

Filed May 6, 2024

**STATE BAR COURT OF CALIFORNIA**  
**REVIEW DEPARTMENT**

In the Matter of ) SBC-22-O-30280  
 )  
FERNANDO EMMANUEL VARGAS, ) OPINION  
 )  
State Bar No. 302550. )  
\_\_\_\_\_ )

This is Fernando Emmanuel Vargas’s first disciplinary matter, which stems from a romantic relationship that also formed into an attorney-client relationship where both ended poorly. Vargas has been charged with multiple counts of moral turpitude, in addition to allegations that he failed to preserve client confidences, breached his fiduciary duties, and threatened charges to gain an advantage in a civil suit. The hearing judge dismissed one count and found Vargas culpable under the remaining six counts of misconduct. The judge recommended an 18-month actual suspension, continuing until Vargas proves his rehabilitation, and also recommended that Vargas obtain psychiatric or psychological counseling during his period of probation or until such counselor concludes that treatment is no longer necessary.

Vargas appeals. He admits to certain facts supporting the alleged misconduct; however, he contests all of the hearing judge’s findings of culpability. He also raises challenges to some of the judge’s evidentiary and procedural rulings. The Office of Chief Trial Counsel of the State

Bar (OCTC) asks that we affirm the judge’s culpability findings and the discipline recommendations.

Upon our independent review (Cal. Rules of Court, rule 9.12), we find Vargas culpable of four counts of misconduct, the most serious of which involve multiple counts of moral turpitude. Given the serious misconduct found, in addition to the aggravating circumstances that outweigh the mitigation circumstances, we recommend an 18-month actual suspension with conditions that include Vargas obtaining mental health counseling during his period of probation or until such mental health professional concludes during his probation that treatment is no longer necessary and that Vargas remain suspended until proving rehabilitation as required under standard 1.2(c)(1) of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.<sup>1</sup>

#### **I. SIGNIFICANT PROCEDURAL BACKGROUND**

On April 20, 2022, OCTC filed a Notice of Disciplinary Charges (NDC) alleging seven counts of misconduct. Vargas filed a response on June 24, which he amended on August 16.

On August 10, 2022, OCTC filed a motion in limine to exclude Vargas’s witnesses and exhibits due to his failure to file a pretrial statement, failure to serve an exhibit and witness list, and failure to lodge exhibits, as required under rules 5.101(E) and 5.101.1(I) of the Rules of Procedure of the State Bar. Over Vargas’s objection, the hearing judge granted OCTC’s motion precluding Vargas from presenting non-character witness testimony and excluding all but four of his exhibits due to his failure to file a pretrial statement.

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<sup>1</sup> All further references to standards are to this source.

An eight-day trial was held between August 18, 2022, and March 1, 2023.<sup>2</sup> Posttrial briefing followed, and the hearing judge issued her decision on June 16, 2023. Vargas filed his request for review on July 17. Oral arguments were heard on February 14, 2024, and the matter was submitted that day.

## II. FACTUAL BACKGROUND<sup>3</sup>

Vargas was admitted to practice law in California on February 13, 2015, and has no prior record of discipline. His legal practice is primarily focused on workers' compensation matters.

### A. Vargas's Romantic Relationship with Diggs

In the summer of 2017, Vargas and Denise Diggs met online and began dating. At the time, Vargas resided in San Francisco and Diggs lived in the Los Angeles area. During the early stages of the relationship, around November 2017, the couple agreed to sublease an apartment in San Francisco for \$2,750 per month. In April 2018, Diggs moved out and informed Vargas that she would no longer be paying any portion of the rent.<sup>4</sup>

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<sup>2</sup> The disciplinary proceeding was abated from September 12, 2022, through February 21, 2023, due to a confidential State Bar Court proceeding involving Vargas.

<sup>3</sup> All findings in this opinion are established by clear and convincing evidence. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552 [clear and convincing evidence leaves no substantial doubt and sufficiently strong to command unhesitating assent of every reasonable mind].) The facts are based on the trial testimony, documentary evidence, and the hearing judge's factual findings, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).)

<sup>4</sup> During the disciplinary trial, Diggs testified that she and Vargas "did not live together" but she "did help him with his rent." The hearing judge did not make any credibility findings regarding Diggs's or Vargas's testimonies; however, she found that Diggs and Vargas agreed to sublease the apartment and she agreed to pay \$800 of the monthly rent, but ultimately she moved out and told Vargas she was no longer going to pay any portion of the rent. We conclude the judge's determinations are supported by the record.

## **B. Vargas Becomes Diggs's Attorney**

Prior to the start of their relationship, Diggs was renting a residence in the Los Angeles area. When Vargas and Diggs lived together in San Francisco, Diggs maintained that residence in Los Angeles. Over the course of their relationship, the couple's interactions became increasingly strained. Despite their rocky relationship, Vargas agreed to represent Diggs in connection with landlord-tenant issues in Los Angeles. On February 5, 2018, Vargas filed a complaint in superior court<sup>5</sup> against Diggs's landlord, alleging breach of warranty of habitability issues and related torts with her residence, and on May 11, he filed an answer to an unlawful detainer complaint<sup>6</sup> that the landlord had filed against Diggs.

Vargas and Diggs had discussed a fee agreement on several occasions but never agreed to the terms or executed an agreement for his representation of her. In his amended response to the NDC, Vargas stated, "my agreement to represent Denise was always, legally speaking, intended to be a conditional gift; that is, a promise to help her with whatever I could so long as we were still together, on good terms, and putting forth the effort toward same or, at a minimum, being civil and maintaining an open line of communication . . . ." In his brief on review, Vargas states a formal fee agreement was not utilized at the outset because the parties agreed to take a "wait-and-see" approach to any attorney fee that would yield from the two matters. During the disciplinary trial, Diggs testified that she wanted a signed fee agreement because the couple always argued about him withdrawing from her case. She also testified that, because Vargas was her boyfriend, it was her expectation that he would work as her attorney for free.

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<sup>5</sup> *Denise Diggs v. Niesje Van Heusden* (Super. Ct. Los Angeles County, No. YC072657).

<sup>6</sup> *Niesje Van Heusden v. Denise Diggs* (Super. Ct. Los Angeles County, No. 181WUD00704).

Diggs testified that she provided her digital signature to Vargas, but only for “changes that needed to be done” for her case as she lived in the Los Angeles area and he lived in San Francisco. She also testified that she never authorized Vargas to use her digital signature on a fee agreement. On February 15, 2018, only 10 days after Vargas filed the complaint in Los Angeles, Diggs emailed him a digital copy of her signature with a subject line that read, “File that and give me my filing fees back.” She testified that she meant for him to carry through with his ongoing threats to withdraw from representing her, which he began after he filed the breach of habitability complaint against her landlord.

In March 2018, when Vargas and Diggs were again discussing that he would withdraw from the case, the following text messages were exchanged:<sup>7</sup>

VARGAS: All you care about is your money and eeverything [*sic*] but me.<sup>8</sup> You can sub me out and I’ll use your signature to get retainer agreement. I can’t just be your lawyer sorry. I don’t want to, better yet. That’s all you’ve wanted apparently.

DIGGS: I want you to shred my signature.

VARGAS: Sure.

DIGGS: I don’t give you authorization to sign anything.

On April 5, 2018, Diggs and Vargas exchanged additional texts, which included a demand that Diggs “sign off on my retainer and sub me out,” and Diggs asked Vargas to draft a fee agreement the next day.

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<sup>7</sup> Leading up to this exchange, Vargas had sent Diggs repeated texts and emails between February 26 and March 25, 2018, where he made crude remarks to her and requested that she replace him as her attorney.

<sup>8</sup> Periods have been added as punctuation for quoted texts and emails throughout this opinion for readability.

## 1. The Attorney-Client Relationship and Romantic Relationship End

Through April and May 2018, Vargas and Diggs continued to exchange messages, which included Diggs informing Vargas that she was looking for a new attorney. At the beginning of June 2018, both the attorney-client relationship and romantic relationship between Vargas and Diggs continued to deteriorate. On June 4, Vargas emailed Diggs demanding \$1,000 for him to “keep working on the case.” On June 8, Vargas and Diggs exchanged the following texts:

VARGAS: Denise pay me to help you. . . .

DIGGS: Email me the file please.

VARGAS: Pay me some of what you owe me and be decent. You’re fucked up. . . .

DIGGS: Why are you still texting me??

VARGAS: I’m tempted to serve you a lawsuit for what you owe me.

DIGGS: [You are a]busing me.

VARGAS: Shut the fuck up . . . . You’re the only abuser.

The following day, on June 9, Vargas emailed Diggs a Notice of Dismissal of Attorney form used for workers’ compensation cases, apparently amended with “Superior Court, Los Angeles County[,] State of California,” and displaying a caption and case number related to the complaint he filed on Diggs’s behalf against her landlord. Vargas asked Denise to sign it, but she did not sign or return the document.

Further demonstrating the volatile nature of their relationship, two days later the following text exchange occurred:

VARGAS: Denise . . . I’m done being your attorney. I’m done.

DIGGS: Don’t you ever contact me again Fernando.

VARGAS: You can keep me on by [*sic*] I’ll do nothing. I love you.

DIGGS: Ok.

VARGAS: All you do is hurt me. All you do is use me. You don't talk to me. You hate me. It kills me.

On June 13, 2018, Vargas sent Diggs multiple emails, each containing unsolicited nude photos of a man and woman engaged in various sexual activities. In these emails, he repeatedly made crude remarks to her and legal threats against her. He also demanded that she "sub me out!!!!" Additional messages were exchanged over the next several days, with Vargas again making crude comments to Diggs and demanding payment from her. On June 19, the following text messages were exchanged:

VARGAS: What nonsense!!!! . . .

DIGGS: I really need you to mail me or email me my file.

VARGAS: As soon as you sub me out you evil con!!! I loved you!!!! Instead of repairing things w[ith] me and stopping this con you'd rather I die and make sure I get kicked out of here too. . . .

DIGGS: Fernando don't do this.

VARGAS: I loved you and you just took advantage[,] playing a victim card the whole time.

DIGGS: I am entitled to a copy of my file.

Discussion regarding a fee agreement continued and, on June 19, Vargas emailed Diggs: "Need to talk about signing a retainer." Despite these communications, Diggs and Vargas never mutually executed a fee agreement. Diggs ended both her personal relationship and the attorney-client relationship with Vargas in mid-June 2018. During this time, she also changed her cellphone number and other contact information several times to avoid Vargas.

On July 12, 2018, Vargas emailed Diggs stating, "I totally forgot you already had [signed a fee agreement,] that's how much we fought." However, as the hearing judge noted in her decision, Vargas's statement in his July 12 email is unsupported because no evidence exists in the record that Diggs signed a fee agreement.

## **2. Diggs Hires New Counsel and Vargas Refuses to Accept the End of Their Relationship**

Diggs started seeking new counsel in March 2018, and ultimately retained Joseph Kellener to represent her. Vargas was substituted out of both cases by June 20, when Kellener requested that Vargas forward him a copy of Diggs's file. Vargas immediately sent Kellener a letter that same day, asserting a lien for attorney fees in both legal matters. A week later, Vargas sent a letter to Farmers Insurance, acknowledging that Kellener was counsel of record but stating he had a lien for services rendered and costs advanced in the breach of habitability case.

Although Diggs had made it clear to Vargas that their romantic relationship was over, he refused to accept it despite her earlier requests that he not contact her. On July 6, 2018, Vargas emailed Diggs apologizing for his past behavior to which she replied that his repeated threats had caused her fear and stated, "I don't want anything to do with you Fernando [and] that's the truth. I really do wish you the best and if you decide to sue me for your rent or whatever ridiculous reason I welcome it. I am tired of your threats. I will move on without you."

Kellener advised Vargas that the two landlord-tenant cases settled on July 10, 2018, for \$25,000. The attorneys then began to negotiate the division of the attorney fees. Still frustrated by the breakup, Vargas was convinced that Kellener and Diggs were involved in a romantic relationship. He also believed Kellener had manipulated Diggs into not only accepting a \$25,000 settlement but also agreeing to what he believed to be "an exorbitantly high, unconscionable," and arguably illegal fee for Kellener's legal services. Ultimately, Vargas received \$4,000 in attorney fees for his representation in the matters.

On July 11, 2018, Kellener asked Vargas to produce the original signed retainer agreement between him and Diggs because Diggs had informed Kellener that she had never signed one. Vargas affixed Diggs's digital signature on a purported fee agreement, backdated



the signature to March 1, 2017, and he then sent a screenshot of the agreement to Kellener stating, “Here you go [J]oe. I’m driving but you were lied to again, she signed this and the complaint here at our place.” He also sent Kellener a Dropbox file that contained the contingency fee agreement with his and Diggs’s digital signatures. As stated *ante*, Diggs testified that she never authorized Vargas to affix her digital signature to any fee agreement. Vargas testified that he believed Diggs had originally given him authority to do so in January 2018. He claimed that he backdated the signature because he wanted to avoid the appearance of impropriety by signing a few days before a settlement, which could appear unconscionable.

On August 30, 2018, Vargas submitted a complaint against Kellener to the State Bar. He alleged that Kellener sought an excessive or illegal fee, had developed a personal relationship with Diggs, and impermissibly interfered with the attorney-client relationship he had with Diggs. The complaint was closed on September 26, 2018.

**C. Vargas Sues Diggs in Small Claims Court for Unpaid Rent and Threatens Kellener and Diggs**

On July 13, 2018, Vargas filed a claim against Diggs in small claims court in San Francisco. He alleged that Diggs owed him \$6,400 because she paid \$800 a month for only four months before breaching her agreement to pay rent through November 2018. Vargas admitted to filing the small claims case to have contact with Diggs. He stated in a text to her on July 19, “Hey, I served you so you could come hug me. . . . It was really designed to get my hug tho [*sic*]. . . . I’m gonna [*sic*] get rid [of the lawsuit], mamas, I don’t want your money.” Vargas informed Diggs that he would dismiss the case if she would meet him for lunch or spend the day with him. Diggs refused and the case was subsequently dismissed because Vargas failed to appear for a hearing in August 2019.

Based on several text messages exchanged on July 26, 2018, Diggs again made it abundantly clear that she no longer wanted to be involved in a personal or romantic relationship with Vargas. She stated, “[S]top trying to contact me. You need to stop this crazy behavior. STOP!!!! . . . I don’t want to be with you. You need to accept it and move on. . . . “I’m not going to repeat myself again. It’s over. Accept it.”

In July 2018, Vargas stated in an email to Diggs that he was drafting a complaint to the State Bar and the civil court about Kellener’s and her actions. In an email dated July 17, Vargas wrote to Kellener with a settlement offer on the attorney fee, but implying that he would make a complaint to the bar and criminal prosecutors about his actions. On July 28, Vargas emailed Diggs and threatened to report her and her father to the Internal Revenue Service (IRS) so she would not disappear “with everythign [*sic*] I have left.” Vargas also attached to the email an IRS notice of levy against Diggs that she had left in San Francisco. The following day, he sent Diggs an email informing her that she and her father had been reported to the IRS. The subject of the email read, “You and your dad have been reported to the irs [*sic*] for trying to skip out on me with no regard for what you owe me . . . .” Attached to the July 29 email was a completed Form IRS 3949-A, Information Referral, in which Vargas stated, inter alia, that Diggs had submitted false deductions, had unreported income, and owed him money. He also attached Diggs’s Wells Fargo business banking statements to the IRS form. Later that day, he informed her that she had been reported to the authorities regarding the landlord-tenant settlement so she could pay taxes on the settlement proceeds.

**D. Vargas Accesses Diggs’s Social Media Accounts and Uses Her Social Security Number Without Authorization**

In early August 2018, Diggs learned that Vargas had used her social security number without her permission. When she confronted him, he stated, “I’m sorry, mamas. I can assure

you I'm not 'using' your social, though. I just ran it on [E]xperian to see if a new address came up. That's it, I swear. I didn't actually run your credit or open up any credit accounts . . . . This has been the hardest period of my life, I'm sorry." At some point between July and August 18, 2018, Vargas accessed Diggs's Verizon account. He emailed her on August 18, stating, "For the record, ms [*sic*] loyalty, I hacked your Verizon [account] months ago when I thought we were still dating . . . how do you think I know your bill was \$745 last month?"

In a March 18, 2019 letter sent by OCTC to Vargas, an investigator stated Diggs had alleged that Vargas had accessed her online accounts, including, but not limited to, Google, NextDoor, Pinterest, Pandora, Microsoft, Dropbox, and Verizon. In his response to the letter, Vargas admitted the allegation by writing, "Yes, I accessed or otherwise attempted to access Denise's accounts, but only because she had already done the same with my accounts as far back as when we first started dating in early 2017."<sup>9</sup>

During the disciplinary trial, Diggs testified that Vargas's behavior had caused her trauma, stress, and fear, and she made efforts to get a restraining order against him and filed a police report, although no criminal charges ensued. She testified that she had to change all of her contact information and is attempting to change her social security number in an effort to avoid him. She also claims that she was living with a family member and maintains nothing in her name to prevent Vargas from locating her.

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<sup>9</sup> Vargas testified that he accessed Diggs's Nextdoor.com account without her permission. The record also indicated that Vargas changed the email to Diggs's Pinterest and, on multiple occasions in December 2018 and February 2019, he forwarded email messages from Pinterest to Diggs.

### III. VARGAS'S CHALLENGES ON REVIEW<sup>10</sup>

Vargas makes several points on review, which, although not entirely clear, appear to raise various procedural and evidentiary arguments. Vargas provides no coherent legal authority and analysis for the majority of his contentions. Having reviewed each of these arguments, we reject them as unavailing, as discussed below.

A judge has broad discretion to admit or exclude evidence. (*In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 499.) An abuse of discretion only occurs when a judge has “exceeded the bounds of reason, all of the circumstances before it being considered.” (*H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1368.) In order to prevail on any claim of error, Vargas must show both abuse of discretion and actual prejudice resulting from the ruling. (*In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, 695 [to prevail on claim of error for procedural ruling, abuse of discretion and actual prejudice resulting from the ruling must be established]; *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 241 [party must establish actual prejudice when asserting violation of due process].)

Vargas asserts that the hearing judge improperly denied his motion for a continuance and request for other discovery. He argues he was prejudiced by the judge’s denial of his motion because it resulted in him having inadequate time to prepare for trial in light of his “pre-existing obligations in other client matters.” In State Bar Court proceedings, “[c]ontinuances of disciplinary hearings are disfavored, and a request for continuance must be supported by a factual showing of good cause.’ [Citation.]” (*Hawk v. State Bar* (1988) 45 Cal.3d 589, 597.) By denying his motion, the judge found that Vargas had not established the good cause required.

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<sup>10</sup> Having independently reviewed all arguments set forth by Vargas, those not specifically addressed have been considered and rejected as without merit.

Vargas had adequate time to familiarize himself with the law relevant to his case and to prepare for his trial; thus, he has failed to show any prejudice from the judge's ruling.

Vargas also contends that the hearing judge erred in granting OCTC's motion in limine to exclude his trial exhibits. Rule 5.101(E) of the Rules of Procedure of the State Bar states that a party's failure to file a pretrial statement may result in the court excluding evidence. Vargas's pretrial statement should have been filed by August 8, 2022, but the judge extended the deadline to August 17 for him to file it. (See Rules Proc. of State Bar, rule 5.101(B) [parties must file and serve pretrial statements 10 days prior to the conference, or as the court orders].) Unless otherwise ordered by the court, parties are required to exchange exhibits at least 10 days prior to the pretrial conference. (Rules Proc. of State Bar, rule 5.101.1(B).) Failure to comply, without good cause, may constitute grounds for exclusion of exhibits. (Rules Proc. of State Bar, rule 5.101.1(I).) On August 15, during a pretrial status conference, the judge told Vargas to lodge his exhibits with the court by noon on August 17; however, he failed to do so. Vargas stated he attempted to lodge the exhibits on August 18, but was "denied by the [c]lerk," and when he tried again on August 24, his USB drive was corrupted. These explanations provide no valid reason why he failed to comply with the rules or with the judge's extended deadline. The judge's ruling on August 24, precluding Vargas from presenting non-character witness testimony and excluding all but four of his exhibits, was proper. We find no abuse of discretion or prejudice here.

#### IV. CULPABILITY<sup>11</sup>

At the outset, OCTC argues that Vargas did not include legal analysis and supporting authority for most of his arguments on review. OCTC relies on *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 to assert that we may treat Vargas's arguments as waived. Nonetheless, under our rules of procedure, which are not applicable to the courts of record, we have a duty to independently review the record. (Rules Proc. of State Bar, rule 5.155(A).)

##### A. **Count One: Moral Turpitude—Dishonesty and Misrepresentation (Bus. & Prof. Code, § 6106)<sup>12</sup>**

In count one, OCTC alleged Vargas committed acts of moral turpitude in violation of section 6106 by (1) placing Diggs's digital signature on a fee agreement, without her knowledge, consent, or authority, thus purporting to give himself a lien on Diggs's lawsuit, and backdating the fee agreement; (2) presenting the purported fee agreement to Kellener as genuine and having been signed by Diggs when he knew it was not; (3) making knowingly false statements to Kellener and Diggs that Diggs had signed the fee agreements months prior; and (4) falsely claiming he had a lien on Diggs's lawsuit. The hearing judge found Vargas culpable as charged.

Section 6106 can be violated by material omissions or misrepresentations of material facts. (See *In the Matter of Farrell, supra*, 1 Cal. State Bar Ct. Rptr. at p. 497 [misrepresentation to tribunal must be material to issues before it].) Here, Vargas's misrepresentations were material, because he sought to secure a financial advantage by obtaining an attorney fee based on

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<sup>11</sup> The hearing judge dismissed count two, a violation of Business and Professions Code section 6068, subdivision (e) (using and revealing client confidences), and OCTC does not contest this dismissal. We have reviewed the record and affirm the judge's dismissal with prejudice. (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 843 [dismissal of charges for want of proof after trial on merits is with prejudice].)

<sup>12</sup> All further references to sections are to the Business and Professions Code.

the assertion of a lien to which Diggs had purportedly consented while not disclosing the true nature of the attorney-client engagement, i.e., the lack of a written fee agreement between him and Diggs. Additionally, case law has long established that culpability under section 6106 includes an attorney's false or misleading statements, which include concealment or affirmative misrepresentations. (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315 [moral turpitude includes concealment as well as affirmative misrepresentations with no distinction to be drawn between "concealment, half-truth, and false statement of fact"]; see also *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 124; *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174-175; and *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 910-911.)

On review, Vargas argues this count should be dismissed and asserts that the record lacks clear and convincing evidence to establish culpability. He maintains that Diggs granted him permission to affix her digital signature on a written fee agreement on several occasions during phone conversations between January and February 2018. His assertions are unavailing in light of the full record. Diggs expressly told Vargas to shred her signature in March 2018, which was prior to him affixing it on a fee agreement in July, and no evidence exists that Diggs ever authorized him to use her signature after March 2018. Additionally, at least once on June 19, 2018, Vargas himself acknowledged that he did not have a signed agreement between them. Once Diggs's signature was affixed to the purported agreement by Vargas, he sent it to Kellener and offered it as one signed by Diggs, when he knew that was not true, with the purpose of asserting the agreement as a lien to recover attorney fees. Contrary to Vargas's argument on this point, his actions as established in the record support culpability. (See *Aronin v. State Bar* (1990) 52 Cal.3d 276, 286-287 [violation of § 6106 where attorney simulated client's signature on verified answer].)

The record also does not support Vargas's additional argument that he had a good faith and honest belief that he was representing Diggs's "best interests and [he was] not spurred by a corrupt, dishonest, or fraudulent purpose." (*In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 9-11 [no moral turpitude found where attorney honestly believed in justifiability of actions].) In fact, the record offers clear examples of the opposite. Vargas attempted to create a path favorable to him in order to assert an attorney lien on Diggs's settlement funds. When Kellener asked Vargas to produce the original signed retainer agreement between him and Diggs, this request prompted Vargas to affix Diggs's signature on a purported fee agreement, backdate the signature to March 1, 2017, and send it to Kellener on July 11, 2018. Then, the very next day, on July 12, Vargas randomly sent Diggs an email falsely claiming he had forgotten she had signed a fee agreement. Despite his assertion of an honest belief or that his actions were in good faith, no evidence in the record supports his defense.

We conclude that the record before us supports Vargas's culpability for engaging in acts of moral turpitude as pleaded in count one. Accordingly, we affirm the hearing judge on this count.

**B. Count Three: Moral Turpitude—Dishonesty (§ 6106)**

In count three, OCTC alleged Vargas violated section 6106 by (1) hacking and accessing Diggs's private social media accounts; (2) running unauthorized credit reports using information he obtained from Diggs as her attorney; (3) using, changing, or creating social media accounts for her, or the data in those accounts, even though, on or about August 9, 2018, respondent was told by Diggs to stop using her social media accounts, running her credit report, and using her private information. This count also alleged Vargas acted without authority and without Diggs's knowledge or consent. The websites involved in the allegations were Experian, Verizon, Pinterest, Pure.dating (a dating app), Nextdoor.com, Microsoft, Dropbox, and DocuSign.



The hearing judge found Vargas culpable on all the allegations except two—she concluded there was no clear and convincing evidence that Vargas improperly accessed Diggs’s DocuSign account or that he created accounts in Diggs’s name on the dating apps Pure.dating<sup>13</sup> or Mingle2.com,<sup>14</sup> and OCTC did not appeal those factual findings. Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes a cause for suspension or disbarment. As explained below, we do not find that the remaining allegations amounted to moral turpitude as charged.

In his response letter to the OCTC investigator, Vargas admitted to accessing or attempting to access Diggs’s Pinterest, Nextdoor.com, Microsoft, Dropbox, and Verizon accounts. Vargas argues he only accessed the accounts because Diggs had done the same with his accounts as early as 2017 when they first began dating. He testified they had a mutual agreement to share each other’s passwords for various social media accounts. Regarding Vargas’s use of Diggs’s social security number, Vargas testified that he obtained it from her prior to the start of the attorney-client relationship, only using it on the Experian website in an attempt to find her new address for the purpose of serving the small claims lawsuit, but stated he did not actually run her credit report. We see no evidence in the record that contradicts Vargas’s testimony on these points.

We do not find that OCTC has proven by clear and convincing evidence that Vargas’s actions as pleaded in the NDC violate section 6106. Vargas’s accessing of Diggs’s accounts and using her social security number without consent or authorization between August 2018 through February 2019 were undoubtedly inappropriate because they occurred well after Vargas and

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<sup>13</sup> While the NDC referred to one dating app as “Pure.dating,” the hearing judge inadvertently used “PureDating.com.”

<sup>14</sup> The NDC made no allegation that Vargas opened an account in Diggs’s name for another dating website, Mingle2.com.

Diggs’s breakup, and by then she had communicated to him that their personal relationship was over. Clearly, Vargas refused to accept the end of their relationship, which seemingly contributed to his desire to maintain access to Diggs’s accounts. However, OCTC has not presented any authority that only improper or unauthorized access to such accounts using information previously provided constitutes moral turpitude as defined in section 6106. (See *In the Matter of Klein, supra*, 3 Cal. State Bar Ct. Rptr. at pp. 9-11 [no moral turpitude where attorney had honest but unreasonable belief].)

No indication from the record exists that Vargas lied or attempted to conceal his bad acts from Diggs. He explained that, at the time, it was difficult for him “to cope with everything [that was] going on,” and that he apologized immediately after doing so. His explanations do not excuse his behavior because even if Diggs had given him permission to access her accounts while they were dating, it was unreasonable for him to believe that he had the right to access her accounts once she ended their relationship. Further, while we recognize that the breach of a basic duty of fidelity owed to a client—which is discussed under count six, *post*—can constitute an act of moral turpitude (see *Marsh v. State Bar* (1930) 210 Cal. 303, 307), the attorney-client relationship between Diggs and Vargas ended in June 2018. Based on this record we fail to see how Vargas’s actions—which albeit were irrational—demonstrate moral turpitude. These facts, without more, support neither a finding of gross negligence nor the necessary intent to establish moral turpitude under section 6106. Given our findings, we dismiss count three with prejudice for lack of proof. (*In the Matter of Kroff, supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

**C. Count Four: Threatening to Gain Advantage in Civil Suit (Former Rule 5-100(A))<sup>15</sup>**

Former rule 5-100(A) provides that an attorney “shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.” Under count four, OCTC charged Vargas with violating former rule 5-100(A) by (1) threatening Diggs and Kellener that he would report Kellener to the State Bar for alleged misconduct and (2) threatening to report Diggs and her father to the IRS, and both threats were done in order to obtain an advantage in a civil dispute with Diggs and Kellener (i.e., the attorney fees he had been demanding from Diggs’s settlement in the breach of habitability lawsuit). The hearing judge found Vargas culpable as charged, and we agree as detailed below.

Regarding the allegations pertaining to Kellener, OCTC alleged Vargas made threats to both Diggs and Kellener, wherein he would file a State Bar complaint against Kellener. As an example of the threats Vargas made, the NDC alleged that Vargas stated in an email around July 2018, “12:01am [*sic*] I start [*sic*] drafting complaint to bar and civil court complaint and civil case if not paid fees.”<sup>16</sup> In his amended response to the NDC, Vargas admitted to sending the email, but he specifically denied the allegation by OCTC that he threatened to file a State Bar complaint against Kellener unless he was paid the attorney fee and rent he demanded.

In the disciplinary trial, Kellener testified that he believed Vargas had threatened him with a complaint to the State Bar, in addition to criminal charges, if he did not accept Vargas’s

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<sup>15</sup> All further references to former rules are to the Rules of Professional Conduct that were in effect from September 14, 1992, to October 31, 2018.

<sup>16</sup> Upon our review of the record, we found an undated email Vargas sent to Diggs with the subject line stating, “12:01am [*sic*] I [*sic*] start drafting complaint to bar and civ [*sic*] court” and the body of the message stating, “Let me know . . . .” This evidence does not comport with OCTC’s allegation quoted above that included the additional language “*if not paid fees.*” (Italics added). This is a troubling misquote by OCTC because it appears to be material to its allegation that Vargas violated the former rule.

settlement demand regarding the attorney fee that was obtained in the breach of habitability case. In an email dated July 17, 2018, Vargas wrote to Kellener stating, “You can keep \$1,000.00 out of that [attorney fee] and I get the rest because I did all the work. It ends there and now. . . . Otherwise, everything will come out the hard way and I don’t think that’s necessary. As much as I’ll have to explain a lot of my emails, your . . . emails will reveal something much worse that is not excusable to me, the bar, or the penal code.”

Despite Vargas’s denial that he made a threat, the emails he sent to Diggs and Kellener are sufficient to conclude Vargas threatened to report Kellener to the State Bar (which Vargas did in fact do six weeks later) in order to obtain an advantage in the settlement of the attorney fee. In *Crane v. State Bar* (1981) 30 Cal.3d 117, an attorney wrote a letter demanding that the recipients pay money the attorney believed to be owed and stated that, if the money was not received, the attorney would commence an action to recover the money and would contact both a regulatory agency and the Attorney General “to assist . . . in [a] solution.” (*Id.* at p. 121.) The Supreme Court determined that Crane’s letter “could quite reasonably be construed as violative of [the rule].” (*Id.* at p. 123 [discussing previous version of rule 5-100(A)].) As the attorney did in *Crane*, Vargas made statements to Diggs and Kellener that, while not explicit threats, a reasonable person could construe as threats, and Kellener’s testimony that he believed he had been threatened with a bar complaint convinces us to affirm the hearing judge’s finding of culpability for that allegation.

Next, we turn to the allegations regarding Vargas’s threats to report Diggs and her father to the IRS. On July 28, 2018, Vargas sent Diggs a threatening email, which included an IRS notice of a levy against Diggs that she had left behind in San Francisco, stating he had to report her so that she did not “disappear with everythign [*sic*] I have left.” The following day, he sent Diggs an email stating that she and her father had been reported to the IRS and included a copy

of the IRS referral form. The IRS referral form completed by Vargas made allegations of false deductions, and stated that Diggs owed him money and recently received a settlement from the lawsuit.

This court's analysis in *In the Matter of Malek-Yonan* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627, 637 is instructive to these allegations. In *Malek-Yonan*, this court found an attorney culpable of violating former rule 5-100(A) by sending a letter asserting that the recipients were engaging in criminal activity and threatened to make the recipients' conduct part of an ongoing investigation by the Federal Bureau of Investigation and the district attorney. The attorney also indicated that copies of the letter were sent to the two law enforcement agencies and to other government agencies. Considering the similar conduct of the attorney in *Malek-Yonan*, we perceive Vargas's emails as a clear violation of former rule 5-100(A). Vargas not only indicated his intent to report Diggs and her father to the IRS but included a copy of Diggs's IRS notice of a levy to indicate his seriousness and reveal that he was motivated to change Diggs's behavior. Also, his statement that he had to do this to keep her from disappearing implies that he is looking to have access to her assets. After stating that he reported Diggs to the IRS, Vargas further threatened her by stating that she had also been reported to the authorities so that she could pay taxes on her \$25,000 settlement. Viewing the language used in the emails from Diggs's perspective, one could reasonably infer that Vargas was seeking to obtain an advantage in the small claims lawsuit he had filed against her two weeks prior because he stated that Diggs was trying "to skip out on [him] with no regard for what [Diggs] owe[d]." (See *Crane v. State Bar*, *supra*, 30 Cal.3d at p. 123 [reasonable interpretation of letter as impermissible threat].) Thus, we affirm culpability under count four based on Vargas's threats to report Diggs and her father to the IRS.

**D. Count Five: Moral Turpitude—Misrepresentation (§ 6106)**

In count five, OCTC alleged Vargas violated section 6106 and engaged in moral turpitude when he sent an email to Diggs on February 22, 2019, and (1) falsely denied he filed a State Bar complaint against Kellener, and (2) claimed the State Bar cleared him in complaints that Kellener and Diggs had filed against him. The hearing judge found Vargas culpable of knowingly and intentionally making misrepresentations as alleged in count five. She concluded clear and convincing evidence existed that Vargas’s statements to Diggs were demonstrably false, and he knew they were false.

Regarding the first allegation concerning the August 30, 2018 State Bar complaint that Vargas filed against Kellener, he specifically stated in the email, “I don’t care if you don’t believe me that I didn’t file a complaint with the state bar . . . .” From this sentence alone, we cannot discern that Vargas was attempting to gain some advantage from Diggs by his denial to her. Also, in his testimony at trial, Vargas stated he never intended to make a misrepresentation to her that he did not file a complaint as he believed that he had been “pretty open” about it to her leading up to his February 22, 2019 email. Without additional evidence as to Vargas’s intent, we conclude that his inaccurate denial to her, solely on its own, cannot support a finding of moral turpitude. (See *Wallis v. State Bar* (1942) 21 Cal.2d 322, 328 [“Representations which may be legally characterized as amounting to ‘moral turpitude, dishonesty or corruption’ must be made with an intent to mislead”].) We do not find OCTC carried its burden of proving moral turpitude by clear and convincing evidence for this allegation.

As for the second allegation, Vargas specifically emailed Diggs that an OCTC investigator “was assigned to investigate me and eventually cleared me.” On or about September 12, 2018, Vargas received a letter from Jay Buteyn, an investigator with the State Bar concerning the complaint that Kellener had filed against him. On September 26, Vargas emailed

Buteyn his response to Kellener's allegations. When Vargas emailed Diggs on February 22, 2019, almost five months had passed from the time he responded to Buteyn, and Vargas testified that he had not received a response from the State Bar after replying to the investigator's inquiry regarding the complaint Kellener filed against Vargas. Without other evidence to counter Vargas's testimony, reasonable doubt exists that Vargas did not intend the statement to be a misrepresentation as he could have believed the State Bar had closed Kellener's complaint due to the passage of time between his response to Buteyn and his email to Diggs. (See *Ballard v. State Bar* (1983) 35 Cal.3d 274, 291 [all reasonable doubts resolved in favor of attorney].) As with the first allegation in count five, we do not find that OCTC's second allegation is supported by clear and convincing evidence.<sup>17</sup> Thus, count five is dismissed with prejudice. (*In the Matter of Kroff, supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

**E. Count Six: Breach of Fiduciary Duty and the Common Law Duty of Loyalty (§ 6068, subd. (a))**

In count six, OCTC charged Vargas with committing several acts that amounted to a breach of his fiduciary duties to his former client Diggs, in violation of section 6068, subdivision (a), and that he also breached his common law duty of loyalty. In addition to incorporating allegations of harassment made earlier in the NDC, OCTC alleged the following actions under count six: repeatedly threatening to do nothing on her case while representing her; placing Diggs's digital signature on a fee agreement after Vargas was terminated as her attorney and without her consent or authorization; backdating Diggs's signature on the fee agreement to

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<sup>17</sup> As part of its allegations under count five, OCTC also alleged that Vargas claimed Diggs had filed an unmeritorious complaint against him and that Buteyn had also cleared him of her complaint. We see no proof of this in the record. Vargas emailed Diggs on February 22, 2019, which is almost a month before the March 18, 2019 State Bar letter that likely made Vargas aware of Diggs's complaint. Therefore, we conclude that his statement in the email could not refer to Diggs's complaint.

give the false impression it was signed months earlier; asserting an attorney's lien based on the phony fee agreement; improperly accessing her social media and other accounts and, in some cases, changing information in the accounts; using Diggs's personal information, including her social security number, to run an Experian search; and threatening to report Diggs and her family to the IRS. While the hearing judge found Vargas culpable as charged under this count, the judge focused her findings on the harassment allegations. The judge concluded that Vargas engaged in a campaign of harassment against Diggs after she ended their romantic relationship, which included insults, threatening messages, sexually explicit photographs, unfounded accusations, and the small claims action he filed against her.

Section 6068, subdivision (a), provides that an attorney has a duty to support the constitutions and laws of the United States and California. Additionally, where a fiduciary relationship exists, one must act with the utmost good faith for the benefit of the other party. (See *Worth v. State Bar* (1976) 17 Cal.3d 337, 341 [attorney who accepts fiduciary responsibility held to high standards of legal profession whether or not acting in capacity of attorney]; see also *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, 809-810 [once attorney assumes fiduciary duty to someone, attorney required to fully protect that person's interests].)

The record as discussed previously reveals numerous instances during the course of the attorney-client relationship where Vargas's conduct fell far short of his duties to Diggs, and his actions ultimately became retaliatory and vengeful. Vargas clearly breached his statutory duty to Diggs, along with his common law duty to her, on multiple occasions by threatening to withdraw and not work on her case as he became upset over the course of their volatile romantic relationship. He continued to breach his duties to Diggs by engaging in a campaign of harassment against her after their romantic relationship ended that involved insults and crude



messages, threats, sexually explicit photographs, unfounded accusations, and the small claims action, all of which are appalling and disturbing. For these actions, we assign culpability under this count.

Aside from that misconduct, we find the remaining allegations under this count allege the same misconduct as set forth in counts one, three, and four. As the evidence, discussed *ante*, established a culpability finding for moral turpitude based on dishonesty and misrepresentations in count one and threatening charges to gain an advantage in a civil suit in count four, this same evidence also supports culpability findings for count six. (See *In the Matter of Jimenez* (Review Dept. 2022) 5 Cal. State Bar Ct. Rptr. 965, 978 [lack of trustworthiness and fidelity to fiduciary duties evidences moral turpitude]; *Metro-Goldwin-Mayer, Inc. v. Tracinda Corp.* (1995) 36 Cal.App.4th 1832, 1839 [attorney's duty includes common law duty of loyalty].) Therefore, we assess no additional weight in discipline under count six where culpability was based on the same facts as counts one and four. (*In the Matter of Moriarty* (Review Dept. 2017) 5 Cal. State Bar Ct. Rptr. 511, 520 [no dismissal of duplicative charge but no weight assigned to charge to determine discipline].) Although we did not find culpability for moral turpitude under count three, we find Vargas abused his position of trust when he knowingly and without permission used Diggs's personal information against her interests after the personal relationship ended to access her social media accounts. (See *In the Matter of Dale, supra*, 4 Cal. State Bar Ct. Rptr. at p. 810 [attorney's violation of duty arising from confidential or fiduciary relationship warrants discipline even in the absence of an attorney-client relationship].) Thus, we also assign culpability for these acts as pleaded under this count.

**F. Count Seven: Moral Turpitude—Breach of Fiduciary Duty, Threatening Client, and Overreaching (§ 6106)**

In count seven, OCTC charged Vargas with committing acts of moral turpitude in violation of section 6106 based on the same acts alleged in count six. The hearing judge found him culpable as charged but assigned no additional disciplinary weight because the same facts were used to establish culpability under count six. Based upon our analysis of culpability in count six as discussed *ante*, we find that clear and convincing evidence establishes culpability under count seven, but no additional weight in discipline will be assigned because culpability for both counts is based on the same facts. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127 [no additional weight in discipline when culpability is based on same facts underlying culpability for misconduct in related counts].)

**V. AGGRAVATION AND MITIGATION**

OCTC must establish aggravating circumstances by clear and convincing evidence under standard 1.5. Vargas has the same burden to prove mitigation under standard 1.6.

**A. Aggravation**

**1. Multiple Acts of Misconduct (Std. 1.5(b))**

The hearing judge found that Vargas engaged in multiple acts of misconduct by committing several counts of moral turpitude, threatening to gain an advantage in a civil suit, and breaching his fiduciary duties. The judge assigned substantial weight in aggravation to this circumstance. We agree. On review, we found fewer acts of misconduct based on our dismissal of counts three and five, but Vargas is culpable of the remaining counts as found by the hearing judge. Within those counts, Vargas's misconduct consisted of multiple acts of moral turpitude based on his dishonesty, misrepresentations, concealments, breach of fiduciary duties, and threats, which spanned for over six months and included many disturbing acts such as his

sending of pornographic photos and demeaning and threatening texts. Accordingly, we affirm the judge's finding of substantial weight in aggravation under this circumstance. (See *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594 [multiple acts in aggravation for one count of moral turpitude where attorney made 11 misrepresentations over 18-month period].)

## **2. Significant Client Harm (Std. 1.5(j))**

Standard 1.5(j) provides for aggravation when an attorney's misconduct causes significant harm to a client, the public, or the administration of justice. The hearing judge correctly found that Vargas's misconduct significantly harmed Diggs. Vargas's behavior while he was her attorney caused Diggs much stress. Even after Diggs ended their professional and romantic relationship, Vargas's relentless behavior inflicted even more emotional stress upon her and caused her to change her phone numbers and residence. She filed a police report and even attempted to get a restraining order against Vargas. Diggs testified that she lives in fear as a result of Vargas's actions and is attempting to change her social security number. We affirm the hearing judge's finding of substantial weight in aggravation. (See *In the Matter of Casey* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 117, 126 [significant harm where client hired new attorney, incurred fees, and suffered for three years due to attorney's misconduct].)

## **3. Indifference (Std. 1.5(k))**

Indifference toward rectification or atonement for the consequences of misconduct is an aggravating circumstance. An attorney who fails to accept responsibility for his actions and instead seeks to shift responsibility to others demonstrates indifference and lack of remorse. (*In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 14.) The hearing judge assigned substantial weight in aggravation for Vargas's lack of insight and failure to accept responsibility for his wrongdoing. While the law does not require false penitence, it does require

that an attorney accept responsibility for his acts and “come to grips with his culpability.” (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) We are mindful that Vargas has expressed some remorse during these proceedings. In his letter to OCTC, he apologized to the State Bar and stated that he should have conducted himself in a more professional manner. He also stated that he was extremely embarrassed by how he allowed his personal affairs to interfere with his professional career. During the disciplinary trial, Vargas reiterated his expression of remorse and shamefulness for his behavior towards Diggs, and he expressed similar statements during oral argument.

We see no reason to doubt Vargas’s expressions of remorse that he has made throughout the bar’s investigation and the judicial proceedings. Although Vargas has shown some understanding of his wrongdoing, the record reveals that he has not fully accepted his culpability, which is demonstrated by his blaming Diggs and Kellener as being the reason for these proceedings. In his brief on review, Vargas argues that OCTC caused significant harm to the administration of justice by “ignoring the attorney complaint form” he submitted against Kellener in favor of the complaints that were submitted against him. (See *In the Matter of Aguiluz* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 41, 50 [blaming others shows indifference and lack of insight].) Vargas also displayed a contemptuous attitude at times during the trial by raising meritless objections and challenges to the admissions of exhibits, which caused the trial to become exceedingly long by requiring Diggs to testify over multiple days to authenticate most of OCTC’s exhibits. (See *Weber v. State Bar* (1988) 47 Cal.3d 492, 507 [attitude toward disciplinary proceedings relevant to determination of appropriate sanction]; see also *In re Morse* (1995) 11 Cal.4th 184, 209 [unwillingness to consider appropriateness of legal challenge or acknowledge its lack of merit is aggravating factor].) Considering Vargas’s mental and emotional challenges, as discussed more fully *post*, which attributed to at least some of his

bad acts, our aggravation for indifference is tempered. Thus, on balance, we find Vargas's indifference warrants moderate weight in aggravation. (*In the Matter of Wolff, supra*, 5 Cal. State Bar Ct. Rptr. at p. 14 [aggravation appropriate where "respondent presented a tangled web of excuses" and tried to shift responsibility to others].)

## **B. Mitigation**

### **1. No Prior Record of Discipline (Std. 1.6(a))**

Mitigation is available where no prior record of discipline exists over many years of practice, coupled with present misconduct that is not likely to recur. Vargas has been practicing law since 2015 and this is his first disciplinary matter. However, the hearing judge afforded no mitigation credit under the standard because Vargas's misconduct began just three years after he became an attorney. We agree with the judge because three years of discipline-free practice does not represent "many years of practice." (See *In the Matter of Dale, supra*, 4 Cal. State Bar Ct. at p. 810 [five years of practice without record of discipline too short in time to constitute mitigation].) Also, given Vargas's indifference, and the fact that he contacted Diggs by email at the start of and during the disciplinary trial—expressing that he misses and longs for her—we cannot conclude that his misconduct is aberrational or unlikely to recur, which is another requirement of this standard. Therefore, we also assign no mitigation under standard 1.6(a).

### **2. Extreme Emotional Difficulties (Std. 1.6(d))**

Standard 1.6(d) provides that mitigation may be assigned for extreme emotional difficulties or physical or mental disabilities if (1) the attorney suffered from them at the time of the misconduct, (2) they are established by expert testimony as being directly responsible for the misconduct, and (3) they no longer pose a risk that the attorney will commit future misconduct. The hearing judge assigned substantial mitigating weight to Vargas's emotional difficulties, concluding that, during the period of misconduct, he was afflicted by symptoms related to

Borderline Personality Disorder (BPD) in addition to his Adult Attention Deficit Hyperactivity Disorder (ADHD) diagnosis. OCTC argues that Vargas's mitigating evidence fails to fully satisfy the standard because he did not prove it was directly responsible for his misconduct, and he has not established rehabilitation. OCTC argues he should only receive, at most, minimal mitigation.

Vargas asserts that his misconduct was attributed to his mental health challenges and personal issues. The evidence in the record supports that he has been treated for adult ADHD since 2010 and prescribed medication, and, at the time of the misconduct, he was not taking any medication. He also testified that, when the misconduct occurred, it was an "extremely emotional distressing time period" for him because he lost his job and his relationship with Diggs. (See e.g., *In the Matter of Mitchell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332, 338, 341 [mitigation afforded for personal problems based on lay testimony because "readily conceivable" problems clouded attorney's judgment]; *In the Matter of Ward* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 47, 60 [some mitigation assigned to personal stress factors established by lay testimony].)

Richard S. Sandor, M.D, a board-certified psychiatrist, performed an independent medical examination of Vargas on November 3, 2022. Dr. Sandor provided a seven-page report on November 22 and a three-page supplemental report on January 9, 2023. His reports explained that Vargas does appear to have ADHD, especially as Vargas lost his train of thought several times during Dr. Sandor's examination of him, but that does not explain his behavior in relation to Diggs. He also stated that "as evidenced by the email and text exchanges" between Vargas and Diggs, "there is a suggestion of at least some aspects of . . . Borderline Personality Disorder." Dr. Sandor further opined that he does not believe Vargas meets all the criteria for making a BPD diagnosis, but his "frantic efforts to avoid real or imagined abandonment" and

“unstable and intense interpersonal relationships,” describes Vargas’s “interactions with [Diggs] quite well.”

Based on this record, including Dr. Sandor’s reports, the fact that Vargas was suffering from an ADHD diagnosis and some traits of BPD at the time of the misconduct is factually established. Likewise, Dr. Sandor’s report indicates that Vargas’s BPD behaviors explain his problematic interactions with Diggs, at least to some degree. Although Vargas’s mental and emotional difficulties may not fully explain the misconduct, we find enough evidence to establish a causal nexus. (See *In re Brown* (1995) 12 Cal.4th 205, 222 [some mitigation for illness even though no expert testimony establishing illness directly responsible for misconduct].)

However, as OCTC has argued, we conclude Vargas has failed to establish that his difficulties no longer pose a risk that he will commit future misconduct, as required under the standard. Although Dr. Sandor reported it is “highly unlikely that these problems will surface again,” and that he did “not believe [psychotherapy] is necessary in order for Mr. Vargas to safely continue his law practice,” he nonetheless opined that Vargas would “benefit from engaging in psychotherapy to work on some of his personality issues.” Because we find Vargas has yet to show full rehabilitation, we assign moderate weight in mitigation.

### **3. Extraordinary Good Character (Std. 1.6(f))**

Vargas may obtain mitigation for “extraordinary good character attested to by a wide range of references in the legal and general communities, who are aware of the full extent of the misconduct.” (Std. 1.6(f).) The hearing judge did not afford Vargas mitigation for good character, concluding that his witnesses did not represent a wide range of references in the legal and general communities.

Vargas presented character testimony from two witnesses during the disciplinary trial, Anna Trejo, a professional colleague, and Edward Schmidt, a former client. Both witnesses attested to Vargas's honesty and character. Trejo has known Vargas for seven years. She works as a claim adjuster for an insurance agency that handles workers' compensation claims and has a professional relationship with Vargas by virtue of their respective professions in the legal community. She was fully knowledgeable of the charges against Vargas, and it did not change her opinion of his integrity and good character. Although Trejo emphasized that she and Vargas are adversaries in a professional context, she described him as knowledgeable, courteous, well-respected, and reliable. Schmidt was aware of Vargas's misconduct but not all the details, testified that Vargas has been a commendable and honest attorney who represents him regarding a workers' compensation claim and has worked on the case for several years. While Vargas's two witnesses do not qualify for full mitigation because he only presented two witnesses, and only one had full knowledge of the alleged misconduct, we assign some mitigating weight because of the quality of Trejo's testimony as someone who has dealt with Vargas in his legal work and Mr. Schmidt's basic understanding of Vargas's misconduct. (*In re Aquino* (1989) 49 Cal.3d 1122, 1130-1131 [testimony of witnesses unfamiliar with details of misconduct not significant in determining mitigation]; *In the Matter of Kittrell* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 615, 624 [assigning little weight in mitigation for character evidence from two witnesses].)

#### **4. No Additional Mitigation**

Vargas seeks additional mitigation for his remorse and recognition of wrongdoing (std. 1.6(g)), remoteness in time of the misconduct (std. 1.6(h)), lack of harm (std. 1.6(c)), excessive delay in prosecution (std. 1.6(i)), and for Diggs being a difficult client. We do not find clear and convincing evidence to prove any additional mitigation. Vargas does not meet the



requirements in standard 1.6(g) as he did not take any objective steps to demonstrate spontaneous remorse or make any acts of atonement to Diggs; however, we recognize his remorse, as expressed through the investigation and disciplinary process, which tempers our indifference finding. Although Vargas asserts he was prejudiced due to OCTC's delay in prosecution and the unfortunate passing of his attorney before the disciplinary trial, he has not shown how the delay impacted the preparation or presentation of an effective defense, as the standard requires. (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 361.) Vargas's misconduct caused significant harm to Diggs and, on this record, Vargas has not established circumstances to prove mitigation for a difficult client. (See *Chefsky v. State Bar*, *supra*, 36 Cal.3d at p. 132.)

## VI. DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to preserve public confidence in the profession; and to maintain high professional standards for attorneys. (Std. 1.1.) Our disciplinary analysis begins with the standards. While they are guidelines for discipline and are not mandatory, we give them great weight to promote consistency. (*In re Silvertown* (2005) 36 Cal.4th 81, 91-92.) The Supreme Court has instructed us to follow the standards "whenever possible." (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) After establishing the applicable standards, we look to comparable case law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

We first determine which standard specifies the most severe sanction for the at-issue misconduct. (Std. 1.7(a) [most severe sanction must be imposed where multiple sanctions

apply].) Standard 2.11 is most apt as it addresses Vargas's acts of moral turpitude.<sup>18</sup> It provides that, "Disbarment or actual suspension is the presumed sanction for an act of moral turpitude, dishonesty, fraud, corruption, intentional or grossly negligent misrepresentation, or concealment of a material fact. The degree of sanction depends on the magnitude of the misconduct; the extent to which the misconduct harmed or misled the victim, which may include the adjudicator; the impact on the administration of justice, if any; and the extent to which the misconduct related to the practice of law."

Upon applying standard 2.11, the hearing judge also found guidance from two cases in determining the appropriate level of discipline for Vargas's misconduct. (See *Rodgers v. State Bar* (1989) 48 Cal.3d 300 [two-year actual suspension where attorney entered into business transaction with uninformed client, obtained interest adverse to client, commingled client funds, and dishonestly concealed wrongful conduct, including from probate court] & *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456 [two-year actual suspension where attorney deceived opposing counsel, courts, and State Bar investigator after improperly disbursing \$15,000 in entrusted funds, including \$5,000 to himself as fees].) Comparing the instant case to *Rodgers* and *Hertz*, the judge found that in all three cases the attorneys engaged in misconduct for the purpose of collecting payments they claimed were owed to them, thus committing moral turpitude for self-gain in addition to other ethical violations. Based on the similar nature of the cases and serious misconduct involved, she ultimately determined an 18-month actual suspension was appropriate for Vargas.

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<sup>18</sup> Standard 2.12 provides for disbarment or actual suspension for Vargas's breach of his fiduciary duties. Standard 2.19 provides for a suspension not to exceed three years or reproof for violations of the Rules of Professional Conduct not specified in the standards, which applies to Vargas threatening to gain an advantage in a civil lawsuit.

We have also consulted case law and find that our opinion in *In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138 is particularly helpful to guide our disciplinary analysis in addressing Vargas's acts of harassment and offensive behavior towards Diggs, which continued over a period of several months and resurfaced once again when he contacted her during his disciplinary trial. OCTC asserts *Torres* is applicable because of Vargas's harmful behavior towards Diggs as well as his aggravation for indifference and significant client harm, and that the hearing judge's 18-month discipline recommendation is "on par" considering the facts in the *Torres* case. Vargas, not relying on any legal authority, argues that no discipline should be imposed and requests that the case be remanded back to the Hearing Department.

In *Torres*, the attorney engaged in multiple acts involving moral turpitude in violation of section 6106 by harassing and intentionally inflicting emotional distress on his client, whom he had represented in a medical malpractice lawsuit that he eventually lost. (*In the Matter of Torres, supra*, 4 Cal. State Bar Ct. Rptr. at pp. 143, 146-147.) While Torres represented his client, he made over 100 late-night calls over a nine-month period, which were either "hang-up" calls or where he would leave an anonymous message. (*Id.* at p. 144.) The client ultimately sued Torres for legal malpractice and harassment, and, during the litigation, Torres falsely suggested he and his client had a sexual relationship and had engaged in promiscuous sexual conduct. (*Id.* at p. 148.) Torres's harassing phone calls during the nine-month period also caused his client to lose her job because she became unstable due to thoughts of terror and fear. (*Id.* at pp. 153.) Torres received a three-year actual suspension including conditions to prove his present fitness to practice law and a requirement for mental health treatment. (*Id.* at pp. 153-155.) In aggravation, Torres was found to have deliberately presented false testimony during his disciplinary trial, caused significant client harm, and exhibited a moderate level of indifference. His only

mitigation was substantial mitigation for pro bono work. (*Id.* at pp. 150-151.) In comparing *Torres* to the case at bar, we deem Vargas's misconduct less serious because, unlike *Torres*, Vargas did not provide deliberately false and evasive testimony during the disciplinary trial, and the harm to Diggs, while considerable, was not as severe as the harm *Torres's* client suffered.

Nonetheless, both *Torres* and the case at bar present similar factual patterns concerning very offensive and harassing behavior over several months. Here, Vargas repeatedly threatened to stop working on his client's case, falsified an attorney-client fee agreement, breached his fiduciary duties, improperly accessed his client's social media accounts and social security number, threatened to report Kellener to the State Bar and Diggs and her father to the IRS (and unjustifiably did report them), and engaged in multiple acts of moral turpitude through misrepresentations and dishonesty. This constitutes serious misconduct. His acts are also combined with substantial aggravation that greatly outweighs his mitigation. We are mindful that Vargas's misconduct is mitigated by the emotional difficulties he suffers given his mental health challenges, but he has not overcome them. Finally, his contacting Diggs during the disciplinary trial is of great concern.

We also find that an 18-month actual suspension is the appropriate recommendation to make, even though the culpability we find is less than the culpability the hearing judge found. This recommendation is in line with the similar cases of *Rodgers* and *Hertz*, and less than *Torres*, which had greater misconduct. We also determine it is necessary to recommend as probation conditions that, inter alia, Vargas establish rehabilitation to return to the practice of law and obtain mental health treatment in order to protect the public, the courts, and the profession. (See *In the Matter of Luis* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 737, 742-743 [standard 1.2(c)(1) hearing offers public protection through formal proceeding designed to ensure moral fitness and legal learning before attorney permitted to return to practice of law]; see

also *In the Matter of Torres, supra*, 4 Cal. State Bar Ct. Rptr. at p. 154 [probation requirements can include mental health treatment where record establishes clear evidence that attorney suffers from mental problems].)

## VII. RECOMMENDATIONS

We recommend that Fernando Emmanuel Vargas, State Bar Number 302550, be suspended from the practice of law for three years, that execution of that suspension be stayed, and that he be placed on probation for three years with the following conditions:

- 1. Actual Suspension Continuing Until Rehabilitation.** Fernando Emmanuel Vargas must be suspended from the practice of law for a minimum of the first 18 months of his probation, continuing until Vargas provides proof to the State Bar Court of his rehabilitation, fitness to practice, and present learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)
- 2. Comply with State Bar Act, Rules of Professional Conduct, and Probation Conditions.** Vargas must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of probation.
- 3. Review Rules of Professional Conduct.** Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Vargas must (1) read the California Rules of Professional Conduct (Rules of Professional Conduct) and Business and Professions Code sections 6067, 6068, and 6103 through 6126, and (2) provide a declaration, under penalty of perjury, attesting to his compliance with this requirement, to the State Bar's Office of Probation in Los Angeles (Office of Probation) with Vargas's first quarterly report.
- 4. Complete E-Learning Course Reviewing Rules and Statutes on Professional Conduct.** Within 90 days after the effective date of the Supreme Court order imposing discipline in this matter, Vargas must complete the e-learning course entitled "California Rules of Professional Conduct and State Bar Act Overview." Vargas must provide a declaration, under penalty of perjury, attesting to Vargas's compliance with this requirement, to the Office of Probation no later than the deadline for Vargas's next quarterly report due immediately after course completion.
- 5. Maintain Valid Official State Bar Record Address and Other Required Contact Information.** Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Vargas must make certain that the State Bar Attorney Regulation and Consumer Resources Office (ARCR) has his current office address, email address, and telephone number. If he does not maintain an office, he must provide the mailing address, email address, and telephone number to be used for State Bar purposes. Vargas must report, in writing, any change in the above information to ARCR, within 10 days after such change, in the manner required by that office.

- 6. Meet and Cooperate with Office of Probation.** Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Vargas must schedule a meeting with his assigned Probation Case Coordinator to discuss the terms and conditions of his discipline and, within 30 days after the effective date of the court's order, must participate in such meeting. Unless otherwise instructed by the Office of Probation, Vargas may meet with the Probation Case Coordinator in person or by telephone. During the probation period, Vargas must promptly meet with representatives of the Office of Probation as requested by it and, subject to the assertion of applicable privileges, must fully, promptly, and truthfully answer any inquiries by it and provide to it any other information requested by it.
- 7. State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court.** During Vargas's probation period, the State Bar Court retains jurisdiction over him to address issues concerning compliance with probation conditions. During this period, Vargas must appear before the State Bar Court as required by the court or by the Office of Probation after written notice mailed to his official State Bar record address, as provided above. Subject to the assertion of applicable privileges, Vargas must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.
- 8. Quarterly and Final Reports.**

  - a. Deadlines for Reports.** Vargas must submit written quarterly reports to the Office of Probation no later than each January 10 (covering October 1 through December 31 of the prior year), April 10 (covering January 1 through March 31), July 10 (covering April 1 through June 30), and October 10 (covering July 1 through September 30) within the period of probation. If the first report would cover less than 30 days, that report must be submitted on the next quarter date and cover the extended deadline. In addition to all quarterly reports, Vargas must submit a final report no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.
  - b. Contents of Reports.** Vargas must answer, under penalty of perjury, all inquiries contained in the quarterly report form provided by the Office of Probation, including stating whether he has complied with the State Bar Act and the Rules of Professional Conduct during the applicable quarter or period. All reports must be: (1) submitted on the form provided by the Office of Probation; (2) signed and dated after the completion of the period for which the report is being submitted (except for the final report); (3) filled out completely and signed under penalty of perjury; and (4) submitted to the Office of Probation on or before each report's due date.
  - c. Submission of Reports.** All reports must be submitted by: (1) fax or email to the Office of Probation; (2) personal delivery to the Office of Probation; (3) certified mail, return receipt requested, to the Office of Probation (postmarked on or before the due date); or (4) other tracked-service provider, such as Federal Express or United Parcel Service, etc. (physically delivered to such provider on or before the due date).
  - d. Proof of Compliance.** Vargas is directed to maintain proof of compliance with the above requirements for each such report for a minimum of one year after either the period of probation or the period of actual suspension has ended, whichever is longer. Vargas is

required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

- 9. State Bar Ethics School.** Within one year after the effective date of the Supreme Court order imposing discipline in this matter, Vargas must submit to the Office of Probation satisfactory evidence of completion of the State Bar Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he will not receive MCLE credit for attending this session. If he provides satisfactory evidence of completion of the Ethics School after the date of this Opinion but before the effective date of the Supreme Court's order in this matter, Vargas will nonetheless receive credit for such evidence toward his duty to comply with this condition.
- 10. Commencement of Probation/Compliance with Probation Conditions.** The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the probation period, if Vargas has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.
- 11. Proof of Compliance with Rule 9.20 Obligation.** Vargas is directed to maintain, for a minimum of one year after commencement of probation, proof of compliance with the Supreme Court's order that he comply with the requirements of California Rules of Court, rule 9.20 (a) and (c), as recommended below. Such proof must include: the names and addresses of all individuals and entities to whom Vargas sent notification pursuant to rule 9.20; a copy of each notification letter sent to each recipient; the original receipt or postal authority tracking document for each notification sent; the originals of all returned receipts and notifications of non-delivery; and a copy of the completed compliance affidavit filed by him with the State Bar Court. He is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.
- 12. Mental Health Condition.** Vargas must obtain psychiatric or psychological counseling or treatment to address his Attention-Deficit Hyperactivity Disorder (ADHD) and Borderline Personality Disorder (BPD) related issues, at his own expense, from a duly licensed psychiatrist, psychologist, clinical social worker, or mental health professional with at least 10 years of practice who specializes in ADHD and BPD and must provide such licensed individual with a copy of this opinion. He must also continue medical treatment and take medication as prescribed by his treating medical professional for his ADHD. However, if such mental health professional determines at any time that no additional counseling or treatment is necessary, Vargas may furnish a written statement from the mental health professional to that effect to the Office of Probation. He must commence counseling or treatment no later than 30 days after the effective date of the Supreme Court's order imposing discipline in this proceeding and must comply with any counseling or treatment plan developed by the mental health professional and continue treatment at least until his period of probation ends. Vargas must certify under penalty of perjury in each quarterly report and in the final report submitted to the Office of Probation that he has obtained and complied with such psychiatric or psychological counseling or treatment plan during the period covered by such report. Within 60 days of written notice from the Office of Probation, he must provide satisfactory evidence of such compliance to the Office of

Probation. The Office of Probation may require that such satisfactory evidence be a letter from the mental health professional on such individual's letterhead, or on a form approved by the Office of Probation, that Vargas has obtained such psychiatric or psychological counseling or treatment and that he has complied with a counseling or treatment plan during the period specified in the written notice.

### **VIII. MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION**

We further recommend that Vargas be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court order imposing discipline in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation within the same period. Failure to do so may result in suspension. (Cal. Rules of Court, rule 9.10(b).) If Vargas provides satisfactory evidence of the taking and passage of the above examination after the date of this opinion but before the effective date of the Supreme Court's order in this matter, he will nonetheless receive credit for such evidence toward his duty to comply with this requirement.

### **IX. CALIFORNIA RULES OF COURT, RULE 9.20**

We further recommend that Vargas be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the date the Supreme Court order imposing discipline in this matter is filed.<sup>19</sup> (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45 [the operative date for identification of clients being represented in pending matters and others to be notified is the filing date of the

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<sup>19</sup> Vargas is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or contempt, an attorney's failure to comply with rule 9.20 is, inter alia, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)



Supreme Court order imposing discipline].) Failure to do so may result in disbarment or suspension.

## **X. MONETARY SANCTIONS**

The hearing judge recommended that Vargas pay \$2,500 in monetary sanctions. OCTC asks that we affirm the judge's recommendation. On review, Vargas expressed financial difficulties and that he is suffering due to debt from the past due rent owed on the apartment he subleased with Diggs. He requests that any amount of monetary sanctions imposed be ordered in installments or that the time to pay be extended.

Rule 5.137(E)(1) of the Rules of Procedure of the State Bar provides, in part, that this Court shall make recommendations to the Supreme Court regarding monetary sanctions in any disciplinary proceeding resulting in an actual suspension. The guidelines recommend a sanction of up to \$2,500 for discipline including an actual suspension, depending upon the facts and circumstances of the particular case. (Rules Proc. of State Bar, rule 5.137(E)(2).) Vargas has committed serious misconduct, which involved multiple acts of dishonesty and breaches of his fiduciary duties, and he engaged in harassing his former client during and after their failed romantic relationship. His culpability, in addition to his indifference and the significant harm he caused Diggs, is very concerning. We take into consideration that Vargas has proffered some evidence to suggest financial hardship or difficulties paying the monetary sanctions in full. (Rules Proc. of State Bar, rule 5.137(E)(3).)

Accordingly, we recommend that Vargas be ordered to pay monetary sanctions to the State Bar of California Client Security Fund in the amount of \$2,000 in accordance with Business and Professions Code section 6086.13 and rule 5.137 of the Rules of Procedure of the State Bar. Monetary sanctions must be paid in installments of one-fourth per year, with Vargas's annual fees for each of the years 2025, 2026, 2027, and 2028. If Vargas fails to pay any

installment as described above, or as may be modified in writing by the State Bar or the State Bar Court, the remaining balance is due and payable immediately. Monetary sanctions are enforceable as a money judgment and may be collected by the State Bar through any means permitted by law. Monetary sanctions must be paid in full as a condition of reinstatement or return to active status, unless time for payment is extended pursuant to rule 5.137 of the Rules of Procedure of the State Bar.

## **XI. COSTS**

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment, and may be collected by the State Bar through any means permitted by law. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against an attorney who is actually suspended or disbarred must be paid as a condition of applying for reinstatement or return to active status.

McGILL, J.

WE CONCUR:

HONN, P. J.

RIBAS, J.