

Filed February 13, 2014

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

In the Matter of	)	Case No. 11-O-16037
	)	
MARIO ESTUARDO DIAZ,	)	OPINION
	)	
A Member of the State Bar, No. 76235.	)	
_____	)	

Respondent Mario Estuardo Diaz practiced law for nearly 30 years, and during most of that time he relied on his brother, whom he considered his “right-hand man,” to oversee his law office, including management of his client trust account (CTA). Unfortunately, Diaz’s hands-off approach resulted in the grossly negligent misappropriation of approximately \$42,470 in settlement funds belonging to his clients, who were co-plaintiffs in a wrongful death and personal injury lawsuit. Diaz also failed to timely file a petition for the compromise of a minor client’s claim in the same case, resulting in an 11-year delay in disbursing a \$10,000 settlement to the minor. Diaz ultimately paid all of the sums owing to his clients.

The Office of the Chief Trial Counsel of the State Bar (State Bar) filed a Notice of Disciplinary Charges (NDC) charging Diaz with: (1) failing to maintain client funds in trust; (2) moral turpitude due to the misappropriation; (3) failing to perform with competence due to the delay in filing the minor’s petition; and (4) failing to promptly pay client funds. After a four-day trial, the hearing judge found Diaz culpable of failure to maintain client funds in trust and misappropriation involving moral turpitude due to his gross negligence in mismanaging his CTA. The judge dismissed the incompetence charge, finding Diaz’s failure to timely file the minor’s petition was negligent, not reckless or intentional. The hearing judge also dismissed the

count alleging failure to promptly pay client funds, finding that the delay in distributing the settlement was at the request of Diaz's client. The hearing judge recommended a 90-day suspension upon finding compelling evidence in mitigation and no aggravation.

The State Bar appeals and asks that we find Diaz culpable of all four counts of misconduct alleged in the NDC. It contends that disbarment is the appropriate discipline.

Based on our independent review (Cal. Rules of Court, rule 9.12), we adopt the hearing judge's culpability findings of failing to maintain client funds in trust and moral turpitude due to gross negligence in the management of Diaz's CTA. We also affirm the dismissal of the charges of incompetence and failure to promptly pay client funds. However, unlike the hearing judge, we find aggravation for client harm, multiple acts of misconduct, and uncharged misconduct due to Diaz's failure to timely allocate the settlement among his various clients and to timely account to those clients.

Nevertheless, Diaz's mitigation is compelling and justifies a discipline less than the disbarment urged by the State Bar. Guided by the applicable standards and relevant Supreme Court decisional law, we recommend that Diaz be actually suspended for two years and until he proves his rehabilitation and fitness to practice law pursuant to standard 1.2(c)(1) of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.<sup>1</sup>

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

Diaz stipulated to many material facts and the admission of several documents. Based on this stipulation and the evidence introduced at trial, the record establishes the following facts.

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<sup>1</sup> As of January 1, 2014, standard 1.2(c)(1) replaced standard 1.4(c)(ii) of the rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. Although this case was submitted for ruling in 2013, the new standard will apply when Diaz is eligible to petition to terminate his suspension. However, the new standard does not conflict with the former. All further references to standards are to the new standards, and references to the earlier version will be designated former standards.

Diaz was admitted to practice law in California on December 21, 1977, and has no prior record of discipline. As a sole practitioner, he focused on complex personal injury cases, workers' compensation, and labor matters, primarily serving the Latino community in Los Angeles.

**A. Diaz Is Retained by Azucena Vasquez and her Family**

On June 28, 2000, Azucena Vasquez's three children were passengers in a Toyota driven by Jose Medina, a family member. A City of Merced trash collection truck hit the Toyota after Medina failed to yield the right-of-way at a stop sign. The crash killed Medina, his wife, Maria Cruz Soria, and two of Vasquez's children, who were not wearing seat belts. Vasquez's youngest child, Jose Maria Cruz, was restrained in a child safety seat and survived, but with serious injuries. Medina was assigned fault for the accident. In July 2000, Vasquez hired Diaz to pursue personal injury and wrongful death claims arising from the car accident on behalf of herself, her surviving son, and three other family members.<sup>2</sup>

Prior to commencing litigation, Diaz settled with the driver's insurance carrier, Cencal, for the policy limits of \$30,000. He obtained \$20,000 on behalf of Vasquez for the death of her two children and \$10,000 for her surviving child's personal injuries. On October 9, 2000, Cencal sent a \$20,000 check to Diaz, who deducted his fee of \$6,660. He kept the remaining \$13,340 as an advance against costs in pursuing other defendants. Cencal notified Diaz later in October 2000 that it would release the additional \$10,000 to Vasquez's surviving child upon proof of court approval of a minor's compromise.<sup>3</sup> Unfortunately, Diaz's employee misfiled

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<sup>2</sup> In addition to Vasquez and her surviving son, Diaz's clients were the father of the driver, Medina, and the parents of the passenger, Maria Cruz Soria.

<sup>3</sup> A petition for approval of compromise of a minor's claim may be filed when a settlement has been obtained. The petition is filed to allow the superior court to oversee the disposition and disbursement of the funds. The compromise is valid only after court approval. (Prob. Code, § 3500, subd. (b).)

Cencal's letter, and 11 years passed before Diaz discovered the mistake when he reviewed his files in response to the State Bar's investigation in October 2011.<sup>4</sup> Diaz maintains that he simply forgot about the petition for the minor's compromise during those 11 years because Cencal never followed up with any additional communication and Vasquez never mentioned it to him. As Vasquez testified, "we all forgot about it. I did too."

In June 2001, Diaz filed a wrongful death and personal injury suit against the State of California (CalTrans), the City and County of Merced, and the driver of the sanitation truck on behalf of Vasquez, her surviving son, Medina's father, and the parents of Maria Cruz Soria. The litigation spanned many years and involved extensive discovery. During the April 2005 trial, Diaz settled with CalTrans for \$130,000 on behalf of all five plaintiffs and with the City of Merced for \$25,000, which was specifically allocated to the surviving child, Jose Maria Cruz. In October 2005, Diaz filed a petition for court approval of the minor's compromise for the \$25,000. But he did not include a request for approval of the earlier \$10,000 settlement from Cencal because it still "wasn't on my radar. . . ." The court approved the minor's compromise in December 2005, and after deducting Diaz's fee and costs, the City of Merced purchased an annuity for Jose Maria Cruz in the amount of \$14,930.

#### **B. Diaz Failed to Maintain Settlement Funds in Trust**

Diaz deposited the \$130,000 received from CalTrans into his CTA on January 20, 2006. After he deducted his fee and costs, he should have maintained \$42,470.03 on behalf of Vasquez and the other four plaintiffs.<sup>5</sup> However, within two weeks, the balance had fallen to \$36,663.11,

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<sup>4</sup> Diaz obtained court approval for the \$10,000 settlement on behalf of Jose Maria Cruz but by then the insurer, Cencal, was bankrupt. He was able to recover the \$10,000 from the California Insurance Guarantee Association, and he distributed the entire amount to Jose Maria Cruz, waiving his \$2,500 fee and costs.

<sup>5</sup> Diaz properly withdrew \$52,000 as his fee, but improperly withdrew an additional \$48,869.97 for costs. In fact, he should have only withdrawn \$35,529.97 for costs since he owed Vasquez a credit for the \$13,340 she previously advanced in October 2000.

and it continued to dip on eight occasions in February alone. By the end of February 2006, the amount in his CTA was \$102.70, and on June 15, 2006, well before Diaz distributed any of the settlement, his CTA balance fell to \$76.41. For the next four and a half years, Diaz's CTA repeatedly dipped below the amount needed to be maintained in trust until Diaz made a final distribution to Vasquez, her son, and her relatives in October 2011. Diaz admits he was not "controlling or administering the trust account" during this time. Instead, he relied on his brother, Werner, a law school graduate, who had been his office administrator and performed his responsibilities without a client complaint for approximately 25 years.

Diaz testified that he did not immediately distribute the \$130,000 in January 2006 because he was awaiting instructions from his clients about the proper allocation of the settlement. However, between August 2006 and July 2010, Vasquez requested four distributions totaling \$15,500, which Diaz made to her and her common-law husband, Jose Cruz.<sup>6</sup> According to Diaz, Vasquez lacked proper identification to open a bank account and was unable to cash checks over \$2,000, whereas Cruz had a bank account and could cash the checks. But Diaz further testified that Vasquez was unsure of the long-term viability of her relationship with Cruz and therefore wanted the settlement to be "paid piecemeal" over a period of years so that she could preserve a portion of the settlement if their relationship failed. The hearing judge found Diaz's testimony to be credible.

Vasquez testified that she expected a single lump sum payment within two to three months of the case settling, and she denied any knowledge that her family members had not agreed to a division of the funds. The hearing judge found Vasquez's testimony was not credible.

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<sup>6</sup> Diaz paid \$5,000 on August 11, 2006, to Jose Cruz; \$3,500 on July 24, 2007, to Jose Cruz; \$2,000 on December 18, 2008, to Vasquez; and \$5,000 on July 26, 2010, to Jose Cruz.

By mid-2009, Werner was too ill to continue his duties as office administrator and Diaz took over responsibility for his CTA. However, Diaz did not review his account or confirm the amount of the settlement proceeds still owing to Vasquez and her family members. Diaz testified that his mishandling of his CTA was due to extreme stress related to a confluence of difficult family events, beginning with his father's stroke in 2006 and death in 2007, Werner's diabetes which was diagnosed in 2009 and his subsequent blindness, and Diaz's mother's cancer diagnosis in 2009 and her death in November 2010. During this entire period, Diaz was the primary caregiver for his mother and brother.

**C. Diaz Distributed Remaining Funds after Vasquez Complained to the State Bar**

In July 2011, Vasquez went to Diaz's law office to obtain a final distribution and accounting of the settlement. She arrived without an appointment and was informed that he was out of the office. This upset Vasquez because she thought he was there and refusing to see her. Shortly thereafter, she filed a complaint with the State Bar, which in turn contacted Diaz. After that, he determined the allocation of the remaining settlement funds. On October 14, 2011, he distributed \$7,000 to the two sets of parents and \$19,970 to Vasquez plus \$13,340 as reimbursement for the advanced costs.<sup>7</sup> Diaz also paid Vasquez \$5,741.39 in interest and \$2,012.53 in interest to the parents, and he provided a final accounting.

On July 2012, the State Bar filed a four-count NDC alleging that Diaz failed to competently perform, failed to maintain client funds in trust, misappropriated client funds, and failed to promptly pay client funds. The hearing judge found Diaz culpable of failing to maintain client funds in trust and misappropriating client funds through gross negligence.

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<sup>7</sup> \$19,970.03 = \$13,340 (advanced costs) + \$29,130.03 (CalTrans settlement) - \$7,000 (share owed to parents) - \$15,500 (previous distributions).

## II. CULPABILITY

### A. **Count One (Rules of Professional Conduct, rule 3-110(A)<sup>8</sup> [failure to perform with competence])**

According to rule 3-110(A), an attorney “shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.” To find such a violation, it must be determined that the attorney acted in reckless disregard of a client’s cause, and not merely that he acted negligently. (*In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 155, fn. 17 [miscalendaring due date and failing to timely file complaint may be negligent but not necessarily reckless].) The State Bar alleged Diaz violated this rule because he delayed filing the petition for minor’s compromise for 11 years.

We find that the hearing judge correctly found Diaz not culpable and dismissed this charge with prejudice. The judge concluded that the lengthy delay stemmed from “a single, isolated incident of failure to perform” when Diaz’s employee misfiled one letter. The judge also found Diaz neither intended the delay nor had been reckless in performing legal services for his clients. To the contrary, the judge believed that Diaz was a “highly competent practitioner.” And to Diaz’s credit, he immediately corrected the problem occasioned by the delay and waived his advance fees and costs, which amounted to more than could have been earned as interest on a blocked account.

The State Bar argues on review that Diaz is culpable of reckless failure to perform under *In the Matter of Sullivan* (Review Dept. 1997) 3 Cal. State Bar. Ct. Rptr. 608 (*Sullivan*). *Sullivan* is distinguishable. The attorney in *Sullivan* maintained four law offices that handled approximately 1,600 cases and he employed seven attorneys and fifteen staff. (*Id.* at p. 610.) For more than a year, the attorney was unaware that an employee with serious personal problems was hiding or throwing away client files, resulting in the compromise of the claims of four

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<sup>8</sup> Subsequent references to rules are to this source.

clients. (*Id.* at pp. 610-613.) We found a rule 3-110(A) violation because the attorney had no effective system for periodic review. (*Id.* at p. 612.) We cautioned that an attorney's failure to have a review system in place "is likely to be" a violation of rule 3-110, but noted that "[s]uch a system should be appropriate to the volume and nature of an attorney's practice." (*Id.* at pp. 611-612.)

*Sullivan* does not support a rule 3-110(A) violation under the circumstances presented here. Unlike the attorney in *Sullivan*, Diaz is a sole practitioner with a small-office operation, although he handled several significant large personal injury cases over his lengthy career. The misconduct at issue stems from Diaz's employee misfiling one letter that resulted in an 11-year delay in collecting a \$10,000 settlement, not an ongoing filing failure that led to four clients' claims being compromised. During the period of delay, Diaz successfully prosecuted the same clients' personal injury claims in a difficult and complicated case. While we find the 11-year delay may have been negligent, it was neither reckless nor intentional rising to the level of discipline within the meaning of rule 3-110(A). (See *Call v. State Bar* (1955) 45 Cal.2d 104, 111 [isolated mistake in judgment not basis for discipline]; *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 757 [where calendaring error resulted in failure to timely file interrogatory responses, no basis for charge of failing to competently perform since other discovery was timely handled]; *In the Matter of Ward* (Review Dept. 1991) 2 Cal. State Bar Ct. Rptr. 47, 57 [attorney not culpable of failing to perform with competence where dismissal of personal injury matter was due to simple error in calculating statute of limitation].) However, we consider Diaz's delay in filing the petition for minor's compromise as part of the overall circumstances surrounding his misconduct in this case.



**B. Count Two (Rule 4-100(A) [failure to maintain client funds in trust])**

Within two weeks of depositing the settlement funds from CalTrans into his CTA, Diaz's account fell below the amount he was required to maintain in trust on behalf of his clients. Thereafter, the CTA repeatedly fell below the necessary amount. Diaz does not contest the hearing judge's finding of culpability for a violation of rule 4-100(A),<sup>9</sup> and we adopt this finding as supported by the record.

**C. Count Three (Bus. & Prof. Code, § 6106 [moral turpitude misappropriation])<sup>10</sup>**

The hearing judge found that Diaz's misappropriation involved moral turpitude due to his gross negligence in managing his trust account. Diaz does not contest this finding and the State Bar concedes that the clear and convincing evidence<sup>11</sup> establishes at most reckless conduct but not dishonesty or intentional misconduct. We agree that the record establishes Diaz's failure to supervise his brother or periodically review his CTA constitutes moral turpitude in violation of section 6106. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 409-411 [failure to properly supervise CTA for nine months resulting in misappropriations in two client matters constituted moral turpitude through gross negligence].)

**D. Count Four (Rule 4-100(B)(4) [failure to promptly pay client funds])**

The hearing judge dismissed Count Four, which alleges that Diaz violated rule 4-100(B)(4) because he did not promptly pay or deliver funds "as requested by the client . . . which the client is entitled to receive." We affirm the dismissal of this count for lack of clear and convincing evidence that Vasquez or her relatives demanded distribution of the settlement,

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<sup>9</sup> Rule 4-100(A) provides: "All funds received or held for the benefit of clients . . . shall be deposited in one or more identifiable bank accounts labeled 'Trust Account,' 'Client's Funds Account' or words of similar import . . ."

<sup>10</sup> Subsequent references to sections are to this source.

<sup>11</sup> 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.)

other than the four specific requests by Vasquez totaling \$15,500, which Diaz timely paid. (*Chefsky v. State Bar* (1984) 36 Cal.3d 116, 126-127 [no violation of former rule 4-100(B)(4) when client did not request funds]; accord, *In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178, 188 [request by client for payment of funds held by attorney is “an essential element of the offense” under former rule 8-101(B)(4) (predecessor to rule 4-100(B)(4))].)

In the instant case, the hearing judge found in favor of Diaz, who testified that Vasquez asked for the funds to be distributed “on a piecemeal basis” and that Vasquez never complained about this arrangement. Although Vasquez testified that she expected a lump sum payment shortly after the settlement of her case, the hearing judge found her testimony was not credible. “Since there was a conflict in the evidence, the judge was in a particularly appropriate position to resolve that conflict.” (*In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 627; Rules Proc. of State Bar, rule 5.155(A) [hearing judge’s findings entitled to great weight].)

Furthermore, there is no evidence that Vasquez’s husband, who was authorized to accept the settlement on behalf of the other family members in Mexico, demanded payment on their behalf. To the contrary, between August 2006 and July 2011, he signed and deposited three installment checks without complaint. We accordingly do not find Diaz culpable of violating rule 4-100(B)(4).

### **III. AGGRAVATION AND MITIGATION**

We determine the appropriate discipline in light of all relevant circumstances, including aggravating and mitigating factors. (Former std. 1.6 (b) [aggravating and mitigating factors may demonstrate need for greater or lesser degree of sanction]; see *Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) The State Bar must prove aggravating circumstances by clear and convincing

evidence. (Former std. 1.2(b).) Diaz must meet the same burden in order to prove mitigating circumstances. (Former std. 1.2(e).)

The hearing judge found no aggravation, but we find three aggravating factors: (1) multiple acts of misconduct; (2) significant client harm; and (3) uncharged misconduct for violating rule 4-100(B)(3) due to Diaz's failure to ascertain the proper distribution of the settlement among his various clients and to timely account to them. We adopt the four factors in mitigation found by the hearing judge: (1) no prior record of discipline; (2) outstanding character evidence; (3) sincere remorse and recognition of wrongdoing; and (4) extreme emotional difficulties. We find additional mitigation in that Diaz displayed candor and cooperation, and has shown remorse and recognition of his wrongdoing.

**A. Three Aggravating Factors**

**1. Multiple Acts of Misconduct (Former Std. 1.2(b)(ii))**

The State Bar contends that Diaz committed multiple acts of misconduct, which is an aggravating factor (former std. 1.2(b)(ii)). We agree. Here, the sheer number of dips in Diaz's CTA over a protracted period was the result of repeated acts of gross negligence, which constitutes significant aggravation.

**2. Significant Client Harm (Former Std. 1.2(e)(iv))**

The State Bar further contends Diaz caused significant harm to Vasquez due to the long delay in distributing the settlement. We previously found that Vasquez asked that the distributions be made over a period of years for personal reasons, and for this reason, we find no evidence of significant harm to her. But we do agree with the State Bar that Diaz's delay in distributing the settlement for several years caused significant harm to Vasquez's relatives, who were poor residents of rural Mexico.

Similarly, we find the 11-year delay in distribution of the \$10,000 settlement to Vasquez's son caused him significant harm. Because of Diaz's failure to file the petition for minor's compromise, the superior court was unable to provide the protection and oversight to which the son was entitled. (Prob. Code, § 3500, subd. (b).) Furthermore, the funds were intended to compensate Vasquez's son for serious personal injuries, which we have found to be "especially harmful." (See *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060-1061 [misappropriation of personal injury settlement "especially harmful" to client because intended to reimburse for personal injuries]; *In the Matter of Blum, supra*, 4 Cal. State Bar Ct. Rptr. at pp. 409, 413 [significant client harm for six-month delay in distributing \$5,618 in medical malpractice settlement proceeds].) We assign aggravating weight to the harm caused to Vasquez's family members.

### **3. Uncharged Misconduct**

Diaz testified that the nearly five-year delay in distributing the settlement was due to the failure of the family members to advise him of the proper allocation of the funds. Diaz incorrectly places the burden on Vasquez and her relatives living in rural Mexico to provide information for him to make a timely distribution. Rather, it was Diaz, who owed a fiduciary duty to all family members to take prompt, affirmative, substantive action to determine the proper settlement allocation and to provide a timely accounting so that they could give their informed consent to the appropriate distributions. During that period, Diaz never provided an accounting to them. Instead, he signed four checks totaling \$15,500 without ever reviewing his books or the status of his CTA and then distributed these funds to Vasquez without obtaining the consent of her family members, who were also his clients.

Having assumed responsibility to hold and disburse the funds for Vasquez and her relatives, Diaz had a fiduciary duty "to account for the funds extended to [all] parties claiming an

interest in them.” (*Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 979.) Diaz’s testimony about his prolonged inaction in obtaining his clients’ consent to the allocation of settlement funds and his failure to provide them with an accounting is evidence that he violated rule 4-100(B)(3), which we find is uncharged misconduct and consider as an aggravating factor. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36 [evidence of uncharged misconduct may be considered in aggravation if based on attorney’s own testimony].)

**B. Five Mitigating Circumstances**

**1. No Prior Discipline (Former Std. 1.2(e)(i))**

Under former standard 1.2(e)(i), the “absence of any prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious” warrants mitigation. The State Bar argues that Diaz is entitled to diminished mitigation because his misconduct was serious. Although Diaz’s misconduct is indeed serious, there is no evidence of any other misconduct or client harm during his 28 years of practice prior to the mismanagement of his CTA, which began in February 2006. Shortly after Vasquez complained to the State Bar in 2011, and prior to the filing of an NDC, Diaz paid the amounts owing to her and her relatives. Moreover, he has shown remorse and is now diligent about managing his funds, having established procedures to ensure that his financial obligations are satisfied. We therefore believe that Diaz’s misconduct involving his misappropriation and trust account violations are unlikely to recur. Accordingly, we assign significant mitigation to his nearly 28 years of discipline-free practice. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 245 [lengthy record of discipline-free practice considered as “strong” mitigating factor where serious misconduct is aberrational and future misconduct unlikely].)

## **2. Good Character (Former Std. 1.2 (e)(vi))**

We afford significant mitigation to Diaz for his “extraordinary demonstration of good character” that was “attested to by a wide range of references in the legal and general communities . . . who are aware of the full extent of the . . . misconduct.” (Former std. 1.2 (e)(vi).) Diaz provided an extraordinary showing of good character from 15 witnesses including 10 attorneys, two judges, a forensic psychologist, a journalist, and an honorary consul-general for the Guatemalan Consulate. These witnesses regarded Diaz as a “real pillar for the Hispanic community” and “a lawyer’s lawyer” who never disparaged, cheated, or treated unfairly any clients. One character witness, Judge Ing, recounted an incident where Diaz saved a man’s life and never sought recognition for his heroic act. Another witness, who shared office space with Diaz, was impressed by Diaz’s level of dedication to his work and the respect he showed all of his clients regardless of their economic status or level of education. Almost all of the attorneys who testified had known Diaz for many years and considered him competent, honest, honorable, and entirely trustworthy. They also testified that he willingly accepted responsibility for his mistakes, which they considered as a hallmark of his integrity. The character witnesses had read the NDC, and were aware of the charges against Diaz. The hearing judge considered the character testimony a “very important factor in mitigation,” and so do we. (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50 [attorneys and judges have strong interest in maintaining honest administration of justice and their testimony is entitled to great consideration].)

## **3. Remorse (Former Std. 1.2 (e)(vii))**

When an attorney promptly takes “objective steps . . . demonstrating remorse [or] recognition of . . . wrongdoing . . . designed to timely atone for any consequences of the . . . misconduct,” it shall be considered as mitigation. (Former std. 1.2 (e)(vii).) Diaz has corrected

his office procedures to avoid a repetition of the events that led to this proceeding and reduced his personal injury case load. Specifically, Diaz now reviews his CTA to ensure it has the required funds owing to his clients and personally reconciles his CTA on a monthly basis in accordance with proper record-keeping standards. He has paid all of the funds owing to his clients, albeit after one of the clients complained to the State Bar, but before the filing of the NDC. We agree with the hearing judge, who afforded mitigative weight for Diaz's remorse. (See generally *Hipolito v. State Bar* (1989) 48 Cal.3d 621, 627, fn. 2 [favorable consideration given for "taking steps to repair the damage done and to prevent its recurrence"].)

#### **4. Extreme Emotional Difficulties (Former Std. 1.2(e)(iv))**

We may consider extremely stressful family circumstances as mitigation (*In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 701-702 [depression due to stress induced by son's emotional turmoil considered as mitigation]), but we afford only minimal mitigation in this case since the 2006 misappropriation occurred before most of Diaz's family's serious problems arose. (Former std. 1.2(e)(iv) [extreme emotional difficulties afforded mitigation credit if they occurred "at the time of the act of professional misconduct"].)

#### **5. Cooperation (Former Std. 1.2(e)(v))**

We find one additional factor in mitigation: Diaz's candor and cooperation. (Former std. 1.2(e)(v).) He stipulated to material facts regarding his failure to maintain client funds in trust and his gross negligence in maintaining his CTA. This aided the State Bar's prosecution and conserved judicial resources, and should be afforded mitigative weight. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 ["more extensive weight in mitigation is accorded those who . . . willingly admit their culpability as well as the facts"].)

## 6. Community Service/Pro Bono Work

We also consider Diaz's community service and pro bono work as worthy of mitigation. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [community service and pro bono activities are mitigating factors that may be entitled to considerable weight].) Diaz provided pro bono legal service to the Consul General of Guatemala, participated for several years in monthly workshops on labor rights for the Central American Resource Center in Los Angeles, and was a founding member of the Mexican American Bar Association's Lawyer Referral and Information Service. Throughout his legal career, Diaz mentored young attorneys, including Judge Ing, who testified as a character witness. Diaz also has mentored high school students in Los Angeles.

## IV. DISCIPLINE ANALYSIS

The primary purpose of disciplinary proceedings is not to punish the attorney but to protect the public, the courts, and the legal profession. (Former std. 1.3; *Bach v. State Bar* (1987) 43 Cal.3d 848, 856-857.) We begin our discipline analysis with the standards, which we give great weight to promote "the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91, internal citation and quotations omitted.) Nevertheless, our Supreme Court does not follow the standards "in talismanic fashion." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221.)

The gravamen of Diaz's misconduct is the grossly negligent misappropriation of approximately \$42,000 constituting moral turpitude. The State Bar accordingly asks us to disbar Diaz relying on former standard 2.2(a).<sup>12</sup> Yet the Supreme Court has not rigidly applied

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<sup>12</sup> Former standard 2.2(a) applies to willful misappropriation and provides for disbarment unless the amount in question is insignificant or the most compelling mitigation clearly predominates, in which case a minimum one-year actual suspension is warranted. As of January 1, 2014, standard 2.1 replaced former standard 2.2. Standard 2.1 provides that disbarment or actual suspension is appropriate for misappropriation involving gross negligence. However, since this case was submitted for ruling in 2013, we apply former



standard 2.2 in every instance of a misappropriation, even when it involves a significant amount of money. Instead, the Court has expressly reserved for itself the authority to “temper the letter of the law with considerations peculiar to the offense and the offender.” (*Howard v. State Bar*, *supra*, 51 Cal.3d at p. 222; *Edwards v. State Bar*, *supra*, 52 Cal.3d at pp. 37-38 [former std. 2.2(a) considered as guideline but disbarment unwarranted for wilful misappropriation because of “extenuating circumstances,” including attorney’s discipline-free record, absence of deceit, repayment of misappropriated funds, candor and cooperation, and voluntary steps taken to improve management of funds].) As a consequence, the Court has not uniformly imposed disbarment.

The evidence in mitigation in the present matter is compelling, but, given the factors in aggravation, it does not “clearly predominate.” (Former std. 2.2(a).) However, the Supreme Court has stated that “[e]ven where the most compelling mitigating circumstances do not clearly predominate, we have recognized extenuating circumstances relating to the facts of the misappropriation that render disbarment inappropriate.” (*Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1022.) In *Lipson*, the Supreme Court suspended an attorney for two years and until he satisfied the requirements of former standard 1.4(c)(ii) for misconduct involving two clients. (*Ibid.*) Due to “serious and inexcusable lapses in office procedure” constituting gross carelessness, the attorney misappropriated \$8,400. (*Id.* at p. 1020.) He later attempted to repay the funds but did so with an NSF check, which was dishonored. (*Id.* at p. 1019.) The attorney borrowed an additional \$7,000 from the same client and failed to repay the funds, and then borrowed \$10,000 from a second client and again attempted to repay the loan with NSF checks. (*Id.* at pp. 1016-1017, 1019.) The clients were unable to collect on these debts. (*Id.* at pp. 1017, 1019.)

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standard 2.2(a). Parenthetically, the outcome of our decision would not be altered under the new standard 2.1.

Even though the attorney's conduct involved two clients and multiple acts of misconduct, the Court considered his misconduct to be "aberrational." (*Lipson v. State Bar, supra*, 53 Cal.3d at p. 1021.) In deviating from former standard 2.2(a), our Supreme Court focused on the attorney's 42 years of practice without discipline. (*Ibid.*) The Court further found in mitigation that the attorney had been candid with the State Bar, had not sought bankruptcy protection, and had shown contrition for his failure to repay the loans. (*Ibid.*) Lastly, the attorney had practiced without incident during the several years since his misconduct occurred. (*Ibid.*)

In *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1305-1306, an attorney failed to maintain records of client funds and misappropriated over \$3,000 from one client. The misappropriation "extended over a substantial period of time and encompassed several separate acts." (*Id.* at p. 1309.) Referring to the standards as "advisory guidelines," the Supreme Court deviated from the disbarment recommended by former standard 2.2 and imposed a two-year actual suspension, which was consistent with its prior decisions. (*Id.* at pp. 1308-1310.) The Court specifically found the mitigation evidence was *not* compelling, but instead described it as "substantial." (*Id.* at pp. 1308-1309.) These factors included the attorney's candid disclosures to his client, his recognition and understanding of his wrongdoing, his efforts to prevent a recurrence, marital difficulties for which he sought therapy, his payment of restitution, and voluntary cessation of his law practice. (*Id.* at pp. 1308-1310.) The attorney received no mitigation for the absence of prior discipline because he had practiced for only four years. (*Id.* at p. 1309.)

Finally, in *Porter v. State Bar* (1990) 52 Cal.3d 518, 520-523, the Supreme Court imposed a two-year suspension for misappropriation of client funds, totaling approximately \$14,500, in three matters, and additional serious misconduct in six other matters, including improper withdrawal or abandonment of several clients, misuse of his trust account to satisfy a personal loan, practicing law while suspended, failure to perform competently in multiple

matters, failure to pay client funds, lying to clients, and forgery constituting moral turpitude. The Supreme Court again was willing to depart from former standard 2.2(a)'s disbarment recommendation because the attorney committed the misconduct while he was undergoing an extremely difficult and emotional marital dissolution, from which he had demonstrated his rehabilitation. (*Id.* at p. 528.) The Court found this evidence to be “especially compelling.” (*Id.* at p. 529.) The Court also considered the attorney’s significant involvement in both the legal and nonlegal communities and his “ ‘extraordinary demonstration of good character.’ ” (*Ibid.*)

Without question, the funds involved in the instant case are substantial, but, as the State Bar concedes, Diaz’s misappropriation was neither intentional nor fraudulent. He distributed all of the settlement funds shortly after he was contacted by the State Bar and well before it filed its NDC. Diaz also has remedied the causes of the misappropriation. Further, his other mitigation is compelling, including his lengthy and stellar career, his impressive community service, outstanding character evidence, remorse, and cooperation. For nearly three decades, Diaz has been a leader and a role model in his community as a tireless supporter of causes aiding the Latino community.

The compelling mitigation in this case may not “clearly predominate,” as suggested by former standard 2.2(a), but it is of such character and weight that it “demonstrates that the public, courts and legal profession would be adequately protected by a more lenient degree of sanction than set forth in [former standard 2.2(a)].” (Former std. 1.2(e).) In light of the standards and guided by our Supreme Court’s decisions discussed above, we conclude Diaz should be suspended for two years and until he has established the required showing under standard 1.2(c)(1).

## V. RECOMMENDATION

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

1. Diaz must be suspended from the practice of law for a minimum of the first two years of the period of his probation, and remain suspended until he provides proof to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1)).)
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 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
4. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including 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.
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. He must comply with the following reporting requirements:
  - a. If he possesses client funds at any time during the period covered by a required quarterly report, he shall file with each required report a certificate from him certifying that:
    - i. He has maintained a bank account in a bank authorized to do business in the State of California, at a branch located within the State of California, and that such account is designated as a "Trust Account" or "Clients' Funds Account;" and

- ii. He has complied with the “Trust Account Record Keeping Standards” as adopted by the Board of Trustees pursuant to rule 4-100(C) of the Rules of Professional Conduct.
- b. If he does not possess any client funds, property or securities during the entire period covered by a report, he must so state under penalty of perjury in the report filed with the Office of Probation for that reporting period. In this circumstance, he need not file the certificate described above.

The requirements of this condition are in addition to those set forth in rule 4-100 of the Rules of Professional Conduct.

- 8. 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 Diaz has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

#### **VI. PROFESSIONAL RESPONSIBILITY EXAMINATION**

We further recommend that Diaz be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of his actual suspension in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

#### **VII. RULE 9.20**

We further recommend that Diaz 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.

## VIII. COSTS

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

EPSTEIN, J.

WE CONCUR:

REMKE, P. J.

PURCELL, J.