PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

Filed November 16, 2015

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

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| In the Matter of | ) | Case Nos. 12-O-13556 (12-O-14216; |
| | ) | 12-O-15710; 12-O-16124; 12-O-16669); |
| PHILIP LORIN MARCHIONDO, | ) | 12-O-18103 (13-O-11227; 13-O-11672) (Cons.) |
| | ) | |
| A Member of the State Bar, No. 129947. | ) | OPINION |
| | ) | |

Philip Lorin Marchiondo and the Office of the Chief Trial Counsel of the State Bar (OCTC) each appeal a hearing judge's decision finding Marchiondo culpable of 14 counts of misconduct,[1] dismissing 20 counts, and recommending an 18-month actual suspension. Many of the dismissed charges relied on an overarching theory of culpability—that Marchiondo facilitated the unbridled, unsupervised, and unlicensed practice of law by non-attorney staff and, in so doing, failed to perform competently on a grand scale. As this theory was not borne out at trial, the hearing judge properly dismissed the majority of OCTC's allegations. However, the judge found Marchiondo culpable of multiple failures to communicate and of trust accounting rule violations. The hearing judge also found Marchiondo culpable of a single moral turpitude count based on his failure to correct what the judge acknowledged was an "unintended typographical error" concerning the amount payable to the client in a settlement disbursement.

Marchiondo contests the judge's findings of culpability, particularly as to moral turpitude, and argues the recommended discipline is "wholly unjust." OCTC supports the 14 culpability findings, and challenges only one dismissal. It also seeks increased aggravation and

[1] In several places, the Hearing Department decision inaccurately states that the judge found Marchiondo culpable of 15 counts.

discipline, including an actual suspension of two years and until Marchiondo proves his rehabilitation.

We independently review the record (Cal. Rules of Court, rule 9.12), and generally adopt the hearing judge's well-considered findings of fact[2] and culpability. However, we do not agree with the judge's assessment that Marchiondo's mistake in misrepresenting a settlement figure constituted moral turpitude. We adopt the judge's aggravation and mitigation findings, with minor modifications. After applying the standards[3] and decisional law to the adjusted findings, we conclude that, absent moral turpitude, a one-year actual suspension is appropriate.

## I. PROCEDURAL HISTORY

On June 24, 2013, OCTC filed a 23-count notice of disciplinary charges (NDC-1) for misconduct in five client matters. On November 13, 2013, OCTC filed a second notice of disciplinary charges (NDC-2), alleging 11 additional counts arising from two more client matters and the State Bar's investigation. The hearing judge consolidated the NDCs. On February 24, 2014, the parties filed a pretrial Partial Stipulation as to Facts and Admission of Documents. During the 10-day trial, Marchiondo stipulated to one count (NDC-2, Count 10) of commingling, but contested the remaining charges.

[2] We afford great weight to the hearing judge's findings. (Rules Proc. of State Bar, rule 5.155(A).) Our factual findings are also based on the parties' stipulations, the trial testimony, and the documents in evidence.

[3] 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.

## II. UNCONTESTED DISMISSALS

OCTC challenges only one of the judge's 20 dismissals. The record supports each of the 19 uncontested dismissals.[4] We affirm them, and limit our analysis to the remaining counts.

## III. MARCHIONDO'S WILSHIRE BOULEVARD PRACTICE[5]

Marchiondo was admitted to practice law in California on December 14, 1987.[6] Prior to 2009, he managed a busy trial practice from an office in the Ladera Heights area of Los Angeles. In 2009, he took over another attorney's personal injury practice operating out of a Wilshire Boulevard office in Los Angeles (the Wilshire office). Marchiondo retained Alexander Kim, the previous attorney's managing administrator, and the staff. But he did not enter into a written contract with Kim articulating their respective rights and obligations, either in managing the Wilshire office or in the event that either party terminated their relationship.

Having to divide his time between the two offices, Marchiondo relied heavily on his non-attorney staff to interface with current and potential clients, communicate with opposing parties, and negotiate medical liens. Marchiondo authorized Kim to manage the Wilshire office's bookkeeping and its highly active trust account. To ensure competent representation and client service, though, Marchiondo implemented quality control measures and procedures to supervise the staff. The Wilshire office ran effectively until early 2012 when Marchiondo received

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[4] The unchallenged dismissed charges are: seven charges of failure to perform competently (NDC-1, Counts 1, 6, 11, 13, and 21; NDC-2, Counts 1 and 4); one charge of failure to respond to client inquiries (NDC-1, Count 2); six charges of aiding the unlicensed practice of law (NDC-1, Counts 3, 7, 12, and 15; NDC-2, Counts 2 and 5); one charge of failure to comply with the laws (NDC-1, Count 14); one charge of failure to pay client funds promptly (NDC-1, Count 19); two charges of committing acts involving moral turpitude (NDC-1, Counts 20 and 22); and one charge of failure to maintain client records and render accounts (NDC-1, Count 23).

[5] To facilitate our analysis, we address the remaining counts out of order and group together those related to Marchiondo's Wilshire Boulevard office. As to culpability, our sole substantive deviation from the hearing decision is our finding of no moral turpitude in a case handled out of the Ladera Heights office. We discuss that matter below under separate heading.

[6] The hearing judge's decision misstates Marchiondo's admission date as June 12, 1995.

complaints of clients' calls going unreturned. He immediately undertook to improve the situation by instituting increased supervision. Through this process, however, his relationship with Kim deteriorated.

Marchiondo terminated Kim and his staff and closed the Wilshire office as of March 30, 2012. However, Kim controlled the Wilshire office space, employees, computers, and other equipment, and refused to turn over a number of Marchiondo's client files and the bulk of his financial records. Kim's behavior caused considerable chaos for Marchiondo who, as a result, did not have records of many clients' contact information, case status, or entrusted funds.

Kim also attempted to withdraw $40,000 each from Marchiondo's Citibank client trust account (CTA-1) and his operating account, using checks issued with Marchiondo's signature stamp. After consultation with Citibank's fraud department, Marchiondo closed those accounts, immediately opened a new CTA (CTA-2) and general account to replace them, and transferred all funds from the closed accounts into the respective new ones. The fraud department assured Marchiondo they would not honor the unauthorized checks, yet Marchiondo discovered from his June bank statements that Citibank had deducted $40,000 from his new CTA-2 to cover Kim's unauthorized withdrawal from CTA-1. At the time of trial, Marchiondo was engaged in ongoing litigation against Citibank for that deduction. Meanwhile, the $40,000 has not been restored to CTA-2, and Marchiondo has frequently had to pay clients and lienholders out of his own monies to ensure they receive their due.[7]

Marchiondo initially handled the matters discussed in the following subsections out of his Wilshire office. He transferred them all to Ladera Heights when the Wilshire office closed. The

[7] Marchiondo was also involved in litigation with Kim, which ended, along with Marchiondo's continuing efforts to obtain client files and bookkeeping records, when Kim passed away in December 2012.

hearing judge found Marchiondo culpable for all counts addressed in this section. We agree generally with these findings, but dismiss certain charges as duplicative.

**A. The Norton Matter (12-O-13556)**

Marchiondo represented Leroy Norton in a personal injury matter. In early 2012, Marchiondo settled Norton's bodily injury claims for $15,000. Three medical liens (totaling just under $9,000) encumbered the settlement funds. Marchiondo deposited the $15,000 check in CTA-1 on March 5, 2012. He took no action to negotiate the medical liens until May 2012, however, despite Norton's several visits to his office requesting disbursement. After he finally negotiated lien reductions, Marchiondo disbursed Norton's settlement share on June 1, 2012. Days later, he learned of the $40,000 reduction to his CTA-2 balance. He informed the lienholders of the account deficiency and surrounding circumstances, but made no effort to satisfy their liens until late in August 2012, when he used his own money to do so.

**Count 4 (NDC-1): Failure to Maintain Records and Render Accounts (Rules Prof. Conduct,[8] rule 4-100(B)(3))[9]**

Marchiondo admitted at trial that he had no access to the accounting records of Norton's funds once he closed the Wilshire office. Thus, he is culpable of failing to properly maintain the required records (client ledgers, account journals, and reconciliations) of his client's settlement funds. (Rule 4-100(B)(3).)[10] Marchiondo had a personal, non-delegable obligation to maintain and preserve those records, and he failed to do so. (*Coppock v. State Bar* (1988) 44 Cal.3d 665,

[8] All further references to rules are to this source, unless otherwise noted.

[9] Rule 4-100(B)(3) provides that a member shall: "Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them; preserve such records for a period of no less than five years after final appropriate distribution of such funds or properties; and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar."

[10] This count also charged that Marchiondo failed to account for a portion of Norton's settlement funds. Following trial, however, the hearing judge granted OCTC's motion to partially dismiss Count 4 (NDC-1) in the interests of justice. We adopt the partial dismissal.

680 [trust account administration is non-delegable duty].) His culpability under rule 4-100(B)(3) is thus clearly and convincingly established.[11]

**Count 5 (NDC-1): Failure to Pay Client Funds Promptly (Rule 4-100(B)(4))[12]**

Marchiondo violated rule 4-100(B)(4) by failing to promptly disburse settlement funds to Norton and the medical lienholders. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127-128 [rule 4-100(B)(4) applies to obligation to pay lienholders out of client trust funds].) Marchiondo asserts he is not culpable because he acted in good faith, and the delay resulted from Kim's theft of funds, a wholly unforeseeable event. This argument is legally and factually unavailing. Legally, Marchiondo's claimed good faith is irrelevant. (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 586 ["good faith is not a defense to a rule 4-100 violation"]; see also *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 976 [rule "leaves no room for inquiry into attorney intent"].) Factually, the CTA shortfall does not excuse Marchiondo's failure to pay the lienholders during March through May of 2012, given that he did not become aware of Citibank's $40,000 withdrawal until June. (*In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 170 [two-month delay was failure to promptly disburse funds].)

**B. The El Fadel Matter (12-O-16124)**

In February 2012, Abdellah El Fadel hired Marchiondo to represent him in a personal injury case. Beginning in early March 2012, El Fadel left the country and was unreachable for approximately three months. In April, Marchiondo received a $2,760 settlement offer from

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[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] Rule 4-100(B)(4) provides that, a member shall: "Promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive."

Progressive Insurance Company. He took no action to inform El Fadel of the offer at that time because he knew he could not reach him. But Marchiondo also failed to inform El Fadel of the offer after his client returned to the United States.

In late May of 2012, Progressive sent Marchiondo a letter (with a copy to El Fadel) and a $3,000 check. The letter incorrectly stated that Progressive and El Fadel had reached a $3,000 settlement, and requested that Marchiondo return a release of El Fadel's claims. On receipt, one of Marchiondo's employees endorsed the $3,000 check and deposited it in trust. Upon his return, El Fadel inquired about the check. When he informed a member of Marchiondo's staff that he wanted to accept the $3,000 offer, the employee told El Fadel that "there was no check."

El Fadel retained new counsel when he returned to the United States. Marchiondo notified Progressive that he no longer represented El Fadel and sent a $3,000 refund for the inadvertently deposited check. Progressive rejected it, claiming the cashed check had settled El Fadel's claims, even without a release. Eventually, El Fadel and Marchiondo agreed to a resolution, whereby El Fadel accepted the entire $3,000 from Marchiondo, who waived his legal fee.

**Count 16 (NDC-1): Failure to Inform Client of Significant Development (Bus. & Prof. Code[13] § 6068, subd. (m))[14]**

Marchiondo's office's receipt, endorsement, and deposit of Progressive's check and his retention of the $3,000 were significant developments he was obligated to convey to his client, which he did not do. That the confusion surrounding El Fadel's case and the $3,000 check may have been attributable to the chaos of the Wilshire office closure is irrelevant. Marchiondo had a duty to manage his practice so as to be able to fulfill his professional obligations, and he is

[13] All further references to sections are to this source.

[14] Section 6068, subdivision (m), provides that 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."

culpable for his failure to do so. (*In the Matter of Sullivan* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 608, 612 ["fact that the file was misplaced, or that there was misconduct by an employee, cannot excuse the failure to maintain an information system that permits a lawyer to periodically check the status of his or her cases"].)

**Count 17 (NDC-1): Failure to Communicate Written Settlement Offer (§ 6103.5)[15]**

The hearing judge additionally found Marchiondo violated section 6103.5 by failing to inform El Fadel of Progressive's April 2012 settlement offer and of the $3,000 settlement check Progressive sent him. To the extent this charge is based on failure to communicate regarding the $3,000 check, we dismiss it as duplicative, given that the same facts form the basis of our culpability finding on Count 16 (NDC-1). (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060 [little, if any, purpose is served by duplicate allegations of misconduct in State Bar proceedings].)[16] Marchiondo admits he did not communicate the April 2012 offer, but argues this was excusable because, once El Fadel returned to the United States, "the issue between the parties had changed to whether depositing the [$3,000] check operated as an acceptance of a settlement offer." This argument is baseless. Marchiondo was obligated to promptly inform El Fadel of *any* written settlement offer. (§ 6103.5.) His client's temporary unreachability does not excuse Marchiondo's wholesale failure to relay the offer. He is therefore culpable as charged.

**C. The Cherrington Matter (12-O-18103)**

Marchiondo represented Sherlett Cherrington and her two minor children in a personal injury case. Marchiondo settled their claims for $10,000, collectively, and on January 16, 2012,

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[15] Under section 6103.5: "A member of the State Bar shall promptly communicate to the member's client all amounts, terms, and conditions of any written offer of settlement made by or on behalf of an opposing party."

[16] The hearing judge also found Marchiondo culpable as charged in Count 18 (NDC-1) for failing to notify El Fadel promptly that he had received the $3,000, under rule 4-100(B)(1). We dismiss Count 18 (NDC-1), which is duplicative of Count 16 (NDC-1). (*Bates v. State Bar, supra,* 51 Cal.3d at p. 1060.)

received the settlement checks. That same day, Cherrington authorized him to distribute the proceeds, including $3,333.33 for a medical lien. Marchiondo disbursed the settlement amounts owed to Cherrington and her children, but did not pay the lien until November 2012, after the medical lienholder, Dr. Phillips, contacted Marchiondo and informed him the lien was outstanding.

**Count 3 (NDC-2): Failure to Pay Client Funds Promptly (Rule 4-100(B)(4))**

Marchiondo's failure to pay the medical lien for more than nine months after he received the settlement check violated rule 4-100(B)(4). (*In the Matter of Hagen, supra,* 2 Cal. State Bar Ct. Rptr. at p. 170; *In the Matter of Sampson, supra,* 3 Cal. State Bar Ct. Rptr. at pp. 127-128.) Marchiondo asserts that, due to the confusion surrounding his closure of the Wilshire office and CTA-1, he reasonably believed the lien had been paid in March and did not learn otherwise until November. Even if fully credited,[17] this explanation is legally irrelevant. (*Guzzetta v. State Bar, supra,* 43 Cal.3d at p. 976 [rule is violated merely by attorney's failure to manage CTA in manner set forth in rule].) The simple facts that:

(1) Cherrington directed Marchiondo to disburse trust funds to pay the liens, and (2) Marchiondo failed to ensure their prompt disbursal, establish his culpability.

**D. The Lyons Matter (13-O-11227)**

In January 2011, Terrie Lyons engaged Marchiondo to pursue personal injury claims. Various medical providers treated Lyons for her injuries and perfected liens (of over $20,000, in aggregate) against any recovery she might receive. Marchiondo settled Lyons's claims and, on September 22, 2011, received her $31,000 settlement check. He deposited the check in trust, but did not notify Lyons that he had received it. By February 2012, Marchiondo had negotiated

[17] The hearing judge found Marchiondo's claim that he attempted to pay Dr. Phillips in March 2012 was "not persuasive."

Lyons's liens down to roughly $9,100. However, he did not disburse the funds to either the lienholder or the client.

Marchiondo relocated Lyons's file to his Ladera Heights office in March when he closed the Wilshire office. He did not inform Lyons of the move.

By June 2012, lienholders began complaining to Marchiondo about his failure to pay. Lyons learned of their complaints in July when two lienholders contacted her directly. She called Marchiondo's office several times to discuss the situation, but he did not return her calls. In January 2013, a third medical lienholder contacted Lyons about her outstanding bills. Through her communication with this lienholder, Lyons learned that Marchiondo had received and negotiated her $31,000 settlement check. She then wrote Marchiondo and demanded he disburse the settlement funds. Between February 8 and 19, Marchiondo finally paid Lyons's medical liens, and on February 27, 2013, he issued Lyons her settlement share.

**Count 6 (NDC-2): Failure to Notify Client of Receipt of Funds (Rule 4-100(B)(1))[18]**
**Count 9 (NDC-2): Failure to Pay Client Funds Promptly (Rule 4-100(B)(4))[19]**

Marchiondo contests the hearing judge's findings that he violated rule 4-100(B)(1) and (B)(4) by failing to notify Lyons he had received her $31,000 settlement check and failing to disburse the funds for more than 16 months after he received them. He claims he informed her in a February 2012 letter detailing the proposed disbursement and that he sent distribution checks to Lyons and the lienholders in early 2012. The judge found Marchiondo's testimony "not persuasive" and deemed the February disbursement letter "highly suspect" because it was on letterhead from the Ladera Heights office, even though the Lyons matter was a Wilshire office case, and because it bore his original signature rather than the electronic signature used by the

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

[19] We consider Counts 6 and 9 (NDC-2) out of order for ease of analysis.

Wilshire office. We give great weight to the hearing judge's credibility findings. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025,1032 [hearing judge "is best suited to resolving credibility questions"].) Accordingly, we adopt these well-considered findings, and conclude he is culpable as charged in Counts 6 and 9 (NDC-2). (*McKnight v. State Bar, supra,* at pp. 1029, 1032 [rule violation where attorney failed to notify client within three weeks of receipt of settlement funds or to specify amount received].)[20]

**Count 7 (NDC-2): Failure to Inform Client of Significant Development (§ 6068, subd. (m))**

Additionally, Marchiondo violated section 6068, subdivision (m), by failing to inform Lyons that he closed his Wilshire office and transferred her file to Ladera Heights. He admits he "had no ability to communicate with Lyons" after he closed the Wilshire office, but asserts it was because Kim denied him access to Lyons's file. We reject this argument. Marchiondo was responsible for preserving his access to his client case files. (*In the Matter of Sullivan, supra,* 3 Cal. State Bar Ct. Rptr. at p. 612.) His failure to do so and resulting inability to contact Lyons do not excuse this failure to communicate. (*Ibid.*)

**Count 8 (NDC-2): Failure to Respond to Client Inquiries (§ 6068, subd. (m))**

Marchiondo also violated section 6068, subdivision (m), by failing to return Lyons's phone calls regarding the settlement funds and outstanding liens. He claims the record does not establish that Lyons called the correct phone number. We give great weight to the hearing judge's finding to the contrary and find it supported by the record, including, inter alia, Lyons's credible testimony regarding the phone number she called, which the record reflects was the phone number of Marchiondo's Ladera Heights office.

[20] In light of his non-delegable trust accounting obligations, we also reject Marchiondo's claim that Kim's theft and the chaos surrounding the Wilshire office closure excuse his delays in distributing settlement funds. We note these occurrences do not explain his failure to disburse the funds for approximately six months from the time he received them until his office closure.

## IV. MATTERS UNRELATED TO THE WILSHIRE BOULEVARD PRACTICE

Besides the charges relating to the Wilshire office, OCTC charged Marchiondo with misconduct in the Perez case, which he handled entirely out of his Ladera Heights office. OCTC also filed two additional charges, based on its own investigation.

### A. The Perez Matter (12-O-14216)

Marchiondo represented Abraham Perez in a personal injury matter. He settled Perez's claims for $100,000, which he deposited into a Wells Fargo Bank trust account (CTA-3) in February 2011. Marchiondo then began negotiating the various medical liens encumbering the funds. In April and May 2011, Marchiondo sent Perez two letters containing a proposed distribution breakdown for the settlement funds, allocating $39,546 to the Los Angeles County USC Medical Center (USCB), holder of the largest lien. After continued negotiations, though, USCB agreed to reduce its lien amount further to $32,546, which Marchiondo paid in June 2011. Marchiondo's office then attempted unsuccessfully for months to contact Perez (via phone, mail, and eventually a private investigator) to obtain approval for the disbursements to the remaining lienholders. Perez resurfaced in May of 2012, and, on June 2, 2012, signed a letter authorizing Marchiondo to disburse the remaining monies. Due to a clerical error, the June 2, 2012 authorization letter and numerous prior letters Marchiondo sent Perez inaccurately reflected the amount paid to USCB as $39,546, rather than the further reduced amount of $32,546.

In mid-July, Marchiondo issued checks for the two remaining liens and Perez's share of the settlement. In reliance on the erroneous disbursement breakdown, he issued Perez's check in the amount of $22,987.92, or $7,000 less than Perez was owed. Perez picked up his check personally from Marchiondo's office on July 26, 2012. Within hours, Marchiondo caught the error and realized he had underpaid Perez. He therefore immediately issued a supplemental $7,000 check, which he mailed to Perez the same day with an explanatory letter. Marchiondo

sent the letter and supplemental check to an address he had confirmed with Perez earlier that day, but, unfortunately, the letter did not reach Perez. Thereafter, Marchiondo was again unable to contact Perez for an extended period and unable to pay Perez the outstanding $7,000 until June 2013.

**Count 8 (NDC-1): Failure to Maintain Records and Render Accounts (Rule 4-100(B)(3))**

Marchiondo admitted at trial that, after he fired Kim, he did not have possession of or access to his account ledgers or journals for the Perez case.[21] Accordingly, he is culpable under rule 4-100(B)(3).[22]

**Count 9 (NDC-1): Failure to Pay Client Funds Promptly (Rule 4-100(B)(4))**

Further, Marchiondo is culpable for failing to disburse any settlement funds for the more than six weeks from June 2, 2012, when Perez authorized disbursement, through July 26, 2012. (Rule 4-100(B)(4); see also *In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr 725, 735 [rule 4-100(B)(4) violation where respondent failed to disburse funds to client for six weeks after client's request without good reason to hold funds].) As the hearing judge aptly noted, Marchiondo's failure "to act with real dispatch is especially problematic," given the extensive delay that had already occurred.

[21] Marchiondo testified that Kim "handled all the ledgers for both offices." The Perez account journals and ledgers were among the records Kim had taken, even though Marchiondo handled the Perez case out of Ladera Heights.

[22] OCTC also charged that Marchiondo violated rule 4-100(B)(3) by failing to provide Perez an accounting for $1,575 in settlement proceeds. OCTC does not challenge the hearing judge's dismissal of this portion of the charge, and we adopt it. Marchiondo's distribution letters to Perez accounted for the $1,575, which was allocated to costs.

**Count 10 (NDC-1): Moral Turpitude (§ 6106)[23]**

The hearing judge found Marchiondo committed an act involving moral turpitude by misrepresenting to Perez the amount he paid to USCB. The hearing judge concluded the misstatement was an "unintended typographical error." Even so, the judge found Marchiondo's conduct in repeating the typo in multiple letters and relying on it to calculate Perez's settlement portion was grossly negligent. (See *Palomo v. State Bar* (1984) 36 Cal.3d 785, 796 [gross negligence in trust accounting may support moral turpitude].) Marchiondo asserts the record does not support gross negligence. We agree.

To begin, we address the hearing judge's finding that "[t]here was no historical explanation for the $39,546 figure" and the judge's apparent reliance on that finding to support gross negligence. In fact, there *was* a historical explanation for the $39,546 figure. Marchiondo testified that when he initially proposed a $32,546 settlement, USCB's representative rejected the offer, stating that USCB "would not accept anything less than [$]39,546." This testimony is consistent with Marchiondo's April and May 2011 letters to Perez, which reflected a $39,546 allocation to USCB. It also conforms to Marchiondo's July 26, 2012 cover letter to Perez, in which he explained he was enclosing the supplemental $7,000 check because USCB "had reduced its hospital lien even further than originally thought."

Given Marchiondo's fundamental fiduciary responsibilities in handling client funds, his failure to confirm the figures before issuing the distribution check was unreasonable. (See *Palomo v. State Bar, supra,* 36 Cal.3d at p. 795 ["rules for the safekeeping and disposition of client funds" are "critically important"].) Nonetheless, we find he made an unintended, honest

[23] Section 6106 provides: "The commission of any act involving moral turpitude dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension . . . ."

mistake. Such an honest but unreasonable trust accounting error does not, in itself, amount to moral turpitude. (*Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 332-333.)[24] Accordingly, we find that Marchiondo's failure to double-check the distribution figures under these circumstances did not amount to gross negligence constituting moral turpitude. Several factors lead us to this conclusion.

Marchiondo's repetition of the error in numerous letters occurred as a result of his diligent efforts to reestablish contact and distribute the settlement funds to Perez. He made a *single* misstatement of the amount paid to USCB in the first letter he sent to Perez after USCB agreed to the reduced settlement value. He then repeated the error by using that same letter as a template for future correspondence in his attempts to contact Perez and finalize distribution of the funds. Marchiondo ultimately relied on the distribution figures in those letters without confirming them before issuing Perez's check. However, he caught the accounting error within hours after giving Perez the erroneous check and immediately mailed the necessary supplemental check. (Compare with *Palomo v. State Bar, supra,* 36 Cal.3d at p. 795 [moral turpitude where attorney acted with "pervasive carelessness" and exhibited "pattern of gross negligence involving serious violations of an attorney's duty to oversee client funds entrusted to his care, and to keep detailed records and accounts thereof"].)

When the $7,000 check remained uncashed, Marchiondo continued to act in Perez's interest by trying to contact him for more than another year, and he ensured Perez eventually

[24] *Sternlieb* and other cases addressing moral turpitude stemming from honest but unreasonable errors involve misappropriations of client funds. We find guidance in these cases, as the error here misstated a distribution figure relating to client funds. Given the serious opprobrium that attaches to misappropriation, though, we find it important to be clear that no allegation or evidence indicates that Marchiondo misappropriated Perez's funds or personally benefited from his admitted mistake.

received the entirety of the funds due.[25] Perez was ignorant of the accounting error and likely would have remained so, if not for Marchiondo's efforts. Finally, and significantly, Marchiondo never removed Perez's funds from his CTA.

On this record, we do not find Marchiondo's acts were "contrary to honesty and good morals" or that he disregarded Perez's interests. (*Stanford v. State Bar* (1940) 15 Cal.2d 721, 727-728 ["act of an attorney which is contrary to honesty and good morals is conduct involving moral turpitude"].) Thus, we find no moral turpitude and dismiss Count 10 (NDC-1) with prejudice.

**B. State Bar Investigation Charges (13-O-11672)**

**Count 10 (NDC-2): Commingling (Rule 4-100(A))[26]**

During trial, Marchiondo stipulated he violated rule 4-100(A) by failing promptly to remove funds that he had earned as fees from CTA-3 and by issuing several checks from those funds (directly from CTA-3) to pay expenses. We adopt and affirm the hearing judge's culpability finding based on these stipulations.

**Count 11 (NDC-2): Fee-Sharing with Non-Attorney (Rule 1-320(A))[27]**

OCTC charged Marchiondo with violating rule 1-320 by improperly sharing legal fees from the Perez matter with a non-attorney independent contractor, Vonn Tabb. The hearing

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[25] We disagree with the hearing judge's finding that Marchiondo "caused a delay of nearly a year before Perez had received all of the funds due to him." Marchiondo acted conscientiously in personally confirming Perez's mailing address on July 26, 2012, when Perez picked up the distribution check. Responsibility for any delay more than the few days it should have taken for Perez to receive the supplemental check does not lie with Marchiondo. We note that OCTC was also unable to reach Perez during this same period. And, when Marchiondo finally connected with Perez via email in June of 2013, Perez apologized "for not contacting [Marchiondo] earlier."

[26] Under rule 4-100(A), "[n]o funds belonging to the member or law firm shall be deposited [into a CTA] or otherwise commingled."

[27] Rule 1-320(A) provides that, subject to various exceptions, "[n]either a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer . . . ."

judge properly dismissed this charge, as OCTC's evidence was circumstantial and inconclusive as to any profit-sharing agreement between Marchiondo and Tabb. OCTC proved only that Marchiondo had compensated Tabb for work on the firm's cases.[28] This is not prohibited under rule 1-320. (Rule 1-320(A)(3) [allowing members to compensate non-attorney employees].)

## V. AGGRAVATION AND MITIGATION[29]

We agree with the hearing judge's findings of three factors in mitigation and three in aggravation, but adjust the weight as to certain factors. We deny OCTC's request for additional aggravation and Marchiondo's requests for additional mitigation.

### A. Aggravating Factors

Marchiondo has one previous record of discipline, effective in 1995, for which he received a one-year stayed suspension and one year of probation.[30] (Std. 1.5(a).) He stipulated that he failed to avoid representing conflicting interests (rule 3-310(A)) and that his brief denial of the wrongdoing was an act of moral turpitude (§ 6106). No aggravating circumstances existed, and the misconduct was mitigated by three factors (candor and cooperation with State Bar, remorse in correcting false denial, and lack of prior discipline). This prior record is aggravating. We assign it only limited weight, though, because the relevant conduct occurred more than 20 years ago (late-1990 through mid-1992), did not result in an actual suspension, and

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[28] The evidence proved only that: (1) Tabb worked on the Perez matter; (2) about three and a half weeks after Marchiondo deposited Perez's settlement check into CTA-3, he issued Tabb a check from that account for approximately half of the amount of Marchiondo's fees from the Perez matter; and (3) the check bore the memo line "Perez." The hearing judge credited Marchiondo's testimony explaining that: (1) he issued the check to pay Tabb for his past work in numerous cases, including the Perez matter; and (2) the reason for the "Perez" memo line was that Marchiondo initially planned to write the check in a lesser amount as a bonus for Tabb's work in the Perez case.

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

[30] The hearing judge erroneously stated that Marchiondo received two years' probation.

was mitigated. (See *In the Matter of Shinn* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 96, 105 [no significant aggravation for prior discipline where misconduct occurred 20 years earlier, resulted in private reproval, and was unrelated to present misconduct].)

We also agree with the judge's finding of aggravation based on Marchiondo's multiple acts of misconduct. (Std. 1.5(b).) While no single act is particularly severe, the number of violations is concerning and warrants significant aggravation.

Marchiondo's conduct is further aggravated by his lack of insight about his personal responsibility for maintaining office management controls that would have prevented the extensive loss of information and records that occurred in the Wilshire office. (Std. 1.5(k); *Gadda v. State Bar* (1990) 50 Cal.3d 344, 356 [aggravation for lack of insight and "reluctance to recognize the seriousness of his misconduct"].) We acknowledge Marchiondo's significant efforts to alleviate harm to clients and lienholders after the Wilshire office closure. However, we remain concerned about his testimony and arguments indicating his misguided notion that he is absolved of responsibility because Kim acted criminally in stealing funds and records.

OCTC argues Marchiondo's misconduct in the Perez case was surrounded by dishonesty and, hence, warrants aggravation. (Std. 1.5(d).) We deny this request for additional aggravation, as we have found Marchiondo acted honestly.

**B. Mitigating Factors**

We adopt the hearing judge's finding of some mitigation for cooperation, based on Marchiondo's pretrial stipulation to facts and his stipulation during trial to culpability for commingling. (See *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443 [factual stipulation merits some mitigation]; *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive mitigation for those who admit culpability].)

Marchiondo is entitled to mitigation under standard 1.6(f), based on the testimony of five character witnesses and testimonial letters from six additional persons.[31] The witnesses and letter-writers included friends, colleagues, clients, and family, and constituted a wide range of references in the legal and general communities (attorneys, an expert witness, business persons, a golf-pro, a politician, and a coach/actor/former pro-football player). They consistently portrayed Marchiondo as a fair and honest person of high integrity and a skilled attorney.[32] While we note that two character letters did not establish the signatories' familiarity with the disciplinary charges, the evidence, in aggregate, supports full mitigation under standard 1.6(f).

Additionally, we credit Marchiondo for his spontaneous and immediate efforts to make restitution for the $7,000 he erroneously withheld from Perez, and his prompt payment of restitution in the Cherrington matter once Dr. Phillips alerted him to the non-payment. We recognize that Marchiondo repaid all funds owed to clients and lienholders in each of the matters at issue. But the Perez and Cherrington cases are the only matters where we find clear and convincing evidence that he acted with no threat of discipline. We therefore afford only limited mitigation under standard 1.6(j) (mitigation for restitution made "without the threat of force of administrative, disciplinary, civil or criminal proceedings").

We decline Marchiondo's requests for mitigation for lack of harm (std. 1.6(c)), good faith (std. 1.6(b)), and remorse (std. 1.6(g)). The record demonstrates that numerous individuals were deprived of funds, sometimes for lengthy periods. Hence, the hearing judge properly denied mitigation for lack of harm. Marchiondo is also not entitled to mitigation for good faith, given that his conduct was unreasonable with respect to certain client matters. (*In the Matter of Rose*

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[31] Marchiondo presented nine character letters in total, but three of them were written by witnesses who also testified at trial.

[32] We note also that two of OCTC's substantive witnesses—a medical lienholder and an administrative assistant for another medical lienholder—testified positively regarding Marchiondo's character and professionalism in their dealings with him.

(Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653 [to establish good faith as mitigation, "attorney must prove that his or her beliefs were both honestly held and reasonable"], emphasis added.) Finally, considering our lack-of-insight finding and that we already have afforded Marchiondo mitigation for making restitution, we decline his request for mitigation under standard 1.6(g) for a prompt demonstration of spontaneous remorse, recognition of wrongdoing, and timely atonement.

## VI. DISCIPLINE[33]

In sum, we have found Marchiondo culpable of 12 counts of misconduct, including eight trust accounting rule violations and four failures to communicate.

Our discipline analysis begins with the standards, which "promote the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91.) Standard 2.7(b) is most apt and provides that actual suspension is the presumed sanction.[34] To determine the appropriate discipline within the range provided by standard 2.7(b), we look to case law. (*In the Matter of Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160, 168.)

In recommending an 18-month actual suspension, the hearing judge relied on *In the Matter of Sampson, supra,* 3 Cal. State Bar Ct. Rptr. 119 [18-month actual suspension for attorney culpable of seven counts of moral turpitude for abdicating responsibility to supervise

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[33] 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.)

[34] Standard 2.2(a) provides that "[a]ctual suspension of three months is the presumed sanction for commingling or failure to promptly pay out entrusted funds," standard 2.2(b) provides that, "[s]uspension or reproval is the presumed sanction for any other violation of Rule 4-100," and standard 2.7(b) provides that, "[a]ctual suspension is the presumed sanction for . . . communication . . . violations in multiple client matters, not demonstrating habitual disregard of client interests."

Standard 1.7 directs that where multiple sanctions apply, the most severe shall be imposed. Here, standard 2.7(b) yields the most severe sanction, since Marchiondo's misconduct, in toto, warrants an actual suspension longer than standard 2.2(a)'s presumed three months.

personal injury cases, disregarding CTA obligations for a year, failing to maintain over $34,000 in trust, and failing to promptly pay entrusted funds in numerous personal injury cases; one count of failure to perform competently; and one count of failure to notify client of settlement receipt]. *Sampson* is analogous to the instant case only in the limited sense that both attorneys neglected administrative responsibilities, resulting in trust accounting violations.

Sampson's misconduct was notably more severe than Marchiondo's in a number of ways. First, Sampson's culpability stemmed not only from his abdication of duties but also from his reckless failure to maintain funds in trust on behalf of various clients and lienholders. In particular, Sampson used for his own purposes over $22,000 in entrusted funds he should have been holding for one lienholder, which he did not repay even after the lienholder sued him and obtained a judgment for recovery. Marchiondo did not misappropriate funds. In fact, he made extensive efforts to unscramble the chaos resulting from Kim's criminal acts and to repay all who were affected. Second, Sampson, unlike Marchiondo, recklessly, repeatedly, or intentionally failed to perform competently with regard to *substantive* legal responsibilities, resulting in missed depositions, arbitration proceedings, and court dates. Marchiondo, on the other hand, spoke frequently with the staff, supervised their work, and did not delegate *legal* duties. Under his supervision, the Wilshire office ran smoothly for two and a half years. When he became aware of problems with the staff, he took prompt action. He even fired Kim and his employees when he was unable to expeditiously resolve the issues. For these reasons, the hearing judge properly dismissed OCTC's charges that Marchiondo failed to perform competently and aided the unlicensed practice of law. Third, Sampson was culpable of seven counts of moral turpitude; whereas, Marchiondo did not commit acts involving moral turpitude.

We observe a dearth of recent cases involving widespread administrative failures such as Marchiondo's, where the respondent was not also culpable of other serious misconduct, such as

failures to competently perform legal services, aiding unlicensed practice of law, and/or moral turpitude. In that respect, this case is unusual, and no ready comparison is available. Relying on *Sampson* as a reference point, we conclude an 18-month actual suspension is excessive. We also find Marchiondo's misconduct less severe than that in other cases imposing 18-month actual suspensions. (E.g., *In the Matter of Malek-Yonan* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627 [18-month actual suspension for attorney culpable, inter alia, of moral turpitude for breaching fiduciary duty to protect client funds, where complete abdication of trust accounting duties allowed staff to steal $1.7 million over year and a half]; *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1 [18-month actual suspension for attorney who failed to obey court order, failed to communicate, and failed to properly withdraw from employment, abandoning more than 300 client matters].) Still, a lengthy actual suspension is necessary to impress upon Marchiondo the serious concern caused by his extensive delegation of operational responsibilities in a manner that unreasonably sacrificed his control over case files and financial records and exposed clients to risk. We also are impacted by the sheer number of violations here, which resulted in 12 culpable counts relating to five client matters. Considering these factors collectively, we conclude a one-year actual suspension is appropriate to protect the public, the courts, and the profession.

## VII. RECOMMENDATION

For the foregoing reasons, we recommend that Philip Lorin Marchiondo be suspended from the practice of law for two years, that execution of that suspension be stayed, and that he be placed on probation for three years on the following conditions:

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

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

## VIII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Marchiondo 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).)

## IX. RULE 9.20

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

## X. 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.

HONN, J.

WE CONCUR:

PURCELL, P. J.

EPSTEIN, J.