PUBLIC MATTER
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STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of	)	Case No. **15-O-10896-LMA**
	)	
ALDON LOUIS BOLANOS,	)	**DECISION**
	)	
Member No. 233915,	)	
	)	
A Member of the State Bar.	)	

Introduction[1]

In this contested disciplinary proceeding, respondent **Aldon Louis Bolanos** is charged with five counts of misconduct, including charging an illegal fee, failing to comply with all laws, failing to inform a client of a significant development, failing to maintain client funds in trust, and misappropriation. The present misconduct began as a failure to recognize the attorney fee limitations mandated in dental malpractice matters, but was exasperated by knee-jerk reactions, poor communication between the parties, and Respondent's mishandling of entrusted funds.

This court finds by clear and convincing evidence that Respondent is culpable of three of the five counts. Based on the nature and extent of culpability, as well as the mitigating and aggravating factors, this court recommends, among other things, that Respondent be actually suspended for a period of two years and until he provides proof to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law.

[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.

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Pertinent Procedural History

The Office of Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) against Respondent on December 23, 2015. On January 19, 2016, Respondent filed a motion to dismiss the present proceeding. On January 27, 2016, the State Bar filed an opposition to the motion to dismiss. On February 1, 2016, the court issued an order denying the motion to dismiss. Respondent filed his response to the NDC on February 12, 2016.

On February 10, 2016, the court, on its own motion, reconsidered the motion to dismiss and issued an order dismissing Count Five without prejudice due to a typographical error. On February 23, 2016, the State Bar filed an amended NDC, containing a corrected version of Count Five. On March 9, 2016, Respondent filed a response to the amended NDC.

The State Bar was represented by Supervising Senior Trial Counsel Robert A. Henderson. Jessica R. MacGregor and Noah S. Rosenthal represented Respondent. On May 16, 2016, the parties filed a partial stipulation as to facts and the admission of documents. A four-day trial was held on May 17, 18, 19, and 24, 2016. Following the filing of closing briefs, this matter was submitted for decision on June 7, 2016.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on December 1, 2004, and has been a member of the State Bar of California at all times since that date.

Facts

In or about November 2011, Anila Maharaj (Anila) went to the dentist and was told that she needed fillings on fifteen teeth. She had seven fillings done and began to experience pain. She had five more fillings done and experienced more pain. She was then told that she needed a

root canal. Upon hearing this, she sought the opinion of another dentist and was told that nine of her teeth were fractured.

Thereafter, Anila hired an attorney. On October 18, 2012, Anila filed a lawsuit in the Sacramento County Superior Court alleging dental malpractice (the lawsuit). The lawsuit was brought against three dentists – Dr. V, Dr. A, and Dr. C.[2]

In or about February 2014, Anila grew dissatisfied with the performance of her attorney. On February 14, 2014, Anila hired Respondent to replace her attorney in the lawsuit. Respondent, Anila, and her husband signed a retainer agreement. The retainer agreement described the service to be provided as a "personal injury matter." The retainer agreement provided for a 33% contingency fee and a $1,000 monthly fee to be used to "finance Client's case, including filing fees and copy charges as well as attorney's fees."[3] (Exhibit 3, p. 403.) Respondent characterized this fee arrangement as a "hybrid-contingency" contract. (See Exhibit 16, p. 521.)

Although the only allegation in the lawsuit's complaint was for dental malpractice, Respondent's retainer agreement made no mention of the statutorily mandated malpractice fee limitations. These limitations were created by the Medical Injury Compensation Reform Act (MICRA) and include a 40% fee limitation on the first $50,000 recovered in health care malpractice matters. (Section 6146, subdivision (a)(1).)

Beginning in February 2014, Anila and her husband began paying the $1,000 monthly fee to Respondent. They went on to pay Respondent's monthly fee for five months, totaling $5,000 in monthly fees.[4]

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[2] The lawsuit ultimately resulted in a confidential settlement with no admission of liability. Accordingly, this decision does not identify the defendant dentists by their full names.

[3] The retainer agreement did not have a provision authorizing Respondent to sign settlement checks on behalf of Anila.

[4] Respondent did not deposit the monthly payments into his client trust account (CTA).

On February 25, 2014, Respondent substituted into the lawsuit. As he began working on the lawsuit, Respondent discovered that Anila also had a possible claim for fraud and unfair business practices.

A mandatory settlement conference in the lawsuit was set for June 30, 2014. Each of the three dentists was represented by separate defense counsel.

On June 18, 2014, Respondent filed a motion to continue the trial. While that motion was pending, Respondent, on or about June 20, 2014, prepared a letter to the settlement conference court.[5] In this letter, Respondent stated that he believed the lawsuit "merits further litigation into some potentially fraudulent and unfair business practices conducted by defendants." (Exhibit 9, p. 840.) More specifically, Respondent noted that Anila "feels strongly that she has experienced a substantial hardship due to both the negligence of the defendants in the course of their dental practice and in being forced to undergo unnecessary treatment and dental procedures due to her excellent insurance coverage providing substantial reimbursement for same." (Exhibit 9, p. 841.) Respondent advised that he would be filing a motion to vacate the trial date for leave to file an amended pleading.

On June 19, 2014, counsel for Dr. V served a settlement conference statement on Respondent, via mail.[6] In his statement, Dr. V's attorney described the pending matter as follows:

> This is a professional negligence action. As such, the legal issues in the case are adequately addressed by the standard CACI instructions on medical negligence liability, causation and damages. (Exhibit 6, p. 625.)

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[5] Respondent also faxed a copy of this letter to each of the defendants.

[6] It is not clear when Respondent actually received items served by mail. Presumably it took somewhere between one to five days.

On June 20, 2014, counsel for Dr. A served a settlement conference statement on Respondent, via mail. In his statement, Dr. A's attorney described the pending matter as follows:

> Plaintiff contends the defendants negligently and unnecessarily removed amalgam fillings and replaced them for no clinical reason. (She denies she requested Dr. [C] to remove the amalgam fillings in the June 2011 treatment plan). She further contends the treatment caused her to develop occlusal problems leading to the variety of pains listed above. [¶]Dr. [A] contends his care and treatment was appropriate and within the standard of care. (Exhibit 8, p. 620.)

On June 20, 2014, counsel for Dr. C served his settlement conference statement[7] on Respondent, via mail. In his statement, Dr. C's attorney described the pending matter as follows:

> This case is covered by the Medical Injury Compensation Reform Act (MICRA) Civil Code section 3333.2. (Exhibit 7, p. 630.)

On June 26, 2014, Respondent filed a motion for leave to amend the complaint to add insurance fraud claims.

On June 30, 2014, the settlement conference was held. The lawsuit settled for a total of $29,997, with each of the three dentists paying $9,999. A settlement agreement and order was signed by the settlement judge on June 30, 2014. The settlement agreement describes the settlement as a "... release and discharge of any and all claims and causes of action made in this action arising out of or in any way related to Plaintiff's claims and as set forth in the allegations in the complaint on file in this matter." (Exhibit 11, p. 581.)

Although Respondent's motion for leave to amend the complaint had not been ruled on at the time of the settlement conference, counsel on both sides felt like they were settling any and

[7] The settlement conference statement in Exhibit 7 is missing its second page.

all claims, including fraud claims that may be alleged if the motion for leave to amend the complaint was granted.[8]

On July 17, 2014, a notice of settlement was filed. On July 18, 2014, Respondent's motion to continue the trial was denied. Respondent's motion for leave to amend was also subsequently denied. It is unclear whether or to what extent these denials were influenced by the fact that the lawsuit had settled. Clearly, both motions were effectively moot once the lawsuit settled.

Between July 29 and August 8, 2014, Anila signed releases for each of the three dentists. Each release was a general release of claims known and unknown. There were no admissions of liability.

In August 2014, Respondent started receiving the settlement checks from each of the three dentists. On August 8, 2014, Respondent, without authority, affixed a signature purporting to be that of Anila's to a settlement check for $9,999, and deposited it into his CTA. On August 11, 2014, Respondent, without authority, affixed a signature purporting to be that of Anila to a second settlement check for $9,999, and deposited it into his CTA.

Therefore, as of August 11, 2014, Respondent had received and deposited into his CTA $19,998 in settlement funds on Anila's behalf. Because this was a MICRA action, Respondent was entitled to 40% of the first $50,000 recovered. Accordingly, as of August 11, 2014, Respondent should have maintained $11,998.80 (60% of the settlement funds) in his CTA on Anila's behalf.

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[8] The attorney for Dr. A testified in this proceeding. He felt the malpractice case was very weak, but was concerned about the looming fraud case. He anticipated that the motion to amend the complaint would be granted, and that was one of the factors that caused him to recommend that his client settle.

On August 11, 2014, Respondent paid himself $9,899 from the settlement funds received.[9] This payment was excessive, as it constituted approximately half of the collected settlement funds.[10] On August 11, 2014, the balance in Respondent's CTA fell to $10,008. (Exh. 28, p. 11.) By collecting fees for settlement funds that had yet to be deposited, Respondent misappropriated $1,998.80 ($11,998.80 - $10,008).

On August 15, 2014, Respondent withdrew an additional $5,000 from his CTA and deposited it into his personal account. As a result, the balance in his CTA was reduced to $5,008. (Exhibit 28, p. 11.) Upon the transfer, the balance in Respondent's personal account grew to over $46,000. (Exhibit L.)

Three days later, on August 18, 2014, Respondent replenished the $5,000 taken from the CTA by making two deposits. The first deposit was for $1,000 from his personal account. (Exhibit L.) And the second deposit was for $4,000 from his business account.[11] (Exhibit K, p. 4.) While the $5,000 was removed from Respondent's CTA and transferred to his other various accounts, it was not spent or otherwise used for Respondent's own purposes.

On August 18, 2014, Respondent, without authority, affixed a signature purporting to be that of Anila's to a third settlement check for $9,999 and deposited it into his CTA. That same day, Respondent wrote a letter to Anila. The letter indicated that Respondent had received and deposited the settlement checks and that "Those checks have now cleared the bank, such that your settlement monies, less applicable fees, are now due and payable." (Exh. 16, p. 521.) The letter went on to give the following accounting:

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[9] Respondent's CTA records reflect that he removed $9,990 on August 11, 2014. In a subsequent accounting, Respondent listed his attorney fees as $9,899. As it is unclear why there is a $91 difference between these two figures, the court will rely on Respondent's accounting.

[10] Respondent collected 33% of $29,997, rather than 33% of the $19,998 that had actually been deposited in his CTA.

[11] Respondent testified that he moved this money because he wanted to pay it out to Anila, but couldn't find his CTA checks. The court did not find Respondent's testimony on this subject to be credible.

Settlement Proceeds	$29,997.00
Attorneys' Fee	($9,899.00)[12]
July 2014 Maintenance Fee	($1,000.00)

At the time Respondent wrote the August 18, 2014 letter, he had already paid himself $9,899. The letter also stressed Respondent's desire to insure Anila's satisfaction and urged her to immediately contact him if she had any questions about her settlement proceeds.

On August 22, 2014, a $19,098 electronic check was issued to Anila. Similar to a cashier's check, the $19,098 immediately came out of Respondent's CTA. Between August 18 and November 3, 2014, Respondent did not hear from Anila. Accordingly, he assumed she was satisfied with the outcome of her lawsuit.

On November 3, 2014, Respondent received a letter from Anila's employer, attorney Robert Borcyckowski (Borcyckowski). The letter stated that it was a "settlement demand regarding a legal malpractice claim against [Respondent's] office alleged by [Anila]...." (Exhibit 17, p. 272.) The letter detailed Respondent's alleged legal malpractice. It then went on to state, "[a]s a separate matter," that Respondent's fee in the dental malpractice case violated Business and Professions Code section 6146, which limited Respondent's total recovery to 40%. The letter noted that Respondent's fees in the amount of $15,899 ($10,899 from the settlement and $5,000 in monthly fees paid by Anila) exceeded the statutory limit by $3,900.20.

Borcyckowski's letter concluded by asserting that Anila anticipates approximately $20,000 in future medical expenses. Accordingly, Borcyckowski offered to settle Anila's legal malpractice claim against Respondent for $20,000.

The very next day, Respondent hastily wrote a response letter to Borcyckowski. Respondent stated that he was "shocked" to receive Borcyckowski's letter and went on to defend his representation of Anila. Respondent also addressed the issue of his fees, stating that he had a

[12] This figure represents 33% of the settlement proceeds.

"hybrid contract." He further asserted, "That my fees eventually exceeded some percentage of the final settlement is immaterial. They could very realistically have been 100% of zero, which is what we were facing at the trial." (Exhibit 18, pp. 274-275.)[13]

In November 2014, Anila still had not cashed the $19,098 check Respondent sent her on August 22, 2014. On November 6, 2014, Borcyckowski returned that check to Respondent and requested that it be re-issued without the words "Full/Final Settlement Payment" on the check. On November 14, 2014, Respondent deposited the $19,098 check back into his CTA.

On November 20, 2014, Respondent mailed a new check to Borcyckowski. While this check did not contain the words "Full/Final Settlement Payment," it was made out for only $16,518 ($2,580 less than the check Anila returned to Respondent). In the attached letter, Respondent asserted that he was now taking fees for additional work performed on Anila's husband's behalf,[14] as well as time spent responding to Borcyckowski's legal malpractice demand. That time, according to Respondent, added up to 8.6 hours of work, compensated at $300 an hour. Respondent therefore took an additional $2,580 from the funds he had previously disbursed to Anila.

Upon collecting the additional $2,580, the total attorney fees Respondent charged Anila rose to $18,479. That figure was calculated as follows:

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[13] At this point, the State Bar argues that the disputed fees should have been placed in Respondent's CTA. While that would have been prudent, the focus of Borcyckowski's letter was to settle a potential legal malpractice action, rather than a fee dispute. This matter could have had a different resolution had Borcyckowski's initial letter focused on the MICRA excessive fee issue rather than immediately putting Respondent on the defensive by criticizing his legal work and demanding $20,000 for Respondent's legal malpractice.

[14] Respondent's contract had no provision for work performed for Anila's husband. Also, no credible documentary evidence of such work was introduced in this proceeding.

Amount	Date Collected
$1,000	February 18, 2014
$1,000	March 7, 2014
$1,000	April 10, 2014
$1,000	May 9, 2014
$1,000	June 10, 2014
$1,000	August 2014
$9,899	August 11, 2014
$2,580	November 20, 2014
$18,479	

On November 20, 2014, Respondent transferred the $2,580 in additional fees out of his CTA and into his business account. The balance in Respondent's CTA went down to $16,520. (Exhibit 28, p. 30.) At that time, Respondent was required to keep $17,998.20[15] in his CTA on Anila's behalf. Accordingly, $1,478.20 ($17,998.20 - $16,520) was misappropriated when Respondent seized the additional fees and removed them from his CTA.

The next day, on November 21, 2014, Respondent reconsidered his position and wrote a letter to Borcyckowski. In the letter, Respondent stated, "[r]ather than escalate things with you and my former client, I'd like to propose that my office agree to a reduced fee which we can both agree is not 'unconscionable.' [¶]So if we agree that forty percent of the settlement is fair, my office will cause a check to be delivered to your office for the difference in which has been collected." Respondent, however, did not return the $2,580 in disputed funds to his CTA.

Neither Borcyckowski nor Anila responded to Respondent's November 21, 2014 letter. Unbeknownst to Respondent, Borcyckowski had only agreed to write some letters to Respondent for Anila but did not have time to devote to this matter.

On or about November 21, 2014, Anila cashed the $16,518 check. As a result, the balance in Respondent's CTA was reduced to $2. (Exhibit 28, p. 30.) In December 2014, Anila filed a complaint with the State Bar.

[15] This figure represents 60% of the $29,997 recovery.

On March 4, 2015, Respondent emailed Anila and again tried to return a portion of his fees and "make it right." Anila did not respond.

In November 2015, Respondent learned that the State Bar thought he owed Anila $2,478. On November 26, 2015, Respondent wrote a check from his business account to Anila in the amount of $2,478. In the memo section of the check Respondent wrote "fee dispute." Anila has not deposited this check.

On the eve of trial in this matter, on May 11, 2016, Respondent sent another check from his business account to Anila in the amount of $4,002.20. Anila also did not cash this check. She therefore currently possesses $6,480.20 in checks from Respondent that have yet to be deposited. Although it was belated, Respondent has now refunded the $5,000[16] Anila paid in monthly fees. He has also paid her 60% of the lawsuit settlement proceeds.

Conclusions of Law

Count One – Rule 4-200(A) [Illegal Fee]

Rule 4-200(A) provides that an attorney must not charge, collect, or enter into an agreement for an illegal or unconscionable fee. By charging and collecting attorney fees in the amount of $18,479 ($6,480.20 more than he was entitled based on the 40% MICRA attorney fee limitations), Respondent charged and collected an illegal fee, in willful violation of rule 4-200(A).

Citing *Waters v. Bourhis* (1985) 40 Cal.3d 424, Respondent argued that the "hybrid" fees he charged and collected did not constitute an illegal fee. The court disagrees. *Waters* is clearly distinguishable from the present case. In *Waters*, the Supreme Court of California held that if a plaintiff *knowingly chooses* to simultaneously proceed on non-MICRA and MICRA causes of

[16] Respondent accounted for $6,000 in monthly fees; however, the final $1,000 monthly fee was taken directly from the settlement proceeds. For the purposes of clarity, this court has kept the monthly fees paid by Anila and the settlement proceeds separate.

action, and obtains a recovery that could be based on a non-MICRA theory, the limitations of section 6146 should not apply. The Supreme Court stressed, however, that this situation could result in a potential conflict of interest between the attorney and client. Therefore, if an attorney seeks a larger fee than authorized by section 6146, he or she must specifically advise the client of the pros and cons related to the MICRA and non-MICRA settlement options, and obtain the client's knowing consent.

Unlike *Waters* – which involved a complaint that sought recovery on MICRA and non-MICRA causes of action[17] – the only cause of action in Anila's complaint was dental malpractice. Further, Respondent never discussed MICRA and non-MICRA settlement options with Anila. Clearly, Respondent did not obtain his client's knowing consent to pursue and settle the lawsuit as a non-MICRA action.

In addition, this court agrees with the State Bar's argument that attorneys cannot be permitted to avoid the MICRA fee limitations by unilaterally reclassifying medical malpractice causes of action. Nor can attorneys circumvent MICRA by charging combined monthly and contingency fees. Permitting such conduct would effectively nullify the MICRA fee limitations.

Count Two – Section 6068, Subdivision (a) [Failure to Comply with All Laws]

Section 6068, subdivision (a), provides that an attorney has a duty to support the Constitution and laws of the United States and California. The State Bar alleged that Respondent violated sections 6146 and 6147, and thereby violated section 6068, subdivision (a).

The court first considers Respondent's alleged violation of section 6147. Section 6147 applies to attorney contracts to represent clients on a contingency fee basis. It states that if the claim is subject to the provisions of section 6146, the written contract must contain a statement that the rates set forth in that section are the maximum limits for the contingency fee agreement,

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[17] *Waters* involved a psychiatrist that was alleged to have engaged in coercive sexual activities with his patient.

and that the attorney and client may negotiate a lower rate. While Respondent's conduct constituted a violation of section 6147, the Review Department has held that section 6147 is not a disciplinable offense under section 6068, subdivision (a). (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279.)

Next, the court considers Respondent's alleged violation of section 6146. Respondent violated section 6146 by exceeding the fee limitations in a dental malpractice matter. This court, however, already relied on these same facts to establish Respondent's culpability in Count One. To do so again in Count Two would be duplicative.[18]

For the reasons stated above, Count Two is dismissed with prejudice.

Count Three – Section 6068, Subdivision (m) [Failure to Communicate]

Section 6068, subdivision (m), provides that an attorney has a duty to promptly respond 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. Here, the State Bar alleged that Respondent's failure to inform Anila that her dental malpractice case fell under MICRA limitations constituted a failure to keep his client informed of significant developments.

Count Three, as charged, does not constitute a failure to communicate a significant development. Here, there was no "significant development." Respondent's failure to advise his client that her lawsuit fell under MICRA fee limitations could have been classified as a competency issue (see rule 3-110(A)[19]), but not a "development." Accordingly, Count Three is dismissed with prejudice.

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[18] The appropriate resolution of this matter does not depend on how many rules of professional misconduct or statutes proscribe the same misconduct. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.)

[19] Note that a violation of rule 3-110(A) requires that the failure to perform legal services with competence be intentional, reckless, or repeated.

Count Four – 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.

Although Count Four was not well-pleaded, Respondent was put on notice that he was being charged with failing to maintain Anila's funds in his CTA in or about August 2014. While this court does not find that Respondent was required to maintain $18,998, as alleged in the NDC, he was required to maintain $11,998.80 (60% of the deposited settlement proceeds) in his CTA on Anila's behalf between August 11 and 17, 2014. On August 11, 2014, the balance in Respondent's CTA fell to $10,008. And on August 15, 2014, the balance further fell to $5,008.

By failing to maintain $11,998.80 in his CTA on Anila's behalf, Respondent failed to maintain funds received for the benefit of a client in a bank account labeled "Trust Account," "Client's Funds Account," or words of similar import, in willful violation of rule 4-100(A).

Count Five – Section 6106 [Moral Turpitude – Misappropriation]

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 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, the State Bar alleged that Respondent misappropriated Anila's funds, as follows:

- A $3,991 misappropriation on or about August 15, 2014; and
- At least a $2,478 misappropriation on or about November 20, 2014.

The court will therefore consider each of these allegations separately.

On August 8 and 11, 2014, Respondent deposited two separate $9,999 settlement checks, totaling $19,998. Of those proceeds, Anila was entitled to $11,998.80 (60%). On August 11, 2014, Respondent collected too much in fees and his CTA balance fell to $10,008. At the time Respondent took the trust funds out of his CTA, he did not have a good faith or reasonable belief that he was entitled to those funds.

When Respondent took his fees on August 11, 2014, he took 33% of the total settlement. Clearly, he should have known that the total settlement had yet to be received and deposited, and that he was not entitled to take fees from settlement funds that were not in his CTA. By collecting fees for settlement funds that had yet to be deposited in his CTA, Respondent willfully misappropriated $1,998.80 ($11,998.80 - $10,008), through gross negligence, constituting an act involving moral turpitude, dishonesty, or corruption, in willful violation of section 6106.[20]

On November 20, 2014, Respondent was required to maintain $17,998.20 in his CTA on Anila's behalf. On that day, Respondent unilaterally claimed disputed funds and removed them from his CTA, causing his CTA balance to drop to $16,520. At the time Respondent took the disputed trust funds out of his CTA, he did not have a good faith or reasonable belief that he was entitled to those funds. He also should have known about the MICRA fee limitations, especially considering MICRA was raised by opposing counsel in the lawsuit, as well as Borcyckowski.

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[20] The court declines to find that Respondent's August 15, 2014 withdrawal of $5,000 constituted misappropriation because the money can be traced through Respondent's accounts, it was not used for Respondent's own use, and it was returned three days later. The court did, however, find Respondent culpable of failing to maintain client funds in trust (Count Four) based, in part, on that withdrawal.

Accordingly, Respondent misappropriated $1,478.20 ($17,998.20 - $16,520) of Anila's funds through gross negligence, constituting an act involving moral turpitude, dishonesty, or corruption, in willful violation of section 6106.

Aggravation[21]

Prior Record of Discipline (Std. 1.5(a).)

Respondent has one prior record of discipline. On October 28, 2015, the Supreme Court issued order No. S227680 (State Bar Court case No. 12-O-12167) suspending Respondent from the practice of law for one year, stayed, with two years' probation, including a 90-day actual suspension. In this matter, the primary issue was whether Respondent's improper handling of client monies constituted misappropriation or a fee dispute. Respondent was found to have: (1) represented clients with a potential conflict without their informed written consent; (2) failed to notify his client promptly of the receipt of settlement funds; (3) improperly withdrawn disputed funds from his CTA; and (4) failed to promptly return his client's file. The Review Department concluded that Respondent had a good faith belief that he was entitled to the disputed trust funds and that his ignorance of his fiduciary duty to keep disputed funds in his trust account did not constitute misappropriation involving moral turpitude. In regard to this charge, the Review Department noted that Respondent "candidly" testified as follows:

> I knew that [the client] would disagree with me, and I took the funds out of the trust account anyway .... I didn't know about [the rule requiring disputed funds to remain in his CTA], and I thought she was suing me for malpractice, and it was a mistake, and I'm aware of the rule now. I mean, it was a mistake.[22] (Exhibit 32, p. 6.)

As a result, the Review Department concluded that Respondent's unilateral taking of disputed funds amounted to negligent misappropriation.

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[21] All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

[22] This testimony was taken in June 2013, a little over a year before the present misconduct.

In aggravation, Respondent committed multiple acts of misconduct and engaging in serious overreaching. In mitigation, he entered into a stipulation, cooperated in the court proceedings, presented strong character testimony, and demonstrated remorse and recognition of his wrongdoing.[23]

Multiple Acts (Std. 1.5(b).)

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

Overreaching (Std. 1.5(g).)

Some of Respondent's actions in this matter equate to overreaching. The most notable example was his unilateral taking of $2,580 from Anila's funds when she returned his check with the request that it not include the words "full and final settlement." Respondent's seizure of funds previously allocated to Anila was unjustified and retaliatory, and constituted overreaching. Respondent's overreaching warrants significant consideration in aggravation.

Uncharged Misconduct (Std. 1.5(h).)

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 requests that the court assign aggravation based on uncharged misconduct involving Respondent's improper handling of client funds. If the court were to make such a finding, it would be based on the State Bar's exhibits (primarily the CTA records), rather than Respondent's testimony. The State Bar had Respondent's CTA records prior to filing the NDC, and had the opportunity to properly charge him with the

[23] While considering Respondent's remorse, the Review Department highlighted his trial testimony when he stated: "I want to take every step I can to make sure that I'm never in this position again, and that I always adhere to the letter of our ethical rules."

uncharged misconduct. Accordingly, the court declines to assign any weight in aggravation for uncharged misconduct relating to Respondent's handling of client funds.

Mitigation

Good Character Evidence (Std. 1.6(f).)

Respondent provided character evidence from seven witnesses.[24] Respondent's seven character witnesses consisted of four practicing attorneys, one engineer, one former client, and a judge. Respondent's character witnesses attested to his integrity and good character. Some of Respondent's character witnesses also testified regarding his pro bono activities and mentoring of young attorneys. These witnesses came from a wide-range of backgrounds and demonstrated an understanding of Respondent's present and prior misconduct. Respondent's good character evidence warrants significant consideration in mitigation.

Remorse and Recognition of Wrongdoing (Std. 1.6(g).)

Before and after Anila complained to the State Bar, Respondent demonstrated some remorse and a desire to rectify the situation. His reconciliatory efforts, however, were often in contradiction with his actions. For instance, on November 21, 2014, Respondent sent a letter to Borcyckowski offering to find an amicable resolution. This letter went unanswered, which is not surprising considering that one day earlier Respondent sent a contentious letter to Borcyckowski and seized additional fees out of settlement proceeds previously allocated to Anila.

A similar contradiction occurred in early 2015. On March 4, 2015, Respondent wrote Anila a sympathetic email stating that a recent dental procedure had given him insight regarding what she was going through. Yet, less than a month earlier, Respondent wrote a letter to the State Bar in which he described Anila as a "hysterical lunatic." (Exhibit 23, p. 395.)

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[24] Six of these witnesses testified and the remaining one presented a declaration.

Respondent's repayment of all fees collected above the MICRA limitations is worthy of note. Those payments, however, occurred after the initiation of the present disciplinary action. (See Std. 1.6(j).)

Ultimately, Respondent's words and actions have been inconsistent. Consequently, the court assigns nominal weight in mitigation for Respondent's remorse and recognition of wrongdoing.

Cooperation with the State Bar (Std. 1.6(e).)

Respondent entered into a partial stipulation of facts and admission of documents. The parties' stipulation as to the admission of exhibits was extensive and helped expedite the proceedings. The stipulated facts, on the other hand, were limited and would have been fairly easy to prove at trial. Accordingly, Respondent's cooperation with the State Bar warrants some consideration in mitigation.

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. *(Chadwick v. State Bar* (1989) 49 Cal.3d. 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d. 1016, 1025.)

In determining the 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). Second, the court looks to decisional law. *(Snyder v. State Bar* (1990) 49 Cal.3d. 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.1 provides that the primary purposes of disciplinary proceedings are the protection of the public, the courts, and the legal profession; the maintenance of high

professional standards; and the preservation of public confidence in the legal profession. This standard also provides that rehabilitation can "be an objective in determining the appropriate sanction in a particular case, so long as it is consistent with the primary purposes of discipline."

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.

In this case, the standards call for the imposition of a minimum sanction ranging from suspension to disbarment. (Standards 2.1(b), 2.2(b), 2.3(b), and 2.12(a).) The most severe sanction is found at standard 2.1(b) which provides that actual suspension is the presumed sanction for misappropriation involving gross negligence.

Due to Respondent's prior record of discipline, the court also looks to standard 1.8(a) for guidance. Standard 1.8(a) provides that if an attorney has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust.

The standards, however, "do not mandate a specific discipline." (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Ct. Rptr. 980, 994.) It has long been held that the court is "not bound to follow the standards in a talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar urges that Respondent be disbarred. Respondent, on the other hand, asserts that either a public reproval or short suspension is appropriate. In determining the appropriate level of discipline, the court also looks to the case law for guidance.

The term "'willful misappropriation' covers a broad range of conduct varying significantly in the degree of culpability. An attorney who deliberately takes a client's funds, intending to keep them permanently, and answers the client's inquiries with lies and evasions, is deserving of more severe discipline than an attorney who has acted negligently, without intent to deprive and without acts of deception." (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 38.) Disbarment would rarely, if ever, be the appropriate discipline in cases involving a single act of negligent misappropriation, absent deception or other aggravating factors. (*Ibid.*) And less discipline has been imposed in cases where the attorney lacked evil intent, and his or her circumstances indicated the "misconduct was aberrational and hence unlikely to recur." (*Ibid.*)

The Supreme Court has repeatedly declined to order disbarment in single-client misappropriation cases involving a relatively small amount of money and compelling mitigation. (See *Edwards v. State Bar*, *supra*, 52 Cal.3d 28 [one-year actual suspension on a $3,000 misappropriation]; *Hipolito v. State Bar* (1989) 48 Cal.3d 621 [one-year actual suspension on a $2,000 misappropriation]; *Howard v. State Bar* (1990) 51 Cal.3d 215 [six-month actual suspension on a $1,300 misappropriation]; *Bates v. State Bar* (1990) 51 Cal.3d 1056 [six-month actual suspension on a $1,229.75 misappropriation].)

In support of its disbarment recommendation, the State Bar cited, among other cases, *Baca v. State Bar*, *supra*, *52* Cal.3d 294. In *Baca*, the attorney was found culpable of misconduct in two matters. In the first, the attorney abandoned his client and allowed the statute of limitations to run. In the second, a workers' compensation judge ordered payment of attorney fees in exact amounts to be disbursed to Baca and his client's three former attorneys. By mistake, Baca received the full amount of attorney's fees from the workers' compensation insurance carrier. Baca deposited the check into his general account. Then, after promising to rectify the problem on several occasions, he failed to do so. A contempt proceeding was filed

and sanctions were imposed against Baca. In aggravation, Baca caused significant harm and failed to participate in the disciplinary proceedings. No significant mitigating circumstances were involved. Noting that Baca's failure to use entrusted funds for the purpose for which they were entrusted constituted misappropriation, the Supreme Court ordered that he be disbarred.

The present case can be distinguished from *Baca* on a few significant points. First, the attorney in *Baca* did not participate and the matter proceeded by default until the case reached the Supreme Court. Second, *Baca* involved no mitigation. Third, the attorney in *Baca* was also found culpable of client abandonment resulting in the client losing his cause of action. And finally, *Baca* did not include a finding that the misappropriation involved gross negligence.

Conversely, the present case is more serious than *Baca* on one significant point. Unlike *Baca*, Respondent has a prior record of discipline. Moreover, Respondent's prior discipline was eerily similar to the present matter. Respondent's repetition of similar misconduct is particularly troublesome considering his testimony in his prior discipline regarding his remorse, recognition of wrongdoing, and the steps he would take to avoid future misconduct.

While the court finds that Respondent's actions were not motivated by an evil intent, the question remains whether he is willing or able to control his conduct in the heat of the moment. The present matter began with Respondent's failure to understand and follow the MICRA fee limitations, but mushroomed with his poor trust account management, as well as his aggressive and overreaching response to Borcyckowski's allegations of malpractice.

At the time of the present misconduct, the hearing department had issued its decision on Respondent's prior discipline, but that matter was on review. Accordingly, Respondent was not on disciplinary probation and had not yet attended Ethics School or Client Trust Accounting School. While Respondent's showing of remorse was inconsistent, his actions give this court

reason to believe that rehabilitation is still feasible. Accordingly, the court concludes that the present matter does not mandate a disbarment recommendation.

Therefore, the court recommends, among other things, that Respondent be suspended from the practice of law for three years, that execution of that period of suspension be stayed, and that he be placed on probation for four years, including a minimum period of actual suspension of two years and until Respondent provides proof to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law.

Recommendations

It is recommended that respondent Aldon Louis Bolanos, State Bar Number 233915, be suspended from the practice of law in California for three years, that execution of that period of suspension be stayed, and that Respondent be placed on probation[25] for a period of four years subject to the following conditions:

1. Respondent is suspended from the practice of law for a minimum of the first two years of probation, and will 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)(i).)

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

[25] 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.)

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 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.[26]

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

Multistate Professional Responsibility Examination

It is not recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination, as he was recently ordered to do so, on October 28, 2015, by the Supreme Court in case No. S227680.

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.

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[26] It is not recommended that Respondent be ordered to attend the State Bar's Ethics School and Client Trust Accounting School, as he has recently been ordered to do so, on October 28, 2015, by the Supreme Court in case No. S227680.

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: July 22, 2016

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 July 22, 2016, 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:

JESSICA RUDIN MACGREGOR
LONG & LEVIT LLP
465 CALIFORNIA ST 5FL
SAN FRANCISCO, CA 94104

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

ROBERT A. HENDERSON, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on July 22, 2016.

Bernadette Molina
Case Administrator
State Bar Court