PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 15-O-10896
	)	
ALDON LOUIS BOLANOS,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 233915.	)	
	)	

I. INTRODUCTION

This is Aldon Louis Bolanos's second disciplinary matter. Like his previous matter, it involves fee issues and his mishandling of client trust funds. Here, Bolanos is charged with five counts of misconduct—most serious among them, misappropriation.

The hearing judge found Bolanos culpable of three of the five counts, including grossly negligent misappropriation. In discipline, she found that Bolanos's prior disciplinary case was remarkably similar to the present matter and questioned whether Bolanos is capable of conforming his conduct to the high ethical standards required of members of the bar. Thus, she recommended a two-year actual suspension to continue until he provides proof of his rehabilitation, fitness to practice, and learning and ability in the general law.

Both Bolanos and the Office of Chief Trial Counsel of the State Bar (OCTC) appeal. Bolanos seeks a reduced sanction. He argues he had a good faith belief of entitlement to the funds and never maliciously intended to take his client's money. OCTC renews its trial request for disbarment and contends Bolanos intentionally misappropriated funds.

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we also find Bolanos culpable of the three counts of misconduct: (1) collecting an illegal fee; (2) failing to

maintain funds in trust; and (3) misappropriation. However, we differ from the hearing judge and find that Bolanos knowingly and intentionally took funds belonging to his client. Under these circumstances, the disciplinary standards call for disbarment. Finding no compelling reason to depart from them, we recommend that Bolanos be disbarred.

II. PROCEDURAL HISTORY

On December 23, 2015, OCTC filed a Notice of Disciplinary Charges (NDC) charging Bolanos with the following violations: (1) Rules of Professional Conduct, rule 4-200(A)[1] (illegal fee); (2) Business and Professions Code, section 6068, subdivision (a)[2] (failure to comply with laws); (3) section 6068, subdivision (m) (failure to communicate); (4) rule 4-100(A) (failure to maintain client funds in trust); and (5) section 6106 (moral turpitude/misappropriation).

On January 19, 2016, Bolanos filed a motion to dismiss, which OCTC opposed and the hearing judge denied on February 1, 2016. On February 10, 2016, the judge reconsidered the ruling sua sponte and dismissed the misappropriation charge without prejudice due to a typographical error in the NDC. On February 23, 2016, OCTC filed an amended NDC and corrected the error. On March 9, 2016, Bolanos filed his response to the amended NDC.

On May 16, 2016, the parties filed a Stipulation as to Facts and Admission of Documents. After a four-day trial (May 17, 18, 19, and 24, 2016) and posttrial briefing, the hearing judge issued her decision on July 22, 2016. She found Bolanos culpable of three counts of misconduct: illegal fee; failure to maintain funds; and grossly negligent misappropriation. She recommended a two-year actual suspension to continue until Bolanos provides proof of his rehabilitation.

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[1] All further references to rules are to the Rules of Professional Conduct unless otherwise noted.

[2] All further references to sections are to the Business and Professions Code.

III. FACTUAL BACKGROUND

On October 18, 2012, Anila Maharaj filed a dental malpractice lawsuit against three dentists (defendants). Notably, this type of lawsuit is subject to the Medical Injury Compensation Reform Act (MICRA), which limits professional negligence damages and attorney fees in actions against health care providers. Pursuant to the MICRA fee limitations, "[a]n attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of" 40 percent on the first $50,000 recovered. (§ 6146, subd. (a)(1).) Further, the written fee agreement must contain a disclosure statement that this contingency fee rate is the maximum allowed by law and that the parties can negotiate a lower rate. (§ 6147, subd. (a)(5).)

Dissatisfied with her first attorney, Maharaj hired Bolanos to substitute into the malpractice case. On February 14, 2014, Maharaj and her husband signed Bolanos's retainer agreement, which identified the sole service to be provided as "a personal injury matter." As for fees, the agreement made no mention of MICRA and the required disclosures, but provided as follows:

> Client will be required to maintain valid credit card information on file with Attorney and does authorize the flat fee disbursement of one thousand dollars per month during the course of legal representation. These funds will be used to finance Client's case, including filing fees and copy charges as well as attorneys' fees. . . . Additionally, Attorney shall be entitled to recoup one third of any settlement, judgment, or other award. This amount is negotiable and you may consult another attorney regarding it.

In his exchanges with Maharaj, Bolanos characterized his fee arrangement as a "hybrid-contingency" contract.

Starting in February 2014 and continuing for the next four months, Maharaj and her husband paid Bolanos $1,000 a month for a total of $5,000. Bolanos did not deposit this money,

which he referred to as "monthly maintenance fees," into his client trust account (CTA). The record is silent as to the amount of these fees, if any, that was applied to costs.

As Maharaj's malpractice case proceeded, the court scheduled a mandatory settlement conference (MSC) for June 30, 2014, and a trial date of August 18, 2014. On June 18, 2014, Bolanos filed a motion to continue the trial, but the court did not rule on it at that time. On June 19 and 20, 2014, the defendants served Bolanos with their MSC statements. All of them described the case as a professional negligence case, and one specifically stated, "This case is covered by the Medical Injury Compensation Reform Act (MICRA) . . . ." On June 20, 2014, Bolanos sent a letter to the court and the defendants disclosing that he intended to seek leave to supplement the complaint with additional causes of actions for fraud and unfair business practices. On June 26, 2014, Bolanos filed his motion for leave to amend. He testified he thought this would give him more leverage to settle the case.[3]

At the end of June, before Bolanos's pending motions were heard, the parties settled the case for $29,997 on the dental malpractice claim without admitting liability. Each of the three defendants agreed to pay Maharaj $9,999, and she agreed to release them from all present and future claims. The releases were finalized in late July and early August and the settlement checks issued thereafter.

On August 8 and 11, 2014, Bolanos received two of the three settlement checks totaling $19,998. Without notifying Maharaj, and without authority to endorse the checks on her behalf, he deposited them into his CTA. On August 11, 2014, he withdrew $9,990 as his fees, and the

[3] John Sillis, counsel for one of the defendants, testified that he considered the looming fraud action in recommending to his client whether to settle the malpractice action.

CTA balance fell to $10,008. Bolanos testified, "[A]fter the first two checks came in, my full fee was in the trust account, and so I believed that I was supposed to remove it, and I did."[4]

On August 15, 2014, Bolanos withdrew an additional $5,000 from his CTA, leaving a balance of $5,008. At trial, he characterized this withdrawal as a response to Maharaj's inquiries about the status of the settlement funds. He testified he intended to give her this money as "an advance," but could not find his CTA checks, so he moved the $5,000 to his personal account, planning to send Maharaj a check from that account once the funds cleared. The hearing judge did not find Bolanos's explanation credible, and we adopt this finding on review.[5] We also note that no evidence in the record shows that Bolanos told Maharaj he had already deposited two of her settlement checks and had withdrawn $9,990 in fees.

On August 18, 2014, Bolanos received the third and final $9,999 settlement check. Again, without notifying Maharaj and without authority, he deposited it into his CTA. He replenished the $5,000 previously withdrawn, bringing his CTA balance to $20,007. Later that day, he wrote Maharaj a letter, informing her of receipt of the three checks and providing her with an accounting.[6]

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[4] Under the terms of the retainer agreement, Bolanos's 33 1/3 percent fee of Maharaj's settlement award ($29,997) would have been $9,999. The reason he took $9 less than his full contingency fee at that time is unclear.

[5] See Rules Proc. of State Bar, rule 5.155(A); *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 (great weight given to hearing judge's findings on credibility).

[6] In the accounting, Bolanos represented that his fees were $10,899, calculated as follows: $9,899 in attorney fees ($91 less than the CTA records show he actually took) plus the July 2014 $1,000 monthly maintenance fee. We point out that Bolanos's retainer agreement did not authorize the monthly maintenance fees to be taken from the settlement funds, and instead specifically stated that such fees were to be charged to the client's credit card. The record does not indicate why Bolanos did not follow the method detailed in the agreement.

On August 22, 2014, Bolanos issued Maharaj an electronic check for $19,098, which was $900 less than the $19,998 she was entitled to under the retainer agreement.[7] The notation on the check stated, "Full/Final Settlement Payment." Similar to a cashier's check, it cleared his account immediately. His CTA balance fell to $909, which he transferred to his business account four days later, leaving no funds in his CTA.[8] After August 22, 2014, Bolanos did not hear from Maharaj and assumed she was satisfied with the outcome.

A few months later, on November 3, 2014, Bolanos received a letter from Maharaj's new attorney, Robert Borcyckowski. It was labeled "Demand for Settlement" and stated that Maharaj believed she had a legal malpractice case against Bolanos. The letter also stated, "[a]s a separate matter," that Bolanos collected fees in the underlying dental malpractice matter in excess of the MICRA limits by $3,900.20. The letter concluded with an offer to settle the legal malpractice claim for $20,000.

The next day, Bolanos wrote a response to Borcyckowski. Bolanos stated he was "shocked" by the allegations and then defended his actions. With regard to the MICRA issue, he stated that his retainer agreement was a "hybrid contract" and that it was "immaterial" that his fees exceeded some percentage of the final settlement as "they could very realistically have been 100% of zero . . . ." When asked at trial whether he recognized the situation as a fee dispute, Bolanos equivocated and said, "I was trying to resolve a fight. I don't know if you want to call it a fee dispute, a malpractice dispute, or what, but I was trying to de-escalate the situation."

On November 6, 2014, Borcyckowski returned the $19,098 check to Bolanos, stating Maharaj did not agree to that sum and asking Bolanos to reissue the check without the words

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[7] Under the terms of the retainer agreement, Maharaj's 66 2/3 percent of the settlement award ($29,997) would have been $19,998.

[8] Neither the NDC nor the hearing judge addresses this withdrawal. Accordingly, we do not consider this deficit in analyzing culpability, but find it necessary to note it for accounting purposes.

"Full/Final Settlement Payment." On November 14, 2014, Bolanos deposited the check into his CTA.

On November 20, 2014, Bolanos mailed Borcyckowski a new check. He removed the notation as requested, but also reduced the amount of the check to $16,518. In the attached cover letter, Bolanos stated that he deducted $2,580 in additional fees for legal services performed for Maharaj's husband as well as for time spent responding to Borcyckowski's legal malpractice demand.[9] Bolanos's CTA records show that he withdrew at least $2,580 on November 20, 2015, bringing his CTA balance to $16,520. When Maharaj's $16,518 check cleared on November 21, 2014, Bolanos's CTA balance fell to $2.00.

Shortly thereafter, Bolanos reconsidered his position. He wrote to Borcyckowski, stating "Rather than escalate things . . . I'd like to propose . . . 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 . . . ." Bolanos did not return any funds to his CTA at this time.

Bolanos did not receive a response from Borcyckowski. Unbeknownst to him, Borcyckowski, who was Maharaj's employer, was no longer involved in the matter as he had only agreed to assist Maharaj for a limited time.

In December 2014, Maharaj filed a complaint with the State Bar. On March 4, 2015, Bolanos emailed Maharaj that he wanted to "make it right." He suggested that if she agreed to a fair and reasonable fee for him, he would "return some of the remaining fee [to her] as a gesture of good will." Maharaj did not respond.

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[9] Bolanos indicated that he provided a total of 8.6 hours of work at $300 per hour. We note that his retainer agreement made no mention of an hourly rate, nor did it include a provision for services to be performed for Maharaj's husband. Further, the hearing judge found that Bolanos did not introduce any credible documentary evidence that he ever performed such work, and we adopt this finding. (See Rules Proc. of State Bar, rule 5.155(A).)

In November 2015, Bolanos learned from OCTC that he owed Maharaj at least $2,478. On November 26, 2015, he wrote her a check for this amount, which Maharaj had not cashed by the time of trial. In May 2016, Bolanos sent Maharaj an additional check for $4,002.20. Again, Maharaj did not cash the check, and, at the time of trial, she possessed a total of $6,480.20 in uncashed checks. Along with the $16,518 in settlement proceeds he previously disbursed, Bolanos has given her payments totaling $22,998.20, which the hearing judge found satisfied the MICRA limits.

IV. CULPABILITY

A. Count Four: Failure to Maintain Funds in Trust (Rule 4-100(A))[10] Count Five: Moral Turpitude/Misappropriation (§ 6106)[11]

We first examine the most serious misconduct, which is the trust account and misappropriation charges.[12] Thereafter, we address the MICRA-related counts.

The hearing judge found Bolanos culpable of failing to maintain settlement funds in trust for his client, in violation of rule 4-100(A), and misappropriating money through gross negligence, in violation of section 6106. The issue on review is whether the misconduct was intentional (as OCTC alleges), grossly negligent (as the hearing judge found), or whether the charges should be dismissed based on a good faith claim of entitlement to the funds (as Bolanos contends). As discussed below, we find Bolanos intentionally misappropriated client funds.

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[10] Rule 4-100(A), in relevant part, requires an attorney to deposit and maintain in a trust account "[a]ll funds received or held for the benefit of clients."

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

[12] In Count Four of the NDC, OCTC alleged that Bolanos failed to maintain $18,998 in trust for his client. In Count Five, it alleged that Bolanos dishonestly or grossly negligently misappropriated $3,991 on or about August 15, 2014, and at least $2,478 on or about November 20, 2014.

We note at the outset that OCTC, Bolanos, and the hearing judge each use different calculations and different dollar amounts in analyzing these charges. The confusion is a result of Bolanos not accounting properly, an inartfully drafted NDC, and the hearing judge's finding that Bolanos was entitled to 40 percent of Maharaj's settlement funds instead of the contracted-for 33 1/3 percent. This is compounded by OCTC's adoption of the hearing judge's incorrect figures on review. We rely, however, on the evidence adduced at trial to calculate the amounts, and specifically, Bolanos's CTA records and retainer agreement. Despite disparities in the figures, we conclude that Bolanos had sufficient notice to prepare a defense to the allegations that he mishandled and misappropriated Maharaj's settlement funds. (See Rules Proc. of State Bar, rule 5.41(B)(2) [NDC must contain facts describing violations in sufficient detail to permit preparation of defense].)

1. August 2014 Misappropriation

Under the fee agreement, Bolanos was entitled to 33 1/3 percent of all sums recovered and thus was required to maintain 66 2/3 percent in trust for Maharaj until he paid her. Since Bolanos received and deposited the settlement checks on different days, we find he was entitled only to his pro rata share of the funds in the CTA upon deposit. (See *Sayble v. Feinman* (1978) 76 Cal.App.3d 509, 514-515 [where settlement is structured or calls for future payments on periodic basis, contingency fee is payable pro rata; i.e., attorney entitled to agreed percentage of each periodic payment]; Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2016) ¶ 5:211, p. 5-31 (Rutter Group).)

On August 11, 2014, Bolanos's CTA contained $19,998. Therefore, Bolanos was entitled to $6,666 (33 1/3 percent) and required to maintain $13,332 (66 2/3 percent) in trust for Maharaj. On that day, however, he withdrew $9,990 as fees, resulting in a CTA balance of $10,008 ($3,324 less than he was required to maintain). This alone raises an inference of

misappropriation. (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474 [inference of misappropriation if CTA drops below amount attorney should maintain in trust for client].) To rebut this inference, the burden shifts to Bolanos to show that a misappropriation did not occur and that he was entitled to the funds he withdrew. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618 [once inference of misappropriation arises, burden shifts to attorney to prove no misappropriation occurred].)

In his defense, Bolanos argues he was trying to comply with his professional obligation to promptly withdraw his earned fees. He points out that his full portion of the settlement, $9,999, was never disputed and states that he took his fees as soon as possible to avoid a commingling charge. The hearing judge rejected Bolanos's explanation, and found that on August 11, 2014, Bolanos did not have a good faith or reasonable belief of entitlement to fees from all three settlement checks: "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." We agree with the hearing judge that, at the time, Bolanos did not have a good faith or reasonable belief in his right to take his full contingency fee.

However, without specific analysis, the hearing judge found that Bolanos's withdrawal of fees was grossly negligent. We find the judge erred in this determination. Bolanos's misconduct did not result from carelessness or inattentiveness (as gross negligence denotes), but rather from his haste to satisfy his own financial interests above those of his client. (See *Greenbaum v. State Bar* (1976) 15 Cal.3d 893, 905 [placing financial interests above those of client is serious misconduct that warrants significant discipline].)

We find, instead, that Bolanos's misconduct in taking $3,324 in additional fees on August 11 was an intentional act. Contrary to his assertions, Bolanos's fees were not properly withdrawn as a fixed interest when he took them. (See Rutter Group, ¶¶ 9:162.2 to 9:164,

pp. 9-27 to 9-30; Cal. State Bar Formal Ethics Opn. 2006-171 [attorney's interest becomes fixed at some point after attorney notifies client of receipt of funds and client expressly approves written accounting setting forth proposed distribution]; *In the Matter of Lawrence* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 239, 243-244 [where no written accounting, attorney's interest deemed fixed after distribution of all funds associated with case other than attorney fees (and no dispute as to amount)].) Here, without authority and without notifying Maharaj, Bolanos endorsed her name to two settlement checks totaling $19,998; he deposited the funds into his CTA and withdrew $9,990 in fees—an amount he knew was more than his pro rata share. Moreover, when Maharaj inquired about the status of her case, Bolanos failed to disclose that he had already received two-thirds of her settlement funds and fully compensated himself from those funds. Instead, Bolanos told Maharaj that he would "advance" her money. (See *Lewis v. State Bar* (1973) 9 Cal.3d 704, 713 [attorney's concealment of material facts designed to mislead is no less serious than affirmative deceptive statements].)

Bolanos testified that on August 15, 2014, in furtherance of his proffered "advance," he withdrew an additional $5,000 from his CTA and deposited it into his personal account. He stated that he transferred the money to his personal account, from which he planned to pay Maharaj, because he could not find his CTA checks. His explanation is not credible. An "advance" implies that the money is coming from Bolanos rather than a disbursement of CTA funds. Thus, Bolanos's unauthorized transfer appears to be a further attempt on his part to obscure the CTA deficit by endeavoring to pay Maharaj from an account other than the CTA. However, by happenstance, the third settlement check arrived a few days later, enabling him to replenish the CTA funds and provide Maharaj with her portion of the settlement funds.

Unlike the hearing judge, we do not find that this absolves Bolanos of the misconduct.[13] Rather, we consider his August 15, 2014, CTA withdrawal to be a continuation of his intentional misappropriation. For these reasons, we find that Bolanos intentionally misappropriated $8,324 of Maharaj's funds in August 2014 ($3,324 on August 11 plus $5,000 on August 15).

2. November 2014 Misappropriation

Equally troubling is Bolanos's handling of Maharaj's funds in November 2014. On November 6, 2014, Bolanos deposited the $19,098 check that Borcyckowski returned to him back into his CTA. Thus, we find that he had a renewed obligation at this point to maintain the full amount of the settlement funds owed to Maharaj in his CTA ($19,998). When Bolanos mailed Maharaj a $16,518 check on November 20, 2014, he still had to maintain $3,480 in trust for her (the difference between $19,998 and $16,518). He did not. Instead, he made additional unauthorized withdrawals that reduced his CTA balance to $2.00 (a misappropriation of $3,478).

Bolanos argues that he took the additional funds as fees for unrelated services rendered to Maharaj's husband and for time spent responding to Borcyckowski's legal malpractice demand against him. This justification fails as a matter of law. Taking money due to a client to pay for unrelated services is not a defense to misappropriation. An attorney may not unilaterally determine his own fee and withhold trust funds to pay himself, even when he is entitled to reimbursement for his services. (*Brody v. State Bar* (1974) 11 Cal.3d 347, 350, fn. 5; *Giovanazzi v. State Bar*, *supra*, 28 Cal.3d at p. 475; *Crooks v. State Bar* (1970) 3 Cal.3d 346, 358; *McKnight v. State Bar*, *supra*, 53 Cal.3d at p. 1037.)

Significantly, the hearing judge rejected Bolanos's claim of entitlement and found no credible documentary evidence that he did any work for Maharaj's husband. We agree. (See *In*

[13] The hearing judge declined to find that Bolanos's August 15, 2014, withdrawal of $5,000 constituted misappropriation, given that the funds were voluntarily returned three days later, traceable through Bolanos's accounts, and not used by Bolanos during this time.

the Matter of Bleecker (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 122 [respondent's failure to produce documentary evidence can be considered indication that his testimony on issue was not credible].) The hearing judge also made a finding in aggravation that Bolanos's "seizure of funds previously allocated to [Maharaj] was unjustified and *retaliatory*." (Italics added.) However, in addressing culpability, the judge found Bolanos was grossly negligent in misappropriating these fees. As with the August 2014 misappropriation, we find the judge erred in this determination. Bolanos clearly withheld funds intentionally, as he did so to spite Maharaj.

On November 3, 2014, Borcyckowski sent a letter to Bolanos on behalf of Maharaj. He raised malfeasance claims against Bolanos and disputed $3,900.20 in excessive fees pursuant to MICRA. He asked that Bolanos reissue the funds he had previously sent to Maharaj and remove the words "Full/Final Settlement Payment." Instead of treating the matter as a fee dispute and reissuing the check in the same or greater amount as requested, Bolanos purposefully issued Maharaj a check for less money.

In his brief on review, Bolanos addressed this action as an "appropriate[]" and "aggressive response" to a threatened malpractice action against him. He stated, "[W]hen someone takes a swing at you, you can either swing back or run. But in the context of puffed demand letters, there is simply nowhere to run. So you either swing back or your opponent continues swinging until he connects." His action was inappropriate and deliberate self-help to his client's funds, which constitutes an intentional misappropriation.

3. Failure to Maintain Funds

The above facts and analysis establish that Bolanos also violated his obligation under rule 4-100(A) to maintain funds in trust for Maharaj. However, to the extent the misconduct overlaps with our section 6106 misappropriation findings, which support the same or greater discipline, we assign no additional disciplinary weight to this rule violation. (*In the Matter of*

Sampson (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127; *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060 [duplicative allegations of misconduct serve little, if any, purpose].)

B. Count One: Illegal Fee (Rule 4-200(A))[14]

OCTC alleged that Bolanos violated rule 4-200(A) by collecting $18,577 in fees, which exceeded the MICRA limit by $6,578.20. The hearing judge found Bolanos culpable as charged. We disagree with the amounts, but affirm the culpability finding.

Because Maharaj's malpractice case settled for $29,997, Bolanos was statutorily entitled to no more than $11,998.80 (40 percent) in fees. Instead, he took a total of $15,899 ($9,990 on August 11, 2014, $909 on August 26, 2014, and $5,000 in monthly maintenance fees.) Thus, we find Bolanos exceeded the statutorily permitted amount by $3,900.20. (See *Yates v. Law Offices of Samuel Shore* (1991) 229 Cal.App.3d 583, 591 [attorney cannot circumvent maximum allowable contingent fee for medical malpractice action by charging both contingent and flat or hourly fees].)

Bolanos presents two arguments on review. First, he argues he "had absolutely zero experience with 'MICRA'" and "[o]ne cannot knowingly violate a law which one does not actually know about." This argument lacks merit. Bolanos was charged with violating rule 4-200(A). Simply put, regarding rule violations, ignorance of the law is no excuse. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 793 [knowledge not required to find willful violation of rules].)

Second, citing *Waters v. Bourhis* (1985) 40 Cal.3d 424, Bolanos contends he did not have to comply with MICRA because Maharaj's case was a "hybrid" case that settled due to the fraud claim, not the malpractice claim. Again, his argument fails. *Waters* is clearly distinguishable. That case involved a complaint against a psychiatrist alleging professional negligence, breach of

[14] Rule 4-200 provides that "a member may not enter into an agreement for, charge, or collect an illegal or unconscionable fee."

duty of good faith, and intentional tortious conduct—both MICRA and non-MICRA causes of actions. The case settled before trial, without any admissions of liability. The Supreme Court held that in a "hybrid" case, where "a plaintiff knowingly chooses to proceed on both non-MICRA and MICRA causes of action, and obtains a recovery that may be based on a non-MICRA theory, the limitations of section 6146 should not apply." (*Id.* at p. 437.) Unlike *Waters*, where the filed complaint contained non-MICRA causes of action, Maharaj's filed complaint alleged only a dental malpractice cause of action, and therefore no ambiguity existed as to the basis of her settlement recovery. To obtain settlement "leverage," Bolanos may have sought to amend Maharaj's complaint four months later to add a fraud cause of action, but the motion for leave to amend was never granted. (See *Prince v. Sutter Health Cent.* (2008) 161 Cal.App.4th 971, 978 [in MICRA case where complaint pleads professional negligence, party cannot raise fraud without obtaining leave to amend; moreover, merely labeling something fraud does not necessarily show injury was caused by intentional tort falling outside MICRA's protections].)

Under these circumstances, we conclude that Maharaj's case was subject to MICRA, requiring Bolanos to limit his fees to 40 percent of the settlement. His failure to do so constitutes a violation of rule 4-200(A).

C. Count Two: Failure to Comply with Laws (§ 6068, subd. (a))[15]

OCTC charged Bolanos with failing to comply with sections 6146 and 6147. The hearing judge found Bolanos violated both code sections. However, for the reasons discussed below, she dismissed Count Two, and we affirm.

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[15] Section 6068, subdivision (a), provides that "it is the duty of an attorney to . . . . support the Constitution and laws of the United States and of this state."

1. Section 6146

Section 6146 prohibits an attorney from collecting fees in excess of the MICRA limitations. The hearing judge found Bolanos exceeded the statutory maximum fee, but the same facts established his culpability in Count One (illegal fee). We agree and adopt her dismissal, which OCTC does not challenge. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148 [appropriate resolution of matter does not depend on how many rules or statutes proscribe same misconduct].)

2. Section 6147

Section 6147 requires that the written fee agreement in MICRA cases state "that the rates set forth . . . are the maximum limits . . . and that the attorney and client may negotiate a lower rate." (§ 6147, subd. (a)(5).) The hearing judge found Bolanos failed to include the statutorily required language in his retainer agreement.[16] However, relying on *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279, the judge concluded that this was not a disciplinable offense. In *Harney*, we found that section 6147 does not provide a basis for discipline, but rather the statute supplies its own remedy: "Failure to comply with any provision of this section renders the agreement voidable at the option of the client, and the attorney shall, upon the agreement being voided, be entitled to collect a reasonable fee." (*Ibid.*, citing § 6147, subd. (b).) We agree with the hearing judge and adopt her section 6147 finding and the dismissal of Count Two in its entirety.

[16] We note that Bolanos's retainer agreement indicated that his fees were negotiable, but did not include the required disclaimer about the maximum limits.

D. Count Three: Failure To Communicate (§ 6068, subd. (m))[17]

OCTC charged Bolanos with failing to keep Maharaj reasonably informed of significant developments in her case by not notifying her of the MICRA fee limitations. The hearing judge dismissed this charge, finding this was not a "development" in the case, and instead should have been brought as a competency issue. OCTC challenges this finding. It argues that Bolanos was statutorily required to notify Maharaj in the retainer agreement that the MICRA limits applied, and further contends that the terms of the retainer agreement, by definition, are a "development."

We agree with the hearing judge that Bolanos's failure to include the required language in his retainer agreement, along with his ignorance of MICRA, is best characterized as a failure to act competently. Bolanos testified that he was unaware at the time he executed the retainer agreement that Maharaj's case was subject to MICRA. And, although the record demonstrates that at least one of the defendants referenced MICRA in an MSC statement in June 2014, Bolanos testified that he did not pay attention to that reference. Further, no evidence exists regarding the particulars of MICRA that may or may not have been discussed at the MSC. Thus, we find no clear and convincing evidence that Bolanos willfully violated section 6068, subdivision (m), and we affirm the hearing judge's dismissal of Count Three.

V. AGGRAVATION AND MITIGATION

Standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence.[18] Standard 1.6 requires Bolanos to meet the same burden to prove mitigation.

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[17] Section 6068, subdivision (m), provides, in relevant part, that it is the duty of an attorney to "keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

[18] Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. All further references to standards are to this source.

A. AGGRAVATION[19]

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

Bolanos has one prior discipline from 2015, a 90-day actual suspension, to which we assign significant weight in aggravation (*Bolanos I*).[20] In *Bolanos I*, he was charged in December 2012 with several violations stemming from a client dispute over the amount of his contingency fees and mishandling of client trust funds.

At trial in *Bolanos I*, OCTC sought disbarment, arguing that Bolanos engaged in an act of moral turpitude by intentionally misappropriating funds, whereas Bolanos argued the matter amounted to a contested fee issue. A hearing judge agreed with Bolanos and dismissed the moral turpitude/misappropriation charge. Nonetheless, she found him culpable of four other counts of misconduct, including failing to promptly notify his client of receipt of funds and improperly withdrawing disputed funds from his CTA. She further found his misconduct was aggravated by multiple acts and serious overreaching that included (1) agreeing to a fee modification and then attempting to renege on that agreement; (2) providing an incomplete accounting to his client; and (3) improperly withholding his client's file from her, conditioning delivery on her payment of copying costs. Notably, in mitigation, the hearing judge found that Bolanos was remorseful and recognized his wrongdoing. In his trial testimony, Bolanos conceded that he was unaware of the CTA rules and that he made a mistake:

> I know 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 the 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. ¶ 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.

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[19] The hearing judge declined to find uncharged misconduct in aggravation, which OCTC does not challenge on review.

[20] Supreme Court Case No. S227680, State Bar Case No. 12-O-12167.

Despite Bolanos's testimony that he was resolved to avoid repeating his errors, when faced with Maharaj's fee dispute and threat of malpractice in 2014, he engaged in virtually identical misconduct and again mishandled CTA funds.[21] Like the hearing judge, we find the similarities striking. In both cases, Bolanos failed to notify his client of receipt of their settlement funds, he endorsed their names to the settlement checks without authority, and he deposited and removed funds from the CTA, in violation of rule 4-100(A). Also, in both cases, when the clients disputed the amount of his fees, Bolanos responded by unreasonably and unjustifiably withholding the clients' property or money. He acted aggressively and impulsively, allowing his personal feelings to overcome his professional and fiduciary obligations.

In this regard, we find Bolanos's previous discipline to be particularly serious. It calls into question his prior expression of remorse and leaves us with doubts as to whether he is willing or able to conform his conduct to the high ethical standards required of an attorney. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443-444 [similarities between prior and current misconduct render previous discipline more serious and indicate lack of rehabilitation]; *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 841 [great weight placed on common thread among past and present misconduct].)

2. Multiple Acts of Wrongdoing (Std. 1.5(b))

We agree with the hearing judge that Bolanos's multiple acts of misconduct are an aggravating circumstance. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 647 [three instances of misconduct considered multiple acts].)

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[21] We note that OCTC appealed the hearing judge's decision in *Bolanos I*. Bolanos did not appeal. He accepted the judge's culpability findings and recommended discipline, and repeated that he understood the seriousness of his actions and would take steps to avoid future mistakes, including retaining an ethics attorney to provide him with ethics counseling. In May 2015, we issued our decision affirming the hearing judge's findings and disciplinary recommendation, which the Supreme Court imposed.

3. Overreaching (Std. 1.5(g))

The hearing judge found that some of Bolanos's actions constituted overreaching, but listed only one example: his "unjustified and retaliatory seizure" of Maharaj's funds in November 2014. Since we relied on this fact in assessing Bolanos's culpability for intentional misappropriation, we decline to give it additional weight in aggravation. However, we do find that he engaged in other acts of overreaching that warrant some aggravation.

Bolanos's fee agreement provided for a nonrefundable monthly maintenance fee to finance his attorney fees and costs. However, he did not identify the specific legal services to be provided for this fee, account for any portion allocated to costs, or deposit any of the collected monthly payments into his CTA. Also, in contravention of the terms of his own retainer agreement and without apparent authorization, he withdrew his July 2014 monthly maintenance fee directly from Maharaj's settlement funds. These acts show that Bolanos overreached in his contractual fee arrangement, and exerted his position of trust to the detriment of his client. (See *Beery v. State Bar* (1987) 43 Cal.3d 802, 813; *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 243-244 [essence of fiduciary or confidential relationship is that parties do not deal on equal terms because person in whom trust and confidence is reposed is in superior position to exert unique influence over dependent party].)

B. MITIGATION

1. Good Character Evidence (Std. 1.6(f))/Pro Bono Activities

The hearing judge assigned Bolanos significant mitigation credit based on the testimony of his seven character witnesses (four practicing attorneys, an engineer, a former client, and a superior court judge), who attested to his good character. Also, we learned from some of these witnesses that Bolanos has engaged in various pro bono and mentoring activities. (*Calvert v.*

State Bar (1991) 54 Cal.3d 765, 785 [community and pro bono work entitled to "considerable weight" in mitigation].)

Four witnesses testified in *Bolanos I* and again in these proceedings: (1) Judge Suzanne Bolanos, Bolanos's cousin by marriage; (2) Philip Downs, Jr., a long-time friend, attorney, and former decorated commander in the United States Marine Corps; (3) Roger Kosla, an attorney and former intern at Bolanos's law office, who testified that Bolanos performed volunteer civil rights work for prisoners; and (4) Kevin Singh, a former client whom Bolanos represented free of charge in a default loan action—Bolanos saved Singh's home from foreclosure and Singh has since referred other clients to Bolanos, including Maharaj. These witnesses continue to support Bolanos and attested to his honesty and trustworthiness, as well as to his commitment to his family, his friends, and his pro bono activities.

Three other character witnesses similarly testified to Bolanos's good character. Melinda Guzman Moore is a solo practitioner who has known Bolanos for several years. She testified that he reached out to her during his 2015 suspension in *Bolanos I*, asking her to serve as his mentor and to provide advice regarding steps he could take to improve, and she believes he is remorseful for his past mistakes and has made positive changes. Paul Klima is an engineer and non-practicing attorney who has known Bolanos since high school. He testified that Bolanos is an honest person with a strong moral compass who would not intentionally do anything against his client's interest. Finally, Xavier Villegas, an attorney who joined Bolanos's law practice after law school, testified by declaration that Bolanos is a diligent and fair lawyer. He described a pro bono asylum case that he and Bolanos worked on together and stated that Bolanos was candid with him about his discipline in *Bolanos I* and the charges against him in this case.

We agree with the hearing judge that Bolanos is entitled to significant weight in mitigation based on the favorable testimony of these witnesses who are aware of Bolanos's past

and present misconduct and who represent a wide range of references in the legal and general communities. In particular, we give serious consideration and considerable weight to the members of the bench and bar who testified on Bolanos's behalf, as they have a "strong interest in maintaining the honest administration of justice." (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319.) We also find Bolanos is entitled to considerable weight in mitigation for his pro bono activities discussed during the witnesses' testimony. (*Calvert v. State Bar*, *supra*, 54 Cal.3d at p. 785.)

2. Cooperation (Std. 1.6(e))

We agree with the hearing judge that Bolanos is entitled to some mitigation for his extensive pretrial stipulation since he only stipulated to easily provable facts. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive mitigation reserved for those who stipulate to culpability].)

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

The hearing judge found Bolanos was remorseful at times, but assigned nominal weight in mitigation, pointing to several examples where his reconciliatory efforts were undermined by his words and actions. We agree, and note that the record is replete with examples where Bolanos showed remorse, but also engaged in contradictory behavior that diluted the mitigation he would otherwise have received. For example, after the November 20, 2014, misappropriation, Bolanos attempted to contact Maharaj, either directly or through Borcyckowski, to reach an amicable solution, but he did not receive a response. At that point, he should have returned the at-issue funds to Maharaj or placed them in his CTA. Instead, he retained full use of the money, and only provided restitution after Maharaj filed a disciplinary complaint. In another example, on March 4, 2015, Bolanos wrote Maharaj a sympathetic email stating that a recent dental procedure gave him insight regarding what she was going through. However, in his

correspondence to OCTC, he described her as a "hypersensitive" patient, "hysterical lunatic," and "insane malingerer."

Ultimately, Bolanos has not been consistent in his claim of remorse. Thus, he is only entitled to nominal weight in mitigation under standard 1.6(g). (*Hipolito v. State Bar* (1989) 48 Cal.3d 621, 627, fn. 2 ["[E]xpressing remorse for one's misconduct is an elementary moral precept which, standing alone, deserves no special consideration in determining the appropriate discipline."].)

VI. DISCIPLINE[22]

Our disciplinary analysis begins with the standards, which, although not binding, are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) The Supreme Court has instructed us to follow them whenever possible (see *In re Young* (1989) 49 Cal.3d 257, 267, fn. 11), and to look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

Standard 2.1(a) specifically deals with intentional misappropriation and provides that disbarment is the presumed sanction for such misconduct "unless the amount misappropriated is insignificantly small or sufficiently compelling mitigating circumstances clearly predominate, in which case actual suspension is appropriate."[23]

Here, Bolanos intentionally misappropriated a significant amount of money—$11,802 ($8,324 in August 2014 plus $3,478 in November 2014). (See *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1361, 1368 [$1,355.75 held to be significant amount].) His actions involved

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[22] The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to maintain the highest professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.1.)

[23] In this case, various other standards also apply (stds. 2.1(b), 2.2(b), 2.3(b), and 2.12(a)), with the presumed discipline ranging from disbarment to reproval. Since the most severe discipline is found in standard 2.1(a), we focus our analysis there. (See std. 1.7(a) [if member commits two or more acts of misconduct and standards specify different sanctions for each act, most severe sanction must be imposed].)

overreaching and concealment, and were, in part, motivated by spite. Moreover, he made full restitution only after his client filed a State Bar disciplinary complaint.

His misappropriation of his client trust funds "breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the profession. [Citations.]" (*Kelly v. State Bar* (1988) 45 Cal.3d 649, 656.) It is grave misconduct for which disbarment is the usual discipline. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 38.) "Even a single 'first-time' act of misappropriation has warranted such stern treatment." (*Kelly v. State Bar*, *supra*, 45 Cal.3d at p. 657.) Accordingly, disbarment is merited in this case even without consideration of *Bolanos I.* (*Sevin v. State Bar* (1973) 8 Cal. 3d 641, 646 [misappropriation involving moral turpitude warranted disbarment "even without consideration of [respondent's] prior record"].)

Nonetheless, this is Bolanos's second discipline involving mishandling of client trust funds, and the similarities to his 2015 disciplinary matter reveal that he has not learned from his prior mistakes and thus remains a risk to the public. (See *Alkow v. State Bar* (1971) 3 Cal.3d 924, 936, citing *Bruns v. State Bar* (1941) 18 Cal.2d 667, 673 [previously administered disciplinary suspension "did not succeed in imparting to [respondent] an understanding of the duties of an attorney to his clients and to the public"].) We conclude that Bolanos's good character evidence, though significant, along with his other mitigation evidence, does not demonstrate sufficiently compelling mitigation to overcome presumptive disbarment. (See *Grim v. State Bar* (1991) 53 Cal.3d 21, 33 [attorney disbarred for willful misappropriation of $5,500 in client funds, despite cooperation and good character evidence attested to by 10 witnesses].)

For these reasons, we do not recommend a more lenient sanction under standard 2.1(a). (Stds. 1.2(i), 1.7(c) [lesser sanction than recommended in standard may be warranted where misconduct is minor, little or no injury to client, public, legal system, or profession, and attorney

able to conform to ethical responsibilities in future]; see *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [clear reasons for departure from standards should be shown].) Accordingly, disbarment is warranted by the facts of this case and under relevant decisional law in order to protect the public, the courts, and the legal profession.[24]

VII. RECOMMENDATION

We recommend that Aldon Louis Bolanos be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice in California.

We further recommend that Bolanos must comply with rule 9.20 of the California Rules of Court and 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 matter.

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

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[24] E.g., *Kelly v. State Bar*, *supra*, 45 Cal.3d 649 (disbarment for approximately $20,000 misappropriation, moral turpitude, dishonesty, and improper communication with adverse party, despite no prior record and no aggravation); *Gordon v. State Bar* (1982) 31 Cal.3d 748 (disbarment for misappropriation of at least $27,000, even though 13 years of discipline-free practice, financial difficulties, emotional difficulties due to divorce, remorse, and lack of harm); *In the Matter of Spaith* (1996) 3 Cal. State Bar Ct. Rptr. 511 (disbarment for approximately $40,000 misappropriation, intentionally misleading client about funds, mitigation including emotional problems, repayment of money, 15 years of discipline-free practice, strong character evidence, and candor and cooperation with State Bar not sufficiently compelling).

VIII. ORDER OF INACTIVE ENROLLMENT

Pursuant to section 6007, subdivision (c)(4), and rule 5.111(D)(1) of the Rules of Procedure of the State Bar, Aldon Louis Bolanos is ordered enrolled inactive, effective three days after service of this opinion.

McGILL, J.

WE CONCUR:

PURCELL, P. J.

HONN, J.