STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of	)	Case No.: **13-O-12150-LMA**
	)	
FERNANDO FABELA CHAVEZ,	)	**DECISION**
	)	
Member No. 86902,	)	
	)	
A Member of the State Bar.	)	

Introduction[1]

In this contested disciplinary matter, respondent **Fernando Fabela Chavez**, is charged with seven counts of misconduct, including misappropriation (two counts), failing to maintain client funds in trust (two counts), commingling, failing to promptly pay out client funds, and failing to obey a court order. Having considered the facts and the law, the court finds respondent culpable on six counts, and recommends, among other things, that he be actually suspended for a minimum of one year and until payment of restitution, as described below.

Significant Procedural History

The State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) against respondent on December 23, 2014. Respondent filed a response to the NDC on January 26, 2015. The State Bar was represented by Senior Trial Counsel Sherrie McLetchie. Respondent was represented by attorney Scott Drexel.

[1] Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

A seven-day trial in this matter was held on April 21-24, and April 29 - May 1, 2015. The matter was submitted for decision on June 24, 2015.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on June 4, 1979, and has been a member of the State Bar of California at all times since that date.

Case No. 13-O-12150 – The *Sanchez v. Cooper Tire* Matter

Findings of Fact[2]

On July 1, 2007, an automobile accident occurred in Madera County, tragically claiming the lives of two children, Jonathan Cornelio (Jonathan) and Zaira Perez (Zaira). Also injured in the accident were the driver Micaela Sanchez (Micaela), Juan Antonio Barajas (Juan Antonio), and Hector Enrique Perez (Hector). The accident was the result of a defective tire on Micaela's vehicle.

Noemi Barajas Arrellano (Noemi) had two children in the car, Jonathan and Juan Antonio. Micaela also had two children in the car, Zaira and Hector. Noemi and Micaela are sister-in-laws, and both are Mexican citizens. Jonathan and Juan Antonio were born in Palo Alto, California.

On July 10, 2007, Noemi was referred to respondent by the Mexican Consulate in San Jose, California.[3] That same day, Noemi signed a contingency fee agreement with respondent's office which provided for a 40% fee if the case was settled after mediation. At or about that time, respondent had various employees working for him, including attorney Hector Salitrero

[2] For the purposes of clarity, this court will identify some individuals by their first names.

[3] Noemi initially went to the Mexican Consulate for help transporting Jonathan's body to Mexico for burial.

(Salitrero) and non-attorney office manager Rosario Villareal-Newell (Rosario).[4] Rosario kept respondent's books and accounts. Rosario was also a signatory on respondent's client trust account (CTA). Respondent tasked Rosario with the day-to-day operations of his CTA with virtually no supervision.

On February 6, 2008, respondent filed a civil complaint on behalf of Noemi, Micaela, and the other family members.[5] This matter was entitled *Sanchez, et al v. Cooper Tire & Rubber Company, et al*, Fresno County Superior Court case no. 08CECG00412 (*Sanchez v. Cooper Tire*).

On July 28, 2008, *Sanchez v. Cooper Tire* was "added-on" to a Judicial Council Coordination Proceeding case: *Winston Tire Cases*, in the Los Angeles Superior Court. Following at least two mediation sessions, respondent negotiated an aggregate settlement on behalf of Noemi and her relatives totaling $750,000. Respondent apportioned the $750,000 in settlement proceeds as follows:

- $220,000 to Micaela for the death of Zaira;
- $220,000 to Noemi for the death of Jonathan;
- $205,000 to Micaela for her own serious personal injuries;
- $90,000 to Hector for his serious personal injuries; and
- $15,000 to Juan Antonio for his injuries.

In October 2010, respondent's firm filed an Amended Petition to Approve Compromise of Pending Action on behalf of Noemi as guardian ad litem for Juan Antonio (amended petition). Attached to the amended petition was a copy of the fee agreement signed by Noemi on July 10, 2007, which provided for a 40% contingency fee if settlement occurred after mediation. The

[4] Both Salitrero and Rosario testified in this proceeding. As illustrated below, Rosario's testimony was not credible, and repeatedly conflicted with the credible documentary and testamentary evidence.

[5] On February 26, 2008, Noemi was appointed guardian ad litem for Juan Antonio, who was a minor.

amended petition, which was signed by Salitrero on behalf of respondent's firm, also represented that respondent's firm expected to receive attorney's fees from Noemi in the amount of $88,000 (which was 40% of her $220,000 settlement). (Exhibit 11, p. 90.)

The amended petition requested that Juan Antonio's settlement proceeds in the amount of $10,000 ($15,000 minus $5,000 in court-approved attorney's fees) be deposited in an insured financial account at Bank of America, subject to withdrawal only upon authorization of the court. In November 2010, the Los Angeles Superior Court approved the compromise of Juan Antonio's claim. The court issued an order requiring that respondent place Juan Antonio's $10,000 in one or more blocked accounts at the Bank of America located at 1510 The Alameda, in San Jose, California. Respondent was required to deposit those funds within 48 hours of receipt. Despite receiving the court's order, respondent never established an account for Juan Antonio's settlement proceeds.

On December 6, 2010, Rosario or respondent[6] deposited the $750,000 settlement check into respondent's CTA. Out of the $220,000 respondent apportioned to Noemi for Jonathan's death, Respondent was entitled to 40%, i.e., $88,000. Once Noemi's portion of the costs was calculated this left a remainder of $123,500 to be held in respondent's CTA.[7]

Beginning on December 15, 2010, Rosario issued the following checks from the CTA:

CHECK #	PAYEE	AMT OF CHECK	DATE
1063	Beatriz Novoa	$30,000	12/15/10
1113	Beatriz Novoa	$25,000	12/17/10
1118	Beatriz Novoa	$15,000	12/17/10
1114	Adriana Novoa	$15,000	12/17/10
1120	Beatriz Novoa	$50,000	04/11/11
1177	Beatriz Novoa	$9,875	11/29/11

[6] Respondent had Rosario execute most, if not all, of the CTA deposits, withdrawals, and transfers.

[7] As noted below, respondent informed Noemi that her portion of the costs totaled $8,500.

Beatriz Novoa is Rosario's sister and Adriana Novoa is Rosario's niece. These checks were issued by Rosario on respondent's behalf, as purported loan repayments. These "loans" were not related to Noemi or her legal matter, and respondent could only generally explain that they were related to office expenditures.[8]

Although respondent was required to maintain $123,500 in his CTA for Noemi, his CTA balance fell below this amount on December 28, 2010, when it dipped to $108,703.09. (See Exhibit 2, p. 25, as corrected by the State Bar's motion correcting Exhibit 2 filed on April 20, 2015.[9]) Respondent's CTA balance remained below $123,500 between December 28, 2010 and March 10, 2011, hitting a low-point of $58,158.09 on February 7, 2011.

On March 6, 2011, respondent's CTA balance was $59,158.09. That next day, respondent deposited $52,937.50 in checks issued in other client matters, raising his CTA balance to $112,095.59. On March 11, 2011, Rosario or respondent wire transferred $100,000 to Noemi.[10]

Respondent, however, was still required to maintain $23,500 in his CTA on behalf of Noemi, and $10,000 in a separate account on behalf of Juan Antonio. Between December 6, 2010 and February 29, 2012, respondent did not maintain a separate account for Juan Antonio and the balance in respondent's CTA fell below $10,000 during the following periods:

- March 11 - 18, 2011
- March 21 - 22, 2011

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[8] These "loans" are highly suspect and raise many questions; however, the legitimacy of these transactions is not an issue currently before this court.

[9] This motion appears to contain a typographical error identifying Exhibit 2 as Exhibit 3.

[10] This court did not find credible the assertion that the distribution of funds to Noemi was delayed by her failure to provide a bank account number for wire transfer purposes. Respondent had previously wire transferred money to Noemi. It was also not credible that Noemi requested that the transfer of funds be delayed due to her fear of being kidnapped in Mexico. The documentary evidence shows that respondent simply did not have enough funds in his CTA to pay Noemi.

- March 28 - April 7, 2011
- April 11 - 15, 2011[11]
- May 2, 2011
- May 4 - 6, 2011
- May 25, 2011
- July 28 - August 2, 2011
- August 3 - 15, 2011
- August 19 - September 30, 2011
- October 28 - 31, 2011
- November 8 - 22, 2011
- December 8 - 14, 2011
- January 13 - February 16, 2012
- February 24 - 29, 2012

On December 27, 2011, Juan Antonio turned 18. On March 5, 2012, respondent had $313.48 in his CTA. On March 6, 2012, Rosario or respondent deposited into the CTA a $20,400 check made out to respondent from the State Compensation Insurance Fund. On March 7, 2012, Rosario or respondent wire transferred $10,100 to Juan Antonio from the CTA.[12]

Prior to Juan Antonio's 18th birthday, Noemi wished to know more information about her settlement proceeds and requested an accounting from respondent. On or about May 17, 2011, Rosario sent Noemi a letter and accounting. Rosario's letter included representations typically made by attorneys, such as identifying evidentiary problems and discussing the type of verdicts that could be expected in the county where the accident took place. The attached accounting indicated that $8,500 in costs was apportioned to Noemi and Juan Antonio and subtracted from their share of the aggregate settlement amount.[13] (See Exhibit 7, p. 2.)

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[11] On April 11, 2011, respondent's CTA had a negative balance (-$1,586.33).

[12] Juan Antonio did not testify in this proceeding, and it is not clear when he first requested payment of his settlement proceeds.

[13] Rosario was not credible when she testified that this was just a draft document and a final accounting was later sent to Noemi.

This accounting contained many errors. Most notably, Noemi's and Juan Antonio's settlement awards were shown to total $215,000. In actuality, Noemi's and Juan Antonio's settlement awards totaled $235,000 ($220,000 for Noemi and $15,000 for Juan Antonio).

After subtracting Juan Antonio's settlement award and fees ($10,000 + $5,000), the May 17, 2011 accounting represents that Noemi's settlement award was only $200,000. And from that $200,000, respondent collected fees in the amount of $91,500.[14] This represents an attorney fee billing rate of 45.75%.

After the State Bar began an investigation in this matter, respondent, on May 30, 2014, provided the State Bar with a modified version of the May 17, 2011 accounting. (See Exhibit 13, p. 28.) In this accounting, respondent added over $3,400 to Noemi's portion of the costs. Respondent also added language stating that respondent's attorney's fees were 50%, but that he reduced them to 47%, resulting in total attorney's fees of $108,100.

The court does not find this accounting to be credible. Nor was the testimony of respondent and Rosario credible on this subject. The court notes that the totals in the May 30, 2014 accounting are still wrong. Respondent's $108,100 attorney's fee represents 47% of $230,000. Yet the total settlement for Noemi and Juan Antonio was $235,000. Further, Juan Antonio's court-approved attorney's fees were 33%, not 50%.

Instead, the court found credible the testimony of Noemi, who testified that she never signed a new retainer agreement modifying the attorney's fees from 40% to 50%. Noemi's testimony was corroborated by the documentary evidence. Further, Salitrero confirmed that although he was working on Noemi's matter, he never saw a 50% retainer agreement.[15] And the

[14] This figure is derived from the $96,500 in total attorney's fees minus the $5,000 in court-authorized fees for Juan Antonio's settlement.

[15] Salitrero worked as an attorney for respondent's office for many years, up until October 15, 2010. Rosario claimed that the alleged modified retainer agreement was executed

amended petition filed in October 2010 includes a copy of the original retainer agreement, not the purported 50% retainer agreement.

Finally, it's curious that respondent so strongly relies on his assertion that the attorney's fees were mysteriously raised from 40% to 50% only to then be lowered to 47%, yet he was unable to produce a copy of the modified retainer agreement.[16] The May 30, 2014 accounting looks more like a post State Bar investigation attempt to justify the fees taken in this matter.[17] While the court does not have clear and convincing evidence that the May 30, 2014 accounting was fraudulently manufactured, it is highly suspect and not at all credible.[18]

Conclusions of Law

Count One – § 6106 [Moral Turpitude]

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. While moral turpitude generally requires a certain level of intent, guilty knowledge, or willfulness, the law is

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on or about January 10, 2010, so Salitrero was still working for respondent's firm at that time. As noted above, this court did not find Rosario's testimony or Exhibit G to be credible on this subject. To the contrary, this court found credible Noemi's testimony that she mistakenly indicated to the State Bar that she met with Rosario in January 2010, but in actuality met with Rosario after the settlement, in January 2011, to obtain Noemi's signature on documents (the documents were in English and Noemi didn't understand what they were for). Noemi also credibly testified that she did not meet with Rosario in 2010.

[16] See *In the Matter of Shinn* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 96 [attorney asserted that written fee agreements had been modified, but failed to produce any documents to support this contention and offered varying characterizations of the alleged changes in the fee arrangements, in contrast to credible client testimony that no such changes had been made].

[17] This is especially true considering the additional costs added and the inexplicable 3% "reduction" in attorney's fees. The only figure that remained constant in respondent's various accountings was Noemi's $100,000.

[18] Respondent's exhibits V, G, I AND U are not credible documents. The timing and content of these documents are not plausible. It is also suspicious that some of these documents were not introduced until the eve of trial.

clear that where an attorney's fiduciary obligations are involved, particularly trust account duties, a finding of gross negligence will support such a charge. (*In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410.)

"Misappropriation" is defined as "[t]he application of another's property or money dishonestly to one's own use." (Black's Law Dict. (8th ed. 2004) p. 1019, col. 1.) "[A]n attorney's failure to use entrusted funds for the purpose for which they were entrusted constitutes misappropriation. [Citation.]" (*Baca v. State Bar* (1990) 52 Cal.3d 294, 304.)

Here, respondent was required to maintain $123,500 in trust on Noemi's behalf. During this time period, respondent delegated all of his accounting responsibilities to his office manager and provided no effective oversight. On February 7, 2011, the funds in respondent's CTA dipped to $58,158.09. Respondent cannot escape responsibility for his CTA accounting by deferring to a non-attorney employee – even if that employee is willing to come to the State Bar Court and throw herself on the sword, as was the case here. Respondent's failure to maintain and supervise his CTA constituted gross negligence, and resulted in a $65,341.91 misappropriation. And while $100,000 was paid out to Noemi, $23,500 remains outstanding today.

By misappropriating $65,341.91 of Noemi's settlement funds through gross negligence, respondent committed an act involving moral turpitude, dishonesty, or corruption, in willful violation of section 6106.[19]

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[19] In the NDC, the State Bar alleged a $22,000 misappropriation from Noemi, rather than $65,341.91. Although the amount of the misappropriation differs, this court concludes that respondent received adequate notice of the allegation that he misappropriated settlement funds from Noemi in *Sanchez v. Cooper Tire*.

Count Two – Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account]

Rule 4-100(A) provides that all funds received or held for the benefit of clients must be deposited in a client trust account and no funds belonging to the attorney or law firm must be deposited therein or otherwise commingled therewith, except for limited exceptions. By failing to maintain Noemi's $123,500 in a bank account labeled "Trust Account," "Client's Funds Account," or words of similar import between on or about December 28, 2010 and March 11, 2011, respondent failed to maintain client funds in trust, in willful violation of rule 4-100(A).

Count Three – Rule 4-100(A) [Commingling]

By issuing the above-listed checks to Beatriz and Adriana Novoa from his CTA for the payment of personal or business expenses, respondent used his client trust account to pay personal or business expenses, in willful violation of rule 4-100(A).

Count Four – Rule 4-100(B)(4) [Promptly Pay/Deliver Client Funds]

Rule 4-100(B)(4) requires an attorney to promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the attorney's possession which the client is entitled to receive. The State Bar alleged that respondent violated rule 4-100(B)(4) by failing to promptly pay out funds belonging to Juan Antonio upon his request. As noted above, Juan Antonio did not testify and the court did not receive clear and convincing evidence regarding when Juan Antonio requested payment of his funds. Accordingly, Count Four has not been established by clear and convincing evidence and is dismissed with prejudice.

Count Five – § 6103 [Failure to Obey a Court Order]

Section 6103 provides, in pertinent part, that a willful disobedience or violation of a court order requiring an attorney to do or forbear an act connected with or in the course of the attorney's profession, which an attorney ought in good faith to do or forbear, constitutes cause for suspension or disbarment. Respondent was ordered by the Los Angeles County Superior

Court to deposit and maintain $10,000 in a blocked account at Bank of America until Juan Antonio turned 18 years of age. Respondent failed to comply with that order, in willful violation of section 6103.

Count Six – Rule 4-100(A) [Failure to Maintain Client Funds in Trust Account]

By failing to maintain Juan Antonio's $10,000 in a bank account labeled "Trust Account," "Client's Funds Account," or words of similar import between on or about December 6, 2010 and December 27, 2011, respondent failed to maintain client funds in trust, in willful violation of rule 4-100(A).

Count Seven – § 6106 [Moral Turpitude – Misappropriation]

Respondent was required to maintain $10,000 in trust for Juan Antonio. The balance in respondent's CTA fell below $10,000 on numerous occasions between December 6, 2010 and December 27, 2011. At its low-point, respondent's CTA had a negative balance on April 11, 2011.

Respondent asserted that he did not misappropriate Juan Antonio's $10,000, but instead Rosario mistakenly transferred the funds from respondent's CTA to his general account. It is well settled that once an attorney's client trust account balance falls below the required amount, an inference of misappropriation arises, and the burden is shifted to the attorney to show that no misappropriation occurred. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618; see also *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474.) Respondent, however, did not provide any credible evidence establishing that Juan Antonio's funds were deposited and maintained in his general account or any other account. Accordingly, this court concludes that respondent misappropriated $10,000 of Juan Antonio's settlement funds through gross negligence, thereby committing an act involving moral turpitude, dishonesty, or corruption, in willful violation of section 6106.

Aggravation[20]

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Std. 1.5.) The court finds the following with respect to aggravating circumstances.

Multiple Acts (Std. 1.5(b).)

Respondent's multiple acts of misconduct constitute an aggravating factor.

Harm to Client/Public/Administration of Justice (Std. 1.5(f).)

Respondent's misconduct caused significant financial harm to Noemi. Respondent continues to owe Noemi $23,500 in settlement proceeds. These funds should have been paid with the rest of Noemi's settlement proceeds on March 11, 2011. The financial harm respondent has caused and continues to cause Noemi warrants some consideration in aggravation.

Uncharged Misconduct

Although evidence of uncharged misconduct may not be used as an independent ground of discipline, it may be considered in aggravation where the "evidence was elicited for the relevant purpose of inquiring into the cause of the charged misconduct [and where the finding of uncharged misconduct] was based on [the attorney's] own testimony. . . ." (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 36.) Here, the State Bar sought and elicited testimony on the collateral issue of whether or not respondent prepared conflict of interest waivers for Noemi and the other passengers. The State Bar's questioning went beyond the scope of inquiring into the cause of the charged misconduct and respondent was not on notice that he would need to prepare a defense to

[20] All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. Effective July 1, 2015, the standards were amended. As this case was submitted prior to the amending of the standards, we apply the standards that were in effect at the time of submission.

such a charge. Accordingly, the court declines to assign any weight in aggravation for uncharged misconduct relating to the existence or nonexistence of conflict of interest waivers.

Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.6.) The court finds the following with regard to mitigating circumstances.

No Prior Record (Std. 1.6(a).)

Respondent has no prior record of discipline over many years of practice. Respondent had been admitted to practice law in California for over 31 years before the misconduct in this matter. Respondent's 31 years of practice without prior discipline warrant significant consideration in mitigation. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 245 [more than 20 years of practice with an unblemished record is highly significant mitigation].)[21]

Good Character (Std. 1.6(f).)

Respondent presented testimony from 19 character witnesses. These witnesses consisted of 6 attorneys, 6 clients, a doctor, a private investigator, and current and former staff. Respondent's character witnesses demonstrated an adequate understanding of respondent's misconduct and attested to his good character – highlighting his honesty, generosity, integrity, and legal competence. Respondent's extensive good character evidence warrants significant consideration in mitigation.

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[21] The Supreme Court and Review Department have considered the absence of prior discipline in mitigation even when the misconduct was serious. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 31, 32, 36, 30 [mitigative credit given for almost twelve years of discipline-free practice despite intentional misappropriation and commingling]; *Boehme v. State Bar* (1988) 47 Cal.3d 448, 452-453, 454-455 [twenty-two years of practice without prior discipline was important mitigating circumstance despite attorney's intentional misappropriation and lack of candor to court].)

Volunteer and Pro Bono Work

Respondent has been extremely active in community service and pro bono activities. He has worked extensively with nonprofit organizations, volunteering his time with speeches and community events. Respondent also established the Chavez Center for Law and Justice, helping low income people with legal advice through technology.

Respondent has also performed considerable volunteer services with the Cesar Chavez Family Foundation, the Cesar Chavez Foundation, and the Legacy Foundation. He has helped build homes in Mexico with the charity organization Save the Children. In addition, respondent volunteers his time at homeless shelters and at the Labor Fair put on by the Mexican Consulate.

Respondent's firm performs pro bono work with wage and hour claims and educates people about AB-60, the bill that permits California residents to obtain driver's licenses regardless of their immigration status. Respondent has also been the recipient of approximately 30 to 40 legal and community awards, such as being named the National Trial Lawyers' Association "Top Trial Lawyer."

Respondent's community service and pro bono work are entitled to consideration in mitigation. This mitigation, however, is somewhat diminished by the fact that the Chavez Center for Law and Justice was not created until after the State Bar began investigating the present matter. Further, respondent's testimony regarding his 30 to 40 legal and community awards, was not corroborated by documentary evidence. Regardless, respondent's community service and pro bono work warrant significant consideration in mitigation.

Discussion

The primary purposes of attorney discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to

preserve public confidence in the legal profession. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; std. 1.1.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Standard 1.7 provides that if aggravating or mitigating circumstances are found, they should be considered alone and in balance with any other aggravating or mitigating factors. And, if two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.7(a).)

Standards 2.1(b) and 2.2(a), among others, apply in this matter. Standard 2.1(b) recommends disbarment or actual suspension for misappropriation involving gross negligence.[22] Standard 2.2(a) advocates actual suspension of three months for commingling or failing to promptly pay out entrusted funds.

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) As the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

The State Bar urges the court to suspend respondent from the practice of law for a minimum of two years. Respondent, on the other hand, argued that he should not be found culpable on the majority of the counts and should be actually suspended for no more than sixty

[22] In the new standards, effective July 1, 2015, standard 2.1(b) has been revised to read, "Actual suspension is the presumed sanction for misappropriation involving gross negligence."

days. The court looked to *In the Matter of Robins* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr 708, and *Gassman v. State Bar* (1976) 18 Cal.3d 125, for further guidance.

In *Robins*, the attorney stipulated to misconduct including, but not limited to, six counts of grossly negligent misappropriation of trust funds totaling over $20,000 in medical liens. In aggravation, the attorney's misconduct was found to constitute a seven-year pattern, he failed to remedy the misappropriations for up to two years after learning about them, and he significantly harmed one client who was sued by a collection agency. In mitigation, the attorney had no prior record of discipline, he had physical disabilities at the time of some of the misconduct, he was candid and cooperative, he made belated restitution, he performed extensive pro bono services, he worked to improve his law office management practices, he changed his values through a spiritual reawakening, and he demonstrated sincere remorse for his misconduct. The Review Department recommended, among other things, that the attorney be suspended for two years, stayed, with a one-year period of actual suspension.

In *Gassman*, the attorney delegated responsibility to manage his trust account to his secretary and then failed to supervise the secretary. Client funds in a single matter were deposited into a commercial account and were used to pay the attorney's office expenses. The attorney also failed to perform services competently in two other matters and entered into an illegal fee splitting agreement with his secretary. The Supreme Court imposed a one-year actual suspension.

The court finds *Robins* and *Gassman* to be somewhat similar to the present matter. Here, respondent completely abdicated his CTA accounting responsibilities to his office manager, resulting in multiple misappropriations and mistakes. Respondent's and Rosario's representations that Noemi's retainer agreement was modified to increase his share of attorney's fees were unsupported and contradict logic and the credible documentary evidence and

testimony. While respondent recklessly provided no supervision over his CTA, it has not been established that he intentionally or maliciously sought to misappropriate his clients' money. Considering respondent's lengthy career with no prior record of discipline, his considerable evidence of good character, and his extensive volunteer and pro bono work, this court concludes that a period of actual suspension on par with *Robins* and *Gassman* is warranted.

Therefore, the court recommends, among other things, that respondent be suspended from the practice of law for two years, that execution of that period of suspension be stayed, and that he be placed on probation for three years, including a minimum period of actual suspension of one year and until respondent pays restitution to Noemi Barajas Arrellano in the amount of $23,500, plus interest.

Recommendations

It is recommended that respondent **Fernando Fabela Chavez**, State Bar Number 86902, be suspended from the practice of law in California for two years, that execution of that period of suspension be stayed, and that respondent be placed on probation[23] for a period of three years subject to the following conditions:

1. Respondent is suspended from the practice of law for a minimum of the first year of probation, and respondent will remain suspended until the following requirements are satisfied:

    i. He makes restitution to Noemi Barajas Arrellano in the amount of $23,500 plus 10 percent interest per year from December 6, 2010 (or reimburse the Client Security Fund, to the extent of any payment from the fund to Noemi Barajas Arrellano, in accordance with Business and Professions Code section 6140.5) and furnish proof to the State Bar's Office of Probation in Los Angeles; and

    ii. If respondent remains suspended for two years or more as a result of not satisfying the preceding requirement, he must also provide satisfactory proof to the State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the general law before his actual suspension will be terminated.

[23] The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

(Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's 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 respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.

4. Respondent 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, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's 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.

5. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.

6. Within one year after the effective date of the discipline herein, respondent 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 respondent will not receive MCLE credit for attending Ethics School or Client Trust Accounting School. (Rules Proc. of State Bar, rule 3201.)

7. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request.

At the expiration of the probation period, if respondent has complied with all conditions of probation, respondent will be relieved of the stayed suspension.

Multi-State Professional Responsibility Examination

It is recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the Supreme Court order imposing discipline in this matter, or during the period of respondent's suspension, whichever is longer and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

California Rules of Court, Rule 9.20

It is further recommended that respondent 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.

Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: August 31, 2015

LUCY ARMENDARIZ
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on August 31, 2015, I deposited a true copy of the following document(s):

DECISION

in a sealed envelope for collection and mailing on that date as follows:

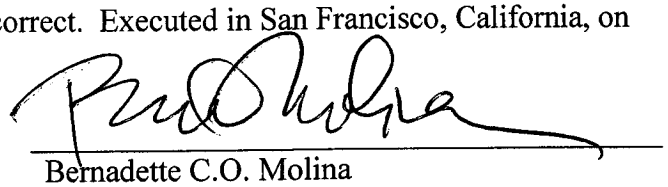
☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

SCOTT JOHN DREXEL
5195 HAMPSTED VILLAGE CTR WAY
238
NEW ALBANY, OH 43054

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

SHERRIE B. McLETCHIE, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on August 31, 2015.



Bernadette C.O. Molina
Case Administrator
State Bar Court