App.4th 606, 614-615 [non-statutory medical liens are contractual in nature]; *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 113-115.) In this context, we examine the fiduciary duty to the medical providers that Lopez assumed.

OCTC did not present clear and convincing evidence¹¹ that Lopez was required to hold the entire \$18,712.86 of the settlement funds in his CTA on behalf of the providers. Indeed, the liens obtained by Cervantes and Sunnyvale required only that Lopez withhold 33 percent of David's settlement, which is precisely what he did when he maintained \$13,712 for the two providers after distributing \$5,000 to David.¹² No evidence shows that either Cervantes or Sunnyvale rejected this contractual condition. In fact, Cervantes continued to provide services after he received the form with the 33 percent limitation. At the same time, OCTC failed to establish that Lopez was required to hold *any* funds on Bay Area's behalf since OCTC offered no competent evidence that Bay Area's lien form was enforceable. As discussed *ante*, the only evidence that David signed Bay Area's lien form was an undated copy of the document containing a signature that was unauthenticated and was not signed by Lopez. Absent evidence

¹¹ Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

¹² After Lopez deducted his \$16,000 in fees, \$5,287.86 in costs, and disbursed \$5,000 to David from the \$40,000 settlement, the CTA had a balance of \$13,712.14. According to the terms of the liens, he was only obligated to hold 33 percent or \$13,200.

of his signature, Lopez had no contractual duty or correlative fiduciary duty to maintain entrusted monies for Bay Area. (*Gilman v. Dalby, supra*, 176 Cal.App.4th at pp. 614-615 [“because defendants had not signed the [medical] lien, they did not have any contractual duty to [the lienholder”].)

In sum, OCTC failed to establish that Lopez’s \$5,000 payment to David resulted in a rule 4-100(A) violation because Lopez maintained adequate funds for Cervantes and Sunnyvale in accordance with the terms of their respective liens. We dismiss this charge with prejudice.

B. Count 1: Failure to Perform Legal Services with Competence (Rule 3-110(A))

The hearing judge dismissed Count One, which charged Lopez with “intentionally, recklessly, or repeatedly” failing to perform legal services with competence (rule 3-110(A))¹³ by failing to negotiate David’s and Miguel’s medical bills after April 2011 and by failing to file the interpleader until December 2012. We adopt the judge’s findings and affirm the dismissal.

The unrefuted trial evidence established that Lopez and his staff continued in their negotiation attempts through at least the summer of 2012. Even if Lopez thereafter suspended his efforts, his handling of the debts and the interpleader do not constitute an intentional, reckless, or repeated failure to perform competently. (See *In the Matter of Riley, supra*, 3 Cal. State Bar Ct. Rptr. at p. 107 [no culpability under rule 3-110(A) where multiple failures to pay medical liens did not involve deliberate indifference to lienholders’ rights; negligence was insufficient to establish violation].) To the contrary, the Baez brothers’ successor attorney wrote to OCTC stating that “Mr. Lopez[s] delay in filing the interpleader greatly helped the Baez brothers. Because of the delay, many of the medical providers decided to not pursue their claims. Those that did took a substantial markdown resulting in the Baez brothers receiving the overwhelming majority of the funds.”

¹³ “A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.” (Rule 3-110(A).)

C. Count 2: Failure to Inform Clients of Significant Developments (§ 6068, subd. (m))

Count Two charged that Lopez violated section 6068, subdivision (m),¹⁴ by failing to notify David and Miguel that he intended to file the interpleader complaint until May 2013 after he had actually filed it. These allegations are flatly unsupported by the evidence, and the hearing judge correctly dismissed them.

Lopez discussed the possibility of filing an interpleader with his clients before their mediation. And as early as July 2010, Lopez advised Millen, David's and Miguel's successor attorney: "it is likely that my office will be required to file an action in interpleader in order to distribute the remaining funds" Lopez communicated again with Millen by phone and by mail about filing an interpleader due to his lack of success in resolving the outstanding liens. If David and Miguel did not know of Lopez's intentions, the responsibility lies with Millen, not with Lopez.

The record also establishes Lopez's ongoing efforts, albeit unsuccessful, to locate his clients in order to serve them with the interpleader complaint, including utilizing skip tracing and hiring a private investigator. We also note OCTC's lack of cooperation with Lopez and his counsel to expedite the service of the complaint.

We affirm the hearing judge's dismissal.

D. Count 3: Failure to Respond to Reasonable Status Inquiries (§ 6068, subd. (m))

Count Three charged Lopez with failing to promptly respond to the Baezes' reasonable status inquiries from about March 2010 through June 2010. The hearing judge correctly dismissed this charge, as the record contains no evidence that Miguel or David made any such inquiries. OCTC does not challenge this dismissal, and we affirm it.

¹⁴ It is the duty of an attorney "[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services." (§ 6068, subd. (m).)

E. Count 4: Failure to Obtain Informed Written Consent Regarding Conflict (Rule 3-310(C)(2))

The hearing judge correctly found Lopez culpable of violating rule 3-310(C)(2), which provides that a member shall not, without written consent of each client “[a]ccept or continue representation of more than one client in a matter in which the interests of the clients actually conflict”

When David and Miguel retained Lopez, they informed him that David had rear-ended the other vehicle, had no driver’s license, and was uninsured. Shortly thereafter, Lopez learned that the police concluded that David caused the accident by speeding. Lopez also learned from a medical report that David was driving under the influence of drugs. At that point, an actual conflict of interest existed between David and Miguel due to the variance in their respective liability. (See *In the Matter of Aguiluz* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 41, 49 [actual conflict of interest developed in concurrent representation of driver and passenger once attorney learned of insurer’s assertion that liability rested with driver-client].)

Lopez argues that no conflict arose because Miguel had no interest in suing his brother. We rejected this same argument in *Aguiluz*, wherein we found the assertion by a passenger-client that he did not intend to sue the driver-client did not establish the absence of conflicting interests and was no defense to a lack of compliance with the conflict-of-interest rule. (*In the Matter of Aguiluz, supra*, 3 Cal. State Bar Ct. Rptr. at p. 49.) Lopez further argues there was no conflict because Miguel had no viable claim against David, who was judgment-proof. We rejected that argument in *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 616. We found that the fact that a claim against the driver was not viable did not establish a defense to a rule 3-310 violation, but was only relevant to the seriousness of the violation. And, in fact, Miguel did have a viable claim against David’s recovery in the lawsuit.

“It is the lawyer’s duty to secure as large a recovery as possible for the clients and to advise each client with undivided loyalty.” (*In the Matter of Sklar, supra*, 2 Cal. State Bar Ct. Rptr. at p. 616.) Ultimately, “[a]ttorneys who undertake to represent parties with divergent interests owe the highest duty to each to make a full disclosure of all facts and circumstances which are necessary to enable the parties to make a fully informed decision regarding the subject matter of the litigation.” (*Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 901.) Such did not occur here. Even though Lopez testified that he verbally advised the brothers of the conflicts and risks of joint representation, he violated rule 3-310(C)(2) by failing to obtain both clients’ signed, informed written waivers.

IV. AGGRAVATION AND MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct¹⁵ requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Lopez to meet the same burden to prove mitigation. The hearing judge found Lopez’s conduct was mitigated by cooperation with the State Bar, remorse, good character, and pro bono work, and aggravated by his prior record of discipline and multiple acts of wrongdoing. We agree with these findings, except that we do not find multiple acts since Lopez’s culpability flows from a single count of failing to obtain a conflict waiver, and we assign far less weight in aggravation to the prior misconduct.

A. Mitigation

Lopez is entitled to minimal credit for cooperation based on his pretrial stipulation, which contained easily provable facts. (Std. 1.6(e); *In the Matter of Bouyer* (Review Dept. 1998) 3 Cal.

¹⁵ Effective July 1, 2015, the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, were revised and renumbered. Because these requests for review were submitted for ruling after the July 1, 2015 effective date, we apply the revised version of the standards. All further references to standards are to the revised version of this source.

State Bar Ct. Rptr. 888, 891 [reduced weight for cooperation with State Bar where “stipulated facts were easily provable”].) Additionally, his conduct is mitigated by remorse and recognition of wrongdoing, as he now realizes the importance of obtaining conflict waivers in every case involving joint representation and has implemented office procedures to ensure this occurs. (Std. 1.6(g).)

Further, Lopez presented strong character evidence from four witnesses and three declarants who constituted a “wide range of references in the legal and general communities.” (Std. 1.6(f).) They included four former clients; two chiropractors who had maintained business relationships with Lopez for over 20 years; and an attorney who also had known Lopez more than 20 years, has worked with him as co-counsel, and sees him daily. The witnesses understood the charges against Lopez¹⁶ and, nevertheless, described him unequivocally as a man of honesty, integrity, and ethics. The chiropractors and clients alike indicated that Lopez communicates clearly and thoroughly. One chiropractor testified that Lopez is an honest professional, and has never failed to pay a bill or timely communicate in the more than 20 years he has treated Lopez’s clients. Also notable was the testimony from attorney, Robert Garcia, Jr., that Lopez is “always available to his clients” and “very conscientious.” (See also *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [character testimony from attorneys is valuable, given their “strong interest in maintaining the honest administration of justice”].) This evidence warrants significant mitigation.

Finally, Lopez’s misconduct is minimally mitigated by his pro bono work. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) One of Lopez’s character witnesses declared that Lopez handled her daughter’s custody case on a pro bono basis; and Lopez testified that he frequently provides pro bono immigration counseling.

¹⁶ One exception was Lopez’s former client, Maria Salas, who testified she was not aware of the charges against Lopez. We afford Salas’s testimony little weight for this reason.

We reject Lopez's request for additional mitigation for good faith. (Std. 1.6(b).) Though Lopez may have acted honestly, his failure to obtain conflict waivers was not reasonable, given his knowledge of David's contributory negligence. (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653 [to establish good faith, attorney must prove "beliefs were both honestly held and reasonable"].) We do agree, however, that he is entitled to mitigation both for having advised his clients, at least verbally, of the consequences of joint representation and for the lack of harm under standard 1.6(c), and we assign this moderate weight. That his clients were not harmed was not mere happenstance, but the result of his zealous representation.

B. Aggravation

Lopez's two prior disciplines are aggravating under standard 1.5(a). This case is unusual, however, as Lopez committed the instant misconduct contemporaneously with the misconduct underlying his second proceeding and two and a half years *before* OCTC filed the NDC in that second case. His initial discipline in California, effective May 2004, was based on misconduct committed in 1998 while practicing in Arizona (*Lopez I*). There, he failed to maintain client funds and the required trust accounting records. He received a one-year stayed suspension and one-year probation for this misconduct, which he stipulated violated rule 4-100(A) and (B)(3).

Effective January 14, 2010, Lopez received a 90-day actual suspension, a one-year stayed suspension, and one year of probation in his second disciplinary proceeding (*Lopez II*). In July 2009, Lopez stipulated in *Lopez II* to ten counts of misconduct in seven client matters, including failures to: (1) properly disburse funds to clients and lienholders; (2) obtain court approvals required when representing minor clients; (3) communicate significant developments; (4) inform a client of a written settlement offer; and (5) perform competently. Lopez also stipulated to airing a misleading radio solicitation. This misconduct was unmitigated and was aggravated by his prior discipline.

As noted above, Lopez's misconduct in the instant proceeding occurred two and a half years before OCTC commenced *Lopez II*. The two pivotal moments that should have triggered Lopez's awareness of the need for written waivers occurred during the summer of 2007, first when he accepted the Baez brothers' case knowing that David was driving without a license and was uninsured, and then when he reviewed the accident report and medical records showing David's contributory negligence.

We take this timing into account and, in so doing, give less aggravating weight to the earlier discipline than did the hearing judge. As we explained in *In the Matter of Sklar, supra*, 2 Cal. State Bar Ct. Rptr. at p. 619: "Since part of the rationale for considering prior discipline as having an aggravating impact is that it is indicative of a recidivist attorney's inability to conform his or her conduct to ethical norms [citation], it is therefore appropriate to consider the fact that the misconduct involved here was contemporaneous with the misconduct in the prior case." We thus assign no aggravating weight for *Lopez II* and consider only *Lopez I*, which, in itself, warrants aggravation. (*In the Matter of Sklar, supra*, 2 Cal. State Bar Ct. Rptr. at p. 618 ["Prior discipline is a proper factor in aggravation 'whenever discipline is imposed' [Citation.]".])

We reject OCTC's requests for additional aggravation based on its assertions that Lopez testified dishonestly and concealed facts. (Std. 1.5(c), (f).) These assertions rely on a strained reading of the trial transcript and are unfounded.

V. 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 discipline analysis begins with the standards, which promote consistent application of discipline. (*In re Silvertan* (2005) 36 Cal.4th 81, 91.) Here, no specific standard addresses the

misconduct at issue. Standard 2.5(a) calls for actual suspension where an attorney fails to obtain informed written conflict waivers, but it applies only where the conflict of interest causes “significant harm to any of the clients.” Since we have found no harm in this matter, standard 2.5(a) provides no guidance.

Standard 1.8(a) provides that “where a member has *a single prior record* of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust.” (Italics added.) Lopez, of course, has two prior disciplines, not “a single prior record,” as addressed in standard 1.8(a).

Standard 1.8(b) provides that “[i]f a member has *two or more prior records* of discipline, disbarment is appropriate” in certain circumstances. However, by its own language, standard 1.8(b) provides an exception that applies here, where “the misconduct underlying the prior discipline occurred during the same time period as the current misconduct.” Here, the misconduct occurred prior to *Lopez II*, and therefore the 90-day actual suspension imposed in *Lopez II* should have little or no bearing on the degree of sanction in the instant case. The underlying purpose served by progressive discipline—deterring future misconduct—is simply not present here since Lopez committed the current misconduct *before* he was aware of or disciplined for the misconduct in *Lopez II*. (*In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 171 [force of prior misconduct diminished where it occurred during same time as present misconduct and did not provide respondent “opportunity to ‘heed the import of that discipline’ [Citation.]”].)

We are thus left to consider the catch-all standard 2.19, which provides for a broad range of discipline from reproof to a suspension not to exceed three years for a rule violation not specified in the standards. Given the lack of guidance from the standards, we look to the

decisional law and in particular those cases involving failures to obtain written conflict waivers. These decisions direct us to the lower end of the spectrum in standard 2.19. Even so, we could find no case imposing discipline for a single failure to obtain written conflict waivers. Instead, we found only cases where a failure to obtain informed consent to a conflict was accompanied by other misconduct. (See, e.g., *In the Matter of Klein, supra*, 3 Cal. State Bar Ct. Rptr. 1 [60-day stayed suspension appropriate for attorney who failed to obey court order, failed to disburse entrusted funds on demand, and failed to obtain informed written consent from both clients in joint representation, where attorney had no prior discipline and proved significant mitigation]; *In the Matter of Sklar, supra*, 2 Cal. State Bar Ct. Rptr. 602 [conflicts violation considered “minor” misconduct but disbarment warranted by dishonest misappropriation of \$13,800, ongoing substance abuse, and probation violations].)

Ultimately, we conclude that progressive discipline *is* appropriate in this case if we are to view it holistically. We note that a one-year stayed suspension was imposed in *Lopez I* many years before the present misconduct, which should have alerted Lopez to the need for strict compliance with the rules of professional conduct at the time he violated rule 3-310(C)(2) for failing to obtain the written conflict waivers. However, we also note that the misconduct underlying *Lopez I* was remote in time, occurring in the late-1990s, resulted in no client harm, and is distinct in nature from the 2007 conflict violation. Still, it involved extensive CTA mismanagement, which presented serious risks to Lopez’s clients. Considering also the fact that Lopez *again* committed trust account violations and other misconduct in *Lopez II*, progression of discipline from the *Lopez I* sanction is not manifestly unjust. (Cf. *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527, 533-534 [Review Department declined to impose progressive discipline where no “common thread or course of conduct through the past and present misconduct” and record demonstrated attorney had “awakened to his responsibilities

to the discipline system”].) We thus progress Lopez’s discipline from the one-year stayed suspension imposed in *Lopez I*, and conclude that a 30-day actual suspension is necessary and appropriate here.

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Anthony Robert Lopez, Jr., be suspended from the practice of law for one year, that execution of that suspension be stayed, and that Lopez be placed on probation for one year on the following conditions:

1. He must be suspended from the practice of law for the first 30 days of the period 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. 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 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, 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.
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 passage of the test given at the end of that session. This requirement is separate from any

Minimum Continuing Legal Education (MCLE) requirement, and he 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 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 further recommend that Lopez be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order 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).)

VIII. COSTS

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

EPSTEIN, J.

WE CONCUR:

PURCELL, P. J.

STOVITZ, J.*

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