PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **MARLENE GERDTS,** A Member of the State Bar.	**99-O-12936; 99-O-13583; 99-O-13586 (Consolidated)** **OPINION ON REVIEW**

In this consolidated matter, respondent Marlene Gerdts has requested our review of the decision of the hearing judge. Respondent was found culpable of not refunding unearned fees promptly; of failing to perform legal services with competence; of failing to keep clients informed of significant developments and failing to respond to reasonable status inquiries of clients; engaging in conduct involving moral turpitude; commingling funds in accounts labeled "trust account"; and issuing trust account checks to pay business and personal expenses.

The hearing judge recommended that respondent be suspended from the practice of law for two years, execution stayed, and that respondent be placed on probation for five years with conditions, including actual suspension of two years and until she provides proof satisfaction to the State Bar Court of her rehabilitation, fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct,[1] and restitution to be paid in full before the end of the probation period.

On review, respondent raises the following issues: (1) whether respondent's right to a fair trial and due process was violated; (2) whether the hearing judge's findings of fact and conclusions of law are supported by the evidence; (3) whether the recommended level of discipline is excessive;

[1]The standards are found in title IV of the Rules of Procedure of the State Bar. All further references to standards are to this source.

(4) whether State Bar trial counsel should have been recused based on prosecutorial misconduct; and (5) whether charges against respondent were based on vindictive motives of the State Bar.

On March 24, 2003, two days before the scheduled oral arguments before this court, respondent filed a Motion to Augment Record. On March 26, 2003, we granted the motion to augment the record on review with a copy of the settlement agreement entered into by respondent and her former client Vilma Delgado in early March 2003, which is attached to respondent's motion as exhibit A and which respondent contends is evidence of her rehabilitation. We denied the motion to augment the record with a copy of the Complaint for Damages for Professional Negligence filed by respondent against her former attorney in this proceeding on March 12, 2003.

Following our independent review of the record (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207) and for the reasons stated below, we agree with and, with only minor modifications, adopt almost all of the hearing judge's findings of facts and conclusions of law. Furthermore, even though we agree with the hearing judge's overall discipline recommendation that respondent be actually suspended from the practice of law for a period of two years, we disagree with some specific portions of her discipline recommendation and, therefore, make a number of modifications to her discipline recommendation, as we note below.

STATEMENT OF THE CASE

Respondent was admitted to the practice of law in California on December 16, 1980, and has no prior record of disciplinary proceedings.

On September 4, 2001, and on October 11, 2001, the parties entered into and filed a joint stipulation as to undisputed facts. The decision of the hearing judge was filed on March 14, 2002.

Case Number 99-O-13583 - The Dr. Park Matter

On July 6, 1999, Dr. Joon Park retained respondent to represent him in his marital dissolution matter. An order to show cause hearing was scheduled for the following day, and respondent appeared with Dr. Park to request a continuance, which was granted. No pleadings were filed. After the hearing on July 7, 1999, Dr. Park paid respondent $10,000 as advanced fees. No written retainer agreement was executed, and the $10,000 was deposited in respondent's client trust account on July 7, 1999 in the People's Bank of California.

Dr. Park then attempted to contact respondent, as he had been instructed by respondent to come to the office to sign a contract. He received no response to his calls and messages.

On July 19, 1999, Dr. Park, unable to contact respondent, hired Attorney Leslie Furukawa to negotiate the return of his fees from respondent and to represent him in the dissolution matter. Attorney Furukawa wrote to respondent on July 20, 1999, requesting the return of Dr. Park's file, the refund of the advanced fees and a substitution of attorney. Respondent did not respond, and a second letter dated July 29, 1999, and a third letter dated August 11, 1999, were sent to respondent. There was no response to any of these letters.

On October 6, 1999, Dr. Park filed a complaint with the State Bar in reference to the advanced fees, return of his file and non-performance of services by respondent. The State Bar wrote to respondent on January 13, 2000, regarding the complaint.

On March 2, 2000, respondent wrote to the State Bar explaining that she had sent Dr. Park a billing statement for services rendered in the sum of $5,685 and a check for unearned fees in the sum of $4,315 on October 20, 1999. She enclosed copies of the billing statement and the check drawn on the People's Bank client trust account, account number 51865483. Dr. Park denied ever receiving the statement or check.

The People's Bank statement for account number 51865483, dated November 8, 1999, shows a beginning balance of $1,172.23 on October 11, 1999, and a debit of $1,000 on October 12, 1999, leaving a balance of $172.23. There were no deposits of funds during this period, and the balance on November 8, 1999, was $166.26 indicating insufficient funds in the account to cover the $4,315 check. This account was closed in January 2000.

In July 2000, the firm of Daigneault, Abel & Daigneault was hired by Dr. Park to represent him in reference to the return of his $10,000 and the dissolution matter. On July 13, 2000, a complaint for the return of $10,000 was filed on behalf of Dr. Park by Attorney Taylor Daigneault. Attorney Marlene Abel of the firm represented Dr. Park in his dissolution matter. Respondent filed her answer to the complaint.

Respondent sent Attorney Daigneault a copy of her billing statement of October 20, 1999, but failed to mention or enclose a copy of the check for $4,315. On August 1, 2000, Attorney

Daigneault sent a letter contesting her billing statement for services rendered and requesting immediate payment of $4,315, the admitted unearned fees. After further negotiations, on October 19, 2000, respondent sent Daigneault a check drawn on respondent's client trust account at Western Financial Bank (not the one at People's Bank) in the sum of $4,315, with a notation "Fee Dispute" on the check. She mentioned to Attorney Daigneault for the first time, that she had previously mailed a check in this amount to Dr. Park which had not been cashed. Upon a request for clarification of the "fee dispute" check by Attorney Daigneault, on November 13, 2000, respondent agreed that the check was for unearned fees and authorized cashing the check. The matter was thereafter settled by payment of an additional $3,000 by respondent.

Conclusion of Law

The hearing judge found, and we agree, that respondent is culpable of a wilful violation of rule 3-700(D)(2) of the Rules of Professional Conduct of the State Bar[2] as charged, by failure to promptly refund unearned fees upon termination of employment. This was based on the unsuccessful demands by Attorney Furukawa and the necessity of Attorney Daigneault to file a lawsuit for the return of the funds. Further, the hearing judge found respondent's testimony unpersuasive that she had issued a check for $4,315 on October 20, 1999, in favor of Dr. Park, based on the insufficient funds in the client trust account at the time of issuance.

Discussion

The hearing judge found respondent's testimony lacking in credibility. Respondent first testified that she doesn't recall that she ever received the letters from Attorney Furukawa requesting that she sign the enclosed substitution form, return Dr. Park's files and refund the fees. Yet, upon a reminder that on file is the signed stipulation that she received the July 20, July 29 and August 11, 1999, letters, respondent testified that she does not recall *when* she received them, but that the letters were received by her office address. Respondent billed Dr. Park for the preparation and filing of a substitution form, but there is no substitution on file. Respondent billed Dr. Park for review of correspondence from Furukawa on July 20, 1999, and also billed him for copying and forwarding

---

[2]Unless noted otherwise, all further references to rules are to these Rules of Professional Conduct.

the file to new counsel. Yet, on August 11, 1999, Attorney Furukawa again, for the third time, wrote to respondent requesting that respondent forward Dr. Park's file for an August 18, 1999, hearing, refund the fees and sign the enclosed substitution form. Yet still, none of these were received by Attorney Furukawa.

We give great weight to the assessment of credibility made by the hearing judge, for she was in the best position to see the witnesses and judge by their demeanor the truthfulness of each. (Rules Proc. of State Bar, rule 305(a); *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 931.) An independent review of the evidence convinces this court of the appropriateness of the hearing judge's findings.

Case Number 99-O-13586 - The Delgado Matter

The Medical Malpractice Action

On April 4, 1995, Vilma Delgado (Delgado) retained respondent to represent her in a medical malpractice action against the Los Angeles Metropolitan Medical Center, San Antonio Clinic and Doctors Arnold Savage and Alfonso Villamizar. A retainer agreement was signed.

In the underlying matter, Delgado underwent a cholecystectomy performed by Dr. Villamizar on March 16, 1995. After the surgery, she suffered great abdominal pain and jaundice. On March 20, 1995, she underwent a second surgery to determine the cause of her problems. It was discovered that surgical clips had been left inside of her body in the initial cholecystectomy.

On March 14, 1996, respondent filed a medical malpractice action on behalf of Delgado – *Vilma Delgado v. Los Angeles Metropolitan Medical Center, et al.*, Los Angeles Superior Court case number BC 146212. On August 16, 1996, a demurrer was filed by Dr. Savage. On September 25, 1996, the superior court ordered the demurrer off-calendar on respondent's representation that an amended complaint would be filed on or before October 1, 1996. Based on that representation, the superior court ordered respondent to file an amended complaint by October 1, 1996, but respondent failed to do so. Accordingly, the court set the matter for a hearing on November 5, 1996, at which time respondent was ordered to show cause why the action should not be dismissed. Respondent failed to appear at the OSC hearing and the court dismissed Delgado's case in its entirety against all defendants. The court entered judgment against Delgado on February 11, 1997, and ordered Delgado to pay $210 in costs.

From about January 1997 to about August 1997, Delgado repeatedly telephoned respondent to request status updates of her case. She was unable to speak to respondent, and respondent did not respond to her calls and messages.

On August 7, 1997, Delgado and her husband met with respondent, who told them that Delgado's case would probably be dismissed.[3] She informed them that she was going to try to get the case going, and if not, they would get together again and arrange something about money settlement. Respondent explained that this was something about papers that weren't filed on time and that she had been too busy handling some other cases and had put it in the hands of someone else who didn't do it on time.

Following the meeting, Delgado and her husband went to court to obtain a copy of her file and learned that their case had been dismissed in November 1996.

The Legal Malpractice Action

On October 14, 1997, a legal malpractice action against respondent was filed by Attorney Waks on behalf of Delgado. On January 16, 1998, respondent filed her answer to the complaint.

On November 19, 1997, respondent was served with interrogatories, special interrogatories, inspection demand and requests for admission. After many motions to compel further responses to the discovery propounded to respondent, the court granted the motions on May 6, 1998, and ordered sanctions in the sum of $1,500 against respondent for the attorney's fees and costs that Delgado incurred in bringing the motions to compel.

On May 29, 1998, Attorney Waks filed a motion for further sanctions based on respondent's failure to comply with the court's order of May 6, 1998, and on June 30, 1998 the court ordered respondent's answer stricken and ordered further sanctions.

Eight months after the court ordered respondent's answer stricken, the court entered a default judgment against respondent on February 26, 1999, in the sum of $500,000 plus $323 in costs.

---

[3]As stated *ante*: *Vilma Delgado v. Los Angeles Metropolitan Medical Center* was dismissed on November 5, 1996, and judgment was entered in favor of all defendants on February 11, 1997.

Respondent was served with a subpoena to produce documents for a judgment debtor's examination on September 9, 1999. This hearing was continued since respondent did not produce all the information requested. On December 9, 1999, the hearing resumed, and respondent disclosed her trust account at People's Bank, but not her account number. She did not disclose the trust account at Western Financial Bank, which had been opened on September 14, 1999. Respondent admitted using these accounts as general accounts depositing her personal funds in them to prevent judgment creditors from collecting their judgments against her.

Conclusions of Law

The hearing judge found respondent culpable of a wilful violation of rule 3-110(A), repeated and reckless failure to competently perform legal services. She found that respondent failed to respond to the demurrer, failed to file an amended complaint as ordered by the superior court and failed to appear at the OSC hearing.

Respondent was charged in count two with a violation of section 6103 of the Business and Professions Code,[4] wilful disobedience of a court order, by failing to file an amended complaint by October 1, 1996, as ordered by the court and failure to appear at the OSC hearing on November 5, 1996, as ordered by the court. However, the hearing judge correctly found that these facts were duplicative of the facts supporting the violation of rule 3-110(A) and should not be considered in determining the appropriate discipline. We agree but we further conclude that the section 6103 charge should therefore be dismissed with prejudice as duplicative of the found rule 3-110(A) violation. (*In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 103, 108; *In the Matter of Dixon* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23, 31.)

The hearing judge found respondent culpable of a wilful violation of section 6068, subdivision (m) for failure to respond promptly to reasonable status inquiries of the client and to keep her client informed of significant developments. Delgado repeatedly telephoned respondent from January to August 1997, but received no response to any of her calls, and she was not informed

---

[4]Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code.

that her case had been dismissed in November 1996. We concur with the hearing judge's conclusion.

Respondent was found culpable of conduct involving moral turpitude in wilful violation of section 6106. We concur. Respondent failed to disclose to Delgado that her case had been dismissed nine months prior to their meeting, concealed matters about her trust accounts in the judgement debtor's examination and concealed her assets under the client trust account label.

We note that count five, a violation of rule 3-400(B), regarding limiting liability to a client, was dismissed at trial, but we add that the dismissal is with prejudice.

Discussion

Respondent's explanation that she had prepared the amended complaint, but had left it to her paralegal and another attorney to file it through an attorney service, which was never done, is not credible and not supported by the evidence. Nor was her testimony credible that she had met with Delgado at least ten to fifteen times to keep her informed, had spoken to her on the telephone at least thirty times and had informed Delgado of the dismissal in person and in writing. Again, no evidence was provided to support this contention.

Credibility lies with Delgado when she testified that she was unable to contact respondent until August 1997, when she and her husband were told that her case would *probably* be dismissed. They learned of the dismissal when they went to court directly from respondent's office to obtain copies of her court file. Soon thereafter a legal malpractice case was filed by Attorney Waks, and respondent, by not properly responding to discovery demands, allowed the matter to proceed to a $500,000 judgment against her.

After more than fifteen years of practice, respondent did not oppose a demurrer, did not file an amended complaint as she represented to the court that she would, did not appear at the OSC hearing on November 5, 1996, and did not file a Code of Civil Procedure section 473 motion to set aside the default in the medical malpractice action. Instead, she testified incredibly that she waited to get consent of her client to file the Code of Civil Procedure section 473 motion. Her explanation as to her failure to produce documents as requested at the judgment debtor's examination was that she was unaware that the request for production of documents was attached to the subpoena. Clear

and convincing evidence supports the hearing judge's findings and conclusions that respondent wilfully violated rule 3-110(A), her duties as an attorney as enumerated in section 6068, subdivision (m), and section 6106.

Case Number 99-O-12936- The Client Trust Accounts Matter

The People's Bank of California Client Trust Account

Respondent stipulated that her client trust account at the People's Bank of California was opened on January 27, 1999, and that the signature card signed by respondent contained two addresses for respondent, one in Beverly Hills and one in San Francisco. She further stipulated that, during the 10-month period from February through November of 1999, she issued at least 46 checks totaling approximately $50,000 from this account. The record clearly supports the hearing judge's findings that respondent deposited both her personal funds and client funds into this trust account during this 10-month period and that respondent issued virtually all of these 46 checks to pay for personal and law office expenses. The account was closed on January 21, 2000.

Respondent's bank statements from the People's Bank for the months of February, March, April and May of 1999 were sent to the San Francisco address. During the five-month period from February through June of 1999, respondent issued five insufficiently funded checks (NSF checks) on this account. Of particular interest is check number 1001, dated April 15, 1999, in the amount of $2,000 and issued to Attorney Lawrence Hunt of Utah. Said check was written on behalf of respondent's client Rodriguez for legal work Attorney Hunt provided in Utah. Rodriguez paid respondent $5,000 in attorney's fees, out of which $2,000 was to be paid to Attorney Hunt. Said check was returned for insufficient funds. Also of interest is check number 1007, dated May 4, 1999, and issued to the law firm of Severson & Werson on behalf of respondent's client Ramirez in the sum of $1,500 in settlement of claims brought against Ramirez. This check was also returned for insufficient funds.

Respondent explained that the NSF checks were due to the misdirected or missing bank statements and also due to several wire transfers from overseas not being credited on time. The hearing judge clearly rejected respondent's explanations that the NSF checks were due to the missing bank statements or that they were due to wire transfers not timely credited. She opined that if

respondent maintained proper records, i.e., a written journal and ledgers, she would have known her current balance for the account. It was her own gross negligence that resulted in the NSF checks. The record shows gross negligence in handling (i.e., managing) the client trust account.

The record shows that the five NSF checks were subsequently honored and paid.

The Western Financial Bank Client Trust Account

Respondent stipulated that her Western Financial Bank client trust account was opened on September 14, 1999, and that, during the 14-month period between September 1999 and November 2000, she issued at least 84 checks totaling approximately $75,000. The hearing judge found that, during this 14-month period, respondent deposited her personal and business funds into this client trust account and that respondent issued virtually all of these 84 checks to pay for personal and law office expenses. Respondent testified that this account was labeled "trust account" by mistake of the bank. This is not credible since we find no attempts on the part of respondent to correct this mistake. She continued to deposit personal funds into that trust account and paid her personal expenses from it, admitting that this was to prevent her judgment creditors from reaching her assets.

Client Trust Account Records

Respondent stated that she kept no ledger card for her client trust accounts and instead reconciled her trust accounts by using her checkbook registers and contacting customer service to verify which checks had been cashed. Moreover, with respect to her Western Financial Bank trust account, she insisted that ledgers were not necessary because the funds were all her personal funds.

Finally, of her checkbook registers, she has copies of two pages only on her People's Bank client trust account (showing the alleged issuance of Dr. Park's check) and testified that the rest of the registers, before and after the issuance of Dr. Park's check, had been misplaced.[5]

Conclusions of Law

With respect to the People's Bank client trust account, the hearing judge found that respondent willfully violated rule 4-100(A) by using the account for personal and business purposes

---

[5]Our review of the bank records and the two-page check register (photo copied) reveals discrepancies between the register and the bank records causing us to question the authenticity of the register.

and by commingling her funds with those of her clients. The hearing judge also found that respondent engaged in acts of moral turpitude in willful violation of section 6106 by issuing five NSF checks on that same trust account, which were issued as a result of respondent's gross negligence in managing the account. In addition, the hearing judge found respondent culpable of a second willful violation of section 6106 by engaging in acts of moral turpitude by using this trust account to secrete more than $54,000 from her creditors.

With respect to the Western Financial Bank client trust account, the hearing judge found that respondent willfully violated rule 4-100(A) by using the account for personal and business purposes and that respondent engaged in acts of moral turpitude in willful violation of section 6106 by using this trust account to secrete more than $79,000 from her creditors.

Discussion

The record clearly supports, and we therefore adopt, the hearing judge's findings, summarized *ante*, that respondent deposited her personal funds in both of her client trust accounts and that respondent repeatedly issued checks from those same accounts to pay personal and law office expenses. In addition, the record clearly supports, and we therefore adopt, the hearing judge's finding that respondent commingled her funds with those of her clients in her People's Bank client trust account.

The Supreme Court in *Doyle v. State Bar* (1982) 32 Cal.3d 12, 22-23, held that former rule 8-101 (now rule 4-100) "absolutely bars use of the trust account for personal purposes, even if client funds are not on deposit." In the case in chief, there were client funds on deposit, constituting commingling of funds. The *Doyle* court continued, "Because petitioner used the account while it was still denominated a trust account, even if he no longer intended to use it for trust purposes, rule 8-101 was violated. The rule leaves no room for inquiry into the depositor's intent." (*Id.* at p. 25.) Accordingly, we hold that the hearing judge correctly determined (1) that respondent is culpable on one count of willfully violating rule 4-100(A) by using her People's Bank client trust account for personal and business purposes and by commingling her personal funds with those of her clients in that account and (2) that respondent is culpable on a second count of willfully violating rule

4-100(A) by using her Western Financial Bank client trust account for personal and business purposes. Thus, we adopt these determinations.

Respondent admitted that both of her client trust accounts were used as general accounts in order to avoid having her personal funds attached by one or more of her creditors, including Delgado. Even though these are admissions that she intentionally concealed her funds in her client trust accounts to defraud her creditors, respondent testified that she did not think her conduct was dishonest, but merely felt that it was not right. We agree with the hearing judge's determinations that respondent is culpable of two counts of willfully violating section 6106: one count for concealing personal funds in her People's Bank trust account and one count for concealing personal funds in her Western Financial Bank trust account. However, in light of respondent's admissions, we conclude that respondent's misconduct in concealing her assets from her creditors not only involved moral turpitude as found by the hearing judge, it also involved dishonesty. It is well established that any "act by an attorney for the purpose of concealment or other deception is dishonest and involves moral turpitude under section 6106." (*Coppock v. State Bar* (1988) 44 Cal.3d 665, 679.) This includes an attorney's misuse of her client trust account to conceal her assets from her creditors. (*In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 125; see *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 625; cf. *Coppock v. State Bar, supra*, 44 Cal.3d at pp. 678-680 [attorney's participation in a client's scheme to defraud the client's creditors (1) by permitting the client to conceal his assets in a client trust account that attorney opened for client and (2) by permitting the client to use that client trust account as the client's personal and business account was dishonest and involved moral turpitude in violation of section 6106].)

Finally, we conclude that the record clearly supports, and we therefore adopt, the hearing judge's findings that respondent issued the five NSF checks on her People's Bank trust account because respondent was grossly negligent in managing the account. Respondent's testimony alone established that she did not have adequate accounting procedures and safeguards in place with respect to her client trust account. Because respondent was grossly negligent in managing her client trust account, her conduct in issuing the five NSF checks involves moral turpitude in willful violation of section 6106 even though no deliberate wrongdoing or dishonesty was found to be

involved by the hearing judge. (Cf. *Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020-1021; *Jackson v. State Bar* (1979) 23 Cal.3d 509, 513.)

In Mitigation

Before she committed the found misconduct, respondent had no prior record of discipline in 15 years of practice.

Respondent provided evidence of her pro bono work through the testimony of Steve Costello whose juvenile sons were in need of a defense counsel in their criminal matters. Respondent took their defense, pro bono, and conducted a two-week trial wherein she obtained good results for the juveniles. She also represented two other juveniles, pro bono, who were involved in the same case. Costello testified that respondent is a wonderful person, a caring person who will go out of her way to help.

Between 1982 and 1985, respondent testified that she spent every Wednesday at the Holy Family Church in Wilmington giving free legal advice to the members of the parish until the program was terminated. She said that she continues to take matters on a pro bono basis.

Joseph Sib Abraham, an attorney practicing in Texas for 40 years, has known respondent for about fifteen to sixteen years. He has acted as cocounsel for respondent's clients and has acted as counsel for codefendants of respondent's clients. They have become good friends. His opinion of respondent is that she's very competent and a very hard working lawyer and that she's an honest, trustworthy type of individual with good moral character.

Nicole Plockier, a paralegal who worked for respondent as an independent contractor, testified that respondent is a very generous, giving, fair and honest person, who takes a lot of pride in everything she does. Plockier felt that sometimes respondent cares too much about the clients and her work.

Ron Jaman, an attorney, has known respondent for 20 years. He referred Dr. Park to respondent. He stated that he was a little disappointed that it took respondent so long to refund the money to Dr. Park because it was detrimental to his relationship with Dr. Park. He probably would not refer another family law matter to respondent but still feels that she is a highly professional,

competent attorney. He finds that respondent works hard and is honest, truthful and forthright and a good person.

The hearing judge gave some weight in mitigation to the foregoing, but found that this evidence did not amount to a showing of an extraordinary demonstration of good character attested to by a wide range of references.

Respondent testified that her daughter's medical condition, which lasted for many years, had an impact on her ability to carry out her professional responsibilities. She testified that her daughter underwent depression, mood swings, aggression and a change of personality. However, her daughter did not require stay-at-home care or assistance and is now attending UCLA.

In Aggravation

In aggravation, the hearing judge found respondent's use of her client trust accounts for personal and business purposes for almost two years established a pattern of misconduct. (Std. 1.2(b)(ii).) The hearing judge further found that respondent's misconduct of writing NSF checks, failing to competently perform legal services, failing to communicate with her clients, failing to promptly return unearned fees, concealing assets from creditors, and committing acts of moral turpitude were multiple acts of misconduct. (Std. 1.2(b)(ii).) Further, the hearing judge found that respondent's misconduct was surrounded by bad faith, dishonesty, concealment and overreaching. (Std. 1.2(b)(iii).)

Additionally, as aggravation, the hearing judge found that there was significant harm to respondent's clients, Dr. Park and Delgado, that there was indifference toward rectification of the consequences of her misconduct and that there was a failure to recognize any wrongdoing in concealing her assets in her client trust accounts. In addition, the hearing judge found a lack of candor and cooperation with her clients, the victims of respondent's misconduct. Moreover, in addition to finding that much of respondent's testimony lacked credibility, the hearing judge found that respondent deliberately presented false testimony in the State Bar Court. She found that respondent falsely testified (1) that she spoke to Dr. Park and his assistant about the unearned fees, (2) that she told Attorney Daigneault, before she sent him her October 19, 2000, letter, that she had

sent Dr. Park a refund check on October 20, 1999, which was never cashed; and (3) that she sent Delgado a letter on November 7, 1996.

As further aggravation, the hearing judge found the uncharged misconduct of respondent charging Dr. Park an unconscionable fee in violation of rule 4-200. This was based on the billing of $5,685[6] for miscellaneous telephone calls to opposing counsel and prior counsel, review of pleadings and correspondence from opposing counsel and preparation and filing of a substitution of attorney. Yet, the record also established that no substitution of attorney was on file. Also included in the $5,685 was $2,500 for a court appearance to request a continuance, when opposing counsel had stipulated to the continuance.

As further uncharged misconduct, the hearing judge found that respondent misappropriated client funds. She based this finding (1) on respondent's testimony that respondent deposited the $10,000 advanced fee Dr. Park paid her in her People's Bank client trust account in July 1999, (2) on respondent's testimony that she sent Dr. Park a $4,315 check drawn on that same trust account on October 20, 1999, as a refund of unearned fees (which refund check was never cashed) and (3) on the bank records showing that, on October 20, 1999, the balance in that trust account was only $142.23. (See *Palomo v. State Bar* (1984) 36 Cal.3d 785, 795 [an inference of a willful misappropriation is established whenever the actual balance of a trust account in which a client's funds have been deposited drops below the amount credited to the client].) Under the hearing judge's reasoning, respondent misappropriated $4,142.77 calculated as follows: $4,315 (the amount of the alleged refund check) less the $172.23 (the amount on deposit in the trust account on October 20, 1999).

Discussion

Upon weighing the foregoing factors, we find, as did the hearing judge, that the aggravating factors far outweigh the mitigating factors. However, strong consideration should be given to respondent's practice of 15 years without any disciplinary proceedings. (Std. 1.2(e)(i).) Moreover,

---

[6]Presumably, this $5,685 was calculated as follows: $10,000 in advance fees paid by Dr. Park less $4,315 in unearned fees that respondent admitted Dr. Park was entitled to receive.

strong consideration should also be given to the fact that there is no evidence that respondent has engaged in or been charged with any misconduct other than the misconduct found in the present proceeding. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 316-317; *In the Matter of Kauffman* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 213, 218; *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 12 ["practicing without complaint *subsequent* to his misconduct is as valid a mitigating circumstance as his lack of a *prior* record"].)

In addition, some weight should be given to respondent's pro bono work. Also, some, but not much, weight should be given to the testimony of the two attorneys, a paralegal and a client, attesting to respondent's honesty, generosity and trustworthiness. One of the attorneys (Jaman) did say that he would not refer any more family law matters to respondent, and he honestly did not know whether he would refer any medical malpractice cases to her. However, he still found her to be professional, competent and forthright.

We do not agree with respondent that the hearing judge found "no value" with the character evidence. We also do not agree that the hearing judge ignored the testimony of Attorney Abraham because he was not a licensed attorney in California. The hearing judge found that respondent's pro bono work and character evidence were somewhat mitigating but did not merit significant weight. In *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 387, we found that positive character assessments by three attorneys and three clients hardly constituted a broad range of references from the legal and general communities as required by standard 1.2(e)(vi), and in *In the Matter of Koehler, supra*, 1 Cal. State Bar Ct. Rptr at pages 624 and 628, we found the attorney's three character references (one attorney and two clients) merited consideration, but noted that it was not extensive. We agree with the hearing judge's assessment that the testimony of the character witnesses was not an extensive or extraordinary demonstration of good character attested to by a wide range of references, but that it should nonetheless be given some weight.

As to respondent's burden of contending with her difficult divorce proceedings and the medical problems of her daughter, respondent's testimony was : "Well, I think that if I'm distracted or concentrating on these particular issues, divorce, single mother, daughter with medical problems, husband trying to get the sort of spousal support, that it does have an impact [on professional practice

and ability to carry out professional responsibilities.]" Even though no real nexus was drawn between respondent's problems and her misconduct, we give some limited mitigating weight to respondent's problems. (See, e.g., *In re Brown* (1995) 12 Cal.4th 205, 222.)

Respondent challenges the hearing judge's findings in aggravation. But the hearing judge's findings that respondent's misconduct demonstrated a pattern of misconduct and involved multiple acts of misconduct which caused significant harm to her clients Dr. Park and Delgado are clearly appropriate. When a client loses a cause of action because of her attorney's misconduct, we recognize substantial harm in aggravation even if the client's claim is weak and she could not have reasonably expected to receive a substantial judgment or settlement. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 642, 646.) In the present case, we recognize greater harm to Delgado because she had a compelling medical malpractice claim on which she could have reasonably expected to receive a substantial, if not a great, judgment or settlement against multiple defendants.

We also conclude that the hearing judge's findings that respondent failed to understand the wrongfulness of her hiding assets from her creditors and that respondent demonstrated lack of remorse for her misconduct are also clearly appropriate aggravating circumstances. Respondent had not paid any portion of Delgado's malpractice judgment (February 11, 1997) at the time of trial in this matter (September 4, 2001). However, as noted *ante*, we augmented the record on review to include a copy of respondent and Delgado's March 2003 settlement agreement. In that agreement, Delgado agreed to accept a series of payments totaling $50,000 from respondent in satisfaction of the $500,000 legal malpractice judgment Delgado obtained against respondent. Furthermore, respondent represented to this court that, on March 10, 2003, she made the initial $3,000 payment to Delgado in accordance with the terms of the settlement agreement. Respondent contends that the settlement agreement and this initial $3,000 payment are evidence of her rehabilitation for which she should be given mitigating credit. However, it would be inappropriate for us to consider them as mitigating circumstances because respondent did not execute the agreement or make the initial payment until shortly before oral argument on review, which was long after the present proceeding was commenced by the State Bar. (*Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1366, and cases

there cited.) Nonetheless, we agree that they reflect positively on respondent because they are evidence that respondent has at least some remorse for her misconduct and that she has made a "concrete," albeit belated, effort to ameliorate at least some of the harm that her misconduct caused Delgado. Thus, while it would be inappropriate to consider the settlement agreement and the initial $3,000 payment as mitigating circumstances at the present time, they do reduce the level of aggravation that the hearing judge found based on respondent's lack of remorse and indifference towards rectification of the consequences of her misconduct.

"There is a clear distinction between credibility and candor. [Citation.] The determination of a witness's credibility (i.e., believability) is primarily within the province of the hearing judge because he or she saw and heard the witness testify. [Citation.] On the other hand, the determination that a witness's testimony lacks candor (i.e., the witness is lying) must ordinarily be found by clear and convincing evidence. [Citations.] Even though a witness's candor must ordinarily be shown by clear and convincing evidence, great weight is still given to the hearing judge's findings on candor. [Citation.]" (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 282.) Our review of the record convinces us that the hearing judge correctly found that respondent deliberately presented false testimony on each of the three issues set forth *ante*. Moreover, we conclude that respondent's unsubstantiated testimony that she met with Delgado ten to fifteen times; that she spoke to her on the telephone at least thirty times; and that, within two days of the dismissal of the medical malpractice action, she so informed Delgado, orally and in writing, lacked candor. (Std. 1.2(b)(vi).) The Supreme Court has repeatedly held that such false testimony in this court may constitute a greater offense than misappropriation. (See, e.g., *Olguin v. State Bar* (1980) 28 Cal.3d 195, 200.)

As noted above, the hearing judge found two counts of uncharged but proved misconduct as aggravation: that respondent charged Dr. Park an unconscionable fee of $5,685 in wilful violation of rule 4-200(A) and that respondent misappropriated $4,142.77 in unearned fees from Dr. Park. The hearing judge did not consider these two counts of uncharged misconduct as independent grounds for discipline. Instead, citing *Edwards v. State Bar* (1990) 52 Cal.3d 28, 36, she concluded that it was appropriate to consider them for purposes of aggravation. She correctly noted that

"Although evidence of uncharged misconduct may not be used as an independent ground of discipline, it may be considered for other purposes relevant to the proceeding" in appropriate circumstances. (*Ibid.* citing *Arm v. State Bar* (1990) 50 Cal.3d 763, 775.) As the Supreme Court held in *Edwards v. State Bar, supra*, 52 Cal.3d at page 36, such evidence may appropriately be considered as "uncharged misconduct" aggravation so long as (1) the evidence was elicited only for the relevant purpose of inquiring into the cause of the charged misconduct, (2) the evidence came from the attorney's testimony or evidence and (3) the evidence was not relied on to establish an independent ground for discipline. Moreover, because due process mandates that an attorney "be fairly apprised of the precise nature of the *charges* before the proceedings commence" (*Van Sloten v. State Bar, supra*, 48 Cal.3d at p. 929, italics added, citing *In re Ruffalo* (1968) 390 U.S. 544, 551), an attorney may not waive these three *Edwards* requirements by failing to object to the introduction of the evidence (cf. *Gendron v. State Bar* (1983) 35 Cal.3d 409, 421, fn. 11; *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 410 [even if the respondent attorney does not have the right to challenge the findings of misconduct to which she stipulated in the hearing department, review department still has an affirmative duty to determine whether the stipulated findings of misconduct are supported by the record]).

The only misconduct charged in the Dr. Park matter (Case Number 99-O-13583) was a rule 3-700(D)(2) violation based on respondent's failure to promptly refund to Dr. Park the *admitted* unearned fee of $4,315. Thus, unlike the evidence in *Edwards*, the evidence indicating that respondent charged Dr. Park an unconscionable fee could not have been elicited or relied on for the purpose of inquiring into the cause of any charged misconduct. Therefore, we reject the hearing judge's determination that respondent's misconduct in charging Dr. Park an unconscionable fee may appropriately be considered as uncharged misconduct aggravation.

As noted *ante*, the hearing judge found that, because the balance of funds in her People's Bank client trust account on October 20, 1999, was insufficient to cover the $4,315 refund check respondent purportedly sent to Dr. Park on that same day, respondent misappropriated client funds. The evidence that respondent misappropriated client funds was elicited from respondent for the purpose of inquiring into the charged misconduct of failing to promptly refund $4,315 in unearned

fees. This suggests that it may be appropriate to consider it as aggravation under *Edwards*. However, implicit in the hearing judge's finding that respondent misappropriated client funds is either the premise (1) that an attorney is required to deposit an advanced fee in her client trust account and to keep it on deposit in that account until the fee is earned or (2) that, once an attorney deposits an advanced fee in her client trust account, she must keep it on deposit in that account until the fee is earned.

"Whether the Rules of Professional Conduct require an attorney to deposit advance fees from clients in a trust account is an unanswered question in California. [Citations.]" (*Katz v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 353, 356, fn. 2; but see *Read v. State Bar* (1991) 53 Cal.3d 394, 414 [Supreme Court omitted advanced fees from its holding that advanced payments for costs and expenses for work not yet done must be placed in a trust account.]; *Id.* at p. 420 [Read claimed that her failure to promptly refund an unearned advanced fee was not willful because she did not have the money with which to make the refund. Without holding that Read was required to deposit the advanced fee in her client trust account, the Supreme Court rejected her claim noting (1) that the money should have been available to refund to the client since Read had not earned the fee and (2) that Read's use of the unearned fees, which made it impossible for her to refund them, "was a wilful act."]; contra, *T & R Foods, Inc. v. Rose* (1996) 47 Cal.App.4th Supp. 1, 7 [Court concluded that rule 4-100(A) requires attorneys to deposit and maintain advanced fees in their trust accounts until the fees are earned.].) We conclude, as we did in *In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459, 465, a case involving similar facts, that respondent's failure to refund the $4,315 in admitted unearned fees to Dr. Park until November 13, 2000, which was almost 16 months after Attorney Furukawa first sent respondent a letter requesting a refund, is itself a particularly aggravating circumstance. As we explained in *In the Matter of Nees, supra*, 3 Cal. State Bar Ct. Rptr. at page 465, an attorney's wrongful retention of an unearned fee for such an extended period of time is itself a particularly aggravating circumstance because it approaches a practical appropriation of the client's property.

Finally, we reject the hearing judge's findings of aggravation based on dishonesty and concealment because that dishonesty and concealment was the factual basis supporting the

culpability determinations of respondent's section 6106 violations. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 132-133.)

Respondent's Contentions

We address respondent's contention in her review brief that she was denied a fair trial and due process. Respondent argues that the State Bar prosecutor was "overzealous, unfair, biased and tainted with misconduct" and that the hearing judge favored counsel for the State Bar over her and was hostile toward her.

We have independently reviewed the record as we must (Rules of Proc. of State Bar, rule 305(a); *In re Morse, supra*,11 Cal.4th at p. 207), and we find respondent's arguments to be specious and unmeritorious.

The record does not show that the State Bar prosecutor was "overzealous, unfair, biased and tainted" or that she "badgered, harassed and annoyed respondent" through the trial. Rather, we find that the prosecutor attempted to carry her burden of proving by clear and convincing evidence the charges brought by the State Bar, which was made difficult by respondent being argumentative and evasive in her testimony. Moreover, respondent caused confusion during trial and forced the prosecutor to cover more ground than was perhaps necessary when respondent refuted the stipulation entered into earlier and attempted to withdraw parts of it.

Respondent next argues that the prosecution was allowed to amend the NDC's without notice to respondent and without an opportunity to oppose. "[A]dequate notice requires only that the attorney be fairly apprised of the precise nature of the *charges* before proceedings commence. [Citation.]" (*Van Sloten v. State Bar, supra*, 48 Cal.3d at p. 929, italics added.)

As to case number 99-O-13583 –The Dr. Park Matter– there is no amendment as alleged by respondent. As to case numbers 99-O-12936 –The Client Trust Account Matter– and 99-O-13586 –The Delgado Matter– our review of the record revealed a Motion in Limine to Amend the NDC to conform to proof based (1) on respondent's deposition, which was taken two months before trial and (2) on the evidence at trial. (See Rules Proc. of State Bar, rule 104(c) [which expressly authorizes a party's initial pleadings to be amended to conform to proof during or after a contested trial].) Said motion was brought by the State Bar on August 7, 2001, which was one month before trial, and the

hearing judge heard and considered arguments, pro and con, and then granted the motion on August 28, 2001, which was approximately one week before trial. Respondent did not request a continuance. The hearing judge accepted respondent's previously filed responses as sufficient responses to the amended NDC's. We note that the only amendments allowed were the additions of violations of section 6106 based on respondent's admitted conduct, and no new facts were added. More importantly, each of the additional charges together with the factual bases supporting it was identified in one of the State Bar's pretrial statements. In sum, respondent clearly had actual knowledge of the precise nature of all the charges against her well before trial, and she has shown no reversible error. (*In the Matter of Respondent V* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 442, 446.)

Finally, respondent argued in her brief that the "new charges were duplicative in nature and only added with the intent to deprive Appellant of her right to due process and a fair trial." If so, this could not have been a trial by ambush as she alleges.

We do not find a violation of respondent's right to a fair trial and due process. We do find, contrary to respondent's proffered arguments, that the hearing judge gave the parties ample opportunity to present their case, and we find no basis to support respondent's argument that the charges were based on vindictive motives on the part of the State Bar. Rather, the evidence independently supports respondent's misconduct.

As to respondent's challenges to the hearing judge's discipline recommendation, we agree that the hearing judge erred in recommending that respondent be required to make restitution to Delgado in the amount of the $500,000, which is the full amount of the default judgment Delgado obtained against respondent in the legal malpractice action. We reject the State Bar's unsupported contention that the restitution recommendation is consistent with the purposes of attorney discipline.

As we have explained "The Supreme Court does not 'approve imposition of restitution as a means of compensating the victim of wrongdoing. [Citation.]' (*Sorensen v. State Bar* [(1991) 52 Cal.3d 1036,] 1044.) In fact, up until *Sorensen*, almost all of the Supreme Court's cases requiring restitution involved misuse of client funds and unearned fees. (*Ibid.*) [While others involved, inter alia, restitution of court ordered sanctions (see, e.g., *Hunniecutt v. State Bar* (1988) 44 Cal.3d 362,

367, 374), of funds improperly borrowed from clients (see, e.g., *Beery v. State Bar* (1987) 43 Cal.3d 802, 811-812, 816) and of benefits or profits wrongfully obtained (see, e.g., *In re Morse, supra*, 11 Cal.4th at p. 211).] Then in *Sorensen* the Supreme Court extended the protective and rehabilitative principles of restitution to cover specific out-of-pocket [losses] directly resulting from an attorney's violation of his duties (1) to bring only such actions and proceedings as are just and (2) not to commence or continue an action from any corrupt motive or interest. However, we do not construe *Sorensen* as extending restitution to cover tort damages. [¶] In fact, in *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 650, we held that it is inappropriate to use restitution as a means of awarding tort damages for legal malpractice. (Accord *King v. State Bar* (1990) 52 Cal.3d 307, 312, 315-316 [Supreme Court adopted review department's discipline recommendation, which recommendation deleted the hearing panel's probation condition requiring King to make restitution to a former client for the $84,000 legal malpractice judgment client obtained against King].)" (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 153.) Accordingly, we reject the hearing judge's $500,000 restitution recommendation.

We do, however, independently recommend that respondent be required to make restitution to Delgado in the sum of $210 with interest, costs the superior court assessed against Delgado in its February 11, 1997, judgment unless respondent has already made such restitution to Delgado and provides proof satisfactory of that restitution to the State Bar's probation unit.

In addition, we independently recommend that respondent be required to make restitution to Delgado in the additional sum of $1,500 with interest, which is the amount of the sanctions the superior court ordered respondent to pay Delgado to reimburse Delgado for the attorney's fees and costs that she incurred in bringing the motions to compel against respondent in the legal malpractice action, unless respondent has already made such restitution to Delgado and provides proof satisfactory of that restitution to the State Bar's probation unit. "Without question, sanction orders are for specific out-of-pocket losses directly resulting from respondent's misconduct and, therefore, proper subjects of a restitution order. [Citation.]" (*In the Matter of Katz* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 430, 440.) Moreover, because respondent was appearing in the legal malpractice action in propria persona, it is immaterial for purposes of restitution that the sanction order was

imposed on her as a party and not on her in her capacity as an advocate for others.[7] (Cf. *Davis v. State Bar* (1983) 33 Cal.3d 231, 240; *In the Matter of Temkin* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 321, 330.)

As to other arguments by respondent not expressly addressed by this court, we have considered and rejected them as irrelevant or meritless.

DISCIPLINE

In disciplinary matters, our concern is the protection of the public, preservation of public confidence in the profession and the maintenance of high professional standards. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; std. 1.3.) Even though we are guided by the standards and prior cases in determining the appropriate level of discipline to recommend to the Supreme Court, it is clear that each case must be determined on its own facts. (*Alberton v. State Bar* (1984) 37 Cal.3d 1, 14.)

As we have held *ante*, the facts in the present proceeding clearly establish that respondent is culpable on the following 10 counts of charged misconduct: (1) failure to promptly refund $4,315 in unearned fees (rule 3-700(D)(2)); (2) reckless failure to competently perform the legal services for which she had been retained in a single client matter (rule 3-110(A)); (3) failure to respond to a client's reasonable status inquiries and to inform the client of significant developments in a single client matter (§ 6068, subd. (m)); (4) misrepresentation to a client regarding status of that client's case (§ 6106); (5) improper issuance of 47 checks for personal and business expenses from a client trust account and commingling personal and business funds with client funds in her People's Bank client trust account (rule 4-100(A)); (6) improper issuance of 84 checks for personal and business expenses on her Western Financial Bank client trust account (rule 4-100(A)); (7) issuance of five

---

[7]We do not construe respondent and Delgado's March 2003 settlement agreement as including this $1,500 sanction award. However, regardless of whether the parties intended to include the sanction award in the agreement, we still recommend that respondent be required to pay the $1,500 sanction with interest in addition to the $50,000 payment required under the settlement agreement. (See, e.g., *In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 674 [because of an attorney's professional responsibilities, she may "be required to make restitution as a moral obligation even when there is no legal obligation to do so"].)

NSF checks on her People's Bank client trust account through gross negligence (§ 6106); (8) concealment of her assets from creditors in her People's Bank client trust account (§ 6106); (9) concealment of her assets from creditors in her Western Financial Bank client trust account (§ 6106); and (10) concealment of facts about her client trust accounts in a judgment debtor's examination conducted by a former client (§ 6106). We reject respondent's contention that the appropriate level of discipline is a public reproval. We also reject, as meritless and unsupported by any case law citations, respondent's alternative contention that the appropriate level of discipline is some unspecified period of stayed suspension together with three years' probation, but no actual suspension.

Standards

In determining the appropriate level of discipline to recommend, we look first to the standards. Under standard 1.6(a), when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended discipline is to be the most severe of the different sanctions. In the present proceeding, the most severe sanction for respondent's misconduct is found in the standard that applies to counts of moral turpitude and dishonesty on which respondent has been found culpable. Standard 2.3 provides that an attorney's culpability of an act of moral turpitude, fraud, intentional dishonesty, or concealment of a material fact from a court, client or other person shall result in *actual suspension or disbarment* depending on the extent to which the victim of the misconduct is harmed or misled and depending on the magnitude of the act of misconduct and the degree to which the act relates to the respondent's practice of law. Moreover, because the aggravating factors outweigh the mitigating factors in this proceeding, we conclude that it is appropriate to recommend a high level of discipline under standard 2.3. (See std. 1.2(b) [aggravating circumstances demonstrate "that a greater degree of sanction than set forth in these standards for the particular act of professional misconduct found or acknowledged is needed to adequately protect the public, courts and legal profession"].)

To determine the appropriate level of discipline, we first consider the substantial harm respondent's misconduct caused her clients Dr. Park and Delgado and others. Dr. Park was forced to hire new counsel and file a lawsuit against respondent to pursue his claim for return of the

unearned fees. Respondent insists that she promptly refunded Dr. Park's unearned fees, an empty gesture, because the record is clear that she did not in actuality do so as there were insufficient funds in the account to cover the $4,315 check when she allegedly issued it. And respondent's wrongful retention of the $4,315 from Dr. Park for almost 16 months is an act approaching the practical appropriation of Dr. Park's property.

Delgado lost her medical malpractice cause of action. Respondent expressed embarrassment at her predicament and remorse for the harm suffered by Delgado and a desire to correct it, but she had made no payments (at the time of hearing) to Delgado and now argues that restitution to Delgado should not be ordered because, inter alia, she entered into the $50,000 settlement agreement with Delgado and made the initial $3,000 payment in accordance with the agreement.[8] Moreover, respondent's deliberate misrepresentation to Delgado that Delgado's medical malpractice case *might* be dismissed when it had already been dismissed and an adverse judgment had already been entered against Delgado involved moral turpitude (*Harford v. State Bar* (1990) 52 Cal.3d 93, 98; *Gold v. State Bar* (1989) 49 Cal.3d 908, 914) and was inexcusable (*Mack v. State Bar* (1970) 2 Cal.3d 440, 445).

Respondent also harmed others by secreting her assets in her client trust accounts and thus depriving her creditors of the opportunity of seeking to recover assets to which they may have been entitled. In addition, respondent's repeated misuse of her People's Bank client trust account put the client funds in that account in outright jeopardy of being attached by respondent's creditors, which is most certainly contrary to the purpose of rule 4-100. (*In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 54.)

---

[8]As noted *ante*, we conclude that the $50,000 agreement and respondent's initial $3,000 payment are evidence of some remorse and of some effort to ameliorate the harm her misconduct caused Delgado. Moreover, in any standard 1.4(c)(ii) proceeding to terminate respondent's actual suspension, respondent's continued compliance with the terms of the settlement agreement, including its term requiring respondent to pay Delgado the full $50,000 by late spring 2005, will "weigh heavily in demonstrating [whether respondent] has or has not been rehabilitated. [Citations.]" (*Weir v. State Bar* (1979) 23 Cal.3d 564, 576, fn. 3; see generally *In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 537-538 [attorney has obligation to make good faith effort to acquire resources sufficient to pay restitution].)

Even though respondent argues that concealing her personal funds from her judgment creditors in her client trust accounts was not dishonest, she admits that it did not feel right. Respondent's deliberate misuse of her trust accounts and deliberate concealing of her assets is misconduct that violates the fundamental rule of ethics –honesty– which demonstrates a pattern of misconduct involving moral turpitude and dishonesty. (Std. 1.2(b)(ii).)

While the State Bar did not allege or charge respondent with misappropriating client funds through her issuance of the five NSF checks on her People's Bank client trust account, it did charge and prove that she issued those five checks through her gross negligence in managing that trust account. Such gross negligence violated respondent's "personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds." [Citations.] (*Palomo v. State Bar, supra*, 36 Cal.3d at p. 795.) Moreover, respondent's argument that her issuing NSF checks is not as egregious as misappropriating client funds, while perhaps technically correct, is additional evidence of her unwillingness or inability to accept responsibility for her actions by downplaying the seriousness of her misconduct. (Cf. *Segal v. State Bar* (1988) 44 Cal.3d 1077, 1086-1087.)

Also troubling to this court are the additional cavalier and unsubstantiated allegations made by respondent indicating that she refuses to accept responsibility for her own misconduct. This suggests that respondent's misconduct may recur. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 781-782 [An attorney's "assertion that *no* discipline should be imposed shows that he does not recognize his problems and that he may not correct them."].) As an example, respondent testified that although she had amended the medical malpractice complaint, she had left it to others to file it through an attorney service which was never done. Yet, no evidence of an amended complaint was offered. She blamed her failure to appear at the November 1996 OSC hearing in Delgado's medical malpractice case on her assistant, claiming that it was the assistant who did not calendar the hearing. Respondent testified that it was Western Financial Bank's mistake that her account was labeled "client trust account," yet she made no effort to correct the mistake, and she continued to use it as her personal account. She frivolously alleged in her review brief that the hearing judge unfairly limited her presentation of mitigating evidence even though, at oral argument, she admitted (1) that she does not

know whether the hearing judge limited her presentation of mitigating evidence and (2) that the hearing judge never told her that her presentation of mitigating evidence was limited.

Case Law

Because the applicable standard allows for such a wide range of discipline, we must look to decisional law for guidance. (*In re Morse, supra* , 11 Cal.4th at p. 207; *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.) However, while the discipline imposed in similar cases is clearly relevant, it is not conclusive in determining the appropriate level of discipline to recommend to the Supreme Court. (*Lipson v. State Bar, supra*, 53 Cal.3d at p. 1021, citing *Levin v. State Bar* (1989) 47 Cal.3d 1140, 1150.) That is because the appropriate level of discipline "does not issue from a fixed formula but from a balanced consideration of all relevant factors, including aggravating and mitigating circumstances. [Citation.]" (*Rodgers v. State Bar, supra*, 48 Cal.3d at p. 316.)

In making her two years' actual suspension recommendation, the hearing judge relied on *Doyle v. State Bar, supra*, 32 Cal.3d 12 because she concluded that the misconduct in it was similar to the misconduct in the present case. However, Doyle not only commingled client funds in violation of the trust accounting rules, but he also deliberately and dishonestly misappropriated more than $20,000 in settlement proceeds that he held in trust for a client. (*Id.* at pp. 16-17, 22-23.) Doyle misappropriated the funds for his personal use for about 10 months and did not remit them to his client until (1) after the client retained a second attorney and made repeated demands for the funds, (2) after the client filed a complaint against Doyle with the State Bar, and (3) after Doyle was notified of that complaint to the State Bar. Notably, Doyle had a prior disciplinary record that involved a misappropriation offense, and it was determined that Doyle had given false testimony under oath in a prior State Bar disciplinary proceeding (*id.* at pp. 21-23), which false statements the Supreme Court described as "serious, aggravating factors." (*Id.* at p. 23.) Finally, the mitigating circumstances in *Doyle* were given some weight in that he suffered severe financial and family problems during the time period in question and because he remitted the misappropriated funds before the disciplinary proceeding actually began. In sum, *Doyle* is distinguishable from the present

proceeding primarily (1) because the seriousness of the offense in *Doyle*[9] is greater than those in the present proceeding and (2) because Doyle had a prior record of discipline involving the identical offense of misappropriation, which suggested a lack of or inability to reform his misconduct, while respondent has no prior record in 15 years of practice.

Neither party cited a case that involves the types of acts of moral turpitude and dishonesty found against respondent in this proceeding. Respondent's most extensive misconduct, at least in duration, was her dishonest use of her client trust accounts, for about 23 months, to secrete her assets from her creditors. Our research reveals that there are only a few published cases involving an attorney's dishonest use of a client trust account to secrete assets from creditors. The two most comparable of those cases are *In the Matter of Koehler, supra*,1 Cal. State Bar Ct. Rptr. 615 and *Mack v. State Bar, supra*, 2 Cal.3d 440.

First, we consider *Koehler*, in which we recommended and the Supreme Court imposed three years' stayed suspension and five years' probation with conditions including six months' actual suspension. The attorney in *Koehler* improperly (1) commingled his own funds with those of his clients in his client trust account and used his client trust account as a personal account for almost 14 months, (2) failed to promptly refund unused costs advanced in two client matters and (3) failed to competently perform legal services in a time sensitive client matter. (*In the Matter of Koehler, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 627-628.) Furthermore, during the14-month period, he used his trust account to hide his own funds from the California Franchise Tax Board (FTB) to prevent it from levying on them for back taxes. (*Id.* at pp. 621, 625, 628.) Because the attorney was not charged with concealing his funds from the FTB, we considered that dishonest misconduct only as aggravation. (*Ibid.*) The remaining aggravation in *Koehler* was the attorney's prior record of

---

[9]Accord, standard 2.2(a), which provides that "Culpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances." The Supreme Court did not apply or address standard 2.2(a) in *Doyle* because the standards were not adopted until January 1, 1986, which was about three and one-half years after the Supreme Court filed its opinion in *Doyle*.

discipline, which was a reproval. (*Id.* at pp. 619-620, 623, 628.) The mitigation in *Koehler* was the attorney's good faith in dealing with the FTB regarding his failure to pay taxes, candor and cooperation with the State Bar, pro bono and community services and favorable, but not extensive, character testimony. (*Id.* at p. 628.)

Because the found misconduct and remaining aggravation in *Koehler* were less than the found misconduct and aggravation in the present proceeding, we view the six months' actual suspension imposed in *Koehler* to be insufficient in this proceeding.

Second, we consider *Mack v. State Bar, supra*, 2 Cal.3d 440 in which the State Bar recommended and the Supreme Court imposed five years' stayed suspension on conditions of probation, including two years' actual suspension. In that case, Mack failed to comply with the rule governing client trust accounts, misappropriated $1,346.74 from a client and then gave the client a $1,346.74 check that Mack knew was insufficiently funded. (*Id.* at pp. 443, 446.) In addition, for about 20 months, Mack misused his client trust account (1) to protect key clients from creditors and (2) for his own personal and business purposes. (*Id.* at pp. 444-446.)

Mack "testified that he represented Western Transistor Corporation, which was his largest single client; that the corporation was in financial difficulty and was being constantly subjected to attachments and levies; that he used his trust account for the corporation and one of its officers, who was also in financial difficulty; that he also ran collections on behalf of the corporation through his trust account; that this made it extremely hard for him to balance the account, and he gave up trying to do so; [fn. omitted] and that he expected to receive substantial fees for permitting the use of his trust account for the business purposes of the corporation and its officer.

"Although [Mack] was the only person authorized to make withdrawals from the account, he maintained no specific ledger sheet or other record to explain his withdrawals or his deposits. He stated that he had no procedure to determine the source of deposits except his own memory and discussion with his secretary. Under the circumstances, petitioner's designation of his bank account as a 'trust account' was nothing more than a sham compliance with [the rule governing trust accounts]." (*Mack v. State Bar, supra* , 2 Cal.3d at pp. 444-445.)

In aggravation, Mack displayed bad faith towards his client by not notifying the client of his receipt of the client's funds, lying to the client to conceal his misappropriation of the $1,346.74 and not making any restitution. (*Mack v. State Bar, supra* , 2 Cal.3d at pp. 445-446.) In addition, Mack had a prior record of discipline for similar misconduct. (*Id.* at pp. 446-447.) There is no mitigation in *Mack.* (*Id.* at p. 446.)

The seriousness of Mack's misconduct is somewhat comparable to that of respondent. Moreover, even though there is no mitigation in *Mack* and even though there is some mitigation in the present proceeding, we consider the two years' actual suspension imposed in *Mack* to be instructive in the present proceeding.

We also review the case of *Borré v. State Bar* (1991) 52 Cal.3d 1047 in which the State Bar Court recommended and the Supreme Court imposed five years' stayed suspension and five years' probation with conditions including two years' actual suspension. The misconduct in that case involved a single client matter in which Borre' represented Paul Lascano, who was incarcerated in state prison on a felony conviction and who was initially represented in the Court of Appeal by court-appointed counsel. (*Id.* at pp. 1049-1050.) In July 1985, Lascano's girlfriend and her mother retained Borre' to determine whether there were grounds for an appeal of Lascano's conviction, and they paid Borre' $1,000 in fees. (*Id.* at p. 1049.) Thereafter, Borre' informed the Court of Appeal "that he would 'be handling the appeal on behalf of Mr. Lascano.' The court then terminated the appointment of the first attorney. [¶] [Borre'] obtained two extensions of time to file an opening brief, but never filed it. On December 26, 1985, the court dismissed the appeal for failure to file the brief." (*Id.* at pp. 1049-1050.)

Thereafter, on February 11, 1986, Borre' wrote Lascano and stated that he had " 'abandoned' " the "appeal." (*Borré v. State Bar, supra*, 52 Cal.3d at p.1050.) Lascano filed a complaint against Borre' with the State Bar, and in response to the State Bar investigation of that complaint, Borre' presented to the State Bar a copy of a letter dated November 26, 1985, that he purportedly sent to the mother of Lascano's girl friend in which Borre' stated that he found no issues for appeal, but had nonetheless obtained an extension until December 18, 1985, to file the opening brief in case she wanted to find another lawyer to handle Lascano's appeal. (*Ibid.*) Borre' testified

at the disciplinary hearing that he had the letter prepared on or before November 26, 1985. However, the letter was found to be false, and Borre' was found to have lied under oath about the letter's authenticity. (*Id.* at pp. 1050-1052.) These two acts and the act of Borre' in sending the letter to the State Bar were each found to involve moral turpitude by the State Bar Court and the Supreme Court. (*Id.* at pp. 1050-1052, 1053.)

Borre' was also found culpable of the following misconduct (1) failure to keep his client informed of significant developments in his case, (2) abandonment of a client who was incarcerated, (3) intentional misrepresentation to a client regarding the status of the client's case, (4) improper withdrawal from representation without taking reasonable steps to avoid prejudice to client's rights and (5) reckless misrepresentation to the Court of Appeal that he was the client's appellate attorney when he knew or should have known that he was unqualified to perform the duties of an appellate attorney.[10] (*Id.* at pp. 1050-1051.)

In adopting the review department's recommendation in *Borre'*, the Supreme Court took special note of the fact that Borre' abandoned an incarcerated client, and stated that Borre's "abandonment of his incarcerated client was itself a serious matter warranting substantial discipline. [Citation.] His fabrication of the November 26 letter and subsequent lies, moreover, are particularly egregious." (*Borré v. State Bar, supra*, 52 Cal.3d at p.1053.) Even though Borre's underlying misconduct is more serious than that of respondent, we note that there are aggravating circumstances in this proceeding that are not found in *Borré*. Thus, we consider the two years' actual suspension imposed in *Borre'* to be instructive in the present proceeding.

Finally, we review *In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390 in which the State Bar Court's recommendation of disbarment was adopted and imposed by the Supreme Court. Like in the present proceeding, the misconduct in *Brimberry* included intentional misrepresentations, failure to competently perform legal services, and failure to refund an unearned

---

[10]Even though the Supreme Court did not explicitly adopt each of these adverse culpability determinations, its opinion implies that it did. (See generally *In the Matter of Dahlz, supra*, 4 Cal. State Bar Ct. Rptr. at p. 286 [where we concluded that the found misconduct in *Borre'* included the State Bar Court's finding that Borre' recklessly misrepresented to the Court of Appeal that he was qualified to perform the duties of an appellate attorney].)

advanced fee. In addition, like respondent, Brimberry failed to appreciate the seriousness of her misconduct. However, unlike the present proceeding, the misconduct in *Brimberry* also involved misappropriation of $2,000 in client funds, failure to promptly account, an offer to pay a referral fee, and client overreaching for Brimberry's personal benefit. Thus, we conclude that the disbarment recommended in *Brimberry* is not necessary in the present proceeding. Nonetheless, we conclude that a recommendation of a substantial period of actual suspension is appropriate in this proceeding.

In summary, even though we find no case that directly guides us, we take assistance from the cases cited *ante* and look to the essential facts of the matter before us to conclude that the interests of the public, the courts, and the legal profession will be adequately protected by the recommendation of the following: that respondent be placed on three years' stayed suspension and on four years' probation with conditions including two years' actual suspension and until she establishes her rehabilitation, fitness to practice, and present learning in the law in accordance with standard 1.4(c)(ii). Moreover, we conclude that two additional modifications to the hearing judge's discipline recommendation are necessary since we have adopted her findings that it was respondent's gross negligence in managing her People's Bank client trust account which caused respondent to issue the five NSF checks and that respondent misused both her People's Bank client trust account and her Western Financial Bank client trust account. Those additional modifications are (1) the addition of a probation condition requiring respondent to take and pass the State Bar's Client Trust Accounting and Record Keeping Course and (2) the addition of a probation condition requiring respondent to file quarterly certificates from a Certified Public Account certifying whether respondent is complying with the trust accounting requirements in rule 4-100 and with the Trust Account Record Keeping Standards as Adopted by the State Bar's Board of Governors, effective January 1, 1993.

Discipline Recommendation

We recommend that respondent Marlene Gerdts be suspended from the practice of law in the State of California for a period of three years; that execution of the three-year suspension be stayed; and that she be placed on probation for a period of four years on the following conditions.

1. Respondent shall be actually suspended from the practice of law in the State of California during the first two years of this probation and until (1) she makes restitution to Vilma Delgado, or the Client Security Fund if it has paid, in the amount of $210 plus interest thereon at the rate of 10 percent simple interest per annum from March 29, 1997, until paid and provides satisfactory proof of such restitution to the State Bar's Probation Unit in Los Angeles; (2) she makes restitution to Vilma Delgado, or the Client Security Fund if it has paid, in the amount of $1,500 plus interest thereon at the rate of 10 percent simple interest per annum from May 22, 1998, until paid and provides satisfactory proof of such restitution to the State Bar's Probation Unit in Los Angeles; and (3) she shows proof satisfactory to the State Bar Court of her rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all the conditions of this probation.

3. Subject to the assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer all inquiries of the State Bar's Probation Unit that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.

4. Respondent must report, in writing, to the State Bar's Probation Unit in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation ("reporting dates"). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of respondent's probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

   (a) in the first report, whether respondent has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation since the beginning of this probation; and

   (b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation during the period.

   During the last 20 days of this probation, respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

5. During each calendar quarter in which respondent receives, possesses, or otherwise handles client funds or property in any manner,[11] respondent must submit, to the State Bar's Probation Unit in Los Angeles with the probation report for that quarter, a certificate from a Certified Public Accountant certifying:

---

[11]As used herein, the terms client funds and client property include, without limitation, funds and property respondent receives or holds in trust for others.

(a) whether respondent has maintained a bank account that is designated as a "Trust Account," "Clients' Funds Account," or words of similar import in a bank in the State of California or, with the written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction;

(b) whether respondent has, from the date of receipt of client funds through the period ending five years from the date of appropriate disbursement of such funds, maintained:

(1) a written ledger for each client on whose behalf funds are held that sets forth:

(a) the name of such client,
(b) the date, amount, and source of all funds received on behalf of such client,
(c) the date, amount, payee, and purpose of each disbursement made on behalf of such client, and
(d) the current balance for such client;

(2) a written journal for each bank account that sets forth:

(a) the name of such account,
(b) the date, amount, and client affected by each debit and credit, and
(c) the current balance in such account;

(3) all bank statements and cancelled checks for each bank account, and

(4) each monthly reconciliation (balancing) of (1), (2), and (3); and

(c) whether respondent has, from the date of receipt of all securities and other properties held for the benefit of the client through the period ending five years from the date of appropriate disbursement of such securities and other properties, maintained a written journal that specifies:

(1) each item of security and property held,

(2) the person on whose behalf the security or property is held,

(3) the date of receipt of the security or property,

(4) the date of distribution of the security or property, and

(5) person to whom the security or property was distributed.

6. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Probation Unit in Los Angeles, her current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes (Bus. & Prof. Code, § 6002.1, subd. (a)) as well as her current home address and telephone number (Bus. & Prof. Code, 6002.1, subd. (a)(5)). Respondent's home and telephone shall *not* be made available to the general public. (Bus. & Prof. Code, 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Probation Unit of any change in this information no later than 10 days after the change.

7. Within the period of her actual suspension, respondent must: (1) attend and satisfactorily complete the State Bar's Ethics School; and (2) provide satisfactory proof of completion of

the school to the State Bar's Probation Unit in Los Angeles. This condition of probation is separate and apart from respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Accord, Rules Proc. of State Bar, rule 3201.)

8. Within the period of her actual suspension, respondent must: (1) attend and satisfactorily complete the State Bar's Client Trust Accounting and Record Keeping Course; and (2) provide satisfactory proof of completion of the school to the State Bar's Probation Unit in Los Angeles. This condition of probation is separate and apart from respondent's MCLE requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Accord, Rules Proc. of State Bar, rule 3201.)

9. Respondent's probation shall commence on the effective date of the Supreme Court order in this matter. And, at the end of the probationary term, if she has complied with the terms and conditions of probation, the Supreme Court order suspending her from the practice of law for three years shall be satisfied, and the suspension shall terminate.

Professional Responsibility Examination, Rule 955 and Costs.

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within the period of her actual suspension and to provide satisfactory proof of her passage of that examination to the State Bar's Probation Unit in Los Angeles within that same time period. Additionally, we recommend that respondent be ordered to comply with the provisions of rule 955 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter. Finally, we recommend that the costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs be payable in accordance with Business and Professions Code section 6140.7.

WATAI, J.

We Concur:

STOVITZ, P. J.
EPSTEIN, J.

CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court. 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 Los Angeles, on June 23, 2003, I deposited a true copy of the following document(s):

OPINION ON REVIEW FILED JUNE 23, 2003

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

[X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

MARLENE GERDTS
433 N CAMDEN DR 6FL
BEVERLY HILLS, CA 90210 4410

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

CECILIA HORTON-BILLARD, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **June 23, 2003**.

Rosalie Ruiz
Case Administrator
State Bar Court