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STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JULIE L. WOLFF

A Member of the State Bar

No. 00–O–13294

Filed December 21, 2006

SUMMARY

Respondent was a member of the Indigent Defense Program of Sacramento County and had more than 300 cases in which she represented indigent clients in dependency proceedings. Without advising any clients, respondent filed a motion resigning as counsel in these cases. Despite the superior court's rejection of respondent's resignation, respondent failed to appear at 39 scheduled hearings in these matters and the superior court sanctioned respondent $1500. The hearing judge found respondent culpable of failing to obey a court order and improper withdrawal and recommended public reproval. The hearing judge also found respondent culpable of failing to communicate and failing to perform competently but determined these violations were duplicative of the conduct establishing respondent's improper withdrawal. The hearing judge declined to find respondent culpable of failing to report judicial sanctions. (Hon. Joann M. Remke, Hearing Judge.)

The review department adopted the hearing judge's culpability findings but concluded that only the charge of failing to competently perform was duplicative. The review department also modified the findings of the hearing judge with respect to mitigation and aggravation and recommended that respondent be suspended for three years, stayed, that she be placed on probation for three years on the condition that she be actually suspended for eighteen months and until she complies with standard 1.4(c)(ii).

COUNSEL FOR PARTIES

For State Bar: Allen Blumenthal

For Respondent: Julie L. Wolff

HEADNOTES

[1] **135.20 Procedure– Commencement/ Venue/ Filing/ Service/ Time (rules 50-64)**
Rule 51(a) imposes a five–year limitation on the commencement of disciplinary proceedings only in those instances where the proceedings are initiated as the result of a third–party complainant. Where the present matter was not initiated as the result of a third–party complainant, but by the State

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Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

Bar after the Sacramento Superior Court entered a sanctions order, the case was not barred by a limitations period as a matter of law.

[2] **191 Proceedings–Effect of/Relationship to Other Proceedings**
Civil findings made under a preponderance of the evidence standard are entitled to a strong presumption of validity if supported by substantial evidence.

[3] **151 Evidentiary Effect of Stipulations**
191 Proceedings–Effect of/Relationship to Other Proceedings
Because a stipulation remains binding on a party in a subsequent proceeding unless the court relieves the party from the stipulation, respondent's stipulation with Sacramento county counsel as part of a settlement of a civil contempt proceeding which stipulated to the findings in a sanctions order constituted stipulated findings, which, standing alone, were sufficient to meet the clear and convincing standard.

[4 a, b] **106.30 Issues re Pleadings–Duplicative charges**
214.30 State Bar Act –Section 6068(m)
277.20 Rule 3-700(A)(2) (former 2-111(A)(2))
It is not necessarily duplicative to find culpability for failure to communicate with clients and culpability for improperly withdrawing from employment when respondent's failure to communicate arose from her failure to inform clients of crucial information regarding representation and respondent's improper withdrawal was based on her failure to take reasonable steps to protect her clients' interests.

[5 a, b] **106.30 Issues re Pleadings–Duplicative charges**
270.30 Rule 3-110(A) (former 6-101(A)(2)/(B))
277.20 Rule 3-700(A)(2) (former 2-111(A)(2))
Where respondent's conduct of intentionally making no further appearances on behalf of her indigent clients established culpability for failing to perform competently and where such conduct was duplicative of the conduct surrounding respondent's improper withdrawal, no additional weight was assigned to the recommended discipline.

[6] **221.00 State Bar Act Violations–Section 6106**
Where respondent had actual knowledge that the court required her to continue to appear on behalf of her indigent clients at their upcoming hearings and where respondent expressly declined to proceed as ordered, respondent's disobedience was willful and constituted a violation of section 6103.

[7 a, b] **277.10 Rule 3-700(A)(1) (former 2-111(A)(1))**
Where respondent was appointed as counsel of record in cases involving indigent clients, where those clients disclosed confidential information to respondent, and where respondent provided legal advice to those clients, respondent's contention that such individuals were not her clients was disingenuous and respondent's failure to obtain approval of the court to withdraw from her cases violated rule 3–700(A)(1).

[8 a, b] **277.20 Rule 3-700(A)(2) (former 2-111(A)(2))**
The duty to take reasonable steps to avoid foreseeable prejudice to the rights of a client when a member withdraws from employment continues until a court grants leave to withdraw and applies whether or not prejudice actually occurs.

[9] **214.55 State Bar Act Violations–Section 6068(o) (comply with reporting requirements)–Not Found**
Where respondent testified that she timely informed the State Bar of the imposition of sanctions, and where the State Bar presented no evidence to contradict respondent's testimony nor any other independent evidence, the State Bar failed to satisfy the clear and convincing standard of proof for a violation of section 6068(o)(3).

[10] **755.10 Mitigation–Prejudicial delay in proceeding (1.2(e)(ix))–Found**
Despite absence of prejudice that would warrant dismissal of charges, State Bar's nearly five–year delay in filing disciplinary charges was accorded considerable mitigative weight.

[11] **535.90 Aggravation–Pattern of misconduct (1.2(b)(ii))–Declined to find–Other reason**
Because respondent's misconduct affected over 300 clients, substantial weight was accorded to the fact that respondent's misconduct involved multiple acts of wrongdoing, but since respondent's misconduct was confined to one month, respondent's misconduct did not constitute a habitual pattern.

[12] **586.10 Aggravation–Harm (1.2(b)(iv))–To administration of justice–Found**
Where respondent's absence from court hearings resulted in substantial disruption of juvenile court proceedings and where respondent's actions impacted the underpinnings of the indigent dependency hearings, respondent's harm to the administration of justice was assigned significant weight in aggravation.

[13] **591 Aggravation–Indifference to rectification/atonement (1.2(b)(v))–Found**
Despite executing a stipulation establishing her misconduct as charged, respondent continued to deny any culpability and sought to shift responsibility for the procedural gridlock occasioned by her actions. An attorney's failure to accept responsibility for her actions when it is not based on an honest belief of innocence may be considered an aggravating factor.

[14] **1015.07 Discipline Imposed –Actual Suspension–18 months**
Where respondent failed to obey a court order, failed to communicate with and failed to properly withdraw from employment in more than 300 client matters, where there was mitigation for 10 years of practice without prior discipline and delay in initiating the disciplinary proceeding, and where there was aggravation due to multiple acts of wrongdoing, significant harm to the administration of justice, and an absence of remorse, the appropriate disciplinary recommendation was a three–year stayed suspension, three years of probation on conditions which included eighteen months actual suspension and until respondent complies with standard 1.4(c)(ii).

ADDITIONAL ANALYSIS

Aggravation

Found

521 Multiple acts of misconduct (1.2(b)(ii))

Declined to Find

545 Bad faith, dishonesty, concealment (1.2(b)(iii))
555 Overreaching (1.2(b)(iii))
615 Lack of candor/cooperation with Bar (1.2(b)(vi))

Mitigation

Found

710.10 Long practice with no prior discipline record (1.2(e)(i))

Declined to Find

740.53 Good character references (1.2(e)(vi))–Inadequate showing generally

765.51 Substantial pro bono work–Insufficient evidence

OPINION

EPSTEIN, J.

This case presents an instance where, during a one–month period, an attorney lost her ethical footing. Respondent, Julie L. Wolff, abandoned over 300 indigent dependency clients and failed to appear in 39 matters as a result of her misguided belief that the orders and rules of the juvenile court of the Sacramento Superior Court could be ignored. Although confined to a relatively brief period of time, respondent's misconduct caused numerous clients to be unrepresented at their hearings and resulted in other detrimental effects on the fair and efficient administration of justice.

Both respondent and the State Bar are appealing the decision of the hearing judge imposing a public reproval based on her findings that respondent is culpable of the following misconduct: 1) failing to obey a court order (Bus. & Prof. Code, § 6103);[1] 2) withdrawing from employment without court permission (Rules Prof. Conduct, rule 3–700(A)(1));[2] and 3) withdrawing from employment without taking reasonable steps to protect the interests of her clients (rule 3–700(A)(2)). Respondent asks this court to reject the hearing judge's culpability findings, asserting that the expiration of the relevant statute of limitations precludes imposition of discipline and that, in any event, she maintains the State Bar did not meet its burden of proving misconduct by clear and convincing evidence.[3]

The State Bar appeals on the grounds that the hearing judge's discipline recommendation is not sufficient in view of the seriousness of the misconduct. Instead, it seeks imposition of two years' actual suspension. The State Bar also asks us to find as additional aggravation that respondent has shown lack of remorse, bad faith and lack of candor.

Upon our de novo review (*In re Morse* (1995) 11 Cal.4th 184, 207), we adopt the hearing judge's findings of culpability, but we find additional culpability for charged misconduct arising from respondent's failure to inform clients of significant developments in violation of section 6068, subdivision (m). We agree with the hearing judge that the charged misconduct under rule 3–110(A) arising from respondent's failure to competently perform legal services is duplicative of the misconduct charged for her improper withdrawal and should be given no additional weight. We also agree with the hearing judge that there is insufficient evidence to support a culpability determination that respondent failed to report judicial sanctions as required by section 6068, subdivision (o)(3).

For the reasons discussed herein, we modify the hearing judge's culpability, mitigation, and aggravation determinations, and recommend that respondent be suspended from the practice of law for three years, that the execution of the three–year suspension be stayed, and that respondent be placed on probation for three years on the condition that respondent be placed on actual suspension for 18 months and until she complies with standard 1.4(c)(ii) of the Standards of Attorney Sanctions for Professional Misconduct.[4]

I. FACTUAL AND PROCEDURAL BACKGROUND

The essential facts that are material to our culpability and disciplinary determinations are the subject of a stipulation, entered into on February 18, 2000, by respondent, her counsel and Sacramento county counsel (Stipulation) as part of the settlement of a civil contempt proceeding entitled *In re: The Matter of The Contempt of Julie Lynn Wolff, Contemner*.[5] In addition to the facts stated in the Stipulation, our findings are based on our de novo review of the evidence adduced in the hearing below.

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1. Unless otherwise noted, all further references to the Business and Professions Code will be referred to as "section."

2. Unless otherwise noted, all further references to the Rules of Professional Conduct will be referred to as "rule."

3. On appeal, respondent has alleged several other errors of the court below. Those allegations not expressly addressed here have been considered and rejected as without merit and/or irrelevant.

4. Unless otherwise noted, all further references to "Standard" are to this source.

5. We address respondent's evidentiary challenges to the Stipulation *post*.

Respondent has practiced law in California since her admission to the State Bar on December 11, 1989. She has no prior record of discipline. Respondent's primary experience is as a juvenile dependency attorney in Sacramento County.

Beginning in or around 1991 through 1999, respondent was a member of the Indigent Defense Program of Sacramento County (IDP). The IDP selected qualified attorneys from a panel to represent parents, and on occasion children, in dependency matters filed with the juvenile court. The court would ask the IDP to assign an attorney from the panel as counsel of record for an indigent individual in the dependency proceedings.[6]

On January 1, 1998, the Honorable Kenneth G. Peterson became the presiding judge for the juvenile court in the Sacramento County Superior Court. In late 1998, Judge Peterson became concerned about the effectiveness of the IDP program. Lawyers appointed from the IDP often represented many indigent clients simultaneously, and instances of conflicting court appearances were becoming more frequent. As a consequence, Judge Peterson decided to reorganize the method of appointment for indigent litigants.

Judge Peterson's solution was to contract with one law firm to represent all indigent clients instead of using the IDP for attorney referrals. A committee was formed to accept bids from various law firms and to select one law firm to provide the services. In April 1999, Judge Peterson held a public meeting during which he explained the reorganization and bidding process for the new contract. At that meeting, Judge Peterson conveyed that no attorney would be forced to resign from his or her current cases, but the winning bidder would be required to accept any cases from which the court relieved other counsel. Judge Peterson was both financially and administratively motivated to relieve counsel from their cases, if they were willing, because the new contract set a flat rate for up to 2,000 cases for the first year. The selected law firm would receive that amount whether one case was transferred to it or 2,000.[7] The new process also was intended to mitigate scheduling conflicts as all of the attorneys would be employed by the same law firm.

Respondent, who was present at the public meeting in April 1999, submitted a bid to the committee. In July 1999, respondent was informed that her bid was rejected. In November 1999, the committee awarded the contract to the Law Offices of Dale S. Wilson.

As of August 1999, respondent was the attorney of record for over 300 juvenile dependency cases before the Sacramento County Superior Court. In that same month, respondent submitted a document to the Sacramento County Superior Court entitled "In re: All My Cases."[8] Respondent testified that this document was intended to effectuate her resignation from her 319 IDP–appointed cases and was to be effective as of September 16, 1999. Prior to submitting this document, respondent did not notify her clients that she intended to withdraw and would not be appearing at their upcoming hearings.[9]

Judge Peterson refused to file respondent's document and instructed his clerk to return it to her and inform her that it was not a proper motion to withdraw from representation. The document did not request a hearing date nor did it indicate that any client or party had been served with the document. Moreover, the document did not identify respondent's

6. An administrator for the IDP, hired by Sacramento County, would select a lawyer who volunteered to be on the panel, and the appointed lawyer would be paid by the court.

7. Judge Peterson testified that on eight occasions, from 1998 to 2004, he relieved an attorney as counsel of record on IDP cases when a proper motion to withdraw was filed in the court.

8. Respondent testified that she gave Judge Peterson this document on August 24, 1999.

9. When asked by the State Bar if she had conveyed to her IDP clients that she had submitted a motion to the court to be relieved as their attorney, respondent answered that she had not. The State Bar then asked respondent: "[d]id you communicate [to] them, communicate with them in some other words to inform them that you were going to withdraw as their attorney?" Respondent answered: "[n]ot that I was withdrawing as their attorney."

cases by name or case number, and therefore the court could not ascertain those cases from which respondent intended to withdraw. Respondent never re–submitted a competent motion to withdraw and the court did not authorize her withdrawal.

Nevertheless, as of September 16, 1999, respondent stopped making appearances for all of the cases in which she was the attorney of record and returned her case files to the IDP administrator, John Soika. Respondent testified that it was her belief that the IDP would re–assign her cases to new attorneys, who would then make all future appearances, and that she had taken sufficient action to withdraw from her more than 300 cases.[10] Judge Peterson testified that the IDP had no authority to relieve an attorney of record, and that such authority rested entirely with the Sacramento Superior Court upon submission of a proper motion to withdraw.[11] Other than submitting the defective document entitled In re All My Cases, respondent took no affirmative action to ensure that she had been relieved as attorney of record for her IDP cases.[12]

Respondent's absence did not go unnoticed by the court, as her failure to make scheduled appearances disrupted court proceedings, caused continuances, and resulted in some indigents appearing in court unrepresented.

For example, on September 16, 1999, respondent had a matter scheduled for 9:00 a.m. in Department 93 of the Superior Court of Sacramento County. Respondent did not appear. Instead, at 9:00 a.m. the referee for that department, sitting as the juvenile court, received a written note from respondent, which stated that she would no longer be appearing on any matters to which she had been appointed by IDP. The referee instructed her administrative assistant to contact respondent's office, and inform her that she must appear for hearing by 10:15 a.m. Respondent failed to do so.

On September 17, 1999, respondent was scheduled to appear at 8:30 a.m. on a different matter in Department 97. Again, respondent was not present when the calender was called. The court clerk called respondent's office around 9:00 a.m. and was informed that respondent was in Modesto, and then was transferred to another person. The clerk informed that person that respondent was being ordered to appear in Department 97 at 1:30 that afternoon. Respondent did not appear.

Ultimately, respondent failed to appear in 39 proceedings between September 16, 1999 and October 13, 1999.

On September 20, 1999, Judge Peterson issued an order in *In re: The Matter of The Contempt of Julie Lynn Wolff, Contemner*, to show cause why respondent should not be adjudged guilty of contempt for her failure to appear at the hearings scheduled on September 16 and 17, 1999 (OSC). On September 29, 1999, in response to the OSC, respondent appeared before Judge Peterson, represented by counsel. The judge informed respondent that the court still considered her the attorney of record for her IDP–appointed cases and instructed respondent to attend her scheduled hearings. The court then inquired as to her intentions regarding her upcoming appearances in juvenile court. Through her counsel, respondent stated that she would not make any future appearances on behalf of her IDP cases because she no longer had the files, having delivered them to IDP. Notwithstanding her explanation, Judge Peterson did not relieve respondent of her duties as the attorney of record for any of her indigent clients.

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10. Respondent testified that three weeks prior to delivering the case files to John Soika, she called him for instructions. "I told him I was resigning IDP and whether I needed to bring him the files, what he wanted me to do. . . . [¶.] He said, prepare a list. Bring me your files. I will have them all reassigned."

11. When asked whether an attorney should rely on directions from Mr. Soika as to how to resign from IDP cases, Judge Petereson testified: "I'm the one that has to grant or deny the motion, and I'll decide every case on its individual basis, if I'm going to grant or deny it. If the merits are there, I'm going to grant it."

12. Respondent testified: "I was simply told that in Judge Peterson fashion, he had formally approved the withdrawal at some point." Respondent did not recall who told her that information, and simply "expected, in standard fashion, he would have granted it."

On October 21, 1999, the court issued an Amended Order to Show Cause In re: Contempt (Amended OSC) ordering respondent to show cause why she should not be adjudged guilty of contempt for her failure to appear at 39 scheduled matters between September 16 and October 13, 1999. Ultimately, on February 18, 2000, in settlement of the contempt proceedings, respondent stipulated to entry of an Order Imposing Sanctions in the amount of $1500 (Sanctions Order) and the court withdrew the Amended OSC. On the same date, the court filed a Notice of Entry of Order and Findings (Notice).[13] In the Sanctions Order, the Sacramento Superior Court found that respondent: "failed to appear on behalf of numerous clients and/or did not make reasonable effort to ensure alternate legal representation was provided at hearings during the period September through October, 1999 [as detailed in the incorporated] Statement of Facts In Re Contempt. Such willful disobedience of court orders was without good cause or reasonable justification. [¶.] [Respondent's] conduct caused substantial disruption of the orderly administration of the juvenile court, including the attendant expenditure of judicial resources and staff time required to continue numerous proceedings, and to inventory and reassign said cases." Included as part of the Sanctions Order was respondent's Stipulation as to the above findings of the court, which was signed by her and her attorney. The Sanctions Order and the factual and legal findings contained therein, which we discuss in detail below, provide clear and convincing evidence of the misconduct for which we find culpability.

The State Bar initiated these proceedings by filing a Notice of Disciplinary Charges (NDC) on October 14, 2004. The NDC contained six counts, charging respondent with failure to inform clients of significant developments in violation of section 6068, subdivision (m); intentional, reckless, and repeated failure to perform legal services with competence in violation of rule 3–110(A); failure to obey a court order in violation of section 6103; improper withdrawal from employment without court permission in violation of rule 3–700(A)(1); failure to provide due notice to a client upon withdrawal from employment in violation of rule 3–700(A)(2); and failure to report judicial sanctions of $1000 or more in violation of section 6068, subdivision (o)(3).

The hearing judge held a one–day trial at which Judge Peterson and respondent testified at length. There were no other witnesses. The records of *In re: The Matter of The Contempt of Julie Lynn Wolff, Contemner*, including the various orders and the Stipulation, were admitted into evidence. The hearing judge found respondent culpable of violations of section 6103, rule 3–700(A)(1), and rule 3–700(A)(2). The hearing judge also found respondent culpable of the charges of failure to communicate and failure to perform competently under section 6068, subdivision (m) and rule 3–110(A), respectively, but she further found these charges were duplicative of the conduct establishing respondent's culpability for improper withdrawal under rule 3–700(A)(2).

The hearing judge found respondent's 10 years of practice without discipline and the delay by the State Bar in filing the NDC to be mitigating circumstances. She accorded very little weight to respondent's pro bono and community service. In aggravation, the hearing judge found that respondent committed multiple acts of wrongdoing and that her conduct caused significant harm to her clients, the public, and the administration of justice. The hearing judge recommended public reproval, finding that respondent's course of conduct was "inexcusable" but nevertheless rejected the State Bar's recommendation of two years' actual suspension as "excessive and disproportionate to the gravity of respondent's misconduct."

II. DISCUSSION

A. Statute of Limitations Defense

Preliminarily, we address respondent's contention that her prosecution is barred by the limitations period specified in rule 51 of the Rules of Procedure

13. The Notice incorporated by reference the Sanctions Order, which in turn incorporated by reference Judge Peterson's September 20, 1999 OSC together with the supporting declarations of court personnel, and the October 21, 1999 Amended OSC, which incorporated a Statement of Facts In re Contempt. The Sanctions Order also incorporated by reference a detailed list outlining 39 specific instances when respondent failed to make an appearance.

of the State Bar of California (rule 51)[14] and that, accordingly, the hearing judge should have dismissed the disciplinary charges against her as a matter of law. The statute of limitations must be pled as an affirmative defense and respondent bears the burden of proving the facts to show a rule of limitations applies. (Evid. Code, § 500.) Respondent not only waited until the conclusion of the trial to assert her defense in her closing brief, but she put forth no evidence in support of the applicability of such a defense.

[1] More importantly, the five–year statute of limitations provided by rule 51(a) does not apply in this case. Rule 51(a) imposes a five–year limitation on the commencement of disciplinary proceedings only in those instances where the proceedings are initiated as the result of a third–party complainant. The present matter was not initiated as the result of a third–party complainant, but by the State Bar, after the Sacramento Superior Court entered its Sanctions Order.[15] We therefore conclude as a matter of law that this case is not barred by a limitations period.

Nonetheless, as discussed below, the hearing judge properly accorded mitigative weight because of the delay by the State Bar in filing the NDC until more than four and one–half years after the Sanctions Order was entered.

B. The Sanctions Order May Be Relied Upon as Evidence of Misconduct

Respondent also asserts that the Sanctions Order was erroneously relied upon by the hearing judge in making her findings of culpability. Respondent argues that the standard of proof in disciplinary proceedings is clear and convincing evidence, whereas the standard for a sanctions order issued by a civil court is preponderance of the evidence.

[2] Civil findings made under a preponderance of the evidence standard are entitled to a strong presumption of validity by this court if supported by substantial evidence. (*In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 117.) The record in this case amply supports the findings contained in the Sanctions Order and satisfies the State Bar's evidentiary burden. Substantial evidence may consist of the testimony of a single witness. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) The question of witness credibility in the instant case was resolved by the hearing judge in favor of Judge Peterson. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 143, fn.7 [the hearing judge is in the best position to determine witness credibility and great weight is given to her findings on this subject]; Rules Proc. of State Bar, rule 305(a).) Judge Peterson's testimony corroborated the factual and legal findings contained in the Sanctions Order.[16]

[3] Moreover, respondent and her attorney signed the Stipulation to the findings contained in the Sanctions Order in *In re: The Matter of The Contempt of Julie Lynn Wolff, Contemner*. These stipulated findings, standing alone, meet the clear and convincing standard. A stipulation may operate in the place of other direct evidence even if that evidence would otherwise be inadmissible.[17] (*County of Alameda v.*

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14. Rule 51, subsection (a) provides: "A disciplinary proceeding based solely on a complainant's allegation of a violation of the State Bar Act or Rules of Professional Conduct shall be initiated within five years from the date of the alleged violation." Parenthetically, subsection (c)(3) provides for a tolling of the five years during the time the alleged misconduct is the subject of criminal or civil proceedings. The civil contempt proceedings in the Sacramento Superior Court terminated upon entry of the Sanctions Order on February 18, 2000. The NDC was filed on October 14, 2004.

15. The State Bar is authorized to open an investigation against an attorney on its own without the need of a complainant. (Rules Proc. State Bar, rule 2402; *McGrath v. State Bar of California* (1943) 21 Cal.2d 737, 740.) Rule 51, subsection (e) exempts from the five–year limitations period a disciplinary proceeding initiated by the State Bar on the basis of information received from a source independent of a time–barred third–party complainant.

16. In addition to the court's express findings in the Sanctions Order stated above, the Statement of Facts in Re: Contempt, which is incorporated by reference into the Sanctions Order, clearly outlines the misconduct that resulted in the court imposing the sanctions.

17. Respondent's stipulated findings of fact and law in the Sanctions Order were properly admitted by the hearing judge

Risby (1994) 28 Cal.App.4th 1425, 1430.) Additionally, a stipulation in one proceeding may constitute an admission in subsequent proceedings. (*Nungaray v. Pleasant Val. Lima Bean Growers & Warehouse Ass'n* (1956) 142 Cal.App.2d 653, 667 [holding that a stipulation of facts containing an admission is admissible in a proceeding subsequent to the one in which the stipulation was made].) A stipulation remains binding on a party during a subsequent proceeding unless the court relieves the party from the stipulation. (*Gonzales v. Pacific Greyhound Lines* (1950) 34 Cal.2d 749, 755.)

Respondent contends that she was only stipulating to the imposition of sanctions and not to the findings of the court. We find this disingenuous. The language of the Sanctions Order clearly states that she was stipulating to the court's findings as well.[18] Furthermore, the Sanctions Order expressly states that the agreed–upon disposition of *In re: The Matter of The Contempt of Julie Lynn Wolff, Contemner* would not preclude a referral of the matter to the State Bar, so respondent was on notice in signing the Stipulation that her conduct might well be the subject of a disciplinary investigation.

C. Count One: Failure to Inform Clients of Significant Developments (§ 6068, subd. (m))

The State Bar disagrees with the hearing judge's dismissal of count one alleging a violation of section 6068, subdivision (m) (failure to communicate significant developments) as duplicative of the conduct found in count five under rule 3–700 (A)(2) (improper withdrawal).

[4a] We also disagree with the hearing judge on this point. It is not necessarily duplicative to find culpability for failure to communicate with clients under section 6068, subdivision (m), and culpability for a rule 3–700 (A)(2) violation for failure to withdraw properly from representation when, as in the instant case, the culpability findings are based on separate acts of misconduct. (*In the Matter of Nunez* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 196, 204–205.) Here, respondent failed to inform her clients that she intended to withdraw as counsel, that she no longer would appear on their behalf in upcoming proceedings, or that a new attorney would be handling their cases. Respondent testified that if she happened to see one of her clients, she informed him or her that "there would be a different attorney appearing at the next hearing." But she made no formal effort to contact her more than 300 clients to inform them she would not appear for them at their pending proceedings.

[4b] Respondent's culpability in count five for improper withdrawal is based on her failure to take reasonable steps to protect her clients' interests, whereas her culpability in count one under section 6068, subdivision (m), arises due to her failure to inform her clients of crucial information regarding her representation of them at upcoming hearings.

D. Count Two: Failure to Perform Competently (Rule 3–110(A))

[5a] Rule 3–110(A) provides: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." Even if an attorney does not intentionally or recklessly fail to competently perform legal services, the rule is violated if there is a repeated failure to perform. (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 539–540.) In *Valinoti*, we found culpability when an attorney's failure to appear at an immigration hearing was not an isolated incident, "but was one of many such failures." (Id. at p. 540.) In *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 115, we concluded that an attorney of record who intentionally absented himself from a client's deposition, despite knowing that the client would be unrepresented, failed to perform legal services competently.

[5b] Here, we find respondent's failure to perform was intentional in that Presiding Judge Peterson

as party admissions, which are an exception to the hearsay rule. (Evid. Code, § 1220; *Crawford v. Alioto* (1951) 105 Cal.App.2d 45, 50.).

18. In addition, in these disciplinary proceedings, respondent stipulated that she had in turn stipulated to the Sanctions Order.

specifically instructed her at the first OSC hearing that he still considered her to be attorney of record for all of her IDP cases and that he expected her to appear at all future proceedings. Nevertheless, she made no further appearances on behalf of her IDP clients. These facts clearly establish culpability under rule 3–110(A), but we agree with the hearing judge that this misconduct is duplicative of the conduct surrounding her improper withdrawal as alleged in count five, and therefore we assign no additional weight to our recommended discipline.

E. Count Three: Failure to Obey a Court Order (§ 6103)

Section 6103 provides, in relevant part, that "willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession . . . [constitutes cause] for disbarment or suspension." In order to establish a violation of an attorney's statutory duty to obey court orders, the State Bar must prove by clear and convincing evidence that 1) the attorney disobeyed a court order willfully; and 2) the court order required the attorney to do or forbear an act in connection with the attorney's practice of law that ought to have been done or not done in good faith. (*In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 603.) Respondent stipulated to the finding in the Sanctions Order that her disobedience of the court's order was "willful."

[6] This stipulated finding alone provides substantial evidence of respondent's violation of section 6103. However, the record in this matter provides additional support as well. As to the first prong of willful disobedience, respondent attempted to unilaterally resign from representation of her indigent clients in late August of 1999, when she tendered her document to the court entitled "In re: All My Cases." When the court refused to file her document, respondent should have known that she had not been authorized by the court to withdraw from her IDP cases. As of the OSC hearing on September 29, 1999, respondent had actual knowledge that the court required her to continue to appear on behalf of her indigent clients at their upcoming hearings. (*In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 403–404 [attorney was present when order was issued and could not claim lack of knowledge as a defense].) Although she expressly declined to proceed as ordered – and in fact failed to appear at any subsequent IDP proceedings – respondent had not been relieved as counsel of record by the court. We thus conclude respondent's disobedience was willful.

As to the second prong, we find that respondent's disobedience was not in good faith. Indeed, respondent stipulated to the finding in the Sanctions Order that her failure to follow the court's instructions "was without good cause or reasonable justification." We deem as bad faith respondent's arbitrary and unilateral decision to ignore the court's order and simply discard her 319 indigent clients without any reasonable assurance that their rights would be protected. We thus find clear and convincing evidence of respondent's culpability under section 6103.

F. Count Four: Withdrawal from Employment Without Court Permission (Rule 3–700(A)(1))

[7a] Rule 3–700(A)(1) provides: "If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission." Respondent contends that no violation of rule 3–700(A)(1) occurred because the indigents she represented were not her clients. We again find her contention to be disingenuous, since respondent testified at trial and admitted in her answer to the NDC that she had been appointed as counsel of record in 319 IDP cases. Moreover, the record confirms that respondent was appointed by the court pursuant to Welfare and Institutions Code section 317, subdivision (a). The version of Welfare and Institutions Code section 317, subdivision (a) in effect during the relevant time period provides: "When it appears to the court that a parent or guardian of the minor desires counsel but is presently financially unable to afford and cannot for that reason employ counsel, the court may appoint counsel as provided in this section." A court appointment is sufficient to establish an attorney-client relationship. (*Responsible Citizens v. Superior Court* (1993)16 Cal.App.4th 1717, 1732 [stating that a court appointment or an express agreement by a partnership

attorney to represent an individual partner established the attorney-client relationship].)[19]

[7b] Respondent also incorrectly argues that the juvenile court had no formal procedures for withdrawal as an indigent's attorney of record. Respondent testified that IDP only required an attorney to return case files and that Judge Peterson never indicated to her that a proper motion was necessary in order to withdraw from her cases. But she also stipulated to the finding in the Sanctions Order that once an attorney was selected to participate in the IDP program, "[i]n the event that it is necessary to consider relieving an attorney . . . only the court can make the determination whether the attorney should be relieved." In addition, the hearing judge found Judge Peterson's testimony to be credible regarding the requirement of a formal motion and approval of the court for an attorney seeking to withdraw from IDP cases. Finally, there is statutory authority requiring court approval for withdrawal by appointed counsel. (Welf. & Inst. Code, § 317, subdivision (d) [appointed counsel for a parent or minor can only be relieved by the court upon substitution of other counsel or for cause].)[20] We thus find clear and convincing evidence of respondent's culpability for withdrawing from employment in the dependency proceedings without the court's permission in violation of rule 3–700(A)(1).

G. Count Five: Withdrawing from Employment Without Protecting the Client's Interests (Rule 3–700(A)(2))

[8a] Rule 3–700(A)(2) provides that reasonable steps must be taken to avoid foreseeable prejudice to the rights of a client when a member withdraws from employment, including giving notice to the client and allowing for time for employment of other counsel. That duty continues until a court grants leave to withdraw. (*In the Matter of Riley, supra*, 3 Cal. State Bar Ct. Rptr. at p. 115.) Respondent stipulated in the Sanctions Order that she "did not make reasonable efforts to ensure alternate legal representation was provided at hearings during the period September through October, 1999." Clearly, she violated her duty under rule 3–700(A)(2) when she did nothing to avoid foreseeable prejudice to her clients after she no longer appeared on their behalf in the dependency proceedings.

[8b] Although rule 3–700(A)(2) applies whether or not prejudice actually occurs (*In the Matter of Riley, supra*, 3 Cal. State Bar Ct. Rptr. at p. 115), in the instant matter, numerous clients were prejudiced because their matters were continued or they had to appear without counsel.[21] Accordingly, we find clear and convincing evidence supporting the hearing judge's determination that respondent violated rule 3–700(A)(2).

H. Count Six: Failure to Report Judicial Sanctions (§ 6068, subd. (o)(3))

[9] Section 6068, subdivision (o)(3) requires an attorney to report judicial sanctions of $1000 or more to the State Bar within 30 days of the attorney's knowledge of such sanctions. The hearing judge found that the State Bar did not meet its burden of clear and convincing evidence to establish culpability under section 6068, subdivision (o)(3). We agree. Respondent testified that her attorney complied with section 6068, subdivision (o)(3) and timely informed the State Bar of the imposition of sanctions. The State Bar presented no evidence to contradict that testimony nor any other independent evidence to satisfy the clear and convincing standard of proof.

19. Additionally, respondent's own testimony was that the indigents disclosed confidential information to her; she had a duty of loyalty to keep that information confidential; she had the duty of zealous advocacy for the people she represented; she spoke for the indigents; and they were not pro per litigants. In addition, she provided legal advice and admitted that the indigents would have regarded her as representing them in a professional capacity.

20. Section 317(d) applies to juvenile dependency hearings in accordance with Welfare and Institutions Code, section 353.

21. Judge Peterson testified that in addition to respondent's misconduct being disruptive, "some of the cases eventually went to trial without anybody representing that party."

III. DISCIPLINE

A. Degree of Discipline

The State Bar contends that a public reproval, which was recommended by the hearing judge, is insufficient given the seriousness of respondent's conduct. We agree. In making our recommendation of discipline, our primary concerns are the protection of the public and maintaining high professional standards by attorneys. (*King v. State Bar* (1990) 52 Cal.3d 307, 315; Atty. std. 1.3.) We look to the standards and relevant case law for guidance in determining the appropriate level of discipline (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980) and afford the standards great weight. (*In re Silverton* (2005) 36 Cal. 4th 81, 92.)

Standard 1.6 provides that the most severe discipline should be recommended of the various violations, adjusted to reflect the aggravating and mitigating circumstances. We have found respondent culpable of violating sections 6103, 6068, subdivision (m), and rules 3–110(A), 3–700(A)(1), and 3–700(A)(2). We therefore focus on standard 2.6, which provides for disbarment or suspension for a violation of section 6103 or 6068.[22]

In order to assess the degree of discipline, we first consider the evidence in mitigation and aggravation. (*Doyle v. State Bar* (1982) 32 Cal.3d 12, 24.)

1. Mitigation

We agree with the hearing judge's decision giving "strong" mitigative weight to respondent's 10 years of practice without discipline. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [over 10 years of practice before first act of misconduct given significant weight]; std. 1.2(e)(i).)

[10] We also agree with the hearing judge's decision to weigh as considerable mitigation the State Bar's delay in initiating disciplinary proceedings against respondent. (Std. 1.2(e)(ix)). Absent a specific showing of prejudice, delay in a State Bar disciplinary proceeding is not a basis for dismissing the charges. However, the delay may be considered in mitigation. (*In the Matter of Crane & DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 157 [three and one–half year delay was sufficient for the purpose of mitigation]. Here, the State Bar waited nearly five years to file disciplinary charges in this matter.

Respondent testified that she spent significant time volunteering at the SPCA and representing pro bono clients. Respondent bears the burden of proving mitigation by clear and convincing evidence. (Std. 1.2(e).) No evidence as to the amount of time spent in connection with her volunteer or pro bono work was presented apart from her own testimony, and we find her own estimation of pro bono hours not credible.[23] Therefore, we assign no weight in mitigation to her community and pro bono activities. Additionally, respondent presented no witnesses to testify as to her character.

2. Aggravation

[11] The hearing judge found in aggravation that respondent's misconduct involved multiple acts of wrongdoing. (Std. 1.2 (b)(ii).) We agree and assign substantial weight in aggravation because of the sheer number of clients and proceedings affected by respondent's misconduct. However, we do not consider that respondent's misconduct constitutes a habitual pattern because it was confined to one month, and we have no evidence of misconduct either before or after that period of time. (*In the Matter of Valinoti, supra*, 4 Cal. State Bar Ct. Rptr. 498, 555 [misconduct not considered a "pattern" unless it spans an extended period of time].)

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22. Standard 2.10 requires reproval or suspension according to the gravity of the offense or the harm to the victim and applies to rules 3–700(A)(1) and 3–700(A)(2).

23. Respondent testified that she had spent 10 hours a day, seven days a week, working on pro bono matters for the past three years, and devoted close to 10 hours a day to her regular caseload. In addition to her approximately 140–hour work week, respondent testified that she had spent time each week volunteering for the Valley SPCA (a non–profit animal rescue organization) and singing in her church's choir, which included practices on Thursday nights and performances on Sundays.

[12] We also agree with the hearing judge's finding in aggravation that respondent's misconduct caused significant harm to the administration of justice. (Std. 1.2 (b)(iv).) Respondent's absences resulted in substantial disruption of the juvenile court proceedings and delay in the resolution of her clients' cases. We assign significant weight in aggravation because the harm to the administration of justice exceeded this procedural disarray. Her actions substantively impacted the underpinnings of the indigent dependency hearings, which rely on appointed counsel to protect against unjust outcomes and ensure that decisions are not antagonistic to the best interests of the child or to the parents' constitutional rights. (*In re Emilye A.* (1992) 9 Cal. App. 4th 1695, 1710 [discussing the importance of appointed counsel to indigent parents in juvenile dependency hearings].)

[13] We agree with the State Bar, which asks that we find as additional aggravation that respondent demonstrated indifference and lack of remorse regarding the consequences of her misconduct. (Std.1.2(b)(v).) Respondent continues to deny any culpability despite her Stipulation establishing her misconduct as charged. At oral argument, respondent presented a tangled web of excuses and sought to shift responsibility to Judge Peterson for the procedural gridlock that was occasioned by her actions. An attorney's failure to accept responsibility for her actions when it is not based on an honest belief of innocence may be considered an aggravating factor. (*In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 380.) Moreover, respondent's assertion that the indigent dependency clients were not her clients provides additional evidence of her indifference.

The State Bar also asks that we find that respondent's misconduct was surrounded by bad faith, dishonesty, concealment, or overreaching (std. 1.2(b)(iii)), based on inconsistencies in respondent's testimony regarding whether or not she made an apology to Judge Peterson. Judge Peterson refuted these allegations during his testimony and the hearing judge made a credibility finding in Judge Peterson's favor. While we also find respondent's testimony not credible, we do not deem it sufficient to be an aggravating factor under this standard. (Compare with *In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 475 [respondent engaged in multiple check forgeries intended to conceal his misuse of client trust account]; *In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, 383 [respondent committed a defalcation against a partner while acting in a fiduciary capacity].)

The State Bar further asks that we find that respondent displayed a lack of candor and cooperation in these proceedings, citing her unwillingness to admit to the stipulated facts in the Sanctions Order. (Std. 1.2(b)(vi).) The Bar also maintains that respondent provided conflicting answers in her Answer and Amended Answer to the NDC. Respondent's refusal to acknowledge the facts contained in her Stipulation has already been addressed as a failure to recognize the consequence of her misconduct under standard 1.2(b)(v). Furthermore, the inconsistencies found in respondent's Answer and Amended Answer are not clear and convincing evidence of lack of candor. (See *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 282–283 [discussing the distinction between credibility and candor].)

B. Comparable Cases

The hearing judge relied on *In the Matter of Respondent X, supra,* 3 Cal. State Bar Ct. Rptr. 592 and *In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862 in arriving at her discipline recommendation of a public reproval. In both of these cases, the attorney disobeyed a single court order and the misconduct was not nearly as serious as presented here. Clearly, respondent's misconduct "was not a single isolated incident which would warrant supervised probation and no actual suspension." (*Matthew v. State Bar* (1989) 49 Cal.3d 784, 791.) In fact, the Supreme Court has generally considered actual suspension warranted where multiple instances of misconduct involving client inattention have occurred. (*Ibid.*; *Lester v. State Bar* (1976) 17 Cal.3d 547.)

Even though respondent's misconduct occurred during a relatively short period of time, the consequences were so broad in scope as to render this a sui generis case. We consider as most comparable those

cases where the misconduct was widespread or where there were multiple instances of client abandonment. The most serious cases warranting disbarment generally arise where there is a prolonged course of extensive misbehavior demonstrating a pattern of misconduct. (*Stanley v. State Bar* (1990) 50 Cal.3d 555 [attorney disbarred for 30 "egregious" acts of misconduct and abandonment of 20 clients over a seven–year period, in addition to acts of moral turpitude including stealing names from other attorneys' answering services, falsely claiming work performed, misappropriating settlement funds by forging clients' names, and conviction for burglary and larceny]; *Farnham v. State Bar* (1988) 47 Cal.3d 429 [seven instances of abandonment spanning approximately four years with prior disciplinary record resulting in disbarment]; *Slaten v. State Bar* (1988) 46 Cal.3d 48 [disbarment for failure to perform for seven clients during a five–year period, commingling funds, advising client to act in violation of law and an extensive discipline record]; *McMorris v. State Bar* (1983) 35 Cal.3d 77 [disbarment for habitual failure to perform in seven matters involving five clients during a nine–year period of time, with two prior suspensions for the same misconduct].)

We conclude disbarment is not appropriate here because, as we noted ante, the misconduct was neither prolonged nor did it constitute a "pattern." (*Young v. State Bar* (1990) 50 Cal.3d 1204, 1217 [abandonment affecting several clients over a period of a few months was not a pattern of misconduct]; *In the Matter of Valinoti*, *supra*, 4 Cal. State Bar Ct. Rptr. 498, 555 [questioning whether two and one–half years of misconduct is a sufficient period of time to establish a pattern of misconduct warranting disbarment].) In cases imposing penalties short of disbarment arising from widespread misconduct, the discipline has ranged from three years' to six months' actual suspension.

The State Bar cites to *In the Matter of Valinoti*, *supra*, 4 Cal. State Bar Ct. Rptr. 498, wherein an attorney with a large volume of immigration cases intentionally abandoned nine clients over a two and one–half year period. (*Id.* at pp. 561, 566.) Even though the attorney continually was warned by several immigration judges of his duty to fully represent his immigrant clients, his cases repeatedly were dismissed due to his misconduct. Valinoti also failed to notify over one thousand clients that he had moved his offices. (*Id.* at p. 562.) We found Valinoti was culpable of 18 counts of charged misconduct and five counts of uncharged misconduct in aggravation, including the aiding and abetting of non–attorney immigration providers in the unauthorized practice of law, engaging in a reckless and careless method of practicing law, and making misrepresentations to the State Bar in his verified answers to interrogatories. We recommended a three–year actual suspension. (*Id.* at p. 564.) *Valinoti* involved more serious misconduct than occurred here because it consisted of several acts of moral turpitude involving fraud and misrepresentations to the courts, and the misconduct continued over a far longer time period. Moreover, there was substantial harm to several clients, including the loss of their rights to remain in the United States (*id.* at p. 560), and abandonment of asylum cases which we considered as tantamount to death penalty cases. (*Id.* at p. 562.)

The State Bar also suggests *Young v. State Bar*, *supra*, 50 Cal.3d 1204 is an analogous case. In *Young*, the Supreme Court rejected this court's recommendation of disbarment, and instead imposed two years' actual suspension for misconduct that resulted in at least nine cases of client abandonment. In several instances, Young accepted a fee and then wilfully failed to perform the agreed–to services or return the unearned fees. Seven of the cases involved criminal defendants whose causes were abandoned by Young, and, in one instance, resulted in the dismissal of a criminal appeal. (*Id.* at p. 1210.) Young also wilfully disobeyed four court orders to appear in four different proceedings, one of which resulted in the court issuing a warrant for his arrest (which ultimately was rescinded when he eventually appeared.) (*Ibid.*) He was held in contempt on at least two occasions. (*Id.* at p. 1212.)

The Supreme Court found that the abandonment of Young's practice was caused by the combination of his illness with hepatitis, the stress of a heavy trial schedule, financial problems, and drug use. (*Id.* at p. 1220.) The court considered these factors in mitigation (other than the drug use), and, in addition, found that none of his clients had been "substantially" harmed, that Young had no prior discipline, that he

showed remorse, and that he cooperated with the State Bar. (*Id.* at p. 1221.)

The *Young* case is instructive in that it involved multiple instances of client abandonment as the result of one act when the attorney moved to Florida and completely deserted his practice without notifying his clients. (*Id.* at p. 1209.) In the instant case, the scope of the misconduct is quantitatively greater, but qualitatively less serious. In essence, respondent refused to follow Judge Peterson's order to continue to represent her indigent clients, resulting in her failure to appear in 39 matters. Ultimately, she resolved this matter without a contempt citation, albeit after being sanctioned in the amount of $1,500. In contrast, in *Young v. State Bar*, *supra*, 50 Cal.3d 1204, the attorney disobeyed orders of four separate courts, was subject to an arrest warrant, and was at least twice held in contempt.

We also consider *In re Morse, supra*, 11 Cal.4th 184 because it, too, involved widespread misconduct consisting of misleading mass mailings to over four million individuals, where an attorney offered his assistance in filing homestead declarations during a period of more than four years. The Supreme Court placed the attorney on three years' actual suspension, with the possibility of reducing this discipline to two years' actual suspension upon payment of restitution, because of the extended and methodical nature of the misleading advertising and the gross negligence and other aggravating circumstances involved. (*Id.* at p. 207.) In the instant case, the conduct was far less widespread and it did not continue for any significant time period. Nevertheless, respondent shares with Morse a remarkable unwillingness even to consider the wrongfulness of her actions or to accept any meaningful discipline. (*Id.* at p. 209.)

Finally, we consider another immigration case, *Gadda v. State Bar* (1990) 50 Cal.3d 344, wherein the Supreme Court imposed six months' actual suspension for serious acts of client neglect and other misconduct in four matters involving at least nine clients, including, inter alia, encouraging a client to lie to a governmental official *(id.* at p. 348) and repeated deliberate misrepresentations to his clients. (*Id.* at p. 350.) The court found that Gadda's dishonesty constituted acts of moral turpitude. (*Id.* at p. 355.) The court also noted the potentially serious consequences of the client neglect in his asylum cases, analogizing them to death penalty cases. (*Id.* at p. 354.)

Additionally, Gadda mailed 500–800 letters to past and present clients misrepresenting that Congress had enacted amnesty legislation. (*Gadda v. State Bar*, *supra*, 50 Cal.3d at p. 350.) As a result, at least 14 individuals were misled into believing they might be eligible for citizenship. (*Id.* at p. 355.) According to the court, these actions in all likelihood undermined public confidence in the legal profession. (*Ibid.*) Aggravating circumstances included Gadda's reluctance to recognize the seriousness of his wrongdoing and his indifference to the proceedings. (*Id.* at p. 356.) Although he had no prior discipline, Gadda had only been practicing for five and one–half years, so no mitigation weight was given by the court. However, the court did afford considerable mitigation to Gadda's substantial pro bono work on behalf of indigent immigrants.

The scope of the misconduct in *Gadda* is similar to the instant case in that Gadda's widespread mailing of the amnesty law letters containing untrue statements not only misled 14 clients, but in all likelihood undermined public confidence in the legal profession. (*Gadda v. State Bar*, *supra*, at p. 355.) However, although Gadda's abandonment and inattention affected only two clients as opposed to respondent's 319 clients, in some respects his conduct was more serious because it involved several intentional acts of dishonesty.

Given the wide–ranging discipline imposed in the above cases, we are left to ponder the fundamental questions posed by the Supreme Court in I*n re Morse, supra*, 11 Cal.4th at pp. 208–209: 1) What did respondent do wrong? and 2) What is the discipline most likely to deter respondent from future wrongdoing? As to the first question, we conclude that, essentially, respondent's improper withdrawal without court permission resulted in the abandonment of over 300 clients and the failure to appear in 39 separate matters. We are concerned that by wilfully ignoring proper procedures and a court order, respondent caused significant disruption to the administration of justice within the juvenile court of the Sacramento Superior Court. Furthermore, although the delay of

each dependency proceeding may not have caused "significant" harm to a particular client (see generally *Young v. State Bar, supra*, 50 Cal.3d 1217), we remain concerned with the large number of affected indigent clients, who are among the most vulnerable in our system of justice. In this respect, the instant case most closely resembles the immigration cases, *In the Matter of Valinoti, supra*, 4 Cal. State Bar Ct. Rptr. 498 and *Gadda v. State Bar, supra*, 50 Cal.3d 344.

Ultimately, we conclude that the public reproval recommended by the hearing judge is inadequate to assure protection to the public and to the courts and the maintenance of professional standards within the legal profession. After considering standard 2.6, the case law, the evidence of mitigation and aggravation and the unique facts of this case, we conclude that an 18–month period of actual suspension is warranted, coupled with a requirement under standard 1.4(c)(ii) that respondent demonstrate to the State Bar Court her rehabilitation and present fitness to practice. Were it not for respondent's lack of recognition of the nature and extent of her wrongdoing, we would be inclined to consider her one–month moral hiatus as aberrational and would contemplate a lesser discipline. (See e.g. *Gadda v. State Bar, supra*, 50 Cal.3d 344.) However, we simply cannot ignore respondent's failure to appreciate her professional duties towards the Sacramento Superior Court and her many indigent clients. This demonstrated lack of insight into the nature of her misconduct suggests that there is a likelihood respondent's misconduct may recur. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 781–782.)

IV. RECOMMENDATION

[14] We therefore recommend that respondent Julie L. Wolff be suspended from the practice of law in the State of California for three years, that execution of that suspension be stayed, and that respondent be placed on probation for three years on the condition that she be actually suspended from the practice of law in the State of California during the first 18 months of probation and until she shows proof satisfactory to the State Bar 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 of Attorney Sanctions for Professional Misconduct, and on the following further conditions:

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

2. Respondent must maintain, with the State Bar's Membership Records Office and the State Bar's Office of Probation 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(a).) Respondent must also maintain, with the State Bar's Membership Records Office and the State Bar's Office of Probation in Los Angeles, her current home address and telephone number. (Bus. & Prof. Code, § 6002.1(a)(5).) Respondent's home address and telephone number will not be made available to the general public. (Bus. & Prof. Code, § 6002.1(d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

3. Respondent must report, in writing, to the State Bar's Office of Probation 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 her probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and must 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, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

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

4. Within one year of the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of no less than four hours of Minimum Continuing Legal Education (MCLE) approved courses in general legal ethics. This requirement is separate from any MCLE requirements, and respondent will not receive MCLE credit for attending the courses.

5. Within one year of the effective date of the discipline herein, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105–1639, or 1149 South Hill Street, Los Angeles, California, 90015–2299, and passage of the test given at the end of that session. Arrangements to attend Ethics School must be made in advance by calling (213) 765–1287, and paying the required fee. This requirement is separate from any MCLE requirements, and respondent will not receive MCLE credit for attending the Ethics School. (Rules Proc. State Bar, rule 3201.)

A. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of her actual suspension and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

B. RULE 955

We further recommend that respondent be ordered to comply with rule 955 of the California Rules of Court and to perform the acts specified in paragraphs (a) and (c) of that rule within 30 days after the effective date of the Supreme Court order in this matter.

C. COSTS

We further 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 enforceable both as provided in Business and Professions Code, section 6140.7 and as a money judgment.

We concur:

WATAI, Acting P. J.
STOVITZ, J.*

*Retired Presiding Judge of the State Bar Court, serving by designation of the Presiding Judge.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

FELIX TORRES, JR.

A Member of the State Bar

No. 03–O–04964; 05–O–04167 (Cons.)

Filed February 7, 2007

SUMMARY

The State Bar requested interlocutory review of a hearing judge's discovery sanctions order, claiming that the sanctions were inadequate. The hearing judge issued the sanctions order due to respondent's failure to appear at his scheduled deposition on two occasions, one of which had been ordered by the hearing judge. The imposed sanctions barred respondent from entering any documentary or testimonial evidence at trial, except for his own testimony. (Hon. Patrice McElroy, Hearing Judge.)

The review department found that the discovery sanction was ineffective to induce respondent to provide the discovery sought and concluded that the hearing judge abused her discretion by imposing an insufficient sanction that failed to protect the interests of the party entitled to but denied discovery. The review department vacated the sanctions order and remanded the matter to the hearing department.

COUNSEL FOR PARTIES

For State Bar: Lawrence J. Dal Cerro, Manuel Jimenez

For Respondent: Felix Torres, Jr., in pro. per.

HEADNOTES

[1] **130 Procedure on Review**
167 Abuse of Discretion
The scope of interlocutory review is limited to deciding whether the hearing judge committed legal error or abused his or her discretion. Under this standard, review is not undertaken with the intention of substituting the view of the review department for that of the hearing judge, but rather with the intention of employing the equivalent of the substantial evidence test by accepting the trial court's resolution of credibility and conflicting substantial evidence, and its choice of possible reasonable inferences.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2] **113 Procedure–Discovery**
130 Procedure on Review
167 Abuse of Discretion
A judge has broad discretion to impose discovery sanctions and is subject to reversal only for arbitrary, capricious, or whimsical action. The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks but the court may not impose sanctions which are designed not to accomplish the objects of the discovery but to impose punishment.

[3] **113 Procedure–Discovery**
130 Procedure on Review
While the power to impose discovery sanctions is broad, there are two requirements that must be met before the imposition of a sanction: 1) there must be a failure to comply with court–ordered discovery; and 2) the failure must be willful.

[4 a–d] **113 Procedure–Discovery**
167 Abuse of Discretion
Where respondent elected not to attend a properly–noticed deposition which resulted in a court order to compel his deposition, where respondent was given the opportunity to comply with that order but willfully failed to do so, and where the hearing judge barred respondent from introducing any documentary or testimonial evidence, except for his own testimony, the sanction imposed was wholly inappropriate to respondent's disobedience, and the hearing judge abused her discretion by imposing an insufficient sanction that failed to protect the interests of the party entitled to but denied discovery. This discovery sanction was ineffective to induce respondent to provide the discovery sought. Moreover, this lesser sanction hindered the State Bar's ability to proceed at trial and would allow respondent to testify without affording the State Bar the opportunity to impeach his testimony or credibility or even to adequately prepare for trial, opening the trial to surprise and delay.

[5 a–c] **113 Procedure–Discovery**
130 Procedure on Review
167 Abuse of Discretion
Discovery sanctions should be appropriate to the dereliction and should not exceed that which is required to protect the interests of the party entitled to but denied discovery. A court will generally impose lesser sanctions regarding a discovery request unless the lesser sanctions will not bring about the compliance of the offending party. A court's exercise of discretion should not reward the disobedient party, let alone at the expense of the fundamental reasons supporting the discovery process.

ADDITIONAL ANALYSIS

Other
194 Effect/Applicability of Statutes Outside State Bar Act

OPINION

STOVITZ, J.*

The State Bar has requested interlocutory review of a State Bar Court hearing judge's discovery sanctions order, claiming that the sanctions were inadequate. Although hearing judges are afforded wide discretion in ruling on discovery matters, we conclude, for the reasons stated, that the hearing judge abused her discretion as her decision frustrated the purposes of discovery. The relevant facts and procedural history are set forth below.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 4, 2005, the State Bar filed a Notice of Disciplinary Charges (NDC) against respondent, and on December 16, 2005, filed a second NDC. On February 15, 2006, the two matters were consolidated. On March 10, 2006, respondent was properly served with a notice of deposition scheduled for April 3, 2006. The Civil Discovery Act (Code Civ. Proc., § 2016.010 et seq.) applies to State Bar disciplinary proceedings with limited exceptions not applicable here.[1] (Rule 180; *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 502.)

On March 27, 2006, respondent sought a protective order requesting that his deposition take place in Laguna Hills, California, instead of at the State Bar's Los Angeles office, as a "reasonable accommodation" under the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.)(ADA).[2] In his papers, respondent also asserted that the time for discovery cut–off had passed.[3] He did not attend the scheduled deposition.

On March 30, 2006, the State Bar filed, *inter alia*, a motion to compel respondent's oral testimony. On April 5, 2006, the hearing judge denied respondent's request for a protective order and granted the State Bar's motion to compel discovery. The court–ordered deposition was scheduled for April 25, 2006.

On April 21, 2006, the State Bar sent respondent an e–mail message reminding him of the rescheduled, court–ordered deposition. Respondent replied via e–mail that he would not attend the deposition, and again cited his disability as the reason. He failed to appear at the scheduled deposition.

On May 4, 2006, the State Bar filed a motion requesting terminating sanctions.[4] On May 10, 2006, respondent filed his reply to the State Bar's motion, again asserting his ADA rights. He also alleged that the original deposition notice was defective, thereby rendering the order to compel discovery void on its face.[5]

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*Retired Presiding Judge of the State Bar Court, sitting by designation of the Presiding Judge.

1. Unless noted otherwise, all references to rules are to the Rules of Procedure of the State Bar. Rule 186 provides that monetary sanctions and arrest of a party are inapplicable as discovery sanctions. The rule also provides that dismissal shall not be ordered as a discovery sanction unless the court first considers the impact of dismissal on the protection of the public.

2. At no time has respondent provided any evidence to support his ADA claim.

3. The discovery cut–off issue was resolved by the hearing judge in favor of the State Bar and is not involved in the limited scope of this review. Respondent also stated in his motion for a protective order that he would not attend the deposition scheduled for April 3, 2006, "in order to reserve his rights for the protective order." However, his request for a protective order did not comply with requirements of California Code of Civil Procedure section 2025.410.

4. A terminating sanction can include an order striking out the pleadings or parts of the pleadings of any party engaging in the misuse of the discovery process; an order staying further proceedings by that party until an order for discovery is obeyed; an order dismissing the action, or any part of the action, of that party; or an order rendering a judgment by default against that party. (Code Civ. Proc., § 2023.030(d)(1)–(4).)

5. The hearing judge correctly concluded that the provision at issue was directory and that no adverse consequence occurred by failing to comply.

On May 17, 2006, the hearing judge issued an "ORDER RE: SANCTIONS" in which she imposed sanctions for respondent's failure to appear at his scheduled depositions on two occasions, one of which had been ordered by the court. The imposed sanctions barred respondent from entering any documentary or testimonial evidence at trial, except for his own testimony.[6]

On June 1, 2006, the State Bar filed a Request for Interlocutory Review with this court. The State Bar contends that the hearing judge abused her discretion by allowing respondent to testify at trial without first submitting to a deposition, thereby denying the State Bar the opportunity to impeach his trial testimony. The State Bar has specifically requested that respondent's answer to the NDC be stricken and that a default judgment be entered against him. Though we granted respondent an opportunity to reply to the State Bar's review petition, he did not do so.

II. DISCUSSION

[1] As this is an interlocutory review, our scope is limited to deciding whether the hearing judge committed legal error or abused her discretion. (Rule 300(k); *In the Matter of Respondent AA* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 721, 726.) Under this standard, we do not review with the " 'intention of substituting the view of this court for that of the hearing judge, but rather with the intention of "employ[ing] the equivalent of the substantial evidence test by accepting the trial court's resolution of credibility and conflicting substantial evidence, and its choice of possible reasonable inferences [citations omitted]." ' [Citation.]" (*In the Matter of Terrones* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 289, 293.) The discretion we review is a discretion that is guided and controlled by fixed legal principles and should be exercised in a manner as to not impede or defeat the ends of substantial justice. (*In the Matter of Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 571, 577.)

As the State Bar has asked this court to review the discovery sanction issued by the hearing judge, it is instructive to be guided by the abuse of discretion standard that civil courts apply when reviewing the appropriateness of a discovery sanction.

California courts favor the long–standing public policy of disclosure regarding discovery. As our Supreme Court stated in its seminal discovery law opinion: "disclosure is a matter of right unless statutory or public policy considerations clearly prohibit it." (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 378.) In *Greyhound*, the court affirmed that "[o]ne of the principal purposes of discovery was to do away 'with the sporting theory of litigation – namely, surprise at the trial.' [Citations.]" (*Id.* at p. 376.)

While discovery statutes are intended to take the game out of the trial, their purpose is not to adversely affect the general adversarial nature of litigation. (*Greyhound Corp. v. Superior Court*, *supra*, 56 Cal.2d at p. 376.) The court set forth nine objectives which the discovery rules were enacted to accomplish:

> "(1) to give greater assistance to the parties in ascertaining the truth and in checking and preventing perjury;
>
> (2) to provide an effective means of detecting and exposing false, fraudulent and sham claims and defenses;
>
> (3) to make available, in a simple, convenient and inexpensive way, facts which otherwise could not be proved except with great difficulty;
>
> (4) to educate the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements;
>
> (5) to expedite litigation;

6. The relevant part of the order states: "**GOOD CAUSE HAVING BEEN SHOWN THEREFOR,** given the failure of respondent to appear for his oral deposition and thereby submit to an authorized method of discovery, and his failure to comply with this court's order, as set forth above, the court orders that pursuant to Code of Civil Procedure section 2023.010, subdivision (d) and section 2025.450, subdivision (d), respondent is barred from offering any documentary evidence or any testimonial evidence, other than his own testimony, at trial in this matter." (Emphasis in original.)

(6) to safeguard against surprise;

(7) to prevent delay;

(8) to simplify and narrow the issues; and,

(9) to expedite and facilitate both preparation and trial."

(*Ibid.*, fn. omitted, paragraphs added.)[7]

Our Supreme Court made clear the benefit of the discovery process in narrowing issues between parties and as a device in which parties can fully ascertain the facts before trial. (See *Greyhound Corp. v. Superior Court*, *supra*, 56 Cal.2d at p. 385; see also *West Pico Furniture Co. v. Superior Court* (1961) 56 Cal.2d 407, *Cembrook v. Superior Court* (1961) 56 Cal.2d 423.)

This strong policy is also codified in the Civil Discovery Act of 1986 (Civil Discovery Act). (Code Civ. Proc. §§ 2016.010–2036.050.) As the State Bar Court has adopted virtually all of the Civil Discovery Act, we are guided by the manner in which the civil courts review discovery sanctions for abuse of discretion or error of law.

[2] A judge has broad discretion to impose discovery sanctions in a civil proceeding, and is subject to reversal only for arbitrary, capricious, or whimsical action. (*Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 228.). "The sanctions the court may impose are such as are suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery he seeks but the court may not impose sanctions which are designed not to accomplish the objects of the discovery but to impose punishment. [Citations.]" (*Motown Record Corp. v. Superior Court* (1984) 155 Cal.App.3d 482, 489, quoting *Caryl Richards, Inc. v. Superior Court* (1961) 188 Cal.App.2d 300, 303-304.) We should be loath to interfere with the hearing judge's discovery decision.[8]

[3] In our analysis, we first determine if discovery sanctions were appropriate. We observe that while the power to impose discovery sanctions is broad, there are two requirements that must be met before the imposition of a sanction: 1) there must be a failure to comply with court–ordered discovery; and 2) the failure must be willful. (*Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545; *Calvert Fire Ins. Co. v. Cropper* (1983) 141 Cal.App.3d 901, 904.)

This record compels the conclusion that respondent failed to comply with court–ordered discovery and that his non–compliance was willful. Respondent failed to appear for a properly–noticed deposition, and subsequently failed to appear for a second, court–ordered deposition. When reminded of the second deposition by the State Bar, respondent indicated that he would not attend.

[4a] The hearing judge correctly determined that sanctions were appropriate. However, we conclude that the hearing judge abused her discretion by imposing an insufficient sanction that failed " ' "to protect the interests of the party entitled to but denied discovery." [Citations.]' " (*Vallbona v. Springer*, *supra*, 43 Cal.App.4th at p. 1545.)[9]

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7. The court identified these areas as intended goals of the Discovery Act of 1956 adopted by the California legislature and modeled after the federal rules regarding discovery. These principles are equally applicable to the purpose of the Civil Discovery Act of 1986. (See *Beverly Hosp. v. Superior Court* (1993) 19 Cal.App.4th 1289, 1294.)

8. The dissent cites our earlier opinion in *In the Matter of Respondent J* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 273, 276, for an abuse of discretion test that equates it with a "manifest miscarriage of justice." That case involved review of a hearing judge's order partially reducing an award of costs. (Bus. & Prof. Code, § 6086.10.) While we emphasize that the hearing judge in a discovery matter is accorded a wide discretion in selecting an appropriate resolution, there are a number of other definitions of abuse of discretion used by us and the civil courts, and we have cited illustrative ones, *ante*.

9. Other than collateral discussions regarding the applicability of the Civil Discovery Act to State Bar Court disciplinary proceedings, we have never found discovery sanctions imposed by a hearing judge inadequate. (See, e.g., *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495 [respondent's claim that application of the Civil Discovery

Long ago, the policy decision was made to apply the Civil Discovery Act broadly to State Bar disciplinary proceedings. (*Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300–302.) Accordingly, it is fully appropriate to apply the sanctions called for by the Act, as allowed by rule 186, for willful disobedience of discovery provisions.

[4b] The hearing judge found that respondent failed to comply with the court–ordered discovery and barred respondent from offering at trial any evidence, except for his own testimony. This discovery sanction results in an empty penalty. It is ineffective to induce respondent to provide the discovery sought since it does not preclude respondent from introducing his own testimony at trial. Not only must we consider the right of the requesting party to obtain proper discovery, we must also consider the integrity of the discovery process and the interest of the court in compelling " 'obedience to its judgments, orders and process.' [Citations.]" (*Sauer v. Superior Court, supra*, 195 Cal.App.3d at p. 230.) The sanction issued by the hearing judge nullifies the purpose of the order that compelled respondent to appear at the deposition.

[5a] The Civil Discovery Act provides that a court may enter monetary, issue, evidence, terminating, or contempt sanctions.[10] (See Code Civ. Proc. § 2023.030.) The penalty should be appropriate to the dereliction, and " ' "should not exceed that which is required to protect the interests of the party entitled to but denied discovery." [Citations.]' " (*Vallbona v. Springer, supra,* 43 Cal.App.4th 1525, 1545.)

[5b] In addressing the issue in the present case, we take into consideration that the purpose of a discovery sanction is to enable a party to obtain evidence under a party opponent's control, as well as to further the efficient and economical disposition of cases on the merits. (*Caryl Richards, Inc. v. Superior Court, supra,* 188 Cal.App.2d at p. 303.) In accordance with this purpose, a court will generally impose lesser sanctions regarding a discovery request unless the lesser sanctions will not bring about the compliance of the offending party. (*R.S. Creative, Inc. v. Creative Cotton* (1999) 75 Cal.App.4th 486, 496.)

[5c] We find *Sauer v. Superior Court, supra*, 195 Cal.App.3d 213, to be instructive in this matter. In *Sauer*, the court upheld an issue–preclusion sanction after concluding that lesser sanctions were insufficient.[11] If the lower court had imposed a lesser sanction, the non–compliant party would have been allowed to benefit from a delay in production of the requested documents by forcing the requesting party to proceed to trial ill–prepared. (*Id.* at p. 230.) A court's exercise of discretion should not reward the disobedient party, let alone at the expense of the fundamental reasons supporting the discovery process.

[4c] In the present case, as noted, the hearing judge barred respondent from introducing any documentary or testimonial evidence, *except for his own testimony*. This is precisely the discovery the State Bar sought by requesting respondent's deposition. We find that the imposition of this lesser sanction hinders the State Bar's ability to proceed at trial. By this means, respondent would be allowed to testify without affording the State Bar the opportunity to impeach his testimony or credibility or even to adequately prepare for trial, opening the trial to surprise and delay.

Act to attorney disciplinary proceeding denied him due process was rejected]; see also, e.g., *In the Matter of Lapin* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 279 [upholding authority of pro tempore judge to only permit testimony of a witness that is first deposed].) The present matter affords such opportunity in that we find the sanction imposed by the hearing judge to be effectively no sanction at all.

10. As noted *ante*, monetary sanctions are inapplicable in State Bar disciplinary hearings.

11. An issue–preclusion sanction allows a court to designate facts that "shall be taken as established in the action in accordance with the claim of the party adversely affected by the misuse of the discovery process." (Code Civ. Proc., § 2023.030(b).) Additionally, a court "may also impose an issue sanction by an order prohibiting any party engaging in the misuse of the discovery process from supporting or opposing designated claims or defenses." (*Id.*)

In an instance where lesser sanctions are ineffective, a court is empowered to apply terminating sanctions. (*R.S. Creative, Inc. v. Creative Cotton*, *supra*, 75 Cal.App.4th at p. 496.) Terminating sanctions are warranted against a litigant who persists in the outright refusal to comply with his discovery obligations. (*Fred Howland Co. v. Superior Court,* (1966) 244 Cal.App.2d 605, 612.) This includes instances where a party refuses to appear for scheduled depositions. (See, e.g., *Flood v. Simpson* (1975) 45 Cal.App.3d 644 [default judgment entered as sanction against defendant failing to appear for three depositions]; *Scherrer v. Plaza Marina Coml. Corp.* (1971) 16 Cal.App.3d 520, superseded by statute on another ground [imposed terminating sanction for failure to appear for two depositions].) However, because of the drastic nature of a terminating sanction, it should only be granted when the party has had an opportunity to comply with a court order. (*Ruvalcaba v. Government Employees Ins. Co.* (1990) 222 Cal.App.3d 1579, 1581.)

[4d] On this record, we conclude that the sanction imposed is wholly inappropriate to respondent's disobedience. Respondent elected not to attend a properly–noticed deposition, which resulted in a court order to compel his deposition. He was then given the opportunity to comply with that order, but willfully failed to do so. Guiding civil case law holds that on this record a more severe sanction is necessary, and we so conclude.

We vacate the order of the hearing judge and remand this matter to the Hearing Department for further proceeding in accordance with this opinion. The order of this court filed on June 16, 2006, staying the proceeding below is hereby vacated.

I concur:

WATAI, Acting P. J.

Dissenting Opinion of EPSTEIN, J.

The State Bar, which is seeking interlocutory review, asserts that the sanctions ordered by a hearing judge are insufficient, and instead it asks for terminating sanctions in the form of an order striking respondent's answer and entering a default. The majority of this court agrees, finding "the sanction imposed is wholly inappropriate to respondent's disobedience," and it remands this matter to the hearing department for further proceedings. (Maj. opn. *ante*, at p. 8.) I respectfully dissent.

The question before this court is whether the hearing judge abused her discretion by imposing the sanctions she chose. (*Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 36–37, superseded by statute on another ground.) The discretion accorded the hearing judge in determining appropriate discovery sanctions is extremely broad. Indeed, "[i]n choosing among its various options for imposing a discovery sanction, a trial court exercises discretion, subject to reversal only for manifest abuse exceeding the bounds of reason. [Citation.]" *(Kuhns v. State of California* (1992) 8 Cal.App.4th 982, 988.) Upon applying the abuse of discretion standard, I would affirm the sanctions order because it is not arbitrary or capricious (*In re Marriage of Chakko* (2004) 115 Cal.App.4th 104, 108) nor does it exceed the bounds of reason.

After respondent failed to appear at his duly–noticed deposition, the State Bar filed a motion for terminating sanctions on May 4, 2006. Respondent filed a reply on May 15, 2006. After considering the matter, the hearing judge issued her sanctions order, which she filed on May 17, 2006. In her order, the hearing judge applied the relevant rules of discovery and issued a written decision addressing respondent's failure to appear at his deposition and concluding that good cause justified the preclusion of all documentary and testimonial evidence, except for respondent's testimony at trial.

The sanctions imposed were grave indeed. More importantly, under the abuse of discretion standard, we must presume that the hearing judge, in issuing her order, was aware of and gave consideration to the various discovery and procedural options available to the State Bar, both before and during trial, including, inter alia, a motion to re–open discovery to enable the State Bar to pursue other avenues such as interroga-

tories, requests for admission, subpoena duces tecum and the like. Also, during trial, the State Bar would not be precluded from requesting a continuance in order to obtain rebuttal evidence. "We presume the trial court was aware of its various options in imposing an appropriate sanction and we will not select a sanction different from that within the trial court's discretion. Where, as here, the petitioner presents a state of facts, a consideration of which, for the purpose of judicial action, merely affords an opportunity for a difference of opinion, the appellate court is neither authorized nor warranted in substituting its judgment for that of the trial court." *(Sauer v. Superior Court, supra*, 195 Cal.App.3d at p. 230 [holding a sanctions order will only be reversed if it exceeds the bounds of reason].)

While we may have ruled differently had we heard the motion, "'[we] may not substitute [our] own view as to the proper decision.' [Citations.]" (*In the Matter of Respondent J, supra,* 2 Cal. State Bar Ct. Rptr. at p. 276.)

Additionally, we have made clear that " ' "[t]o be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice." ' [Citations.]" (*In the Matter of Respondent J, supra,* 2 Cal. State Bar Ct. Rptr. at p. 276.) In this instance, neither a discretionary abuse has been demonstrated nor has a "manifest miscarriage of justice" been established.

Without question "management of discovery lies within the sound discretion of the trial court" (*Britts v. Superior Court* (2006) 145 Cal.App.4th 1112, 1123), and it is our duty to ensure that it remains within the hearing department's discretionary purview. In my view, the majority opinion trespasses upon the hearing department's area of responsibility and impinges on its broad discretion necessary for management of the discovery process. The chief mischief of the majority's opinion is that it may ultimately compromise the court's ability to expedite trials. The Supreme Court gave voice to this very concern in *Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2 Cal.3d 161, 171, fn. 11: " 'One of the prime purposes of the Discovery Act is to expedite the trial of the action. This purpose will be defeated if appellate courts entertain petitions . . . by which review of the orders of trial courts in discovery proceedings are sought and which do not clearly demonstrate an abuse of discretion where discovery is denied . . . .' "

Lest we unnecessarily compromise the integrity of the discovery process, we must take care not to substitute the judgment of this court for that of the hearing judge unless that judgment exceeds all bounds of reason. Having searched the record for an abuse of discretion, it simply cannot be found. Therefore, I would deny the State Bar's petition.

EPSTEIN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ROBERT D. RUDNICK

Petitioner for Reinstatement

No. 03–R–03557

Filed February 8, 2007

SUMMARY

After resigning from the State Bar in 1989 with disciplinary charges pending (alleging misappropriation of client funds), petitioner requested reinstatement in 2003. The hearing judge concluded that petitioner met his burden of showing by clear and convincing evidence that he was rehabilitated, had the requisite moral fitness, and the present learning and ability in the law to be reinstated. (Hon. Richard A. Honn, Hearing Judge.)

The State Bar sought review, but withdrew its request prior to the completion of briefing. After the State Bar Court transmitted the recommendation for reinstatement to the Supreme Court, the Supreme Court ordered the review department to review the hearing judge's decision. The State Bar subsequently requested review on the grounds that petitioner had failed to establish his rehabilitation and present moral fitness. The review department concluded that petitioner had failed to sustain his burden of establishing his rehabilitation based on his inadequate evidence of restitution to former clients, omissions from the petition for reinstatement, character testimony that lacked facts on which the court could determine rehabilitation, and the failure to timely comply with California Rules of Court, rule 955.

COUNSEL FOR PARTIES

For State Bar: Alan B. Gordon

For Respondent: Michael E. Wine

HEADNOTES

[1 a–i] 2504 Reinstatement–Burden of Proof
2551 Reinstatement Not Granted–Rehabilitation
Where the underlying misconduct involves the theft of client trust funds, restitution is fundamental to rehabilitation. The weight attached to whether restitution has been undertaken in whole or in part depends on the ability to restore the misappropriated funds as well as the attitude expressed

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Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

regarding the matter. Thus, the petitioner must provide a factual showing that he understands the extent of the harm his misconduct caused, as well as proof of his willingness to remedy it. Where petitioner engaged in a repeated pattern of theft of client funds for three years, but petitioner was unable to identify with any certainty the number of clients harmed or the amounts misappropriated, and the record lacked specificity as to how long clients had to wait for payment, the specific harm they incurred and its effect or petitioner's attitude in rectifying the harm, petitioner's assertion that all clients were repaid lacked conviction, and the evidence of rehabilitation was inadequate.

[2] **2504 Reinstatement–Burden of Proof**
2551 Reinstatement Not Granted–Rehabilitation
Where some clients were repaid amounts misappropriated from them during petitioner's cycle of theft and repayment, paying one client with another client's money, and no evidence was presented to show that petitioner repaid any of the identified or unidentified clients guided by a moral imperative consistent with the duties of an attorney, or merely to perpetuate his ongoing scheme or to satisfy terms of his probation, the review department could not conclude that the manner of restitution was consistent with rehabilitation.

[3] **2504 Reinstatement–Burden of Proof**
2551 Reinstatement Not Granted–Rehabilitation
Petitioner's misappropriations occurred because he found himself overcome by the stresses of his increased financial obligations, and petitioner still had outstanding loan obligations. Thus, given the utter lack of evidence showing his comprehension of the magnitude of harm, or his attitude of mind regarding repayment, his assurances at trial that he would no longer resort to unethical means to pay his debts constituted insufficient evidence of rehabilitation.

[4 a–d] **2504 Reinstatement–Burden of Proof**
2551 Reinstatement Not Granted–Rehabilitation
While an omission is not necessarily fatal to a petition for reinstatement, if an omitted claim is significant or misleading, or conceals derogatory information, reinstatement may be denied. Where petitioner failed to disclose nine lawsuits to which he was a party, regardless of the reasons for the omissions, the omissions left it to chance whether the bar's investigation process would uncover the lawsuits. Even if petitioner omitted the lawsuits as a result of hurrying to meet a deadline, he had ample time to correct his omission well before he did so, and his lack of care and the expedited manner in which he handled the disclosure of his lawsuits, coupled with a lack of evidence to show rehabilitation, was troubling and further demonstrated petitioner's failure to understand the seriousness of his misconduct.

[5 a, b] **2504 Reinstatement–Burden of Proof**
2551 Reinstatement Not Granted–Rehabilitation
In instances where significant weight has been afforded to character declarations or testimony, the evidence has been complementary to other probative evidence of the petition. Where letters in support of petitioner's reinstatement described him as a man of personal integrity, described his involvement in charitable activities, asserted that petitioner's misconduct was aberrant behavior traceable to financial stresses, and stated that the declarants were aware of petitioner's misconduct, yet petitioner had not accounted for the full financial extent of the harm to his clients, nor the manner in which he made restitution, it was unclear how the witnesses could fully understand the magnitude of petitioner's misconduct or how he made up for it.

ADDITIONAL ANALYSIS

Other

2554 Reinstatement Not Granted–Rule 955

OPINION

STOVITZ, J.*

After resigning from the State Bar in 1989 with charges pending that alleged misappropriation of client trust funds, petitioner Robert D. Rudnick filed a petition for reinstatement on September 2, 2003. After two days of testimony, the hearing judge concluded that petitioner met his burden of showing clear and convincing evidence that he is rehabilitated, has the requisite present moral fitness, and the present learning and ability in the law to be reinstated.

The State Bar's Office of Chief Trial Counsel (State Bar) sought review, but withdrew its request prior to the completion of briefing. After this court transmitted the recommendation for petitioner's reinstatement to the Supreme Court, it ordered that we review the hearing judge's decision before deciding whether to grant petitioner's reinstatement. The State Bar subsequently sought our review on the grounds that petitioner has not met his burden of proof regarding his rehabilitation and present moral fitness. Specifically, the State Bar asserts that petitioner has not shown rehabilitation and present moral fitness because he has not established a lengthy course of truly exemplary conduct. He failed to disclose nine lawsuits, along with other omissions, and failed to timely comply with rule 955, California Rules of Court. The State Bar does not challenge that petitioner has met his burden to show his present learning and ability in the law.[1]

Petitioner asserts that he has met his burden showing his good character and rehabilitation, and that the State Bar's assertions do not negate his evidence of rehabilitation and present moral fitness, despite omissions in his petition for reinstatement. In addition, petitioner argues that he has established a lengthy period of exemplary conduct, and also that his failure to comply with rule 955 does not negate his showing of rehabilitation.

As we shall discuss, on an independent review of the record (*In re Morse* (1995) 11 Cal.4th 184, 207), we have concluded that the hearing judge erred in his conclusions and recommendation, and that petitioner has not met his burden of proof to show his rehabilitation. For these reasons, we shall deny petitioner's request for reinstatement.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Background and Pre–Resignation Conduct

Petitioner was admitted to the practice of law in January 1970. Initially, he worked as an attorney in the Los Angeles area, but relocated to Palm Springs in either 1971 or 1972.[2] Upon moving to Palm Springs, petitioner worked as an associate for another attorney. Sometime in 1972, petitioner opened his own general law practice in Palm Springs involving mainly real estate, personal injury, landlord–tenant, and contract matters. Petitioner practiced law for approximately ten years before being privately reproved for aiding and abetting an out–of–state attorney in the unauthorized practice of law.[3]

Starting in 1986, petitioner began to experience financial difficulties due to his choice to send his four children to private schools. Petitioner initially approached his sister for a loan to help address his ballooning financial debts. His sister offered help on the condition that petitioner withdraw his children from private school. Petitioner refused to comply with this advice and turned to alternative means to pay his expenses.

Beginning in 1986, petitioner started to use his client trust account "as his own bank." He began a repeated pattern of withdrawing money from the account and replacing it when subsequent settlement money was awarded to his clients. One client's misappropriated money was repaid by the next client's settlement award. By petitioner's own testimony, he

*Retired Presiding Judge of the State Bar Court, sitting by designation of the Presiding Judge.

1. The State Bar also does not contest that petitioner has passed the Multistate Professional Responsibility Examination. (See Cal. Rules of Court, rule 9.10(f).)

2. Petitioner was not sure of the year he moved to Palm Springs.

3. The court grants the State Bar's request to take judicial notice of petitioner's prior record of discipline.

misappropriated more than $160,000 of trust funds from between 15 and 20 clients over a three–year period. Over this three–year period, petitioner's law practice experienced financial difficulties, including the loss of some clients and the strain from the advancement of costs regarding a civil rights case. Eventually, petitioner could no longer replace the misappropriated funds.

The State Bar filed a Notice of Disciplinary Charges (NDC) in December 1988, alleging that petitioner misappropriated money from two clients. Petitioner does not dispute those allegations. The NDC alleged in count one that on July 15, 1986, petitioner settled a claim for $57,500 on behalf of his client, John Neldberg, that the funds were deposited into the client trust account the next day, that petitioner misappropriated the money, and that the money was not paid until October 14, 1986, on which date petitioner remitted $36,657.59 to Neldberg. The NDC also alleged in count two that Gina Gomez received a settlement on October 10, 1986, in the amount of $69,500, that the money was deposited into the client trust account on October 16, 1986, that petitioner misappropriated those funds, and that $52,125 was not paid to Gomez until December 11, 1986, after a complaint was made to the State Bar.[4]

On June 6, 1989, petitioner resigned with charges pending from the practice of law, and his resignation was accepted by the Supreme Court on December 14, 1989. Incident to resigning, he was ordered to comply with California Rules of Court, rule 955.[5]

At the time petitioner resigned, criminal charges were pending against him concerning another client, Larry Fisher. Fisher filed a complaint with the Riverside County District Attorney in February 1989, alleging that petitioner misappropriated $25,000 of a $45,000 settlement award. Unlike the previous misappropriations, petitioner was financially unable to replace Fisher's $25,000 back in the client trust account.[6]

On September 15, 1989, petitioner pled guilty to one count of felony grand theft from Fisher. (Pen. Code, § 487.) On November 1, 1989, he was placed on probation for five years on the conditions that he serve the first 300 days in the county jail, and that he make restitution to his victims.[7] On November 27, 1989, petitioner began his jail commitment. He was subsequently released after serving 57 days and placed in a work release program.[8]

Petitioner maintained employment after his release from jail in various jobs, including work in the legal field and real estate.[9] From his release through the time of filing his petition for reinstatement, petitioner struggled financially, and he testified that his lifestyle changed dramatically after his resignation and incarceration. His wife started working, and he could no longer pay for his children's education.

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4. The record is unclear as to whether the differences in the amounts paid to Neldberg and Gomez reflected petitioner's respective fees, or if those amounts were simply not repaid.

5. This rule has been renumbered as rule 9.20. All further references to former rule 955 are to this current rule 9.20.

6. On June 29, 1989, petitioner filed bankruptcy under Chapter 11 with the United States Bankruptcy Court, Central District of California, which was later converted to a Chapter 7 proceeding. The bankruptcy estate continued until March 29, 1999.

7. The Probation Officer's Report listed Fisher and two other clients as victims: Paul Maciel and the DeMatisse family. The exact amount petitioner misappropriated from Fisher was $25,950. This was repaid to Fisher as ordered by the terms of petitioner's probation out of his bankruptcy estate. (See footnote 4, *ante*.) The State Bar and petitioner stipulated that on November 25, 1989, Fisher had been paid in full from bankruptcy funds.

According to the Probation Officer's Report, petitioner had misappropriated from the trust account $39,500.69 from Paul Maciel and $10,000 from the DeMatisse family. The amount was owed to Maciel from a settlement that petitioner took from the trust account and did not repay. In addition to that amount, Maciel obtained a non–dischargeable debt claim against petitioner for $7,050.56 in connection with petitioner's bankruptcy settlement. Petitioner testified that he did not remember the DeMatisse family as among his victims.

8. Petitioner's felony conviction was reduced to a misdemeanor on March 8, 1993, his guilty plea was set aside, and the action was dismissed.

9. Petitioner received a restricted real estate salesperson's license in 1991.

Petitioner sold his home and moved into an apartment. As of the time of his petition, petitioner had outstanding loan obligations totaling $49,250.16.[10]

On September 2, 2003, petitioner filed his petition for reinstatement, which we now review.

B. Petitioner's Evidence to Show Rehabilitation

Petitioner testified that, in connection with his criminal conviction, his defense attorney compiled a list of clients from whom petitioner misappropriated money and in what amount. Petitioner did not submit this list or any other testimonial or documentary evidence as to the names, amounts misappropriated, or amounts remitted to the remaining 10 to 15 clients.[11]

Petitioner's testimony demonstrates his lack of knowledge of the extent and victims of his defalcations.[12] The hearing judge accounted for a total of over $160,000 of misappropriated funds. While that is literally correct, our record review shows that the amount misappropriated from only the five identified clients is at least $164,233.28.[13] The total amount he misappropriated remains unknown. Regarding restitution, petitioner submitted evidence to show that Fisher and Maciel were repaid out of his bankruptcy estate.[14] Petitioner offered no specific evidence as to the timing of restitution or source of funds to repay the 10 to 15 other clients, testifying simply that all of his clients had been repaid.

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10. This amount includes a debt of $1,943 that was originally undisclosed on the petition for reinstatement.

11. When asked whether or not he had compiled a list of those clients, petitioner stated: "I don't recall that I did. However, my attorney who represented me in the criminal matter . . . as I recall, made up a list, either obtained from my trust account or information [*sic*], and presented that to the Court." Additionally, petitioner testified that he did see the list and "noticed that there were several names that were not clients that I embezzled from. They were regular fees that I had a right to."

12. "Q [State Bar] All right. Let's talk about how many clients, between 1986 and 1989, had their funds misappropriated. I think you testified earlier today that there was Mr. Larry Fisher, and there was a Mr. Mecielle or Macielle, and I believe you also indicated, at least in the deposition that we took on the 27th of August, that there was the De Matisse family. Those were three of how many other clients whose monies you had misappropriated?

"A [Petitioner] Well, you mentioned De Matisse. I don't have an independent recollection of De Matisse. I think I saw that on a probation report, and I believe that was the basis for my testimony. However, I have reviewed documents that you provided counsel, and I thought about the number of people, and I would say it probably was in the 15 to 20 number. [¶]

"Q Okay. Let me ask you this. At the time that you were preparing to file your petition for reinstatement to the practice of law, you know, sometime before or at or near the time that you filed it, did you contact anybody at the State Bar to determine what, if any, matters had been pending against you that were closed or terminated, as we say, at the time that your resignation was accepted?

"A Not that I recall. [¶] . . . [¶]

"Q Okay. Can you tell us, in your best estimate, as you sit here today, how much, in dollars and – dollars – I'm not going to hold you to cents, but how many dollars did you embezzle between 1986 and 1989?

"A I recall Mr. Fisher's, which was 30,000. I recall Macielle, which was approximately 40,000. I can't recall numbers of any of the other clients, and, as I testified previously, some of the funds that replenished the embezzled from I took (sic) my trust account came from me. [¶] . . . [¶]

"Q . . . I'm not asking you about returning money, because, for example, let me turn – again invite your attention, once again, to Exhibit 1, which is the notice to show cause that was filed in 1988, which alleges that you received and deposited in your client trust account 57 and a half thousand dollars on behalf of Mr. Nellburg [*sic*], and that ultimately you remitted some over 36 and a half thousand dollars to him. All right.

"Does that, to the best of your knowledge, reflect accurately what occurred?

"A I can't recall, but, you know, I see this, and I'm reading it, and I see these numbers, and I just presume that the State Bar is accurate as to these numbers and the clients."

13. The record reflects that petitioner misappropriated the following: $36,657.59 from Neldberg, $52,125 from Gomez, $25,950 from Fisher, $39,500.69 from Maciel (not including the non–dischargable debt claim of $7,050.56), and $10,000 from the DeMatisse family.

14. This amount is $65,450.69. Petitioner did not present evidence of restitution to the DeMatisse family. Neldberg and Gomez appear to have been made whole; however, the only evidence regarding their respective payments was contained within the NDC filed on December 29, 1988, by the State Bar.

C. Omissions from the Petition for Reinstatement

The 2003 petition listed 11 lawsuits in which petitioner was involved since his resignation.[15] Petitioner did not disclose nine lawsuits in his petition for reinstatement. On August 27, 2004, the State Bar scheduled a deposition to take petitioner's testimony in connection with his petition. The State Bar presented information to petitioner regarding the omitted lawsuits at that deposition, and petitioner testified that not until that deposition did he become "aware" of those cases. Petitioner filed a supplement to his petition on September 7, 2004, a year after filing his petition, in which he listed the nine omitted lawsuits.

The omitted lawsuits involved a personal injury action filed in the Los Angeles Superior Court in which petitioner was the defendant; a personal injury action filed in the Kern County Superior Court in which petitioner was the plaintiff; an action to recover fees filed in the Riverside Municipal Court in which the petitioner was the defendant; an action to recover referral fees from his cousin filed in the Riverside Municipal Court in which the petitioner was the plaintiff; an unlawful detainer action filed in the Riverside Municipal Court in which the petitioner was the defendant; a breach of contract case filed in the Orange County Superior Court in which the petitioner was the defendant; a complaint arising from a condemnation of trust property filed in the Kern County Superior Court in which petitioner was the defendant and cross–complainant; a commercial complaint filed in the Los Angeles County Superior Court in which the petitioner was a defendant; and a case alleging breach of contract, fraud, and deceit filed by petitioner's client, Fisher, in the Riverside Superior Court in which petitioner was the defendant.

The omitted lawsuit involving Fisher arose out of petitioner's misappropriation of Fisher's money from the client trust account. Fisher filed a civil claim in Riverside County against petitioner on February 10, 1989. The claim was settled on March 21, 1994, for $65,000 and was paid out of petitioner's bankruptcy estate. This amount is separate from the $25,950 that was paid to Fisher as restitution for petitioner's misappropriation. Petitioner submitted details of this claim and the manner in which it was settled in the supplement to his petition.

Petitioner testified as to the reasons why he did not disclose the nine lawsuits. He stated that he missed those lawsuits because he hurriedly prepared the petition as he believed the petition had to be filed within a year of getting the favorable results of the Multistate Professional Responsibility Exam (MPRE).[16] Petitioner also testified that his non–disclosure was inadvertent as he only focused on litigation that had occurred in Riverside County.

In the financial obligations section of his reinstatement application, petitioner did not disclose a debt of $1,943 to a creditor, TRACO. This debt was disclosed in the supplement to the petition, and was settled subsequent to filing his petition for reinstatement.

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15. The 11 disclosed lawsuits were: a subrogation case in which petitioner was the defendant; petitioner's bankruptcy; two personal injury cases in which petitioner was the plaintiff; a small claims case involving the nonpayment of wages in which petitioner was the plaintiff; an unlawful detainer action in which petitioner was the defendant; a case for declaratory relief in which petitioner was the plaintiff; the dissolution of marriage between petitioner and his wife that at the time of petition was still pending with reconciliation discussions ongoing; proceedings involving the ongoing administration of a testamentary trust in which petitioner is a beneficiary; a liquidation of a trust in which petitioner is a beneficiary; and an appeal in which petitioner was the appellant.

16. Petitioner first took the MPRE on August 9, 2002. He testified that he believed the petition for reinstatement had to be submitted within one year of receiving the results of the MPRE, but later found out that the year ran from the date of the examination. Rule 665(a) of the Rules of Procedure of the State Bar provides that proof of passage of the MPRE must be shown to have occurred after the "resignation but not more than one year before the filing of the petition for reinstatement." Petitioner submitted the petition for reinstatement on August 30, 2003. He retook the MPRE on March 13, 2004. Petitioner passed the MPRE both times.

D. Evidence of Current Learning and Ability in the Law

Petitioner had several jobs after his release from jail. According to the petition for reinstatement, he worked as a law clerk for three months in 1994, where he conducted legal research and prepared legal briefs, complaints, answers, interrogatories, and Chapter 11 bankruptcy filings. Petitioner also stated in his petition that he worked as a law clerk/real estate salesperson from June 1995 to September 1996, where he performed legal research and obtained real estate listings and buyers.

Petitioner's testimony regarding his learning and ability in the law relied primarily on the work he has done in connection with two trusts in which he is one of several beneficiaries.[17] In connection with one of those trusts, he testified that he worked with a trust attorney for about 100 hours, for which he was paid for about 50 hours.[18] Petitioner also testified that he attended public meetings in connection with his family's property, Onyx Ranch, in Kern County. Also in connection with Onyx Ranch, petitioner testified that he researched various wind and water rights issues. In total, he has spent between 200 and 300 hours conducting this research, and submitted copies of various legal memoranda he had prepared from January through September 2003.

Petitioner also submitted evidence of attending 15 hours of continuing education, all relating to trust issues. He also listened to the State Bar's 12–hour Mandatory Continuing Legal Education Self–Study Audio Program for 2001.

E. Other Evidence Toward Rehabilitation

Petitioner submitted 13 witness declarations in support of his character. The witnesses included attorneys, family members, business associates, and petitioner's girlfriend. All of the witnesses stated that they were fully aware of the scope of petitioner's misconduct, conviction, and reasons for his resignation. All stated their belief that petitioner is remorseful for his actions.

Several of the witnesses had worked in a legal capacity with petitioner. Petitioner's son, who is an attorney, worked with petitioner for a three–month period at a legal clinic where they were both law clerks in 1994. Mary Ann Bluhm, an attorney hired in 2003 to work on a trust appeal involving petitioner's family trust, prepared appellate briefs with input from petitioner. Stanley Jacobs, an attorney and friend since 1955, worked with petitioner in the late 1980's on a personal injury case. Those attorneys all stated that petitioner was forthright in disclosing his misconduct and that he has the necessary character and legal ability to be a member of the bar.

Petitioner also testified on his own behalf about his childhood, education, and his family obligations as an adult. He described the stresses and financial pressures that caused him to misappropriate funds from his client trust account, including the increasing costs of maintaining his children at private schools. Petitioner assured the hearing judge that the financial pressures that engendered his misconduct are no longer in existence as all of his children are grown. Petitioner also assured the court that his misconduct would never happen again. He expressed remorse and stated that he wanted to volunteer with the State Bar to help develop a program to discourage attorneys from resorting to the same misconduct as he did when faced with financial pressures.

Petitioner also testified as to his community involvement. Subsequent to petitioner's resignation, he was a member of the West Mojave Plan of the Desert Mountain Resource Conservation and Development District.[19] He attended meetings as a member of the West Mojave Plan, and participated in negotiations with the Friends of Jaw Bone Canyon, an

17. These trusts are the Oscar Rudnick Testamentary Trust and the Rudnick Estate Trust. These trusts have been subjected to litigation both prior to and after petitioner's resignation.

18. Petitioner testified that he only billed the attorney for 50 hours' worth of work.

19. Petitioner's interest in this group arose out of concerns regarding property held in the two family trusts.

off–road vehicle group. Petitioner also spent one day helping build a house with Habitat for Humanity, and spent 50 hours over two years volunteering with Beyond Tolerance.[20]

Petitioner did not comply with California Rules of Court, rule 9.20, until December 7, 2004, over a month after the hearing below. He testified that he believed the rule was not applicable to him because he had no clients at the time of his resignation. Petitioner also asserted that at the time he signed his resignation, he was distraught and was not thinking clearly. He testified that given his present understanding of the rule, he would have complied with it at the time of his resignation.

F. Hearing Judge's Findings

The hearing judge recommended that petitioner be reinstated. After discussing petitioner's childhood and family background, the hearing judge then made findings regarding the misconduct that led to petitioner's resignation. The hearing judge found, without any detail, that petitioner had made full restitution to all clients in which petitioner misappropriated money.

After concluding that full restitution had been made, the hearing judge found that petitioner met his burden of showing that he is rehabilitated. The hearing judge attributed petitioner's rehabilitation to his community service, attendance in religious classes, and that petitioner was seeking reinstatement to "clean up the mess" he created. The hearing judge also considered petitioner's testimony that he had lost his dignity and wants to be useful in society, and that he no longer faced the stresses that caused him to misappropriate his clients' money. The hearing judge found that petitioner expressed remorse and shame.

The hearing judge did find the omission of nine lawsuits "troubling," reflecting a failure by petitioner to take his duties and obligations as a lawyer seriously. Nevertheless, the judge did not find these omissions sufficient to disqualify petitioner from reinstatement because the omitted lawsuits occurred after petitioner's incarceration. The hearing judge determined that this was a traumatic period in petitioner's life and the lawsuits were remote in time. He also found that most of the lawsuits involved "mundane" matters and did not reflect negatively on petitioner's ability to practice law. The hearing judge also found that petitioner did not wilfully seek to hide the Fisher lawsuit. In addition, the hearing judge gave great weight to the character testimony.

As to petitioner's present learning in the law, the hearing judge found that his work as a law clerk and the work researching issues related to his family's trust property was sufficient to meet the standard of proof required.

II. DISCUSSION

A. Applicable Law

The legal standards required for reinstatement are well–established. A petitioner seeking readmission after disbarment or resignation with charges pending has the burden of proving by clear and convincing evidence that he meets the requirements for reinstatement. (*In the Matter of Giddens* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 25, 30.) A decision recommending reinstatement must be based on clear and convincing evidence that the petitioner is rehabilitated, has the present moral qualifications for reinstatement, has present ability and learning in the law, and passed the MPRE. (Rules Proc. of State Bar, rule 665(a), (b).)

While the law looks with favor upon the regeneration of errant attorneys (*In re Andreani* (1939) 14 Cal.2d 736, 749), the burden on the petitioner to prove his rehabilitation is a heavy one. (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1091.) A petitioner must present stronger evidence of his present honesty and integrity than one seeking admission for the first time, whose character has never been in question. (*Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403.) This requires

20. Beyond Tolerance is a non–profit organization that organized students in the Santa Barbara School District on trips to the Museum of Tolerance in Los Angeles. Petitioner became involved in this organization through his girlfriend, Adele Rosen.

that the evidence presented must be considered in light of the moral shortcomings that resulted in the imposition of the discipline. (*Ibid.*)

On our independent review of the record (*In re Morse, supra*, 11 Cal.4th at p. 207), we find that petitioner has not met his burden of proof regarding his rehabilitation.

B. Restitution

[1a] Since serious misappropriation of trust funds led to petitioner's resignation, the most significant starting point in assessing his rehabilitation is examining the nature and extent of his amends to his former clients. This record presents a paucity of evidence to show petitioner's restitution in a way that would allow us to determine whether it is consistent with rehabilitation.

[1b] The State Bar correctly states that a serious and protracted pattern of egregious abuse of client trust requires a substantial period of exemplary conduct to make a showing of rehabilitation. (*In re Gossage* (2000) 23 Cal.4th 1080, 1096.) Petitioner is also correct in his assertion that " ' "the passage of an appreciable period of time" constitutes an "appropriate consideration" in determining whether a petitioner has made sufficient progress towards rehabilitation.' [Citations.]" (*In the Matter of Rudman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 546, 558.) However, both fail to understand that "[o]ur concern, however, is not just in counting the correct number of years for measuring petitioner's rehabilitation; but more importantly, to assess the quality of petitioner's showing in light of his very serious misconduct...." (*In the Matter of Bodell* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 459, 464.) Thus, petitioner's burden is to present clear and convincing evidence so that the court may assess the quality of petitioner's showing of rehabilitation regarding the misappropriation of a large sum of money from 15 to 20 clients.

[1c] Petitioner engaged in a repeated pattern of theft of client funds for three years. This represented a continuing course of serious professional misconduct. (E.g., *Tomlinson v. State Bar* (1975) 13 Cal.3d 567 [disbarring an attorney who repeatedly misappropriated client funds finding he was not worthy of being held out to the public as a person of trust].) Petitioner's misconduct was sufficiently egregious to have warranted his summary disbarment had he not submitted his resignation. (See *In re Ewaniszyk* (1990) 50 Cal.3d 543 [noting that misconduct occurring after the adoption of Business and Professions Code section 6102 on January 1, 1986, results in summary disbarment of an attorney upon a conviction of the type petitioner suffered].)

[1d] We take seriously the charge that we must not reinstate an attorney unless he presents "the most clear and convincing, nay, we will say upon overwhelming, proof of reform – proof which we could with confidence lay before the world in justification of a judgment again installing him in the profession which he has so flagrantly disgraced." (*In the Matter of Stevens* (1922) 59 Cal.App. 251, 255.) When looking to rehabilitation in a case where the misconduct involved the theft of client trust funds, it is clear that restitution is "fundamental to the goal of rehabilitation." (*Hippard v. State Bar, supra*, 49 Cal.3d at p. 1094.) It cannot be understated that the weight that should be attached to whether restitution has been undertaken in whole or in part depends on the applicant's ability to restore the misappropriated funds as well as his attitude expressed regarding the matter. (*In re Andreani, supra*, 14 Cal.2d at p. 750; *Resner v. State Bar* (1967) 67 Cal.2d 799, 810; *In re Gaffney* (1946) 28 Cal.2d 761, 764; *Hippard v. State Bar, supra*, 49 Cal.3d at p. 1094.)

[1e] Thus, our review requires us to ascertain if petitioner provided a factual showing that he understood the extent of the harm his misconduct caused, as well as proof of his willingness to remedy it. (See *In the Matter of Distefano* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 668, 674 [stating that the demonstration of a recognition of the wrongdoing is part of the requirements to show rehabilitation]; see also *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 317 [petitioner demonstrated an appreciation of the gravity of his misconduct].) Without clear and convincing evidence of such, it is difficult to show that rehabilitation has occurred. (Cf. *In the Matter of Distefano, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 674–675.)

[1f] The record before us does show that petitioner made restitution to Fisher and Maciel through his bankruptcy estate and as a term of his probation.

While a willingness to repay a financial debt is not necessarily at odds with the compliance of a forced mandate (see *In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423, 429–430), the petitioner must show a proper attitude of mind regarding his offense before he can hope for reinstatement. (*Wettlin v. State Bar* (1944) 24 Cal.2d 862, 869–870.)

[2] In addition, some clients were repaid during petitioner's cycle of theft and repayment, paying one client with another client's money. We cannot conclude, given petitioner's minimal showing, that this manner of restitution is consistent with rehabilitation. No evidence was presented to show that petitioner repaid any of the identified or unidentified clients guided by a moral imperative consistent with the duties of an attorney, or merely to perpetuate his ongoing scheme or to satisfy the terms of his probation. (Cf. *In re Menna* (1995) 11 Cal.4th 975, 986 [a petitioner is not entitled to the benefit of the doubt if an equally reasonable inference may be drawn from a proven fact].)

[1g] The record lacks specificity as to what amounts were taken from the unnamed clients, how long they had to wait for payment, and, most importantly, the specific harm they incurred and its effect or petitioner's attitude in rectifying that harm. Petitioner did not show that he pursued options available to him in order to make a sufficient showing that he understood the magnitude of his misconduct or his willingness toward restitution, nor did he show that attempts to detail his misappropriation were unavailable. For example, he did not offer in evidence the list he claims was drawn up in connection with his criminal conviction, outlining who the unidentified clients were, how much he misappropriated, and how long those clients had to wait to receive their money. He offered no evidence as to whether his office records described relevant details and he testified that he had not sought any information in the State Bar's possession at the time he resigned which could have helped him ascertain the full extent of his misdeeds. Nor did he show that he contacted the parties or their insurance carriers from whom his clients settled or obtained a judgment to determine the amounts of the award. Nor did he even show evidence of an admission of his misconduct to his clients. If petitioner is unable to identify with any certainty the number of clients harmed or the amounts misappropriated, his assertion that all clients were repaid lacks conviction.

In *Resner v. State Bar*, *supra*, 67 Cal.2d 799, the Supreme Court reinstated a disbarred attorney whose misconduct included misappropriating a client's money. In showing his willingness and earnestness in making restitution, the petitioner submitted a letter from the attorneys representing the harmed client stating that petitioner had made payments to the client during the previous five years as his income would allow. The letter also stated that the petitioner always expressed his sorrow at having caused the client financial harm. The question regarding the petitioner's attitude toward repayment in *Resner* was affirmatively answered by the client harmed.

[3] Petitioner's misconduct occurred because he found himself overcome by the stresses of his increased financial obligations. Petitioner assured the hearing judge that he would no longer resort to unethical means to pay his debts. Petitioner still has outstanding loan obligations. While that alone would not result in the denial of his petition for reinstatement (see *Resner v. State Bar*, *supra*, 67 Cal.2d at p. 810), given the utter lack of evidence showing his comprehension of the magnitude of harm, or his attitude of mind regarding repayment, his assurances are insufficient evidence of his rehabilitation.

[1h] Petitioner admitted to misappropriating funds from 15 to 20 clients. In only two of those cases do we know the manner of restitution. In only five cases do we even know the amounts of money that were misappropriated. We are left to guess as to the total amount misappropriated from the majority of clients that petitioner harmed. Petitioner may have misappropriated an insignificant amount from the remaining clients, or a sum which far exceeded the loss from just the five identified clients. Petitioner may have returned the funds early and willingly or otherwise. We simply do not know.

[1i] Under any analysis of the record in view of the applicable law, we can conclude only that petitioner's evidence of rehabilitation from this most serious breach of trust is woefully inadequate.

C. Omissions From the Petition for Reinstatement

[4a] It is undisputed that petitioner failed to disclose nine lawsuits to which he was a party. The State Bar contends that petitioner's failure to disclose those nine lawsuits in his petition for reinstatement, along with other omissions, disproves petitioner's rehabilitation. Petitioner testified that he missed the undisclosed lawsuits because he hurried to prepare his petition, and only focused on litigation that occurred in Riverside County.

[4b] An omission is not necessarily fatal to a petition for reinstatement. (See *Calaway v. State Bar* (1986) 41 Cal.3d 743 [Supreme Court reinstated an applicant who omitted an ancillary third party claim noting that the underlying action had been disclosed].) However, if an omitted claim is significant or misleading, or conceals derogatory information, reinstatement may be denied. (See *In the Matter of Giddens, supra*, 1 Cal. State Bar Ct. Rptr. 25 [petitioner denied reinstatement where he disclosed no information regarding two lawsuits].)[21]

[4c] Contrary to the hearing judge's findings, in our view, the nine undisclosed lawsuits are no more remote in time than any of the eleven disclosed lawsuits.[22] There is also little distinction between the nature of the eleven disclosed and nine undisclosed lawsuits. The omitted lawsuit of most concern is Fisher's civil claim.

[4d] While the hearing judge correctly stated that Fisher's claim arose out of the same conduct underlying petitioner's criminal conviction, the disclosure of petitioner's criminal conviction did not reference or point to Fisher's civil claim. (See *Calaway v. State Bar, supra*, 41 Cal.3d at p. 748.) We find this to be significant. This was a distinct civil claim that resulted in a separate $65,000 settlement award to Fisher. While the settlement of this claim was paid out of petitioner's bankruptcy estate, petitioner made no mention of this on the petition for reinstatement.[23] The Fisher lawsuit does not appear to reflect well on petitioner as it asserted petitioner committed fraud, breach of contract, and deceit in connection with his professional relationship with Fisher. In addition, this claim was filed in Riverside County Superior Court.[24]

[4e] Regardless of the reasons for the omissions, we find that the failure to disclose nine lawsuits left "it to chance whether the bar's investigation process would uncover the [lawsuits]." (*In the Matter of Giddens, supra*, 1 Cal. State Bar Ct. Rptr. at p. 33.) Unlike in *Calaway v. State Bar, supra*, 41 Cal.3d 743, here the information regarding the nine omitted lawsuits was not contained in other parts of the petition. While we note that petitioner cured the omission of the nine lawsuits in his supplement to the petition for reinstatement, this was not filed until over a year after the original petition, and subsequent to his deposition in which the State Bar brought these omitted lawsuits to petitioner's attention.

[4f] Even if petitioner omitted the nine lawsuits as a result of hurrying to meet a deadline, he had ample time to correct his omission well before he did so. We find petitioner's lack of care and the expedited manner in which he handled the disclosure of his lawsuits, coupled with his lack of evidence to show rehabilitation, to be troubling, and further demonstrate petitioner's failure to understand the seriousness of

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21. We note the distinction that in *In the Matter of Giddens, supra*, 1 Cal. State Bar Ct. Rptr. 25, the petitioner had previously applied for reinstatement, and one of the undisclosed lawsuits was pending at the time the petition was filed. However, we find *Giddens* instructive in that, with specific regard to the Fisher lawsuit, the disclosure of petitioner's criminal conviction should have refreshed his memory of the connected civil claim. (See *In the Matter of Giddens, supra*, 1 Cal. State Bar Ct. Rptr. at p. 33.)

22. Of the 11 disclosed lawsuits, one was filed in 2003, one in 2000, one in 1996, two in 1995, one in 1994, two in 1992, one in 1989, one in 1965, and one in 1959. (The 1965 and 1959 lawsuits represent ongoing litigation that continued for many years in connection with the two Rudnick family trusts.) Of the nine undisclosed lawsuits, one was filed in 1997, two in 1995, four in 1994, one in 1989, and one in 1987.

23. Petitioner did not disclose that the bankruptcy estate paid this claim until he submitted his supplement to the petition for reinstatement.

24. In total, four of the undisclosed lawsuits were filed in either the Riverside Superior or Municipal Court.

his misconduct. In addition, we consider petitioner's failure to disclose the TRACO debt, in light of the other omissions, as further demonstrating his carelessness regarding the submission of his petition. We have observed that the petition for reinstatement is not merely a paperwork exercise to hurdle on the way to readmission. (*In the Matter of Giddens*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 34.) Here, petitioner did not even succeed the jump.

D. Letters in Support of Rehabilitation

Petitioner asserts that both the Supreme Court and this court have reinstated attorneys based primarily on character testimony, and cited to multiple cases in which this occurred. First, it is well–established that character evidence, no matter how laudatory, does not alone establish the requisite rehabilitation. (*In re Menna*, *supra*, 11 Cal.4th at p. 988; see also *Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 939; *In re Petty* (1981) 29 Cal.3d 356, 362; *Wettlin v. State Bar*, *supra*, 24 Cal.2d at p. 869.)

In *In the Matter of Cate* (1922) 60 Cal.App. 279, a petitioner's application for reinstatement was denied where he had been criminally convicted of embezzlement of his clients' money. In support of his application, the petitioner submitted numerous letters by his co–workers, attorneys, and members of a local bar association. While all submitted that the petitioner had learned a valuable lesson and would conduct himself with propriety in the future, the court found these letters inadequate as none provided facts on which the court could determine the petitioner's rehabilitation. "[N]o disbarred attorney can be reinstated in his old place in the profession except upon a showing of *facts*, aided perhaps by affidavits or even letters of well–known persons, particularly lawyers and judges, expressing a conviction, based on a statement of facts, that the petitioner for reinstatement has reformed, and all demonstrating that he is fit to reassume the ermine which he has already polluted." (*Id.* at p. 283, original italics.)

[5a] In instances where significant weight has been afforded to character declarations or testimony, the evidence has been complementary to the other probative evidence of the petition. (See *In the Matter of Salant* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 1, 4 [detailed accounts from two government attorneys for whom petitioner had directly worked in stressful, conflict–laden work where she showed the determination to always do the ethical thing].)

[5b] Letters in support of petitioner's reinstatement described him as a man of personal integrity. Some of the declarations described his present involvement in charitable activities and asserted that petitioner's earlier criminal conduct was aberrant behavior traceable to financial stresses. All of the declarants stated they were aware of petitioner's misconduct. While we do not doubt the sincerity of the comments expressed in support of petitioner, given that petitioner has not accounted for the full financial extent of the harm to his clients, nor the manner in which he made restitution, we do not see how his witnesses can either fully understand the magnitude of petitioner's misconduct or how he made up for it.

E. Other Evidence Regarding Reinstatement

The hearing judge found that petitioner's showing of his present learning and ability in the law was sufficient to meet his burden, and the State Bar has not contested this issue. While not extraordinary, upon our independent review we find petitioner's showing of his present learning and ability in the law sufficient. In addition, we find petitioner's community service and pro bono work positive, but it cannot fill the large hole caused by his failure to prove his rehabilitation from his earlier pattern of misappropriation of trust funds.

Petitioner's failure to timely comply with rule 955 would not necessarily preclude his reinstatement. (*Hippard v. State Bar*, *supra*, 49 Cal.3d at pp. 1096–1097 [noting that the violation occurred over ten years prior to the petition for reinstatement and did not cause any injury to the attorney's clients]; *In the Matter of Salant*, *supra*, 4 Cal. State Bar Ct. Rptr. at pp. 5–6 [failure to comply with rule 955 was not in itself a ground for denial where the attorney had no clients or cases pending at the time of her disbarment, and delegated the submission of this requirement to

her counsel who did not follow through].) The *Hippard* court noted that in denying a petitioner for reinstatement where "there is a significant infirmity in the showing of rehabilitation, the failure to comply with rule 955 is a proper consideration." (*Hippard v. State Bar*, *supra*, 49 Cal.3d at p.1097.)

III. CONCLUSION AND RECOMMENDATION

We reiterate that the burden to show rehabilitation on a petitioner seeking reinstatement is a heavy one. Petitioner has not met this burden. He has not demonstrated an understanding of the magnitude of his misconduct nor has he shown the manner in which he rectified the extensive harm he caused. The evidence presented by petitioner on these crucial issues was so minimal that we can only conclude that he has failed to sustain his burden. Accordingly, the petition for reinstatement is denied.

We concur:
REMKE, P. J.
WATAI, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

THOMAS L. RIORDAN

A Member of the State Bar

No. 02–O–11078

Filed April 19, 2007

SUMMARY

A hearing judge recommended respondent be publicly reproved due to his handling of an automatic appeal from a capital sentence in which he failed to perform legal services with competence, failed to comply with Supreme Court orders, and failed to timely report judicial sanctions. (Hon. Joann M. Remke, Hearing Judge.) Both the respondent and State Bar appealed.

The review department adopted the hearing judge's culpability findings but modified the findings of the hearing judge with respect to mitigation and aggravation and recommended that respondent be suspended for six months, stayed, and that he be placed on probation for one year with conditions.

COUNSEL FOR PARTIES

For State Bar: Sherrie B. McLetchie

For Respondent: Jerome Fishkin

HEADNOTES

[1] 270.30 Rule 3–110(A)[former 6–101(A)(2)/(B)] (nonnegligent incompetence)
Although noncompliance with a time limitation does not establish per se a failure to act competently, such noncompliance can constitute a violation of Rules of Procedure of the State Bar, rule 3–110(A) if it is not the result of mere negligence. Where respondent was counsel of record for a decade on a capital appeal, successfully moved for appointment of associate counsel, conferred with California Appellate Project staff counsel with respect to relevant issues, sufficiently familiarized himself with the record on appeal, and obtained eight extensions of time over almost two years to file an opening brief, respondent's failure to ultimately file an opening brief evidenced a reckless failure to perform

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Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

legal services competently. Neither the Supreme Court's refusal to permit respondent's withdrawal nor perceived inadequacies of his draft opening brief by others excused respondent's failure to file a brief.

[2] **220.00 State Bar Act Section 6103, clause 1 (disobedience of court order)**
In order to be found culpable of wilfully violating Business and Professions Code section 6103, the State Bar need not prove that respondent violated court orders in bad faith. For disciplinary purposes, bad faith must be proved if the State Bar alleges that respondent's noncompliance with court orders involves moral turpitude.

[3] **214.50 Section 6068(o) (comply with reporting requirements)**
Respondent had an independent duty to report judicial sanctions. Business and Professions Code section 6068, subdivision (o)(3) offers no exception to respondent's independent reporting obligation, regardless of his actual knowledge that the Supreme Court had complied with its own separate statutory duty to notify the State Bar.

[4] **710.10 Mitigation–Long Practice with no prior discipline record (1.2(e)(i))–Found**
Although standard 1.2(e) of the Standards for Attorney Sanctions for Professional Misconduct describes instances when consideration of certain mitigating circumstances is mandatory, it is by no means an exclusive list of every factor that may be considered in mitigation. The Supreme Court has considered the absence of prior discipline in mitigation even when the misconduct was serious, thus respondent's practice of law for more than 17 years with no prior record of discipline is a significant mitigating factor.

[5] **750.10 Mitigation–Passage of time and rehabilitation (1.2)(e)(viii))–Found**
Although the hearing judge neither referenced Standards for Attorney Sanctions for Professional Misconduct, standard 1.2(e)(viii) nor specifically found respondent to be rehabilitated, this does not foreclose consideration of respondent's three and one–half years of successful post–misconduct practice since the Supreme Court has found mitigation where there was no specific showing of rehabilitation other than the practice of law for a period of time without further misconduct.

[6] **735.10 Mitigation–Candor and cooperation with Bar (1.2(e)(v))–Found**
Where stipulated facts were not difficult to prove and did not admit culpability but were extensive, relevant and assisted the State Bar's prosecution of the case, respondent's factual stipulation was a mitigating circumstance.

[7] **1013.04 Six months (incl. anything between 6 and 9 mos)**
1017.06 One year (incl. anything between 1 yr. & 18 mos.)
Where respondent failed to perform legal services with competence, failed to obey Supreme Court orders, and failed to timely report judicial sanctions imposed by the Supreme Court, where there was mitigation for 17 years of practice without prior discipline, exemplary post–misconduct practice, good character, and cooperation with the State Bar, and where there was aggravation due to multiple acts of wrongdoing and significant harm to the administration of justice, the appropriate disciplinary recommendation was a six–month stayed suspension and one year of probation on conditions.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

THOMAS L. RIORDAN

A Member of the State Bar

No. 02–O–11078

Filed April 19, 2007

SUMMARY

A hearing judge recommended respondent be publicly reproved due to his handling of an automatic appeal from a capital sentence in which he failed to perform legal services with competence, failed to comply with Supreme Court orders, and failed to timely report judicial sanctions. (Hon. Joann M. Remke, Hearing Judge.) Both the respondent and State Bar appealed.

The review department adopted the hearing judge's culpability findings but modified the findings of the hearing judge with respect to mitigation and aggravation and recommended that respondent be suspended for six months, stayed, and that he be placed on probation for one year with conditions.

COUNSEL FOR PARTIES

For State Bar: Sherrie B. McLetchie

For Respondent: Jerome Fishkin

HEADNOTES

[1] **270.30 Rule 3–110(A)[former 6–101(A)(2)/(B)] (nonnegligent incompetence)** Although noncompliance with a time limitation does not establish per se a failure to act competently, such noncompliance can constitute a violation of Rules of Procedure of the State Bar, rule 3–110(A) if it is not the result of mere negligence. Where respondent was counsel of record for a decade on a capital appeal, successfully moved for appointment of associate counsel, conferred with California Appellate Project staff counsel with respect to relevant issues, sufficiently familiarized himself with the record on appeal, and obtained eight extensions of time over almost two years to file an opening brief, respondent's failure to ultimately file an opening brief evidenced a reckless failure to perform

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Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

legal services competently. Neither the Supreme Court's refusal to permit respondent's withdrawal nor perceived inadequacies of his draft opening brief by others excused respondent's failure to file a brief.

[2] **220.00 State Bar Act Section 6103, clause 1 (disobedience of court order)**
In order to be found culpable of wilfully violating Business and Professions Code section 6103, the State Bar need not prove that respondent violated court orders in bad faith. For disciplinary purposes, bad faith must be proved if the State Bar alleges that respondent's noncompliance with court orders involves moral turpitude.

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ADDITIONAL ANALYSIS

Culpability

Found

214.51 Section 6068(o) (comply with reporting requirements)

220.01 Section 6103, clause 1 (disobedience of court order)

270.31 Rule 3–110(A) (former 6–101)(A)(2)/(B))(nonnegligent incompetence)

Aggravation

Found

586.10 Harm to administration of justice

Found but Discounted

523 Multiple Acts

Declined to Find

565 Uncharged violations

Mitigation

Found but Discounted

740.31 Good character

Declined to Find

715.50 Good faith

Discipline

Standards

863.90 Standard 2.6–Suspension

OPINION

WATAI, J.

I. INTRODUCTION

Respondent, Thomas L. Riordan, requests review of a decision recommending that he be publicly reproved due to his handling of an automatic appeal from a capital sentence[1] in which he failed to perform legal services with competence, failed to comply with Supreme Court orders, and failed to timely report judicial sanctions imposed by the Supreme Court. Respondent seeks a reversal of the culpability findings. The State Bar also requests review, urging us to affirm the culpability findings and recommend respondent's actual suspension for sixty days.

Respondent was admitted to the practice of law in California on December 3, 1982, and has no prior record of discipline. His misconduct began in October 2000 and continued through February 2005. We have independently reviewed the record (Cal. Rules of Court, rule 9.12;[2] Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207) and find clear and convincing evidence to support all findings of culpability. The parties further request various modifications to factual findings and legal conclusions. To the extent we agree, the opinion so reflects; otherwise, as more fully discussed below, we adopt the factual and culpability findings of the hearing department, as modified, and increase the recommendation regarding discipline to include a six–month stayed suspension.

II. DISCUSSION

A. Factual and Procedural Background

On September 12, 1991, the California Supreme Court (Court) appointed respondent as lead counsel to represent defendant Richard Turner in his automatic appeal and any related habeas corpus proceedings pending before that Court. Turner had been convicted of murder in the first degree and was sentenced to the punishment of death on about October 19, 1988, in the San Bernardino County Superior Court. Although respondent had no prior death penalty appellate experience, he applied for the appointment after Kevin Culhane, a partner with respondent's law firm, urged him to undertake such an appeal.[3] While preparing the Turner appeal, respondent worked with California Appellate Project (CAP) staff attorneys.[4] In addition to offering guidance and reviewing respondent's drafts, CAP provided respondent with material on death penalty appeals such as sample appellate briefs and relevant case law. After respondent requested appointment of associate counsel to assist in the investigation and preparation of the petition for writ of habeas corpus, the Court appointed Robert M. Sanger on June 26, 1992, as associate counsel to represent defendant Turner in the same capacity as respondent. Almost eight years after respondent was appointed to the Turner appeal, the record on appeal was certified on

1. See Penal Code section 1239, subdivision (b).

2. Effective January 1, 2007, rule 951.5 has been renumbered as rule 9.12.

3. Only five months prior to his appointment to the Turner appeal, respondent became an associate with the now–defunct Sacramento law firm of Hansen, Boyd, Culhane, and Watson (Hansen). While with Hansen, respondent worked for several different partners, primarily researching and writing motions. Respondent left the firm in August 2002 after it was suggested that he seek other employment opportunities due to his handling of the Turner appeal. Before the Supreme Court appointed respondent to the Turner appeal, his work experience involved approximately three years as a research attorney with the Contra Costa County Public Defender's Office where he completed a small percentage of criminal appellate work, one and one–half years as an associate with a private law firm in San Francisco where he performed a small amount of civil appellate work, and approximately three years as a research attorney with the Third District Court of Appeal in Sacramento where approximately half his work involved criminal appeals.

4. CAP is a nonprofit law firm established by the State Bar in 1983 that assists private attorneys appointed to represent indigent persons in death penalty appeals and in other criminal appeals and writs before the California Supreme Court. CAP assigns staff attorneys to cases with appointed counsel to provide guidance and assistance, as needed, in preparation of an appeal. CAP typically does not become attorney of record and was never attorney of record in the Turner appeal.

July 6, 1999, and on that same date, the Court notified respondent and Sanger that the appellant's opening brief (AOB) was due on August 16, 1999.

The Court granted respondent's repeated requests for extensions of time to file the AOB.[5] On August 25, 2000, the Court granted respondent's seventh request for extension of time and stated that "No further extensions of time are contemplated." Despite this admonition, respondent requested an eighth extension and on October 24, 2000, the Court granted an extension to December 12, 2000, stating that "No further extensions of time will be granted." Nevertheless, instead of filing the AOB on December 12, respondent filed his ninth request for an extension of time, which the Court denied on December 20, 2000.

Despite the Court's denial, respondent did not file the AOB. Instead, on February 21, 2001, respondent filed a request to withdraw as counsel and to substitute Sanger as sole counsel for Turner. On June 13, 2001, the Court denied respondent's request without prejudice, and on June 27, 2001, ordered that the AOB be filed by July 31, 2001. The Court further warned that if the AOB was not timely filed, it would consider issuing an order directing respondent and Sanger to show cause why they should not be held in contempt or other sanction imposed for their delay in the appellate process occasioned by the eight extensions of time thus far granted. Neither respondent nor Sanger filed the AOB by the due date, and on August 15, 2001, the Court issued an order to show cause why they should not be held in contempt for the willful neglect of their duty to file the AOB. (*In re Thomas L. Riordan and Robert M. Sanger on Contempt*, California Supreme Court Case No. S009038.)

The hearing on the order to show cause was held on November 7, 2001. By order filed November 14, 2001, the Court relieved respondent as counsel of record in the Turner appeal.[6] On January 7, 2002, the Court filed and served on respondent an opinion finding him guilty of contempt and ordering him to pay a fine of $1,000. (*In re Riordan* (2002) 26 Cal.4th 1235.) The Court specifically found that respondent had not complied with the Court's June 27, 2001 order, that respondent was aware of and had the ability to comply with the order, and that his failure to do so was both willful and an act occurring in the immediate view and presence of the Court within the meaning of Code of Civil Procedure section 1211, thus constituting a direct contempt.[7] In a separate order also filed on January 7, 2002, the Court ordered respondent to reimburse the Court for the $42,378.36 in fees paid for preparation of the AOB.[8]

The Court forwarded a copy of the judgment of contempt to the State Bar. On January 26, 2005, the State Bar filed a three–count Notice of Disciplinary Charges (NDC) alleging that respondent failed to perform competently, failed to obey court orders, and failed to report judicial sanctions. Although respondent was required to notify the State Bar of the $1,000 fine no later than February 11, 2002, he failed to do so until three years later when he filed a response to the NDC on February 17, 2005.

After a three–day trial on August 2, 3, and 9, 2005, the hearing judge found respondent culpable on all charged counts and, upon considering the mitigating and aggravating circumstances, recommended respondent's public reproval.

B. Count One: Failing to Act Competently (Rules Prof. Conduct, rule 3–110(A))[9]

Respondent initially worked diligently on the Turner appeal but did not maintain that effort, as evidenced by the fact that he spent a mere two and one–half weeks on the Turner appeal in 2000 and

5. The Court granted respondent's requests for extension of time to file the AOB on August 20, 1999, October 21, 1999, December 23, 1999, February 28, 2000, April 18, 2000, July 3, 2000, August 25, 2000, and October 24, 2000.

6. Sanger was designated sole counsel on appeal, and he filed the AOB on May 7, 2002. The Turner appeal was decided in *People v. Turner* (2004) 34 Cal.4th 406.

7. In her decision, the hearing judge mischaracterized various statements made by the justices at the OSC hearing as "findings." However, the only substantive findings of the Court are contained in its written opinion and order. (See *In re Caldwell's Estate* (1932) 216 Cal. 694, 697.)

8. Respondent's firm paid both the fine and fee reimbursement on February 6, 2002.

performed no substantial work on it in 2001. The hearing judge found that having spent eight years on the appeal, respondent knew or should have known the matter was not simple. Rather than seek the Court's permission to withdraw earlier, respondent procrastinated, sought repeated extensions, and fostered the impression that he was working on the AOB. Ultimately, respondent was unable to complete and file the AOB, and it took the intervention of the Supreme Court to ensure that the Turner matter was fully briefed. Because respondent failed to timely file the AOB, the hearing judge concluded that respondent willfully violated rule 3–110(A).

The focus of our inquiry as to a charge of failing to act competently is whether respondent intentionally, recklessly, or repeatedly failed to apply the diligence, learning and skill, and mental, emotional, and physical ability reasonably necessary to discharge the duties arising from his employment. (Rule 3–110(A).) In order to fulfill Turner's right to effective assistance of counsel, due process principles required respondent, as appointed advocate, to submit, at a minimum, "'a brief referring to anything in the record that might arguably support the appeal.'" (*In re Andrew B.* (1995) 40 Cal.App.4th 825, 853.) Respondent contends that because his request to withdraw was denied and his draft brief was deemed constitutionally inadequate by his co–counsel,[10] his failure to timely file the AOB in this case does not constitute a violation of rule 3–110(A). Respondent's argument is unpersuasive. "That an appellate attorney has demonstrated a willingness to undertake the difficult task of representing criminal defendants sentenced to suffer the death penalty does not excuse his failure timely to [file a brief or] investigate fully the potential grounds for . . . relief in any particular case." (*In re Sanders* (1999) 21 Cal.4th 697, 712 [appellate counsel appointed to represent defendant's direct appeal and habeas corpus proceedings abandoned defendant because he never investigated or filed a petition for a writ of habeas corpus].)

[1] Although noncompliance with a time limitation does not establish per se a failure to act competently (see *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 377), we have found a violation of rule 3–110(A) when an attorney's noncompliance with a time limitation is not the result of mere negligence. (See, e.g., *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 278, 279 [attorney's failure to attend a status conference in a client's workers' compensation case constituted reckless failure to perform legal services]; *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 155 [attorney's failure to file a complaint within the statute of limitations, when part of a series of repeated failures, constituted a failure to perform legal services competently].) During the decade that respondent was counsel of record on the Turner appeal, he successfully moved for appointment of associate counsel, conferred with CAP staff counsel with respect to relevant issues, sufficiently familiarized himself with the record on appeal to create an extensive draft AOB, and obtained eight extensions of time over almost two years to file the AOB after the record on appeal was certified. In spite of these efforts on Turner's behalf, respondent was unable to finish his assigned task. Given the length of time respondent was involved in the appeal, it is simply inexplicable that he could not or did not either obtain adequate assistance or take timely steps to withdraw, particularly in a case involving the death penalty where diligent representation was of paramount importance. Under these circumstances, respondent's failure ultimately to file the AOB evidences a reckless failure to perform legal services competently. Neither the Court's refusal to permit respondent's

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9. Unless noted otherwise, all further references to rule(s) are to the Rules of Professional Conduct.

10. Respondent testified that by the end of 2000, he became aware that both his assigned CAP staff attorney, Scott Kauffman, and Sanger believed respondent's draft AOB did not develop critical issues. Kauffman testified that he did not believe respondent's draft AOB was sufficient to file and Sanger testified that he did not feel respondent's draft AOB was adequate to present to the Court. Sanger testified in the hearing below that he did utilize some of respondent's work product, and the evidence corroborates that significant portions of the AOB drafted by respondent were incorporated into the brief ultimately filed by Sanger.

withdrawal nor perceived inadequacies of his draft by others excused respondent's protracted delay and utter failure to file the AOB.

C. Count Two: Failure to Obey Court Orders (Bus. & Prof. Code, § 6103)[11]

The hearing judge found that respondent failed to comply with the Court's October 24, 2000 and June 27, 2001 orders requiring the AOB be filed no later than December 12, 2000, and July 31, 2001, respectively, in willful violation of section 6103. We find clear and convincing evidence to support this culpability determination, particularly since the Court filed an opinion, *ante*, finding that respondent had not complied with its June 27, 2001 order, that respondent was aware of and had the ability to comply with said order, and that respondent's failure to do so was willful, constituting a direct contempt.

[2] Respondent argues that he should not be found culpable of willfully violating section 6103 because the State Bar failed to prove that he violated the Court's orders in bad faith. Contrary to respondent's assertion, we do not find that bad faith is a necessary element of a section 6103 violation.[12] For disciplinary purposes, bad faith must be proved if the State Bar alleges that respondent's noncompliance with the Court's orders involves moral turpitude. (See *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 950–953.) Such an allegation is not at issue in this matter.

Respondent also claims he did not comply with the Court's orders because he had a good faith belief that his draft AOB was insufficient to adequately protect Turner's interests and that Sanger had assumed the task of filing the AOB. The hearing judge rejected this argument, as do we. Respondent's *belief* in the merit or lack of merit of his brief is simply irrelevant to the issue of whether he made a good faith *effort* to comply with the Supreme Court's orders. Respondent had an affirmative duty to comply with the Court's orders and he could not simply disregard them and "sit back and await contempt proceedings before complying with or explaining why he . . . cannot obey a court order." (*In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 404.) Moreover, in view of the Court's statements in its orders that "no further extensions of time are contemplated" and "no further extensions of time will be granted," we find that respondent's claimed belief that he had the right to ignore this clear and unequivocal language was implausible at best and disingenuous at worst. (*Maltaman v. State Bar, supra*, 43 Cal.3d at pp. 951–952.) Nevertheless, we address respondent's asserted basis for good faith as a possible factor in mitigation, *post*.

D. Count Three: Failure to Report Judicial Sanctions (§ 6068, subd. (o)(3))[13]

Respondent stipulated that he was served with the Court's opinion finding him in contempt and sanctioning him in the amount of $1,000. He also stipulated that he was to notify the State Bar about the imposed sanction no later than February 11, 2002. Since respondent did not so notify the State Bar until February 17, 2005, the hearing judge concluded that he willfully violated section 6068, subdivision (o)(3).

[3] On appeal, respondent admits that he did not report the judicial sanction by February 11, 2002, but justifies his failure to do so because he received a copy of the February 7, 2002, notice of the sanction sent to the State Bar by the Clerk of the Supreme Court. Respondent claims that because he had actual knowledge that the Clerk notified the State Bar of the

11. Unless noted otherwise, all further references to section(s) are to the Business and Professions Code.

12. According to section 6103, "A wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear . . . [constitutes cause] for disbarment or suspension."

13. Under this section, "It is the duty of an attorney . . . .[¶] . . . [¶] . . . To report to the [State Bar], in writing, within 30 days of the time the attorney has knowledge of . . . . [¶] . . . [¶] . . . The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000)."

sanction, it would have been superfluous for him to provide additional written notice. We disagree. The Clerk had a statutory duty to notify the State Bar of the order of contempt and imposition of judicial sanctions and therefore did not notify the State Bar on respondent's behalf.[14] However, respondent had an independent duty to report judicial sanctions and the time for reporting such sanctions ran from the moment he knew the sanctions were imposed, regardless of the finality of the order or pendency of any appeal. (*In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 866–867.) Section 6068, subdivision (o)(3) offers no exception to respondent's independent reporting obligation, regardless of his actual knowledge that the Court had complied with its own separate statutory duty to notify the State Bar. (See, e.g. *In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 176 [attorney's awareness that the Superior Court was notifying the State Bar of sanctions mitigated his violation of section 6068, subdivision (o)(3) but did not absolve him of culpability].) Thus, we adopt the hearing judge's culpability finding on this count.

E. Factors in Aggravation and Mitigation

1. Aggravation

We agree with the hearing judge's determination that respondent engaged in multiple acts of wrongdoing, but we give this little weight. Respondent willfully failed to obey court orders and failed to promptly report the imposition of judicial sanctions. These acts support a finding in aggravation that respondent engaged in multiple acts of misconduct. (See *In the Matter of Malek–Yonan* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627 [two violations of failure to supervise resulting in trust fund violations, plus improper threat to bring criminal action constituted multiple acts of wrongdoing in aggravation]; but see *In the Matter of Blum, supra,* 3 Cal. State Bar Ct. Rptr. at p. 177 [one client matter involving misappropriation, failure to promptly pay funds at client's request and failure to inform client of right to seek independent counsel, plus failure to report sanctions in another client matter, were not viewed by this court "as strongly presenting aggravation on account of multiple acts of misconduct . . . ."]; Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(ii).)[15]

The State Bar contends that the hearing judge improperly failed to consider additional evidence of uncharged misconduct and argues that respondent lied to the Court at the OSC hearing when he told Justice Kennard that his practice had been exclusively civil since 1991 when he was appointed to the Turner appeal. It is unclear whether respondent's statement to Justice Kennard was solely limited to his practice with the Hansen firm which may have been exclusively civil, the Turner appeal notwithstanding.[16] Accordingly, on this record, we do not find clear and convincing evidence that respondent intended to mislead the Court or willfully committed an act involving moral turpitude, dishonesty or corruption.

The State Bar next contends that the hearing judge omitted a finding that respondent's conduct in failing to timely file the AOB significantly harmed the administration of justice. We agree. Respondent's misconduct unnecessarily delayed the appellate process by more than two years and thus harmed the administration of justice. (Std. 1.2(b)(iv); see also *In*

14. Section 6086.7, subdivision (a) provides that "A court shall notify the State Bar of any of the following: [¶] . . . A final order of contempt imposed against an attorney that may involve grounds warranting discipline [or] . . . . [¶] . . . [¶] . . . The imposition of any judicial sanctions against an attorney, except sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000)."

15. All further references to standard(s) are to these provisions.

16. During the OSC hearing, Justice Kennard stated to respondent, "you indicated that the root of the problem in this case [the Turner appeal] for your failure to come up with a brief within certain time constraints was your problem in dealing with criminal issues." Justice Kennard then asked respondent, "Do I gather, then, that currently your practice is – you have a very heavy civil practice; would that be correct to state?" Respondent stated, "You're right. It's exclusively civil. And has been since I had this – the case in 1991."

the Matter of Hunter (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 75, 79 [attorney's misconduct which included, among other things, violation of court orders and findings of contempt, harmed the administration of justice].)

2. Mitigation

[4] We adopt the hearing judge's finding that respondent practiced law for over 17 years with no prior record of discipline. The State Bar contends that respondent should receive no mitigative credit for his extensive period of discipline–free practice because his present misconduct is serious. We are not persuaded by the State Bar's argument. According to standard 1.2(e), "Circumstances which *shall* be considered mitigating are: [¶] (i) [the] absence of any prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious . . . ." (Italics added.) Thus, in a disciplinary proceeding where an attorney sufficiently proves the absence of a prior record of discipline over many years and where the misconduct is not deemed serious, mitigative credit must be given. Although standard 1.2(e) describes instances when consideration of certain mitigating circumstances is mandatory, it is by no means an exclusive list of every factor that may be considered in mitigation. Indeed, the Supreme Court and this court routinely have considered the absence of prior discipline in mitigation even when the misconduct was serious. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 31, 32, 36, 39 [mitigative credit given for almost twelve years of discipline–free practice despite intentional misappropriation and commingling]; *Boehme v. State Bar* (1988) 47 Cal.3d 448, 452–453, 454–455 [twenty–two years of practice without prior discipline was important mitigating circumstance despite attorney's intentional misappropriation and lack of candor to court]; *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 588–589, 591 [mitigation acknowledged for the absence of a prior record of discipline in twelve years of practice despite willful misappropriation of over $29,000]; *In the Matter of Trillo* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 59, 69 [credit given for no prior history of discipline in fourteen years of practice where attorney converted client funds and deceived clients].) Therefore, we consider respondent's practice of law for more than 17 years with no prior record of discipline to be a significant mitigating factor.

[5] Like the hearing judge, we also find mitigating the fact that there has been no further misconduct on the part of respondent.[17] However, while the hearing judge determined that respondent had been practicing for more than four years without misconduct, we conclude that only three and one–half years elapsed from the date respondent failed to timely report judicial sanctions in February 2002 to the date trial commenced in this matter in August 2005. Although the hearing judge neither referenced standard 1.2(e)(viii) nor specifically found respondent to be rehabilitated,[18] this does not foreclose consideration of respondent's successful post–misconduct practice since the Supreme Court has found mitigation where there was no specific showing of rehabilitation other than the practice of law for a period of time without further misconduct. (*Amante v. State Bar* (1990) 50 Cal.3d 247, 256 [three years of unblemished post–misconduct practice given mitigative credit]; *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 305, 308, 316–317 [passage of approximately six years of continued practice without suffering additional charges of unethical conduct demonstrated attorney's ability to adhere to standards of professional behavior and was considered in mitigation].) Thus, we afford mitigation to respondent's three and one–half years of discipline–free, post–misconduct practice.

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17. On the third day of trial during respondent's direct examination, his attorney asked him "Do you have any prior record of discipline?" Respondent answered, "No." Respondent's attorney then asked, "And do you have any subsequent discipline cases since this one has been raised?" Respondent answered, "No." Although it had the opportunity to do so, the State Bar did not rebut respondent's claim. Thus, we reject the State Bar's assertion that there is no evidence in the record that respondent did not commit further misconduct.

18. Standard 1.2(e) states that "Circumstances which shall be considered mitigating are: [¶] . . . [¶] (viii) the passage of considerable time since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation . . . ."

The hearing judge gave slightly diminished mitigation to respondent's evidence of good character, reasoning that respondent's four character witnesses, all of whom were attorneys, did not constitute a wide range of references in the legal and general communities required under standard 1.2(e)(vi).[19] Each witness reviewed the Stipulation of Undisputed Facts and the pretrial statements each party filed,[20] and uniformly attested at trial to respondent's good character and honesty. The hearing judge found that the declaration of one of the character witnesses, Ms. Pavlovich, was "particularly noteworthy" and so do we. Ms. Pavlovich testified that she had worked with respondent in the same law firm for twelve years, which included the time when he was working on the Turner AOB. She declared that "he performed his assignments in an exemplary manner" and that "she trusted him completely to timely deliver an excellent work product." She further attested that he was "one of the most honest, honorable, moral persons" she had known and "of the highest moral character." Because attorneys and judges have a "strong interest in maintaining the honest administration of justice" (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319), "[t]estimony of members of the bar . . . is entitled to great consideration." (*Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403.) However, in disciplinary proceedings, we have tempered the weight afforded evidence of good character offered for the purpose of mitigation when a wide range of references is absent. (See, e.g., *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 590, 594–595 [character testimony of an attorney, district sales manager, and a department store owner did not constitute a wide range of references]; *In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 476 [character testimony from three attorneys not a sufficiently wide range of references].) Thus, like the hearing judge, we recognize respondent's good character evidence but, due to the absence of a wide range of references, diminish its weight in mitigation accordingly.

[6] We agree with the hearing judge that respondent's cooperation with the State Bar by entering into a factual stipulation covering background facts should be considered in mitigation. Although the stipulated facts were not difficult to prove and did not admit culpability, they were, nevertheless, extensive, relevant and assisted the State Bar's prosecution of the case. The State Bar further admitted in its pretrial statement that respondent had "cooperated in the State Bar's investigation and proceedings . . . ." Thus, we consider respondent's factual stipulation a mitigating circumstance under standard 1.2(e)(v). (See *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 567 [attorney afforded mitigation for entering belated stipulations which mostly concerned easily provable facts].)

As mentioned earlier, the hearing judge properly rejected respondent's good faith claim as a defense to his culpability under section 6103. We also find his good faith claim in mitigation is unavailing. "In order to establish good faith as a mitigating circumstance, an attorney must prove that his or her beliefs were both honestly held *and* reasonable. [Citations.]" (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653, italics added.) To conclude otherwise would reward an attorney for his unreasonable beliefs and "for his ignorance of his ethical responsibilities." (*In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420, 427.) Even if respondent honestly believed that his draft AOB was insufficient to adequately protect Turner's interests and that Sanger had assumed the task of filing the AOB, it was not reasonable for him to believe that he did not have to comply with the Court's order to timely file the AOB since respondent knew the Court had rejected his requests for addi-

19. Standard 1.2(e) states that "Circumstances which shall be considered mitigating are: [¶] . . . [¶] (vi) an extraordinary demonstration of good character of the member attested to by a wide range of references in the legal and general communities and who are aware of the full extent of the member's misconduct . . . ."

20. We reject as unsupported by the record the State Bar's contention that respondent's character witnesses were not aware of the full extent of his misconduct. We see no shortcoming in using the parties' pretrial statements, which addressed the charges against respondent, and stipulation to apprise the character witnesses of petitioner's alleged unethical acts.

tional extensions of time and to be relieved as counsel. In addition, respondent made no effort to confirm that Sanger would be able to timely file the AOB.

F. Level of Discipline

The hearing judge recommended that respondent be publicly reproved. The State Bar requests that respondent be actually suspended, while respondent seeks dismissal of all charges.[21] We have found respondent culpable of failing to perform competently, to obey court orders and to timely report judicial sanctions. Respondent's unethical conduct is aggravated because it involves multiple acts of misconduct and significantly harmed the administration of justice. Respondent's mitigation consists of a seventeen–year career with no record of discipline, three and one–half years of successful post–misconduct practice, good character, and cooperation with the State Bar.

We observe that rather than the punishment of attorneys, the purpose of attorney discipline is the protection of the public, the preservation of confidence in the legal profession, and the maintenance of the highest professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; std. 1.3.) In determining the appropriate level of discipline, we afford "great weight" to the standards (*In re Silverton* (2005) 36 Cal.4th 81, 92). Nevertheless, The Supreme Court is "'not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender.' [Citations.]" (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994, quoting *Howard v. State Bar* (1990) 51 Cal.3d 215, 221–222.) We also consider relevant decisional law. (See *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059.)

Standard 2.6 applies to respondent's misconduct and, depending on the gravity of the offense or harm, provides for disbarment or suspension when an attorney violates section 6068 or 6103.[22] A review of a variety of case law, as well as the unique facets of this case, discussed *post*, leads us to conclude that respondent's misconduct warrants discipline on the low end of the range suggested by standard 2.6, particularly since there was no client harm in this matter.[23]

In *Borre v. State Bar* (1991) 52 Cal.3d 1047 (*Borre*), an attorney who had practiced law for over 14 years without prior discipline received a two–year actual suspension after he abandoned an incarcerated client's criminal appeal. Despite obtaining two extensions of time to file the opening brief, the attorney never filed it, and the court dismissed the appeal. (*Id.* at p. 1050.) After the client filed a complaint with the State Bar, the attorney proffered an exculpatory letter which was determined to be fabricated. (*Ibid.*) In adopting a two–year actual suspension, the Supreme Court noted that "Petitioner's abandonment of his incarcerated client was itself a serious matter warranting substantial discipline [Citation]" and that "His fabrication of the . . . letter and subsequent lies . . . are particularly egregious." (*Id.* at p. 1053.)

In *Harris v. State Bar* (1990) 51 Cal.3d 1082 (*Harris*), the Supreme Court imposed a 90–day actual suspension on an attorney who "did virtually

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21. In the alternative, respondent urges us to recommend his admonishment in the event we find him culpable of unethical conduct.

22. According to this standard, "Culpability of a member of a violation of any of the following provisions of the Business and Professions Code shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline . . . [¶] (a) Sections 6067 and 6068; [¶] (b) Sections 6103 through 6105 . . . ."

23. Since the gravamen of respondent's misconduct involves issues of competent performance, which in this instance underlie a violation of Supreme Court orders, we have reviewed cases which involve either an attorney's failure to perform in a single client matter or failure to obey court orders.

nothing for over four years to perform the duties for which she had been retained." (*Id.* at p. 1088.) Although the attorney practiced law for ten years without misconduct and contracted typhoid six months after being retained, this did not outweigh the fact that she caused substantial prejudice to the client and showed no remorse or even an understanding that her neglect was improper. (*Ibid.*)

In *Layton v. State Bar* (1990) 50 Cal.3d 889 (*Layton*), the Supreme Court imposed a 30–day actual suspension on an attorney who, over more than a five–year period, failed to conserve the assets and obtain the distribution of an estate for which he was the attorney and executor. (*Id.* at p. 897.) Due to his neglect, the probate court removed the attorney as estate executor. (*Ibid.*) The attorney's misconduct significantly harmed a beneficiary by denying her distribution from the estate at a time when she was experiencing extreme financial need and also harmed the estate by depriving it of interest and causing it to incur tax penalties. (*Ibid.*) The attorney was also indifferent toward rectification or atonement. In mitigation, the attorney had practiced law for over 30 years without discipline and had been under considerable emotional and physical strain due to the need to care for his terminally–ill mother. (*Ibid.*)

In *Van Sloten v. State Bar* (1989) 48 Cal.3d 921 (*Van Sloten*), the Supreme Court imposed a six–month stayed suspension on an attorney who had practiced law for approximately five and one–half years before committing misconduct that spanned one year and involved a single act of failing to perform in a dissolution matter. The court found that the attorney's failure to perform was "without serious consequences to the client" but that his failure to appear before the Review Department "demonstrate[d] a lack of concern for the disciplinary process and a failure to appreciate the seriousness of the charges against him." (*Id.* at p. 933.)

In *In the Matter of Respondent Y, supra,* 3 Cal. State Bar Ct. Rptr. 862 (*Respondent Y*), we found an attorney culpable of failing to obey a court order to pay sanctions that were imposed as a result of his bad faith tactics and actions while defending an action in San Diego County Superior Court. We also concluded that the attorney failed to timely report the sanctions to the State Bar. In adopting the hearing judge's recommendation of a private reproval, we observed that "There is little evidence before us bearing on degree of discipline." (*Id.* at p. 869.) We acknowledged the attorney's lack of prior discipline; however, we neither described the period of discipline–free practice nor application of the disciplinary standards. (*Ibid.*)

In *In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459 (*Nees*), the Supreme Court adopted our recommendation of a six–month actual suspension for an attorney who abandoned the habeas corpus petition of a client incarcerated on a long prison sentence. In addition, the attorney failed to return the client's files, to refund $7,000 in advanced fees, and to cooperate with the State Bar. (*Id.* at p. 463.) The attorney's mere four years of practice without prior discipline was not mitigating. His misconduct was aggravated by the fact that it involved multiple acts and significantly harmed the client. The attorney failed to acknowledge the impropriety of his actions and failed to participate in the underlying disciplinary proceeding. (*Ibid.*) We further observed that the attorney's protracted retention of significant unearned fees "approached a practical appropriation." (*Id.* at p. 465.)

In this case, respondent's inability to timely file the AOB on behalf of an incarcerated client closely resembles the facts in *Borre* and *Nees* where actual suspension was appropriate, but unlike those cases, respondent did not abandon his incarcerated client outright. Indeed, respondent's inaction did not cause client harm on this record. Furthermore, the misconduct in *Borre* involved moral turpitude because the attorney lied under oath and fabricated a letter and the incarcerated client's guilt or innocence was at issue. The client's criminal appeal was dismissed as a result of the attorney's misconduct. Beyond abandoning an incarcerated client's habeas corpus petition, the attorney in *Nees* also showed indifference by failing to participate in the disciplinary proceedings and committed further ethical transgressions by not cooperating with the State Bar or returning the client's file and advanced fees that were unearned. Respondent's misconduct and aggravating factors are not as extensive as those in either of these cases.

Like the attorneys in *Harris* and *Layton*, respondent's failure to file the AOB spanned multiple years. Additionally, his neglect resulted in his court removal, as was the case in *Layton*. Although the attorneys in *Harris* and *Layton* practiced law for several years without prior misconduct, such mitigation was outweighed by lack of remorse and significant harm to clients. Although respondent's unethical conduct harmed the administration of justice, there is no evidence of client harm. In balance, we find that respondent's seventeen years of discipline–free practice, successful post–misconduct practice, good character and cooperation outweigh the aggravation in this case. Although some of the misconduct in *Respondent Y* is analogous to respondent's, it does not involve issues of competent performance. We find respondent's misconduct and aggravation to be more extensive than those found in *Respondent Y*. However, like *Van Sloten,* respondent's misconduct involves only a single client matter. Although respondent's performance issues also involve a failure to report court–imposed sanctions and uncharged misconduct not found in *Van Sloten*, respondent has seventeen years of discipline–free practice compared to only five and one–half in *Van Sloten*. Furthermore, respondent's facts include additional mitigation not present in *Van Sloten,* such as good character and cooperation.

Comparisons with the other cases, however, cannot overshadow the unique facets of the case before us. We are most concerned that this case arises in the area of appointed representation in a criminal automatic appeal, where so very much is at stake for the defendant and for the fair and effective administration of justice. That context would normally lead us to recommend actual suspension for the totality of the misconduct present here. On the other hand, our independent review of the record shows that at least respondent's initial actions arose out of an attempt to assist, not hinder, the effective administration of justice. Respondent's senior partner sought to increase the number of counsel available in his firm to represent capital defendants and, undoubtedly, respondent was eager to accommodate the partner as well as the goal. Further, the history of the support structure available to respondent in this case, particularly the succession of CAP attorneys available to respondent as resources and more centrally, respondent's associate counsel, appears to have diffused, rather than focused, respondent's vision of his responsibilities to his client and the Supreme Court.

Although this matter involves an incarcerated client, this is not a classic case of client abandonment. Respondent acceded to his partner's request that he take on a death penalty appeal, which he had never before undertaken. It seems clear that respondent was in over his head, resulting in his failure to timely extricate himself or to obtain appropriate relief from the Supreme Court, but no moral turpitude was involved. Rather, because of respondent's ineptitude or lethargy, or both, he allowed the appeal to languish. The harm thus was to the administration of justice, not to his client. Additionally, respondent's misconduct appears to be limited to this one – albeit prolonged – matter as there is no other evidence of misconduct, either in the seventeen years prior to this incident or in the three and one–half years afterwards. His misconduct is also at odds with the strong testimony of his character witnesses.

[7] Of course, none of these facts excuses respondent's failure to perform his professional responsibilities properly. However, they form a unique confluence of circumstances that demonstrate to us that the goals of imposing discipline, protection of the public, courts and legal profession and the maintenance of high professional standards are best served here by a stayed suspension, such as that imposed in *Van Sloten*.

III. RECOMMENDATION

We recommend that respondent, THOMAS L. RIORDAN, be suspended from the practice of law in the State of California for a period of six months; that execution of the six–month period of suspension be stayed; and that he be placed on probation for a period of one year on the following conditions:

1. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all the conditions of this probation. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Ange-

les, his 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).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. (See Bus. & Prof. Code, 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

2. Respondent must report, in writing, to the State Bar's Office of Probation 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 his 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, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

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

3. Within 30 calendar days from the effective date of the Supreme Court's final disciplinary order in this proceeding, respondent must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss probation conditions. At the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must meet promptly with the probation deputy as directed and upon request.

4. Subject to the proper or good faith assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation 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.

5. Within one year after the effective date of the Supreme Court order in this matter, respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation 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.)

6. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. And, at the end of the probationary term, if respondent has complied with the conditions of probation, the Supreme Court order suspending respondent from the practice of law for six months will be satisfied, and the suspension will be terminated.

IV. PROFESSIONAL RESPONSIBILITY EXAMINATION

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 one year after the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

V. COSTS

We further 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 are enforceable as provided in Business and Professions Code section 6140.7 and as a money judgment.

We concur:
EPSTEIN, J.
STOVITZ, J.*

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*Retired Presiding Judge of the State Bar Court and Judge Pro Tem of the State Bar Court appointed by the State Bar Board of Governors under rule 14 of the Rules of Procedure of the State Bar, sitting by designation of the Presiding Judge.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

TIMOTHY JOHN MACKENZIE

Petitioner for Reinstatement

No. 04–R–15895

Filed May 11, 2007

Reconsideration denied, opinion modified June 29, 2007

SUMMARY

Approximately one year after petitioner filed his petition for reinstatement (and one month before trial), the State Bar filed a motion to dismiss the reinstatement proceeding on the ground that prior to filing the reinstatement petition, petitioner had failed to comply with Rules of Procedure of the State Bar, rule 662(c) by failing to provide proof to the State Bar Court that he had paid all discipline costs from his previous disbarment case. Petitioner opposed the motion to dismiss on the grounds that the rule was nonenforceable as more restrictive than the controlling costs statute and that the costs were discharged in his bankruptcy case, which he filed after the State Bar Court issued its disbarment recommendation. The hearing judge granted the motion to dismiss, concluding that the costs were not discharged in bankruptcy and that the rule required the payment of costs prior to filing a reinstatement petition. Petitioner then filed a motion to set aside the dismissal on the ground that he had paid in full all assessed discipline costs. The State Bar opposed setting aside the dismissal because petitioner had not met the threshold requirement of the rule at the time he filed the reinstatement petition and therefore the court was divested of jurisdiction to hear the motion to set aside the dismissal. The hearing judge denied the motion to set aside the dismissal, determining that the court lacked jurisdiction to consider the motion. (Hon. Richard A. Platel, Hearing Judge.)

Petitioner requested review of both the order of dismissal and the order denying the motion to set aside the dismissal. The review department determined that Rules of Procedure of the State Bar, rule 662(c) was directory rather than mandatory and that noncompliance with the rule did not divest the court of jurisdiction. The review department therefore concluded that the hearing judge erred in denying the motion to set aside the dismissal for lack of jurisdiction and remanded the matter to the hearing department for further consideration.

COUNSEL FOR PARTIES

For State Bar: Diane J. Meyers

For Respondent: Timothy G. Dallinger

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1a, b] **101 Procedure–Jurisdiction**
117 Procedure–Dismissal
135.87 Revised Rules of Procedure–Reinstatement (rules 660-666)
2509 Reinstatement–Other Procedural Issues

The review department concluded that the hearing judge erred as a matter of law in denying the motion to set aside the dismissal for lack of jurisdiction and found that the procedural requirement of Rules of Procedure of the State Bar, rule 662(c) did not divest the court of jurisdiction to extend the time for, or to grant relief from, payment of costs. Relying on well–settled rules of statutory construction, the review department construed the rule to be directory rather than mandatory or jurisdictional and thus found that the court retained jurisdiction to determine whether petitioner's failure to provide proof of payment of costs prior to filing the reinstatement petition should have resulted in a dismissal under the facts and circumstances of the case.

[2a, b] **101 Procedure–Jurisdiction**
135.87 Revised Rules of Procedure–Reinstatement (rules 660-666)
2509 Reinstatement–Other Procedural Issues

Despite its seemingly mandatory wording, Rules of Procedure of the State Bar, rule 662(c) is merely procedural, advancing a time requirement for the payment of costs, while the relevant Business and Professions Code sections confer jurisdiction to decide the substantive issues of costs and relief therefrom. There is no evidence that the Board of Governors of the State Bar attempted to supplant the statutory authority set forth in Business and Professions Code section 6140.7 and 6086.10, or to divest the State Bar Court of jurisdiction, by implementing a rule of procedure, and indeed, the Board of Governors is proscribed from doing so by Business and Professions Code section 6086. That section is consistent with the more general rule that, where a statute empowers an administrative agency to adopt regulations, those regulations must be consistent and not conflict with the governing statute. Because there is no express language or clear intent to render the rule jurisdictional, the review department looks to the cost provisions as a whole, the nature and character of these provisions, and the consequences that would follow from potential constructions. If the rule were interpreted to be mandatory or jurisdictional, the rule would conflict with and/or constrict relevant statutes and other rules, inadvertently alter the reinstatement requirements, and at times produce unreasonable results. Construing the rule as directory, however, in no way interferes with or compromises the ability of the State Bar or the State Bar Court to effectuate the intent of obtaining costs as money judgments.

[3a-e] **135.87 Revised Rules of Procedure–Reinstatement (rules 660-666)**
2504 Reinstatement–Burden of Proof
2509 Reinstatement–Other Procedural Issues

A strict and unyielding interpretation of rule 662(c) of the Rules of Procedure of the State Bar mandating that costs be paid prior to filing a reinstatement petition is more restrictive than the requirement of Business and Professions Code section 6140.7 that costs be paid as a condition of reinstatement of active membership. A strict interpretation is also inconsistent with the State Bar Court's delegated authority to give relief from costs in whole or in part or to extend the time to pay costs. If a resigned or disbarred attorney were completely relieved of the obligation to pay costs or were provided an extension of time to pay, it would be impossible to provide proof that all discipline costs have been paid prior to filing a reinstatement petition. If the rule were interpreted to be mandatory, it would render relevant costs provisions irrelevant; but the finding that the rule is directory harmonizes all provisions and avoids an unnecessary and impermissible conflict with state

statutes and other rules of procedure of the State Bar. Also, such a construction is consistent with the rehabilitative goals of the discipline system by maintaining the court's discretion to consider the timely payment of costs as a factor in determining a petitioner's rehabilitation.

[4a-d] **135.87 Revised Rules of Procedure–Reinstatement (rules 660-666)**
2504 Reinstatement–Burden of Proof

The statutory intent that discipline costs are penalties payable to and for the benefit of the State Bar of California to promote rehabilitation and to protect the public supports the position that nonpayment of these costs should not be construed as an absolute roadblock to a reinstatement proceeding in every case, but a factor in determining overall rehabilitation during the proceeding. Rule 9.10(f) of the California Rules of Court does not require or address payment of costs, and the long–standing procedure for dealing with outstanding discipline costs has been to order reinstatement upon payment of all fees and costs. If Rules of Procedure of the State Bar, rule 662(c) is construed as directory, it allows timely payment of costs to be a relevant factor in determining whether a petitioner has been rehabilitated, which is the very essence of a reinstatement proceeding and consistent with rehabilitative goals. Conversely, if the rule were interpreted to be mandatory, the court would be precluded from considering all relevant factors regarding efforts toward rehabilitation, including the timing and efforts at paying costs. Such an interpretation would effectively change the reinstatement requirements, inadvertently rendering the timing of the payment of costs to be a conclusive determination of rehabilitation.

[5a b, c] **101 Procedure–Jurisdiction**
117 Procedure–Dismissal
135.87 Revised Rules of Procedure–Reinstatement (rules 660-666)
2504 Reinstatement–Burden of Proof
2509 Reinstatement–Other Procedural Issues

In construing statutes, a practical construction is preferred. A construction of Rules of Procedure of the State Bar, rule 662(c) which permits the State Bar Court to retain jurisdiction is manifestly more practical than one which cuts off the court's jurisdiction regardless of the time and resources the parties have already expended in the court proceedings. Where a reinstatement proceeding had been pending for almost a year at the time a motion to dismiss was filed, the State Bar's investigation period and the discovery period for both parties had expired, and the trial was set to commence in approximately one month, dismissal was a severe remedy for noncompliance with payment of costs, and denial of a motion to set aside the dismissal was draconian. If a petitioner fails to pay the disciplinary costs prior to filing his reinstatement petition, the hearing judge has discretion to dismiss the reinstatement proceeding rather than to undertake a lengthy trial. But the hearing judge may also consider the failure to timely pay costs as a negative factor in petitioner's showing of rehabilitation or condition a petitioner's return to active status on the payment of some or all of the costs. Finally, if a disbarred or resigned attorney has failed to pay costs, the State Bar may enforce an order imposing costs as a money judgment. Construing Rules of Procedure of the State Bar, rule 662(c) as directory will continue to promote timely payment of costs, while not mandating unreasonable consequences in pending proceedings.

OPINION

REMKE, P.J.

Petitioner Timothy John MacKenzie, who is seeking reinstatement, asks this court to review the hearing judge's orders dismissing this case and denying petitioner's motion to set aside the dismissal. The dismissal was based on petitioner's failure to provide proof to the State Bar Court that he had paid all discipline costs imposed under Business and Professions Code section 6086.10, subdivision (a),[1] prior to filing his petition for reinstatement. (Rules Proc. of State Bar, rule 662(c).[2]) The order denying the motion to set aside the dismissal was based on the hearing judge's determination that he lacked jurisdiction to rule on the motion.

Upon our independent review (Cal. Rules of Court, rule 9.12; *In re Morse* (1995) 11 Cal.4th 184, 207; rule 305(a)), we determine that the hearing judge erred in denying the motion to set aside the dismissal based on lack of jurisdiction. We find that rule 662(c) is directory, and therefore, noncompliance with the rule does not divest the court of jurisdiction. Accordingly, we remand the matter to the hearing department for further consideration consistent with this opinion.

I. PROCEDURAL HISTORY

On November 13, 1998, the State Bar filed a Notice of Disciplinary Charges against petitioner in case number 96–O–08652. After trial on October 19, 1999, the hearing judge in that case issued a decision recommending petitioner's disbarment. One month later, on November 16, 1999, petitioner filed a chapter 7 bankruptcy proceeding. On March 13, 2000, an order was issued granting a discharge of petitioner's debts under title 11 United States Code section 727. The State Bar was not listed as a creditor in petitioner's bankruptcy proceeding.

Petitioner tendered his resignation on August 23, 2000, and by order filed on September 20, 2000, the Supreme Court accepted the resignation with charges pending, effective October 20, 2000. In that order, the Supreme Court awarded discipline costs to the State Bar.

On December 27, 2004, petitioner filed his petition for reinstatement in this matter, and the State Bar filed its response on May 20, 2005.[3] Then, on December 9, 2005, the State Bar filed a motion to dismiss under rule 662(c) on the ground that prior to filing his petition, petitioner had failed to establish that he had paid all discipline costs imposed pursuant to section 6086.10, subdivision (a). On December 22, 2005, petitioner filed his opposition, arguing that rule 662(c) was more restrictive than the controlling statute on costs, section 6140.7, and therefore, the rule could not be enforced. He also contended that the costs were discharged in his bankruptcy. The State Bar filed a reply on December 23, 2005. On January 13, 2006, the hearing judge granted the motion to dismiss, finding that the costs were not discharged in bankruptcy and that rule 662(c) required the payment of costs prior to filing a petition.

Subsequently, on January 26, 2006, petitioner filed a motion to set aside the dismissal. This motion was premised upon petitioner's payment in full of the assessed discipline costs in the sum of $9,079.10. On February 1, 2006, the State Bar filed its opposition, arguing that since petitioner had not met the threshold requirement of rule 662(c) at the time he filed his petition for reinstatement, the court was divested of jurisdiction to hear the motion to set aside the dismissal. The State Bar argued that, despite his payment of costs, petitioner should be required to file a new petition for reinstatement and to pay another $1,600 filing fee. Petitioner filed a reply on February 7, 2006. On February 8, 2006, the hearing department denied petitioner's motion to set aside the order of dismissal,

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1. Unless otherwise noted, all further references to section(s) are to the Business and Professions Code.

2. Unless otherwise noted, all further references to rule(s) are to the Rules of Procedure of the State Bar of California.

3. In its response, the State Bar did not object to the petition based specifically on respondent's failure to pay costs prior to filing his petition for reinstatement. As a general objection, the State Bar argued, "petitioner has not demonstrated that he is in control of his outstanding financial obligations," and listed various debts, including the discipline costs.

finding that it lacked jurisdiction to consider the motion.

Petitioner filed a request for review on February 15, 2006.

II. DISCUSSION

The Legislature has developed a statutory framework in the Business and Professions Code to govern discipline costs, which generally requires errant attorneys to pay the costs resulting from their disciplinary proceedings. (§§ 6086.10 and 6140.7.) Discipline costs are considered "penalties," payable to the State Bar "to promote rehabilitation and to protect the public." (§ 6086.10, subd. (e).)

As for reinstatement proceedings, section 6140.7 provides, in relevant part, that: "Unless time for payment of discipline costs is extended pursuant to subdivision (c) of Section 6086.10, costs assessed against a member who resigns with disciplinary charges pending . . . or [is] disbarred shall be paid as a condition of reinstatement of . . . active membership." Section 6086.10, subdivision (c), provides: "A member may be granted relief, in whole or in part, from an order assessing costs under this section, or may be granted an extension of time to pay these costs, in the discretion of the State Bar, upon grounds of hardship, special circumstances, or other good cause." This statutory discretion is expressly delegated to the court to grant requests for relief from costs or for extensions of time to pay costs pursuant to rules 280(f) and 282.

Effective January 1, 2004, the Legislature amended the Business and Professions Code to authorize the State Bar to enforce orders regarding discipline costs and Client Security Fund (CSF) reimbursements as money judgments in an attempt to increase the State Bar's collection efforts.[4] In August 2004, the State Bar's Board of Governors (Board) adopted "a number of proposed amendments to the Rules of Procedure to both implement the statutory amendments and to clarify the process for assessing discipline costs, seeking relief from costs and compromising judgments for costs and Client Security Fund payments and assessments." (Agenda Item 122, Board of Governors Meeting, July 2004, p. 4.) Among the various amendments were modifications to rule 282, providing for the court's authority to grant requests for relief from costs or for extensions of time to pay costs to "permit a member against whom judgment enforcement efforts are being made, to seek a compromise of that judgment in the State Bar Court,"[5] and to "clarify that the State Bar Court has authority to grant appropriate relief from discipline costs or an extension of time to pay those costs even after the Supreme Court has suspended the member for nonpayment of his annual membership fees." (*Id.* at pp. 5–6.)

The Board also adopted subdivision (c) to rule 662, which provides: "No petition for reinstatement shall be filed unless and until the petitioner has provided satisfactory proof to the State Bar Court that he or she has paid all discipline costs imposed pursuant to Business and Professions Code section 6086.10(a) and all reimbursement for payments made by the Client Security Fund as a result of the petitioner's conduct, plus applicable interest and costs, pursuant to Business and Professions Code section 6140.5(c)." While recognizing that sections 6140.7 and 6140.5 require the payment of costs and CSF reimbursements as a condition of reinstatement, the Board amended this procedural rule to provide for

4. "This action also responds to a criticism of the 2001 State Auditor's report that opined that the State Bar was not aggressively seeking these reimbursements, therefore requiring higher membership fees to fund the disciplinary program. [The auditor] contended that if the Bar could increase its collection results, the resulting additional recovered funds could then be used to offset some of the costs. Similarly, increased recoveries could also be used to fund the Client Security Fund Account and decrease reliance on membership dues." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1708 (2003–2004 Reg. Sess.) as amended July 2, 2003, p. 13.)

5. Effective April 1, 2007, as recommended by the Board, the Supreme Court adopted rule 9.23 of the California Rules of Court expressly to authorize the State Bar to enforce discipline costs and CSF payments as money judgments, and to authorize the State Bar Court to hear motions to compromise these judgments. Subdivision (c) of rule 9.23 provides "[m]otions for the compromise of any judgment entered under this rule must, in the first instance, be filed and heard by the State Bar Court."

payment at the time of filing the petition in an attempt to promote judicial economy.[6] In so doing, it recognized the proper role and discretion of a judge in deciding the issues relating to the payment of discipline costs:

> "The proposed amendment to rule 662 would require the payment of these amounts prior to the filing of the petition for reinstatement. Under the current version of rule 662, reinstatement petitioners sometimes approach the time of trial continuing to owe substantial, if not huge, sums in assessed disciplinary costs and CSF payments and assessments with no financial ability to make those payments. Under these circumstances, State Bar Court hearing judges have sometimes dismissed the reinstatement proceeding rather than to undertake a lengthy trial and prepare a written decision in the matter when the reinstatement petitioner will not be eligible to return to active membership status and has no prospects for payment of the disciplinary costs or CSF payments and assessments." (Agenda Item 122, Board of Governors Meeting, July 2004, p. 10.)

[1a] In the present case, it is undisputed that when petitioner filed his petition on December 27, 2004, he had not provided proof of payment of discipline costs. Approximately one year later – and one month before trial – the hearing judge dismissed the petition for reinstatement, pursuant to rule 662(c). The judge then denied petitioner's motion to set aside the dismissal, holding that the court lacked jurisdiction to rule on the motion. For the reasons stated herein, we conclude the hearing judge erred as a matter of law in denying the motion to set aside the dismissal for lack of jurisdiction. We find that the procedural requirement of rule 662(c) does not divest the court of the jurisdiction to extend the time for payment or to grant relief from payment provided in sections 6086.10 and 6140.7 and rules 280(f) and 282.

[1b] When interpreting rules of procedure, we utilize rules of statutory construction. (*In the Matter of Wu* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 263, 267.) Relying on well–settled rules of statutory construction, which we discuss below, we construe rule 662(c) to be directory rather than mandatory or jurisdictional, and thus, find the court retained jurisdiction to determine whether petitioner's failure to provide proof of payment of costs prior to the filing of his petition for reinstatement should have resulted in a dismissal under the facts and circumstances of this case.

A. Rule 662(c) is directory rather than jurisdictional

The California Supreme Court has stated that "jurisdiction embraces a large number of ideas of similar character, some fundamental to the nature of any judicial system, some derived from the requirement of due process, some determined by the constitutional or statutory structure of a particular court, and some based upon mere procedural rules originally devised for convenience and efficiency, and by precedent made mandatory and jurisdictional." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 291 [held district court of appeal was without jurisdiction to issue writ of mandate before administrative proceeding was final].)

However, "[m]ost procedural steps, including those regarded as 'mandatory,' are not jurisdictional. Errors or omissions in compliance with them are not fatal to the fundamental subject matter jurisdiction of the court . . . nor to its jurisdiction to act. [Citations.]" (2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 281, p. 848.) Such procedural rules, even if worded as "mandatory," are often construed as directory. (*In re Jones* (1971) 5 Cal.3d 390, 394 [rule that petition for review "shall" be filed within 60 days of disciplinary decision is not jurisdictional]; *In the Matter of*

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6. The Board agenda specifically referenced *In the Matter of Jaurequi* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 56, wherein we raised in dicta the State Bar's concern with "the potential waste of judicial and State Bar resources." (*Id.* at p. 60.) In that case, we were not faced with a conflicting rule of procedure, and held that the unambiguous language of section 6140.5, subdivision (c), did not "preclude the filing of a petition for reinstatement without including a showing of repayment to the client security fund." (*Id.* at p. 59.)

Petilla (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 231, 246 [rule requiring hearing judges to file decision within 90 days after submission is neither mandatory nor jurisdictional]; *In the Matter of Navarro* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 192, 198, fn. 5 [time limit for filing an answer to a notice to show cause is not jurisdictional]; see generally *McDonald's Systems of California, Inc. v. Board of Permit Appeals* (1975) 44 Cal.App.3d 525, 544–545, fn. 15 [citing numerous authorities construing "mandatory" time limitations for filing decisions as directory and not jurisdictional[7]]; but see *Davis v. Superior Court* (1921) 184 Cal. 691, 693–695 [noncompliance with filing fee statutes divests a court of jurisdiction].)

"[T]he 'directory' or 'mandatory' designation does not refer to whether a particular statutory requirement is 'permissive' or 'obligatory,' but instead simply denotes whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates. [Citations.]" (*Morris v. County of Marin* (1977) 18 Cal.3d 901, 908.) Thus, "[a] statutory requirement may impose on the state a duty to act in a particular way, and yet failure to do so may not void the governmental action taken in violation of the duty. [Citations.]" (*In re Richard S.* (1991) 54 Cal.3d 857, 865.)

" 'In order to determine whether a particular statutory provision . . . is mandatory or directory, the court, as in all cases of statutory construction and interpretation, must ascertain the legislative intent. In the absence of express language, the intent must be gathered from the terms of the statute construed as a whole, from the nature and character of the act to be done, and from the consequences which would follow the doing or failure to do the particular act at the required time. [Citation.] When the object is to subserve some public purpose, the provision may be held directory or mandatory as will best accomplish that purpose [citation]....' [Fn. omitted.]" (*Morris v. County of Marin*, supra, 18 Cal.3d at p. 910.)

[2a] In spite of its seemingly "mandatory" wording, rule 662(c) is merely a procedural rule, advancing a time requirement for the payment of costs. It is the statutory provisions of the Business and Professions Code that confer jurisdiction to decide the substantive issues of costs and relief therefrom. There is no evidence that the Board attempted to supplant the statutory authority set forth in sections 6140.7 and 6086.10, or to divest the court of jurisdiction, by implementing a rule of procedure, and indeed, the Board is proscribed from so doing. Section 6086 expressly provides: "The board of governors, *subject to the provisions of this chapter* [of the Business and Professions Code], may by rule provide the mode of procedure in all cases of complaints against members." (Italics added.)[8] This provision is consistent with the more general rule that, where a statute empowers an administrative agency to adopt regulations, those regulations must be consistent and not conflict with the governing statute. (See *Ontario Community Foundations, Inc. v. State Bd. of Equalization* (1984) 35 Cal.3d 811, 816.)

[2b] There is no express language or clear intent to render rule 662(c) jurisdictional; we therefore look to the cost provisions as a whole, the nature and character of these provisions, and the consequences that would follow from both potential constructions. (*In re Richard S., supra,* 54 Cal.3d at pp. 865–866.) If rule 662(c) were interpreted to be mandatory or jurisdictional, the rule would, as discussed *post*, conflict with and/or constrict relevant statutes and other

7. Cases cited included: *Garrison v. Rourke* (1948) 32 Cal.2d 430, overruled on another ground in *Keane v. Smith* (1971) 4 Cal.3d 932, 939 [held that the time limitation for the court's action is not mandatory, regardless of the mandatory nature of the language, unless a consequence or penalty is provided for failure to do the act within the time commanded]; and *Buswell v. Supervisors, Etc.* (1897) 116 Cal. 351, 354 [concluded that even in the absence of a statutory enactment, the provisions as to the time upon which, or within which, acts are to be done by a public officer regarding the rights and duties of others are directory, unless the nature of the act or language of the legislature makes it clear that the time fixed is by way of limitation].

8. In addition, section 6025 provides, in pertinent part, that "[s]ubject to the laws of this State, the board may formulate and declare rules and regulations necessary or expedient for the carrying out of this chapter."

rules, inadvertently alter the requirements for reinstatement, and at times, produce unreasonable results. Moreover, as noted, the various amendments to the procedural rules, including rule 662(c), were intended to "implement the statutory authority to enforce orders regarding disciplinary costs and CSF reimbursements as money judgments." (Agenda Item 122, Board of Governors Meeting, July 2004, p. 3.) Construing rule 662(c) as directory in no way interferes with or compromises the ability of the State Bar or this court to effectuate the intent of obtaining costs as money judgments. Thus, to avoid the potential invalidity of the rule, while at the same time advancing the goal of collecting discipline costs, we construe the rule as directory. (See *Dikkers v. Superior Court* (1948) 88 Cal.App.2d 816, 818 [court interpreted rule that applied to demurrers to apply only to special demurrers to avoid invalidity of rule].)

1. Construing rule 662(c) to be directory harmonizes the rule with relevant statutes and avoids eviscerating sections 6140.7 and 6086.10, subdivision (c)

It is a well–established rule of statutory construction that "potentially conflicting provisions should be reconciled in order to carry out the overriding legislative purpose as gleaned from a reading of the entire act. [Citation.]" (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 788).) Accordingly, "[a] construction which makes sense of an apparent inconsistency is to be preferred to one which renders statutory language useless or meaningless. [Citation.]" (*Ibid.*) As noted *ante*, rule 662(c) is a procedural rule within a broader statutory scheme governing cost provisions, and if at all possible, the cost provisions should be construed as a whole to create harmony and reconcile conflict.

[3a] Rule 662(c) declares that no petition for reinstatement shall be filed unless and until the petitioner has provided satisfactory proof to the State Bar Court that he or she has paid all discipline costs. In contrast, as set forth *ante*, section 6140.7 provides that "[u]nless time for payment of discipline costs is extended . . ., costs . . . shall be paid as a condition of reinstatement of . . . active membership." Thus, a strict and unyielding interpretation of rule 662(c) mandating that costs be paid prior to filing a reinstatement petition is more restrictive than the requirement of section 6140.7 that costs be paid "as a condition of reinstatement of . . . active membership."

[3b] Such an interpretation of rule 662(c) also is inconsistent with this court's delegated authority pursuant to section 6086.10, subdivision (c), which authorizes relief from costs, in whole or in part, or an extension of time to pay costs, upon grounds of hardship, special circumstances, or other good cause. Rule 280(f), previously adopted by the Board, expressly recognizes the court's authority to grant relief from costs pursuant to section 6086.10, subdivision (c), and rule 282 sets forth the procedure to seek relief or an extension of time to pay costs from this court. In none of these statutes or rules is there a conclusive obligation to pay costs in every case upon resignation or disbarment. Indeed, a person may be completely relieved of the obligation to pay costs or may be provided an extension of time to pay. In such cases, it would be impossible to provide proof that "all discipline costs" have been paid prior to the filing of a petition.[9]

[3c] Local rules may be adopted to the extent they are not in conflict with state law. (See Gov. Code, § 68070; see also *Lang v. Superior Court* (1984) 153 Cal.App.3d 510, 516.) If rule 662(c) were

9. At oral argument, the State Bar conceded that rule 662(c) should be considered in light of rule 282 and sections 6140.7 and 6086.10. However, deputy trial counsel argued that at the time of filing the petitions for reinstatement, petitioners could submit court orders, which provide for relief from or extensions to pay costs, to the court's clerks to satisfy the "proof" requirement of rule 662(c). This contention is unreasonable for at least two reasons. First, a clerk's role is limited to ministerial duties (*Rojas v. Cutsforth* (1998) 67 Cal.App.4th 774, 777), which does not include making judicial determinations such as "satisfactory proof." (See, e.g., *Isbell v. County of Sonoma* (1978) 21 Cal.3d 61, 71 [stating a clerk is not a judicial officer]; see also *Rose v. Lelande* (1912) 20 Cal.App. 502, 503–504 [no power to enter default by determining if the defendant's answer is legally insufficient].) Second, rule 662(c) explicitly provides that proof shall be shown to the "State Bar Court." Accordingly, the court, not the clerk, must determine whether petitioner has provided "satisfactory proof" of payment of all costs, or has been relieved of the obligation, in whole or in part.

interpreted to be mandatory, it would render the relevant cost provisions of sections 6140.7 and 6086.10 and rules 280(f) and 282 irrelevant. Our finding that rule 662(c) is directory thus harmonizes all provisions, and avoids an unnecessary and impermissible conflict with state statutes and other rules of procedure of the State Bar.

In the Matter of Sheppard (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 91 is illustrative of the need to harmonize various rules and statutes. In *Sheppard,* the issue was whether rule 665(a), requiring a petitioner for reinstatement to show proof of passage of a professional responsibility examination (PRE) "with any petition for reinstatement," conflicted with former California Rules of Court, rule 951(f), requiring that a petitioner for reinstatement "[p]ass a professional responsibility examination." There, this court noted that the language of the rule was ambiguous as to whether it required passage of the PRE at the time of filing a petition for reinstatement or merely "during the course of hearing on the petition." (*Id.* at p. 98.) After considering the language and the purpose of the rule, we interpreted the relevant language to require merely that proof of passage of the PRE be shown during the petition process, not to require that proof of passage be shown at the time of filing the reinstatement petition. (*Id.* at p. 99.) Significantly, we there emphasized that the interpretation of the rule that we were adopting would not "add to the burdens of an applicant for reinstatement as established by rule 951(f) of the California Rules of Court and Supreme Court case law, whereas the interpretation of rule 665(a) urged by the State Bar would make petitions for reinstatement more restrictive than the California Rules of Court." (*Ibid.*) We thus made it clear that the interpretation we were adopting saved rule 665(a) from impermissibly conflicting with rule 951(f) of the California Rules of Court.

[3d] In similar situations, where local rules have been deemed to impose greater restrictions on a litigant's ability to bring motions or conduct discovery than provided under state statutes or California Rules of Court, courts have invalidated the local rules as impermissibly conflicting with the state statutes or rules.

For example, in *Sierra Craft, Inc. v. Magnum Enterprises, Inc.* (1998) 64 Cal.App.4th 1252, the court invalidated a local rule that allowed a trial court to grant summary judgment in favor of a party *opposing* summary judgment if it appeared appropriate from all the evidence; the summary judgment statute required that a motion be filed in a specific form. (Code Civ. Proc., § 437c.) The court stated that because summary judgment is a drastic remedy, "it is important that all of the procedural requirements for the granting of such a motion be satisfied before the trial court grants the remedy. Local rules may not provide a shortcut for these requirements. [The local rule] is not consistent with [the summary judgment statute] and is consequently invalid . . ." (*Sierra Craft, Inc. v. Magnum Enterprises, Inc., supra,* 64 Cal.App.4th at p. 1256.)[10]

[3e] Construing rule 662(c) as directory avoids eviscerating the statutory authority set forth in sections 6140.7 and 6086.10, subdivision (c), as well as in rules 280(f) and 282. Also, as we discuss *post,* such a construction is consistent with the rehabilitative goals of our discipline system by maintaining the court's discretion to consider the timely payment of costs as a factor in determining a petitioner's state of rehabilitation. This interpretation harmonizes the rule

10. See also *People v. Smith* (2002) 95 Cal.App.4th 283, 302–303 [appellate court invalidated a local rule that deprived a criminal defendant of the "*right* to fully litigate the validity of a search or seizure on the basis of evidence presented at a special hearing on a suppression motion if the defendant files an initial brief making a prima facie case" simply because the criminal defendant in that case did not file a reply brief]; *Wagner v. Superior Court* (1993) 12 Cal.App.4th 1314, 1317–1320 [trial court's order setting discovery cutoff date before having set a trial date denied parties their statutory right to have up to the 30th day before the initial trial date to complete discovery]; *Carlson v. Department of Fish and Game* (1998) 68 Cal.App.4th 1268 [local rule requiring a certificate of assignment to be provided at the time of filing a complaint could not be the basis for a clerk's refusal to file the complaint when presented for filing since the California Rules of Court explicitly stated that the Judicial Council intended to fully occupy the field of form and format for pleadings and since noncompliance with the California Rules of Court constituted the only permissible basis for a clerk's refusal to file a pleading].

with relevant statutes and avoids an impermissible conflict.

2. Construing the rule as directory ensures that all relevant factors in a reinstatement proceeding are considered

[4a] After the court in *In re Taggert* (9th Cir. 2001) 249 F.3d 987, 994 concluded that attorney discipline costs in California are dischargeable in bankruptcy because they are not penal in nature, section 6086.10 was amended to clarify that "costs imposed pursuant to this section are penalties, payable to and for the benefit of the State Bar of California . . . to promote rehabilitation and to protect the public."[11] Thus, the statutory intent regarding the nature and character of discipline costs further supports the position that the payment of these costs should not be construed as jurisdictional and an absolute roadblock to a reinstatement proceeding in every case, but a factor in determining overall rehabilitation during the proceeding.

[4b] In subdivision (f) of rule 9.10 of the California Rules of Court, the Supreme Court has set forth the requirements for reinstatement: "Applications for readmission or reinstatement shall, in the first instance, be filed and heard by the State Bar Court. Applicants for readmission or reinstatement must: [¶] (1) Pass a professional responsibility examination; [¶] (2) Establish their rehabilitation and present moral qualifications for readmission; and [¶] (3) Establish present ability and learning in the general law." The rule does not require or address payment of costs, and, in fact, the long–standing procedure for dealing with outstanding discipline costs has been to order a petitioner's reinstatement *upon payment* of all fees and costs. (§ 6140.7; see also *Calaway v. State Bar* (1986) 41 Cal.3d 743 ["ordered that petitioner be reinstated on the roll of attorneys at law in this state on payment of the fees and taking the oath required by law"].)

[4c] The amendment to rule 662 was promulgated to preserve judicial resources by avoiding lengthy proceedings when a petitioner "has no prospects for payment of the disciplinary costs or [Client Security Fund] payments and assessments." (Agenda Item 122, Board of Governors Meeting, July 2004, p. 10.) "Thus the detailed procedure set forth in rule [662(c)] appears to us designed to serve collateral interests of the judicial system" (*In re Richard S., supra,* 54 Cal.3d at p. 866), unrelated to the substance of a reinstatement proceeding. However, if rule 662(c) is construed to be directory, it allows the timely payment of costs to be a relevant factor in determining whether a petitioner has been rehabilitated, which is the very essence of a reinstatement proceeding and consistent with rehabilitative goals.

[4d] Conversely, if rule 662(c) were interpreted to mandate payment of costs before a petition is filed, the court would be precluded from considering all relevant factors regarding a petitioner's efforts towards rehabilitation, including the timing of and efforts at paying costs. (See *Hippard v. State Bar of California* (1989) 49 Cal.3d 1084, 1093 [restitution is not conclusive of rehabilitation and ability to repay must be considered as a factor].) Such an interpretation of rule 662(c) would effectively change the reinstatement requirements, inadvertently rendering the timing of the payment of costs to be a conclusive determination of "rehabilitation."

3. Construing the rule as directory avoids unreasonable consequences

[5a] "In construing a statute, a court may consider the consequences that would follow from a particular construction and will not readily imply an unreasonable legislative purpose. Therefore, a practical construction is preferred. [Citation.]" (*California Correctional Peace Officers Association v. State Personnel Board* (1995) 10 Cal.4th 1133, 1147.) A construction of rule 662(c) which

11. Without referencing the *Taggert* case, the Legislature provided that the amendment was "declaratory of existing law." (§ 6086.10, subd. (e); see also *In re Findley* (Bankr. N.D.Cal., April 25, 2007, No. 06–4180–AT) 2007 WL 1231621 [amendment clarifies that discipline costs imposed against an attorney in California are penal in nature and nondischargeable].) This amendment to section 6086.10 was also included in Assembly Bill 1708 (2003–2004 Reg. Sess.) as part of the broader statutory scheme to increase the State Bar's collections efforts.

permits the court to retain jurisdiction "is manifestly more practical than one which cuts off the jurisdiction of the [court] regardless of the time and resources the parties have already expended in proceedings before the [court]." (*Ibid.*)

[5b] The case at hand is a perfect example of the potential problems with construing rule 662(c) as mandatory. The petition had been pending for almost a year at the time the motion to dismiss was filed. The 120–day investigation period afforded the State Bar and the additional 120–day discovery period for both parties had expired (rule 663(a) and (b)), and the trial was set to commence within approximately one month. Under these circumstances, dismissal was a severe remedy for noncompliance with payment of costs, and the denial of the motion to set aside the dismissal was draconian.

[5c] If a petitioner fails to pay the disciplinary costs prior to filing his petition, the hearing judge has the discretion to dismiss the reinstatement proceeding rather than to undertake a lengthy trial. But the hearing judge may also consider the failure to timely pay costs as a negative factor in a petitioner's showing of rehabilitation. In addition, the hearing judge may condition a petitioner's return to active status on the payment of some or all of the costs – a strong incentive for payment. (§ 6140.7.) Finally, if a disbarred or resigned attorney has failed to pay costs, the State Bar may enforce an order imposing costs as a money judgment. (§ 6086.10, subd. (a).) In other words, the statutory scheme governing costs provides for several alternative remedies to assure compliance with and enforcement of the cost provisions. Thus, construing rule 662(c) to be directory will continue to promote timely payment of costs, while not mandating unreasonable consequences in pending proceedings.

B. The Issue of the Dischargability of Costs in Bankruptcy is Moot

Finally, as to petitioner's contentions regarding the discharge in his bankruptcy case of the costs at issue here, in view of petitioner's payment of these disciplinary costs subsequent to the hearing judge's order of dismissal, we need not and do not address the bankruptcy discharge issues on review. (See *In the Matter of Jaurequi, supra,* 4 Cal. State Bar Ct. Rptr. at pp. 59–60.)

III. DISPOSITION AND REMAND ORDER

Because we find that the hearing judge erred in ruling that he lacked jurisdiction to consider petitioner's motion to set aside the dismissal, we reverse his order and remand this proceeding to the hearing department for further consideration consistent with this opinion.

We Concur:

WATAI, J.
EPSTEIN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RICHARD MARTIN OZOWSKI

A Member of the State Bar

No. 04–C–10213

Filed September 20, 2007

SUMMARY

After respondent pled nolo contendere to one count of misdemeanor trespass in a criminal case, the hearing judge determined in this conviction matter that the facts and circumstances surrounding respondent's conviction involved no moral turpitude but warranted discipline. In a decision filed on April 11, 2006, the hearing judge recommended a public reproval with conditions. The State Bar requested review on April 20, 2006, but on the same day moved to amend the decision in the hearing department by correcting and changing certain names in the decision. On April 27, 2006, the hearing judge granted the motion in part, directed that an amended decision changing some names be filed, and ordered that the time for requesting review would run from the date of service of the April 27, 2006, order. The State Bar filed a second request for review on May 4, 2007, but on May 5, 2007, respondent filed a timely opposition to the State Bar's motion to amend in the hearing department. The hearing judge considered the timely opposition and issued a second order on May 18, 2006, declining to modify the April 27, 2006, decision and ordering that the time for requesting review would run from the date of the May 18, 2006, order. The State Bar did not file another request for review. (Hon. Joann M. Remke, Hearing Judge.)

The review department determined that the State Bar's motion to amend the decision filed in the hearing department constituted a posttrial motion within the meaning of Rules of Procedure of the State Bar, rule 221 and that therefore the two requests for review filed prior to the final ruling on the posttrial motion were deemed vacated. The review department further determined that the State Bar had thus failed to file a timely petition for review, and as a result, the review department lacked jurisdiction to consider the State Bar's appeal.

COUNSEL FOR PARTIES

For State Bar: Donald R. Steedman

For Respondent: Richard Martin Ozowski, in pro. per.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a–c] **125 Procedures–Post–trial motions**
130 Procedures–Procedure on Review
135.50 Division V, Review/Delegated Powers (rules 200-224)
135.70 Procedures–Division VII, Review/Delegated Powers (rules 300–321)
The State Bar's posttrial effort to amend the hearing judge's decision could not be characterized as anything other than a posttrial motion covered by Rules of Procedure of the State Bar, rule 221, since no language in rule 221 limits its applicability to rules 222 through 224 and no language indicates that rules 222 through 224 are intended to be an exclusive roster of posttrial motions. Thus, when the State Bar filed a motion to amend the decision in the hearing department, it had the effect of vacating the request for review filed on the same date in the review department, rendering the request for review void *ab initio*. Moreover, the State Bar's second request for review was vacated because it was filed prior to the hearing judge's final ruling on the motion to amend, which final ruling was made when the hearing judge realized she had prematurely issued a ruling before respondent filed a timely opposition.

[2 a–g] **101 Procedures–Jurisdiction**
125 Procedures–Post–trial motions
130 Procedures–Procedure on Review
135.70 Procedures–Division VII, Review/Delegated Powers (rules 300–321)
Although the State Bar apparently believed that it had perfected its right to appeal due to having filed two requests for review, no timely request for review was filed after service of a final order disposing of a posttrial motion, and therefore the review department was without jurisdiction to hear the appeal. Due to the *sui generis* nature of disciplinary proceedings, as well as the differences between statutes and rules regarding notices of appeal applicable in civil matters and those applicable in disciplinary matters, the review department could not apply civil rules and statutes so as to consider the requests for review as prematurely filed or to stay proceedings at the trial level after a request for review had been filed. Although the State Bar asked for relief on the grounds that it never received a copy of the hearing judge's final order and that it was misled when the review department clerk's office did not reject pleadings filed after the requests for review, the evidence established that service of the hearing judge's final order was properly effectuated, and the review department clerk's failure to issue a notice of rejection of pleadings was not a ground for relief under any rule but merely a courtesy function. More importantly, because the review department was divested of jurisdiction, it was powerless to relieve against mistake, inadvertence, accident, or misfortune.

OPINION

EPSTEIN, J.

The State Bar seeks review of a hearing judge's disciplinary recommendation in this conviction referral matter involving a domestic dispute between respondent, Richard M. Ozowski, and his former girlfriend of many years. Respondent pled nolo contendere to one count of misdemeanor trespass for his uninvited intrusion into his former girlfriend's residence, which resulted in a tumultuous confrontation. The testimony by respondent and his former girlfriend regarding what occurred during that encounter was dramatically divergent.

After a two–day trial, the hearing judge found that the facts and circumstances surrounding respondent's criminal conviction, while not involving moral turpitude, warranted discipline, and she recommended, inter alia, that respondent be publicly reproved with conditions lasting one year. Respondent did not seek review, but he argues here that we lack jurisdiction to consider this appeal because the State Bar failed to file a timely request for review. For the reasons discussed below, we agree with respondent's position.[1] Although we are loath to dismiss this case on jurisdictional grounds, we are compelled to do so because, despite its efforts, the State Bar's two requests for review filed in this matter were vacated by operation of law, thereby depriving us of jurisdiction to consider this appeal.

I. PROCEDURAL BACKGROUND

Respondent was admitted to practice law in California on May 8, 2002, and has no prior record of discipline in California.[2]

As the result of his uninvited entrance into his former girlfriend's residence on July 6, 2003, and the ensuing altercation, respondent pled nolo contendere to misdemeanor trespass under Penal Code section 602.5, subdivision (a) on December 18, 2003.[3] Respondent also was required to participate in a domestic violence program, which is a mandatory condition required of all convictions that involve a dating relationship.

The State Bar transmitted the record of conviction to this court on April 15, 2005, and we referred the matter to the Hearing Department to determine if the conviction involved moral turpitude or other misconduct warranting discipline. The trial was held on January 18 and 19, 2006, and the hearing judge filed her decision on April 11, 2006, recommending, inter alia, that respondent be publicly reproved.

After the decision of April 11, 2006, various posttrial procedural steps taken by the State Bar and respondent resulted in the hearing judge twice resetting the time within which the parties could request review.

On April 20, 2006, the State Bar filed its first request for review in the Review Department. On the same date, it filed a Notice of Motion and Motion to Amend the Decision and Correct Errors (Motion to Amend) in the Hearing Department, citing California Penal Code section 1054.7 and the California Style Manual sections 5:9, 5:12, and 6:18 as the bases for its request that the full names of Vicki D. and Dennis D. be omitted or changed to protect their privacy. The State Bar also asked the hearing judge to correct the name of the victim's husband, who was erroneously identified as Derrick instead of Dennis.

On April 27, 2006, the hearing judge issued an order granting the State Bar's Motion to Amend, in part, and vacating her April 11, 2006, decision. She directed that an amended decision be filed in which the names of the victim and her spouse were stricken

1. On appeal, respondent asserts several other procedural and substantive claims, but in light of our decision to dismiss this matter for want of jurisdiction, we do not address the merits of those contentions.

2. Respondent was admitted to the Texas State Bar prior to moving to California.

3. As part of his plea, the court dismissed a misdemeanor charge of battery on a person with whom the defendant had a dating relationship (Pen. Code §§ 242 and 243, subd. (e)(1)) and a misdemeanor charge of false imprisonment (Pen. Code §§ 236–237).

and replaced with aliases. She also ordered that the time for filing a request for review be reset to the date of service of her order.

The State Bar filed a second request for review on May 4, 2006. But, on May 5, 2006, respondent filed a timely Opposition to the Motion to Amend (Opposition), in which he argued that the modifications requested by the State Bar would have the effect of wrongly characterizing him as a perpetrator of domestic violence. The hearing judge, acknowledging that respondent's Opposition was timely filed, considered his pleading and issued another order on May 18, 2006, declining to modify her April 27, 2006, decision. The hearing judge again reset the time to file a request for review to begin on the date of service of the May 18th order. The State Bar did not file another request for review.

On June 22, 2007, we advised the parties, pursuant to rule 305(b),[4] to consider addressing the following issues at oral argument: 1) whether the State Bar's request for review, filed on May 4, 2006, was vacated by the order of the hearing judge dated May 18, 2006; and, 2) whether the State Bar's May 4, 2006, request for review was a nullity, thereby depriving the Review Department of jurisdiction to consider this matter.

Both parties filed supplemental briefs on these issues.

II. DISCUSSION

At the outset, we note that we have the jurisdiction to determine our jurisdiction. (*In the Matter of Applicant B* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 731, 734.) We start with the most fundamental definition of jurisdiction, which is "the right to adjudicate" the cause. (*Harrington v. Superior Court* (1924) 194 Cal. 185, 188.) This basic jurisdictional principle is embedded in various provisions of the rules, which explicitly dictate when and under what circumstances we have jurisdiction to hear a matter.

Rule 301(e) sets forth the boundary line of this court's jurisdiction: "Except as expressly permitted by these rules, no action of a hearing judge shall be reviewable by the Review Department until after the entry of a decision or order by the hearing judge fully disposing of the entire proceeding."[5]

[1a] In the instant case, the State Bar filed its Motion to Amend in the Hearing Department on April 20, 2006, which had the effect of vacating its request for review filed on the same date in the Review Department. (Rule 301(d).)[6] The State Bar's request for review therefore was void *ab initio*. Under rule 301(d), this court was thus deprived of jurisdiction to hear the appeal of this matter, and the hearing judge retained jurisdiction to rule on the State Bar's posttrial motion. The hearing judge thus acted well within her discretion when, on April 27, 2006, she ruled that "[a]lthough the changes are insubstantial and do not affect the merits of the decision, the court considers the State Bar's request as a post–trial motion and is thereby governed by rule 221 of the Rules of Procedure of the State Bar. The time during which review may be sought in this matter will run from the date the order is served."[7]

[1b] Moreover, the State Bar's second request for review, filed in this court on May 4, 2006, was vacated under rule 221(b)(2), because it was filed prior to the hearing judge's final ruling on the Motion

4. Unless otherwise noted, all references herein to "rule" or "rules" are to the Rules of Procedure of the State Bar.

5. Prior to 1989, intermediate review by the Review Department of the Hearing Department's decisions was automatic regardless of whether a timely request for review was or was not filed. (See former rule 450(b).) After 1989, with the creation of appointed State Bar Court judges pursuant to Business and Professions Code sections 6079.1 and 6085.65, intermediate review ceased to be automatic and instead required a timely request of a party.

6. Rule 301(d) provides: "The filing of a post–trial motion as to a decision shall vacate any request for review of that decision filed under this rule."

7. The State Bar in its Motion to Amend incorrectly advised the hearing judge that "those amendments and corrections specifically identified herein [should not] otherwise disturb the timing for the filing of requests for review." Even though the April 27th and May 18th orders made no material changes to the hearing judge's April 11th decision, the judge had a duty to consider the merits of the State Bar's Motion to Amend, as well as

to Amend.[8] As it turned out, respondent interposed his timely Opposition to the Motion to Amend on May 5, 2006. Recognizing her error in making a premature ruling, the hearing judge issued a superseding order on May 18, 2006, in which she gave due consideration to respondent's Opposition, but nevertheless declined to further amend her earlier decision. The hearing judge also ordered that "[i]n light of respondent's timely opposition to the motion [to amend], the time during which review may be sought in this matter will run *from the date this order is served*." (Italics added.)

The hearing judge's two posttrial orders resetting the time to file a request for review were consistent, not only with rules 221(b)(2) and 301(d), which operated to vacate the State Bar's two requests for review, but with three other rules, all of which expressly provide that the time to file a request for review commences after the filing of the hearing judge's orders fully disposing of the matter. Thus, rule 221(b)(1) provides: "[t]he time to seek review *shall commence upon the service of the Hearing Department's ruling* on the post-trial motion . . . ." (Italics added.) Rule 301(a)(1) states that the filing and service of a request for review must "be filed within thirty (30) days *after* service of the hearing judge's ruling on a post–trial motion . . . ." (Italics added.) Additionally, rule 301(d) provides that "[t]he time to request review after a post–trial motion *shall commence with the service of the hearing judge's ruling* on the motion." (Italics added.)

[2a] The State Bar apparently believed that it had perfected its right to appeal, having filed the two requests for review, but, unfortunately, it was in error. Since no timely request for review was filed in this court after service of the May 18th order, we are without jurisdiction to hear the matter. (Rule 301(a).)

[2b] In an effort to avoid this harsh result, the State Bar looks to the California Rules of Court and the Code of Civil Procedure (CCP) for relief. However, "State Bar disciplinary proceedings are of a nature of their own and are not governed by the rules of procedure governing criminal and civil litigation. [Citation.]" (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 171.) Indeed, the *sui generis* nature of these proceedings reinforces our conclusion that we are without jurisdiction to consider the State Bar's appeal. For example, the State Bar suggests that we consider the two requests for review as prematurely filed, citing to California Rules of Court, rule 8.104(e).[9] However, there are no analogous provisions in the Rules of Court to rules 221(b)(2) and 301(d), that would have the effect of vacating notices of appeal filed prior to a decision on a posttrial motion.

[2c] We also do not agree with the State Bar's suggested application of CCP section 916(a), which stays proceedings in the trial courts of record once a notice of appeal has been filed, since rules 221(b)(1) and 301(a) and (e) expressly preclude the filing of a request for review until *after* the Hearing Department fully disposes of the proceeding and the hearing judge's final order has been served.

[2d] The State Bar further cites to *In re Jones* (1971) 5 Cal.3d 390, for support that the Supreme Court has not imposed a strict jurisdictional rule for appeals to the Supreme Court from State Bar disciplinary proceedings. In *In re Jones*, the court held that the 60-day period for a member to file a petition for review in the Supreme Court from a decision recommending disbarment or suspension is not jurisdictional. (*Id.* at p. 394.) The court cited to California Rules of Court, rule 45(e) (now rule 8.60(d)) for the

respondent's timely Opposition, which raised substantive objections to the requested changes, before rendering a decision "fully disposing of the entire proceeding." (Rule 301(e).) Thus, rule 220(a), which provides "[c]orrections of typographical errors or insubstantial changes not affecting the merits shall not constitute a modified decision," is inapplicable since the Hearing Department did not modify its decision *on its own motion*, but rather rendered a decision after the State Bar filed its posttrial motion.

8. Rule 221(b)(2) provides: "Any request for review filed prior to the Hearing Department's ruling on any post-trial motion shall be deemed vacated."

9. California Rules of Court, rule 8.104(e) provides that a "notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment" and a "reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment."

proposition that it may grant relief to a party from default or for any failure to comply with the rules if good cause is shown, as well as for its inherent authority to reverse or modify a disciplinary recommendation even when no request for review has been filed. (*In re Jones*, *supra*, 5 Cal.3d at p. 394.) However, nothing in the *Jones* opinion addresses the issues presented here – i.e., the transfer of jurisdiction *inter se*, i.e., between the Hearing Department and the Review Department. Furthermore, the *Jones* opinion predates the 1989 creation of the State Bar Court pursuant to sections 6079.1 and 6086.65, as well as the rules governing the filing of a request for review (see fn. 5 *ante*), and accordingly the court did not consider the effect of the vacation of a request for review pursuant to rules 221(b)(2) and 301(d).

[1c] Without citation to authority, the State Bar further argues that its Motion to Amend was not a posttrial motion, suggesting that the only posttrial motions covered by rule 221 are those specified in rules 222 through 224.[10] But there is no language in rule 221 limiting its applicability to rules 222 through 224, nor is there any language indicating that those rules are intended to be an exclusive roster of posttrial motions. In fact, rules 222 through 224 set forth the *evidentiary grounds* on which a party may present one of the motions enumerated therein, whereas rule 221 delineates the *procedures* a party must follow when presenting *all* posttrial motions to the court. We are at a loss to characterize the State Bar's posttrial effort to amend the hearing judge's decision as anything other than a posttrial motion, and we accordingly find that the hearing judge was well within her discretion to treat it as such.

[2e] Finally, the State Bar asks for relief on the grounds that it never received a copy of the May 18th order, and that it was misled by this court's clerk's office, which did not reject its pleadings filed after the requests for review. However, the record contains a copy of a Certificate of Service, certifying that on May 18, 2006, a copy of the order was served on the Deputy Trial Counsel "by interoffice mail through a facility regularly maintained by the State Bar of California." The State Bar averred in a declaration attached to its supplemental brief that the Deputy Trial Counsel did not have a copy of the May 18th order in her files, but it did not submit competent evidence establishing that service was not properly effectuated. Merely because the May 18th order did not reach the Deputy Trial Counsel's files does not controvert the fact established by the Certificate of Service that the service of the order was effectuated once it was deposited in the regular State Bar interoffice mail. (Rule 63(a);[11] see also *Caldwell v. Geldreich* (1955) 137 Cal.App.2d 78, 81.)

[2f] Moreover, the fact that the State Bar did not receive a clerk's notice of rejection of its pleadings is not grounds for relief pursuant to any rule; any notice of rejection is merely a courtesy function of the clerk's office. More importantly, because we were divested of jurisdiction once the requests for review were vacated, we are powerless "to relieve against mistake, inadvertence, accident, or misfortune." (*Stuart Whitman, Inc. v. Cataldo* (1986) 180 Cal.App.3d 1109, 1113, citing *Estate of Hanley* (1943) 23 Cal.2d 120, 123; see also *Maynard v. Brandon* (2005) 36 Cal.4th 364, 372–373.)

[2g] We acknowledge the public policy in favor of resolving "doubtful" cases so that parties may maintain their remedial rights of appeal. (See *Koehn v. State Board of Equalization* (1958) 50 Cal.2d 432, 435.) But this is not a doubtful case, since it involves the application of no less than five rules and two orders of the hearing judge, all of which clearly required the State Bar to file its request for review after service of the May 18, 2006, order. We find no ambiguity in the language of rule 221(b)(2) and rule 301(d), which operated to vacate the requests for review. The usual and ordinary meaning of "vacate" is to "nullify or cancel; make void; invalidate." (Black's

10. Rule 222 applies to motions to reopen the record, rule 223 concerns motions for a new trial and rule 224 governs motions for reconsideration.

11. Rule 63(a) states: "When service is made by United States mail or State Bar inter–office mail, by the Court or by a party, the provisions of Code of Civil Procedure section 1013(a) apply." CCP section 1013, subdivision (a) provides that service of the May 18th order was effectuated when it was deposited in the mail. (*McKeon v. Sambrano* (1927) 200 Cal. 739, 741.)

Law Dict. (8th ed. 2004); *People v. Trevino* (2001) 26 Cal.4th 237, 241 [we look to the usual and ordinary meaning of the statute to determine its intent].) In the absence of ambiguity or conflicting legislation,[12] we are satisfied as to the meaning and intent of these rules (*In re Derrick B.* (2006) 39 Cal.4th 535, 539), which are intended to preclude the Hearing Department and the Review Department from simultaneously adjudicating cases pending in the State Bar Court. It is "axiomatic that jurisdiction vests in only one court at a time." (*In the Matter of Kirwan* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 630, 635.) If we were to disregard rule 221 and rule 301, we would invite incongruent decisions and duplication of effort by the Hearing Department and the Review Department.[13] Additionally, to ignore the rules would allow the parties to seek this court's review of the very decisions they are asking the Hearing Department to modify. This is not only jurisdictionally nonsensical, it flies in the face of the proper administration of justice.

III. CONCLUSION

Rules 221 and 301 deprive us of jurisdiction to hear this matter and, accordingly, we are without authority to ameliorate the procedural lapses of the State Bar. We therefore conclude that the decision of the hearing judge recommending, inter alia, that respondent be publicly reproved is the final decision of the State Bar Court and this appeal is dismissed forthwith.

We concur:
WATAI, Acting P. J.
STOVITZ, J.*

*Retired Presiding Judge of the State Bar Court, sitting by designation of the Presiding Judge

12. Compare *In re MacKenzie* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 56, wherein we construed the clear language of a procedural rule as not being jurisdictional in order to harmonize the rule with the Business and Professions Code. Here, there is no such conflict with section 6086.65 of the Business and Professions Code or with California Rules of Court, rule 9.12, both of which contemplate that this court shall independently review decisions, orders, or rulings by a hearing judge once the court has fully disposed of an entire proceeding.

13. The State Bar argues that the Hearing and Review Departments comprise a unitary court, and as such, the rules transferring a matter between the two departments are not jurisdictional. The express language of the rules belies this interpretation. (See Bus. & Prof. Code, §§ 6086.5, 6086.65; rules 300, 301, 305; see also *In the Matter of Kirwan, supra*, 3 Cal. State Bar Ct. Rptr. at p. 635.)

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

MARK M. GEYER

A Member of the State Bar

Nos. 00–O–10746; 00–O–14654; 01–O–01709; 02–O–15397; 03–O–05008; 04–O–12467; 04–O–12746

Filed October 10, 2007

SUMMARY

Following respondent's admission into the Alternative Discipline Program (ADP), the State Bar opened seven new investigations against respondent involving serious misconduct allegedly occurring after respondent's acceptance into the ADP. Despite repeated orders from the court, respondent failed to cooperate or respond in any meaningful way to the State Bar regarding its investigation of the seven new matters. As a result, the State Bar filed a motion to terminate respondent from the ADP which the hearing judge denied. The State Bar requested interlocutory review of the hearing judge's order.

The review department concluded that the hearing judge abused his discretion by failing to terminate respondent from the ADP in light of uncontroverted and overwhelming evidence demonstrating respondent's repeated failure to comply with court orders and to cooperate in seven pending investigations regarding new allegations of serious misconduct. The review department reversed the hearing judge's order, granted the State Bar's motion to terminate respondent from the ADP, and remanded the matter to the hearing department for further proceedings.

COUNSEL FOR PARTIES

For State Bar: David T. Sauber

For Petitioner: Edward O. Lear

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] 130 Procedure on Review
167 Abuse of Discretion

In reviewing a hearing judge's decision not to terminate an attorney from the Alternative Discipline Program, the review department's examination of the issue is limited to deciding whether the hearing judge committed legal error or abused his discretion.

[2] 130 Procedure on Review
167 Abuse of Discretion

To determine if an abuse of discretion occurred, the review department is required to conclude that the judge contravened the uncontradicted evidence.

[3] 130 Procedure on Review
167 Abuse of Discretion

Where a hearing judge failed to terminate respondent from participating in the Alternative Discipline Program despite uncontroverted and overwhelming evidence demonstrating the respondent's repeated failure to comply with court orders and to cooperate in seven pending investigations involving serious misconduct, the hearing judge abused his discretion.

[4] 135.89 Specific Proceedings–Other/General

Where a judge questioned the State Bar at an Order to Show Cause hearing about its reasons for seeking an attorney's termination from participating in the Alternative Discipline Program, the hearing judge did not improperly shift the burden of proof to the State Bar because an order to show cause requires parties to appear at a specified time to demonstrate why the relief sought by the applicant should not be granted.

OPINION

THE COURT:*

The State Bar has requested interlocutory review of a hearing judge's order denying the State Bar's motion to terminate respondent Mark M. Geyer from the Alternative Discipline Program (ADP). In light of the uncontroverted and overwhelming evidence that Geyer continually and deliberately failed to comply with court orders and to cooperate with the State Bar during its investigation of outstanding matters, we conclude that the hearing judge abused his discretion by failing to terminate Geyer from the ADP.

I. GEYER REPEATEDLY FAILED TO COMPLY WITH THE TERMS AND CONDITIONS OF THE ADP

On November 20, 2003, Geyer signed a Contract and Waiver for Participation in the ADP (ADP contract) and was formally accepted into the program. The ADP contract is the written agreement in which the hearing judge set forth the terms and conditions of Geyer's participation in the program. (Rules Proc. of State Bar, rule 802(a).) By signing the ADP contract, Geyer acknowledged and accepted that "allegations of additional misconduct which occurred after Respondent was accepted into the [ADP]" and his failure to "comply with the [judge's] orders" could result in his termination from the program.

Following his admission into the ADP, seven new complaints were submitted against Geyer. The State Bar opened investigations on all seven matters, each of which involved allegations of serious misconduct occurring *subsequent* to Geyer's acceptance into ADP.[1] Three of the complaints were submitted to the State Bar in 2005 (2005 matters), and four were submitted in 2006 (2006 matters). Despite repeated orders from the court and Geyer's assurance that he would comply forthwith, he failed to cooperate or respond in any meaningful way to the seven new matters under investigation.

On January 25, 2007, the State Bar filed a motion to terminate Geyer from the ADP based on his lack of cooperation with the State Bar in its investigations, and because the additional misconduct occurred after Geyer's admission into the program. The hearing judge issued an order to show cause (OSC) on March 2, 2007, regarding termination of Geyer from the ADP.[2] The State Bar filed a response to the OSC, attaching 11 exhibits in support of its motion to terminate. Geyer failed to file a response to the OSC or to provide any explanation for his non–compliance.

A hearing on the OSC was held on April 4, 2007. The hearing judge admitted into evidence, without objection, the 11 exhibits submitted by the State Bar that set forth the new allegations of misconduct and substantiated Geyer's failure to cooperate with the State Bar's investigations. At the hearing, the hearing judge denied the State Bar's motion to terminate, repeatedly stating that the matters under investigation were "old" and "stale" because no formal Notice of Disciplinary Charges (NDC) had been filed as to those matters. The hearing judge focused almost exclusively on the delay and failure by the State Bar to file a NDC regarding the investigation matters. Geyer offered no evidence or testimony, and the hearing judge did not pose any questions to him regarding his failure to comply with the investigations.

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*Before Remke, P.J., Watai, J. and Epstein, J.

1. The cases are: 05–O–3466 [failure to prosecute a claim after payment of $10,000 advanced fee]; 05–O–3558 [failure to prosecute a personal injury claim resulting in dismissal]; 05–O–4582 [failure to represent interests of client and to communicate after payment of $5,000 advanced fee]; 06–O–10068 [failure to perform and abandonment of client]; 06–O–10422 [settlement of personal injury suit without authority and failure to promptly disburse funds]; 06–O–10424 [failure to pay medical providers in personal injury suit]; and 06–O–13266 [referral from Los Angeles Superior Court for gross neglect and client abandonment resulting in default judgment].

2. Two different hearing judges oversaw Geyer's participation in the ADP. The original hearing judge left the court in late 2006 and Geyer's case was reassigned to the new judge, who issued the OSC and made the determination now on review.

The State Bar's evidence presented to the hearing judge established that beginning in November 2005, Geyer continually and deliberately failed to cooperate with the State Bar during its investigation of the outstanding matters. Between November 2005 and December 2006, Geyer failed to respond to at least 14 separate letters from the State Bar requesting information pertaining to the seven complaints filed against him. As detailed below, during this same one–year period, Geyer repeatedly failed to comply with court orders that demanded his immediate cooperation and response to the outstanding matters.

Status Conference on March 9, 2006. By this time, six new investigations had been filed against Geyer: the three 2005 matters and three of the 2006 matters.[3] Geyer provided neither cooperation nor a response to the investigator regarding the 2005 matters. The three 2006 complaints were just entering the investigation stage of the State Bar process. Geyer was ordered to respond to all outstanding matters. The judge set a status conference for April 13, 2006, where he "[expected] all of these matters to be dealt with."

Status Conference on June 5, 2006:[4] At this conference, the judge noted that as of the April 13, 2006, conference, the outstanding investigations had still not been resolved, and that Geyer had yet to respond or fully cooperate with the investigations. Geyer claimed that he had responded to the 2005 matters, but acknowledged that he had not done so on the 2006 matters. However, contrary to Geyer's claim, the State Bar had not received any information from him about the 2005 matters. Geyer was ordered to cooperate with the investigator to resolve all of the matters within 60 days and a new conference date was set.

Status Conference on August 7, 2006: By this date, the State Bar had completed its investigation of the three 2005 matters without Geyer's cooperation, and was preparing to file a formal NDC. The three 2006 matters were still under investigation. Geyer had not provided any information or contacted the investigator regarding the 2006 matters despite being ordered to do so by the court. Geyer was again ordered to respond to these matters by August 11, 2006.

Status Conference on September 20, 2006: As of this date, Geyer had still not responded to the three 2006 cases. The fourth 2006 complaint was filed and under investigation. Geyer had not contacted the investigator, despite representations to the court in every prior status conference of his intention to do so forthwith. The State Bar asked that Geyer be placed on inactive status, arguing that "the delay in getting these investigations done" was attributable to Geyer. Further, the State Bar argued that the difficulty in resolving the matters or filing charges was because the "[i]nformation is not being provided by Mr. Geyer."

The judge admonished Geyer stating that "[as] far back as November of 2005, we've been talking about outstanding matters . . . every time we have met, I have talked with you about these matters. This has got to stop." Further, the judge told Geyer: "I'm going to take you out of practice. All right? Unless you, in thirty days, clear up all of these matters. And that's gonna [sic] be the final thing. I'm giving you notice that if they are not resolved in terms of your providing the information necessary to the investigators so that they can move forward on this in thirty days, you're not gonna [sic] be practicing law." A subsequent status conference was set for October 30, 2006.

The October 30, 2006, status conference was continued until December 4, 2006, at which time the matter was transferred to the new hearing judge. Geyer did not appear in December; however, his counsel was present. The matter was then continued two more times, first to January 2, 2007, and then to January 19, 2007. By that date, Geyer still had not

3. In addition, there were three complaints still being investigated that had been pending since the time Geyer entered the ADP. Ultimately, the parties reached a stipulation as to facts and culpability on these three matters and they were consolidated with the original proceeding. These three matters are not part of the motion to terminate.

4. No transcript of the April 13, 2006, proceeding was admitted in evidence.

cooperated in any of the outstanding matters under investigation.

II. THE HEARING JUDGE ABUSED HIS DISCRETION

[1] Our examination of the issues presented on interlocutory review is limited to deciding whether the hearing judge committed legal error or abused his discretion. (Rules Proc. of State Bar, rule 300(k); *In the Matter of Respondent AA* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 721, 726.) The State Bar asserts that the hearing judge abused his discretion in two ways: first, by improperly shifting the burden at the OSC hearing to the State Bar to show cause as to why Geyer should be terminated; and second, by failing to terminate Geyer from the ADP given the overwhelming evidence of his failure to comply with the program requirements.

[2] To determine if an abuse of discretion occurred, " 'the decision of the hearing judge is reviewed not with an intention of substituting the view of this court for that of the hearing judge, but rather with the intention of " 'employ[ing] the equivalent of the substantial evidence test by accepting the trial court's resolution of credibility and conflicting substantial evidence, and its choice of possible reasonable inferences [citations omitted]." ' (*In the Matter of Murphy* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 571, 577–578.)" (*In the Matter of Terrones* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 289, 293.) " '[I]t is generally accepted that the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered. [Citations.] . . . [W]hen two or more inferences can reasonably be deduced from the facts, a reviewing court lacks power to substitute its deductions for those of the trial court. [Citations.]' [Citation.]" (*H. D. Arnaiz v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1368.) Thus, in order to upset the determination of a lower court, we are required to conclude that the judge " 'contravened the uncontradicted evidence.' [Citations.]" (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 527.) Such is the case here.

[3] Upon the record, we are compelled to conclude that the hearing judge abused his discretion by failing to terminate Geyer in light of the uncontroverted and overwhelming evidence demonstrating Geyer's repeated failure to comply with court orders and to cooperate in seven pending investigations regarding new allegations of serious misconduct.

The goal of the ADP is to protect the public, courts and legal profession while providing assistance to rehabilitate members of the State Bar from substance abuse or mental health problems. (State Bar Court, Alternative Discipline Program, Program Outline (June 2005) p. 1. (Outline); see also Bus. & Prof. Code, § 6230 et seq.) The ADP offers a respondent the opportunity to receive less severe discipline if he admits to having committed misconduct, establishes a nexus between his substance abuse or mental health issue and the misconduct, successfully completes the prescribed treatment, and performs any other duties required under his ADP contract. (Rules Proc. of State Bar, rules 802, 803.) When the participant fails to comply with the terms of the ADP contract, he may be terminated from the program and more severe discipline may be imposed. (Rules Proc. of State Bar, rules 803, 805.) Thus, the ADP provides a clear incentive of a more lenient discipline to the participant to comply with the program terms, while providing a disincentive for failure to comply in the form of more severe discipline.

We cannot, and do not, readily disregard the determinations of the hearing judge, as program judges are afforded wide discretion in the supervision of an ADP participant. (Rules Proc. of State Bar, rule 807; see also Outline at pp. 7–8.) However, the State Bar presented a documented and uncontroverted litany of Geyer's non–compliance with court orders and of his failure to cooperate with the State Bar. Indeed, when the hearing judge finally decided to issue an OSC after more than a year of non–compliance and in response to the State Bar's motion to terminate, Geyer failed to file any response. He was present at the OSC hearing, but offered no contradictory testimony or exhibits. Similarly, although given an opportunity, Geyer failed to file a response or offer any evidence in opposition to the State Bar's request for interlocutory review. We find that Geyer's repeated and prolonged failure to cooperate with the State Bar on even the most basic level, coupled with his willful disobedience of numerous

court orders, clearly demonstrates his lack of concern for compliance with his ADP contract and his lack of appreciation of the importance of these disciplinary proceedings. In order to uphold the integrity of the ADP, such a participant cannot be allowed to remain in the program with the potential reward of less severe discipline.

[4] The above analysis renders moot the State Bar's other point that the hearing judge abused his discretion by questioning the State Bar at the OSC hearing as to why Geyer should be terminated from the ADP. Nevertheless, we note that, contrary to the State Bar's assertion, the hearing judge did not "shift the burden" to the State Bar during the hearing. An order to show cause requires parties to appear at a specified time to demonstrate why the relief sought by the applicant should not be granted, and a hearing follows in the same manner as if the time were specified in a notice of motion. (*McAuliffe v. Coughlin* (1894) 105 Cal. 268, 270; *Eddy v. Temkin* (1985) 167 Cal.App.3d 1115, 1120.) While we certainly believe an inquiry directed at Geyer as to why he should not be terminated from the ADP would have been judicious, the hearing judge acted within his discretion to question the State Bar at the hearing regarding its reasons for seeking Geyer's termination.

Finally, the hearing judge's concern that the matters were "old" and "stale" are irrelevant to the substantive inquiry of the motion to terminate for failure to cooperate with the State Bar's investigation. The issue was, and remains, Geyer's disregard for his obligation to cooperate with the State Bar and to comply with all court orders as a condition of receiving lesser discipline. The record before this court clearly indicates that

Geyer's unremitting failure to assist the State Bar in its investigations caused the delay in bringing formal charges against him. Rather than participate in the ADP by adhering to his obligations, he caused obstruction and impediment to ongoing investigations.

Although we generally defer to a hearing judge's determinations regarding a program participant, there is no uncertainty here as to the numerous obligations Geyer failed to fulfill. His continued disregard for those obligations clearly demonstrates his unwillingness to participate fully in the program and he should no longer be entitled to the benefit of participation. Thus, we find that the hearing judge "contravened the uncontradicted evidence" by failing to terminate Geyer from the ADP.

III. THE MOTION TO TERMINATE IS GRANTED

We reverse the hearing judge's order of May 8, 2007, and accordingly, the State Bar's motion to terminate Mark M. Geyer from the ADP is granted. This matter is remanded to the hearing department for further proceedings in accordance with this opinion.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DONALD J. LOFTUS

A Member of the State Bar

No. 02–O–13160; 03–O–05017

Filed November 7, 2007

SUMMARY

While representing clients in a medical malpractice lawsuit, respondent surreptitiously recorded a telephone conversation with a doctor and threatened to contact a juror's employer. The hearing judge found respondent culpable of harassing a juror but found no culpability on three other charges. In recommending a one–year stayed suspension, the hearing judge considered the respondent's uncharged misconduct, harm to the administration of justice as well as respondent's 28 years of discipline–free practice. Both parties sought review.

The review department adopted most of the hearing judge's factual findings, modifying the culpability findings and finding fewer factors in mitigation and more factors in aggravation than did the hearing judge. The review department recommended that respondent be suspended for one year, stayed, that he be placed on probation for 18 months on the condition that he be actually suspended for three months.

COUNSEL FOR PARTIES

For State Bar: Don M. Anthony

For Petitioner: Donald J. Loftus

HEADNOTES

[1] **221.00 State Bar Act–Section 6106**
Although it is not inherently wrong for an attorney to communicate with an opposing party not represented by counsel, where an attorney instigates a conversation with an adverse party under false pretenses, secretly tape–records the conversation and thereafter lies about the surreptitious recording during litigation, the attorney is culpable of moral turpitude.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2] **213.10 State Bar Act–Section 6068(a)**
In State Bar Court proceedings any reasonable doubts must be resolved in respondent's favor. Where construction of law prohibiting recording of confidential communications without consent was uncertain at the time respondent surreptitiously recorded a telephone conversation, it could have been possible to determine that respondent's conduct did not violate the law. Thus, the charge that respondent failed to support the laws of California was dismissed with prejudice.

[3] **343.00 Rule 5–320(D)**
In order to find a violation under rule 5–320(D), the State Bar must prove by clear and convincing evidence that respondent subjectively had the specific intent to harass or embarrass a juror, or influence a juror's actions in future jury service. Where respondent threatened to send a letter to a juror's employer only after the juror refused to sign an affidavit for respondent, and where respondent waited approximately one year before sending a letter to the juror's employer and then only after the State Bar filed a Notice of Disciplinary Charges, the facts convincingly establish respondent's subjective intent to harass the juror.

[4] **710.30 Mitigation–Long Practice With No Prior Discipline Record–Found But Discounted**
Where respondent had a license to practice law in Nebraska since 1973 but offered no evidence as to the scope or continuing nature of his practice there, mitigating credit for 27 years of discipline–free practice in Nebraska is severely diminished. However, respondent is entitled to full credit for 10 years of discipline–free practice in California.

[5] **740.51 Mitigation–Good Character–Declined To Find**
A single character witness is insufficient to be a mitigating circumstance.

[6] **740.53 Mitigation–Good Character–Declined To Find**
765.51 Mitigation–Pro Bono–Declined To Find
Where respondent's charitable work in the form of donating to charity the sales proceeds of a compact disc he recorded was uncontroverted, respondent's testimony on its own is not sufficient to establish his charitable work as a mitigating factor since there was no evidence as to where the proceeds were delivered or any supporting witnesses to attest to the work.

[7] **1015.03 Discipline Imposed in Disciplinary Matters Generally–Three Months**
Where respondent committed acts involving moral turpitude and harassed a juror in violation of rule 5–320(D), where there was mitigation for discipline–free practice, and where there was aggravation due to multiple acts of wrongdoing, significant harm to the administration of justice, and a demonstrated indifference toward rectification, the appropriate disciplinary recommendation was one year stayed suspension, 18 months of probation on conditions which included three months actual suspension.

ADDITIONAL ANALYSIS

Aggravation

Found

521	Multiple Acts
586.10	Harm To Administration Of Justice
591	Indifference

Found but Discounted

543.10	Duplicative of Section 6106 Charge

Other

106.30	Procedures–Pleadings–Duplicative Charges
221.50	State Bar Act–Section 6106.5

OPINION

REMKE, P.J.:

"It is common knowledge that it is increasingly difficult to obtain willing citizens to serve as members of a jury." (*Lind v. Medevac, Inc.* (1990) 219 Cal.App.3d 516, 521.) This case represents an attorney's failure to recognize both his obligations as an officer of the court and his ethical obligations as an attorney to insure that his conduct does not "exacerbate the reluctance of some persons to undertake jury service . . . ." (*Ibid.*) During respondent Donald J. Loftus's representation of his clients, not only did he harass a juror, he secretly tape–recorded a telephone conversation with an adverse party and then lied about it during the litigation. Such unscrupulous litigation tactics severely damage the reputation of the legal profession.

Both parties have sought review of the recommendation by the hearing department that Loftus be suspended from the practice of law for one year, that the execution of that suspension be stayed, and that he be placed on probation for 18 months. Upon our independent review, we adopt most of the hearing judge's factual findings, but modify the culpability findings. We also find fewer factors in mitigation and more factors in aggravation. With these modifications, we amend the disciplinary recommendation to include an actual period of suspension of 90 days.

I. BACKGROUND INFORMATION

Loftus was admitted to practice law in California on December 4, 1990, and has been a member of the State Bar since that date. He also has been licensed in Nebraska since 1973.

On August 27, 2004, the Office of Chief Trial Counsel of the State Bar of California (State Bar) filed a Notice of Disciplinary Charges (NDC) against Loftus charging him with violating Business and Professions Code section 6106,[1] for committing acts involving moral turpitude, in counts one and three; violating section 6068, subdivision (a), for failing to support the Constitution and laws of the United States and California by violating Penal Code section 632, for recording a confidential communication, in count two; and violating the Rules of Professional Conduct, rule 5–320(D),[2] for harassing or embarrassing a discharged juror, in count four. Loftus filed a response on September 13, 2004, denying all counts.

A two–day hearing was held on November 15 and 16, 2005. Subsequent to the hearing, Loftus filed a motion for mistrial, which was denied on February 27, 2006. The decision was filed on February 28, 2006. The hearing judge found culpability for violating rule 5–320(D), harassing a juror, in count four, and no culpability for counts one through three. She also found in aggravation uncharged misconduct based upon Loftus's dishonesty and bad faith, and for harming the administration of justice. In mitigation, the hearing judge considered Loftus's 28 years of discipline–free practice and his charitable work. She did not consider Loftus's one character witness as mitigation because he had limited knowledge of Loftus's character.

II. FACTS

Upon our de novo review of the record (Cal. Rules of Court, rule 9.12), we adopt most of the hearing judge's findings of fact, which are supported by clear and convincing evidence and summarized below. However, where relevant, we supplement the hearing judge's findings with details evident from the record.

A. Loftus Records a Conversation Without Permission

On August 29, 2000, Thomas Marcisz, a neurosurgeon, performed surgery on Tamara Lukeman (Tamara). The surgery was to correct a malfunctioning internal shunt. Shortly after the surgery, Tamara suffered a seizure that resulted in her subsequent hospitalization. Gabrielle Morris, another neurosurgeon at the same hospital, took over Tamara's

1. All further references to section(s) will be to the Business and Professions Code unless otherwise noted.

2. All further references to rule(s) are to the California Rules of Professional Conduct unless otherwise noted.

treatment from Dr. Marcisz. As part of her treatment, Dr. Morris externalized Tamara's shunt. After the shunt was externalized, in a state of confusion, Tamara disconnected the shunt and suffered severe brain damage.

Tamara and her husband hired Loftus to represent her in a medical malpractice lawsuit. On December 21, 2000, Loftus sent a letter to Dr. Morris, stating that he was Tamara's attorney. The purpose of the letter was to find out what orders, if any, were issued by Dr. Morris regarding restraints for Tamara, whether Tamara's removal of the shunt was the cause of her severe brain damage, and whether, in Dr. Morris's opinion, Dr. Marcisz's negligence was a substantial factor in bringing about the initial seizure.

Although Loftus knew that Dr. Morris would be a defendant in any medical malpractice lawsuit he filed, he failed to advise or warn Dr. Morris of this fact in his letter. He also failed to inquire whether Dr. Morris had retained counsel. Instead of revealing the adversarial nature of his inquiry, Loftus started the letter by stating, "[b]oth Tammy and Ken Lukeman have a great deal of admiration and respect for you and I am sorry to have to trouble you, however, I have a couple of questions about her medical care and treatment that need to be resolved." Loftus gave the impression that he was gathering information from Dr. Morris as a potential witness, not a defendant, and that he hoped "to obtain the above information without having to impose upon [her] by taking [her] deposition."

On December 27, 2000, Dr. Morris telephoned Loftus in response to his letter. Loftus claims he heard a strange noise on the phone and thought that perhaps Dr. Morris was recording the conversation or that she was using her speaker phone and someone else – possibly her attorney – was listening. When Loftus asked, Dr. Morris confirmed that she was not recording the conversation. Loftus contends that at that point he realized *his* tape–recorder was on and *he* was recording the conversation. Rather than turn it off or ask Dr. Morris if he could record the conversation, Loftus decided to continue the recording and not tell her. Loftus recorded the conversation because he was suspicious of Dr. Morris and wanted the recording in case he needed to impeach her statements later during the litigation. Had she been asked, Dr. Morris testified that she would not have consented to the conversation being recorded.

During the conversation, Dr. Morris answered several of Loftus's questions regarding her and Dr. Marcisz's care of Tamara. Dr. Morris said that she was more than happy to help Loftus with Tamara. Dr. Morris said that although Tamara was properly restrained, she was still able to pull the shunt out because "unfortunately that does happen." Dr. Morris stressed, "it's not that the nurses didn't do what they needed to do." Dr. Morris also said that Dr. Marcisz was incompetent, but that there was little connection between his competency and Tamara's injuries. Dr. Morris also told Loftus that she would have no problem stating under oath that Dr. Marcisz had a poor reputation in the medical community.

On May 22, 2001, Loftus filed a complaint against the hospital and Dr. Marcisz, alleging medical malpractice and intentional infliction of emotional distress. On October 17, 2001, Loftus filed a second lawsuit, alleging medical malpractice and naming only Dr. Morris as a defendant. The two cases were consolidated for trial.

On December 5, 2001, Dr. Morris retained attorney Daniel Belsky. On December 11, 2001, Belsky called Loftus to discuss a date for scheduling Dr. Morris's deposition. Belsky was aware of the conversation that occurred between Dr. Morris and Loftus on December 27, 2000, regarding Tamara's medical condition. While discussing a date for Dr. Morris's deposition, Loftus asked Belsky if Dr. Morris had tape–recorded the conversation. Belsky thought it was such a bizarre question that it prompted him to ask Loftus if he had recorded the conversation with Dr. Morris, to which Loftus replied that he had not.

During discovery, Loftus prepared responses to form interrogatories on behalf of his clients, Kenneth and Tamara Lukeman. The Lukemans' responses were dated October 29, 2001, and December 21, 2001, respectively, and signed by Loftus. The interrogatories specifically asked whether anyone on the Lukemans' behalf had interviewed any individual concerning the medical treatment giving rise to the lawsuit, and also asked whether anyone on the

Lukemans' behalf had recorded a statement from any individual regarding Tamara's medical treatment. The interrogatory responses failed to disclose the December 27, 2000, tape–recorded conversation between Loftus and Dr. Morris. The first time Loftus acknowledged that he had recorded his conversation with Dr. Morris was at the conclusion of Dr. Morris's February 5, 2002, deposition when he attempted to impeach the doctor's testimony. On February 11, 2002, Loftus signed a supplemental response to the form interrogatories wherein he admitted interviewing and recording a conversation with Dr. Morris.

B. Loftus's Conversation with a Juror

On August 5, 2003, in a consolidated trial before the Honorable Lisa Guy–Schall, a jury was selected in Tamara's medical malpractice matter. On August 21, 2003, Judge Schall told the jurors that they would have no jury duty on the following Monday. She also told them that they were on the honor system because it was not the court's obligation to tell their employers that there would be no jury duty.

On October 22, 2003, after the verdict in favor of the defendants and the jury had been discharged in Tamara's medical malpractice matter, Loftus contacted juror Stuart Shafer over the phone at his place of work to investigate his belief that Judge Schall had committed prejudicial error by her admonition to the jurors that the court would not advise their employers of their day off. Loftus had previously left at least four messages for Shafer. Loftus started out cordially asking Shafer questions about jury deliberation and jury instructions, which Shafer answered. Loftus then asked Shafer if he recalled Judge Schall telling the jurors when she dismissed them on August 21, 2003, that they would not have jury duty on Monday, August 25, 2003, but that she was not going to tell their employers. Shafer recalled Judge Schall making such a statement. Loftus next asked Shafer if he would sign an affidavit to that effect. Shafer declined to provide an affidavit because he did not feel comfortable in so doing. After Shafer refused to provide an affidavit, the tone of the conversation changed from being cordial to being adversarial.

The next question Loftus asked Shafer was whether he had gone to work on August 25, 2003. Shafer replied that he had not gone to work. Loftus then asked Shafer if his employer had paid him for jury service on August 25, 2003. Shafer told Loftus that he was not going to answer that question. After Shafer refused to answer the question, Loftus informed Shafer that he was going to write a letter to Shafer's employer informing the employer that Shafer did not have jury duty on August 25, 2003. Shafer was so angry at what he perceived to be Loftus's implicit threat that he told Loftus to never call him again and hung up on Loftus. The conversation between Shafer and Loftus lasted approximately five minutes. Loftus did not call Shafer again.

III.LOFTUS IS CULPABLE OF MISCONDUCT

Both parties have sought review. The State Bar contends that the hearing judge erred by not finding additional culpability for violating section 6068, subdivision (a), for Loftus's undisclosed recording of the conversation with Dr. Morris in violation of Penal Code section 632. Further, it contends that the hearing judge should have found additional factors in aggravation, namely that Loftus's failure to disclose the recording in interrogatories lacked candor, and that he demonstrated no remorse for his actions. The State Bar asks that "some period" of actual suspension be recommended, without recommending the length of suspension or providing any supporting case law. Loftus argues, among other things, that the hearing judge erred in finding culpability for count four and that all counts should be dismissed.

A. Count One – Secretly Recording a Conversation

Section 6106 provides that an attorney's commission of an act involving moral turpitude, dishonesty or corruption constitutes grounds for suspension or disbarment. Count one of the NDC alleges that Loftus violated section 6106 by recording his telephone conversation with Dr. Morris without her knowledge and with the intent to use the recording in the subsequent lawsuit against her. Focusing on the issue of confidentiality, the hearing judge declined to find culpability because it was not clear that Loftus believed or had reason to believe he was recording a "confidential communication." However, that analy-

sis is too narrow. When we look to the totality of the circumstances surrounding the recording, we find that Loftus's conduct was clearly dishonest and in violation of section 6106.

When Loftus tape–recorded his telephone conversation with Dr. Morris, he knew that she was the "primary focus" of any litigation. However, not only did he fail to warn her of this fact, he gave Dr. Morris the false impression that he was contacting her as a potential witness against the hospital and/or Dr. Marcisz. Then, without notice or permission, Loftus tape–recorded the conversation. Loftus justifies his decision to record the conversation by claiming that he heard a strange noise and thought that either Dr. Morris was recording the conversation or that someone else was listening – possibly her attorney. Loftus wanted the recording in case Dr. Morris later recanted her statements during litigation. Thus, not only was it likely that any recorded conversation could be used against Dr. Morris in subsequent litigation, it was the very reason Loftus recorded the conversation and, indeed, the exact purpose for which he ultimately used it.

Loftus's devious purpose in recording the conversation is further evident by his subsequent actions. In addition to failing to warn Dr. Morris that he was recording their conversation, Loftus lied to Belsky about it and then failed to disclose the recorded interview during discovery. Despite multiple opportunities in which he could have disclosed the recording, Loftus chose not to do so until the "gotcha" moment during Dr. Morris's deposition. Although they may make for good television drama, such Machiavellian litigation tactics cannot be condoned.

Moral turpitude includes fraud and has been said to mean dishonesty and conduct not in accordance with good morals. (*Call v. State Bar* (1955) 45 Cal.2d 104, 109.) A finding of gross negligence will support a charge of moral turpitude, even without an evil intent behind the act committed. (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 384.) "A finding of gross negligence in creating a false impression is sufficient [to find a] violation of section 6106. [Citations.] Acts of moral turpitude include concealment as well as affirmative misrepresentations. [Citations.] Furthermore, ' "[n]o distinction can . . . be drawn among concealment, half–truth, and false statement of fact. [Citation.]" [Citation.]' [Citation.]" (*In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, 808.)

[1] Although it is not inherently wrong for an attorney to communicate with an opposing party not represented by counsel (see rule 2–100), we find that Loftus breached his ethical duties in this case. Loftus's misconduct began in a grossly negligent manner with Dr. Morris when he created the false impression that she was not an adverse party and that he was not recording the conversation, and evolved to his making false statements to conceal the truth. Loftus failed to demonstrate the good morals associated with being an attorney. The totality of the facts clearly and convincingly establish that Loftus is culpable of moral turpitude as charged by instigating a conversation with an adverse party under false pretenses, then secretly tape–recording it, and subsequently lying and concealing it during the litigation.

B. Count Two – Illegally Recording Confidential Communications

Section 6068, subdivision (a), requires attorneys to support the Constitution and laws of the United States and California. Count two charges a violation of this section based upon Loftus's recording of the conversation with Dr. Morris, allegedly in violation of Penal Code section 632, which prohibits recordings of confidential communications without consent.[3] The

3. Penal Code section 632 makes it a crime for any person to "intentionally and without the consent of all parties to a confidential communication, by means of [a recording device, to eavesdrop or record a] confidential communication . . ." The provision defines a confidential communication as "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded."

hearing judge dismissed this count, finding that at the time of the recording the law was uncertain as to what was a "confidential communication." The State Bar asserts that no uncertainty existed and that Loftus should have known that the conversation fell under the protection of Penal Code section 632. We agree with the hearing judge.

The hearing judge found that when Loftus recorded his conversation with Dr. Morris in 2000, the Courts of Appeal were in disagreement over the critical term "confidential communication." One line of authority held that a conversation is confidential if a party to the conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded. (*Frio v. Superior Court* (1988) 203 Cal.App.3d 1480, 1488–1490; *Coulter v. Bank of America* (1994) 28 Cal. App.4th 923, 929.) The other line of authority held that a conversation is confidential only if the party has an objectively reasonable expectation that the content will not later be divulged to third parties. (*O'Laskey v. Sortino* (1990) 224 Cal.App.3d 241, 248; see also *Deteresa v. American Broadcasting Companies, Inc.* (9th Cir. 1997) 121 F.3d 460, 464.) It was not until 2002 that the California Supreme Court finally resolved the conflict. In *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 775, the Supreme Court adopted the reasoning in the *Frio* line of cases, holding that a conversation is deemed confidential if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded.

[2a] After reviewing the cases representing the two lines of construction of Penal Code section 632, we are inclined to agree with the hearing judge's finding that, given the uncertain state of the law at the time the telephone call was recorded, it could have been possible to determine that no violation occurred. When language in penal law is reasonably susceptible to two constructions, ordinarily the construction that is more favorable to the offender will be adopted. (*In re Tartar* (1959) 52 Cal.2d 250, 256.) "The defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact or as to the true interpretation of words or the construction of language used in a statute." (*Id.* at p. 257.) Likewise, in State Bar Court proceedings, any reasonable doubts must be resolved in the respondent's favor. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 438; *Young v. State Bar* (1990) 50 Cal.3d 1204, 1216.)

[2b] In the telephone conversation with Loftus, Dr. Morris stated that she would be willing to repeat under oath the comments that she made to Loftus. By agreeing to testify in court regarding her statements to Loftus, the content of the conversation between Dr. Morris and Loftus would ultimately be divulged to third parties. Thus, under the *O'Laskey* line of cases, the conversation between Dr. Morris and Loftus would not have been a "confidential communication." Thus, we cannot conclude that Loftus's conduct would have been construed as violating Penal Code section 632, and dismiss the charge with prejudice.

C. Count Four – Harassing a Juror

Rule 5–320(D) provides that "[a]fter discharge of the jury from further consideration of a case a member shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service." In order to find a violation under rule 5–320(D), the State Bar must prove by clear and convincing evidence that Loftus subjectively had the specific intent to harass or embarrass a juror, or influence a juror's actions in future jury service. (*In the Matter of Respondent A* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 255, 261–262.) We agree with the hearing judge's finding that Loftus violated this rule.

Loftus vehemently asserts that Shafer and the superior court judge engaged in a conspiracy to defraud Shafer's employer, and that it was his "duty as a citizen" to inform the employer of this fraudulent conduct. Whether or not Loftus truly believed he had such a duty, the manner and circumstances in which he presented the statement to Shafer is harassment.

[3] Upon Shafer's refusal to sign an affidavit regarding the judge's admonition, Loftus became adversarial. Further, it was only after Shafer's refusal to sign an affidavit that Loftus told Shafer he would send a letter to Shafer's employer. A juror should not have to endure such intimidation merely because he refuses to aid an attorney. Finally, despite

Loftus's claim that he had a duty as a citizen to report Shafer's conduct to the employer, he acknowledges that he sent the letter about a year after the conversation with Shafer and then only after the State Bar filed the NDC. Thus, we find that the facts surrounding the conversation convincingly establish Loftus's subjective intent to harass Shafer in violation of rule 5–320(D).

D. Count Three – Inappropriate Contact with a Juror

Count three of the NDC charges Loftus with violating section 6106 by harassing Shafer in an attempt to obtain a signed affidavit. The hearing judge did not find culpability for this count and neither party challenges that finding. We agree with the hearing judge.

Loftus's statement that he would contact Shafer's employer was nothing less than a threat made in his unbridled quest to win. Although the statement may have resulted from an unprofessional reaction born out of frustration in the moment, more restraint is demanded of attorneys. We find Loftus's repeated willingness to exploit his status as an attorney for improper purposes to be abhorrent.

Loftus's statement to Shafer is unethical and certainly constitutes a disciplinable offense. However, since the same misconduct that is alleged to constitute acts involving moral turpitude in this count also is alleged to be the basis of a rule 5–320 violation in count four, we decline to find culpability for both counts. The appropriate resolution of this case does not depend on how many rules of professional conduct or statutes proscribe the same conduct. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.) We find that this misconduct is better charged as a rule violation as set forth above in count four. Accordingly, we dismiss with prejudice count three.

IV. DISCIPLINE

A. Mitigation

Loftus has the burden to prove mitigating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).[4])

[4] Loftus has been admitted to practice in California since 1990. He also testified that he has had a license to practice in Nebraska since 1973, but offered no other evidence as to the scope or continuing nature of his practice in Nebraska, or whether he has ever been disciplined in that state. Based on the limited evidence, Loftus's mitigation credit for his 27 years of discipline–free practice is severely diminished. However, he is entitled to full credit for his 10 years of discipline–free practice in California prior to the current misconduct. (Std. 1.2(e)(i).)

[5] Loftus presented one character witness, Marc Anderson, as evidence in mitigation. (Std. 1.2(e)(vi).) Anderson's knowledge of Loftus's character is limited to assisting Loftus with one trial in 2001, which lasted approximately one month, and then having a "few lunches" together afterwards. The 2001 trial was Anderson's last professional contact with Loftus. Prior to assisting Loftus, Anderson did not know him and had no knowledge of Loftus's reputation in the community. The standard requires that "an extraordinary demonstration of good character" be shown by a "wide range of references in the legal and general communities and who are aware of the full extent of the member's misconduct." We agree with the hearing judge that Loftus's one character witness is insufficient to be a mitigating circumstance. (See *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 939.)

4. All further references to standard(s) are to these Standards for Attorney Sanctions for Professional Misconduct.

[6] Lastly, we disagree with the hearing judge's finding that Loftus's charity work establishes a separate factor in mitigation under standard 1.2(e)(vi). Loftus testified that he recorded a CD and donated the proceeds from the sale to charity. An attorney's charitable work may be considered as some evidence in mitigation, notwithstanding that it does not meet the criteria for character evidence set forth in standard 1.2(e)(vi). (*In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 158, fn. 22.) Although Loftus's testimony regarding these charitable activities is uncontroverted, there is no evidence as to where these proceeds were delivered or any supporting witnesses to attest to this work. Thus, respondent's testimony on its own is not sufficient to establish his charitable work as a mitigating factor.

B. Aggravation

The hearing judge found two factors in aggravation. First, she found evidence of uncharged misconduct, finding Loftus to be dishonest and acting in bad faith based on his lie to Belsky regarding the recording and his omission of the tape in the interrogatory responses. (Std. 1.2(b)(iii).) We agree that Loftus's misconduct was clearly surrounded by concealment and dishonesty, as he blatantly denied recording the conversation when directly asked. However, we do not consider it as an additional factor in aggravation because such a finding would be duplicative of the misconduct comprising acts of moral turpitude under count one.

Second, the hearing judge found that Loftus's treatment of Shafer significantly harmed the public and the administration of justice. (Std. 1.2(b)(iv).) We agree. Loftus's actions demonstrate contempt for his ethical responsibilities and further alienate jurors, many of whom are already unwilling to participate in jury service. (See *Lind v. Medevac, Inc.*, *supra*, 219 Cal.App.3d at p. 521.) Given the importance of the jury system, it is paramount that attorneys interact with jurors in the most professional and ethical manner. (*Ibid.*)

In addition, we find that Loftus committed multiple acts of wrongdoing. (Std. 1.2(b)(ii).) Not only did he harass a juror, he secretly tape–recorded a telephone conversation with an adverse party and then lied about it during the litigation.

Finally, we find further aggravation under standard 1.2(b)(v), as Loftus has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. Loftus continues to assert that Shafer defrauded his employer and alludes that a conspiracy existed between the trial judge and the jurors. Loftus states that Shafer had "something to conceal" and that Shafer was angry because Loftus "wasn't complying with the judge's promise of silence." Loftus dismisses the more likely cause of Shafer's irritation, which was that Loftus clearly stated his intent to inform Shafer's employer that Shafer collected pay to which he was not entitled. We are concerned that in view of his lack of recognition of his wrongdoing, and the dubious justification for his actions, there is a risk that he may again commit similar misconduct.

C. Level of Discipline

When determining the appropriate level of discipline, we must always keep in mind that the purpose of discipline is not to punish the attorney, but to protect the public. (Std. 1.3; *Bach v. State Bar* (1987) 43 Cal.3d 848, 856.) To do this, we consider the standards, prior decisional law, and the facts and circumstances unique to this case. (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) Although the standards are afforded "great weight" in determining the appropriate level of discipline (*In re Silverton* (2005) 36 Cal.4th 81, 92), they are intended to be flexible in nature, so that we may "temper the letter of the law with considerations peculiar to the offense and the offender. [Citations]." (*In the Matter of Van Sickle*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 994.) We have found Loftus culpable of violating rule 5–320(D), and committing acts of dishonesty in violation of section 6106. Under standard 2.10, a violation of rule 5–320(D) provides for a range of discipline from a reproval to suspension. Standard 2.3 applies to Loftus's violation of section 6106 and provides that an act of moral turpitude, fraud or intentional dishonesty "shall result in actual suspension or disbarment" according to the gravity of the offense or the harm, if any, to the victim. When two or more standards apply, the most severe standard

should be used. (Std. 1.6(a); *In the Matter of Regan* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 844, 858.)

The hearing judge noted that she did not uncover any cases setting forth facts similar to the current matter, but found instructive both *Sorensen v. State Bar* (1991) 52 Cal.3d 1036, and *In the Matter of Scott* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 446. We appreciate her difficulty, as our review of case law reveals that the incidence of improper contact with jurors is rare. Although the State Bar advocates for "some period of actual suspension," it has cited no authority to support its position. Likewise, Loftus failed to present any cases that demonstrate the hearing judge erred in her discipline recommendation.

Although *Sorensen v. State Bar*, *supra*, 52 Cal.3d 1036, did not involve the type of misconduct presented here, the hearing judge found the case to be instructive because it involved an act of pursuing an action out of vindictiveness. The attorney in *Sorenson* pursued a meritless action for fraud and was found to have violated section 6068, subdivisions (c) and (g), by breaching his duty to maintain actions that appear to him legal or just and his duty not to encourage the commencement of an action from a corrupt motive of passion or interest. In aggravation, the Supreme Court considered that there was no justification in bringing the fraud action, no showing of regret or remorse about his actions, and the use of legal skill to abuse the litigation process and harass the opposing party. The court adopted the Review Department's recommendation of 30 days' actual suspension.

In *In the Matter of Scott*, *supra*, 4 Cal. State Bar Ct. Rptr. 446, the attorney pursued a series of four related lawsuits in which after each action was resolved unfavorably to the attorney, he filed the next. We found the attorney culpable of violating section 6068, subdivisions (c) and (g), as a result of his conduct in filing and pursuing the four lawsuits, and found that he did so in bad faith and for a corrupt motive. In imposing discipline, we noted that we were troubled by the attorney's portrayal that he was the victim and that he had not gained any insight into his misconduct. In mitigation, we considered the attorney's lack of prior discipline, but discounted his good character witnesses who were not aware of the full extent of his misconduct. In aggravation, we found that the misconduct harmed the administration of justice and that the attorney showed no recognition of his wrongdoing. Thus, the discipline imposed reflected the lack of insight by the attorney, as well as the harm to the victim and the assurance to the public and bar that such conduct will not be tolerated. (*Id.* at p. 458.) Taking into consideration all of the factors, we imposed two years' stayed suspension with two years' probation with conditions, including 60 days' actual suspension.

We also look for guidance to the case of *Levin v. State Bar* (1989) 47 Cal.3d 1140. Although the misconduct in *Levin* is significantly distinguishable from the current matter, we find it instructive in that the Supreme Court allowed for increased discipline upon considering the attendant aggravating factors. In *Levin*, the hearing department of the State Bar Court recommended an actual period of suspension of 30 days. On review, we recommended an increased period of six months' actual suspension. The Supreme Court adopted our recommendation, finding that in an attempt to settle a lawsuit the attorney made false statements of fact to the opposing counsel, and communicated with a party he knew to be represented by counsel. In a second matter, he settled a lawsuit without his client's permission, misrepresented to the settling insurance company that his client personally signed a release, and failed to deliver the settlement funds to his client or to provide a proper accounting. In assessing the level of discipline, the Supreme Court concluded that the attorney's ethical violations were aggravated by his dishonest attempts to conceal this wrongful conduct. (*Id.* at p. 1149.) Coupled with his multiple dishonest acts, the factors in aggravation outweighed the evidence in mitigation and justified the increase in discipline. (*Ibid.*)

In the current matter, Loftus's conduct is intolerable. Misconduct such as occurred here damages the integrity of the legal system, and discourages the public from participating in a vital function of the administration of justice. Based on the very serious misconduct of harassing a juror, we believe that this case calls for a higher level of discipline than in *Sorenson* and *Scott*. We are equally troubled by Loftus's dishonest answers and denial, on more than

one occasion, that he secretly recorded the telephone conversation with Dr. Morris. Finally, Loftus's comments on review regarding Shafer do not evince to us that Loftus fully appreciates the extent of his wrongdoing. He continues to boast that he had a "duty as a citizen" to report Shafer to his employer. Like the attorney in *Levin*, we are concerned that in view of the lack of recognition of his wrongdoing, there is a risk that Loftus may again commit similar misconduct. However, we note that the misconduct in this case is not as extensive as in *Levin* and less severe discipline is appropriate.

[7] Therefore, finding Loftus culpable for acts of moral turpitude and finding more factors in aggravation than the hearing judge, we conclude that an actual period of suspension is warranted. We amend the hearing judge's recommendation so that Loftus is placed on one–year suspension, stayed, with 18 months' probation, on the condition that he is actually suspended for the first 90 days.

V. RECOMMENDATION

It is hereby recommended that respondent Donald J. Loftus be suspended from the practice of law for one year, that execution of that suspension be stayed, and that he be placed on probation for 18 months, with the following conditions:

1. Respondent must be actually suspended from the practice of law for the first 90 days of probation;

2. During the period of probation, respondent must comply with the State Bar Act, the Rules of Professional Conduct and all conditions of probation;

3. Respondent must maintain, with the State Bar's Membership Records Office and the State Bar's Office of Probation in Los Angeles, his 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).) Respondent must also maintain, with the State Bar's Membership Records Office and the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. (Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will not be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

4 Respondent must report, in writing, to the State Bar's Office of Probation 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 his probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and must certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

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

(2) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that 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 (2) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

5. Subject to the proper or good faith assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer any inquiries of

the State Bar's Office of Probation 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.

6. Within one year after the effective date of the Supreme Court order in this matter, respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation 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.)

7. The period of probation shall commence on the effective date of the order of the Supreme Court imposing discipline in this matter. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law will be satisfied and that suspension will be terminated.

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

It is further recommended that respondent be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule, within thirty (30) and forty (40) days, respectively, from the effective date of the Supreme Court order herein. Willful failure to comply with the provisions of rule 9.20 may result in revocation of probation; suspension; disbarment; denial of reinstatement; conviction of contempt; or criminal conviction.

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

We concur:

WATAI, J.
EPSTEIN, J.

State Bar Court
Review Department

In the Matter of

ERIC W. CONNER

A Member of the State Bar

No. 04–O–10090

Filed February 8, 2008, modified February 13, 2008, and March 11, 2008

SUMMARY

A hearing judge recommended respondent's disbarment after finding him culpable of obtaining interests adverse to a client, misappropriating client funds, violating client trust account rules, failing to competently perform, failing to provide an accounting, failing to promptly return a client's file, and committing multiple acts involving moral turpitude.

Respondent sought review contending that several of the culpability findings and the findings in aggravation and mitigation should be reversed and that disbarment was inappropriate.

The review department rejected most of respondent's contentions and adopted the recommendation that respondent be disbarred.

COUNSEL FOR PARTIES

For State Bar: Donald R. Steedman

For Petitioner: Joanne E. Robbins

HEADNOTES

[1] **135 Procedure–Rules of Procedure**
148 Evidence–Witnesses
167 Abuse of Discretion
192 Due Process/Procedural Rights

Trial judge did not prejudicially err in exercising discretion to excuse witness where respondent failed to either request that the witness be recalled or to make an offer of proof as to the testimony respondent expected to elicit from the witness.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2] **135 Procedure–Rules of Procedure**
159 Evidence–Miscellaneous
167 Abuse of discretion
192 Due Process/Procedural Rights

Where respondent neither identified an exhibit for the record nor made an offer of proof demonstrating what the exhibit would have established, respondent failed to perfect his right to claim on appeal the that hearing judge improperly excluded the exhibit from evidence.

[3] **221.12 Section 6106–Gross negligence**

Where respondent's slipshod procedures allowed a substantial sum of entrusted funds to be misappropriated without respondent's knowledge, such misappropriation resulted from respondent's gross negligence and constitutes moral turpitude.

[4 a-c] **221.19 Section 6106–Other factual basis**

Where letter drafted on behalf of respondent threatened to disclose client confidences, impute criminal conduct, and cause financial harm, respondent's failure to retract the letter constituted serious overreaching that compromised respondent's fiduciary duties to his client and involved moral turpitude.

[5] **270.31 Rule 3–110(A) [former 6–101(A)(2)/(B)]**

Where attorney allowed a paralegal to conduct most of the negotiations regarding settlement of a client's case, granted the same paralegal unchecked authority over the law office accounts without providing adequate supervision or training, resulting in significant misappropriations, and ceded day-to-day operations of the firm to the same paralegal, respondent abdicated his duty to supervise the paralegal and thereby failed to perform legal services competently in violation of rule 3-110(A).

[6] **221.11 Section 6106–Deliberate Dishonesty/Fraud**

Where respondent submitted invoices and binders of memoranda to the State Bar which were fraudulent and created after the fact in an attempt to justify respondent's fees, such conduct constitutes moral turpitude.

[7] **280.41 Rule 4–100(B)(3) [former 8–101(B)(3)]**

Invoices provided to the State Bar rather than respondent's former client do not satisfy the requirements of rule 4-100(B)(3). Invoices which account for only a portion of respondent's fees and which fail to indicate withdrawal of entrusted funds to pay a third party invoice violate rule 4-100(B)(3).

[8] **290.01 Rule 4–200 [former 2–107]**

Where respondent conducted legal research despite the absence of any provision in the retainer agreement authorizing respondent to commence it and where respondent failed to obtain the client's approval to conduct the research, respondent's collection of fees for the legal research was unauthorized and violated the unconscionability provisions of rule 4-200.

[9] **221.19 Section 6106–Other factual basis**

Where respondent believed a client was mentally unstable and billed the client in excess of the amount authorized in the retainer agreement, billed in excess of a subsequently negotiated oral fee agreement and also billed for unnecessary research, respondent's exploitation of the vulnerable client was overreaching and constituted an act of moral turpitude.

[10] **545 Aggravation–Bad Faith, Dishonesty–Declined to Find**
561 Aggravation–Uncharged Violations–Found

Where respondent misappropriated entrusted funds and thereafter structured transactions to create the false appearance that he had maintained the funds in the form of cashier's checks from the time he misappropriated them until they were deposited into a second trust account, respondent's attempt to deceive the State Bar was more appropriately viewed as an uncharged violation of section 6106 rather than misconduct surrounded by bad faith, dishonesty, concealment and overreaching.

[11] **582.10 Aggravation–Harm to Client–Found**

Respondent's failure to interplead the full amount of sales proceeds he misappropriated from client causing client to incur considerable legal expenses and impeding client's ability to negotiate a settlement constituted significant client harm.

[12] **710.10 Mitigation–No Prior Record–Found**

Mitigative credit must be given in a disciplinary proceeding where an attorney sufficiently proves the absence of a prior record of discipline over many years and where the misconduct is not deemed serious. However, the Supreme Court and this court routinely have considered the absence of prior discipline in mitigation even when the misconduct was serious. Therefore, respondent's practice of law for over twelve years with no prior record of discipline was a mitigating factor.

[13] **735.10 Mitigation–Candor–Bar–Found**

Although it did not admit culpability, respondent's stipulation as to facts and admissibility of exhibits was extensive, relevant, and assisted in the State Bar's prosecution of the case and was accorded limited mitigation.

[14] **1610 Conviction Matters–Discipline–Disbarment**

Where attorney improperly obtained interests adverse to a client, committed trust account violations, intentionally misappropriated $26,699.56, failed to competently perform, failed to account, failed to return client files, collected an unconscionable fee, and committed multiple acts involving moral turpitude, where the misconduct was aggravated by multiple acts, uncharged misconduct, lack of candor, significant client harm and indifference toward rectification but mitigated by an absence of a prior record of discipline and cooperation, the appropriate discipline recommendation was disbarment.

ADDITIONAL ANALYSIS

Aggravation

Found

521 Aggravation–Multiple Acts Found
591 Aggravation–Indifference–Found
601 Aggravation–Lack of Candor–Victim–Found

Other

106.30 Procedure–Pleadings–Duplicative Charges
221.11 Section 6106–Deliberate Dishonesty/Fraud
273.01 Rule 3-300 [former 5-101]
277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]
280.01 Rule 4-100(A) [former 8-101(A)]

OPINION

WATAI, Acting P.J.

I. INTRODUCTION

Respondent, Eric W. Conner, requests review of a hearing judge's decision recommending that he be disbarred due to misconduct in a single client matter in which the hearing judge found that respondent improperly obtained interests adverse to the client, misappropriated client funds, violated trust account rules, failed to competently perform, failed to provide an accounting, failed to promptly return the client's file, and committed multiple acts involving moral turpitude including preparing and submitting false documentation to the State Bar. Respondent seeks reversal of several of the culpability findings and the findings in aggravation and mitigation, and further asserts that disbarment is inappropriate.

Respondent also requests various modifications to the factual findings and legal conclusions. To the extent we agree, the opinion so reflects; otherwise, as more fully discussed below, we adopt the factual and culpability findings of the hearing judge, as modified.

We have independently reviewed the record (Cal. Rules of Court, rule 9.12; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), and adopt the recommendation that respondent be disbarred.

II. DISCUSSION

A. Factual and Procedural Background

Respondent was admitted to the practice of law in California on December 18, 1989, and has no prior record of discipline. His misconduct began in June 2002 and continued through July 2006.

On April 23, 2002, Janet Spitler entered into a retainer agreement with respondent wherein respondent would receive a legal fee of $10,000 to "[a]ttempt to prevent charges from being file [sic] (or) if charges are filed, [to] attempt to settle [the] case in federal court." The agreement further stated that the retainer did not cover the cost of taking the matter to trial and that "[a]dditional fees and retainer may be due if charges/forfeiture are filed."[1] At the time she employed respondent, Spitler held title to three California properties: 11311 Patterson Drive, Clearlake (Patterson), 11135 Lakeshore Drive, Clearlake (Lakeshore), and 5760 Live Oak, Kelseyville (Live Oak). The purchase of Patterson and Live Oak was financed entirely by Spitler's friend, Dennis Hunter, described by Spitler as a fugitive from the federal government.[2] After Hunter's arrest in or about March 2002, Spitler sought the services of an attorney because she believed the government might file criminal charges against her due to her association with Hunter.

A few days after the parties executed the retainer agreement for $10,000, respondent's personal assistant, Ray Robinson, advised Spitler that representation would cost $50,000 because the case was more involved than originally believed. After Spitler objected, she and Robinson orally agreed to a fee of $30,000. Although this modification to the fee agreement was never reduced to writing, Robinson had Spitler execute a deed of trust against the Lakeshore property to secure payment of the fees. This deed of trust was recorded with the Lake County assessor on June 11, 2002, and on its face indicates that it secures a promissory note in the principal sum of $30,000 in favor of respondent, the named beneficiary of the deed of trust.[3] According to respondent, he learned of the deed of trust only after it was recorded, but then did nothing to rescind it or otherwise negate its effect.

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1. Although the retainer agreement indicates it was signed on April 23, 2001, the parties stipulated, and respondent testified, that the date of hire was actually April 23, 2002.

2. Spitler testified that she contributed $12,900 toward the purchase of Lakeshore and made no mortgage payments on any of the three properties until after Hunter was incarcerated. She also testified that Hunter was running from the United States Drug Enforcement Agency "[b]ecause of growing marijuana."

3. Robinson testified that he also gave Spitler a quitclaim deed to the Live Oak property. Neither the quitclaim deed for Live Oak nor the promissory note related to the deed of trust on Lakeshore were included as exhibits.

At no time did respondent or Robinson advise Spitler in writing of her right to seek the advice of independent counsel before executing the deed of trust.

Because of the government's investigation of Hunter, Spitler wished to divest herself of the properties she obtained through him and to recover the funds she contributed for mortgage payments and the purchase of Lakeshore. She did not have the funds to pay respondent's fee and the parties understood that it would be paid from the proceeds of the sale of the properties. For this reason, Spitler believed the services respondent would provide under the retainer agreement included the sale of the properties. Respondent denied the retainer included such representation. Despite this, respondent represented Spitler throughout the sale of the properties without a separate written agreement for these services.

During its investigation, the United States Attorney's office came to believe that Hunter had used Spitler as a straw buyer for the Patterson, Lakeshore and Live Oak properties. As a result, when an offer was made for the purchase of the Patterson property, the federal government halted the sale. Due to the government's intervention in the Patterson sale, respondent and Spitler met with U. S. Attorney Stephanie Hinds, who informed them that the government was considering seizing Hunter's interest in the properties. Because Spitler's relationship with Hunter was still being investigated, the government agreed to allow the property sales to go forward provided that respondent retained the net proceeds in his client trust account. Soon thereafter, the Patterson property went into escrow again and Robinson requested that Hinds provide a letter authorizing release of the sales proceeds. On June 11, 2002, Hinds sent a letter to the escrow company confirming the government's agreement that the net proceeds could be released to respondent and maintained in trust. Two days after Hinds sent this letter, respondent made a demand on the escrow company for payment of attorney fees in the amount of $18,500. He did not provide a copy of the demand letter to Hinds. Spitler did not object to respondent's demand because she believed it was partial payment of the $30,000 fee. Similarly, when the Lakeshore property went into escrow, Hinds provided the escrow company–at Robinson's request–with a letter on July 1, 2002, again releasing the sales proceeds to respondent in trust. On July 2, 2002, respondent sent the escrow company a demand letter for $19,500 in outstanding legal fees. As with the Patterson property, respondent did not provide a copy of his demand letter to Hinds. Spitler knew that the additional $19,500 was $8,000 more than the $30,000 in fees she had agreed to pay, but she did not object because she could no longer afford the mortgage payments and needed to sell the property. Although Hinds assumed Robinson was an attorney, she neither contemplated attorney fees as legitimate closing costs nor authorized the withdrawal of attorney fees from the sales proceeds of either of the two properties. After respondent deducted his fees, the net proceeds from the sale of the Patterson and Lakeshore properties were $133.86 and $53,971.95, respectively, which respondent deposited into a client trust account in July 2002.

Three months later, Robinson offered to pay Spitler $2,000 on respondent's behalf in exchange for her authorization allowing respondent to borrow $25,000 of the entrusted funds, purportedly for telephone advertising. Because she was financially strapped, Spitler agreed to the loan and on October 30, 2002, executed a document which "authorize[d] the Law Office of Eric W. Conner to withdraw $25,000.00 from . . . funds that are currently being held in [trust.]" The authorization further stated that "The Law Office of Eric W. Conner hereby agrees to replenish the entire $25,000.00 withdrawn . . . ." At no time did respondent or Robinson advise Spitler in writing of her right to seek the advice of independent counsel before executing the loan authorization.

After withdrawing the loaned funds, respondent was required to maintain $29,105.01 in trust.[4] However, in October 2003, respondent wrote three checks totaling $18,637.81 against the trust account made payable to "CASH/Eric W. Conner" as follows:

4. This sum reflects $133.86 + $53,971.95 - $25,000.80. Although respondent's withdrawal slip and draft were written in the amount of $25,000, his bank processed the withdrawal in the amount of $25,000.80.

check number 1041 on October 1, 2003, in the amount of $5,000; check number 1042 on October 1, 2003, in the amount of $6,937.81; and check number 1002 on October 31, 2003, in the amount of $6,700. Respondent did not obtain authorization from either Spitler or the government before making these withdrawals. To date, respondent has not repaid any of the $18,637.81 he withdrew nor the $25,000 he borrowed.

Thereafter, the third property, Live Oak, went into foreclosure and was sold at auction. After Spitler received notice that $17,176.06 in surplus proceeds resulted from the foreclosure sale, Robinson completed paperwork for Spitler to receive those proceeds. On November 24, 2003, respondent deposited a check for that amount into his client trust account. He then provided Spitler with a check in the amount of $17,176.06, along with an invoice for $7,071.75 from an entity called Fast and Efficient Attorney Service (Fast and Efficient). Although Robinson owned Fast and Efficient, Robinson did not divulge that fact to Spitler even when he directed her to pay the bill. Spitler was unfamiliar with Fast and Efficient and attempted to ascertain the work it had performed by calling the telephone number on the invoice, but she could not reach a live person. When she left messages requesting a return call, Robinson would call her asking if she had paid the invoice. Spitler became suspicious and decided to retain new counsel.

By December 2003, Spitler had retained Marie Klopchic, who notified respondent by letter dated December 15, 2003, that his employment was terminated and requested the immediate delivery of all of Spitler's files. More than nine months later, on September 16, 2004, respondent made Spitler's files available. In her letter to respondent, Klopchic stated that Spitler would not pay the outstanding bill for $7,061.75 until she received her file, an itemization of services rendered and a copy of all fee agreements. Despite this letter, respondent paid Robinson $7,061.75 on January 22, 2004, out of the funds he held in trust. Additionally, three more withdrawals from the entrusted funds were made after Spitler terminated respondent's employment, for a total of $1,000 as follows: $300 and $200 on December 19, 2003, and $500 on December 29, 2003. These funds were transferred to respondent's general operating account and were never refunded. Again, respondent did not obtain authorization from either Spitler or the government before making any of these withdrawals.

After a three-day trial on July 25-27, 2006, the hearing judge found respondent culpable on all but one of the charged counts and, upon considering the mitigating and aggravating circumstances, recommended respondent's disbarment.

B. Due Process

Respondent contends that he was denied due process in that the hearing judge excused Spitler rather than subject her to recall and because the hearing judge excluded a receipt that respondent asserts would have negatively impacted Spitler's credibility. We reject respondent's claims.

On the first day of trial, the State Bar conducted direct examination of Spitler, followed by respondent's cross-examination. After the State Bar completed redirect examination, respondent did not conduct recross-examination, but instead requested that Spitler be subject to recall. When the hearing judge asked for a showing of good cause why respondent could not ask his questions at that point in the trial, respondent's counsel stated, "It would depend on what testimony we get tomorrow from the government people." After determining that neither the State Bar nor respondent had subpoenaed Spitler, the hearing judge excused her. At no point after the government witnesses testified did respondent request that Spitler be recalled.

[1] After direct and cross-examination, recall of a witness may be granted or withheld at the court's discretion in accordance with Evidence Code section 778.[5] Respondent extensively cross-examined Spitler and, after informing the hearing judge that he had no further questions once the State Bar completed

5. Evidence Code section 778 provides that "After a witness has been excused from giving further testimony in the action, he cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion."

redirect-examination, he failed to offer any justification for not excusing Spitler. Under these circumstances, we find that the hearing judge's exercise of her discretion to excuse the witness was sound. After the government witnesses testified, respondent failed either to request that Spitler be recalled or to make an offer of proof as to the testimony respondent expected to elicit from Spitler if she were recalled. As a result, we find that respondent failed to demonstrate error or prejudice in the hearing judge's decision to excuse Spitler. (See *People v. Thomas* (1992) 2 Cal.4th 489, 542; but see *People v. Raven* (1955) 44 Cal.2d 523, 526 [sufficient offer of proof was made to allow determination that trial court prejudicially erred in exercising discretion not to recall witness].)

[2] During direct examination of Robinson, respondent's counsel asked to approach Robinson with an unidentified exhibit. After being shown the exhibit, the State Bar objected to it on several grounds, claiming that it had never been shown to them before, it constituted hearsay and it lacked foundation. Respondent's counsel explained that the exhibit was for purposes of rebuttal and the State Bar again objected, asserting that such rebuttal was improper. The hearing judge sustained the State Bar's objections without specifying which ones were the basis for her decision. Thereafter, respondent's counsel did not identify the exhibit for the record or attempt to have it admitted into evidence.[6] Nor did he make an offer of proof demonstrating the fact(s) the exhibit would have established. Under these circumstances, respondent failed to perfect his right to claim on appeal that the hearing judge improperly excluded the exhibit from evidence.

C. Count One: Avoiding Interests Adverse to a Client (Rules Prof. Conduct, rule 3-300)[7]

Because respondent failed to comply with the prophylactic requirements of this rule when he obtained the deed of trust against the Lakeshore property and when he borrowed $25,000 from the funds held in trust, the hearing judge concluded that respondent willfully violated rule 3-300. Respondent does not contest this conclusion, and in light of his failure in both instances to advise Spitler in writing of her right to seek the advice of an independent attorney, we agree with the culpability finding of the hearing judge.

D. Counts Two and Seven: Failure to Maintain Client Funds in Trust Account (Rule 4-100(A))

Rule 4-100(A) provides that funds received for the benefit of clients shall be deposited into a trust account. "The rule absolutely bars use of the trust account for personal purposes, even if client funds are not on deposit." *Doyle v. State Bar* (1982) 32 Cal.3d 12, 22-23. Because respondent withdrew entrusted funds for his personal use in the amount of $18,637.81 ($5,000+$6,937.81+$6,700) in October 2003 as alleged in count two and in the amount of $8,061.75 ($300+$200+$500+$7,061.75) between December 2003 and January 2004 as alleged in count seven, the hearing judge concluded that respondent failed to maintain client funds in trust. Respondent does not contest these conclusions and, based on our independent review of the record, we see no reason to disturb the culpability findings on these counts.

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6. The only evidence in the record that mentions this unidentified document comes from the following exchange between the hearing judge and respondent's counsel: "THE COURT: But why wasn't this receipt shown to Ms. Spitler on Tuesday? ¶ MR. JONES: Because I didn't have the receipt on Tuesday, your Honor."

7. Unless noted otherwise, all further references to rule(s) are to the Rules of Professional Conduct. Rule 3-300 precludes an attorney from entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client unless the transaction or acquisition and its terms are fair and reasonable to the client and fully disclosed in writing, the client is advised in writing of the right to seek the advice of an independent lawyer, and the client consents in writing to the terms of the transaction or acquisition.

E. Counts Three and Five:
Moral Turpitude–Misappropriation
(Bus. & Prof. Code, § 6106)[8]

The hearing judge found that respondent misappropriated the $18,637.81 withdrawn from the trust account in October 2003 as well as the $8,061.75 withdrawn from the trust account in December 2003 and January 2004, thereby committing acts involving moral turpitude, dishonesty and/or corruption prohibited by section 6106. We agree.

Respondent argues that he should not be found culpable of willfully violating section 6106 because his misappropriations were the result of his gross negligence in failing to supervise Robinson adequately. The record indicates otherwise. Respondent testified that he authorized the trust account withdrawals in October 2003 because he was implementing an agreement with the government to split the proceeds from the sale of the Patterson and Lakeshore properties.[9] However, Hinds testified that such an agreement never existed and although Robinson testified that he drafted a memorandum of understanding setting forth the terms of the alleged agreement, respondent did not produce that document at trial. The hearing judge did not believe respondent's explanation, and neither do we. (See, e.g., *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 935, fn. 13 [when attorney fails to corroborate his testimony with evidence one would expect to be produced, it is a strong indication that his testimony is not credible].)

If such an agreement existed, respondent would have needed to draft only one check payable to the government rather than the three checks issued to "CASH/Eric W. Conner." Furthermore, respondent admitted at trial that the $6,937.81 check was deposited into his general operating account on October 23, 2003, and then used to pay bills. As we discuss in greater detail *post*, almost a year later, respondent purchased a cashier's check in the amount of $6,937.81 and deposited it in a second trust account in an attempt to deceive the State Bar that the funds had not been misappropriated. For these reasons, we find that respondent's actions were intentional and thus his October 2003 misappropriations violated section 6106.

Respondent testified at trial that he authorized the withdrawals totaling $1000 in December 2003 in order to pay the costs incurred for Robinson's paralegal fees. Since respondent expressly authorized these withdrawals, they were not the result of his failure to supervise Robinson, and thus violated section 6106.

[3] Respondent testified that since Spitler had terminated his services, he did not authorize Robinson to pay the Fast and Efficient invoice for $7,071.75 from the trust account. Instead, he claims that it was his understanding that Robinson would pay that bill with funds from respondent's general operating account. Nevertheless, respondent concedes that this misappropriation resulted from his gross negligence. We agree, and find that such laxity constitutes moral turpitude. (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 796, fn. 8.) He not only allowed Robinson to simulate respondent's signature on trust account checks but he also failed to instruct Robinson in trust account requirements and did not undertake regular examination of either Robinson's records or the firm's bank statements. These slipshod procedures allowed a substantial sum of entrusted funds to be misappropriated without respondent's knowledge.

F. Count Four: Moral Turpitude (§ 6106)

[4a] At the time Klopchic notified respondent that Spitler had terminated his services and would not pay the outstanding bill of $7,061.75 until her file was returned and a full accounting rendered, respondent was away from his office on vacation. Using respondent's law office letterhead, Robinson answered Klopchic's letter on respondent's behalf. In

8. Unless noted otherwise, all further references to section(s) are to the Business and Professions Code.

9. According to respondent, the government agreed to accept $26,000, release $12,900 to Spitler and permit respondent to receive the remainder of the sales proceeds.

order to dissuade Spitler from pursuing her legal remedies and to induce her to pay the outstanding Fast and Efficient invoice, Robinson drafted a letter that was a conglomeration of veiled threats to disclose Spitler's client confidences, to impute that Spitler was involved in a drug operation and money laundering, and to cause her financial harm by releasing her bank records to the government.[10]

[4b] The hearing judge determined that the threat to betray attorney-client privileges and to deliver the remaining entrusted funds to the United States government constituted extortion intended to avoid a lawsuit by Spitler and to coerce payment of the $7,061.75 bill. Because respondent became aware of the letter while on vacation but did nothing to retract it, the hearing judge concluded that respondent's ratification of the letter constituted an act involving moral turpitude in violation of section 6106. We agree.

[4c] Respondent contends that while Robinson's letter was clearly unwise and unprofessional, it did not meet the legal definition of extortion since it does not threaten illegal action.[11] His argument is unavailing because "Extortion has been characterized as a paradoxical crime in that it criminalizes the making of threats that, in and of themselves, may not be illegal." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 326.) Irrespective of whether the letter met the legal requirements of extortion, it clearly was serious overreaching and compromised respondent's fiduciary duties to his client, which constituted moral turpitude. (*In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 959 [attorney's overreaching of his clients constituted acts of moral turpitude].)

G. Count Six: Failure to Perform with Competence (Rule 3-110(A))

[5] The focus of our inquiry on the charge of failing to act competently is whether respondent intentionally, recklessly, or repeatedly failed to apply the diligence, learning and skill, as well as the mental, emotional, and physical ability, reasonably necessary to discharge the duties arising from his employment. (Rule 3-110(A).) In this case, respondent not only allowed Robinson to conduct all negotiations with Spitler regarding the $30,000 deed of trust and the subsequent $25,000 loan but also permitted Robinson to conduct most of the negotiations with Hinds to obtain the letters of release of the net proceeds from the sale of the properties. Robinson's involvement was so extensive that Hinds assumed he was an attorney. Furthermore, respondent granted Robinson

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10. This letter stated: "[S]ince it appears that Ms. Spitler is interested in pursuing a legal remedy, instead of paying the legal fees that she authorized, she should also be aware that if she sues, she may be waiving the attorney-client privilege. Therefore, in the event the federal government proceeds with criminal charges against Ms. Spitler for the money laundering, the U.S. Attorney's Office could force our staff . . . to testify regarding information disclosed . . . by Ms. Spitler, her dealings with Dennis Hunter, her involvement in his drug operation, and the fact that all of the proceeds are traceable to the exchange of a controlled substance. . . . ¶ Since it appears our services are terminated, we will advise the U.S. Attorneys [sic] Office accordingly and will be turning all of the remaining drug proceeds, minus any outstanding legal fees, over to the United States Department of Treasury, pursuant to a federal warrant. In addition, we will be providing the Bank of the West records, including a copy of the check issued to Ms. Spitler regarding the drug proceeds from the Lake Property, over to the U.S. Attorneys [sic] Office, pursuant to a federal warrant. . . . ¶ In addition, should Ms. Spitler proceed with legal action against this office, she should be aware that Mr. Conner *aggressively defends* legal actions and may pursue legal remedies from Ms. Spitler for, inter alia, malicious prosecution and fraud. Ms. Spitler is well aware of her activities and it would be, at the very least, malicious for her to proceed with a frivolous lawsuit in an effort to force the release of drug proceeds that belong to the United States government or to avoid paying a bill for work performed on her behalf that she clearly authorized."

11. "Extortion is the obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear . . . ." (Pen. Code, § 518.) Fear, for purposes of extortion, "may be induced by a threat, either: [¶] 1. To do an unlawful injury to the person . . . threatened . . . or, [¶] . . . [¶] 3. To expose, or to impute to him . . . any deformity, disgrace or crime; or, [¶] 4. To expose any secret affecting him . . . ." (Pen. Code, § 519.) "Every person who, with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in Section 519, is punishable in the same manner as if such money or property were actually obtained by means of such threat." (Pen. Code, § 523.)

unchecked authority over the law office accounts without providing adequate supervision or training, resulting in significant misappropriations. Respondent claimed at trial that he reprimanded Robinson in December 2003 after learning that the check for $6,937.81 had been deposited into his general operating account. Even if we accept this statement as true, respondent nevertheless continued to cede the day-to-day operations of the firm and control over the firm's accounts to Robinson without limitation, resulting in additional misappropriations in December 2003 and January 2004. We therefore agree with the hearing judge that respondent's abdication of his duty to supervise Robinson properly evidences a reckless failure to perform legal services competently in violation of rule 3-110(A). (See, e.g., *In the Matter of Malek-Yonan* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627, 634 [attorney who abdicated responsibility to properly supervise her trust account and non-attorney staff was found culpable of violating rule 3-110(A)].)

H. Count Twelve: Moral Turpitude (§ 6106)

In order to facilitate our analysis, we discuss count twelve out of order. During the investigation of this matter, respondent provided the State Bar with two invoices dated April 23, 2001,[12] and June 14, 2002,[13] detailing legal services respondent claims were provided in representing Spitler. Respondent also gave the State Bar seven binders of memoranda and research dated June 15, 2001, through February 28, 2003, which he asserts contained work product prepared while representing Spitler. The hearing judge concluded that the billing statements and binders of alleged work product were fraudulent and that respondent created them to deceive the State Bar into believing that his office actually performed services for Spitler to justify the fees collected.

Respondent contends that the hearing judge's determination was made without any reliable evidentiary support. On the contrary, numerous discrepancies support the hearing judge's conclusion that the billing statements were false. The first invoice was dated one year before Spitler even hired respondent. Twenty-eight items on this invoice totaling $25,980 in fees were for services allegedly performed before respondent's date of hire.[14] At trial, respondent offered inconsistent explanations for this error.[15] Another discrepancy is the fact that on June 13, 2002, respondent requested the escrow company to release only $18,500 in legal fees from the sales proceeds of the Patterson property when respondent's invoice indicated that Spitler owed $27,170 in fees as of May 11, 2002. A similar incongruity exists regarding respondent's July 2, 2002, request to the escrow company for legal fees of $19,500 from the sales proceeds of the Lakeshore property while his invoice showed that $20,145 in legal fees were owed at that time.[16] Respondent failed to explain the gap between his demands for payment and the amount of the legal fees allegedly owed according to his own invoices.

Another conflict is the fact that, according to the invoices, respondent continued to claim legal fees

12. This invoice itemizes legal services allegedly provided between April 1, 2001, to May 11, 2002, for a total of $27,170 in legal fees.

13. This invoice itemizes legal services allegedly provided between June 14, 2002, to December 29, 2003, for a total of $27,046.40 in legal fees.

14. According to this invoice, twenty separate billable events occurred between April 1, 2001, and December 8, 2001, for a total of $21,050 in fees; eight separate billable events occurred between January 11, 2002, and April 6, 2002, for an additional $4,930 in fees, and two billable events occurred on May 10-11, 2002, for an additional $1,190 in fees.

15. Respondent first testified that invoice entries were "off by a year" so that work performed in 2001 actually should have reflected a 2002 date. After trial counsel pointed out that this would cause certain invoice entries to overlap with charges that purportedly occurred in 2002, respondent altered his explanation to assert that services provided in 2002 were actually performed in 2003. Upon further questioning, respondent excluded from his explanation invoice entries with a 2003 date because adding a year to those dates would have resulted in work being performed after Spitler terminated his services.

16. According to respondent's June 14, 2002, invoice, he provided legal services totaling $11,475 between June 14, 2002, and July 2, 2002. In addition, $8,670 ($27,170 - $18,500) was still owed from the April 23, 2001, invoice after respondent received payment from the sale of the Patterson property. Thus, by July 2, 2002, respondent's outstanding legal fees totaled $20,145 ($11,475 + $8,670).

after Spitler's case became inactive. Respondent testified that after he and Spitler met with Hinds in July 2002 and reached agreement concerning the sale of the properties, Spitler was no longer the target of a federal indictment. Spitler's case became "kind of in limbo," and respondent did not know why the government delayed in determining disposition of the proceeds from the sale of the properties.[17] Despite the fact that the government did not file criminal charges against Spitler or pursue any forfeiture claim against the sales proceeds, respondent billed an additional $14,571.40 in legal fees from August 2, 2002, to November 14, 2003. At the same time he admitted that Spitler's case was dormant, respondent inconsistently claimed that additional services were justified because the government was "gearing up for litigation."

Furthermore, at trial respondent incredibly asserted that the $25,000 of the sales proceeds withdrawn from his trust account in October 2002 was not a loan from Spitler for telephone advertisements, but an advance for fees he needed to prepare for the "anticipated litigation." Yet another inconsistency is the fact that respondent charged $1,000 for legal services allegedly provided on December 19 and 29, 2003, after Spitler terminated his services on December 15, 2003.

The seven binders of work product containing memoranda and copies of cases are also replete with discrepancies. More than half of these binders contain alleged work product that predates respondent's employment.[18] Furthermore, almost half of the memoranda included copies of cases that the memoranda did not even reference. Copies of cases and statutes obtained via the internet were altered by white-out or by removing the bottom portion of the printed pages to delete the date on which the documents were printed. Robinson's explanation was that the original cases and statutes were inexplicably discarded and had to be reprinted at a later date, and he did not want the date of reprinting to be apparent. However, because several of the purported research memoranda contained altered copies of cases that the memoranda never mentioned, Robinson had no way of knowing they needed to be reprinted. Thus, we find it unbelievable that Robinson was able to recall years later which cases needed to be reprinted.

[6] Respondent next argues that even if these documents were fraudulent, there is no evidence that he had any knowledge of or involvement with them. The record renders such an argument entirely untenable. Respondent and Robinson each testified that respondent not only reviewed the invoices but authorized the charges. Furthermore, Robinson testified, and respondent did not refute, that Robinson provided him with the binders of memoranda before they were given to the State Bar. Based on these numerous inconsistencies as well as the fact that respondent never provided Spitler with any invoices, memoranda, research or other work product, we agree with the hearing judge's determination that the invoices and binders of memoranda provided by respondent were fraudulent and created after the fact in an attempt to justify respondent's fees. Accordingly, we conclude that respondent's conduct constitutes moral turpitude.

I. Count Eight: Failure to Account (Rule 4-100(B)(3))

[7] Rule 4-100(B)(3) requires an attorney to maintain complete records of all client funds coming into possession of the attorney and to render appropriate accounts to the client regarding those funds. There is no evidence that respondent ever provided Spitler with the accounting Klopchic requested on her behalf. The invoices dated April 23, 2001, and June 14, 2002, do not satisfy the requirements of this rule since respondent provided them to the State Bar in this disciplinary proceeding, not to Spitler and her attorney as requested. Furthermore, even if respondent had given them to Spitler, they are wholly inadequate since they only account for $54,216.40 in

17. Hinds testified that the delay was due in part to respondent's failure to provide the final closing statement on the Lakeshore property. As a result, the government's investigation became dormant, and it moved on to other cases.

18. Between June 15, 2001, and April 6, 2002, legal research was allegedly completed in Spitler's matter on 22 different occasions.

alleged fees while respondent obtained at least $63,000 in fees ($18,500 + $19,500 + $25,000). In addition, these invoices fail to indicate that respondent withdrew an additional $7,061.75 of entrusted funds to pay the outstanding Fast and Efficient invoice. For these reasons, we agree with the hearing judge's conclusion that respondent willfully violated rule 4-100(B)(3).

J. Count Nine: Failure to Return Client File (Rule 3-700(D)(1))

Rule 3-700(D)(1) requires an attorney whose employment has terminated to promptly release to a client, at the client's request, all of the client's papers and property. Because respondent did not release Spitler's file until September 2004, approximately nine months after Klopchic requested it in December 2003, the hearing judge concluded that respondent violated rule 3-700(D)(1). Respondent does not contest this culpability finding on appeal. Based on our independent review of the record, we agree with the finding of the hearing judge. (See *In the Matter of Brockway, supra*, 4 Cal. State Bar Ct. Rptr. at p. 958 [delay of two months in returning a client's file is sufficient to find a violation of rule 3-700(D)(1)].)

K. Count Ten: Unconscionable Fee (Rule 4-200(A))

Rule 4-200(A) prohibits an attorney from entering into an agreement for, charging, or collecting an illegal or unconscionable fee. The hearing judge concluded that respondent collected $60,061.75 in excess of the $10,000 flat fee he was entitled to under the retainer agreement and that this excess fee was exorbitant and so disproportionate to the services performed as to shock the conscience.

[8] Although we agree with the hearing judge's conclusion that respondent violated the unconscionability provisions of rule 4-200, we do so on different grounds. Respondent collected the following amounts as fees: $18,500 from the Patterson sales proceeds in June 2002; $19,500 from the Lakeshore sales proceeds in July 2002; and $25,000.80 in October 2002. According to the retainer agreement, additional fees would be due *only* if the government filed criminal charges or a forfeiture proceeding. Even though neither contingency occurred, respondent authorized Robinson to conduct research in forfeiture law allegedly related to Spitler's case on at least 22 occasions after Spitler's case became inactive. Respondent collected $15,571.40 in fees for legal research in forfeiture law performed either while the case was dormant or after respondent's services had been terminated. Respondent neither obtained Spitler's approval to conduct this research nor provided her with invoices or work product pertaining to it. Since the condition precedent did not occur, there was no provision in the retainer agreement authorizing respondent even to commence this research. By collecting an unauthorized fee of $15,571.40, respondent violated the unconscionability provisions of rule 4-200. (See *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 990 [attorney's collection of unauthorized fee violated rule 4-200(A)]; *In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct Rptr. 838, 855 [attorney's attempt to charge and collect more than was due under his fee agreement constitutes a violation of rule 4-200(A)].)

Even if this research were authorized under the terms of the retainer agreement, respondent still would have run afoul of rule 4-200(A) since it was performed unnecessarily and constituted a practical appropriation of entrusted funds. Respondent admitted that he did not provide any substantive legal services after Spitler's case went inactive in July 2002 other than to review some of Robinson's research. Although respondent did not even bother to review all of Robinson's legal memoranda, he nevertheless charged Spitler for them. Also, respondent testified that he was experienced in forfeiture law before Spitler's retention of him, and had handled approximately five to ten forfeitures annually. Yet, despite his prior experience, respondent authorized Robinson to conduct research and generate memoranda, some of which were a mere half-page in length, on topics that were neither novel nor complex, such as Affirmative Defenses, Lack of Knowledge and Innocent Owner as Defense. Worse, this research took place while Spitler's case was inactive. We find that respondent's authorization of such unnecessary research evidences overreaching on his part and his collection of fees for such research "under the circumstances, constituted a practical appropriation of [entrusted] funds. [Citation.]" (*Bushman v. State Bar* (1974) 11 Cal.3d 558, 563.)

L. Count Eleven: Moral Turpitude (§ 6106)

The hearing judge concluded that respondent's charging and collecting unconscionable fees constituted acts of moral turpitude. Respondent argues that even if he were culpable of charging and collecting unconscionable fees, his conduct did not rise to the level of moral turpitude. We disagree.

[9] Spitler was vulnerable and emotionally distressed. In fact, shortly after retaining respondent, the pending government investigation caused Spitler to become extremely depressed and even hospitalized. Respondent suspected that Spitler was suffering from depression and testified that he knew she was "mentally unstable." He took advantage of her vulnerable situation by billing her in excess of the $10,000 originally authorized by the retainer agreement, and also charging her $8,000 more than the $30,000 fee Spitler later authorized orally. Even when it became apparent that the government would not criminally charge Spitler or seek forfeiture of the sales proceeds, respondent further breached his fiduciary duty by authorizing and billing for unnecessary research. We find respondent's exploitation of a vulnerable client to be overreaching and an act of moral turpitude. (See *In the Matter of Brockway, supra,* 4 Cal. State Bar Ct. Rptr. at p. 959 [attorney's overreaching of his clients constituted acts of moral turpitude].)

M.Count Thirteen: Failure to Cooperate with the State Bar (§ 6068, subd. (i))

For providing fraudulent invoices and work product, the State Bar charged respondent with failing to cooperate with its disciplinary investigation. The hearing judge concluded that respondent's deception was an act involving moral turpitude rather than a failure to cooperate. Neither party challenges this conclusion on appeal. Based on our independent review of the record, we do not disturb the hearing judge's determination on this count and dismiss it with prejudice.

III. FACTORS IN AGGRAVATION AND MITIGATION

A. Aggravation

We agree with the hearing judge's determination that respondent engaged in multiple acts of wrongdoing. Respondent improperly obtained interests adverse to his client, misappropriated entrusted funds, willfully failed to supervise his assistant Robinson, collected unconscionable fees, and committed multiple acts involving moral turpitude. These actions support a finding in aggravation that respondent engaged in multiple acts of misconduct. (See *In the Matter of Malek-Yonan, supra,* 4 Cal. State Bar Ct. Rptr. 627 [two violations of failure to supervise resulting in trust fund violations, plus improper threat to bring criminal action constituted multiple acts of wrongdoing in aggravation]; Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(ii).[19])

[10] The hearing judge also considered as an aggravating circumstance respondent's attempt to conceal his misappropriations. After the State Bar began its investigation of this matter, respondent opened a second trust account on September 22, 2004, and deposited into it four cashier's checks, all purchased in September 2004. Two of these checks were for $6,937.81 and $6,700, respectively, and corresponded to the amounts respondent misappropriated from Spitler in October 2003. During trial, respondent admitted that he structured the transactions to create the false appearance that he had maintained the funds in the form of cashier's checks from the time he misappropriated them until they were deposited into the second trust account. Because of this, the hearing judge concluded that respondent's misconduct was surrounded by bad faith, dishonesty, concealment and overreaching. (Std. 1.2(b)(iii).) We believe it more appropriate to view respondent's attempt to deceive the State Bar as an aggravating circumstance under standard

19. All further references to standard(s) are to these provisions.

1.2(b)(iii) because it was an act involving moral turpitude, constituting an uncharged violation of section 6106.[20]

The hearing judge also found that respondent displayed a lack of candor during trial under standard 1.2(b)(vi),[21] and we agree. The hearing judge concluded that respondent falsely claimed that the $25,000 withdrawal in October 2003 represented additional attorney fees and that he lied to the court about an agreement with the government for distribution of the sales proceeds from the properties. The explicit language of the authorization signed by Spitler indicates that respondent was to repay the $25,000 loan, and even Robinson testified that the funds were to be used for advertising rather than legal fees. Additionally, as we discussed *ante*, there is ample evidence in the record that there never was an agreement with the government to distribute the sales proceeds respondent held in trust.

[11] Hunter ultimately sued Spitler for the sales proceeds, and that case was still pending during trial in this proceeding. At the time of trial, Spitler had incurred approximately $60,000 in legal fees defending herself in the Hunter lawsuit. Respondent claimed that he interpleaded approximately $32,000 of the entrusted funds[22] as a result of the Hunter suit. Since Hunter's action against Spitler caused her to incur considerable legal expenses, the hearing judge found that she was significantly harmed by respondent's misconduct. (Std. 1.2(b)(iv).) Respondent argues that Hunter would have sued Spitler for recovery of the sales proceeds regardless of his ethical misconduct. Even if that were the case, as a result of respondent's misconduct, only $32,000 of the $54,105.81 in net sales proceeds were available for Spitler to negotiate settlement with Hunter, thus significantly harming her.

We also agree with the hearing judge's finding that respondent demonstrated indifference toward rectification under standard 1.2(b)(v) due to his failure to refund the entire amount he misappropriated. Respondent misappropriated $26,699.56 ($18,637.81 + $8,061.75) and improperly borrowed $25,000.80. Of the $50,700.36 in entrusted funds he converted, only $32,000 had apparently been interpleaded. We find respondent's failure to make full restitution to be an aggravating factor under standard 1.2(b)(v). (See *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594.)

B. Mitigation

We do not adopt the hearing judge's finding that there was no evidence of mitigation. Respondent practiced law for approximately twelve and one-half years with no prior record of discipline. However, due to the seriousness of his misconduct, the hearing judge found that respondent's lack of prior discipline was not a mitigating circumstance.

[12] According to standard 1.2(e), "Circumstances which *shall* be considered mitigating are: [¶] (i) [the] absence of any prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious . . . ." (Italics added.) Therefore, mitigative credit must be given in a disciplinary proceeding where an attorney sufficiently proves the absence of a prior record of discipline over many years and where the misconduct is not deemed serious. While standard 1.2(e) describes instances when consideration of certain mitigating circumstances is mandatory, it is by no means an exclusive list of every factor that may be considered in mitigation. Indeed, the Supreme Court and this court routinely have considered the absence of prior discipline in mitigation even when the misconduct was serious. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 31, 32, 36, 39 [mitigative credit given for almost twelve years of discipline-free practice despite intentional misappropriation and commingling]; *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576 [mitigation acknowledged for absence of prior record of discipline in twelve years

20. We reject respondent's argument that this finding is duplicative of his substantive violations. The fact that respondent fraudulently created a second trust account to deceive the State Bar was not relied upon to support a finding of culpability for any ethical violations or other aggravating circumstance.

21. The hearing judge inadvertently referred to this standard as 1.2(b)(iii).

22. Respondent provided no documentary evidence to support this claim.

of practice despite willful misappropriation of over $29,000]; *In re Trillo* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 59 [credit given for no prior history of discipline in fourteen years of practice where attorney converted client funds and deceived clients].) Therefore, we consider respondent's practice of law for over 12 years with no prior record of discipline to be a mitigating factor. (See *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [over 10 years of practice before first act of misconduct given mitigative weight].)

[13] We also find that respondent cooperated with the State Bar by entering into a factual stipulation as to background facts, which should be considered in mitigation. Although the stipulated facts were not difficult to prove (compare *In the Matter of Silver* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 902, 906 [attorney afforded substantial mitigation for his cooperation by stipulating to facts not easily provable]) and did not admit culpability, they were, nevertheless, extensive, relevant, and assisted the State Bar's prosecution of the case since respondent stipulated to the authenticity of certain exhibits and agreed to the admissibility of several other exhibits. Thus, under these circumstances, we accord respondent limited mitigation under standard 1.2(e)(v) for his cooperation in entering a stipulation as to facts and admissibility of exhibits. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190.)

III. LEVEL OF DISCIPLINE

[14] The hearing judge recommended that respondent be disbarred. The State Bar agrees with the hearing judge's recommendation and urges us to affirm it. Respondent, on the other hand, asserts that his misconduct warrants no more than a one-year actual suspension.

We have found respondent culpable of improperly obtaining interests adverse to a client, trust account violations, intentionally misappropriating $26,699.56, failing to competently perform, failing to account, failing to return a client's files, collecting an unconscionable fee, and three separate counts involving moral turpitude. Respondent's unethical behavior is aggravated by multiple acts of misconduct, uncharged misconduct involving moral turpitude, lack of candor, indifference toward rectification, and significant harm to his client. Particularly disturbing is the fact that some of respondent's acts involving moral turpitude stemmed from his lack of candor to the State Bar and to this court. His limited mitigation consists of a twelve-and-one-half year career with no record of discipline as well as cooperation with the State Bar's investigation.

We observe that the purpose of attorney discipline is not the punishment of attorneys but the protection of the public, the preservation of confidence in the legal profession, and the maintenance of the highest professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; std. 1.3.) In determining the appropriate level of discipline, we afford "great weight" to the standards. (*In re Silverton* (2005) 36 Cal.4th 81, 92.) Nevertheless, we are "'not bound to follow the standards in talismanic fashion. [W]e are permitted to temper the letter of the law with considerations peculiar to the offense and the offender.' [Citations.]" (*In the Matter of Van Sickle, supra,* 4 Cal. State Bar Ct. Rptr. at p. 994.) We also consider relevant decisional law. (See *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059.)

Several standards apply to respondent's misconduct which provide for sanctions ranging from reproval to disbarment. (See stds. 2.2(a), 2.3, 2.4(b), 2.7, and 2.8.) We consider standard 2.2(a) controlling since it mandates the most severe sanction of disbarment.[23] Respondent misappropriated $26,699.56, a significant amount. (See *Lawhorn v. State Bar* (1987) 43

23. This standard provides that "Culpability of a member of willful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of the 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."

Cal.3d 1357, 1367-1368 [misappropriation of $1,355.75 considered significant].) Thus, the issue before us in assessing the appropriate level of discipline is whether respondent has shown that the "most compelling mitigating circumstances clearly predominate . . . ." (Std. 2.2(a).) Clearly, they do not.

Indeed, respondent's multiple circumstances in aggravation, particularly those involving concealment, his lack of candor, and his indifference toward rectification outweigh any militating effect his mitigating factors might have.

Turning to the relevant case law, we conclude that respondent's facts warrant disbarment under the provisions of standard 2.2(a). "The wilful misappropriation of client funds is theft. [Citation.]." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221.) "In a society where the use of a lawyer is often essential to vindicate rights and redress injury, clients are compelled to entrust their claims, money, and property to the custody and control of lawyers. In exchange for their privileged positions, lawyers are rightly expected to exercise extraordinary care and fidelity in dealing with money and property belonging to their clients. [Citation.] Thus, taking a client's money is not only a violation of the moral and legal standards applicable to all individuals in society, it is one of the most serious breaches of professional trust that a lawyer can commit." (*Ibid.*) " ' "The usual discipline imposed for such a breach is disbarment, in the absence of strong mitigating circumstances. (Citations.)" ' " (*Ibid.*) "An attorney who deliberately takes a client's funds, intending to keep them permanently, and answers the client's inquiries with lies and evasions, is deserving of more severe discipline than an attorney who has acted negligently, without intent to deprive and without acts of deception." (*Edwards v. State Bar, supra,* 52 Cal.3d at p. 38.)

In *Grim v. State Bar* (1991) 53 Cal.3d 21, the Supreme Court disbarred an attorney who willfully misappropriated $5,546 from a client. Although the attorney displayed good character, candor and cooperation, the Supreme Court concluded that this "[did] not constitute compelling mitigation in view of the various circumstances in aggravation," which included a prior reproval for commingling and failing to competently perform six years earlier, failure to timely pay restitution, and uncharged misconduct involving taking advantage of an out-of-state client and mismanagement of his trust account. (*Id.* at pp. 35-36.) Furthermore, the Supreme Court found that "The misappropriation in this case . . . was not the result of carelessness or mistake; petitioner acted deliberately and with full knowledge that the funds belonged to his client. Moreover, the evidence supports an inference that petitioner intended to permanently deprive his client of her funds . . . ." (*Id.* at p. 30.)

In *Chang v. State Bar* (1989) 49 Cal.3d 114, the Supreme Court disbarred an attorney who willfully misappropriated $7,898.44. In conjunction with the misappropriation, the attorney failed to render an accounting and misrepresented to the State Bar the surrounding circumstances. During trial, he displayed a lack of candor to the court by contending that his client agreed to pay him a contingency fee. The attorney's actions involved a course of conduct designed to conceal his misappropriation that was deliberate rather than the result of negligence or inexperience. His conduct was aggravated by harm to the client, failure to make restitution, and failure to acknowledge any wrongdoing. (*Id.* at pp. 123-124.) Although the attorney had practiced eight years with no prior disciplinary record, the Supreme Court concluded that this was insufficient to avoid disbarment, particularly since the Supreme Court doubted whether the attorney would conform his future conduct to the professional standards due to his failure to acknowledge the impropriety of his conduct, his failure to reimburse the client, and his lack of candor before the State Bar, which manifested a disrespect for the Bar's authority. (*Id.* at pp. 128-129.)

In *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, the Supreme Court disbarred an attorney who misappropriated checks payable to his law firm and a check from a client trust fund totaling approximately $29,000. When confronted by his managing partner, the attorney repeatedly denied knowledge of the missing checks and then claimed they were needed to help pay for necessary medical treatment for his father. The attorney later misrepresented to the State Bar that he used the money to finance medical treatment for his mother-in-law and claimed he spent $100,000 of his own funds on treatment. The attorney later

confessed that he made no such expenditures and used the misappropriated funds to maintain a standard of living beyond his means. (*Id.* at p. 1069.) The attorney had practiced for more than 11 years without prior discipline, paid restitution, produced 16 character witnesses and presented evidence that he was suffering from emotional problems related to his marriage and his mother-in-law's illness. The court determined this evidence was insufficient to avoid disbarment because the attorney's conduct was part of a purposeful design to defraud and would not have ceased absent the action of the attorney's partners. (*Id.* at pp.1071-1072.)

Like the attorneys in *Grim*, *Chang* and *Kaplan*, respondent's case involves significant aggravating factors, an absence of compelling mitigation, and conduct designed to conceal misappropriations which were not the result of negligence or inexperience. As in *Grim*, the evidence supports an inference that respondent intended to permanently convert entrusted funds. Analogous to the facts in *Kaplan*, respondent displayed a lack of candor to the State Bar and before the State Bar Court. This is particularly crucial since the Supreme Court has held that "'fraudulent and contrived misrepresentations to the State Bar' may constitute perhaps a 'greater offense' than misappropriation. [Citation.]" (*Cain v. State Bar* (1979) 25 Cal.3d 956, 961.)

Based on this record, we can glean no assurance that the public will be protected against future acts of misconduct. Therefore, as the Supreme Court concluded in *Chang* at p. 129, we similarly determine that "The risk that [respondent] may engage in other professional misconduct if allowed to continue practicing law is sufficiently high to warrant his disbarment. [Citations.]" For these reasons, we conclude that the absence of compelling mitigating circumstances combined with respondent's significant misappropriations, his attempt to conceal them after the fact, and his lack of candor to the State Bar and the State Bar Court warrant his disbarment.

IV. RECOMMENDATION

We therefore recommend that respondent ERIC W. CONNER be disbarred from the practice of law in this state and that his name be stricken from the roll of attorneys licensed to practice. We further recommend that he be ordered to comply with the provisions of rule 9.20 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order in this matter. We further recommend that the State Bar be awarded costs in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

V. ORDER OF INACTIVE ENROLLMENT

In view of our disbarment recommendation, it is ordered that respondent be enrolled as an inactive member of the State Bar. (Bus. & Prof. Code, § 6007, subd. (c)(4).) The inactive enrollment is effective three days after service of this opinion. (Rules Proc. of State Bar, rule 220(c).)

We concur:
EPSTEIN, J.
HONN, J.*

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*By designation of the Presiding Judge, Judge Richard Honn sat in place of Judge Joann Remke, who was disqualified.

State Bar Court
Review Department

In the Matter of

**JAMES R. MILLER, A/K/A
JAMES MILLER, III**

A Member of the State Bar

No. 05–C–04139

Filed May 30, 2008

SUMMARY

Acting pursuant to authority delegated by the Supreme Court, the review department had referred a matter to the hearing department to determine whether respondent's criminal assault conviction involved moral turpitude or other misconduct warranting discipline, and, if so, to recommend a degree of discipline. The hearing department dismissed the conviction referral proceeding prior to consideration of evidence about the facts and circumstances of the conviction because the State Bar had failed to notify respondent, who defaulted, of factual and legal contentions about the evidence on which it would rely in this matter. (Hon. Richard A. Honn, Hearing Judge.)

The review department concluded that because of the nature of conviction referral proceedings, there is no requirement that the State Bar provide the attorney with written notice of all of the facts it considers germane to the matter before commencement of proceedings or entry of respondent's default. Instead, the State Bar's notice afforded ample due process protections where it alerted respondent that evidence could be introduced on the facts and circumstances surrounding his assault conviction. The review department therefore concluded the hearing judge erred in dismissing the referral, and remanded the matter to the hearing department for further consideration.

COUNSEL FOR PARTIES

For State Bar: Joseph R. Carlucci

For Respondent: No Appearance

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a–d] **107 Default/Relief from Default**
191 Effect of/Relationship to Other Proceedings
1511 Driving Under the Influence
1513.10 Homicide, Assault, Battery, and Related Crimes
1515 Drug–Related Crimes
1516 Violation of Tax Laws
1691 Admissibility and/or Effect of Record in Criminal Proceeding
1699 Other Miscellaneous Issues in Conviction Cases

In contrast to original disciplinary proceedings, which emanate from complaints against lawyers or from State Bar investigations and require an accusatory pleading alleging with reasonable specificity the charges related to alleged violations of specific conduct rules or laws, conviction referral proceedings are intended to be more streamlined because they are initiated based solely on a member of the State Bar's conviction, which is conclusive evidence of guilt of the crime. Convictions for offenses which may or may not involve moral turpitude or other misconduct warranting discipline should be referred for an evidentiary hearing to determine whether in the commission of the crime the convicted lawyer was guilty of misconduct warranting suspension or disbarment; typical offenses in this category include: assault and battery crimes, driving while intoxicated, certain tax convictions, and certain drug law convictions. Because it is appropriate to consider a wide ambit of facts and circumstances surrounding an attorney's commission of a crime during an evidentiary hearing in a referral proceeding, the State Bar met historic notice requirements by alerting respondent that evidence could be introduced on the facts and circumstances surrounding his assault conviction. The review department held the State Bar was not further required to provide respondent written notice of all the facts it considered germane to the referral proceeding at the time it started or respondent's default was entered for failure to reply to the notice of hearing.

[2] **107 Default/Relief from Default**
192 Constitutional Issues–Due Process/Procedural Rights
1699 Other Miscellaneous Issues in Conviction Cases

In conviction referral proceeding, ample due process protections were afforded to respondent where the State Bar served him via certified mail with a copy of the conviction referral order along with written notice that informed him of the specific conviction that was subject to the referral and of the specific issues to be decided at the hearing, warned him of the specific consequences of failure to timely reply, and directed him to attend the hearing to present evidence on his behalf and to examine and cross-examine witnesses. Further, the motion for entry of default, also served by certified mail, again warned respondent of the consequences of his failure to participate and notified him of the minimum level of discipline the State Bar would recommend if the hearing judge found culpability. *1*

[3] **107 Default/Relief from Default**
191 Effect of/Relationship to Other Proceedings
1699 Other Miscellaneous Issues in Conviction Cases

While allegations in an original proceeding are deemed admitted after a default is entered, in a conviction referral matter, even after a default, the State Bar must prove by clear and convincing evidence any facts or circumstances it maintains are relevant to the conviction. If respondent in conviction referral proceeding had replied instead of defaulting, he could have sought to discover the State Bar's contentions of specific facts surrounding the conviction, and the court could have required the parties to exchange pretrial statements to identify factual contentions still in dispute before trial.

OPINION

STOVITZ, J.*

This review raises the question whether our court's Hearing Department erred in dismissing a referral we made to that department to determine, pursuant to authority delegated to us by the Supreme Court, whether the facts and circumstances surrounding the Ohio criminal assault conviction of respondent James R. Miller involved moral turpitude or other misconduct warranting discipline, and if so, for a recommendation as to the degree of discipline. Since the Hearing Department dismissed this proceeding prior to the consideration of evidence about the facts and circumstances of the conviction, and the dismissal was based solely on the failure of the State Bar to notify respondent (who had defaulted) of its factual and legal contentions about the evidence it would rely on, and since we hold that applicable law does not require such notice, we find that the hearing judge erred by dismissing our referral. We shall therefore remand this matter to the Hearing Department for further proceedings consistent with this opinion.

I. STATEMENT OF THE CASE

This proceeding was handled as a conviction referral proceeding by this court acting on delegated authority of the Supreme Court, which inherently controls such proceedings. (Bus. & Prof. Code, §§ 6101–6102;[1] Cal. Rules of Court, rule 9.10(a) (formerly rule 951(a)).)[2] As we shall discuss in more detail *post,* and as the hearing judge acknowledged, this "conviction referral" proceeding, arising after a California attorney is convicted of a criminal offense, is fundamentally different from "original disciplinary" proceedings.[3]

This conviction referral proceeding started in March 2006 when this court referred to the Hearing Department the question of whether respondent's conviction in the Court of Common Pleas of Ohio, Franklin County, on February 1, 2005, of one count of misdemeanor assault under Ohio Revised Code section 2903.13, involved moral turpitude or other misconduct warranting discipline.

Although the operative facts have not been found by our Hearing Department and we do not find them here, the Ohio state court transcript of proceedings of respondent's entry of his plea of guilty identified as a victim of respondent's criminal conduct a local police officer performing security duty on August 8, 2004, at the Port Columbus, Ohio, International Airport.[4] The police officer was apparently summoned after respondent became verbally abusive to federal Transportation Security Administration employees who were screening respondent at the airport as a ticketed passenger. The facts surrounding the assault are in dispute as to the precise nature of respondent's physical conduct toward the police officer. What is not in dispute is respondent's admission to the Ohio court that he did commit an assault in violation of the Ohio misdemeanor offense underlying his conviction. The evidence proffered by the State Bar also includes a colloquy between respondent and the Ohio court as to the cause of respondent's conduct and the steps he has assertedly taken to resolve underlying problems.

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* Honorable Ronald W. Stovitz, retired Presiding Judge of the State Bar Court, sitting by designation of the Presiding Judge.

1. Unless noted otherwise, all later statutory references are to the provisions of the Business and Professions Code.

2. As to conviction referral proceedings, generally, see, e.g., *In re Kelley* (1990) 52 Cal.3d 487, 493-494; *In re Langford* (1966) 64 Cal.2d 489.

3. See sections 6075-6088. As to original disciplinary proceedings, generally, see, e.g., *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300-302; *Chronicle Publishing Co. v. Superior Ct.* (1960) 54 Cal.2d 548, 567; *In re Walker* (1948) 32 Cal.2d 488, 489-490.

4. In reciting these basic facts, we draw no conclusions concerning the admissibility of the evidence revealing these facts or as to whether or not respondent is culpable, pursuant to our referral of this conviction to the Hearing Department. (But see § 6102, subd. (g) [the record of proceedings in the convicting court, including a transcript of testimony in that court, may be received in evidence].)

On March 16, 2006, when we started this conviction referral proceeding, we filed an order referring this Ohio conviction to the Hearing Department for a hearing and decision recommending the degree of discipline in the event that the Hearing Department found that the facts and circumstances surrounding respondent's conviction involved moral turpitude or other misconduct warranting discipline. The referral order was served on respondent at his official State Bar Membership Records address, which he is required to maintain pursuant to section 6002.1.

On March 27, 2006, the clerk of the Hearing Department served on the parties a notice of hearing on the conviction referral. That notice opened with a bold–faced, underlined heading: "**NOTICE TO RESPONDENT RE: DEFAULT AND INACTIVE ENROLLMENT**." In following paragraphs, this notice warned respondent of the consequences of default, should he not file an answer or appear at the State Bar Court hearing, including the consequences of inactive enrollment: that he would lose the opportunity to participate further in the proceedings, that evidence "that would otherwise be inadmissible may be used against" him, and that he would lose the opportunity to present evidence in mitigation or to counter the State Bar's evidence in aggravation. This notice was served by certified mail on respondent at his official Membership Records address and attached our order of referral filed March 16, 2006.

Respondent failed to timely reply to this notice of hearing and the State Bar moved for entry of his default. As required by the Rules of Procedure of the State Bar, the motion gave notice to respondent that if he failed to file an answer within ten days of service of the motion for entry of default, among other consequences, "EVIDENCE THAT WOULD OTHERWISE BE INADMISSIBLE MAY BE USED AGAINST YOU IN THIS PROCEEDING." (See Rules Proc. of State Bar, rule 202(a) [at default hearings, the State Bar is "entitled to introduce any evidence on which responsible persons are accustomed to rely in the conduct of serious affairs"].)[5]

Respondent failed to reply to the motion for entry of default or to file an answer, and on May 17, 2006, the court granted the motion and entered his default.[6] The order was served on respondent.

After the State Bar filed a closing brief as to culpability and discipline, which included the evidence it offered to prove the facts and circumstances surrounding the conviction,[7] the matter was submitted.

After vacating the submission and issuing an order to the State Bar to show cause why this proceeding should not be dismissed in the interests of justice or for want of due process, the hearing judge dismissed the conviction referral proceeding without prejudice for failure of the State Bar to show that it had notified respondent, prior to the entry of default, of the State Bar's factual and legal contentions about evidence of respondent's conviction that it had submitted to the Hearing Department with its closing brief. While acknowledging the substantial differences between conviction referral proceedings and original proceedings, the hearing judge nevertheless determined that the State Bar breached principles of due process by failing in a conviction proceeding to give notice to respondent, prior to the entry of default, of the legal and factual contentions on which the State Bar relied. Accordingly, the hearing judge concluded that the State Bar could not sustain its burden of presenting clear and convincing evidence that the facts surrounding respondent's conviction involved moral turpitude or misconduct warranting discipline in light of the State Bar's failure to have submitted the evidence it would rely on to respondent prior to entry

5. The motion also set forth the minimum discipline the State Bar intended to recommend if culpability was found. (Rules Proc. of State Bar, rule 200(a)(3).)

6. Respondent also failed to answer the charges of two original disciplinary proceedings that were consolidated with this conviction referral proceeding. His default was entered in the original proceedings as well.

7. This evidence consisted of a declaration from the police officer assaulted by respondent, certified copies of two reporter's transcripts of hearings in respondent's criminal proceeding in the Court of Common Pleas, Franklin County, Ohio, and a declaration from a State Bar supervising attorney overseeing the monitoring of pending criminal charges against California attorneys.

of default. The hearing judge also concluded that the fundamental fairness requirements of notice of alleged offenses in an original proceeding extended to require a similar notice in conviction proceedings that depend on a referral to the Hearing Department to assess the surrounding facts and circumstances. The State Bar seeks review, urging that the procedures followed in conviction referral proceedings are fair to the respondent and that the hearing judge's dismissal order was unwarranted.

II. DISCUSSION

[1a] As we noted *ante*, this conviction referral proceeding is fundamentally different in structure and governing procedures from the more common original disciplinary proceedings. Original disciplinary proceedings, which emanate either from complaints against lawyers or from State Bar investigations without a complaint, ultimately require an accusatory pleading ("Notice of Disciplinary Charges"), alleging the charges, with reasonable specificity, as related to the specific conduct rules or laws alleged to have been violated by the accused attorney. (See, e.g., § 6085; *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 168.)

In contrast, it is solely the event of a misdemeanor or felony conviction of a member of the State Bar of a criminal offense that is the initiating basis of a conviction referral proceeding under sections 6101 and 6102, and implementing rule 9.10(a) of our Supreme Court. (*In the Matter of Curtis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 601, 606.)

Conviction proceedings have been a feature of California's attorney disciplinary framework for at least eight decades and are intended to be more streamlined than original proceedings, "recognizing that they rest on proceedings in the criminal courts in which the burden of proof is beyond a reasonable doubt." (*Ibid.*) For that reason, California law has long recognized that an attorney's conviction of a crime or even the entry of a plea of nolo contendere or guilty to criminal charges is "conclusive evidence of guilt" of the crime. (§ 6101, subds. (a), (e).) Moreover, convictions of crimes inherently involving moral turpitude, including, inter alia, forgery, perjury, bribery, extortion and murder, necessarily establish an attorney's culpability by the very fact of the conviction and do not require any evidentiary hearing or showing beyond the certified evidence of the conviction itself. (§ 6101(a); e.g., *In re Hallinan* (1954) 43 Cal.2d 243, 247–248; *In re Rothrock* (1940) 16 Cal.2d 449, 454.) Indeed, between 1872 and 1955, an attorney's final conviction of a crime involving moral turpitude was a basis for *automatic* disbarment – obviating any evidentiary hearing. (*In re Paguirigan* (2001) 25 Cal.4th 1, 5, 8.) Commencing in 1986, summary disbarment was enacted for certain felonies. (*Id.* at p. 8.)

[1b] No later than 1954, the Supreme Court recognized that not all crimes committed by California attorneys inherently involved moral turpitude, and certain convictions should be referred to the State Bar to determine whether "in the commission of the crime the convicted lawyer was guilty of misconduct" warranting suspension or disbarment. (*In re Hallinan*, *supra*, 43 Cal.2d at pp. 253–254.) As a result, many of the conviction proceedings started against attorneys in California, including the one before us, arise from convictions which *may or may not* involve moral turpitude or misconduct warranting discipline. Typical offenses in this category include convictions involving: assault and battery crimes (e.g., *In re Otto* (1989) 48 Cal.3d 970; *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52); trespassing (e.g., *In re Hurwitz* (1976) 17 Cal.3d 562); driving while intoxicated (e.g., *In re Kelley, supra*, 52 Cal.3d 487); certain tax convictions (e.g., *In re Grimes* (1990) 51 Cal.3d 199; *In re Rohan* (1978) 21 Cal.3d 195); and certain drug law convictions (e.g., *In re Cohen* (1974) 11 Cal.3d 416). Prior to 1991, the Supreme Court itself referred these convictions to the State Bar for a hearing and report as to whether moral turpitude or misconduct warranting discipline were involved; and if so found, for a recommendation of the degree of discipline. (See, e.g., *In re Hallinan, supra*, 43 Cal.2d at p. 253; § 6102, subd. (f) (as amended in 1955).) In 1991, the Supreme Court delegated its referral powers to this court, which continued the practice of evidentiary referral to the hearing department of those crimes which did not involve moral turpitude per se.

[1c] In a referral for an evidentiary hearing of those criminal convictions which "may or may not"

involve moral turpitude or misconduct for an attorney, it is clear that "all facts and circumstances surrounding the commission of a crime by an attorney" may properly be considered. (*In re Arnoff* (1978) 22 Cal.3d 740, 745; see also *In re Higbie* (1972) 6 Cal.3d 562, 572; *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 740–747.) Thus, the Supreme Court has rejected claims by attorneys that it was improper to consider facts about the use of fraudulent medical reports in a conviction for capping (*In re Arnoff, supra*, 22 Cal.3d at p. 745), and about an attorney's involvement in a gold importation transaction in a conviction for selling securities in a crib–playpen venture without a permit (*In re Langford, supra,* 64 Cal.2d at p. 496).

[1d] Since a wide ambit of facts surrounding the commission of a crime is appropriate to consider in a conviction referral proceeding, and since the basis of such a State Bar Court referral proceeding is the conviction itself, there has never been a requirement that, at the time the proceeding is started or at the time that the member's default is entered for failure to reply to the notice of hearing, the member receive written notice of all the facts that the State Bar considers germane to the referral.[8] The notice that was provided literally alerted respondent that evidence could be introduced on the facts and circumstances surrounding his Ohio assault conviction.[9] This is all that has historically been required.

[2] Contrary to the conclusion drawn by the hearing judge, we hold that the procedures surrounding this conviction referral proceeding afforded respondent ample due process protections. First, respondent was served with written notice of the specific issues to be decided at a hearing that he was directed to attend in order to present evidence on his behalf and to examine and cross–examine witnesses, and the notice cited the specific criminal conviction which was the subject of the referral. Second, the notice at the outset warned respondent of the specific consequences for failure to reply timely. This notice was served upon respondent by certified mail at the address he was required to maintain on the State Bar's official records, and it was accompanied by a copy of our referral order. Finally, in the motion for entry of default, respondent was again warned of the consequences of his failure to participate, and was notified of the minimum level of discipline the State Bar recommended if culpability was found. This motion also was served upon respondent by certified mail.

[3] The well–established conviction referral proceedings provide even more defense opportunities for attorneys who participate in the proceedings. Thus, had respondent replied instead of defaulting, he could have sought to discover the State Bar's contentions of specific facts surrounding the conviction and the court could have required pretrial statements to be exchanged between the parties to identify factual contentions still in dispute before trial. (Rules Proc. of State Bar, rules 180 et seq., 211 and 608.) In all conviction referral cases, including defaults, the State Bar is required to present by clear and convincing evidence any facts it maintains are relevant to the conviction. (See *In the Matter of Carr* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 756, 763–764 [paucity of record presented by State Bar did not permit conclusion that facts and circumstances surrounding the attorney's conviction was a basis for discipline].) Thus, while allegations in an original proceeding are deemed admitted after a default is

8. We have only found one case in which we discussed a notice issue in a conviction referral proceeding. In *In the Matter of Respondent I* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 260, 269, the attorney, who was convicted in another state of driving under the influence of alcohol, argued that due process would be violated because he was provided no advance notice of the grounds on which discipline would be imposed. We did not resolve this issue as we decided the case on other grounds, but we noted authorities which rejected or cast serious doubt on the vitality of such a challenge. (*Id.* at p. 270.)

9. To require that the State Bar provide notice, at the outset of a conviction proceeding, as to the facts it relies on to establish moral turpitude or other misconduct warranting discipline, may well be unduly burdensome in light of the case law cited *ante* that all facts and circumstances surrounding the conviction are appropriately considered. Unlike an original proceeding, which is more within the control of the State Bar as to timing of initiation, a conviction referral proceeding is intended to be streamlined and the State Bar is under a statutory duty to transmit the record of conviction to the State Bar Court within five days of its receipt. (See § 6101, subd. (c); Cal. Rules of Ct., rule 9.10(a).)

entered, in a conviction referral matter, there is an additional built–in prophylactic measure that, even after a default, any fact or circumstance relied on must still be proven.

III. DISPOSITION

The hearing judge erred by dismissing this referral proceeding without legal justification. We therefore remand the proceeding to the Hearing Department with directions to vacate the order of dismissal and to take further proceedings consistent with this opinion.

We concur:

REMKE, P. J.
WATAI, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

CLIFFORD LEE CASEY

A Member of the State Bar

No. 04-O-11237

Filed December 4, 2008

SUMMARY

Respondent negotiated a transfer of real property between two of his clients, and as a result of the transfer his minor son received a 50 percent interest in the property from the recipient client without the son's notice. Respondent failed to disclose in writing the terms of the transfer to the client who was the original owner of the property. As a result, the client lost title to the property, but remained on the deed of trust, which put her at risk of having to pay the balance of the mortgage upon a default in the mortgage payments or recordation of the grant deed. The hearing judge found respondent culpable of acquiring a pecuniary interest adverse to his client, but did not find respondent culpable of acts of moral turpitude. The hearing judge found respondent was entitled to substantial credit in mitigation for 12 years of service as a judge pro tem, but was not entitled to mitigation credit for good moral character or remorse. In aggravation, the hearing judge found respondent had a prior record of discipline, significantly harmed his client, was indifferent and lacked insight into the seriousness of his misconduct. The hearing judge recommended respondent be placed on three years' probation on the condition that he be actually suspended for 90 days. (Hon. Richard A. Platel, Hearing Judge.)

The review department reversed the hearing judge's findings regarding culpability. Instead, the review department concluded that respondent did not acquire a pecuniary interest adverse to his client, but that he was culpable of acts of overreaching and breach of fiduciary duty that constituted moral turpitude in violation of section 6106. The review department adopted the hearing judge's findings in aggravation and mitigation, and adopted the recommendation that respondent be suspended for three years, stayed, and that he be placed on three years' probation on the condition that he be actually suspended for 90 days.

COUNSEL FOR PARTIES

For State Bar: Paul T. O'Brien

For Respondent: George S. Wass

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HEADNOTES

[1 a–b] **273.00 Rule 3–300 [former 5–101] (improper transaction with client)**
Respondent did not acquire a pecuniary or financial interest in his client's former condominium under rule 3-300. The fact that a second client, to whom the condominium was transferred, gave respondent's minor son a 50 percent ownership interest to induce respondent to manage the condominium did not create on the part of the respondent any ownership, possessory, security, or other interest in the property. To violate rule 3-300, an attorney must be a party to or financially gain from the business transaction. Respondent's role in the negotiations did not make him a party to the purchase of the condo, nor did his management of the condo or the ownership interest acquired by his son make him a third party beneficiary to the transaction.

[2 a–b] **221.00 State Bar Act–Section 6106 (moral turpitude, corruption, dishonesty)**
430.00 Breach of Fiduciary Duty
Respondent ignored his role as a fiduciary to one client when, while negotiating the transfer of her real property to his other client, he failed to advise her that she would no longer have any right, title, or interest in the property, that she remained on the deed of trust placing her at risk of having to pay the mortgage upon default in the mortgage payments or recordation of the grant deed, or that she would continue to receive the tax bills. At best, respondent was grossly negligent in failing to disclose the terms of the sale and the pros and cons of the transactions to his client, and at worst, respondent intentionally concealed the information to the advantage of his other client and his son. Respondent exploited his superior knowledge and position of trust to the detriment of his vulnerable client, which constituted an act or moral turpitude.

[3 a–c] **221.00 State Bar Act–Section 6106 (moral turpitude, corruption, dishonesty)**
430.00 Breach of Fiduciary Duty
In addition to the fiduciary duty to fully inform his client about the sale of her condominium, respondent breached correlative fiduciary duties to adequately document the terms of the sale in a manner reasonably calculated for the client to understand, to advise his client that she should consult another attorney, or to disclose the serious conflicts in representing both parties to the transfer transaction. Respondent's conduct constituted overreaching, and as a result of his multiple conflicts, he gravely compromised his duty of loyalty to his client.

[4] **765.10 Mitigation Substantial Pro Bono Work–Found**
Respondent's 12 years of service as a judge pro tem was entitled to substantial mitigation credit.

[5] **582.10 Aggravation–Harm to Client–Found**
Client was significantly harmed where, as a result of respondent's actions, she had to hire new counsel, incurred a significant amount of attorney's fees, and unsuccessfully attempted to reclaim her condominium for three years.

[6] **591 Aggravation–Indifference to Rectification/Atonement–Found**
Substantial weight in aggravation assigned to respondent's lack of insight into his wrongdoing where he failed to realize his actions while representing both parties to a real property transfer compromised his fiduciary duties, and he believed he was not culpable because one of the clients was awarded only nominal damages in a civil suit against him. Respondent thus misperceived the

purpose of disciplinary proceedings, which is protection of the public and the profession, and on which the extent of civil damages awarded have little or no relevance.

ADDITIONAL ANALYSIS

Culpability

Found

221.19 Section 6106

430.01 Breach of Fiduciary Duty

Not Found

273.05 Rule 3–300 [former 5–101]

Aggravation

Found

511 Prior record

582.10 Harm to client

591 Indifference

Mitigation

Found

765 Substantial pro bono work (12 years service as a judge pro tem entitled to substantial mitigation credit)

Declined to Find

740.51 Good Character

745.52 Remorse

Discipline

1013.09 Stayed Suspension–3 years

1015.03 Actual Suspension–3 months

1017.09 Probation–3 years

OPINION

EPSTEIN, J.:

This matter highlights some of the ethical perils when an attorney negotiates a business transaction between two clients. The hearing judge found respondent, Clifford Casey, acquired a pecuniary interest adverse to his client in violation of rule 3-300 of the Rules of Professional Conduct[1] and recommended that respondent be placed on three years' probation on the condition that he be actually suspended for 90 days. Respondent seeks review of the hearing judge's discipline recommendation, arguing that it is too harsh because he made an "innocent mistake" in failing to disclose the material terms of the transaction to one of his clients. The State Bar asks us to adopt the hearing judge's recommendation.

We review the record de novo (*In re Morse* (1995) 11 Cal.4th 184, 207), and we reverse the hearing judge's finding of culpability under rule 3-300. Instead, we find respondent culpable as charged of violating Business and Professions Code section 6106 (moral turpitude).[2] However, based upon all relevant circumstances, as well as the standards[3] and guiding case law, we conclude that the hearing judge's discipline recommendation is sufficient to protect the public, the courts and the profession.

I. FACTUAL AND PROCEDURAL BACKGROUND

Respondent was admitted to practice law in California on June 23, 1978, and he has been a member of the State Bar since that time. He stipulated to a prior discipline resulting in a public reproval in October 2003 due to his conviction of three misdemeanor violations of unlawful entry into the property of another (Pen. Code, § 602, subd. (l)).

In 1985, Thomas and Ida Stewart, who lived in Santa Ana, California, purchased a condominium in Palm Springs for $49,990. In 1992, the Stewarts decided to sell the condo to two elderly women (Tenants), but when they could not qualify for a loan, the Stewarts agreed to lease the condo to them for twenty years with an option to purchase the condo. The terms of the lease required the Tenants to pay rent, which was the equivalent of the monthly mortgage payment, the Homeowners Association (HOA) dues and the property taxes. Title to the condo remained in the Stewarts' name until payment in full of the mortgage.

In 1998, when the Tenants fell behind on the HOA dues, Mrs. Stewart contacted respondent and retained him to prosecute an unlawful detainer action against them, which he filed on September 3, 1998. Respondent resolved the matter prior to trial by negotiating an agreement whereby the Tenants relinquished their rights under the lease and assigned to the Stewarts a rental agreement which they had with a subtenant.

In July 1999, Mrs. Stewart again contacted respondent and asked him to assist her because the Stewarts had not paid past-due HOA dues on the condominium, and the HOA was threatening foreclosure. Mrs. Stewart wrote to respondent, explaining that this situation posed a financial hardship: "I can't believe it falls upon me to make these payments in arrears, that are due. Where are my rights? . . . My home in Santa Ana is our nest egg . . . . We survive on our pensions and try to meet our monthly responsibilities." Respondent negotiated a payment plan with the HOA requiring the Stewarts to pay an additional $200 per month, but Mrs. Stewart could not agree to those payments due to her declining finances, and also because Mr. Stewart had become ill and had moved to a retirement home in Florida to be

1. All further references to "rule(s)" are to the Rules of Professional Conduct, unless expressly noted.

2. All further reference to "section(s)" are to the Business and Professions Code, unless expressly noted.

3. All further references to "standard(s)" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, unless expressly noted.

closer to his family. Mrs. Stewart continued to live in Santa Ana, but she traveled back and forth to visit her husband, increasing the Stewarts' living expenses. To add to her worries, the subtenant living in the Stewarts' condo failed to pay the rent on time, causing Mrs. Stewart additional hardship.

At this point in time, the record becomes murky due to conflicting testimony between respondent and Mrs. Stewart and the absence of corroborating evidence. Respondent testified that Mrs. Stewart offered to sell him the Palm Springs condo. Specifically, he said that Mrs. Stewart asked him to assume the mortgage payments for the condo, pay the past-due HOA dues and pay the taxes. At the time, there was a balance of approximately $34,000 left on the condominium's first trust deed. The parties stipulated that the condominium's fair market value as of July, 1999, was approximately $29,000 to $34,000.

Respondent testified that he told Mrs. Stewart that he was not interested in purchasing the condo but he had a client named Ajax Corporation (Ajax) that might be interested. Ajax had at least one shareholder, Ray Lyons, who was also president of the company. Lyons was a long-standing client and friend of respondent, as well as a business partner in at least one deal involving the purchase of a bar. Not only did respondent represent Ajax, but he was also its agent for service of process and, at different times after March 2001, he served as Ajax's president.[4]

Respondent testified that he communicated Mrs. Stewart's offer to Lyons and that Lyons was interested, but wanted respondent to be "involved" in managing the condo for him "so that [Lyons] wouldn't have to be – you know, have a problem with it or be burdened with it." He further testified that Lyons suggested that respondent's minor son, Chance Casey, be made a joint tenant and be given a 50-percent ownership interest in the condo, in part because Lyons was fond of Chance, and in part, according to respondent, because "this was [Lyons'] way of getting me involved to manage this condominium for him." Respondent did not disclose the terms of the proposed purchase by Ajax in writing to the Stewarts.

Mrs. Stewart had a very different understanding of the transaction. She testified that she asked respondent to "handle" the condo for her since she "had not been able to get the tenant who was there to pay her on time." Since respondent was in "Palm Springs and [she] was in Santa Ana," she thought it was "easier for him to – to look over the property and see what [could] be done because she wasn't getting anywhere with" the current tenant. Mrs. Stewart further testified: "I contacted Mr. Casey as my counsel. I thought that I – he would look after my interest and help me to resolve this matter hopefully with good tenants, and of course I expected him to be reimbursed one way or another even if it came to the point where we had to sell the condominium. If it came to that, I said to him, 'Remember, Mr. Casey, we share.'" Mrs. Stewart thus believed that respondent would help to stabilize the property with good tenants and that if at some point it became necessary to sell the condo, she and respondent would in some manner share in the proceeds of the sale.

On August 27, 1999, respondent sent a letter to the Stewarts while they both were in Florida, enclosing a grant deed to the condo for them to sign. The letter stated in its entirety: "Enclosed is a deed to the Palm Springs condo for the two of you to sign and return to me. Although Mrs. Stewart has said that it is not necessary, I am obligated to tell you that you have the right to have a lawyer of your choosing review the document and our transaction overall." Mrs. Stewart testified that she did not receive this letter, which was sent around the time of Mr. Stewart's death in August of 1999.

Even though the Stewarts did not sign the deed, respondent assumed management of the condo in August 1999 on behalf of Ajax. Respondent collected the rent and paid the mortgage and HOA fees out of his office account, with reimbursement from Ajax.

4. The hearing judge also found that at various times respondent had an ownership interest in Ajax. We find no evidence in the record to support this finding.

On March 2, 2001, Mrs. Stewart traveled by bus from Santa Ana to Palm Springs and met respondent at a notary office to sign the grant deed. Mrs. Stewart testified that she signed the deed at that point because she knew she would "owe [respondent] money eventually and not being able to pay him, that [signing the deed] was the only way to show good faith." The deed conveyed the Palm Springs condo to respondent's son, Chance, and Ajax, Inc., as tenants in common. Chance had no knowledge that he had obtained a one-half interest in the condo. On the same date she signed the deed, respondent provided Mrs. Stewart a check for the mortgage payment she had advanced for the month of March. However, Mrs. Stewart remained liable on the deed of trust, which was not cancelled or re-conveyed to her. Mrs. Stewart also wanted respondent to reimburse her $500 for the money she advanced for the taxes. Respondent told Mrs. Stewart that he would send her the money, but he never did. Mrs. Stewart called respondent a number of times seeking the $500 for the taxes, but he never spoke to her again after the meeting in the notary office.

Mrs. Stewart filed a civil suit against respondent, received a judgment in her favor of one dollar, but did not obtain legal possession of the condo. Mrs. Stewart's attorney's fees for the suit against respondent totaled between $67,000 and $77,000, of which she paid $10,000.

On October 23, 2006, after the conclusion of Mrs. Stewart's civil case against him, respondent filed a libel action against Mrs. Stewart and her attorneys, alleging that Mrs. Stewart's attorneys wrote a defamatory letter to Ajax's president, Lyons, stating that respondent had defrauded Mrs. Stewart. At the time of the hearing below, respondent had not served the complaint on Mrs. Stewart or her attorneys because he claimed he might amend it to dismiss Mrs. Stewart if she had no knowledge of the alleged libelous letter.

The State Bar filed a Notice of Disciplinary Charges (NDC) on March 27, 2006, alleging three counts of misconduct in one client matter. On April 11, 2006, respondent filed a response denying culpability. On September 19, 2006, the parties filed a partial stipulation as to certain facts, and the hearing judge dismissed Count 2 of the NDC.[5] After three days of hearings, the matter was submitted on August 13, 2007. On November 8, 2007, the hearing judge filed a decision finding culpability on Count 1 of the NDC, acquiring an interest adverse to a client, in violation of rule 3-300. The hearing judge further found there was insufficient evidence to establish moral turpitude under Count 3. He recommended a three-year stayed suspension, three years' probation, and 90 days' actual suspension. Respondent sought review of this decision on December 12, 2007. The State Bar did not request review. On December 17, 2007, the hearing judge filed a Modification Order to correct the duration of time within which respondent had to pass the Professional Responsibility Examination and to correct a typographical error of the probation term.[6]

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5. The hearing judge dismissed Count 2 (circumventing a court order) on the State Bar's motion because it could not produce evidence to support the charge. Upon our de novo review, we adopt the hearing judge's dismissal of this count with prejudice.

6. Respondent alleges that the hearing judge, sua sponte, increased his discipline recommendation when he filed the Modification Order. Respondent is incorrect because in the November 8, 2007, Decision, first paragraph under "VI. Recommended Discipline," the hearing judge clearly recommends respondent be suspended for "three years." However, under probation condition number 8, a typographical error stated "the Supreme Court order suspending Casey from the practice of law for *two* years" (emphasis added). The Modification Order did not increase the recommended discipline but only corrected the typographical error to ensure that the suspension outlined in the probation condition corresponded with the suspension recommendation.

II. CULPABILITY DISCUSSION

A. Count 1: Rule 3-300 – Acquiring Pecuniary Interest Adverse to Client

Rule 3-300 provides in relevant part: "[a] member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client . . ." unless certain requirements are satisfied.[7]

The hearing judge found respondent culpable of violating rule 3-300 by reason of acquiring a pecuniary interest in the Palm Springs condo that was adverse to Mrs. Stewart without fully disclosing to her the terms of that transaction in writing and without obtaining her written consent. The hearing judge concluded that the following facts established that respondent acquired a pecuniary interest in Mrs. Stewart's condo: 1) he agreed to manage the condo for Ajax; 2) his minor son received a 50% interest in the property from Ajax without the son's knowledge; and 3) respondent was Ajax's attorney and agent for service of process at the time of the transaction. The hearing judge explained: "Respondent's personal and professional life were so entangled with Lyons and Ajax that it was incumbent on respondent to follow his ethical obligations under rule 3-300 and make the requisite disclosures and obtain Mrs. Stewart's written consent." Although we agree with the ethical concerns articulated by the hearing judge, we do not agree that the record establishes that respondent either entered into a business transaction with Mrs. Stewart or acquired a pecuniary interest – or any other ownership, possessory, or security interest – within the meaning of rule 3-300.

We look to *In the Matter of Fandey* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767 as precedent. Fandey introduced his father to a client who was interested in selling his home. Fandey attended the negotiations between his father and the client, and helped prepare the documents for the sale of the client's home to his father. The client originally listed the home at $180,000, but Fandey convinced the client to offer the property at $30,000 less under the pretext that the client would receive a tax savings. Fandey's father bought the home at the reduced price. The hearing judge in the *Fandey* case reasoned that "'the closeness of the relationship between respondent and his parents is tantamount to respondent himself entering into a business transaction with [the client].'" (*Id.* at p. 774.) The hearing judge found that Fandey was accordingly culpable, inter alia, of improperly obtaining an interest in a client's property and/or entering into a business transaction with a client in violation of former rule 5-101 (the predecessor to rule 3-300).

We reversed, and instead found that Fandey's close relationship with his father and his involvement in the negotiation of the sale of his client's property to his father was not evidence "that respondent was a party to or benefitted financially from either property transaction." (*In the Matter of Fandey, supra*, 2 Cal. State Bar Ct. Rptr. at p. 777.) We nevertheless found Fandey's conduct in negotiating the property transactions between his father and his client constituted overreaching and a conflict of interest and therefore was a significant aggravating factor under standard 1.2(b)(iii).[8] (*Id.* at pp. 777-778.)

[1a] As in *Fandey*, we do not find that respondent acquired a pecuniary or financial interest in Mrs. Stewart's condo under rule 3-300. Ajax's agreement to give Chance Casey a 50-percent ownership interest in order to induce respondent to manage the condo did not create on the part of respondent any "ownership, possessory, security or other interest" in the

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7. Those requirements are: (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and (C) The client consents in writing to the terms of the transaction or acquisition.

8. The misconduct involving overreaching and conflict of interest was not charged in the NDC in *Fandey* and therefore was considered as aggravation. Here, we address respondent's similar actions as *charged* misconduct in our discussion of Count 3, *post*.

property. To the contrary, the grant deed, which is the only written evidence of the transaction, transferred the Stewarts' ownership interest in the condo to Ajax and Chance, who became the two owners as tenants in common. (*Emery v. Emery* (1955) 45 Cal.2d 421, 432 [minor child's property is his or her own, and not that of child's parents]; see also Fam. Code, § 7502 [parent has "no control over the property of [a] child"]; *In re Tetsubumi Yano's Estate* (1922) 188 Cal. 645, 649 [minority does not incapacitate a person from taking and holding real estate].)

[1b] Rule 3-300 further provides that "[a] member shall not enter into a business transaction with a client . . . ." However, to violate rule 3-300, an attorney must be a party to or financially gain from the business transaction. (*In the Matter of Fandey, supra,* 2 Cal. State Bar Ct. Rptr. at pp. 776-777; cf. *In the Matter of Peavey* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 483, 485 [attorney entered into agreement with clients where clients loaned him $25,000 with option to convert loan into partnership to share in proceeds from sale of book attorney produced]; *In the Matter of Gillis* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 387, 392-393 [attorney sold his residential property to client in exchange for substantial portion of settlement proceeds attorney obtained for client]; *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 160-161 [attorney convinced clients to invest $80,000 in attorney's business park development partnership].) Respondent's role in the negotiations did not make him a party to the purchase of the condo. We could find no clear and convincing evidence establishing that respondent was financially even a third party beneficiary by virtue of his management of the condo or the ownership interest acquired by his son. "For a third party to qualify as a beneficiary under a contract, the contracting parties must have intended to benefit that third party, and their intent must appear from the terms of the contract. [Citations.]" (*Kirst v. Silna* (1980) 103 Cal.App.3d 759, 763.)

Accordingly, we conclude that the hearing judge was incorrect in finding respondent culpable of violating rule 3-300.

B. Count 3:
Section 6106 – Acts Involving Moral Turpitude

Our finding that the State Bar did not establish a rule 3-300 violation does not absolve respondent of culpability. To the contrary, the conduct alleged in Count 1 also is alleged in Count 3 as constituting acts involving moral turpitude in violation of section 6106. The hearing judge found there was not clear and convincing evidence of moral turpitude. We disagree. Indeed, as we discuss below, we find the moral turpitude allegations in Count 3 are clearly established by evidence of respondent's failure to act as a fiduciary in fully communicating the terms of the sale or properly documenting the transaction, his overreaching, and his conflicts of interest.

Mrs. Stewart was about 80 years old when she contacted respondent about the HOA dues. She advised him she could not pay the arrearages because she was "strapped." Additionally, she testified that "everything was – my husband was on his death bed, and I was living – he was living in Florida. We were living in Florida and in California. My expenses were terribly high, and we had depleted our savings, and I just couldn't – couldn't advance any more money." It is clear from the record that the Stewarts sought respondent's legal advice when they were in financial distress and emotionally vulnerable.

[2a] Respondent testified that his role in the transaction between Mrs. Stewart and Ajax was "[j]ust as the guy in the middle, the go-between delivering information back and forth." Respondent's testimony completely ignores his role as a fiduciary. "'The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party.' [Citation.]" (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813.) Respondent did not advise Mrs. Stewart that she would no longer have any right, title or interest in and to the condo, or that she would remain on the deed of trust, which put her at risk of having to pay the balance of the mortgage upon a default in the mortgage payments or recorda-

tion of the grant deed.[9] Mrs. Stewart was also not advised that she would continue to receive the tax bills.

[2b] We find, at best, respondent was grossly negligent in failing to fully disclose the terms of the sale of the condo as well as the pros and cons of the transaction to Mrs. Stewart. At worst, respondent intentionally concealed the information to the advantage of Ajax and his son. A finding of gross negligence is sufficient for a violation of section 6106. (*In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9, 15; *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 90, 91.) As Mrs. Stewart's attorney, "respondent exploited [his] superior knowledge and position of trust to the detriment of [his] vulnerable client and this clearly constituted an act of moral turpitude." (*In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 244; see, e.g., *In the Matter of Gillis, supra,* 4 Cal. State Bar Ct. Rptr. at pp. 397-98 [attorney sold his own home to a client for fair market value but without full disclosure of the risks involved in the transaction]; *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 959-60 [attorney used technical legalese in fee agreement to disadvantage of clients who spoke limited English]; *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, 807 [attorney elicited a confession from incarcerated defendant with 10th grade education].)

[3a] In addition to his fiduciary duty to fully inform Mrs. Stewart about the sale of her condo, respondent had a correlative fiduciary duty to ensure that the transaction was properly documented. (*In the Matter of Fandey, supra,* 2 Cal. State Bar Ct. Rptr. at p. 778.) Respondent maintains that the terms of the sale were adequately documented by the grant deed Mrs. Stewart signed on March 2, 2001. We disagree. The deed merely disclosed that Ajax and Chance Casey were the grantees. It did not disclose the material terms of the sale or the ramifications of the transfer of the property in a manner reasonably calculated for Mrs. Stewart to understand the consequences of her signing the deed. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 663.)

[3b] We also find respondent's August 27, 1999, letter, which accompanied the grant deed he sent to Mrs. Stewart, to be woefully inadequate. There is no mention in the letter of the terms of the transaction or the consequences to her. (*Rose v. State Bar, supra,* 49 Cal.3d at p. 663.) More importantly, the letter does not disclose respondent's conflicts of interest. (*Ibid.*) His precautionary language, "I am obligated to tell you that you have the right to have a lawyer of your choosing review the document and our transaction overall" merely suggested that she *could* consult another attorney; he did not advise her that she *should* consult an attorney, which he was required to do. (*Ibid.*) Indeed, his letter "implied it was unnecessary because he would be looking out for her interests." (*Ibid.*) Had respondent fully disclosed the terms of the sale in writing, the discrepancies between his and Mrs. Stewart's understanding of the transaction should have become apparent to both of them.

[3c] Respondent further breached his fiduciary duty to Mrs. Stewart because of his divided loyalties among her, his other client Ajax, and his son, Chance. It is the attorney's "duty to advise each client with undivided loyalty. [Citation.]" (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 616.) We found in *In the Matter of Fandey, supra,* 2 Cal. State Bar Ct. Rptr. at pp. 777-778, that an attorney's participation in similar negotiations involving the sale of a client's real property was "rife with potential and actual conflicts of interest," which constituted overreaching. We thus observed: "Perhaps because of the conflicting loyalties respondent faced between [his client] and respondent's father, respondent did not safeguard [his client's] interests in these transactions . . . he did not adequately explain the transactions to [his client] or advise [his client] to seek independent counsel. . . ." (*Ibid.*) Respondent did not disclose the serious conflicts in representing Mrs. Stewart and Ajax (and vicariously his son). "As a consequence of his multiple conflicts, respondent lost any claim to objectivity or neutrality, and in so doing he gravely compromised his duty of loyalty to [his client] . . . ." (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 594.)

9. The record reflects that the mortgage was subject to a "due on sale" provision.

III. DISCIPLINE

The primary purpose of these disciplinary proceedings is not to punish but to protect the public, the courts, and the legal profession. (Std. 1.3; *Bach v. State Bar* (1987) 43 Cal.3d 848, 856.) No fixed formula applies in determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Rather, we determine the appropriate discipline in light of all relevant circumstances, including mitigating and aggravating circumstances. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

A. Mitigation

[4] We agree with the hearing judge's finding that respondent's service as a judge pro tem from 1986 to 1998 is entitled to substantial mitigation credit. (*In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 729.)

Two character witnesses, Ford Dent Munn, Esq. and George Wass, Esq., testified to respondent's good moral character. The hearing judge afforded Wass' testimony minimal weight because he found Wass lacked candor due to his failure to disclose that he represented respondent in the libel action against Mrs. Stewart and her attorneys. Respondent challenges this credibility determination. However, even if, arguendo, we were to deem Wass' testimony credible, we would assign no weight in mitigation to respondent's character evidence because his two witnesses do not constitute a broad range of references from the legal and general communities. (Std. 1.2(e)(vi); *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 840 [respondent not entitled to mitigation for good character based on testimony of two witnesses].)

Additionally, we agree with the hearing judge that no weight should be given in mitigation to respondent's testimony that he feels very bad about Mrs. Stewart's situation because his words of remorse do not amount to "objective steps promptly taken" by him to make amends for his misconduct. (Std. 1.2(e)(vii); *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 519.) Respondent has not even made restitution to Mrs. Stewart for her $500 tax payment for which she was to be reimbursed.

B. Aggravation

We adopt all of the hearing judge's findings in aggravation.

Respondent has a prior disciplinary record. (Std. 1.2(b)(i).) In a 2003 conviction referral matter, respondent stipulated to a public reproval for his guilty plea for three misdemeanor violations of Penal Code section 602, subdivision (l) for entering property without consent, which were crimes not involving acts of moral turpitude.

[5] We agree with the hearing judge's finding that respondent significantly harmed Mrs. Stewart. (Std. 1.2(b)(iv).) She had to hire new counsel, incurred a significant amount of attorney's fees, and suffered "three years of misery" in an unsuccessful attempt to reclaim her condo.

[6] Respondent's lack of insight into the seriousness of his misconduct is particularly troubling. (Std. 1.2(b)(v).) For example, in his Opening Brief, respondent asserts his conduct did not hurt Mrs. Stewart and that "it is nice to protect little old ladies, but it is very common that many people use the age of the client as a ploy to win lawsuits." He also characterizes his misconduct as "a minor ethical problem." Respondent fails to understand or acknowledge that his representation of Mrs. Stewart in any way compromised his fiduciary duties; instead, he believes that he "went out of his way to help" her. Respondent also believes he has no culpability because Mrs. Stewart was only awarded nominal damages in her civil suit against him. He thus misperceives the purpose of these disciplinary proceedings, which is protection of the public and the profession. The extent of the damages awarded to Mrs. Stewart for respondent's tortious conduct or breach of contract is of little or no

relevance to this court.[10] We assign substantial weight in aggravation to respondent's indifference and failure to appreciate the wrongfulness of his misconduct.

C. Level of Discipline

The hearing judge relied on standard 2.8[11] and two cases involving conflicts of interest and self-dealing to assess the level of discipline: *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297 and *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735. Although culpability in these cases is grounded in a different rule, the factual underpinnings of the misconduct are somewhat similar to the instant case.

In *In the Matter of Lane, supra*, 2 Cal. State Bar Ct. Rptr. 735, the gravamen of the case was Lane's failure to document various transactions with his client in violation of rule 5-101 (the predecessor to rule 3-300). (*Id.* at p. 745.) We also found violations of rules 3-310 (formerly 4-101 and 5-102), 3-400 (formerly 6-102) and 3-700 (formerly 2-111(A)(2)). Over the course of many years, Lane made at least two loans to his client totaling $100,000, and he secured the loans with a variety of the client's personal and business assets, a second mortgage on the client's home, an assignment of stock, and a UCC-1 covering all of the client's personal property, including his car, household furnishings and similar items. Lane continued to represent his client in a variety of lawsuits. He also sued his client on several occasions and was his co-defendant in at least one case. Several years later, Lane urged, then threatened, his client to ensure he filed for Chapter 7 bankruptcy proceedings, in part as an effort to protect Lane's interests in the various properties, including over $17,000 in legal fees that were subject to a confession of judgment. (*Id.* at pp. 742, 745.)

Lane not only failed to properly document the transactions, he did not adequately explain all of the ramifications of his continued representation to his client. (*In the Matter of Lane, supra*, 2 Cal. State Bar Ct. Rptr. at p. 745.) Lane also failed to return the client's files after he was sued for malpractice. Aggravation included multiple acts of misconduct and indifference. Lane's mitigation included his 25 years of practice without prior discipline and his good standing in the legal community as established by his good character evidence. (*Id.* at p. 748.) *Lane* involves far more extensive misconduct than here, although the client in that case was not an elderly and vulnerable individual, but rather a wily businessman. In fact, we found in *Lane* that there was "bad judgment, greed and self-interest on both sides." (*In the Matter of Lane, supra*, 2 Cal. State Bar Ct. Rptr. at p. 750) In recommending 60 days' actual suspension, we noted that the attorney had already "paid a high personal and financial cost for his poor judgment." (*Ibid.*)

The second case relied on by the hearing judge, *In the Matter of Hultman, supra,* 3 Cal. State Bar Ct. Rptr. 297, involved an attorney who was the trustee of a testamentary trust and who made two loans to himself from that trust. Both loans were interest-only with no due date for payment of the principal. We found that the attorney not only violated rule 3-300, but that he was culpable of moral turpitude as a result of his gross neglect in managing the trust and in filing a false accounting with the probate court. (*Id.* at p. 307.) Evidence in mitigation included the 13 years of discipline-free practice, good character testimony of seven witnesses, remorse and restitution. We recommended 60 days' actual suspension. *Hultman* presents similar misconduct involving self-dealing and moral turpitude, but there is more mitigation than in the instant case.

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10. The record is devoid of documentation establishing the causes of action in the complaint filed by Mrs. Stewart against respondent. Nor do we have any evidence of the findings of fact or conclusions of law made by the Superior Court, which further diminishes the relevance of Mrs. Stewart's civil case to our disciplinary analysis.

11. Standard 2.8, which applies to rule 3-300 violations, provides for suspension unless the misconduct and harm to client are minimal, in which case reproval is recommended.

We also look to standard 2.3, which provides: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a . . . client or another person of concealment of a material fact to a . . . client or another person shall result in actual suspension or disbarment . . . depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law."[12] Respondent's misconduct was aligned with his practice because he negotiated the sale of the condo between two clients and Mrs. Stewart looked to him as her attorney to protect her interests.

Some of the misconduct in *In the Matter of Fandey, supra,* 2 Cal. State Bar Ct. Rptr. 767, wherein we imposed a six-month actual suspension was similar to respondent's involvement in negotiating the sale of Mrs. Stewart's condo. However, we find the case is not useful in assessing the appropriate level of discipline because the primary focus of our culpability determination in *Fandey* was his aiding and abetting of his client's flight from California in order to avoid compliance with a child support order. Thus, we consider *Fandey* as involving more serious misconduct than the instant case.

In *In the Matter of Gillis*, *supra*, 4 Cal. State Bar Ct. Rptr. 387, Gillis received six months' actual suspension for violation of rule 3-300 in a single client matter. Gillis sold his residential property to his client in exchange for a portion of the settlement funds that Gillis obtained for his client in a wrongful death action. Gillis' client was unemployed, lacked skills for employment (except housekeeping) and received Aid to Families with Dependent Children. We determined that Gillis committed acts of moral turpitude and breached his fiduciary duty to his client because the transaction was not fair and reasonable. He failed to disclose encumbrances on the property and the need for title insurance, and he entered into the transaction partially for his own benefit. We found an additional act of moral turpitude based on Gillis' deliberate attempt to mislead the State Bar investigator as well as a violation of section 6068, subdivision (e) for failing to maintain his client's confidences. With the exception of misleading the State Bar investigator, we found Gillis' acts were unintentional but grossly negligent. In mitigation, Gillis practiced for 26 years without prior discipline. In aggravation, we found multiple acts of misconduct. Again, Gillis' misconduct was more serious than the instant case.

Finally, in *In the Matter of Johnson*, *supra*, 3 Cal. State Bar Ct. Rptr. 233, we found Johnson culpable of breaching her fiduciary duty to her client who was also her sister-in-law. Johnson represented the client in a personal injury action, subsequently borrowing $20,000 of the settlement proceeds without repaying the loan. We found that Johnson's unsecured loan was neither fair nor reasonable to her client, who was in fragile health and unsophisticated in business matters. In addition to moral turpitude, we found Johnson violated former rule 8-101 for failing to place the settlement proceeds in a trust account and to pay the remainder promptly. Johnson received mitigation for her 11 years of practice without incident. In aggravation, we found that her misconduct significantly harmed her client and involved multiple acts of wrongdoing. Further, Johnson showed indifference towards rectification for the misconduct, made no attempt to repay the loan and exhibited a lack of candor during the hearing. Johnson received two years' actual suspension for her misconduct.

Upon our de novo review of the record, we conclude that the recommendation of the hearing judge is within the confines of the decisional law and the applicable standards. Our conclusion is underscored by the State Bar, which sought 90 days' actual suspension below, and here asks us to adopt the recommended discipline of the hearing judge.

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12. Respondent's assertion that we cannot recommend suspension or disbarment without a finding of moral turpitude is not only incorrect (e.g., §§ 6077, 6103), it is moot because we found his misconduct did involve moral turpitude.

IV. RECOMMENDATION

For the foregoing reasons, we recommend that respondent Clifford Lee Casey be suspended from the practice of law in the State of California for three years, that execution of that suspension be stayed, and that respondent be placed on probation for three years on the following conditions:

1. That respondent be actually suspended from the practice of law in the State of California during the first 90 days of the period of his probation and until he makes restitution to Ida Stewart in the amount of $500 plus 10% interest per annum from March 2, 2001 (or to the Client Security Fund to the extent of any payment from the fund to Ida Stewart, plus interest and costs, in accordance with Business and Professions Code section 6140.5) and furnishes satisfactory proof thereof to the State Bar's Office of Probation. Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

2. If respondent is actually suspended for two years or more, he shall remain actually suspended until he provides proof to the satisfaction of the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

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

4. Respondent must maintain, with the State Bar Membership Records Office and the State Bar's Office of Probation in Los Angeles, his 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)(1).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. (Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

5. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report must be submitted on the next following quarter date, and cover the extended period. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the proper or good faith assertions of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation [and any probation monitor assigned under these conditions] which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein.

7. Within one year of the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE) requirement, and respondent shall not receive MCLE credit for attending Ethics School (Rules Proc. of State Bar, rule 3201).

8. Respondent's probation will commence on the effective date of the Supreme Court order impos-

ing discipline in this matter. At the end of the probationary term, if respondent has complied with the conditions of probation, the Supreme Court order suspending respondent from the practice of law for three years will be satisfied, and the suspension will be terminated.

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

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 one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

VI. RULE 9.20

It is further recommended that respondent be ordered to comply with rule 9.20, California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, from the effective date of the Supreme Court order herein.

Willful failure to comply with the provisions of rule 9.20 may result in revocation of probation; suspension; disbarment; denial of reinstatement; conviction of contempt; or criminal conviction.

VII. COSTS

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

We concur:
REMKE, P. J.
STOVITZ, J.*

* Hon. Ronald W. Stovitz, Retired Presiding Judge of the State Bar Court, sitting by designation of the Presiding Judge.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

GREGORY DEAN ESAU

A Member of the State Bar

No. 05-N-04411

Filed December 27, 2007

SUMMARY

Respondent stipulated to culpability of violating Business and Professions Code section 6103 due to his untimely filing by 104 days of the affidavit required by rule 9.20. The hearing judge recommended respondent be suspended for two years and until he complied with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. (Hon. Robert M. Talcott, Hearing Judge.)

The review department modified the findings of the hearing judge with respect to mitigation and recommended that respondent be disbarred.

COUNSEL FOR PARTIES

For State Bar: Joseph R. Carlucci

For Respondent: Michael G. Gerner

HEADNOTES

[1] 725.51 Lack of Expert Testimony
No mitigation credit for emotional problems where absence of expert testimony left court to speculate about relevance and weight to be given respondent's testimony concerning alcoholism and where absence of such testimony also left court unable to reasonably evaluate the temporal aspects of respondent's personal issues surrounding his alcohol consumption.

[2 a, b] 740.31 Insufficient Number of References
740.32 References Unfamiliar with Misconduct
Minimal weight afforded to character testimony where respondent presented testimony from only three witnesses which did not constitute a wide range of references and where two witnesses did not become aware of the full extent of respondent's disciplinary proceedings until called to testify and third witness did not become aware of respondent's disciplinary record until three months prior to the hearing.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[3] **740.33 Inadequate Showing Generally**
Minimal weight in mitigation afforded to respondent's credible testimony as to his community service and pro bono activities because the brevity and lack of detail of respondent's testimony left court unable to assess the breadth or significance of these activities.

[4] **735.30 Found but Discounted or Not Relied On**
Court routinely recognizes limited mitigation when a respondent stipulates to material facts.

[5] **745.52 Inadequate Showing Generally**
Respondent's attestations of his recognition of wrongdoing did not constitute clear and convincing evidence of mitigation in light of history of repeated probation violations.

[6] **1010 Disbarment**
Where respondent failed to obey a court order to comply with rule 9.20 by untimely filing an affidavit of compliance, where there was minimal mitigation for good character, community service, and cooperation with the State Bar, and where there was aggravation due to three prior incidents of discipline, the appropriate disciplinary recommendation was disbarment.

ADDITIONAL ANALYSIS

Culpability

Found

220.01 Section 6103, clause 1 (disobedience of court order)
1915.10 Culpability of Violation
1913.24 Delay in Filing Affidavit of Compliance

Aggravation

806.10 Applied—(b) Disbarment after two priors
861 Applied—Disbarment

Discipline

1010 Disbarment—Discipline Imposed in Disciplinary Matters Generally

OPINION

EPSTEIN, J.

This matter illustrates the serious consequences of an attorney's extended inattention to State Bar disciplinary proceedings and his repeated disregard of Supreme Court orders. Respondent, Gregory Esau, was found culpable of violating Business and Professions Code section 6103[1] as the result of disobeying a Supreme Court order requiring him to comply with California Rules of Court, rule 955.[2] Respondent does not contest the hearing judge's culpability findings or the disciplinary recommendation that he be suspended from the practice of law for four years, stayed, and that he be placed on probation for four years, with an actual suspension for two years and until he complies with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.[3]

The State Bar seeks review and urges disbarment as the appropriate discipline recommendation in light of respondent's history of probation violations. The State Bar also asserts that the hearing judge erroneously gave credit in mitigation under standard 1.2(e)(iv), finding that respondent's alcoholism contributed to his misconduct. Further, the State Bar argues that no mitigating credit should have been given for respondent's three good character witnesses under standard 1.2(e)(vi). Finally, the State Bar contends that respondent's cooperation in entering into a stipulation is not entitled to any weight in mitigation under standard 1.2(e)(v) and that, contrary to the hearing judge's finding, he has not demonstrated remorse for his actions under standard 1.2(e)(vii). For reasons discussed herein, we agree with most of the State Bar's contentions, including the assertion that disbarment is the proper discipline under these circumstances.

Respondent's underlying misconduct, which involved the wrongful retention of $1700 in advanced fees in the state of Washington, resulted in a lenient discipline in California of a private reproval with conditions attached for 12 months. Had respondent complied with those conditions, he would not be facing disbarment. However, since his private reproval, respondent has had his reproval period extended by one year, has received a six-month stayed suspension and two years' probation, has had his probation revoked and has suffered a six-month actual suspension. This increasingly strict discipline should have provided respondent with both the incentive and the opportunity to comply with the conditions of his probation, and yet he is before us a *fourth* time for violating another court order.

Our de novo review of the record (*In re Morse* (1995) 11 Cal.4th 184, 207) compels the conclusion that the discipline recommended by the hearing judge is insufficient. Indeed, the finding that respondent willfully violated a court order requiring his compliance with rule 9.20 is sufficient grounds for disbarment when, as here, the evidence in mitigation is not compelling. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131; *Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186-1188; *Powers v. State Bar* (1988) 44 Cal.3d 337, 342.) Moreover, respondent's violation of a court order is compounded by his repeated failure to comply with even the most basic terms of his probation, such as filing his quarterly probation reports, updating his membership records, and taking the Multistate Professional Responsibility Exam (MPRE). His apparent lack of concern for his license to practice law in California demonstrates that he is an unsuitable candidate for further disciplinary probation. We therefore recommend disbarment as the appropriate discipline.

I. FACTUAL AND PROCEDURAL BACKGROUND

Respondent was admitted to the practice of law in California on December 12, 1983, and has been a member of the California State Bar since that time. He practiced law in California until 1991, when he moved to the state of Washington and was admitted

1. Unless otherwise noted, all further references to "section(s)" are to the California Business and Professions Code.

2. Effective January 1, 2007, rule 955 was re-numbered as rule 9.20. All further references to former rule 955 shall be denominated as rule 9.20.

3. Unless otherwise noted, all further references to "standard(s)" are to the Standards for Attorney Sanctions for Professional Misconduct.

to the Washington State Bar. After moving to Washington, respondent had no California clients, and practiced exclusively in Washington, except for two limited appearances in California in 1996 and 1997. His primary practice area is family law, and he has achieved a relatively successful career in Washington following the disciplinary action against him in that state.

Respondent has a history of alcohol abuse. Between 1996 and 1997, he voluntarily sought help from the Lawyers' Assistance Program in Washington, and has been sober since August 15, 1998. He began attending Alcoholics Anonymous five months prior to the disciplinary hearing below.

Respondent's entanglement with the attorney discipline system began in July 1996 in Washington when he failed to return an advanced fee of $1700 after the client terminated his services and requested a refund. The client sued respondent and obtained an uncontested judgment for $1751. Respondent paid the judgment, but the matter was referred to the Washington State Bar. In January 2000, the Disciplinary Board of the Washington Bar ordered that respondent be publically reprimanded in accordance with a stipulation as to culpability [4] and discipline.

In May 2000, the State Bar filed a Notice of Disciplinary Charges (NDC) against respondent, based on the disciplinary proceeding in Washington. On May 19, 2000, the State Bar Court approved the stipulation of the parties as to the facts, conclusions of law, and disposition, and respondent was privately reproved, with conditions attached for 12 months.

Thereafter, respondent violated several of the attached conditions. Specifically, he failed to file two quarterly reports indicating compliance with all provisions of the State Bar Act and Rules of Professional Conduct; he failed to update his address with membership records; and he failed to submit proof of completion of three hours of Minimum Continuing Legal Education (MCLE) courses in ethics. The hearing department extended the conditions attached to the private reproval for an additional 12 months, as stipulated by both parties, by an order filed on July 16, 2001.

However, respondent again failed to comply with these conditions and he also failed to submit four more quarterly reports, failed to complete the three hours of MCLE courses in ethics, and failed to take and pass the MPRE. As a result, the State Bar filed another NDC on May 22, 2002, charging respondent with violating rule 1-110 of the Rules of Professional Conduct for the State Bar of California for failing to comply with the attached conditions to his private reproval.

That proceeding was resolved by stipulation, wherein respondent was found to have willfully violated rule 1-110 by not complying with the conditions attached to reproval and was placed on six months' stayed suspension, two years' probation on conditions, and required to pass the MPRE within one year. No actual suspension was recommended. On March 18, 2003, the Supreme Court issued an order imposing the recommended discipline.

Respondent subsequently violated the conditions of his probation required by the March 18, 2003, order when he again failed to submit four quarterly probation reports, and failed to report a change of address within 10 days as required. On February 17, 2005, respondent and the State Bar entered into a stipulation as to culpability for the violation of respondent's conditions of probation, revoking his probation, and imposing discipline of six months' actual suspension. Further, the stipulation required respondent's compliance with rule 9.20. By order filed on June 10, 2005, the Supreme Court imposed the stipulated discipline and required respondent's compliance with rule 9.20 and performance of the acts in subdivisions (a) and (c) of rule 9.20 within 30 and 40 days, respectively.

Respondent received the Supreme Court order, but he did not file the affidavit as required by rule

4. Respondent stipulated to violations of the Washington Rules of Professional Conduct, rules 1.14(a), failing to deposit client funds into a trust account; 1.14(b)(3), failing to render an accounting; 1.4(b)(4), failing to promptly pay client funds on demand; and 1.5, which requires the proper termination of representation. Respondent has had no further disciplinary matters in Washington.

9.20(c).[5] He did not file the affidavit of compliance until December 1, 2005 (104 days late), the same date the State Bar filed the NDC initiating the proceeding which is the subject of this review. The NDC charged respondent with violating Business and Professions Code section 6103 by failing to obey a court order.

At the hearing below, which commenced on August 15, 2006, the State Bar presented evidence and the hearing judge admitted, without objection, certified copies documenting respondent's original discipline and the subsequent compliance orders, including the Supreme Court's rule 9.20 order. Respondent stipulated as to culpability, and the trial proceeded with a determination of the appropriate discipline.

Respondent presented three witnesses who attested to his good character. Allen Hart, a client represented by respondent in a child custody proceeding, had known respondent for a year and a half, but he did not know that respondent was the subject of discipline in California or Washington until just prior to the current proceeding. Hart testified that respondent is an honest man based on his brief experience as respondent's client. Jeff McNamara, an attorney in Washington, had known respondent in a professional capacity for approximately two years because they worked in the same office. McNamara was unaware of respondent's discipline in both Washington and California until respondent asked him to be a witness in these proceedings. McNamara also testified he was a recovering alcoholic and acted as a sponsor for four attorneys, although he was not respondent's sponsor. McNamara testified that respondent had a high level of honesty based on his observations of respondent's interactions with clients. He referred two clients to respondent despite his knowledge of the disciplinary actions against respondent. When questioned regarding respondent's failure to comply with the conditions attached to his discipline, McNamara stated he "understood it to be a travail of clerical error." Keith Kemper was a partner in the firm in which respondent is of-counsel. He testified that he knew respondent both professionally and socially for approximately nine years prior to this disciplinary proceeding, and was instrumental in respondent's employment with Kemper's firm. Respondent disclosed his disciplinary history with the state of Washington to Kemper and the other partners prior to joining the firm. Kemper did not become aware of respondent's disciplinary record in California until three months prior to the hearing below. He testified that respondent is an honest man and that he was remorseful.

Respondent testified briefly that he was involved in church activities, coached Little League, worked with a mission to help other recovering addicts and alcoholics, and volunteered at a legal clinic. He did not offer any evidence to substantiate the nature and extent of these activities.

Respondent also testified that his recent participation with Alcoholics Anonymous had made him aware that some of the "keys that lead one to alcoholism" were self-deception, denial, fear, and "not wanting to face certain things." These character flaws, according to respondent, explain how he was able to maintain his sobriety for eight years and establish a thriving practice in Washington as a member of a respected law firm, yet ignore and avoid his duties as an attorney in California. No expert testimony was presented to corroborate respondent's testimony.

II. DISCUSSION

The underlying facts regarding respondent's culpability were stipulated to by the parties, which supports a finding that respondent violated section 6103 by failing to obey a court order. Thus, we direct our discussion solely to the recommended discipline.

A. Aggravation

The hearing judge found respondent's prior record of discipline to be an aggravating circumstance. (Std. 1.2(b)(i).) We not only agree with the

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5. Although respondent had no clients in California to notify, rule 9.20(a) requires an attorney to file an affidavit even if he or she has no clients and there is no opposing counsel to inform. (*Bercovich v. State Bar, supra,* 50 Cal. 3d at p. 130.)

hearing judge, but find this to be strong evidence in aggravation and, as discussed below, it is outcome-determinative. Since respondent's initial disciplinary proceeding in California, the State Bar Court has been required to intervene four times in order to bring respondent into compliance with the terms of his probation.[6] The need for the court's repeated involvement is both inexplicable and inordinate.

B. Mitigation

To be weighed against the evidence in aggravation is the evidence in mitigation, which respondent has the burden of proving by clear and convincing evidence. (Std. 1.2(e); *In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 311.) After considering respondent's evidence in mitigation, the hearing judge found "that the mitigating circumstances in the present proceeding are strong and warrant a departure from disbarment." We respectfully disagree.

In our view, the hearing judge incorrectly gave credit in mitigation for respondent's emotional problems under standard 1.2(e)(iv), which provides that extreme emotional difficulties or physical disabilities may be considered as mitigating circumstances, *provided* "expert testimony establishes [the disability] was directly responsible for the misconduct . . . and further provided that the member has established through clear and convincing evidence that he or she no longer suffers from such difficulties or disabilities."

[1] Here, no expert testimony was presented establishing that respondent's emotional problems were causally related to his probation violations. In the absence of an expert witness, we are left to speculate about the relevance and weight to be given to respondent's testimony that among the "character defects" inherent in alcoholism is "self-deception," which caused him to ignore his duties in California. As the hearing judge observed, "it is difficult to understand how respondent was able to competently and successfully practice law in Washington during the same period he was unable to comply with the various conditions imposed on him in California." (*Bercovich v. State Bar*, *supra*, 50 Cal.3d 116, 119, 127-129 [questioning why physical and emotional problems offered as mitigation for noncompliance with rule 9.20 would not also affect the attorney's ability to competently practice law and not allowing mitigation in the absence of expert testimony].) Also, without the aid of expert testimony, we are unable to reasonably evaluate the temporal aspects of respondent's personal issues surrounding his alcohol consumption, which stopped in 1998, with his failure to address his disciplinary obligations in California, which did not commence until 2000. We therefore credit respondent with no mitigation under standard 1.2(e)(iv).

[2a] The hearing judge also found respondent's three character witnesses were sufficient to establish mitigation. (Std. 1.2(e)(vi).) Again, we disagree. Standard 1.2(e)(vi) mandates that "an *extraordinary* demonstration of good character of the member attested to by a *wide range* of references in the legal and general communities and who are aware of the full extent of the member's misconduct" must be shown to be considered a mitigating circumstance. (Italics added.) Even though we do not disturb the hearing judge's determination that respondent's three character witnesses were "*extremely* credible" (italics in original), we nonetheless find that the substance of their testimony does not constitute clear and convincing evidence of respondent's good character. Two of the witnesses had a relationship with respondent for less than two years, and neither was aware of the full extent of respondent's disciplinary proceedings until called to testify. The third witness knew respondent for nine years but did not become aware of respondent's disciplinary record in California until three months prior to the hearing.

[2b] We further find that the three witnesses do not constitute a wide range of references, and as such, we afford only minimal weight to their testimony. (*In the Matter of Katz* (Review Dept. 1995)

6. We include in our analysis the necessity of the hearing department's intervention by order filed on July 16, 2001, extending the conditions attached to respondent's private reproval for an additional 12 months after he failed to timely satisfy them.

3 Cal. State Bar Ct. Rptr. 430 [no mitigation for testimony from two attorneys and one client because they were not considered a wide range of references]; *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363 [limited weight given to testimony of three attorneys and three clients because they did not constitute a broad range of references]; cf. *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591-592 ["significant" mitigative weight given to testimony of three witnesses who had long-standing familiarity with attorney and broad knowledge of his good character].)

[3] The hearing judge found that respondent's good character was further established by "his own credible testimony as to his community service and pro bono activities." Even accepting respondent's testimony as credible, we only accord it minimal weight in mitigation as we are unable to assess the breadth or significance of these activities due to the brevity and lack of detail provided by respondent.

[4] The hearing judge also allowed "some mitigation" in favor of respondent because he entered into a stipulation with the State Bar as to the facts that established his culpability. (Std. 1.2(e)(v).) We agree. We routinely recognize limited mitigation when a respondent stipulates to material facts. (*In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 913.)

[5] Lastly, the hearing judge granted "some" weight in mitigation for the recent steps respondent had taken to "insure that he complies with his California disciplinary conditions," and that he eventually filed his rule 9.20(c) affidavit, albeit 104 days late. The hearing judge found this demonstrated respondent's recognition of wrongdoing and remorse. (Std. 1.2(e)(vii).) We do not agree. During the hearing below, respondent testified: "I don't blame anybody for [failing to comply with rule 9.20] other than myself because nobody's at fault. I can't say that I wasn't given a fair shake or – fair warning." He also ascribed his probation failures to his mistaken belief that these California proceedings were "ancillary" to and of "lesser significance" than his Washington disciplinary matter, where he had made good progress. This testimony is unpersuasive, given that respondent has repeatedly stipulated to his probation violations, yet in every instance, his seeming recognition of wrongdoing has been undercut by a continued failure to comply with stipulated discipline. In light of this history, respondent's attestations of his recognition of wrongdoing do not constitute clear and convincing evidence of mitigating circumstances under standard 1.2(e)(vii).

C. Level of Discipline

Fundamentally, the purpose of discipline is not to punish the attorney, but to protect the public. (Std. 1.3; *Bach v. State Bar* (1987) 43 Cal.3d 848, 856.) In assessing the proper level of discipline, we consider the standards, prior decisional law, and the facts and circumstances unique to this case. (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) Respondent is culpable of violating section 6103,[7] and therefore the applicable standard is standard 2.6(b), which provides that a violation of this section shall result in disbarment or suspension "depending on the gravity of the offense or the harm, if any, to the victim...." Additionally, under standard 1.7(b),[8] "[d]isbarment is also the presumptively appropriate discipline if a member found culpable of professional misconduct has a record of two impositions of discipline. (Std. 1.7(b).) Prior discipline includes discipline imposed for violation of probation. (Std.1.2(f); [Citations.].)" (*In the Matter of Pierce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 382, 388.)

The standards are afforded "great weight" (*In re Silverton* (2005) 36 Cal.4th 81, 92), but they are

7. We agree with the hearing judge that a violation of rule 9.20 is more appropriately charged under rule 9.20(d), which provides for the disbarment or suspension of a member for failure to comply with the rule. (*Lydon v. State Bar, supra*, 45 Cal.3d at p. 1187.) However, as section 6103 provides for disbarment or suspension for a violation or willful disobedience of a court order, the culpability finding and sanctions are consistent with rule 9.20(d).

8. Standard 1.7(b) provides that when an attorney has a record of two prior disciplines, "the degree of discipline in the current proceeding shall be disbarment unless the most compelling mitigating circumstances clearly predominate."

intended to be flexible in nature so that we may "temper the letter of the law with considerations peculiar to the offense and the offender. [Citations.]" (*In the Matter of Van Sickle*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 994.) Our concern here is respondent's repeated non-compliance with his probation and his willful disobedience of court orders resulting in a violation of rule 9.20. We observed in *In the Matter of Pierce, supra,* 2 Cal. State Bar Ct. Rptr. at p. 388, that "[d]isbarment is particularly appropriate when a respondent repeatedly demonstrates indifference to successive disciplinary orders of the Supreme Court." Moreover, since *Bercovich v. State Bar*, *supra*, 50 Cal. 3d 116, the decisional law has been weighted towards disbarment for violations of rule 9.20. (*Dahlman v. State Bar* (1990) 50 Cal.3d 1088, 1096 [disbarment ordered where attorney had ignored the efforts of both the State Bar and the Supreme Court to obtain his compliance with rule 9.20 and had "evidenced an indifference to the disciplinary system"]; *In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287 [disbarment recommended after attorney failed to comply with rule 9.20 while on interim suspension from conviction of cocaine possession and client trust account violations, plus serious aggravating circumstances including practicing law while on suspension and the absence of strong mitigating circumstances]; *In the Matter of Babero* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 322 [disbarment recommended notwithstanding attorney's participation in the proceedings, some effort at compliance with rule 9.20, and absence of client harm]; *In the Matter of Grueneich* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 439, overruled on another ground in *In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 916, fn. 6 [disbarment recommended, in spite of significant mitigation, for repeated probation violations and violations of rule 9.20, wherein the underlying misconduct involved abandonment of clients and failure to return unearned fees]; *In the Matter of Snyder* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 593, 600 [disbarment recommended for untimely filing of rule 9.20 affidavit, falsely reporting compliance and practicing while on suspension, even though significant mitigative evidence of family misfortune, good character evidence, therapy to overcome personal problems, community service and compliance with probation obligations].)

Our decision in *In the Matter of Pierce, supra,* 2 Cal State Bar Ct. Rptr. 382, is most relevant to our analysis. In *Pierce*, the attorney initially was disciplined for a single matter involving client abandonment. Subsequently, she repeatedly defaulted in her probation proceedings and then she defaulted in a fourth disciplinary proceeding arising from her prior probation violations. In addition, after two reminders from the probation department, the attorney filed the required rule 9.20 affidavit 21 days late. Although we noted this was a "short delay" (*id.* at p. 385), and we found that the late filing was not in bad faith, we nevertheless concluded this late filing was willful. The attorney had no pending cases and therefore there was no client harm (*id.* at p. 387), but we found that the attorney's "ostrich-like behavior" resulted in her prolonged inattention to the actions taken by the State Bar and the Supreme Court. (*Id.* at p. 388.) Thus, even though "all of the proceedings stemmed from minor misconduct involving one client" (*id.* at p. 387), we concluded that disbarment was "particularly appropriate" given the attorney's demonstrated indifference to successive disciplinary orders. (*Id.* at p. 388.)

In the instant matter, we are at a loss to find any basis in fact or law justifying our departure from disbarment. The cases decided after *Bercovich* that have resulted in discipline of less than disbarment involved significant evidence in mitigation and/or substantial compliance with rule 9.20, neither of which is present here.

For example, in *Shapiro v. State Bar* (1990) 51 Cal.3d 251 (*Shapiro)*, an attorney was found culpable of collecting a fee, failing to appear on behalf of his client, and subsequently withdrawing without refunding $1,500. He also accepted a $500 fee from another client, failed to place the money in a trust account, and failed to use reasonable diligence in representing the client. After he was fired, he failed to return the unearned fee. In the third matter, he was found to have practiced law while suspended for failure to pay Bar dues. The rule 9.20 proceeding

arose when the attorney filed his rule 9.20 affidavit five months late, which the Supreme Court found was willful. (*Id.* at p. 258.)

However, *Shapiro* did not involve repeated disregard of court orders and there also was substantial evidence in mitigation. (*Shapiro*, at p. 259.) The attorney had timely notified his clients and others of his suspension (*ibid.*), and his late filing was in part due to inadequate advice from his probation monitor about the requirements of the rule. (*Ibid.*) Furthermore, when the attorney learned his affidavit was deemed insufficient by the court, he contacted his probation monitor and retained a law firm to assist him with compliance. (*Ibid.*) The matter was resolved satisfactorily within several weeks, although by then the Supreme Court's referral order had already triggered State Bar disciplinary proceedings.

In addition, because all three incidents of client misconduct occurred within a fairly narrow time frame, the attorney's lack of prior discipline for 16 years was considered a mitigating factor. (*Shapiro,* at p. 259.) He also successfully evidenced that he was undergoing physical and psychological difficulties. (*Id.* at pp. 259-60.) Finally, the attorney submitted testimony from experienced practicing attorneys in the community who, aware of his misconduct, testified to petitioner's good character and his considerable ability as a lawyer. (*Id.* at p. 260.) The court thus concluded that in light of the evidence in mitigation, the appropriate discipline was a two-year suspension, stayed, with one year's actual suspension. (*Id.* at p. 261.)

In *In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192 (*Rose*), the attorney had two prior records of discipline involving unreasonable delay in surrendering a case file, willful failure to communicate with clients, willful failure to provide services, willful failure to promptly and properly discharge obligations with regard to client funds and records, improper client solicitation, and improper business dealings with a client. (*Id.* at pp. 198-199.) He was ordered to comply with rule 9.20 in both matters. He timely filed his rule 9.20 affidavit in the first matter (*id.* at p. 200), and thereafter, he did not practice law, had no clients and no co-counsel to notify. (*Ibid.*) He thus believed he did not need to comply with the second rule 9.20 order. (*Ibid.*) After receiving a letter from the probation department, the attorney attempted to file his rule 9.20 affidavit, albeit late, but the clerk refused to accept the affidavit.[9]

We considered the attorney's late filing a willful violation of rule 9.20, and his failure to timely file three quarterly reports and two trust account audits willful violations of his probation conditions. (*Rose*, at p. 201.) But, we noted that the attorney's misconduct was mitigated by his recognition of wrongdoing (*id.* at p. 205), his timely compliance with the conditions of his probation for a two-year period prior to the proceedings, which we considered "important steps toward rehabilitation" (*id.* at p. 206), and that his attempt to file his affidavit occurred within two weeks of the due date. (*Id.* at p. 207.) We also gave credit for his efforts on behalf of physically- handicapped persons through pro bono litigation and other activities and for the lack of harm to clients in the rule 9.20 matter. (*Ibid.*) We rejected the notion that respondent's conduct represented a pattern, as the matters did not represent a common thread (*ibid.*), but did find his prior record of discipline in aggravation. (*Ibid.*) Giving consideration to this mitigation, we recommended in the probation matter five years' stayed suspension with two years' actual suspension, and in the rule 9.20 matter two years' suspension stayed, with nine months' actual suspension to run concurrently.

Finally, *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527, involved a relatively minor violation owing to the filing of a rule 9.20 affidavit two weeks after it was due and before disciplinary action was commenced. The attorney had timely notified his clients of his suspension and otherwise complied with his rule 9.20 obligations. We were "encouraged by his participation in [his] disciplinary matter, his cooperation with the State Bar, and his short delay in his full compliance with all the requirements of rule [9.20]." (*Id.* at p. 535.) Also, he recognized his mistakes, was working on rectifying

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9. We note that two years later, Rose was disbarred after his fourth disciplinary proceeding in which he was found culpable of violating court-ordered probation conditions. (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646.)

his misconduct and showed a good faith effort, which were all mitigating factors. (*Id.* at pp. 530-531.) We accordingly recommended "a very modest sanction" of 30 days' actual suspension (*id.* at p. 534), finding that the attorney had "awakened to his responsibilities to the discipline system." (*Id.* at p. 533.)

D. Conclusion

We have scrutinized the cases involving violations of rule 9.20 in our quest to recommend appropriate discipline that would adequately protect the public, giving consideration to a sanction less than disbarment, provided the record disclosed mitigation to justify doing so. (*In the Matter of Babero, supra,* 2 Cal. State Bar Ct. Rptr. at p. 332.) We recognize that respondent's initial involvement with the discipline system arose from misconduct in a single client matter, which did not result in serious discipline. We note too that respondent's subsequent malfeasance in failing to comply with his probation conditions did not result in client harm. However, "[a]ttorneys who engage in this extended practice of inattention to official actions, as respondent did, should not be allowed to create the risk that it will extend to clients resulting in inevitable and grievous harm to them." (*In the Matter of Pierce, supra,* 2 Cal State Bar Ct. Rptr. 382, 388.)

[6] Ultimately, we could find no case imposing a sanction less than disbarment for an attorney who repeatedly has been called to account in disciplinary proceedings for violating conditions of probation, while at the same time violating court orders requiring compliance with rule 9.20. Our observation in *In the Matter of Rose, supra,* 3 Cal. State Bar Ct. Rptr. at p. 649 applies equally here: "Respondent has had ample opportunity to conform his conduct to the ethical requirements of the profession, but has repeatedly failed or refused to do so. Probation and suspension have proven inadequate to prevent continued misconduct." Furthermore, "respondent's failure to comply with successive orders of the Supreme Court has repeatedly burdened the resources of this court and the State Bar disciplinary system, also a matter of great concern to us. [Citation.]" (*In the Matter of Pierce, supra,* 2 Cal State Bar Ct. Rptr. 382, 388.)

III. DISCIPLINE RECOMMENDATION

For these reasons, we recommend that respondent be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys.

We also recommend that respondent be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in paragraphs (a) and (c) within 30 and 40 days, respectively, after the effective date of the order imposing discipline in this matter.

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

ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

Pursuant to the provisions of section 6007, subdivision (c)(4), respondent is ordered enrolled inactive upon personal service of this opinion or three days after service by mail, whichever is earlier.

We concur:

REMKE, P. J.
WATAI, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

FRANCIS T. FAHY

A Member of the State Bar

No. 05-O-05123

Filed March 6, 2009

SUMMARY

While serving as a juror in a civil jury trial, respondent informed the jurors that he would change his vote for the defense to break an 8 to 4 deadlock that was in favor of the defendant. Respondent changed his vote so he could return his attention to his law practice. When the trial judge questioned respondent about his actions, he stated that he acted only within the court's instructions and the trial evidence. The hearing judge found respondent culpable of violating his duties under the law by his juror misconduct and of moral turpitude by misrepresenting to the civil court trial judge that his vote for the defendant followed the law and evidence. The hearing judge did not find respondent culpable of the charge of moral turpitude in attempting to corrupt the jury in deliberations because she concluded there was no evidence offered by the State Bar to support that charge. She also found the charge of failing to maintain the respect due the court to be duplicative of the acts which supported the found misconduct and dismissed this charge. The hearing judge found no mitigating circumstances. In aggravation, the hearing judge found respondent had recent misconduct resulting in significant actual suspension, multiple acts of misconduct, uncharged misconduct in acting in bad faith and for a corrupt motive by changing his vote to favor the defendant despite his belief that the defendant was liable for the plaintiff's injuries, his misconduct significantly harmed the public and the administration of justice, he showed indifference to rectifying or atoning for his misconduct, and he lacked an understanding of his misconduct. The hearing judge recommended respondent be disbarred. (Hon. Lucy Armendariz, Hearing Judge.)

The review department upheld the hearing judge's culpability, mitigation and aggravation findings and adopted the hearing judge's recommendation of disbarment.

COUNSEL FOR PARTIES

For State Bar: Donald R. Steedman

For Respondent: Francis T. Fahy

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **162.20 Standards of Proof – Respondent's Burden in Disciplinary Matters**
Where respondent claims that others should have presented evidence to exculpate him, it was respondent's burden to undertake the defense of the charges against him.

[2 a, b] **213.10 State Bar Act–Section 6068(a)(support Constitution and laws)–Found**
Respondent violated his duty as an attorney to comply with the law by violating his duties as a civil trial juror. The Judicial Council has recognized that jury service is an "important civic responsibility," requiring court and staff use of all necessary and appropriate means to ensure that citizens fulfill this duty, and it is the accepted duty of citizens to serve, subject to the statutory provision for excuse for undue hardship. The harm to the parties and to the fair administration of justice is clear and serious when respondent disregarded his duty to vote as the facts and judge's instructions guided him, and instead voted as the convenience of his law practice swayed. Respondent's change of vote to avoid continuing to serve as a juror voided the verdict he rendered and required the parties, their counsel and the courts to bear the additional costs, time and burdens of appellate and further trial court proceedings.

[3] **221.00 State Bar Act–Section 6106 (moral turpitude, corruption, dishonesty)–Found**
Where respondent falsely represented to civil trial judge that his verdict was within the court's instructions and the trial evidence, respondent's deceit to the judge during questioning of him regarding his verdict was most certainly an act of moral turpitude and reprehensible conduct for an attorney.

[4] **221.50 State Bar Act–Section 6106–Not Found**
Where record establishes that the jurors steadfastly remained divided into two groups based on their evaluation of the evidence and it was only the respondent who espoused a verdict for reasons of personal convenience, respondent was not culpable of the charge of moral turpitude for having sought to corrupt other jurors by unduly influencing them.

[5] **586.10 Standards–Harm to Administration of Justice–Found**
830 Standard 2.3 (Moral Turpitude, Fraud, etc.)
Even though respondent was not acting as an attorney in the case but as a citizen, his change of vote for the defense to break a jury deadlock so he could return his attention to his law practice caused significant harm to the administration of justice.

[6 a, b] **511 Aggravation–Prior record of discipline–Found**
805.10 Standards–Effect of Prior Discipline–Applied
Review Department applied standard 1.7(a) where respondent's prior misconduct rested on the serious offense of willful misappropriation, the prior misconduct occurred four years before the current misconduct, both matters involved deceit, respondent was defending the charges in the prior at the time he was committing misconduct as a juror, and respondent continued to serve his actual suspension for the prior.

ADDITIONAL ANALYSIS

Culpability

Found

221.11 Section 6106–Deliberate dishonesty/fraud

Aggravation

Found but discounted or not Relied on

543 Bad Faith

Discipline

1010 Disbarment

Other

148 Evidentiary Issues–Witnesses

106.30 Duplicative Charges

OPINION

Stovitz, J. *

Respondent Francis T. Fahy, a member of the State Bar since 1990, was found culpable of serious misconduct while acting as a civil trial juror in 2004 in a medical negligence case tried in the Superior Court of San Francisco. A State Bar Court hearing judge found that, even though the evidence led respondent to believe that the defendant was responsible for the plaintiff's injuries, respondent voted to find the defendant not liable for negligence in order to end a likely jury deadlock so that he could return his attention to his law practice. When respondent was questioned by the trial judge about his actions, he misrepresented the reasons for his vote. Based on the seriousness of respondent's misconduct and his previous two-year actual suspension, the hearing judge recommended disbarment.

Respondent appeals, arguing his innocence of the charges and that a number of procedural errors occurred. The State Bar's Office of Chief Trial Counsel (State Bar) supports the hearing judge's culpability findings, argues that additional culpability should be found and supports the recommendation of disbarment.

On our independent review of the record (Cal. Rules of Court, rule 9.12; *In re Morse* (1995) 11 Cal.4th 184, 195), we reject respondent's claims as unsupported and agree with the hearing judge's recommended disbarment. As the evidence clearly shows, respondent's acts went beyond dereliction of his duties as an attorney to follow the law when sworn to act as a trial juror. Indeed, his deceit of the trial judge and exploitation, for personal reasons, of the very institution which underpins our system of litigation demonstrate respondent's unfitness to continue to be licensed as an attorney, especially in light of his serious prior misconduct for which he is currently on actual suspension.

I. STATEMENT OF THE CASE

The key facts are relatively simple and established largely by documentary evidence. A patient sued an ophthalmologist in San Francisco Superior Court for medical negligence in performing laser eye surgery. On March 29, 2004, respondent was selected as one of the trial jurors in the action and he took the juror's oath pursuant to Code of Civil Procedure section 232.[1] Deliberations started on April 16, 2004,[2] and continued into the next week. Although the jury took a number of votes, it was unable to reach a verdict; and, by April 21, it appeared deadlocked 8 to 4 in favor of the defendant. On April 21 and 22, the jury foreperson, Beth Rimbey, advised the assigned judge, David Ballati, of the deadlock and requested the court's guidance. Judge Ballati urged the jury to continue to deliberate and to review and discuss all of the evidence; and, on April 22, he directed the jury to resume its deliberations on Monday, April 26.

On April 22, respondent concluded that Judge Ballati would not declare a mistrial due to the jury's impasse. He foresaw further lengthy deliberations that his busy law practice could not afford. Accordingly, on that day, he told the other jurors that if the judge would not declare a mistrial, respondent would change his vote for the defense to break the deadlock so he could return his attention to his law practice. On April 26, respondent changed his vote, thus creating a verdict in favor of the defendant.

Meanwhile, juror foreperson Rimbey, concerned that respondent was failing to follow his duty as a juror, reported to Judge Ballati that "some jurors"[3] had changed their votes solely to end the deliberations and not based on the evidence. After consulting with counsel for the plaintiff and the defendant, Judge Ballati questioned the jurors separately as to whether each juror followed the court's instructions and whether the jurors' most recent vote was based on anything but the trial evidence or the court's instructions.

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*Retired Presiding Judge of the State Bar Court sitting by designation of the Presiding Judge.

1. As pertinent, this statutory oath required respondent to "well and truly try" the pending case and "render a true verdict . . . according only to the evidence presented . . . and to the instructions of the court."

2. Unless noted otherwise, all later references to dates are within the year 2004.

3. Although Rimbey used the plural in her message to Judge Ballati, she observed the reported misconduct only as to respondent.

When respondent was questioned, he stated that he acted only within the court's instructions and the trial evidence. As no proof of juror misconduct was evident, Judge Ballati entered the defense verdict and discharged the jury.

On June 10, the plaintiff moved for a new trial based on respondent's misconduct. The plaintiff's motion included respondent's declaration detailing how he decided to vote for a defense verdict solely to end deliberations and to return to his law practice.[4] Respondent also testified before Judge Ballati that the signature on the declaration appeared to be his and was in fact his correct signature, but the key statements as to his conduct as a juror were incorrect. He offered several theories for how his declaration could have been signed by him or could have appeared in the action. He contended that his signature was forged, signed by him by mistake or he was tricked into signing it. In granting plaintiff's motion for new trial, Judge Ballati observed that respondent's declaration was accurate but much of respondent's testimony about his declaration was "obfuscating and not credible."

Although the defendant appealed the order granting a new trial, it was upheld in an opinion of the Court of Appeal. (*Macdougall v. Buckley* (Nov. 17, 2005, A108008)[nonpub. opn.].)[5] In its opinion, the Court of Appeal stated in part: "[Respondent's] statement made explicit his intent to render his vote based not on the facts and the law but on the court's unwillingness to declare a mistrial. His subsequent change of vote confirmed this expressed intent. To reach the conclusion that misconduct occurred, we do not need to evaluate his thought processes - that is, to determine the reason he decided to violate his oath - but only to know the conclusion he reached, as he himself expressed it." (*Ibid.*)

This formal disciplinary proceeding began in April 2007, when the State Bar filed charges that respondent violated the Business and Professions Code as follows: section 6068, subdivision (a)[6] by failing to comply with his statutory duties as a juror; section 6106 by committing moral turpitude by lying to Judge Ballati when questioned in April 2004 about his verdict and by trying to corrupt the jury when attempting to influence the jury in deliberations based on an improper purpose; and section 6068, subdivision (b) by failing to maintain respect for the courts by his juror misconduct.

Respondent denied the charges and at the State Bar Court trial, he testified, as did jury foreperson Rimbey and plaintiff's counsel Himmelheber. After evaluating the witnesses and considering the documentary evidence, the State Bar Court hearing judge found respondent culpable of violating his duties under the law by his juror misconduct and of moral turpitude by misrepresenting to Judge Ballati that his vote for the defendant followed the law and evidence. The hearing judge did not find respondent culpable of the charge of moral turpitude in attempting to corrupt the jury in deliberations because she concluded there was no evidence offered by the State Bar to support

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4. Respondent volunteered his declaration to plaintiff's counsel Himmelheber confirming what he had told juror foreperson Rimbey. Himmelheber testified how he had drafted the declaration for respondent to sign. Respondent contacted Himmelheber and requested that some changes be made to the draft. Himmelheber made the changes and drove to respondent's house to obtain his signature. When they met, respondent presented to Himmelheber a retyped version of the original form of the declaration bearing his signature.

Respondent's signed declaration read in part: "I was convinced from the outset [of the trial] that [the defendant] had violated the standard of care in his care and treatment of the [p]laintiff. . . . During the trial that was supposed to last only 2-3 weeks, I maintained a busy law practice. As the trial continued into its 4th week, problems at work continued to mount as most of the day was devoted to my being a juror. Deliberations were a nightmare . . . .

It was becoming very apparent that even if the other jurors were to vote in favor of the [p]laintiff on the issue of liability, that lengthy discussion would take place on other issues . . . As a result, I advised my fellow jurors that I would change my vote if Judge Ballati failed to declare a mistrial after he was advised that the jury was deadlocked because there was no way I could afford to spend another week away from the office . . .[¶] When I arrived on Monday, I changed my vote to favor [the defendant] even though he was liable for what happened to the [p]laintiff. I changed my vote so that the deliberations would finally come to an end and I could return to the office . . . ."

5. The unpublished appellate opinion was properly considered as part of the record in this disciplinary proceeding. (Cal. Rules of Court, rule 8.1115(b)(2).)

6. Unless noted otherwise, all later references to sections are to the provisions of the Business and Professions Code.

that charge. She also found the charge of failing to maintain the respect due the court to be duplicative of the acts which support the found misconduct and dismissed this section 6068, subdivision (b) charge.

In reaching her culpability conclusions, the hearing judge found that no credible evidence was presented that respondent's signature was forged on his declaration supporting plaintiff's motion for new trial. Instead, she found that neither respondent's testimony regarding the signature of his declaration nor the "various explanations [by respondent] as to why the signature thereon was either a forgery or a mistake" were credible. The hearing judge found that attorney Himmelheber's testimony that he drafted a declaration for respondent to sign was credible.

The hearing judge found no mitigating circumstances as respondent offered no evidence in mitigation but the judge found several aggravating ones. These consisted of respondent's recent misconduct resulting in significant actual suspension (see *post*), his multiple acts of misconduct, uncharged misconduct in acting in bad faith and for a corrupt motive by changing his vote to favor the defendant despite his belief that the defendant was liable for the plaintiff's injuries, that his misconduct significantly harmed the public and the administration of justice, that respondent showed indifference to rectifying or atoning for his misconduct, and that he lacked an understanding of his misconduct. As examples of this latter aggravating circumstance, the hearing judge cited respondent's arguments that he was immune from prosecution because his statements while a juror were protected by constitutional free speech guarantees, his assertion that Himmelheber forged his name to the June 2004 declaration and his deprecatory reference to the juror foreperson.

As to respondent's prior record of discipline, effective in July 2007, the Supreme Court suspended respondent for three years, stayed, on conditions of probation which included a two-year actual suspension and until respondent demonstrates his rehabilitation, present fitness to practice and present learning and ability in the general law.[7] This decision flowed from our February 2007 opinion in which we recommended this discipline to the Supreme Court. Our decision found respondent culpable of willful misappropriation of $2,716.61 in trust funds in a single client matter. This misconduct, which occurred in 1999 and 2000, was accompanied by respondent's failure to report to his client the receipt of trust funds, his failure to maintain those funds in a trust account, and his failure to promptly pay them to his client.

Mitigating respondent's prior culpability was his repayment of $5,000 to his client before a State Bar complaint was filed. Evidence of pro bono work and cooperation with the State Bar by stipulating to certain facts were entitled to some or modest mitigative weight. Aggravating circumstances were respondent's deliberate concealment from the client and her successor counsel of the existence of her funds[8], his multiple acts of misconduct, uncharged misconduct showing that respondent failed to provide an accounting of funds to his client after withdrawing from employment and threatening to report the client's successor counsel to the State Bar if she did not pay respondent an attorney fee he maintained was due him. We also found aggravation in respondent's indifference to rectification or atonement for his wrongdoing and in his repeated acts of disrespect to the court and his opposing counsel in the disciplinary process, which harmed the administration of justice. We noted instances of mocking references by respondent to atonement and invectives against the prosecutor, the State Bar Court hearing judge and disciplinary process in his pleadings and correspondence. In our assessment of the appropriate discipline to recommend in the prior proceeding, we observed that this would be a "prototypical misappropriation case but for respondent's unwillingness or inability to appreciate the impropriety of his conduct and his manifest disrespect" of those in the disciplinary process including this Court and the Supreme Court.

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7. Although the State Bar has expressed concern that the record of respondent's prior discipline was not admitted into evidence in the current proceeding, our review of the record is that respondent's prior discipline was admitted as Exhibit 1.

8. We did not accord this aggravating circumstance additional weight as it rested on the same facts as those supporting respondent's willful misappropriation of trust funds.

II. DISCUSSION

A. CULPABILITY

Respondent levies a host of arguments against the procedures employed in this proceeding. Chief among them is that he was foreclosed from offering exculpatory evidence. We have considered respondent's arguments and deem them without merit. Respondent had a full and fair opportunity to marshal and offer his evidence and we see no error warranting relief as to this claim or as to his other claims of procedural error.

Concerning the merits, respondent essentially argues that we should prefer his version of the facts over those found by the hearing judge. He repeats his argument that his June 2004 declaration in support of the plaintiff's motion for new trial was not accurate and that he did not intend to sign the copy of it that became part of the record. However, this issue was analyzed by Judge Ballati with the benefit of observation of respondent's testimony and it was considered de novo by the hearing judge in light of respondent's and others' testimony. The hearing judge, as did Judge Ballati, found respondent's testimony to lack credibility as to the issues surrounding respondent's signature on his declaration. It is settled that we give great weight to the hearing judge's findings of fact that resolve witness credibility issues. (Rules Proc. of State Bar, rule 305(a); *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1055; *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 183.) Our adherence to this rule is well-justified in this case as respondent's testimony was remarkable in showing his repeated inability to recall many of the most basic facts. In contrast, attorney Himmelheber and foreperson Rimbey, who also testified below, demonstrated no such difficulty.

[1] Respondent also attacks the sufficiency of the evidence relied on by Judge Ballati and the State Bar Court hearing judge. In our view, the evidence convincingly supports the culpability found by the hearing judge. Respondent appears to claim that others should have presented evidence to exculpate him; however, it was respondent's burden to undertake the defense of the charges against him (see *Jones v. State Bar* (1989) 49 Cal.3d 273, 288), and he was given a full and fair opportunity to do so.

[2a] With regard to the hearing judge's findings that respondent violated his duty as an attorney to comply with the law (§ 6068, subd. (a)), by violating his duties as a civil trial juror, the conclusion is inescapable that he is culpable as charged. The only disciplinary cases we have found in the area of attorneys dealing with juries are cases in which an attorney sought to affect the venire in criminal cases (*Noland v. State Bar* (1965) 63 Cal.2d 298, 300-301) or sought as a party to influence an individual juror hearing his criminal case (*In re Possino* (1984) 37 Cal.3d 163, 166, 170). However, the harm to the parties and to the fair administration of justice is clear and serious when respondent disregarded his duty to vote as the facts and judge's instructions guided him, and instead voted as the convenience of his law practice swayed. To be sure, jury service for busy citizens of all occupations or with family responsibilities can be difficult, even burdensome, at times. Yet it is the accepted duty of citizens to serve, subject to the statutory provision for excuse for undue hardship. (Code Civ. Proc. §§ 191, 204, subd. (b).) Moreover, the Judicial Council has recognized that jury service is an "important civic responsibility," requiring court and staff use of all necessary and appropriate means to ensure that citizens fulfill this duty. (Cal. Rules of Court, rule 2.1008(a).) Surely, respondent, as a practicing attorney at the time, was keenly aware of the role which an effective jury system serves in the fair administration of justice.

[2b] Respondent's violation was not a technical one. As the Court of Appeal and the State Bar Court hearing judge each found, respondent's vote was decisive in breaking the jury's deadlock. Patently, his change of vote to avoid continuing to serve as a juror voided the verdict he rendered and required the parties, their counsel and the courts to bear the additional costs, time and burdens of appellate and further trial court proceedings.

Even beyond respondent's clear violation of his statutory duties as a juror, his deceit to Judge Ballati during questioning of him regarding his verdict was most certainly an act of moral turpitude and reprehensible conduct for an attorney, proscribed by section 6106. It is settled that any act of dishonesty or misleading of a court is disciplinable. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174; *In the Matter of Lais* (Review Dept.

2000) 4 Cal. State Bar Ct. Rptr. 112, 122.) Here, the record is clear that respondent falsely represented to the judge that his verdict was within the court's instructions and the trial evidence.

[4] We do uphold the hearing judge's decision finding respondent not culpable of the charge of moral turpitude for having sought to corrupt other jurors by unduly influencing them. We agree with the hearing judge as to the lack of any proof that respondent's remarks to the other jurors were calculated to have corrupted them. From all that we see in the record, the jurors steadfastly remained divided into two groups based on their evaluation of the evidence and it was only the respondent who espoused a verdict for reasons of personal convenience.

As to the charge that respondent disrespected the court, the State Bar does not disagree that the findings arose from the same conduct. It merely asserts that the better practice would have been to find respondent culpable but to assess no added discipline. Whatever the ultimate procedure used, duplicate or redundant charges add nothing to the appropriate resolution. (See *In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148-149.) In our view, the hearing judge's findings and conclusions that the charge was duplicative of the misconduct amply resolve the charges in this case pursuant to the evidence. Although we observe that respondent could have been charged with moral turpitude, in addition to the violation of section 6068, subdivision (a), for his deliberate abdication of his duties as a juror, the hearing judge appropriately found, as uncharged aggravating conduct, that respondent acted in bad faith and for a corrupt motive in voting for the defense to end his jury service. We adopt that finding; but will accord it no added weight in assessing the degree of discipline, as it arises from the same facts as our section 6068, subdivision (a), conclusions of respondent's culpability in violating his duties as a juror.

B. DEGREE OF DISCIPLINE

We uphold the hearing judge's findings that there are several aggravating circumstances and none in mitigation. Again, respondent had an ample opportunity to present any mitigating evidence he wished to offer, but chose not to do so. The most serious aggravating circumstance in this case is respondent's prior suspension for willful misappropriation of trust funds coupled with other trust account violations and the lack of recognition of the seriousness of his offense. As the State Bar notes correctly in its brief, respondent engaged in his misconduct in the current matter while defending his conduct in the prior matter.

[5] Viewing the Standards for Attorney Sanctions for Professional Misconduct (Standards),[9] we first identify that they provide a range of discipline from suspension to disbarment for each of respondent's offenses. For his failure to comply with the law as to his discharge of his duties as a juror under section 6068, subdivision (a), the degree of discipline depends on the gravity of the offense and the amount of harm to the victim, with due regard to the purposes of imposing discipline. (See std. 2.6 (a) and the discussion *post*, as to the purposes of attorney discipline.) For respondent's moral turpitude in misrepresenting his actions to Judge Ballati, the range depends on the extent to which the victim of the misconduct is harmed or misled and the act's magnitude and extent to which it relates to respondent's acts within the practice of law. (Std. 2.3.) We agree with the hearing judge's finding that respondent caused significant harm to the administration of justice and that his misconduct was serious, even though he was not acting as an attorney in the case but as a citizen. Certainly, respondent's participation as a juror was at the heart of the work of the courts and the administration of justice.

9. Unless otherwise noted, all later references to standards are to Rules of Procedure of the State Bar, Title IV, Standards for Attorney Sanctions for Professional Misconduct.

When we proceed to the task of balancing mitigating and aggravating factors (std. 1.6), we are guided to recommend significant actual suspension at a minimum, even if respondent had no prior discipline, given the weight in the present record of aggravation and absent any mitigation.

Looking solely at the two California cases involving an attorney's misconduct toward the jury system, we do not see consistent guidance. In *Noland v. State Bar*, *supra*, 63 Cal.2d 298, the Supreme Court imposed a 30-day actual suspension on an attorney with about five years of practice as an assistant district attorney. Nolan influenced court staff to remove from the list of prospective jurors in the county's master jury list the names of about 65 individuals who Noland believed would be less favorable to the prosecution based on their votes in previous jury service or their challenges by prosecutors when previously examined for jury service. The court's opinion did not reveal whether the attorney had a prior record of discipline but it appeared that he had a strained financial condition with many dependents.

In *In re Possino*, *supra*, 37 Cal.3d 163, the Supreme Court disbarred the attorney. This was a referral proceeding after Possino's conviction of offering to sell large quantities of marijuana. There were many aggravating circumstances, including his improper approach to a juror in his criminal trial, purchasing cocktails for the juror and her companions, and conversing with her about himself, although he avoided talking to her about the case. Even though other drug convictions of attorneys had resulted in suspension, the court determined that Possino's evidence in mitigation did not serve to show that disbarment was excessive. The court had harsh words for Possino's approach to the trial juror, opining that it might have been criminal, and it was at the very least "grossly unethical" and "plainly demonstrates an unfitness to practice law." (*Id.* at p. 170.)

[6a] Because respondent has a significant, recent actual suspension, we look to standard 1.7(a), which provides that the discipline for a second case of misconduct shall be greater than the first, except for prior discipline that was so remote in time or imposed for so minimally severe an offense that it would be manifestly unjust to enhance the discipline. As respondent's prior was not remote – he continues to serve his actual suspension – and rested on the serious offense of willful misappropriation of trust funds and failure to follow the related ethical rules to safeguard those funds, neither exception is present.[10] In that regard, the hearing judge's recommendation of disbarment for the present offense is well merited.

What is of great concern is respondent's continued avoidance of responsibility for his misdeeds. (See *Noland v. State Bar*, *supra*, 63 Cal.2d at pp. 302-303.) Rather than focus on his own behavior to recognize his ethical misconduct and to seek to avoid it in the future, respondent has in his defense in the prior matter attacked others involved in the State Bar Court proceeding and again, in the present matter, he has extended his disaffection with the State Bar and the State Bar Court by commencing a federal civil rights action against the justices of the Supreme Court, the judges of this court and the State Bar attorneys assigned to this matter.

The purposes of disciplinary proceedings are not to punish respondent but to protect the courts, the public and the legal profession from those members of the bar who are unable or unwilling to discharge their duties ethically. (Std. 1.3; e.g., *In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 345.) Manifestly, looking at respondent's

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[6b] 10. We have occasionally declined to apply standard 1.7(a) where the current offense and the prior misconduct happened contemporaneously (*In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343, 351), or, as we observed in *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52, 61, where the prior and current misconduct were only a year apart and were of a fundamentally different nature, the prior had not been imposed until after the later misconduct, and the State Bar did not seek greater discipline in the second matter. Here, respondent's prior misconduct occurred four years before his current misconduct, both matters involved deceit and respondent was defending the charges in the prior at the time he was committing misconduct as a juror. Moreover, there is nothing in the definition of prior discipline which limits the application of standard 1.7(a) to discipline imposed or final prior to the commission of later misconduct. (See Rules Proc. of State Bar, rule 216; std. 1.2(f); as to prior discipline generally, see *Lewis v. State Bar* (1973) 9 Cal.3d 704, 715.)

prior and current proceedings, he has demonstrated that clients, courts and the legal profession are at serious risk of future harm should he be allowed to continue to practice. Accordingly, we recommend that he not be allowed to resume practice without undergoing a formal reinstatement proceeding proving by clear and convincing evidence his rehabilitation, moral fitness and learning and ability in the law. (See Cal. Rules of Court, rule 9.10(f).)

III. FORMAL RECOMMENDATION

For the above reasons, we recommend that respondent, Francis T. Fahy, be disbarred from the practice of law in this State and that his name be stricken from the roll of attorneys.

As respondent has been continually under actual suspension since June 2007, we do not again recommend that he be required to comply with the provisions of California Rules of Court, rule 9.20.

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

The order of the hearing judge below that respondent be enrolled as an inactive member of the State Bar pursuant to section 6007, subdivision (c)(4), shall continue in effect pending the consideration and decision of the Supreme Court on this recommendation.

We concur:

EPSTEIN, Acting P. J.[11]
PURCELL, J

11. Serving as Acting Presiding Judge by designation of the Presiding Judge.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

STEPHEN C. DOWNEY

A Member of the State Bar

[No. 05-O-04653]

Filed October 20, 2009; as modified October 21, 2009

SUMMARY

The State Bar and respondent each requested review of a hearing judge's decision to recommend a public reproval based on findings that respondent committed an act involving moral turpitude and failed to maintain a current address with the State Bar.

The review department upheld the hearing judge's culpability determination. However, it found fewer factors in mitigation and more in aggravation. Due to respondent's serious prior record of discipline, the review department applied standard 1.7(a) and recommended respondent be actually suspended for 150 days.

COUNSEL FOR PARTIES

For State Bar: Agustin Hernandez

For Respondent: Ellen A. Pansky

HEADNOTES

[1] **148 Evidentiary Issues–Witnesses**
159 Evidentiary Issues–Miscellaneous Evidentiary Issues
164 Quantum of Proof Required in Disciplinary Matters–Proof of Intent
Great weight is given to a hearing judge's finding as to intent. Where hearing judge determined respondent was grossly negligent when verifying his clients' complaint and State Bar relied on same evidence already considered by the hearing judge to argue respondent was intentionally deceitful, there was no basis to conclude that respondent's decision to sign verification rose to an act of intentional dishonesty rather than mere gross neglect.

[2 a, b] **221.12 Section 6106 (moral turpitude, corruption, dishonesty)–Gross Negligence**
Respondent was grossly negligent and culpable of moral turpitude when he jumped to the unreasonable conclusion without sufficient supporting evidence that his clients left the county. Additionally, respondent could have used a tailored affidavit explaining why his clients did not sign the verification rather than using a standard, pre-printed form provided by the Judicial Council.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[3] **720.50 Lack of Harm to client/victim (1.2(e)(iii))–Declined to Find**
Although respondent's filing of a false verification burdened opposing counsel and the court, there was no evidence that the burden rose to the level of cognizable harm in aggravation. Nevertheless, it clearly repudiates a finding of no harm in mitigation.

[4 a, b] **511 Aggravation–Found**
Where respondent's prior misconduct extended over several years and was very serious in nature, the record of prior discipline constituted a significant aggravating circumstance.

[5] **541 Bad faith, dishonesty, concealment (1.2(b)(iii))–Found**
Where respondent failed to demonstrate recognition of his mistake in filing a false verification by promptly taking steps to rectify it and instead twice concealed it through legal semantics, respondent's misconduct was followed by dishonesty and concealment.

[6] **805 Current discipline should be greater than prior**
Although respondent's misconduct was limited in nature, it was tempered only by limited character evidence and cooperation and aggravated by dishonesty and concealment and a record of serious prior misconduct. This totality of circumstances warranted progressive discipline as directed by standard 1.7(a).

[7] **1015.03 Three months (incl. anything between 3 and 6 mos.)**
Where attorney committed an act involving moral turpitude by filing a false verification, and failed to maintain a current address with the State Bar, where the misconduct was aggravated by serious prior misconduct and subsequent dishonesty and concealment but mitigated by limited character evidence and cooperation, the appropriate discipline recommendation was 150 days actual suspension under standard 1.7(a).

ADDITIONAL ANALYSIS

Culpability

Found

214.01 Violations–Section 6068(j) (comply with section 6002.1 address)

Mitigation

Found but discounted or not relied on

735.30 Candor and cooperation with Bar (1.2(e)(v))
740.30 Good character references (1.2(e)(vi))

OPINION

REMKE, P.J.

Respondent Stephen C. Downey was admitted to practice law in 1976 and has one prior record of discipline that resulted in a four-month suspension for making misrepresentations in violation of Business and Professions Code section 6106.[1] In the present case, Downey is culpable of committing an act of moral turpitude by gross neglect in violation of section 6106 for filing a false verification, and failing to update his membership records address. The issue is whether the discipline imposed in this case should be greater than that imposed in the prior proceeding, as provided for under the standards.[2] In particular, standard 1.7(a) directs that the degree of discipline imposed on an attorney with a prior record of discipline "shall be greater than that imposed in the prior proceeding *unless* the prior discipline imposed was so remote in time to the current proceeding *and* the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust." (Italics added.) Downey's prior misconduct was serious. Moreover, his misconduct here also was serious and was followed by dishonesty and concealment. Accordingly, we find that progressive discipline is warranted.

Both the State Bar's Office of Chief Trial Counsel (State Bar) and Downey appeal from the decision of the hearing judge that imposed a public reproval based on the two counts of professional misconduct. The State Bar urges us to find that Downey's act of moral turpitude was intentional and, based on his prior record of discipline, seeks an increase in discipline to include six months of actual suspension. Downey argues that any finding of moral turpitude is unwarranted. However, he contends that if any discipline is justified, the hearing judge's recommendation of a reproval should be adopted. Upon independent review of the record (*In re Morse* (1995) 11 Cal.4th 184, 207), we uphold the hearing judge's culpability determination, finding Downey's gross neglect in filing a false verification under penalty of perjury clearly supports a finding of moral turpitude. However, we find fewer factors in mitigation and more in aggravation. In light of Downey's serious prior record of discipline, we will follow standard 1.7(a) and recommend that Downey be suspended for 150 days.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Many of the key facts set forth in the hearing department decision were stipulated to by the parties and are supported by clear and convincing evidence. Thus, except as noted, we adopt most of the hearing judge's findings and summarize the pertinent facts below.

Downey has significant experience representing landlords in unlawful detainer actions. At the relevant time in 2005, his office typically filed about 60 to 70 unlawful detainer actions monthly. Downey's office was located in Mission Hills in Los Angeles County.

In May 2005, Charles and Fradelle Rosenberg hired Downey to evict Paula Sundstrom from a residence the Rosenbergs owned in Sherman Oaks, California. On May 23, 2005, Downey caused to be served on Sundstrom a notice to quit the premises within 60 days, ending her tenancy on July 25, 2005. The notice required Sundstrom to pay, on a pro rata basis, the July rent owed to the Rosenbergs. After Sundstrom failed to pay the July rent, on July 5, 2005, Downey served her with a three-day notice to pay rent or quit.

On July 11, 2005, the Rosenbergs telephoned Downey's office and spoke with a staff person. They informed the staff person that Sundstrom still had not paid the July rent and requested that an unlawful detainer complaint be filed. During that same conversation, the Rosenbergs paid Downey's remaining fees and costs by credit card. Downey prepared the complaint that day, which required his clients to sign

1. Unless noted otherwise, all later references to sections are to the provisions of the Business and Professions Code.

2. All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct

a verification. Downey's office manager called the Rosenbergs twice to ask them to come into the office to verify the complaint, but he was unable to reach them. Downey testified that he also telephoned the Rosenbergs once that day but was unsuccessful in reaching them. Downey did not take any additional steps to contact the Rosenbergs on July 11.

Later that day, Downey filed the verified complaint for unlawful detainer. He had signed the verification on behalf of the Rosenbergs as their attorney, alleging the truth of the matters in the complaint based on information and belief. An attorney may sign the verification on behalf of a client if the client is "absent from the county" where the attorney has his or her office. (Code Civ. Proc., § 446, subd. (a).) Downey signed the verification under penalty of perjury, attesting that the Rosenbergs were "absent" from Los Angeles County.[3] According to Downey, he signed the verification because "the most plausible explanation" of why he was unable to reach the Rosenbergs is that "they were traveling somewhere and probably out of the county." However, the Rosenbergs lived in Los Angeles County and were in fact in the county on July 11, 2005.

On July 20, 2005, opposing counsel in the unlawful detainer action moved to strike the complaint on the ground that it was unverified by the clients, and that if they "resided" in Los Angeles County, Downey's verification was untrue. The Rosenbergs met with Downey on August 4, 2005, and told Downey that they had been in Los Angeles County on July 11. Downey obtained the Rosenbergs' signatures on new verifications and filed them with the court, along with his opposition to the motion to strike.

In the opposition to the motion to strike, rather than acknowledging that he signed the verification on behalf of his clients in error, Downey argued the motion must be denied because he never said that the Rosenbergs resided in another county. In particular, he argued:

> Nowhere in the verification does counsel for plaintiff state that plaintiffs reside out of the county, nor does [Code of Civil Procedure] Section 446 say 'unless the parties reside out of the county', only that they "are absent from the county". "Absent" is a condition that may be only temporary, as when the party is out of the county when the attorney verifies the complaint in his stead. For the purposes of a motion to strike the verification, the truth or falsity of the allegation that the parties were absent from the county does not appear from a reading of the pleading. Whether plaintiffs were out of the county at the time their counsel executed the verification on their behalf is a question of fact. Nevertheless, new verifications of the complaint, executed by plaintiffs themselves, are submitted herewith.

On the same day as he filed the opposition, and after he had learned that the Rosenbergs were not out of the county, Downey also sent a letter to opposing counsel, stating:

> I have also read your motion to strike, and I wonder whether you even read the verification before you decided to threaten me with the a [sic] complaint to the State Bar. The verification only states that my clients were absent from the county, not that they reside out of the county. The two words do not mean the same thing... I have to wonder just what information you have that the Rosenbergs were absent from the county when I verified the complaint.

The superior court ultimately determined that opposing counsel's motion to strike was moot since Downey had filed new verifications signed by his clients.

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3. The preprinted verification form states: "I am one of the attorneys for ____, a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. [¶] I declare under the laws of the State of California that the foregoing is true and correct."

A. Count One – Moral Turpitude in Violation of Section 6106

The hearing judge found Downey culpable of moral turpitude in violation of section 6106 based on his gross neglect in executing and filing the verification, which falsely attested under penalty of perjury that the Rosenbergs were out of the county. The hearing judge found that Downey concluded unreasonably that his clients were absent based on insufficient facts and analysis. Other than being unable to reach the Rosenbergs by telephone, Downey had no information indicating that they were absent from the county. We adopt the hearing judge's conclusion that Downey willfully violated section 6106 by filing a false verification with the superior court.

[1] Although directing its appeal primarily to the degree of discipline, the State Bar argues that we should find Downey's deceit in verifying his clients' complaint was intentional rather than mere gross neglect. However, we see no evidence relied on by the State Bar for this characterization beyond that already considered by the hearing judge. Having seen and heard the testimony, the hearing judge found no intent to defraud. In this situation, we give great weight to a hearing judge's finding as to intent. (*Aronin v. State Bar* (1990) 52 Cal.3d 276, 283; Rules Proc. of State Bar, rule 305(a).) Thus, on this limited record, we are unwilling to conclude that Downey's decision to sign the verification rose to an act of intentional dishonesty.

[2a] Conversely, Downey argues that he did not engage in moral turpitude in violation of section 6106. Conceding that his acts could be characterized as "hasty" or "negligent," he contends that he exercised more care than is required for a gross neglect finding. We reject Downey's attempt to minimize his transgression. Downey jumped to the unreasonable conclusion that the Rosenbergs had left the county with insufficient supporting evidence. Indeed, the Rosenbergs had telephoned Downey's office earlier that day to request filing of the unlawful detainer action and provide payment of legal fees. There is no evidence that they told Downey or his staff that they were leaving the county, and under the circumstances, it was unreasonable for Downey to make such an assumption.

[2b] Downey also suggests that he was unduly constrained by using a standard, pre-printed form verification provided by the Judicial Council. However, as an experienced attorney, Downey undoubtedly knew that standard forms are merely expedient tools for the situations they cover and not talismanic choices. The circumstances under which an attorney may verify a pleading on behalf of his client is not limited to when a client is "absent" from the county, but includes when the client is "from some cause unable to verify it." (Code Civ. Proc., § 446, subd. (a).) After Downey failed to reach the Rosenbergs by telephone, he could have used a tailored affidavit explaining why his clients did not sign the verification. His decision to use the pre-printed form verification under the circumstances supports a finding of gross neglect. Thus, we agree that Downey was grossly negligent and culpable of moral turpitude in violation of section 6106 by signing the verification on behalf of his clients and misrepresenting that they were absent from the county.

B. Count Four – Failure to Update Address in Violation of Section 6068, subdivision (j)[4]

Downey admittedly moved his office in February 2005 and did not notify the State Bar's membership records office until 28 months later. He thus violated section 6068, subdivision (j), by failing to perfect notice of the change within 30 days. (See § 6002.1, subd. (a).) On review, Downey does not contest this culpability conclusion, and we adopt it.

4. Count Three (improper withdrawal from representation, rule 3-700(A)(2) of the Rules of Professional Conduct (Rules)) was dismissed by the court prior to trial pursuant to a motion by the State Bar. Count Two (failure to perform legal services competently, rule 3-110(A)) was dismissed during trial for insufficiency of the evidence. On appeal, these dismissals are not in dispute and we adopt them.

II. DISCIPLINE

We determine the appropriate level of discipline in light of all relevant circumstances, including mitigating and aggravating factors. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) Downey must establish mitigation by clear and convincing evidence, while the State Bar has the same burden of proof for aggravating circumstances. (Stds. 1.2(e) and 1.2(b).)

A. Two Limited Mitigating Factors

Downey offered six character witnesses, including four attorneys, who were aware of Downey's prior and current misconduct, and had a very high opinion of his moral character and integrity. However, we give this evidence only limited weight in mitigation since it is not "an extraordinary demonstration" of good character from a "wide range of references." (Std. 1.2(e)(vi); *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 387 [testimony of three clients and three attorneys entitled to limited weight].)

We agree with the hearing judge that Downey is entitled to mitigation for cooperating with the State Bar by entering into a fairly comprehensive pretrial stipulation of facts. Although the stipulated facts were not difficult to prove, and Downey did not admit culpability, the stipulation was relevant and assisted the State Bar's prosecution of the case. (Cf. *In the Matter of Silver* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 902, 906 [attorney afforded substantial mitigation for his cooperation by stipulating to facts not easily provable].) Under these circumstances, we accord Downey limited mitigation under standard 1.2(e)(v).

[3] We reject, however, the hearing judge's finding in mitigation that neither Sundstrom nor the superior court was harmed by Downey's conduct. His actions did burden Sundstrom's counsel, the court, and his own clients in resolving the motion attacking Downey's verification. Although there is no evidence that the burden rose to the level of cognizable harm in aggravation (std. 1.2(b)(iv)), it clearly repudiates a finding of no harm in mitigation.

B. Two Serious Aggravating Factors

[4a] Downey's prior record of discipline is a significant aggravating circumstance. (Std. 1.2(b)(i).) Effective July 2, 1993, Downey received a one-year stayed suspension, three years of probation with conditions, including a four-month period of actual suspension. Beginning before 1983 and continuing to 1987, Downey failed to perform required legal services in over 22 separate collection matters, resulting in numerous matters being dismissed for failure to prosecute. During this time, he also repeatedly misrepresented to his law firm the amount of work he had performed for clients, causing the firm to incorrectly bill the clients for about $86,000 in legal fees. Substantial mitigating circumstances were considered, including no prior record of discipline, Downey's psychological condition at the time, his candor and cooperation with his employer and the State Bar, remorse and evidence of rehabilitation. There were no aggravating circumstances.

[5] We also find in aggravation that Downey's present misconduct was followed by dishonesty and concealment. (Std. 1.2(b)(iii).) By August 4, 2005, Downey knew that the verification he executed and filed with the court was in error. However, rather than promptly demonstrating recognition of his mistake and taking steps to rectify it, he twice concealed it through legal semantics. In his opposition to the motion to strike filed with the court, Downey clearly implied he was entitled to sign the verification based on the absence of his clients from the county. Likewise, Downey's letter to opposing counsel challenged counsel to prove that the Rosenbergs were not absent from the county when Downey signed the verification. Although Downey may have felt pressure to quickly file the unlawful detainer complaint when he signed the verification, these subsequent misleading statements were made after Downey had time to reflect on his earlier gross carelessness. The Supreme Court has held that such concealment of a material fact "misleads the judge as effectively as a false statement . . . . No distinction can therefore be drawn among concealment, half-truth, and false statement of fact." (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315, citing *Green v. State Bar* (1931) 213 Cal. 403, 405.) We are troubled by the similarity between

Downey's attempts to conceal his wrongdoing in the present case and his analogous behavior in his prior record of discipline. Thus, we assign great weight to this factor in aggravation.

C. Degree of Discipline

In determining the appropriate level of discipline, we first consider the standards applicable to this case. While we are "not compelled to strictly follow [the standards] in every case," we look to them for guidance (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11), and they should generally be given great weight in order to assure consistency in attorney disciplinary cases. (*In re Brown* (1995) 12 Cal.4th 205, 220.) On this record, several standards call for suspension. In light of Downey's prior record of discipline, we find that standard 1.7(a) is the most pertinent to the disciplinary analysis in this case.[5]

[4b] As set forth above, standard 1.7(a) provides that if an attorney has one prior imposition of discipline "the degree of discipline imposed in the current proceeding shall be greater than that imposed in the prior proceeding *unless* the prior discipline imposed was so remote in time to the current proceeding *and* the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust." (Italics added; *In re Silverton* (2005) 36 Cal. 4th 81, 90-91 [exception to standard 1.7(a) is in the conjunctive].) Although it was imposed 12 years before his commission of the current offenses, we do not regard Downey's prior record as so remote to devalue it to the extent that the hearing judge did. More importantly, the hearing judge "made no finding that [Downey's] prior misconduct was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust, nor would such a finding be supported by a review of the prior disciplinary proceeding." (*In re Silverton, supra,* 36 Cal. 4th at p. 91.) In fact, Downey's prior misconduct extended over several years and was very serious in nature. Thus, the two-prong exception to "standard 1.7(a)'s requirement of greater discipline for recidivist attorneys" is not applicable in the present case and we find no other compelling justification to deviate from the standard. (*Id.* at pp. 90-91.)

Overall, Downey's misconduct was central to the practice of law and it was misleading to opposing counsel and the court. (Std. 2.3.) The filing of a false verification by an attorney not only undermines the ability of the courts to rely on the accuracy of sworn declarations, it also diminishes the public's confidence in the integrity of the legal profession. Further, we are troubled by Downey's subsequent misleading statements made to the court and opposing counsel in an attempt to conceal his wrongdoing. An attorney's false statements violate "'the fundamental rules of ethics—that of common honesty—without which the profession is worse than valueless in the place it holds in the administration of justice.'" (*Alkow v. State Bar* (1952) 38 Cal.2d 257, 264, quoting *Tatlow v. State Bar* (1936) 5 Cal.2d 520, 524.) Had this been Downey's first offense, the limited nature of the misconduct ordinarily may have called for a short or even stayed period of actual suspension. However, Downey's current misconduct is aggravated by his serious prior record and his subsequent dishonesty and concealment, tempered only by the limited weight we give his character evidence and cooperation.

[6], [7] We find the totality of the circumstances warrants progressive discipline as directed by standard 1.7(a). (*In the Matter of Cacioppo* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 128, 150 [reproval for minor violations increased to stayed suspension due to prior misconduct].) In light of Downey's four-month prior suspension for serious misconduct, we conclude that a 150-day period of actual suspension is appropriate here to protect the public, the courts and the legal profession, to maintain high professional standards by attorneys and to preserve public confidence in the legal profession. (Std. 1.3.) Our recommendation is supported by compa-

5. The other relevant standards are 2.3 and 2.6(a). Standard 2.3 provides for suspension or disbarment for acts of dishonesty or moral turpitude, depending on the extent to which the victim is harmed or misled and on the magnitude of the misconduct and the degree to which it relates to the practice of law. Likewise, standard 2.6(a) provides for disbarment or suspension as a result of Downey's failure to comply with his reporting requirements, depending on the seriousness of the offense and harm, if any, to the victim, with appropriate regard to the purposes of imposing discipline.

rable case law as the appropriate sanction to ensure discipline proportionate to the misconduct. (*Conroy v. State Bar* (1991) 53 Cal.3d 495 [one-year suspension for failure to act competently and misrepresentations involving moral turpitude, even though no mitigation and two prior disciplines]; *Bach v. State Bar* (1987) 43 Cal.3d 848 [60-day suspension for misleading a judge, in aggravation a prior public reproval and behavior that threatens public and undermines confidence in profession, and no mitigation]; *Hallinan v. State Bar* (1948) 33 Cal.2d 246 [90-day suspension for simulating client's signature on settlement release with no priors].)

III. RECOMMENDATION

We recommend that Stephen Curtis Downey be suspended from the practice of law for two years, that execution of that suspension be stayed, and that he be placed on probation for two years subject to the following conditions:

1. Stephen Curtis Downey is to be suspended from the practice of law for the first 150 days of probation.

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

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office of the State Bar and the State Bar's Office of Probation.

4. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

5. Subject to the assertion of any applicable privilege, he must fully, promptly and truthfully answer all inquiries of the State Bar's Office of Probation, and any probation monitor assigned under these conditions, that are directed to him, whether orally or in writing, relating to whether he is complying or has complied with the conditions of this probation.

6. Within one year of the effective date of the discipline herein, he must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School given periodically by the State Bar and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE), and he shall not receive MCLE credit for attending Ethics School (Rules Proc. of State Bar, rule 3201).

7. 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 period of probation, if he has complied with all conditions of probation, the two-year period of stayed suspension will be satisfied and that suspension will be terminated.

We further recommend that Stephen Curtis Downey be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners, and provide proof of passage to the Office of Probation, within one year of the effective date of the discipline herein. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

We further recommend that Stephen Curtis Downey be ordered to comply with rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, from the effective date of the Supreme Court order. Failure to do so may result in disbarment or suspension.

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

We concur:

EPSTEIN, J.

PURCELL, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JOHN WILLIAM ELKINS

A Member of the State Bar

Case No. 05-O-03819

Filed November 17, 2009

SUMMARY

Respondent requested review of a hearing judge's decision to recommend a 90-day actual suspension based on findings that respondent committed acts involving moral turpitude, threatened to report individuals to various agencies to gain advantage in a civil dispute, showed disrespect to a judge, and failed to maintain a current address with the State Bar.

The review department upheld the hearing judge's culpability determinations and adopted the recommended 90-day actual suspension.

COUNSEL FOR PARTIES

For State Bar: Kevin B. Taylor

For Respondent: John William Elkins

HEADNOTES

[1] 101 Jurisdiction
135.50 Division V, Defaults and Trials (rules 200-224)
Rules of Procedure of the State Bar, rule 220(b), which requires the court to file its decision within 90 days of taking a matter under submission, is not jurisdictional. Although filing a decision well beyond the prescribed 90 days undermines important objectives, an attorney's decision to abate his law practice pending filing of hearing decision is too speculative to establish specific, legally cognizable prejudice.

[2 a, b] 193 Constitutional Issues–Other
221.19 Section 6106 (moral turpitude, corruption, dishonesty)–Other factual basis
Sending numerous, threatening voicemail messages is intentionally harassing and constitutes moral turpitude. Such conduct is not protected by the First Amendment of the U.S. Constitution.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[3] **300.01 Rule 5-100 (former 7-104) (improper threat to bring charges)–Found**
Respondent violated rule 5-100(A) when he threatened to report individuals to the FBI, State Attorney General and others if they did not comply with his various demands regarding administration of his father's estate and his litigation with a mortgage company.

[4] **213.20 Section 6068(b) (respect for courts and judges)**
Respondent violated section 6068(b) when he repeatedly made false charges of bribery against an ex officio judge in probate matters.

[5] **740.51 Insufficient number of references**
Respondent was not entitled to mitigation for good character because he had only one witness testify and this did not constitute a broad range of references from the legal and general communities.

[6] **725.59 Declined to find–Other reason**
Respondent was not afforded mitigative credit for extreme emotional difficulties he suffered as a result of his father's death and the prospective loss of the family home because he failed to establish a causal nexus between those emotional difficulties and his misconduct.

[7] **720.50 Lack of harm to client/victim (1.2(e)(iii))–Declined to find**
Where victims of respondent's misconduct felt threatened for their own safety compelling them to obtain a stay-away protective order, respondent was not entitled to mitigation for lack of harm.

[8] **1015.03 Three months (incl. anything between 3 and 6 mos.)**
Where attorney committed acts involving moral turpitude, threatened to report individuals to various agencies to gain advantage in a civil dispute, showed disrespect to a judge, and failed to maintain a current address with the State Bar, where the misconduct was aggravated by multiple acts, significant harm to the administration of justice, and lack of insight but mitigated by an absence of priors over 24 years of practice, the appropriate discipline recommendation was 90 days actual suspension.

ADDITIONAL ANALYSIS

Aggravation

Found

521 Multiple acts of misconduct (1.2(b)(ii))
586.10 Harm to administration of justice
591 Indifference to rectification/atonement (1.2(b)(v))

Mitigation

Found

710.10 Long practice with no prior discipline record (1.2(e)(i))

Declined to find

735.50 Candor and cooperation with Bar (1.2(e)(v))

Other

Duplicative charges

106.30 Procedural Issues–Issues re Pleadings

Found

214.01 Section 6068(j) (comply with section 6002.1 address)

OPINION

EPSTEIN, J.

After respondent, John William Elkins, was removed as co-executor of his father's estate (the "estate"), he sent 53 threatening and abusive voicemail messages to the successor administrator of the estate, the attorney for the administrator, and the ex officio judge of the Forsyth County Superior Court of North Carolina (the "Superior Court"), who was responsible for overseeing the estate. As a result, Elkins is charged with acts of moral turpitude in violation of Business and Professions Code section 6106.[1] He is also charged with violating: Rules of Professional Conduct, rule 5-100(A)[2] for threatening to report these individuals to various state and federal agencies to gain an advantage in a civil dispute; section 6068, subdivision (b) for showing disrespect to the ex officio judge and accusing him of taking a bribe; and section 6068, subdivision (j) for failing to update his membership address with the State Bar.

The hearing judge found Elkins culpable of all of the alleged violations and recommended that he be suspended from the practice of law for two years, stayed, and placed on probation with a 90-day period of actual suspension. Elkins seeks review, arguing that his conduct does not involve moral turpitude, that his communications are protected by the First Amendment, and that he should not be subject to discipline because he was acting in a personal, not a professional, capacity at the time of the alleged misconduct. The State Bar asks us to affirm the culpability findings and discipline recommendations of the hearing judge.

Based upon our de novo review of the record (*In re Morse* (1995) 11 Cal.4th 184, 207), as well as the standards[3] and guiding case law, we adopt the hearing judge's culpability determinations, and his discipline recommendation, which we find is sufficient to protect the public, the courts and the legal profession.

I. JURISDICTION

At the outset, we address Elkins' jurisdictional challenge to these proceedings. He was admitted to the practice of law in California on February 14, 1980. Elkins challenges our jurisdiction on the grounds of undue delay by the hearing judge, who filed his decision one year after the conclusion of a four-day trial and ten months after the matter was submitted. Elkins asserts this delay is proscribed by Rules of Procedure of the State Bar, rule 220(b) (rule 220(b)), which provides: "The Court shall file its decision within ninety (90) days of taking the matter under submission . . . ." Elkins also asserts that the hearing judge's delay resulted in substantial prejudice because he has not practiced law since 2005 out of concern that these proceedings "might cause problems with respect to potential client matters."

In *In the Matter of Petilla* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 231, 246, we held that "the 90-day time limit in rule 220(b) is neither mandatory nor jurisdictional, but directory." Nevertheless, we acknowledge Elkins' frustration and his desire for an expeditious determination in this matter. Indeed, the 90-day time limit for filing decisions under rule 220(b) is the legislative recognition of the fundamental axiom "that justice delayed is justice denied and the unmistakable requirement that the judiciary now take active management and control of cases, from start to finish, for speedy dispute resolution [Citation.]." (*Laborers' Internat. Union of North America v. El Dorado Landscape Co.* (1989) 208 Cal.App.3d 993, 1007 [justice-delayed axiom underlies Trial Court Delay Reduction Act of 1986 (Gov. Code, § 68600 et seq.]; *Warren v. Schecter* (1997) 57 Cal.App.4th 1189, 1199 [justice-delayed axiom reflected in trial-setting preference in Code Civ. Proc. § 36].)

[1] Rule 220(b) serves a dual purpose in disciplinary proceedings: (1) if no culpability is found, a decision within the 90-day time limit allows the

1. Unless otherwise noted, all further references to "section(s)" are to the Business and Professions Code.

2. Unless otherwise noted, all further references to "rule(s)" are to the Rules of Professional Conduct.

3. All further references to "standard(s)" are to Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

member to clear his name as quickly as possible; and (2) if culpability *is* found, the public is assured of the necessary and timely protection to which it is entitled under the State Bar disciplinary process. In this case, the filing of the decision well beyond the prescribed 90 days undermines these important objectives. Nevertheless, the rule is not jurisdictional and Elkins' decision to abate his practice out of concern that these disciplinary proceedings "might" cause problems for "potential" clients is too speculative to establish specific, legally cognizable prejudice. (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 510.) We thus find Elkins' jurisdictional challenge to be without merit.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Factual and Procedural Background

Elkins and his brother were appointed co-executors of their father's estate by order of the Superior Court on August 27, 2002. The principal asset of the estate was their father's home in North Carolina. At the time his father died, Elkins was residing in this home to care for his father.

In July 2004, Margaret Lortie, Assistant Clerk of the Superior Court, sent letters to Elkins and his brother indicating that they had failed to file a satisfactory accounting. A few weeks later, Brice Murphy, another Assistant Clerk of the Superior Court and an ex officio judge, served an order on Elkins directing him to file an accounting because the previous accountings were unsatisfactory. Elkins responded by asking for clarification as to how the accountings were unacceptable, and Murphy sent another letter to Elkins outlining the flaws. Once again, Elkins wrote to Murphy, asking for further clarification of the deficiencies. In response, Murphy served Elkins with an Order to Show Cause for Failure to File Inventory/Account (OSC), with a hearing date set for October 12, 2004. Elkins sought a continuance of the OSC hearing, which Murphy denied. While all of this was happening, Elkins also was embroiled in litigation with Household Mortgage Financial Services (the "mortgage company"), having sued it for a usurious mortgage that he alleged had been fraudulently negotiated with his father prior to his death.

Between August and September 2004, Elkins left five lengthy messages on Murphy's voicemail, expressing his displeasure with the court. He was convinced that the clerk's office was "up to no good at this point involving graft and corruption." Elkins stated: "[S]omebody in your office, I think, is playing games with this estate and is trying to get rich off of it through the mortgage company. That's what I'm charging at this point because it's circumstantial based on the timing. Now, I suspect you better back off."[4] Elkins informed Murphy: "I'm going to the FBI on you people if you don't back off now." He also warned: "I'm going to make a complaint against you to the commission on judicial performance and good luck fellow. You've exceeded your authority. You've abused your discretion." To underscore the seriousness of his intentions, Elkins advised Murphy that he has been "an attorney for twenty five years" and therefore Murphy should not take his accusations "lightly or irrationally."

Murphy felt threatened by these phone calls and feared for his personal safety. He accordingly asked two bailiffs to be present at the OSC hearing. At the hearing, Murphy ordered Elkins and his brother to file an acceptable accounting within 30 days of receipt of a forthcoming clerk's letter outlining the defects to be remedied. After they failed to comply with this order, Assistant Clerk Lortie, acting as an ex officio judge of probate, ordered Elkins and his brother removed as co-executors and appointed attorney Gregory D. Henshaw to succeed them as a public administrator for the estate. The Superior Court affirmed the order on May 3, 2005.

Three weeks later, on May 24, 2005, Henshaw wrote Elkins a brief letter introducing himself as the public administrator of the estate and advising that,

4. Elkins made numerous threats and accusations in his phone messages to Murphy. We have limited our account of the messages to a few representative examples.

based on his review of the assets, "it appears it may be necessary to sell [his father's home] to pay the debts of the estate." Henshaw further wrote that he would be "more than happy to work with you to arrange full payment of [the estate's] obligations . . . if you can pay the outstanding estate debts, there will be no reason to proceed with selling the real property." Since the estate had been pending for almost three years, Henshaw asked Elkins to "[p]lease contact me to discuss this matter by June 10, 2005. . . . I will gladly discuss your options in the matter with you upon your contacting my office."

In response, Elkins called Henshaw, but, according to Henshaw, the conversation "deteriorated so quickly with the way he was speaking to me" that Henshaw terminated the call. Elkins eventually realized that Henshaw had purposely hung up the phone, which infuriated him. Unable to reach Henshaw by phone, Elkins left 21 messages on his voicemail during one week from May 26, 2005 through June 1, 2005. In the messages, Elkins referred to Henshaw, Murphy, and Lortie as "white trash" and "slime liars," and he repeatedly accused Henshaw of conspiring with Lortie and Murphy to accept a bribe from the mortgage company. Elkins made these accusations without any direct knowledge or investigation, based on what he repeatedly characterized as "circumstantial evidence."

Elkins then threatened Henshaw:

> [B]uddy boy, you make one more move other than to resign whatever it is you've supposedly been appointed to and I'm going to report your behavior to the State Bar, I'm going to the State Attorney General's Office on you, on Margaret Lortie, on Bryce Murphy. . . .And I will go to the FBI on you too, because I think you're in cahoots, I think you've been taken a bribe. That's what I decided.

Elkins also repeatedly warned Henshaw not to "mess" with him, and to back up his threats, he reminded Henshaw that Elkins had been practicing law in California for 25 years.

Henshaw retained William Walker, a partner in his law firm, to act as his attorney in the estate proceedings. Walker then sent Elkins a brief e-mail on June 2, 2005, informing him that his multiple messages had been recorded and transcribed and that they had clogged Henshaw's voicemail, preventing other callers from reaching him. Walker admonished Elkins to stop calling Henshaw or anyone else in his office and to communicate only in writing.

Incensed, Elkins left 19 messages on Walker's voicemail on the same day he received Walker's e-mail, railing against everyone involved in the administration of the estate. He advised Walker, "I can and I will [go] to the State Attorney General and the FBI at some point. So I'd advise you to back off. . .I just said you better watch your step. . . .Because I'm watching you." Elkins also left eight messages for Henshaw on the same day, in spite of Walker's admonishment not to call him. In fact, these messages were even more harassing, demeaning and offensive than the earlier ones.[5] Elkins followed up the next day by sending Walker an e-mail asserting his right to communicate with Henshaw in any manner he deemed "expedient."

Faced with these harassing communications, Walker sought a restraining order against Elkins and clarification from the Superior Court regarding Henshaw's authority to act as the administrator of the estate. On June 27, 2005, the Superior Court made the following findings in support of the restraining order: (1) Elkins "repeatedly makes statements that could be interpreted as threats to and attempted intimidation of Henshaw and his office staff;" (2) his statements had a tendency to "impede and harass Henshaw, his staff, and his attorney in the performance of Henshaw's duties as estate representative;" (3) his statements had a tendency to "obstruct Henshaw in the performance of his duties;" and (4)

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5. For example, he said: "Kid, as long as you've got a fiduciary relationship to me, which you do, you've got to talk to me, whether you like it or not, you little bullshit artist, and I'll fuck you anyway I want to until you do." (We have limited our account of Elkins' messages to Henshaw and Walker to a few representative examples.)

Elkins offered no evidence to support his "outrageous accusation" that the clerk who supervised the estate took bribes.

The court ordered Elkins to communicate only in writing with Henshaw, Walker, and their staff, not to enter their office premises and not to intentionally come within 100 feet of them except at court hearings. The court also confirmed Henshaw as the sole administrator of the estate. Elkins ceased making telephone calls after issuance of this order.

Count 1: Acts Involving Moral Turpitude [§ 6106]

[2a] Elkins is charged with committing acts of moral turpitude in violation of section 6106[6] for sending numerous threatening voicemail messages to Henshaw and Walker. In assessing whether Elkins' conduct constitutes moral turpitude, we utilize a "commonsense" approach (*In re Mostman* (1989) 47 Cal.3d 725, 738). Based on the record and guiding precedent, we conclude that Elkins' conduct indeed involved moral turpitude. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 147 [numerous phone calls to client resulting in harassment and intentional infliction of emotional distress constituted acts of moral turpitude]; *In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80, 88 [harassing telephone call to juror threatening to report absence from jury duty to juror's employer constituted moral turpitude].) The telephone messages can only be viewed as intentionally harassing, given the sheer number of calls Elkins made in a relatively short time period, and his repeated warnings that Henshaw should not "mess" with him or Henshaw would "regret it." Elkins also told Walker to "watch his step" because he would "regret it the rest of [his] life." The fact that Elkins made these threats in his private rather than his professional capacity does not affect our determination since section 6106 by its express language applies to acts of moral turpitude whether or not committed in the course of practicing law. In actuality, Elkins used his status as a California attorney to leverage his threats.

Of particular concern are the facts that Elkins' telephone tirades caused Henshaw and Walker to suffer fear and were triggered by two relatively harmless events: (1) Henshaw's unwillingness to contact Elkins by phone after their first, aborted telephone conversation; and (2) Henshaw's May 24, 2005 letter, advising Elkins of Henshaw's appointment as representative and asking him to discuss arrangements to pay the estate's debts. Walker felt it was necessary to call the sheriff about Elkins' threats out of concern for his personal safety and that of his office staff. Similarly, Henshaw testified that Elkins' condescending and strident tone of voice, as well as his ugly and foul language, and the number of messages, caused him to be concerned for his personal safety and for his professional standing.

[2b] Elkins incorrectly asserts that his voicemail messages are protected by the First Amendment to the U. S. Constitution, and therefore he cannot be disciplined under section 6106. First, regardless of the *content* of the messages, the mere act of making 53 phone calls in a short time period constitutes harassing *conduct* that is not protected by the First Amendment. (*Roberts v. United States Jaycees* (1984) 468 U.S. 609, 628 [104 S.Ct. 3244] ["[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection [Citation.]"].) Moreover, the intimidating voicemail messages, which caused three individuals to fear for their physical safety, are not entitled to First Amendment protection. (*Virginia v. Black* (2003) 538 U.S. 343, 359-360 [123 S.Ct. 1536, 1547-1548]; *In re M.S., a Minor* (1995) 10 Cal.4th 698, 720.)[7]

Count 2: Threats to Gain Advantage in a Civil Dispute [Rule 5-100(A)]

[3] Rule 5-100(A) provides that "[a] member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute." Elkins violated this rule when he threatened to report Henshaw and Walker to the FBI, a city councilman, the State Attorney General and others if they did not comply with his various demands

6. Section 6106 proscribes conduct "involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise..."

7. We reject Elkins' contention that section 6106 is unconstitutionally vague or overbroad, noting that challenges on these grounds have been previously considered and rejected. (See, e.g., *Canatella v. Stovitz* (N.D. Cal. 2005) 365 F.Supp.2d 1064, 1074-1076.)

regarding the estate and his litigation with the mortgage company. (*In the Matter of Malek-Yonan* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627, 637.)

We reject Elkins' argument that rule 5-100(A) does not apply to his conduct because he was acting in a private capacity, not as an attorney, when he left his messages. The Rules of Professional Conduct do not "apply only to lawyers who are acting in their role as advocates for others." (*Davis v. State Bar* (1983) 33 Cal.3d 231, 240 [applying former rule 7-105 regarding misrepresentations made to court to attorney's misconduct while representing himself in malpractice action]; *In the Matter of Malek-Yonan, supra,* 4 Cal. State Bar Ct. Rptr. at p. 637 [applying rule 5-100(A) to attorney representing herself in collections dispute].) However, in finding culpability, we assess no additional weight for discipline purposes since we relied on these same persistent threats to establish Elkins' culpability for violating section 6106 under Count 1.

Count 3: Disrespect of Courts and Judicial Officer [§ 6068, subd. (b)]

[4] Section 6068, subdivision (b) requires an attorney to maintain the respect due the courts of justice and judicial officers. Elkins is culpable of violating this rule by repeatedly and falsely accusing Murphy, who was both a clerk and an ex officio judge in probate matters, of taking bribes. He also threatened to report Murphy to the State Attorney General, the FBI and the commission on judicial performance. As a result of these phone calls, Murphy was so fearful for his safety that he enlisted two deputies to attend the OSC hearing when Elkins was present.

Elkins again argues that the First Amendment protects his statements maligning Murphy's honesty and integrity. He is wrong. Elkins admits he had no direct evidence that Murphy took a bribe, nor did he conduct any investigation. Thus, his statements were based on nothing more than mere conjecture and are subject to discipline because Elkins made them with reckless disregard of their truth or falsity. (*In the Matter of Anderson* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 775, 782-783 [no constitutional protection for false statements made with knowledge they are false or made with reckless disregard of truth "because there is no constitutional value in such false statements of fact"].) In addition, the State Bar established the falsity of the accusations by the uncontradicted testimony of Murphy that he did not take bribes, which was corroborated by the findings of the Superior Court in support of its restraining order. The false charges of bribery were sufficiently serious to constitute a violation of section 6068, subdivision (b), for which Elkins may be disciplined. (*Ramirez v. State Bar* (1980) 28 Cal.3d 402, 410-412.)

Count 4: Failure to Update Membership Address [§ 6068, subd. (j)]

Neither party challenges the hearing judge's finding that Elkins failed to notify the State Bar of his current address within 30 days after he abandoned the address on file in the official membership records of the State Bar in willful violation of section 6068, subdivision (j). Upon our independent view of the record, we adopt the hearing judge's findings of fact and conclusions of law that Elkins is culpable of violating section 6068, subdivision (j).

III. DISCIPLINE DISCUSSION

The primary purpose of these disciplinary proceedings is not to punish but to protect the public, the courts, and the legal profession. (Std. 1.3; *Bach v. State Bar* (1987) 43 Cal.3d 848, 856-857.) In determining the appropriate degree of discipline, we consider the unique facts of this case as well as any mitigating and aggravating circumstances.

A. Mitigation

Elkins' 24 years of practice without discipline are entitled to significant mitigation. (Std. 1.2(e)(i).)

[5] He is not entitled to mitigation for good character under standard 1.2(e)(vi) because he had only one witness testify, which does not constitute a broad range of references from the legal and general communities. (*In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 840 [respondent not entitled to mitigation for good character based on testimony of two witnesses].)

[6] Additionally, Elkins claims mitigation for the extreme emotional difficulties he suffered as a result of his father's death and the prospective loss of the family home. While we acknowledge his plight, we afford him no mitigative credit because he failed to establish a causal nexus between those emotional difficulties and his misconduct. (*In the Matter of Kennon* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 267, 277 [death of parent and break-up of marriage given no weight in mitigation without additional evidence of causal connection between psychological distress and misconduct].) We note that the harassing calls to Murphy began in August of 2004, two years after Elkins' father died. He then committed the same misconduct against Henshaw and Walker eight months later, in May of 2005, and his harassment increased in frequency and in degree of abusiveness. During this significant time period, he had the opportunity to gain perspective and to reflect on the inappropriateness of his misconduct.

[7] Elkins also argues that he caused no harm to the victims of his misconduct. (Std. 1.2(e)(iii).) We disagree. Murphy, Walker and Henshaw testified that they felt threatened and concerned for their own safety as well as the safety of their employees. Walker and Henshaw felt compelled to obtain a stay-away protective order from the court.

Elkins further asserts that he is entitled to mitigation under standard 1.2(e)(v) due to his cooperation and participation in these proceedings. His participation is required by section 6068, subdivision (i), and he did not present clear and convincing evidence of cooperation deserving of mitigative credit.

B. Aggravation

We find three factors in aggravation. First, Elkins' multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).) Second, his misconduct significantly harmed the administration of justice by imposing a burden on the Superior Court to ensure the proper supervision of the estate and the protection of those involved in representing the estate. (Std. 1.2(b)(iv).) Third, Elkins lacks insight into the wrongfulness of his actions and the extent of his misconduct. He continues to perceive that he is the victim rather than Murphy, Walker and Henshaw, all of whom were the targets of his incessant, harassing messages. (Std. 1.2(b)(v).)

C. Level of Discipline

In assessing the level of discipline, we look to the standards, which serve as guidelines. (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) Because Elkins is culpable of acts of moral turpitude and violations of rule 5-100(A) and section 6068, subdivisions (b) and (j), the applicable standards are 2.3 and 2.6.[8] Both provide for suspension or disbarment depending on the gravity of the misconduct or harm to the victim.

We also look to prior disciplinary decisions for guidance, noting that those cases involving assaultive behavior have resulted in a range of actual suspension from 30 days to one year.[9] We find the most relevant decisions concern attorneys who harassed other individuals in order to gain an advantage, but whose actions did not entail dishonesty. In *In the Matter of*

8. Standard 2.3 provides: Culpability of a member for an act of moral turpitude "toward a court, client or another person... shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed... and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law." Standard 2.6 states that culpability for a violation of section 6068 "shall result in disbarment or suspension depending on the gravity of the offense or the harm, if any, to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3...."

9. See, e.g., *In the Matter of Burns* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 406 [two years' stayed suspension for conviction for assault with firearm causing great bodily injury to another person]; *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52 [60 days' actual suspension for assault on police officer, with prior record of discipline]; *In re Hickey* (1990) 50 Cal.3d 57 [30 days' actual suspension for repeated acts of assault toward wife and others coupled with failure to properly withdraw from legal representation in another matter, no prior record, conduct arose from alcohol abuse]; *In re Larkin* (1989) 48 Cal.3d 236 [one-year actual suspension for attorney convicted of assault with deadly weapon and conspiracy to commit it, strong mitigation including no prior record]; *In re Otto* (1989) 48 Cal.3d 970 [six months' actual suspension for felony conviction for serious assault and corporal injury on co-habitant of opposite sex].

Torres, supra, 4 Cal. State Bar Ct. Rptr. 138, 153, an attorney created "an atmosphere of fright and terror" by harassing his client with 100 late-night phone calls over a nine-month period. The calls had dire effects on the client. She became unstable, lost her job as an office manager, and was unable to work except as a part-time clerk. Torres was found culpable of moral turpitude for making the harassing phone calls, which was aggravated by his deliberately false and evasive testimony. Because of "the depravity of this misconduct in its relation to the legal profession" and the fact that Torres turned on his own client, we considered disbarment. (*Id.* at p. 151.) But, instead, we recommended three years' actual suspension because Torres terminated his conduct promptly when his client's new attorney contacted him. (*Id.* at p. 153.) In the instant case, the level of harassment did not approach the seriousness of that in the *Torres* case. Moreover, Elkins did not engage in overreaching of a helpless client.

We further consider *Sorensen v. State Bar* (1991) 52 Cal.3d 1036, where an attorney was suspended for 30 days because he sued a court reporter for fraud and deceit, seeking $14,000 in punitive damages, over a simple $45 billing dispute. The court reporter incurred $4,375 in legal fees and expenses. The Supreme Court found Sorensen "was motivated in large measure by spite and vindictiveness, and he acted on those base impulses by selecting the most oppressive and financially taxing means of redress, out of all proportion to the minor sum and rather innocuous incident in controversy." (*Id.* at p. 1042.) The Court thus focused on the disproportionate and malicious response as evidence of the attorney's spiteful motive. (*Id.* at pp. 1042-1043.) We find that, like Sorenson, Elkins' phone vendetta was completely out of proportion to the incidents that precipitated his ire. As a practicing attorney, Elkins was aware of and should have used accepted legal procedures to address his frustration with Henshaw, Walker and the court, which was administering the estate.

We also take into account the bribery accusations Elkins aimed at Murphy. Such conduct alone is worthy of a 30-day actual suspension. (*Ramirez v. State Bar, supra,* 28 Cal.3d 402, 404-405 [30-day actual suspension for attorney who falsely accused Ninth Circuit judges of acting "unlawfully" and "illegally" and becoming "parties to the theft" of property of attorney's clients].)

[8] To his credit, Elkins has 24 years of discipline-free practice without a record of abusive conduct, and he now recognizes that he got "carried away" with the situation. Moreover, his behavior did not involve physical injury to another. We further observe that when faced with the Superior Court's order, he ceased his telephone harassment of the three individuals. But, by any measure, his conduct is "unacceptable from anyone in society and particularly reprehensible from an attorney." (*In the Matter of Frascinella* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 543, 550.) Thus, we conclude that the hearing judge's recommended discipline, including the 90-day actual suspension, is appropriate.

IV. RECOMMENDATION

We recommend that JOHN WILLIAM ELKINS be suspended from the practice of law in the State of California for two years, that execution of that period of suspension be stayed, and that he be placed on probation for two years on the following conditions:

1. He must be suspended from the practice of law for the first 90 days of probation;

2. During the period of probation, he must comply with the State Bar Act and the Rules of Professional Conduct;

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office of the State Bar and the State Bar's Office of Probation;

4. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act,

the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

5. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the State Bar Office of Probation which are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein;

6. Within one year of the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School (Rules Proc. of State Bar, rule 3201).

7. His probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if he has complied with all conditions of probation, the period of stayed suspension will be satisfied, and that suspension will be terminated.

PROFESSIONAL RESPONSIBILITY EXAMINATION

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 one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

RULE 9.20

We further recommend that John William Elkins be ordered to comply with rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, from the effective date of the Supreme Court order. Failure to do so may result in disbarment or suspension.

COSTS

Finally, we recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

We concur:

REMKE, P. J.
PURCELL, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

BENJAMIN THOMAS FIELD

A Member of the State Bar

[Nos. 05–O–00815; 06–O–12344 (Cons.)]

Filed February 12, 2010

SUMMARY

The review department upheld a hearing judge's disciplinary recommendation that an attorney be actually suspended for four years for ethical misconduct in four criminal prosecutions. Although the review department did not adopt the hearing judge's conclusion that the attorney performed incompetently and committed an act of moral turpitude by not disclosing certain California search warrants, it did adopt the hearing judge's conclusion that the attorney failed to obey court orders, repeatedly failed to comply with the law, and committed other acts involving moral turpitude. The review department adopted the hearing judge's finding that the attorney committed multiple acts of misconduct and significantly harmed the administration of justice. It also adopted the finding in mitigation that the attorney cooperated, displayed extraordinary good character, and provided pro bono service.

COUNSEL FOR PARTIES

For State Bar: Donald R. Steedman, Cydney T. Batchelor

For Respondent: Allen Ruby

HEADNOTES

[1] **220.00 State Bar Act Violations—Section 6103, clause 1 (disobedience of court order)**
Where reasonable interpretation of a court order is that a dental exam would not be allowed unless the court ordered it after the parties filed supporting and opposing papers, such order was mandatory and not permissive. Therefore attorney's willful failure to obey the court order was a violation of section 6103.

[2 a, b] **221.00 State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)**
Prosecutors have a duty under California and federal law to disclose exculpatory materials after trial, including in habeas corpus proceedings. Attorney committed an act of moral turpitude and dishonesty when he intentionally concealed the statement and whereabouts of a favorable witness in a habeas corpus proceeding.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[3] **106.10 Procedure—Issues re Pleadings—Sufficiency of pleadings to state grounds for action sought (rule 5.124(C), (E))**
106.20 Procedure—Issues re Pleadings—Adequate notice of charges (rules 5.41 and 5.124(C), (D), (E))
Attorney's due process right not violated when notice of disciplinary charges characterized his post-conviction disclosure duty as legal rather than ethical. Such characterization did not deny attorney sufficient opportunity to defend.

[4] **270.30 Rules of Professional Conduct Violations—Intentional, reckless, or repeated incompetence (RPC 3-110(A); 1975 RPC 6-101(A)(2)/(B))**
Attorney did not perform incompetently where attorney did not know that search warrant affidavit he completed was substituted with a deficient search warrant affidavit by out of state sheriff's deputy.

[5] **213.20 State Bar Act Violations—Section 6068(b) (respect for courts and judges)**
221.00 State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)
Attorney's violation of a judge's explicit instruction is an act of disrespect to the court. Further, where an attorney intentionally does not keep his promise to a judge, he is culpable of an act of moral turpitude and dishonesty.

[6 a, b] **213.10 State Bar Act Violations—Section 6068(a) (support Constitution and laws)**
Attorney's failure to timely disclose defendant's jail interview was a violation of Penal Code sections 1054.1(b) and (f) and 1054.7 which sufficiently established a failure to obey the law.

[7] **221.00 State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)**
Where attorney suppressed evidence by intentionally failing to voluntarily disclose a defendant's jail interview, such conduct was dishonest and involved moral turpitude.

[8] **213.10 State Bar Act Violations—Section 6068(a) (support Constitution and laws)**
Attorney failed to obey the law when he informed the jury during closing argument what would happen to a defendant if the jury found the defendant to be a sexually violent predator.

[9] **221.00 State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)**
Attorney committed an act of moral turpitude when he intentionally argued the consequences of a sexually violent predator finding in his closing argument to a jury in violation of California law and an in limine order.

[10] **586 Aggravation—Harm—To administration of justice**
Attorney's repeated failure to disclose exculpatory evidence harmed the administration of justice by depriving criminal defendants valuable evidence to which they were entitled, causing court delays, creating unnecessary litigation, compromising serious criminal cases and negatively impacting the reputation of the District Attorney's Office and the public's trust in the criminal justice system.

[11] **740 Mitigation—Good character references**

Attorney presented an extraordinary demonstration of good character where 36 character witnesses consisting of judges, attorneys, public officials, law enforcement personnel, community leaders, victims of crime and friends who knew attorney between 5 to 30 years uniformly attested to attorney's character and integrity despite knowledge of charges against attorney.

[12] **833.40 Standard 2.3—Applied—Suspension—Presence of other mitigation**
1091 Miscellaneous Substantive Issues re Discipline—Proportionality with Other Cases

Where attorney committed multiple acts involving moral turpitude, failed to obey the laws or court orders and where the misconduct was aggravated by multiple acts and harm to the administration of justice but mitigated by character evidence, cooperation, and pro bono service, the appropriate discipline recommendation was a 4-year actual suspension.

ADDITIONAL ANALYSIS

Culpability

Found

213.11 Section 6068(a) (support Constitution and laws)
213.21 Section 6068(b) (respect for courts and judges)
220.01 Section 6103, clause 1 (disobedience of court order)
221.11 Section 6106 (moral turpitude)—Deliberate dishonesty/fraud

Not Found

213.15 Section 6068(a) (support Constituion and laws)
221.50 Section 6106(moral turpitude, corruption, dishonesty)
270.35 Intentional, reckless, or repeated incompetence (RPC 3-110(A))

Aggravation

Found

586.11 Harm—To administration of justice—Inherent in nature of misconduct
586.12 Harm—To administration of justice—Specific interference with justice
521 Multiple acts of misconduct

Declined to Find

595 Indifference to rectification/atonement

Mitigation

Found

740.10 Good character references
765.10 Substantial pro bono work

Found but discounted or not relied on

735.30 Candor and cooperation with Bar

Discipline

1013.11 Stayed Suspension—Five years or more
1015.10 Actual Suspension—Four years (incl. anything between 4 & *5* yrs.)
1024 Ethics exam / ethics school
1030 1986 Standard 1.4(c)(ii) Rehabilitation Requirement

Discipline Imposed

1013.11 Stayed Suspension—Five years or more
1015.10 Actual Suspension—Four years (incl. anything between 4 & *5* yrs.)
1024 Ethics exam / ethics school
1030 1986 Standard 1.4(c)(ii) Rehabilitation Requirement

Other

106.30 Procedural Issues—Issues re Pleadings-Duplicative charges

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OPINION

PURCELL, J.:

I. INTRODUCTION

Benjamin Field, a career prosecutor for Santa Clara County, disregarded prosecutorial accountability in favor of winning cases. In doing so, he failed to fulfill his "important and solemn duty [as a prosecutor] to ensure that justice and fairness remain the touchstone of our criminal justice system." (*People v. Hill* (1998) 17 Cal.4th 800, 847.) Field committed misconduct that had a great impact on the legal system. He violated the due process rights of criminal defendants, and several courts criticized his performance as a deputy district attorney, ultimately imposing evidentiary sanctions for his conduct. As a result, the Office of the Chief Trial Counsel (State Bar) has charged Field with professional misconduct in four criminal cases over a ten-year period, alleging that he violated court orders and directives, performed incompetently, did not respect the court, failed to obey the law, withheld evidence, misled a judge and committed multiple acts involving moral turpitude, dishonesty or corruption.

The hearing judge found Field culpable of this misconduct, but also found the mitigation evidence to be so compelling that she recommended suspension rather than disbarment. Specifically, the hearing judge recommended that Field be actually suspended from the practice of law for a minimum of four years, subject to a five-year stayed suspension and a five-year probation period. Also, the hearing judge imposed as a condition of reinstatement that Field must first prove rehabilitation from his misconduct, fitness to practice law and learning and ability in the general law. On review, Field urges that he is entitled to exoneration and requests that we reverse the hearing judge's decision in its entirety. At trial, the State Bar requested a three-year actual suspension but, on review, asks us to adopt the hearing judge's recommended discipline, including the four-year actual suspension.

Upon independent review of the record (*In re Morse* (1995) 11 Cal.4th 184, 207) and after considering the standards,[1] the mitigation and aggravation, and the guiding case precedent, we agree with and adopt the hearing judge's recommended discipline. We find that Field's misconduct was inexcusable and we hold him accountable for unethical behavior in four criminal prosecutions. We conclude that the recommended discipline, particularly the four-year actual suspension, is necessary to protect the public and the courts, to preserve public confidence in the legal profession, and to maintain high professional standards for attorneys.

II. PROCEDURAL HISTORY

The State Bar filed two separate Notices of Disciplinary Charges (NDC), one in October 2007 (amended May 2008) and the other in June 2008. The first NDC alleged misconduct in three criminal matters (05-O-00815, 06-O-11153, and 06-O-12173), and the second NDC alleged misconduct in a fourth (06-O-12344). The hearing judge consolidated both NDCs for trial.

III. SUMMARY

Field was admitted to the practice of law in 1993. Shortly thereafter, he became a Deputy District Attorney for Santa Clara County, where he worked for over a decade as a prosecutor. The case before us alleges the following misconduct against Field:

(1)**The Minor A. Matter**. In 1995, Field obtained a dental examination of a minor accused of sexual assault in violation of a court order. As a result, the juvenile court judge suppressed the evidence from the examination;

(2)**The Auguste and Hendricks Matter**. In 2003, Field intentionally withheld a witness's statement that was favorable to the defense in a habeas corpus proceeding involving a sexual assault case. As a result, the superior court judge found that Field committed a discovery violation by concealing evidence;

1. Unless otherwise noted, all references to "standard(s)" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

(3)**The Ballard, Barrientos and Martinez Matter**. In 2003, Field intentionally withheld a defendant's statement favorable to co-defendants in a murder case. As a result, the superior court judge found that Field committed a discovery violation and dismissed a 25-year gun enhancement against one of the co-defendants; and

(4)**The Shazier Matter**. In 2005, Field made an improper closing argument in a sexually violent predator (SVP) case. As a result, the appellate court reversed the judgment committing the defendant as an SVP, describing Field's closing argument as "deceptive and reprehensible."

IV. STANDARD OF PROOF

The State Bar has the burden of proving misconduct by clear and convincing evidence. (Rules Proc. of State Bar, rule 213.) The function of a standard of proof is to instruct the fact-finder as to the required degree of confidence in the correctness of factual conclusions in a case. (*In re Winship* (1970) 397 U.S. 358, 370.) Evidence by a clear and convincing standard requires that the proof be "so clear as to leave no substantial doubt" and must be "sufficiently strong to command the unhesitating assent of every reasonable mind." (*Sheehan v. Sullivan* (1899) 126 Cal. 189, 193.) We independently review the record by this standard of proof.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. THE MINOR A. MATTER

In April 1995, 16 months after being admitted to the bar, Field prosecuted Minor A. for sexual assault. Although Minor A. said he was 13 years old, Field sought to prove that he was at least 16 years old in order to prosecute him as an adult. Welfare and Institutions Code section 608 provides that when a minor's age is at issue, the court may order a dental examination of his third mandibular molar if it finds that a scientific or medical test would assist in determining the minor's age. Field and his supervisor discussed how to obtain that examination of Minor A. The supervisor did not believe a court order was required, but Field decided to request one.

At a hearing before Judge Pro Tem Al Fabris on April 18, 1995, Field orally requested an order for the dental examination. Judge Fabris denied the request without prejudice. He ordered:

"Determination is whether minor is 13 or 16 years old. D.A. requests 3^d molar mandibular test. Denied. D.A. may file papers in that regard. Original birth certificate proffered by mother."

Judge Fabris told Field to file and serve a motion for the test to allow the defense an opportunity to respond, and he scheduled a pretrial conference regarding the "molar test" for April 27, 1995.

A few days before the pretrial conference, on April 24, 1995, Field met in chambers with Socrates Manoukian, the judge assigned to the case, and Minor A.'s counsel. Again, he orally requested the dental examination. Judge Manoukian testified that he told Field "if he wanted to have the test done, that he should make a motion . . . ," as Judge Fabris had ordered.

Yet, shortly thereafter, Field instructed the probation department to have the dental examination performed on Minor A. without filing a motion or obtaining a court order as he had been directed to do. The result disclosed that Minor A. was between 16 and 19 years old.

Judge Raymond Davilla presided over the April 27, 1995 pretrial conference. Field moved to amend the petition to state that Minor A. was 16 years old, informing Minor A.'s counsel and Judge Davilla that the dental test had been completed. Minor A.'s counsel opposed the motion because the test was done without a court order. Judge Davilla did not rule on any of the issues and continued the hearing to May 1, 1995, before Judge Manoukian. At that hearing, Judge Manoukian denied Field's request to amend the petition as to Minor A.'s age because Field failed to obtain the dental test in the manner that Judge Fabris had ordered. Judge Manoukian set the case for jurisdictional hearing (trial) and informed Field that he could raise the minor's age as an issue at that time.

At the jurisdictional hearing on May 4, 1995, Judge Manoukian expressed his displeasure with Field for obtaining the dental examination without the

court's order. He stated that a "lawful order" required Field to file papers requesting the test, and yet Field had obtained it "without a colorable reason for doing so." Field insisted that Judge Manoukian told him during their in-chambers meeting on April 24, 1995, that he "would be within [his] rights in getting the test done." However, Judge Manoukian corrected him, stating that he told Field that he was within his rights to conduct the dental examination "[i]f [Field] filed the motion." Judge Manoukian found that Field illegally obtained the test results and ordered them suppressed.

Count Fifteen[2] (Failure to Obey Court Order, Bus. & Prof. Code, § 6103[3])

Section 6103 provides for suspension or disbarment if an attorney willfully disobeys or violates a court order. The State Bar alleged that Field willfully disobeyed Judge Fabris' April 18, 1995 order. The hearing judge found Field culpable, and we agree. Judge Fabris' written order, later clarified by Judge Manoukian, required Field to file a noticed motion to obtain a court order for the test. Yet he failed to do so and proceeded with the dental examination of Minor A.

[1] Field argues that Judge Fabris' order was not mandatory but "permissive" because it stated that the "DA may file papers." This argument lacks merit. The reasonable interpretation of Judge Fabris' order is that Field's oral request for the dental test had been denied, and the test would not be allowed *unless* the court ordered it and only *after* the parties filed supporting and opposing papers. We find that Field's willful failure to obey Judge Fabris' order is a violation of section 6103.[4]

B. THE AUGUSTE AND HENDRICKS MATTER

In June 2001, Damon Auguste and Kamani Hendricks both filed a petition for writ of habeas corpus after unsuccessfully appealing their 1998 convictions for sexually assaulting a 15-year-old girl named Monique. They claimed, among other things, that Monique had falsely accused them. In support of this claim, they provided a declaration by Stephen Smith stating that Monique admitted to him that she made up the sexual assault allegations to avoid punishment for missing curfew. Field had originally prosecuted both men and was assigned to their habeas corpus proceedings before Judge James Emerson.

1. Witness Stephen Smith's Location and Interview

Judge Emerson ordered an evidentiary hearing on the habeas corpus petitions and the parties commenced discovery. Because Smith could not be found, Field obtained a search warrant for the telephone records of Smith's girlfriend, which enabled Field's investigator to locate him. On March 2, 2003, the investigator tape-recorded an interview with Smith, who confirmed that Monique told him she had made up the sexual assault charges against Auguste and Hendricks. Smith also provided even more exculpatory details than were included in his declaration.

In April 2003, Auguste's attorney requested that Field disclose all witness reports and interviews, including Smith's. In June 2003, having received no

2. Because we present the four criminal matters in chronological order rather than the order in which the State Bar charged them, the numbers assigned to the counts of misconduct do not appear sequentially.

3. Unless otherwise noted, all references to "sections(s)" are to this source.

4. The State Bar alleged that by failing to obtain a court order for the dental examination, Field is also culpable of the misconduct alleged in Count Sixteen (Failure to Comply with Laws [in Welfare and Institutions Code section 608] (§ 6068, subd. (a)) and Count Seventeen (Failure to Maintain Respect to the Court (§ 6068, subd. (b)). The same facts supporting our culpability finding in Count Fifteen also form the basis for these violations. In *Bates v. State Bar* (1999) 51 Cal.3d 1056, 1060, the Supreme Court has instructed that little, if any, purpose is served by duplicate allegations of misconduct in State Bar proceedings. We therefore dismiss Counts Sixteen and Seventeen with prejudice as duplicative allegations.

response from Field, Auguste's attorney repeated the request. About a month later, Auguste's attorney filed a status conference statement requesting Field's witness list, witness statements or summaries of the witnesses' anticipated testimony, and any reports of witness interviews.

Field did not disclose Smith's location or interview. Instead, he prepared a status conference statement and requested that his investigator prepare a supporting declaration. However, Field directed the investigator by e-mail not to reveal Smith's location or interview in that declaration, stating: "I don't want you to include anything about your attempts to locate him [Smith] except that you found out he is no longer with the Army and that he hasn't been for a long time." The declaration was misleading because it omitted the fact that the investigator had located and interviewed Smith and instead included him in the "summary . . . of unsuccessful attempts to locate" witnesses at the addresses provided by the defense. Field filed with the court both the misleading declaration by his investigator and his own status conference statement, which stated in part:

"Stephen Smith . . . appears to be the only witness whose testimony, if believed, would impeach the victim's testimony. However, Petitioner Auguste's witness list provides an address from which Smith moved approximately two years ago. Assuming Petitioners do not know Smith's whereabouts and cannot secure his appearance as a witness, there will be little if anything to rebut."

During an in-chambers status conference on July 18, 2003, Auguste's attorney asked the court to continue the habeas corpus hearing because he had lost contact with Smith. Instead of disclosing Smith's whereabouts and interview, Field kept this information to himself and emphatically urged the court to proceed. Ultimately, the court continued the hearing since the necessary witnesses, including Smith, had not been found.

On July 28, 2003, a defense investigator located Smith, who revealed that Field's investigator had tape-recorded an interview with him five months earlier. Upon learning this, Auguste's attorney filed a motion to suppress evidence and for sanctions based on prosecutorial misconduct. Only then did Field provide Smith's interview and location. At the hearing on the motion, Judge Emerson concluded that Field had committed a discovery violation and ordered certain evidence suppressed. Judge Emerson denied the request for sanctions, however, because no irremediable prejudice had been shown.

At the State Bar proceedings, Field testified about why he withheld Smith's location and interview. First, he explained that he did not believe he had a legal duty to provide discovery in a habeas corpus proceeding. And second, he felt the defense had not been forthcoming with discovery and therefore concluded: "if they were going to hold back . . . I was entitled to do the same."

Count Six (Failure to Comply with Laws, § 6068, subd. (a))

Under section 6068, subdivision (a), it is a duty of an attorney "to support the Constitution and laws of the United States and of this state." The State Bar alleged that Field failed to comply with the law when he did not voluntarily disclose Smith's location and interview in violation of his constitutional duty under *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] (prosecutor has constitutional duty to disclose evidence favorable to defense before trial). Field contends *Brady* does not apply in post-conviction proceedings such as habeas corpus. (*District Attorney's Office for the Third Judicial District, et al. v. Osborne* (2009) 557 U.S. ___, 129 S.Ct. 2308, 174 L.Ed.2d 38.) For purposes of analyzing Field's culpability in this count, we do not decide whether the *Brady* rule applies because we find Field culpable for a statutory violation in Count Seven, below, based on the same facts – that Field intentionally withheld Smith's statement. (See *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 671 [principles of judicial restraint require court to avoid deciding case on constitutional grounds unless absolutely necessary and non-constitutional grounds must be relied on if available].) We therefore dismiss Count Six with prejudice as duplicative of Count Seven.

Count Seven (Moral Turpitude – Suppression of Evidence, §6106)

[2a] Under section 6106, "The commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension." For purposes of State Bar disciplinary proceedings, moral turpitude is "any crime or misconduct reflecting dishonesty, particularly when committed in the course of practice . . . ." (*Read v. State Bar* (1991) 53 Cal.3d 394, 412.) The State Bar charged that Field is culpable under this section because he intentionally suppressed Smith's interview and location in violation of his legal duty to disclose them. Although our courts consistently impose a post-conviction duty on prosecutors to disclose all material evidence favorable to the defendant, they have not uniformly described the source of this duty. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1261 [after conviction, prosecutor is bound by ethics of his office to disclose information materially favorable to defense]; *People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179-1182 [prosecution's failure to disclose exculpatory evidence during post-conviction appeal is constitutional due process violation under *Brady*].) Independent of the application of the *Brady* rule, prosecutors have a duty under California and federal law to disclose exculpatory materials after trial, including in habeas corpus proceedings. (*Imbler v. Pachtman* (1976) 424 U.S. 409, 427, fn. 25 [96 S.Ct. 984, 993, 47 L.Ed.2d 128, 141,]; *In re Lawley* (2008) 42 Cal.4th 1231, 1246; *People v. Gonzalez, supra,* 51 Cal.3d at p. 1261.) And the State Bar's ethical rules of conduct also prohibit withholding evidence that prosecutors have a legal obligation to produce. (Rules Prof. Conduct, rule 5-220 [suppression of evidence]); see *Merrill v. Superior Court* (1994) 27 Cal.App.4th 1586, 1595.) Without question, a prosecutor is duty-bound – even after conviction – "to inform the appropriate authority of . . . information that casts doubt upon the correctness of the conviction. [Citations.]" (*In re Lawley, supra,* 42 Cal.4th at p. 1246.) Furthermore, it is expected that prosecutors with such information will disclose it promptly and fully (*People v. Gonzales, supra,* 51 Cal.3d at p. 1261), and regularly. (*In re Steele* (2004) 32 Cal.4th 683, 694.)

[2b] The interview of Smith by Field's investigator was clearly favorable to Auguste and Hendricks because it directly impeached Monique's trial testimony and cast doubt upon the validity of their convictions. Field had a duty to promptly and fully disclose Smith's statements as well as his whereabouts. By intentionally concealing that material evidence, Field committed an act of moral turpitude and dishonesty. (*In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 910 [moral turpitude includes creating false impression by concealmentas well as by affirmative misrepresentations].)

We note that Field's misconduct is particularly disturbing because it escalated over time. First, he instructed his investigator to prepare a misleading declaration and then knowingly filed it with the court and served it on opposing counsel. Second, Field filed a status conference statement falsely implying he did not know Smith's whereabouts. Third, he waited nearly five months before disclosing Smith's interview and location, and did so only after Auguste's attorney learned of it and filed a motion alleging prosecutorial misconduct. Fourth, and most significantly, Field sought to take advantage of his deception by urging the court to proceed to the habeas corpus hearing without Smith. We conclude that Field's actions constitute a calculated scheme to hide evidence favorable to the defense, and we adopt the hearing judge's finding that he "intentionally withheld Smith's whereabouts in an attempt to prevent Auguste and Hendricks from locating Smith."

[3] Field argues that *his* due process rights were violated because the NDC characterized his post-conviction disclosure duty as legal rather than ethical, thereby denying him sufficient opportunity to defend against the charges. We find this characterization did not deny him sufficient opportunity to defend.[5]

5. In Count Eight, the State Bar alleged Field suppressed evidence (rule 5-220) by not voluntarily disclosing Smith's location and interview. In Count Eleven, the State Bar alleged Field failed to maintain respect due to the courts (§ 6068, subd. (b)) by not disclosing the information about Smith when the court was considering whether to continue the evidentiary hearing. The same facts that support the culpability finding in Count Seven also form the basis for these violations. We therefore dismiss Counts Eight and Eleven with prejudice as duplicative allegations.

2. The Search Warrants

Field obtained five California search warrants from judges other than Judge Emerson to gather evidence in connection with the habeas corpus proceedings. Field reviewed his investigator's search warrant affidavits and worked closely with him in preparing them. Each affidavit recited that it sought evidence in a pending habeas corpus proceeding involving 1998 crimes.

At the July 18, 2003 status conference, Auguste's attorney objected to Field using search warrants for discovery in a habeas corpus proceeding because it was a civil matter. Judge Emerson also questioned the use of search warrants in such proceedings. He cautioned Field to meet only with him for any additional search warrants. When Field asked what to do if he needed one in an emergency, Judge Emerson testified, "I looked him right in the eye, and I said, 'Ben, just don't do it.'" Field testified that he agreed to notify Judge Emerson about "any further law enforcement efforts to obtain a warrant." Judge Emerson did not issue a written order because he trusted Field to comply with his verbal directive.

On July 22, 2003, only four days after this discussion, Field obtained an additional search warrant from a Colorado judge without notifying Judge Emerson. Field and his investigator prepared the original draft of the investigator's affidavit for the Colorado search warrant. The affidavit was substantially similar to the five used in California. The investigator then e-mailed his affidavit to a Colorado deputy sheriff to process in Colorado, authorizing him to make changes. However, before submitting the document to the Colorado judge, the deputy sheriff replaced Field's investigator's affidavit with his own, which was substantially different and eliminated many important facts. Field did not know about the substituted affidavit until after the search warrant was served.

Count Two[6] (Failure to Perform with Competence, Rules Prof. Conduct, rule 3-110(A)[7])

[4] Under rule 3-110(A), "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." The State Bar alleged that Field is culpable because he permitted his investigator to submit false and misleading affidavits to obtain the California search warrants, and he failed to properly oversee the execution of the Colorado warrant. We adopt the hearing judge's finding that while the California affidavits were "sloppy," they were not misleading since it was clear they were sought in a habeas corpus proceeding related to 1998 crimes. As to Field's involvement in the Colorado warrant, we do not adopt the hearing judge's finding that Field performed incompetently. The record reveals that he did not know the Colorado deputy had substituted his own deficient affidavit for the one Field and his investigator had prepared until after the search warrant was executed. Therefore, we do not find Field culpable for a violation of rule 3-110(A) and dismiss Count Two with prejudice.

Count Three (Moral Turpitude – Misrepresentations, § 6106)

The State Bar charged that Field committed an act of moral turpitude, dishonesty or corruption when he permitted his investigator to obtain the California affidavit submitted by the deputy sheriff in Colorado. This count is dismissed with prejudice for lack of evidence.

Count Five (Moral Turpitude – Disrespect for Court, § 6106)

[5] The State Bar alleged that Field committed an act involving moral turpitude, dishonesty or corruption because he represented to Judge Emerson that he would exclusively seek authorization from him for

6. The State Bar alleged only "General Allegations" in Count 1 of the first NDC; no specific violation is charged.

7. Unless otherwise noted, all further references to "rule(s)" are to this source.

any future search warrants, and then failed to do so. Judge Emerson's directive to Field was clear when he looked at him and emphatically stated: "Ben, just don't do it." We consider Field's violation of this explicit instruction to be an act of disrespect to the court. In addition, Field admitted at trial that he agreed to contact Judge Emerson for future search warrants. Yet, only four days later, he obtained the Colorado warrant without notifying Judge Emerson which, given the circumstances, is disrespectful conduct toward the court. We find that Field, as an officer of the court, intentionally did not keep his promise to Judge Emerson, and is culpable of an act of moral turpitude and dishonesty.[8]

Count Nine (Moral Turpitude – Misrepresentations, § 6106)

The State Bar charged that Field committed an act of moral turpitude, dishonesty or corruption by making misrepresentations to and concealing material information from the court about Smith and about the execution of three California search warrants. The hearing judge found him culpable. We agree that Field is culpable for concealing material information and making misrepresentations about Smith, but this finding is duplicative because it is based on the same facts that support culpability in Count Seven.

Further, we do not agree with the hearing judge that Field's failure to disclose to the court three California search warrants involving Smith constituted moral turpitude. Those search warrants were executed before Judge Emerson issued his oral instruction to notify him about any future search warrants. Without more, Field's failure to disclose those warrants does not support a finding of moral turpitude, dishonesty or corruption. We therefore dismiss Count Nine with prejudice for lack of evidence and as duplicative of Count Seven.[9]

C. THE BALLARD, BARRIENTOS AND MARTINEZ MATTER

In November 2002, Field was assigned to prosecute Bernard Ballard, Jaime Barrientos and Alfred Martinez for a home invasion robbery-murder of a methamphetamine dealer. The intruders wore masks during the crime, and one of them shot and killed the dealer. After arrest, each confessed involvement, but accused one another of doing the actual shooting. Specifically, Ballard identified Martinez as the shooter. Two witnesses, Angel Farfan and Crystle Lucchesi, were present at the dealer's apartment at the time of the murder. Lucchesi did not see the shooting, and Farfan implied that an "African-American" was the shooter. Ballard is African-American and Martinez and Barrientos are Latinos.

In January 2003, Martinez's counsel told Field that his client wanted to talk to law enforcement in the hope of currying favor with the prosecution to receive a lighter sentence. Martinez's attorney and Field entered into a written agreement to interview Martinez on the condition that the interview statement would not be used at trial by either party without further mutual agreement. On February 11, 2003, two police detectives interviewed Martinez at the jail in the presence of Martinez's attorney and Field. Martinez implicated witness Farfan as an accomplice whose role in the crime was to confirm that the dealer was home with the drugs and money when the robbers arrived. Martinez also revealed that witness Lucchesi was pregnant with his child, and that she removed drugs and money from the dealer's apartment after the murder.

At the joint preliminary hearing, Martinez entered into a plea agreement for a sentence of 35-years-to-life, and Field stipulated that Martinez was not the shooter. Field did not disclose the Martinez jail interview to Ballard or Barrientos, and

8. In Count Four, the State Bar alleged that Field failed to maintain respect to the court (§ 6068, subd. (b)) when he violated Judge Emerson's instruction. These facts also support our culpability finding in Count Five. Therefore, we dismiss Count Four with prejudice as a duplicative allegation.

9. In Count Ten, the State Bar alleged Field sought to mislead a judge (§ 6068, subd. (d)), based on the same facts alleged in Count Nine. For the reasons stated for our dismissal of Count Nine, we also dismiss Count Ten with prejudice.

the court proceeded with the preliminary hearing on the murder charges pending against them.

Field called as witnesses Lucchesi, Farfan, a detective who interviewed Martinez, and Ballard's roommate. He asked each of them carefully-crafted questions that did not reveal the Martinez jail interview. Farfan and Lucchesi testified they were shocked by the sudden arrival of the robbers and could not identify them. Only Farfan provided details about the shooter's identity when he implied that it was Ballard because the man who was armed with a gun and standing next to the dealer when he was shot was African-American. After the preliminary hearing, based on Farfan's testimony, Field charged Ballard as the shooter by adding an enhancement of 25-years-to-life for discharging a firearm, causing great bodily injury or death.

On May 19, 2003, the court set the trial for Ballard and Barrientos for July 7, 2003. Still not disclosing the Martinez interview, Field filed a request with the court to transfer Martinez from San Quentin to the county jail, stating that he intended to call him as a trial witness. On July 7, 2003, the court continued the trial to August 18, 2003.

A week before the August trial date, Ballard's counsel learned that Martinez was upset about being brought to the county jail, and went to visit him. Martinez complained that he should not have to testify since he already gave his statement to police detectives who interviewed him in jail six months earlier with Field and his attorney present. Ballard's counsel was surprised to discover this and immediately confronted Field, who then produced the tape of Martinez's jail interview.

Ballard and Barrientos moved to dismiss the case because Field had not timely revealed the Martinez interview. The trial court concluded Field should have produced it as exculpatory evidence because it discredited witness Farfan's identification of Ballard as the shooter. As a result, the court dismissed the 25-year gun enhancement against Ballard, calling Field's failure to disclose the interview a "blatant" discovery violation.

Count Twelve (Failure to Comply with Laws, § 6068, subd. (a))

The State Bar alleged that Field's failure to disclose the Martinez jail interview violated section 6068, subdivision (a), on two grounds: (1) that he did not comply with his constitutional duty under *Brady v. Maryland, supra,* 373 U.S. 83; and (2) that he did not fulfill his statutory discovery obligations under California Penal Code sections 1054.1, subdivisions (b), (e), and (f) and 1054.7.

[6a] We first look to Field's statutory discovery obligations. Penal Code sections 1054.1(b), (e) and (f), respectively, require the prosecutor to disclose statements of defendants, exculpatory evidence and statements of witnesses.[10] Penal Code section 1054.1 is designed to promote truth in trials by requiring timely pretrial discovery and provides in pertinent part: "The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the Penal Code section 1054.7 requires the disclosures to be made at least 30 days before trial unless good cause is shown why they should be denied, restricted or deferred. Field was obligated to timely produce Martinez's jail interview statement because he was both a defendant and a trial witness. Field did not fulfill this obligation. We conclude that he is culpable under this count because he violated Penal Code sections 1054.1(b) (defendant statement) and (f) (witness statement), and 1054.7 (30-day discovery cutoff) since he failed to disclose the interview at least 30 days prior to the July 7, 2003 or August 18, 2003 trial dates, and made no showing of good cause for any delay.

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10. Penal Code section 1054.1 is designed to promote truth in trials by requiring timely pretrial discovery and provides in pertinent part: "The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] [¶] (b) Statements of all defendants. [¶] [¶] (e) Any exculpatory evidence. [¶] (f) Relevant written or recorded statements of witnesses . . . whom the prosecutor intends to call at the trial "

We reject Field's argument that he thought the 30-day discovery cutoff for the first trial was postponed because the trial had been continued. He explained that the trial date set by the court was not real, and an attorney must use a "predictive ability" based upon "on-the-job training" to determine when a case is actually going to trial for the purpose of timely producing discovery. Field's position is untenable. Absent express language in section 1054.7 dictating otherwise, we do not presume the Legislature intended to allow parties in criminal proceedings to disregard discovery deadlines associated with trial dates merely because they think they can successfully predict that a trial date will be continued. (See *Sandeffer v. Superior Court* (1993) 18 Cal.App.4th 672, 678 [under Penal Code § 1054.7, disclosure may properly be compelled on date even before 30 days preceding "the date set for trial"].) Moreover, Field's argument is disingenuous because the superior court did not postpone the discovery cutoff date for either trial and did not grant a continuance for the first trial until the actual trial date of July 7, 2003. And even after the court set the new August 18, 2003 trial date, Field did not produce the Martinez interview until August 16, 2003, just two days before the second trial date and only after it had been discovered by defense counsel.

[6b] The State Bar asserts an additional ground of culpability – that Penal Code section 1054.1, subdivision (e), required Field to disclose the Martinez interview as exculpatory evidence because it impeached the credibility of witnesses. We do not decide whether Field violated subdivision (e) (exculpatory evidence) because his violations of Penal Code sections 1054.1, subdivisions (b) and (f) are sufficient to establish culpability for failing to obey the law, as charged in this count. Likewise, we do not decide whether Field violated his *constitutional* duty to disclose evidence under *Brady* since we have concluded that he is culpable for violating his statutory discovery obligations.

Count Thirteen (Moral Turpitude – Suppression of Evidence, § 6106)

[7] The State Bar alleged that Field committed an act involving moral turpitude, dishonesty or corruption when he intentionally suppressed Martinez's statement. We agree. Even though Field eventually disclosed it before trial, he intended from the start to withhold the interview statement since he entered into the written agreement with Martinez and his attorney not to reveal it without further mutual agreement. And Field tailored his witness examination during the preliminary hearing to avoid disclosing its existence. Moreover, Field waited nearly six months before producing Martinez's statement, and did so only after the attorney for Ballard discovered it and confronted him. Under these circumstances, we find that Field's failure to voluntarily disclose the Martinez jail interview was intentional, dishonest and involved moral turpitude.[11]

D. THE SHAZIER MATTER

In 1994, Dariel Shazier pled guilty to multiple sex crimes and was sentenced to state prison. In April 2003, the Santa Clara County District Attorney sought to prevent Shazier's release from custody by filing a petition to commit him as an SVP to a state mental hospital for a two-year period.[12] The case was assigned to Field.

The SVP jury trial was held in 2004. Shazier's counsel made a motion in limine to prohibit witnesses from telling jurors that Shazier would go to a hospital rather than prison if he were found to be an SVP. The court granted the motion.

Nonetheless, Field elicited witness testimony that violated the order. One of Field's witnesses stated that SVPs are sent to Atascadero State Mental Hospital for treatment and are re-evaluated every two years. Shazier's counsel objected, and the court

11. In Count Fourteen, the State Bar alleged that by failing to voluntarily disclose the Martinez interview, Field is also culpable of suppressing evidence (rule 5-220). The same facts that support our culpability findings in Counts Twelve and Thirteen also support Count Fourteen. We therefore dismiss Count Fourteen with prejudice as a duplicative allegation.

12. An SVP is a person who receives a determinate sentence after being convicted of a sexually violent offense against two or more victims, and has a diagnosed mental disorder that makes that person a danger to the health and safety of others because of a likelihood to commit further sexually violent crimes. (Welf. & Inst. Code, § 6600, subd. (a).)

struck the testimony and directed Field not to mention it in final argument. Field apologized, admitting that he should have framed his question more narrowly and had failed to advise his witness about the in limine order. The trial resulted in a hung jury, and Shazier remained in Atascadero pending a new hearing.

At the second SVP trial in 2005, the court re-adopted the in limine order from the first hearing. Field testified that he knew the order also applied to him. Yet, in his rebuttal closing argument, he commented to the jury about Shazier's placement at Atascadero if found to be an SVP:

> ". . .The defense has had some testimony about how difficult a place Atascadero State Hospital is. It's a stressful environment, that sort of thing. And that testimony is intended at least in part to make you think sympathetically toward the [defendant]. [¶] [*Y*]*ou should not make a decision based on what you think it's going to be like for the [defendant] in Atascadero State Hospital.* That's not for you." [Italics added.]

Shazier's counsel objected and moved for a mistrial on the ground that Field violated the court's in limine order. Field explained that he only intended to dispel sympathy for Shazier that he thought had been created when two psychology technicians from Atascadero described the facility as a high-stress environment where violent outbreaks often occurred. The court denied the motion for mistrial but warned Field that his comments in closing argument were on "dangerous ground" and he should not make them again in any SVP case. The jury found that Shazier was an SVP, and the court committed him for two years.

Shazier appealed, claiming that Field had engaged in prosecutorial misconduct during the closing argument. The Court of Appeal agreed and reversed the judgment, finding that Field "violated not only the court's in limine order prohibiting reference to the consequences of a true finding, but also the proscription against such comments set forth in *Rains* [*People v. Rains* (1999) 75 Cal.App.4th 1165, 1169]." The appellate court called Field's comments ". . . deceptive and reprehensible in addition to being in direct contravention of the trial court's orders." The court also observed that Field's comments were designed to inform the jury that Shazier was merely going to the hospital for treatment if found to be an SVP and were made at the end of Field's rebuttal argument where they would be fresh in the jurors' minds as they entered deliberations.[13]

Count One (Failure to Comply with Laws, § 6068, subd. (a))

[8] The State Bar charged that Field violated California law under *People v. Rains, supra,* 75 Cal.App.4th 1165, by informing the jury during closing argument what would happen to Shazier if it found him to be an SVP. *Rains* established that a trier of fact may not receive evidence about the *consequences* of an SVP finding because it is irrelevant to proving the *criteria* for SVP. We find that the only reasonable inference to be derived from Field's argument to the jury is that Shazier would be sent to Atascadero State Hospital if found to be an SVP. We conclude, as did the appellate court, that Field's closing argument violated *Rains*.

On review, Field volunteers several explanations for his closing argument that he never offered at the time he made the comments. First, he denies that he violated *Rains* because the jury already knew from the trial testimony that Shazier would be housed at Atascadero if committed as an SVP. Second, Field reasons that Shazier's counsel "opened the door" for his argument by eliciting testimony from a psychologist about the percentage of people who were in Atascadero under an SVP commitment. Third, he contends that his comments were authorized by *People v. Grassini* (2003) 113 Cal.App.4th 765, which provides that when the defense claims that

13. On August 30, 2006, the California Supreme Court granted a petition for review in *Shazier*, but dismissed it on May 14, 2008, in light of its decision in *People v. Lopez* (2008) 42 Cal.4th 960.

treatment can take place in an out-patient facility, the jury must be instructed that the prosecution has to prove that treatment in a secure facility is necessary to protect the public. And finally, Field argues that the in limine order changed over the course of the trial, permitting him to comment on the consequences of an SVP finding.

The record does not support any of Field's new assertions. Although the trial court in Shazier permitted certain testimony before the jury about housing SVPs at Atascadero, it did not change the in limine order or authorize Field to argue the *consequences* of an SVP finding. Nor did Field seek a ruling that trial developments had entitled him to make such an argument. We conclude that Field intended to, and in fact did, argue to the jury the custody consequences of an SVP commitment for Shazier – in violation of *Rains*. The hearing judge correctly found Field culpable of violating the law under section 6068, subdivision (a).[14]

Count Three (Moral Turpitude – Improper Closing Argument, § 6106)

[9] The State Bar alleged that Field committed an act of moral turpitude, dishonesty or corruption by intentionally arguing the consequences of an SVP finding in his closing argument in violation of both California law and the in limine order. The State Bar urges that the conduct was particularly deceptive due to its timing – at the end of the hearing as part of Field's rebuttal argument. Finding that Field lacked credibility, the hearing judge rejected his explanation that the argument was designed to dispel juror sympathy for Shazier. Given this credibility determination, we agree with and adopt the hearing judge's conclusion that Field is culpable of moral turpitude as charged.[15]

VI. FACTORS IN AGGRAVATION AND MITIGATION

The offering party bears the burden of proof for aggravating and mitigating circumstances. Field must establish mitigation by clear and convincing evidence (std. 1.2(e)), while the State Bar has the same burden to prove aggravating circumstances. (Std. 1.2(b).)

A. FACTORS IN AGGRAVATION

[10] The hearing judge found two factors in aggravation and we agree. First, Field committed multiple acts of wrongdoing. (Std. 1.2(b)(ii).) Second, his misconduct harmed the administration of justice by depriving criminal defendants of valuable evidence to which they were entitled, causing court delays, creating unnecessary litigation and compromising serious criminal cases. (Std. 1.2(b)(iv).) The setting for Field's misconduct involved grave criminal offenses, with correspondingly serious punishments. In such cases, "[i]t is self evident that a lawyer's presentation to the court and counsel of deliberately fabricated . . . evidence strikes directly at the very integrity of the judicial process." (*Price v. State Bar* (1982) 30 Cal.3d 537, 551, dis. opn. of Richardson, J.) We find that Field's abuse of his prosecutorial power negatively impacts the reputation of the District Attorney's Office and the public's trust in the criminal justice system.

Like the hearing judge, we do not find that Field displayed indifference toward rectification. (Std. 1.2(b)(v).) Although he vigorously contests his culpability as charged, Field admitted at trial that he exercised poor judgment and viewed his discovery duties too narrowly by failing to disclose Smith's location and statement in the Auguste and Hendricks

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14. In the Shazier Matter (the second NDC), in Count Two, the State Bar alleged Field failed to obey a court order (§ 6103) when he violated the in limine order by telling the jury what would happen if Shazier were found to be an SVP. In Count Four, the State Bar alleged Field failed to perform with competence (rule 3-110(A)) when he made his closing argument in violation of California law and the in limine order. In Count Five, the State Bar alleged that Field failed to maintain respect to the court (§ 6068, subd. (b)) when he made his closing argument in violation of California law and the in limine order. The same facts that support our culpability finding in Count One also form the basis for these violations. We therefore dismiss Counts Two, Four and Five with prejudice as duplicative allegations.

15. Having reviewed de novo all of the arguments set forth by Field in this case, any arguments not specifically addressed in this opinion have been considered and rejected.

Matter, and by withholding the Martinez interview in the Ballard, Barrientos and Martinez Matter. Field also admitted at trial that he should have immediately produced the Martinez interview, concluding "there's no argument that I violated [Penal Code section] 1054." He testified that he would conduct discovery differently now and has made significant changes to his discovery procedures, including permitting an open-file policy. And in the Shazier Matter, it was Field who self-reported the finding of prosecutorial misconduct to the State Bar as soon as he learned of the appellate court's decision. On this record, we do not find that there is clear and convincing evidence that Field lacks recognition or understanding of his misconduct.

B. FACTORS IN MITIGATION

The hearing judge found three factors in mitigation: cooperation, good character and pro bono service. Overall, the hearing judge concluded that the mitigation was compelling. We agree.

First, Field cooperated with the State Bar by entering into a stipulation related to the four criminal cases at issue. Although the stipulated facts were not difficult to prove (compare *In the Matter of Silver* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 902, 906 [attorney afforded substantial mitigation for cooperation by stipulating to facts not easily provable]) and Field did not admit culpability, the stipulation was relevant and assisted the State Bar's prosecution of the case. We therefore assign limited mitigation for cooperation. (Std. 1.2(e)(v).)

[11] Second, Field presented an extraordinary demonstration of good character. (Std. 1.2(e)(vi).) Like the hearing judge, we find that showing to be a very persuasive factor in mitigation. Field presented 36 character witnesses, including judges, attorneys, public officials, law enforcement personnel, community leaders, victims of crime, and friends. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [testimony from members of bench and bar entitled to serious consideration because judges and attorneys have "strong interest in maintaining the honest administration of justice"].) His witnesses had known Field between five to 30 years and uniformly attested to his honest character and extraordinary integrity. Their opinions remained unchanged despite knowledge of the charges against him.

We expressly note the testimony of several witnesses. George Kennedy, the District Attorney for Santa Clara County from 1990 to 2007, lauded Field's extraordinary professional skills and good character. Although he thinks Field failed to exercise sufficient care in his obligations to the defense, Kennedy also believes Field is a completely honest person and not intentionally corrupt. Retired Judge Ronald Lisk testified that he has never doubted Field's competency, character or honesty. Even after learning of the charges, his opinion of Field remained so high that he recommended him to the governor for appointment to the bench. Significantly, a senior public defender who has known Field for 15 years testified that he believed Field was a fair and honest man with integrity and compassion. And a defense attorney working for the Alternate Defender's Office testified that he felt Field was honest and behaved impeccably as a prosecutor.

Third, Field offered an impressive record of participation in pro bono and community service activities. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [community service is mitigating factor entitled to considerable weight].) He has devoted much of his free time to valuable charitable work for disadvantaged youths, crime victims, and the hungry and homeless.

And he actively participates in local community groups, including the Santa Clara Bar Association, Legislation for Public Interest, Silicon Valley Campaign for Legal Services and PACT (People Acting in/Community Together).

VII. LEVEL OF 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 legal profession and to maintain high professional standards for attorneys. (Std. 1.3.) Ultimately, we balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with

its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266; *Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

Our analysis begins with the standards. While we recognize that they are not binding on us in every case, the Supreme Court has instructed that we should follow them "whenever possible" (*In re Young, supra,* 49 Cal.3d at p. 267, fn. 11), and they should be given great weight in order to promote "the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91.) Guided by standard 1.6(a), we must consider the most severe discipline that applies to Field's misconduct. Because Field committed acts of moral turpitude and dishonesty, we apply standard 2.3, which provides for actual suspension or disbarment.

Given the broad range of discipline in standard 2.3, we look to comparable case law. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311). We note that the California Supreme Court has not hesitated to impose disbarment on attorneys whose interference with the fair administration of justice resulted in their criminal convictions. (See *In re Hanley* (1975) 13 Cal.3d 448, 454 [defense attorney's conviction for bribing witness not to testify in murder case "impugned the integrity of the judicial system" justifying disbarment]; see *In re Allen* (1959) 52 Cal.2d 762, 768 [plaintiff attorney's conviction for soliciting witnesses to commit perjury in civil trial "inherently" called for disbarment].) However, these cases are not directly on point with Field's circumstances because the record does not reveal any criminal convictions for his misconduct. In fact, our research reveals very limited case precedent as to State Bar discipline for prosecutorial misconduct, with the guiding cases imposing discipline ranging from 30 days' to two years' actual suspension.

In *Noland v. State Bar* (1965) 63 Cal.2d 298, a prosecutor committed an act of moral turpitude by attempting to delete potential pro-defense jurors from the jury list to gain an advantage at trials. The Supreme Court imposed a 30-day actual suspension, finding that his misconduct was a "calculated thwarting of objective justice." (*Id.* at p. 303.)

In *Price v. State Bar, supra,* 30 Cal.3d 537, a prosecutor altered evidence presented at a murder trial in order to obtain a conviction. His misconduct involved moral turpitude, and was aggravated when the prosecutor visited the defendant in jail and offered to seek a favorable sentence if the defendant agreed not to appeal the conviction. The prosecutor in *Price* presented significant evidence in mitigation, including lack of a disciplinary record, cooperation, remorse, good character and community works. Although the misconduct was extremely serious, the Supreme Court concluded that the weight of the mitigation militated against disbarment and imposed a two-year actual suspension.

We agree with the hearing judge that Field's misconduct over the 10-year period warrants more severe discipline than that imposed in *Price.* Prosecutors must meet standards of candor and impartiality not demanded of other attorneys. They are held to this elevated standard of conduct because of their "unique function . . . in representing the interests, and in exercising the sovereign power, of the state. [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820.) "The [prosecutor] is the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88.) Although our system of administering criminal justice is adversarial in nature, and prosecutors must be zealous advocates in prosecuting their cases, it cannot be at the cost of justice. (*United States v. Young* (1985) 470 U. S. 1, 7 [". . . while [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones"].) The "ultimate goal [of the criminal justice system] is the ascertainment of the truth, and where furtherance of the adversary system comes in conflict with the ultimate goal, the adversary system must give way to reasonable restraints designed to further that goal." (*In re Ferguson* (1971) 5 Cal.3d 525, 532.)

We find that Field lost sight of this goal when he prosecuted the four criminal cases examined here. And in doing so, he disregarded the foundation from which any prosecutor's authority flows – "The first, best, and most effective shield against injustice for an individual accused . . . must be found . . . in the integrity of the prosecutor." (Corrigan, *Commentary on Prosecutorial Ethics* (1985) 13 Hastings Const.

L.Q. 537.) Field's misconduct began shortly after his admission to the bar, involved moral turpitude, spanned a 10-year period and significantly affected the criminal justice system. A narrow reading of his discovery obligations, coupled with the desire to convict, blurred his understanding of a prosecutor's special duty to promote justice and seek the truth. Although we recognize that not every violation of the law regarding discovery and argument merits discipline, in the criminal cases before us Field was not candid and truthful in his dealings with the superior court, counsel and the defendants. His intentional violation of the law deprived criminal defendants of important rights. We consider Field's misconduct related to the discovery violations to be the most serious. When prosecutors act dishonestly or unilaterally decide that evidence favorable to the defense should be withheld, the accused is endangered, the case is damaged and public confidence is lost.

In the final analysis, however, the determination of attorney disciplinary sanctions must turn on a consideration of all factors in the case. (*Codiga v. State Bar* (1978) 20 Cal.3d 788, 796.) The hearing judge found compelling the un-rebutted mitigation testimony of 36 character witnesses. These findings must be given great weight "because the hearing judge heard and saw the witnesses and observed their demeanor. [Citations.]" (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 315; see also Rules Proc. of State Bar, rule 305(a); *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1055.) Recognizing that the hearing judge is in the best position to assign the proper weight to this evidence, and upon our own reading of the record, we concur that the mitigation was compelling.

[12] While Field's misconduct was serious, like the hearing judge, we do not recommend disbarment in view of his mitigation and the lesser discipline imposed in similar cases. Rather, after balancing all of the relevant circumstances, we believe that the goals of attorney discipline and prosecutorial accountability will be met by recommending a four-year actual suspension, which is basically the longest period to recommend short of disbarment.[16] We also recommend that Field be suspended from the practice of law for five years, stayed, and placed on a five-year probation period. And finally, we recommend that after serving his actual suspension, Field be reinstated to practice law only if he establishes before the State Bar Court his rehabilitation, fitness to practice, and learning and ability in the law, as required in a standard 1.4(c)(ii) proceeding. Although Field acknowledged at trial that he would do things differently now, we find this to be only a first step on the road to proving rehabilitation from the serious misconduct that he committed.

VIII. RECOMMENDATION

We recommend that Benjamin T. Field be suspended from the practice of law in the State of California for five years, that execution of that suspension be stayed, and that he be placed on probation for five years on the following conditions:

1. He must be suspended from the practice of law for a minimum of the first four years of the period of his probation, and he will remain suspended until the following requirement is met:

    a. He must provide proof to the State Bar Court of rehabilitation, fitness to practice and learning and ability in the general law before suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)

2. He must comply with the provisions of the State Bar Act and the Rules of Professional Conduct.

3. Within 10 days of any change, he must report in writing to the Membership Records Office of the State Bar and the State Bar's Office of Probation, all changes in the informa-

16. A request for reinstatement may be filed five years after the effective date of the disbarment. (Rules Proc. of State Bar, Rule 662(b).)

tion required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes.

4. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

5. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation which are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

6. Within one year of the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

7. 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 period of probation, if he has complied with all conditions of probation, the five-year period of stayed suspension will be satisfied and that suspension will be terminated.

IX. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Field be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of actual suspension imposed in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

X. RULE 9.20

We further recommend that Field be ordered to comply with rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, from the effective date of the Supreme Court order. Failure to do so may result in disbarment or suspension.

XI. COSTS

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

We concur:

REMKE, P. J.
EPSTEIN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

HAROLD VINCENT SULLIVAN II

A Member of the State Bar

No. 08-C-12029

Filed August 12, 2010

SUMMARY

Respondent entered a plea to the criminal offense of conspiracy to obstruct justice, a misdemeanor involving moral turpitude per se. The hearing judge found that respondent's criminal misconduct was aggravated by his three prior records of discipline, and by uncharged misconduct of failing to report his criminal conviction to the State Bar. In mitigation, the hearing judge found that respondent had consistently performed pro bono services for the public. The hearing judge recommended respondent be disbarred. (Hon. Richard A. Honn, Hearing Judge.)

The review department found the same aggravating and mitigating factors as the hearing judge, and additionally found in aggravation that respondent lacked insight into his misconduct. The review department also assigned modest weight in mitigation to respondent's pro bono work, which was established only by his own testimony. Applying standards 3.2 and 1.7(b), the review department also recommended respondent be disbarred.

COUNSEL FOR PARTIES

For State Bar: Michael J. Glass

For Respondent: David A. Clare

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **1518 Substantive Issues in Conviction Proceedings—Moral Turpitude —Administration of Justice Offenses (contempt, perjury, etc.)**
1521 Substantive Issues in Conviction Proceedings—Moral Turpitude —Found to Exist Per Se
Respondent's conviction for a crime involving conspiracy to obstruct justice was a serious offense involving moral turpitude per se.

[2] **765.31 Mitigation—Substantial Pro Bono Work—Insufficient Evidence**
Respondent performed pro bono legal work for a few hours each week during much of his legal career. Where respondent offered only his own testimony to establish this pro bono activity, only modest weight was afforded to this mitigation evidence.

[3 a,b] **214.50 State Bar Act Violations—Section 6068(o) (comply with reporting requirements)**
561 Aggravation—Uncharged violations—Found
Respondent was required to report to the State Bar his criminal charges and conviction both under section 6068(o)(4) and (5), and under disciplinary probation conditions specifically requiring him to comply with the State Bar Act. His failure to report these charges and conviction was considered in aggravation as serious uncharged misconduct. By failing to report, respondent impeded the disciplinary process. The State Bar was not informed of respondent's criminal conduct when it made recommendations to the Supreme Court in two of his previous disciplinary matters, and the Supreme Court was also unaware of his conviction when it imposed discipline in those cases.

[4 a,b] **806.10 Application of Standards—Standard 1.7(b) (Disbarment after two priors) —Applied**
1552.10 Application of Standards—Standard 3.2 (Moral Turpitude) —Applied—Disbarment
Disbarment was appropriate where respondent was convicted of conspiracy to obstruct justice, a serious offense of moral turpitude, he did not report this conviction to the State Bar, and he did not prove compelling mitigation. If this conviction had marred an otherwise discipline-free record, disbarment would not necessarily be warranted, but respondent's prior record of discipline reveals his criminal misconduct was not an isolated incident, and also triggered analysis under standard 1.7(b).

[5 a,b] **806.10 Application of Standards—Standard 1.7(b) (Disbarment after two priors) —Applied**
Common threads or patterns of misconduct are not requirements for disbarment under standard 1.7(b), but are simply possible issues to consider along with several other factors. As the standard provides, the critical issue is whether compelling mitigating circumstances predominate to warrant an exception to the severe penalty of disbarment. Even absent compelling mitigation, the Supreme Court has not always ordered disbarment; rather, all facts and circumstances of a case must be considered to determine the discipline to impose.

[6] **806.10 Application of Standards—Standard 1.7(b) (Disbarment after two priors) —Applied**
1552.10 Application of Standards—Standard 3.2 (Moral Turpitude)—Applied —Disbarment
1610 Discipline Imposed—Disbarment
Disbarment was warranted and necessary where attorney failed to meet professional obligations for over two decades in four disciplinary cases. In the first three cases, respondent performed incompetently, and in fourth case, which occurred between his first and second discipline, he was convicted of a crime of moral turpitude that he never reported. Disbarment was recommended under standards 3.2. and 1.7(b), because overall, respondent demonstrated pervasive carelessness towards compliance with ethical rules, and appeared unwilling or unable to conform his behavior to the rules of professional conduct.

ADDITIONAL ANALYSIS

Aggravation
Found but discounted or not relied on
511 Prior record of discipline
621 Lack of remorse/failure to appreciate seriousness
Discipline
1610 Disbarment
Other
2311 Inactive Enrollment afterr Disbarment Recommendation

OPINION

PURCELL, J.:

I. SUMMARY

In his fourth disciplinary proceeding, respondent Harold Vincent Sullivan II requests review of a hearing judge's recommendation that he be disbarred. In 1999, Sullivan entered a plea to conspiracy to obstruct justice, a misdemeanor involving moral turpitude per se. He never reported the criminal charges or conviction to the State Bar. After Sullivan's conviction was transmitted to us, we referred it to the hearing department to recommend the appropriate discipline. The hearing judge found that Sullivan's misconduct was significantly aggravated because he has three prior records of discipline and he failed to report the charges and conviction to the State Bar. In recommending disbarment, the hearing judge applied two standards that call for disbarment absent compelling mitigation: standard 3.2 for criminal convictions involving moral turpitude and standard 1.7(b) for two or more records of discipline.[1] The State Bar Office of the Chief Trial Counsel (State Bar) did not seek review and supports the hearing judge's decision.

Sullivan contends that disbarment is too harsh and standard 1.7(b) should not apply because there is no common thread or repeated misconduct in each of his disciplines. Sullivan urges us to assign more mitigation credit to his pro bono work, apply less weight to his records of discipline and recommend an actual suspension equal to the time he has been on interim suspension. The primary issue before us is whether standard 1.7(b) requires a common thread or repetitive pattern of misconduct in Sullivan's four discipline records. We conclude it does not, and recommend that Sullivan be disbarred under standards 3.2 and 1.7(b), given his moral turpitude criminal conviction, his extensive disciplinary record and his failure to prove compelling mitigation.

II. PROCEDURAL HISTORY

Sullivan was admitted to practice law in California in 1967. He was disciplined three times for violating the Rules of Professional Conduct[2] and the State Bar Act[3] for misconduct that began in 1988. Sullivan was first disciplined in 1997. While on probation in that case, and with a second disciplinary matter pending, Sullivan pled no contest in 1999 to conspiracy to obstruct justice, the misdemeanor conviction matter before us. He did not report the charges or conviction to the State Bar. In 2000, Sullivan received his second discipline. Then in 2002, while on probation in that matter, he was disciplined a third time. Sullivan has been on interim suspension since July 7, 2008, as a result of his conviction. (§ 6102, subd. (a).)

III. SULLIVAN'S CRIMINAL CONVICTION

A. FACTS AND CIRCUMSTANCES SURROUNDING THE CONVICTION

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we find that the following facts were proved by clear and convincing evidence. In 1995, Sullivan entered into a business relationship with Faina Bash, the owner/ operator of MGB Legal Service (MGB). Sullivan paid MGB $5,000 per month to market his practice to the Russian community in Los Angeles and to provide him with a secretary and a translator.

Sullivan represented Jose Hermasillo, whose child was killed in a hit-and-run accident. After the case settled, Sullivan issued a check for $10,000 to MGB from the Hermasillo client trust account (CTA). He testified that he owed MGB that amount for two months of services, and denied that MGB had referred the Hermasillo case to him.

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1. Unless otherwise noted, all further references to "standard(s)" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

2. Unless otherwise noted, all further references to rule(s)" are to the Rules of Professional Conduct of the State Bar.

3. Business and Professions Code, section 6000 et seq. Unless otherwise noted, all further references to "section(s)" are to the Business and Professions Code.

In August 1998, the Los Angeles District Attorney's Office filed a criminal complaint against Sullivan and Bash as co-defendants in a "capping" conspiracy, alleging that Sullivan paid Bash for referring clients to him. The District Attorney claimed that the $10,000 payment from the Hermasillo settlement was the overt act needed for the conspiracy charge.

Sullivan and Bash were each charged with three felony counts: (1) conspiracy to commit a crime (Pen. Code § 182, subd. (a)(1)); (2) capping (Ins. Code § 750, subd. (a)); and (3) conspiracy to commit an act injurious to the public or to obstruct justice. (Pen. Code § 182, subd. (a)(5).) On April 12, 1999, Sullivan pled no contest to count three as a misdemeanor and Bash pled no contest to count two as a misdemeanor.[4] Sullivan claims that he entered his plea only to save money, not because he believed his dealings with Bash were illegal. But the superior court judge plainly told Sullivan and Bash that their pleas related to the fee that Sullivan paid Bash for referring the Hermasillo matter.

Sullivan contends that he was not required to report either the felony charges or the misdemeanor conviction to the State Bar. He testified: "I didn't think I had to. It was a misdemeanor and a nolo contendere plea and I didn't think I did anything wrong . . . [The District Attorney] said just plead to the general conspiracy type thing which obstruction of justice really doesn't mean anything." Sullivan claims that he did not consider his misdemeanor conviction as a criminal record and merely followed his attorney's advice to report only felony convictions to the State Bar.

B. THE CONVICTION INVOLVED MORAL TURPITUDE PER SE

[1] Sullivan was convicted of violating Penal Code section 182, subdivision (a)(5), a conspiracy "[t]o commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws." Conspiracy to obstruct justice is a serious crime involving moral turpitude per se. (*In re Craig* (1938) 12 Cal.2d 93, 97 ["no doubt that the offense of conspiring to corruptly influence, obstruct, impede, hinder and embarrass the due administration of justice . . . falls easily within the definition of 'moral turpitude.' "].) Sullivan's conviction is conclusive evidence of his guilt. (*In re Utz* (1989) 48 Cal.3d 468, 480 [record of conviction is conclusive evidence of guilt that attorney cannot collaterally attack in discipline proceedings].) He was sentenced to 36 months' probation, one day in jail, $100 restitution and a $4,000 fine and penalty assessment. Other than failing to report the charges and conviction to the State Bar, Sullivan successfully completed his criminal probation.

IV. AGGRAVATION AND MITIGATION

The offering party bears the burden of proving aggravating and mitigating circumstances. Sullivan must establish mitigation by clear and convincing evidence (std. 1.2(e)), and the State Bar must prove aggravation by the same standard. (Std. 1.2(b).)

A. ONE FACTOR IN MITIGATION

[2] We agree with the hearing judge that Sullivan proved one factor in mitigation for performing pro bono work. For a few hours a week during much of his career, he advised and represented clients who could not afford legal services in immigration, business and small claims cases. However, Sullivan offered only his own testimony to establish these efforts. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [pro bono and community service as mitigating factor].) We therefore assign only modest weight to this mitigation evidence. (*In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 840 [limited mitigation weight for community service established only by respondent's testimony].) We reject Sullivan's request for mitigation credit for severing ties with Bash after the criminal charges were filed and for downsizing his office and caseload before his first discipline. He is not entitled to

4. Both Sullivan and Bash entered their pleas pursuant to People v. West (1970) 3 Cal.3d 595 (where no contest plea is not admission of guilt but agreement to be punished as if guilty).

mitigation merely for lawfully operating his practice, and he already received credit in prior disciplinary actions for improving his office management.

B. THREE FACTORS IN AGGRAVATION

The hearing judge found two factors in aggravation – Sullivan's record of prior discipline (std. 1.2(b)(1)) and uncharged misconduct for failing to report the criminal charges and conviction. (Std. 1.2(b)(iii); *Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36.) We agree, but also find a third aggravating factor in that Sullivan lacks insight into his misconduct. (Std. 1.2(b)(v).)

1. Sullivan Has Three Prior Discipline Cases

Sullivan has an extensive record of discipline. For more than a decade, he operated a lax office management system that caused case dismissals, settlement disbursement delays, client communication failures and trust account violations. Sullivan harmed at least nine clients from 1988 to 2000. We assign great aggravating weight to his prior record.

The First Discipline – 1997 (Supreme Court Case number S060193)

This discipline covers misconduct from 1988 through 1993 in five client matters. (*In the Matter of Sullivan* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 608.) During this time, Sullivan did not properly supervise a secretary who threw away or hid documents in several cases, and he failed to periodically review his files to discover the missing items. He was found culpable of failing to: (1) perform competently, (2) apprise clients of case status, and (3) return a file. In aggravation, Sullivan caused harm to clients whose cases were dismissed because he failed to appear in court. In mitigation, he was credited for practicing law for 21 years without discipline, correcting flaws in his case management system, acknowledging responsibility for his wrongdoing and downsizing his practice before the State Bar contacted him. Sullivan received a 60-day actual suspension subject to a one-year stayed suspension and three years of probation.

The Second Discipline – 2000 (Supreme Court Case number S089249)

This discipline covers misconduct from 1990 to 1991 in one matter involving three clients. Sullivan stipulated to culpability for performing incompetently when a case was dismissed because he missed several court appearances. He also failed to respond to client status inquiries. In aggravation, Sullivan had a prior record of discipline and caused harm to his clients. In mitigation, the secretary who mishandled documents in the first disciplinary matter also worked on this case, Sullivan was distracted by his own divorce proceedings, and he was again credited for downsizing his office. Sullivan received a one-year stayed suspension and two years of probation.

The Third Discipline – 2002 (Supreme Court Case number S108822)

This discipline covers misconduct from 1996 to 2000 involving three clients. Sullivan stipulated to culpability for performing incompetently and committing trust account violations by: (1) failing to supervise an attorney employee who issued three insufficiently funded checks from his CTAs, (2) failing to properly deposit or disburse settlement funds, (3) failing to promptly pay a medical provider, and (4) failing to supervise office staff regarding settlement paperwork. In aggravation, Sullivan had a prior record of discipline. No mitigating factors were present. Sullivan received a 75-day actual suspension subject to an 18-month stayed suspension and two years of probation.

2. Sullivan Did Not Report the Criminal Charges or Conviction

[3a] The State Bar Act mandates that criminal charges and convictions be reported to the State Bar within 30 days. (§ 6068, subd. (o)(4) and (5) [State Bar Act]; *In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 65, fn. 3 [preexisting duty under State Bar Act to report misdemeanor conviction within 30 days after no contest plea].) And Sullivan's disciplinary probation conditions specifically required that he comply with

the State Bar Act. Yet he failed to report his criminal charges and conviction, which is serious uncharged misconduct. (Std. 1.2(b)(iii).) Since the directives to report were clear, we reject Sullivan's explanation that he did not know he had to do so. (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 937 ["serious act of misconduct" of failing to notify State Bar not excused by ignorance of rule requiring notification].)

[3b] By failing to report, Sullivan impeded the disciplinary process. The State Bar Court was not informed of his 1999 conviction when it made recommendations to the Supreme Court for Sullivan's second and third discipline cases in 2000 and 2002, respectively. Similarly, the Supreme Court was unaware of the conviction when it imposed discipline in those cases. Under these circumstances, we assign heavy aggravating weight to this uncharged misconduct.

3. Sullivan Lacks Insight into Misconduct

Sullivan lacks "a full understanding of the seriousness of his misconduct," which is an additional and troubling aggravating factor. (*In the Matter of Duxbury, supra,* 4 Cal. State Bar Ct. Rptr. at p. 68.) He downplayed his misconduct when he testified that the conviction "really doesn't mean anything." Clearly, he does not recognize his professional and ethical duties to comply with the law.

Overall, the evidence in aggravation substantially outweighs the limited mitigation evidence of pro bono work.

V. LEVEL OF DISCIPLINE –DISBARMENT UNDER STANDARDS 3.2 AND 1.7(B)

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts and the legal profession, to maintain high standards for attorneys and to preserve public confidence in the profession. (Std. 1.3.) Ultimately, we balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that discipline is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.)

We begin our analysis by looking to the standards. The Supreme Court has instructed us to give the standards great weight and follow them "whenever possible," even though they are not mandatory. (*In re Young, supra,* 49 Cal.3d at p. 267, fn. 11.; see *In re Silverton* (2005) 36 Cal.4th 81, 91 [stds. promote "consistent and uniform application of disciplinary measures"].)

Standards 3.2 and 1.7(b) apply here and the presumptive discipline for each is disbarment. Standard 3.2 instructs that an attorney who is convicted of a crime of moral turpitude shall be disbarred unless the most compelling mitigating circumstances clearly predominate, in which case at least a two-year actual suspension shall be imposed. Likewise, standard 1.7(b) provides for disbarment where an attorney is culpable of professional misconduct and has a record of two prior disciplines, unless the most compelling mitigating circumstances clearly predominate. Both standards call for Sullivan's disbarment.

A. SULLIVAN'S CRIMINAL CONVICTION UNDER STANDARD 3.2

[4a] Disbarment is appropriate under standard 3.2 because Sullivan's conviction for conspiracy to obstruct justice is a serious offense of moral turpitude, and he did not prove compelling mitigation. (See *In re Craig, supra,* 12 Cal.2d at p. 97; see also *In re Crooks* (1990) 51 Cal.3d 1090, 1101 [disbarment is rule rather than exception following conviction of serious crime of moral turpitude].) Further, Sullivan's actions after his conviction cause great concern about his attitude toward his professional obligations, including his responsibilities to the State Bar. Sullivan's conviction and failure to report justify applying standard 3.2 which, standing alone, merits his disbarment.

[4b] We do not agree with Sullivan's contention that his criminal conduct was an isolated incident of capping that does not warrant disbarment. If his conviction marred an otherwise discipline-free record, we might not recommend disbarment. (*In the Matter of Duxbury, supra,* 4 Cal. State Bar Ct. Rptr. 61 [six-month actual suspension for misdemeanor capping conviction involving moral turpitude and no previous discipline].) But Sullivan's prior record reveals that his present misconduct is not a solitary incident and it triggers our analysis under standard 1.7(b).

B. SULLIVAN'S PRIOR DISCIPLINE RECORD UNDER STANDARD 1.7(B)

Sullivan should be disbarred under standard 1.7(b). He has three prior records of discipline, and his pro bono work, while commendable, does not establish mitigation compelling enough to preponderate over the strong aggravation evidence. Even if Sullivan's first two discipline cases were consolidated because the misconduct occurred during the same time period, standard 1.7(b) still applies because the criminal conviction before us would then be his third discipline.

[5a] Sullivan contends that we should not apply standard 1.7(b) unless all of his discipline records demonstrate a "common thread" or "repeated finding of culpability of the same offense." We reject this contention. Such patterns of misconduct are not *requirements* for disbarment under standard 1.7(b), but are simply possible issues to consider. In fact, the Supreme Court has considered several factors other than a pattern of misconduct in deciding whether to apply standard 1.7(b). (See, e.g., *Morgan v. State Bar* (1990) 51 Cal.3d 598, 607 [pattern of misconduct, indifference to disciplinary orders and no compelling mitigation considered in applying std. 1.7(b)]; *Morales v. State Bar* (1988) 44 Cal.3d 1037, 1048 [lack of remorse and no compelling mitigation considered in applying std. 1.7(b)].)

[5b] As the standard provides, the critical issue is whether compelling mitigating circumstances clearly predominate to warrant an exception to the severe penalty of disbarment. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 113 [disbarment under std. 1.7(b) imposed where no compelling mitigation]; compare *Arm v. State Bar* (1990) 50 Cal. 3d 763, 778-779, 781 [disbarment under std. 1.7(b) not imposed where compelling mitigation included lack of harm and no bad faith].) Yet even where compelling mitigation is absent, the Supreme Court has not always ordered disbarment. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-508 [one-year actual suspension even though no compelling mitigation in std. 1.7(b) case].) Instead, the Supreme Court considers all relevant facts and circumstances of a case to determine the discipline to impose. (See *In re Young, supra,* 49 Cal.3d at p. 267, fn 11 [stds. not required to be strictly followed in every case].) Guided by these considerations, we examine the nature and chronology of prior discipline records in standard 1.7(b) cases, recognizing that "[m]erely declaring that an attorney has [two prior] impositions of discipline, without more analysis, may not adequately justify disbarment in every case." (*In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136.)

[6] In view of the factors unique to this case, disbarment is warranted and necessary to protect the public, the courts and the legal profession. Sullivan did not present compelling mitigation and has failed to meet his professional obligations for over two decades in four disciplinary cases. In his first three cases, he performed incompetently and in the present case, although it occurred between his first and second discipline, he was convicted of a crime of moral turpitude that he never reported. Overall, Sullivan has demonstrated "pervasive carelessness" toward his practice and compliance with ethical rules since 1988. (*Palomo v. State Bar* (1984) 36 Cal.3d 785, 796). Consequently, it appears that he is either "unwilling or unable" to conform his behavior to the rules of professional conduct. (*Barnum v. State Bar, supra,* 52 Cal.3d at p. 111.) Under both standards 3.2 and 1.7(b), we recommend that Sullivan be disbarred.

VI. RECOMMENDATION

We recommend that Harold Vincent Sullivan II be disbarred from the practice of law in California and that his name be stricken from the roll of attorneys.

We further recommend that he be required to comply with the provisions of rule 9.20 of the California Rules of Court and to perform the acts specified in subdivision (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court's order in this case.

We further recommend that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10, and such costs are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VII. ORDER

The hearing judge's order that Harold Vincent Sullivan be enrolled as an inactive member of the State Bar under Business and Professions Code section 6007, subdivision (c)(4), shall continue in effect, pending the Supreme Court's decision in this case.

We concur:

REMKE, P. J.
EPSTEIN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

MARIE DARLENE ALLEN

A Member of the State Bar

No. 06-O-13329

Filed November 19, 2010

SUMMARY

Respondent was charged with one count of misconduct related to her purchase of a residential duplex from her longtime friend and occasional client. The hearing judge found that respondent did not engage in an improper business transaction with a client in violation of rule 3-300, because there was insufficient evidence respondent acted within an attorney/client relationship when she entered into the agreement to purchase the duplex. The hearing judge ordered the Notice of Disciplinary Charges (NDC) dismissed with prejudice. (Hon. Richard A. Honn, Hearing Judge.)

The review department considered the findings in a civil action relating to the sale of the duplex, concluded the issues in the civil matter bore a strong similarity to the charged disciplinary conduct, and found substantial evidence supported the findings. The review department found no violation of rule 3-300, because at the time of the sale there was no attorney/client relationship, respondent did not exercise undue influence over her friend and their prior attorney/client relationship gave respondent no advantage in the sale transaction. The review department affirmed the order dismissing the NDC with prejudice.

COUNSEL FOR PARTIES

For State Bar: Hugh G. Radigan

For Respondent: Marie D. Allen

HEADNOTES

[1] **162.11 Standards of Proof/Standards of Review—Clear and convincing standard**
The burden is on the State Bar to prove misconduct by clear and convincing evidence. This showing requires evidence so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2] **130 Procedure on Review**
Review department would not consider exhibits not admitted into evidence by Hearing Judge, or portions of briefs relying on or referencing those exhibits.

[3] **191 Miscellaneous General Issues in State Bar Court Proceedings—Effect of/ Relationship to Other Proceedings**
While the purpose of a civil proceeding differs from that of a disciplinary matter, review department considers findings in civil matter, which are entitled to a strong presumption of validity, where issues in civil matter bear a strong similarity or identity to charged disciplinary conduct.

[4] **191 Miscellaneous General Issues in State Bar Court Proceedings—Effect of/ Relationship to Other Proceedings**
Issues presented in civil matter bore strong identity with issues in disciplinary matter where the civil lawsuit involved the same sales transaction that was the focus of the disciplinary proceeding, an expert witness testified about the nature of the attorney/client relationship and its ramifications on sale in question, the jury considered the same facts contained in the stipulation in the disciplinary matter, and the jury found in favor of the respondent. Further, the jury's findings, which were made under the preponderance of the evidence standard, were supported by substantial evidence.

[5] **191 Miscellaneous General Issues in State Bar Court Proceedings—Effect of/ Relationship to Other Proceedings**
There is no reason to preclude the use of civil findings merely because they are exculpatory of a respondent. To conclude otherwise would give the State Bar an unfair advantage, allowing it to use prior civil findings that are adverse to respondents in establishing culpability, while precluding those same respondents from relying on prior civil findings that help them defend against disciplinary charges.

[6 a,b,c] **273.00 Rules of Professional Conduct Violations—Improper transaction with client (RPC 3-300; 1975 RPC 5-101)**
No attorney/client relationship existed between respondent and her friend at the time respondent purchased duplex from her. The duration of an attorney/client relationship is dependent on the nature and scope of the relationship. Respondent had previously informally represented the friend in four minor matters, but these matters had no relationship to the purchase of the duplex and respondent did not obtain confidential or financial information during the earlier representation that she used in subsequent negotiations. Moreover, almost two and a half years elapsed between the services provided and the purchase of the duplex. The State Bar also provided insufficient evidence that the attorney/client relationship was resurrected at the time of the sale, and the review department afforded a presumption of validity to the findings in a civil matter that no attorney/client relationship existed during the negotiation and sale of the duplex and no legal services were provided at that time.

[7] **273.00 Rules of Professional Conduct Violations—Improper transaction with client (RPC 3-300; 1975 RPC 5-101)**
Rule 3-300 does not apply to a former client where, during transaction in question, respondent did not exercise undue influence over former client regarding the purchase agreement and their prior attorney/client relationship did not give respondent any advantage over former client.

[8 a,b,c] 273.00 Rules of Professional Conduct Violations—Improper transaction with client (RPC 3-300; 1975 RPC 5-101)

In limited circumstances, rule 3-300 may apply to transactions between attorneys and former clients involving the fruits of the attorney's representation, if there is evidence that the client placed his trust in the attorney because of that representation. But, the Supreme Court has not been inclined to dramatically extend the definition of an attorney/client relationship beyond its common understanding. Whether an attorney/client relationship exists is a question of law.

ADDITIONAL ANALYSIS

Culpability

Not Found

273.05 Improper transaction with client (RPC 3-300; 1975 RPC 5-101)

Other

133 Award of Costs to Exonerated Respondent

OPINION

EPSTEIN, J.:

The Office of the Chief Trial Counsel (OCTC) of the State Bar is appealing the hearing judge's dismissal of a Notice of Disciplinary Charge (NDC) charging respondent, Marie Darlene Allen, with a single count of misconduct due to her purchase of a residential duplex from a longtime friend and occasional client, Supara Ratanasadudi (Supara). The hearing judge found that the State Bar failed to establish that Allen willfully violated Rules of Professional Conduct, rule 3-300,[1] which governs business transactions with clients, because it did not present clear and convincing evidence that Allen was acting within an attorney/client relationship at the time she entered into the agreement to purchase the duplex. Based on our de novo review of the record (Cal. Rules of Court, rule 9.12), we agree that the State Bar did not meet its evidentiary burden, and we affirm the hearing judge's dismissal of this matter with prejudice.

I. EVIDENTIARY BURDEN

[1] The parties submitted the issue of culpability based on an extensive Stipulation as to Facts, filed on April 29, 2009, as modified in June 2009 (Stipulation).[2] The burden is on the State Bar to prove misconduct by clear and convincing evidence. (Rules Proc. of State Bar, rule 213.) This showing requires that the evidence must be " 'so clear as to leave no substantial doubt' " and " 'sufficiently strong to command the unhesitating assent of every reasonable mind.' " (*Sheehan v. Sullivan* (1899) 126 Cal. 189, 193.) Moreover, we resolve all reasonable doubts in Allen's favor, and when equally reasonable inferences may be drawn from the stipulated facts, we accept those inferences that lead to a conclusion of innocence. (*Young v. State Bar* (1990) 50 Cal.3d 1204, 1216.)

II. PROCEDURAL AND FACTUAL HISTORY

The facts in this matter are set forth with particularity in the Stipulation and are accurately recited in the hearing judge's decision filed on December 22, 2009. We adopt the hearing judge's factual findings, and summarize below those facts which are pertinent to our analysis.

Allen was admitted to the practice of law on December 12, 1988, and has been a member of the State Bar of California since that time. She has no prior record of discipline in more than 21-years of practice, which is primarily in the areas of real estate and family law.

Allen and Supara met in 1997 or 1998, and developed a close personal relationship. Allen provided occasional legal services to Supara between July 1999 and October 2002. In 1999, Allen prepared a grant deed and change of ownership for a timeshare owned by Supara in Big Bear Lake, California. Also in 1999, she prepared a land sales contract for Supara for property in Lakewood, California. In early 2002, Allen drafted two letters to the purchasers of the Lakewood property and their attorney. She also prepared two notices to pay rent or quit, and reviewed the Lakewood property escrow instructions and communications from the purchasers' attorney. Later, in October 2002, Allen drafted a memorandum of agreement for property owned by Supara at Leisure World, and she consulted with Supara about enforcement of a judgment against an entity that later filed for bankruptcy. In each of these instances, Allen's services were limited to a specific matter. There was no retainer agreement between Supara and Allen, and Allen did not issue formal billing statements. In fact, Allen received modest compensation for her services. On one occasion, Allen was paid $150 in cash, and in other instances, Supara paid for dinner or arranged for discounted lodging for Allen at various Hilton Hotels. Allen provided no other legal services to Supara between October 2002 and February 2005, although their friendship continued.

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1. All further references to "rule(s)" are to the Rules of Professional Conduct unless otherwise noted.

2. In addition to the Stipulation, Allen submitted five other exhibits that were admitted into evidence by the Hearing Judge. The State Bar submitted no evidence other than the Stipulation.

[2] In its Opening Brief and Rebuttal Brief on review, the State Bar refers to various exhibits that were not admitted. The court has not considered these exhibits or those portions of the State Bar's briefs that rely on or reference these exhibits. (Rules Proc. of State Bar, rule 306(a).)

In 2004, Supara vacated a duplex she owned in Long Beach, California, when she moved to Leisure World. She initially listed the duplex for sale for $789,000 and then reduced the price to $735,000. But the duplex still did not sell and the listing expired in September 2004. Supara knew that Allen's daughter suffered from multiple sclerosis and wanted to move from Vermont to California to be closer to Allen. With this in mind, in February 2005, Supara offered to sell the duplex to Allen for $700,000 and to finance the entire transaction. Allen agreed to the proposal and on March 7, 2005, they signed a purchase agreement which was a pre-printed form that was chosen by Allen (Purchase Agreement). At Allen's suggestion, the arbitration clause was deleted on the form.

The duplex had a problem tenant in one of the units, so after discussion with Supra, Allen prepared three notices to pay rent or vacate the premises and had them served on the tenant on April 7th and 8th and May 3rd. The State Bar and Allen stipulated that these "instruments were prepared by [Allen] on behalf of Supara." However, the Stipulation also stated that Allen's purpose in preparing the notices was "to facilitate both the removal of a problem tenant and to allow [Allen's] daughter to occupy the premises."

In late April 2005, Supara asked Allen to attend a meeting with Supara's accountant to discuss the tax consequences of the transaction, including the feasibility of an Internal Revenue Code Section 1031 like-kind exchange of the property for Supara. At that meeting, Supara introduced Allen to her accountant as her "friend" and "attorney." Allen did not repudiate this description of herself. Allen and Supara each paid one-half of the accountant's fee. After this meeting, the terms of the deal changed on several occasions. Supara suggested most of the changes, which were favorable to her, including the obligation of Allen to obtain financing. Both parties agreed to extend escrow beyond the contemplated closing date of April 30, 2005, so that Allen could obtain financing and Supara could locate a property for a 1031 like-kind exchange.

On June 1, 2005, the parties signed an "interim occupancy agreement pending close of escrow" allowing Allen to assume management of the premises as well as responsibility for repair and alterations without notice to Supara. Allen repainted, installed new carpet, bathroom flooring, wallboard and tile, replaced windows and kitchen cabinets, made repairs to the stucco and rewired the electrical system.[3] Allen's daughter and her family moved into the duplex in July 2005. Allen was unsuccessful at obtaining financing, but believing she had secured an ownership interest in the duplex under the Purchase Agreement, Allen listed the property for sale for $959,000 without notifying Supara. On April 3, 2006, shortly after the duplex was listed, Allen accepted a written offer of $895,000, subject to the close of escrow of the sale between Allen and Supara. When Supara learned about the sale on April 5, 2006, she instructed the escrow agent to stop the sale and cancel the joint escrow.

Two days later, on April 7th, Allen sued Supara for breach of contract and specific performance in Los Angeles County Superior Court (*Allen v. Ratanasadudi* lawsuit). Supara cross-complained for breach of fiduciary duty and fraud. After a 15-day trial, the jury found for Allen and against Supara, and made the following specific findings in its Special Verdict: (1) at the time of the negotiation and sale of the duplex, an attorney/client relationship did not exist between Allen and Supara; (2) at the time of the negotiation and sale of the duplex, Allen was not providing legal services for Supara; (3) Allen's prior attorney/client relationship with Supara did not cause her to have influence or to obtain any advantage over Supara at the time of the negotiations and purchase of the duplex; and (4) Allen did not exercise undue influence over Supara such that the Purchase Agreement should be unenforceable. The jury awarded Allen $207,000 in damages, plus interest of $20,926.85 and $144,767 in attorneys' fees and costs, for a total award of $372,693.85. Supara appealed to the Court of Appeal, which affirmed the judgment due to Supara's failure to designate the record on appeal.

3. The value of these repairs and alterations was about $53,000, according to Allen's expert who testified in the *Allen v. Ratanasadudi* lawsuit, which we discuss *post*.

On September 24, 2008, the State Bar filed the NDC against Allen for one count of violating rule 3-300 by her negotiation and purchase of the duplex. Rule 3-300 provides that "[a] member shall not enter into a business transaction with a client" unless certain requirements have been satisfied.[4]

In August 2009, the parties agreed to have the matter adjudicated as to Allen's culpability based upon the Stipulation. After briefing by the parties, the hearing judge filed his decision and order on December 22, 2009, dismissing this case for lack of proof.

III. JURY'S FINDINGS IN *ALLEN V. RATANASADUDI*

[3] In reaching our conclusion, we have considered the findings contained in the jury's Special Verdict in the *Allen v. Ratanasadudi* lawsuit, which are entitled to a strong presumption of validity.[5] (*In the Matter of Scott* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 446, 455 [civil verdicts, judgments and findings entitled to strong presumption of validity].) We recognize that the purpose of a civil proceeding is different from a disciplinary matter. (*In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 117.) "However, civil matters do arise which bear a strong similarity, if not identity, to the charged disciplinary conduct." (*Ibid.*) This is just such an instance.

[4] The *Allen v. Ratanasadudi* lawsuit involved the same sales transaction that is the focus of these disciplinary proceedings. At the civil trial, which lasted 15 days, both Allen and Supara presented expert witnesses who testified about the nature of the attorney/client relationship between them and the ramifications of their relationship to the sale of the duplex. In addition to this expert testimony, the jury considered the same facts that are contained in the Stipulation filed in the instant matter. At the trial's conclusion, the jury found in favor of Allen. Supara moved for a new trial and a judgment notwithstanding the verdict on the specific grounds that Allen did not present substantial evidence in support of the verdict. The trial court denied Supara's motion. We thus find that the issues presented in the *Allen v. Ratanasadudi* matter bear a strong identity with the issues raised here, and that the jury's findings, which were made under a preponderance of the evidence standard, were supported by substantial evidence. (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 948 [civil findings entitled to strong presumption of validity if supported by substantial evidence].)[6]

IV. APPLICABILITY OF RULE 3-300

[6a] The State Bar asserts that "[t]he fundamental issue raised within this request for review is whether, *based upon the stipulated facts submitted*, there existed the requisite attorney/client

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4. Those requirements are that: (A) the transaction and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can reasonably be understood by the client; (B) the client is advised in writing that he or she may seek the advice of an independent lawyer of the client's choice and given a reasonable opportunity to seek that advice; and (C) the client thereafter consents in writing to the terms of the transaction Allen stipulated that she did not advise Supara of these requirements; however, she maintains that she was not required to do so in the absence of an attorney/client relationship

5. The jury's findings were incorporated into the Stipulation.

6. In his decision, the hearing judge did not rely upon the jury's findings because he found they were "irrelevant to any issue" in this proceeding. We disagree and consider the findings to be highly relevant.

[5] We also do not agree with the hearing judge's conclusion that only prior civil findings that are *adverse* to a respondent are entitled to a strong presumption of validity in the State Bar Court. Although prior civil findings are not binding upon us (*In the Matter of Applicant A* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 318, 327), such findings – whether adverse or exculpatory – come to us with a strong presumption of validity if they were made under a preponderance of the evidence test and supported by substantial evidence. (*Id.* at p.325.) We find no authority or sound reason to preclude the use of civil findings merely because they are exculpatory of a respondent. To conclude otherwise would give the State Bar an unfair advantage, allowing it to use prior civil findings that are adverse to respondents in establishing culpability, while precluding those same respondents from relying on prior civil findings that help them defend against disciplinary charges.

relationship and its concomitant inherent influence at the time of the proposal, without which the rule [3-300] has no application." (Italics added.) Simply put, the answer is no.

Nowhere in the Stipulation does it state that in 2005 Allen was acting as Supara's attorney at the time of the purchase of the duplex or that an attorney/client relationship continued past October 2002. The State Bar argues that we may infer from the informal nature of Allen's earlier representation that an attorney/client relationship existed in 2005 when Allen purchased the duplex. It posits that this informality "served only to cloud the extent and duration of the existent attorney/client relationship." Indeed, the State Bar contends that "the mere fact that the parties enjoyed an attorney client relationship at some time prior to this real estate sale transaction proposal, suffices to trigger the application of the rule [3-300]." At oral argument, the State Bar summarized its position, stating that, under rule 3-300, "once a client, always a client."

[6b] We do not agree with this proposition. The duration of an attorney/client relationship is dependent upon the nature and scope of the relationship. (Vapnek et. al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2008) para. 3:29.5, p. 10-11.) In this case, the sporadic legal services that Allen provided between 1999 and 2002 were limited to four minor matters for which Allen received a total of $150, a few dinners and some discounts on hotel rooms. Although each of these matters concerned real property issues, none of them had any relationship to the purchase of the duplex and Allen did not obtain any confidential or financial information during her earlier representation of Supara that was used in the subsequent negotiations. Nor did Allen use any financial or personal information she otherwise learned about Supara through their prior attorney/client relationship. Moreover, almost two and a half years elapsed between the services provided and the purchase of the duplex.

[6c] The State Bar contends that even if the prior relationship ended in 2002, it was "resurrected" in 2005. The State Bar cites to the fact that Allen did not repudiate Supara's introduction of her to the accountant as Supara's attorney as evidence of their attorney/client relationship in 2005. We find this evidence to be inconclusive at best and insufficient to satisfy the clear and convincing standard. The State Bar also cites to Allen's preparation in April and May 2005 of three tenant notices to vacate the premises as evidence of the resurrection of the attorney/client relationship. However, the stipulated facts are in conflict as to whether Allen drafted the three notices on behalf of Supara or herself to facilitate her daughter's occupancy of the duplex. When equally reasonable inferences may be drawn from the stipulated facts, we are obliged to resolve reasonable doubts in Allen's favor. (*Young v. State Bar, supra*, 50 Cal.3d at p. 1216.) More importantly, the competing inferences as to the existence of the attorney/client relationship are outweighed by the presumption of validity we give to the jury's specific findings in the *Allen v. Ratanasadudi* lawsuit that there was no attorney/client relationship between Allen and Supara during the negotiation and sale of the duplex and that no legal services were provided to Supara at that time.

[7] In the alternative, the State Bar seeks to extend rule 3-300 to apply to Supara as a *former* client because "the established long-standing personal friendship and multiple prior attorney/client relations . . . carried with it an ongoing aura of inherent influence associated with the prior history of representation in real property matters." Again, this is rebutted by the specific findings of the jury in *Allen v. Ratanasadudi* that Allen did not exercise undue influence over Supara regarding the Purchase Agreement and that their prior attorney/client relationship did not give Allen any advantage over Supara.

[8a] Furthermore, we do not find support for the State Bar's broad interpretation of rule 3-300, either in its language or in the decisional law. Rule 3-300 imposes restrictions on an attorney's business transactions with a "client." In limited circumstances, the courts have applied rule 3-300 and its predecessor, former rule 5-101, "to a transaction between an attorney and a former client involving the fruits of the attorney's representation, if there is evidence that the client placed his trust in the attorney because of that representation . . . ." (*Hunniecutt v. State Bar* (1988) 44 Cal.3d 362, 372; accord, *Beery v. State Bar* (1987) 43 Cal.3d 802 [attorney solicited investment from former client in precarious venture *before*

final distribution of litigation proceeds]; *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 243 [attorney culpable for solicitation of loan or investment "on the heels" of client's receipt of settlement].) The State Bar's reliance on *In the Matter of Peavey* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 483 in support of its extension of rule 3-300 to former clients is misplaced because in *Peavey* the attorney entered into a business transaction with his client while he was still representing the clients' interests in litigation (*id.* at p. 486), and in a second instance, the attorney entered into a business transaction while the clients were still seeking his assistance and advice in an ongoing relationship. (*Id.* at p. 489.)

[8b] The Supreme Court has not been inclined to "dramatically extend the definition of an 'attorney-client relationship' beyond its common understanding. . . ." (*Hunniecutt v. State Bar, supra,* 44 Cal.3d at p. 372.) We, too, decline to expand the meaning of attorney/client relationship to include Allen's prior representation of Supara.

V. CONCLUSION

[8c] Whether an attorney/client relationship exists is a question of law, although we have considered the evidence adduced in the hearing below in arriving at our legal conclusion. (*Meehan v. Hopps* (1956) 144 Cal.App.2d 284, 287.) In so doing, we conclude that the State Bar did not establish by clear and convincing evidence that Allen and Supara had an attorney/client relationship at the time of the purchase of the duplex, which is an essential element of a rule 3-300 violation. Accordingly, we affirm the order dismissing the NDC with prejudice. Because Marie Darlene Allen has been exonerated of all charges following a judicial determination on the merits, she may, upon the finality of this opinion, file a motion seeking reimbursement for costs as authorized by Business and Professions Code section 6086.10, subdivision (d). (Rules Proc. of State Bar, rule 283.)

We concur:

REMKE, P. J.

PURCELL, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JAMES VINCENT REISS

A Member of the State Bar

[Nos. 09-O-10499, et al.]

Filed October 3, 2012

SUMMARY

The review department upheld a hearing judge's disciplinary recommendation that an attorney be disbarred for ethical misconduct in five client matters. The review department adopted all of the hearing judge's culpability findings which included taking client money by false pretenses, lying to a court and clients about case status, forging a client's signature on a settlement agreement, retaining unearned fees, failing to properly account to clients, writing dishonored checks, improperly making client loans, and failing to cooperate with the State Bar. The review department adopted the hearing judge's finding that the attorney committed multiple acts of misconduct and significantly harmed the administration of justice. It also found that the attorney engaged in a ten-year pattern of dishonesty. It also adopted the finding in mitigation that the attorney cooperated, displayed extraordinary good character, and provided pro bono service.

COUNSEL FOR PARTIES

For State Bar: Cydney T. Batchelor

For Respondent: Michael G. Gerner

HEADNOTES

[1] 221.00 Culpability—State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)

Attorney committed an act involving moral turpitude when he wrote several checks from a personal account to a client when he knew or should have known the bank would not honor them.

[2] 162.20 Standards of Proof/Standards of Review—Respondent's burden in disciplinary matters

An attorney has a duty to present all favorable evidence at his disciplinary trial. Where an attorney did not call witnesses from his bank or provide other documentary evidence to prove dishonored checks he wrote were actually paid, his claim that the checks were ultimately honored was properly rejected.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[3 a,b] **221.00 Culpability—State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)**

Attorney committed acts involving moral turpitude when he orally misrepresented case status to clients and sent them letters that omitted critical information the clients were entitled to know.

[4] **213.90 Culpability—State Bar Act Violations—Section 6068(i) (cooperate in disciplinary proceedings)**

Where attorney did not provide written response to State Bar investigative inquiry but allegedly met with State Bar two months after receiving inquiry, this is not timely cooperation.

[5] **221.00 Culpability—State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)**

Attorney committed act involving moral turpitude when he persuaded a client to pay him $68,500 by falsely stating he had settled the client's defense case for that amount.

[6] **221.00 Culpability—State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)**

Attorney committed act involving moral turpitude when he signed, or caused to be signed, his client's name to a forbearance agreement without the client's knowledge or consent.

[7 a-e] **221.00 Culpability—State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)**

Attorney committed acts involving moral turpitude by issuing five checks when he knew or should have known his account was negative. Since each check was made in an amount equal to his account overdraft protection limit and the account balance was negative when each check was written and presented for payment, the attorney could not reasonably expect his bank would honor any of the checks. Overdraft protection is not a substitute for the proper handling of client money and will not relieve an attorney from unethical conduct that caused the overdraft. Excessive use of overdraft protection is improper in any account for the purpose of covering checks paid to or on behalf of clients. The purpose of overdraft protection is to avoid harm to the client for an occasional shortfall in funds due to bank errors or delay in processing funds.

[8] **531 Aggravation—Pattern of misconduct (standard 1.2(b)(ii))—Found**

Attorney's misconduct evidenced a 10-year pattern of deception for personal gain or to cover up mismanagement of client cases.

[9] **710.35 Mitigation—Long practice with no prior discipline record (interim Standard 1.6(a); 1986 Standard 1.2(e)(i))—Found but discounted or not relied on—Present misconduct too serious**

No mitigation credit for attorney's 13-year discipline-free record because attorney engaged in 10-year pattern of dishonesty and serious misconduct and did not prove significant mitigation or rehabilitation. Attorney's lack of prior record was irrelevant to prove he would avoid future misconduct.

[10] **802.61 Application of Standards—Standard 1.7 (1986 Standard 1.6) (Determination of Appropriate Sanctions)—Most severe applicable sanction to be used**
831.10 Application of Standards—Standard 2.3 (Moral Turpitude, Fraud, etc.) —Applied—Disbarment—Extent of harm to victim great
831.15 Application of Standards—Standard 2.3 (Moral Turpitude, Fraud, etc.) —Applied—Disbarment—Adjudicator as victim
831.30 Application of Standards—Standard 2.3 (Moral Turpitude, Fraud, etc.) —Applied—Disbarment—Related to practice of law
Where attorney committed multiple acts involving moral turpitude, displayed a 10-year pattern of misconduct, significantly harmed the administration of justice and clients and showed no remorse, the appropriate discipline recommendation was disbarment.

ADDITIONAL ANALYSIS

Culpability
Found
213.91 Section 6068(i) (cooperate in disciplinary proceedings)
221.11 Section 6106 (moral turpitude)—Deliberate dishonesty/fraud
221.12 Section 6106 (moral turpitude)—Gross negligence
221.19 Section 6106 (moral turpitude)—Other factual basis
273.01 Improper transaction with client
277.61 Failure to refund unearned fees
280.41 Maintain records of client funds

Aggravation
Found
521 Multiple acts of misconduct (Standard 1.2(b)(ii))
530 Pattern of misconduct Standard 1.2(b)(ii))
582.10 Harm to client (Standard 1.2(b)(iv))
621 Lack of remorse/failure to appreciate seriousness

Mitigation
Found but Discounted or not relied on
740.31 Good character references (Standard 1.2(e)(vi))—Insufficient number of references
740.32 Good character references (Standard 1.2(e)(vi))—References unfamiliar with misconduct
765.31 Substantial Pro Bono Work—Insufficient evidence

Discipline
1010 Disbarment

Other
2311 Inactive enrollment after disbarment recommendation—Imposed

OPINION

PURCELL, J.

This case illustrates the disciplinary consequences of dishonesty. Respondent James Vincent Reiss seeks review of a hearing judge's recommendation that he be disbarred for serious misconduct that involved six clients and occurred from 2000 to 2010. The State Bar's Office of the Chief Trial Counsel (State Bar) has charged, and the hearing judge found, that Reiss: (1) took client money by false pretenses; (2) lied to the court and his clients about the status of cases; (3) forged a client's signature on a settlement agreement; (4) retained unearned fees; (5) failed to render a proper accounting; (6) wrote non-sufficient funds (NSF) checks; (7) made client loans without proper written disclosures and consent; and (8) failed to cooperate with a State Bar investigator.

Reiss contends that the State Bar did not prove his culpability except for one count of improperly loaning money to a client, which he concedes. Reiss requests no more than a 90-day actual suspension. The State Bar asks us to affirm the hearing judge's decision.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we adopt all of the hearing judge's culpability findings and the disbarment recommendation. In sum, Reiss repeatedly took advantage of several clients by deceiving them and taking their money. As the hearing judge aptly noted, Reiss has "demonstrated a profound detachment from the honesty and integrity that serve as pillars for the legal community." Given his significant aggravation, including lack of insight, we recommend that Reiss be disbarred to protect the public, the courts, and the legal profession.[1]

I. THE CHAMBERS MATTER (09-O-10499)

A. FINDINGS OF FACT[2]

In January 2005, Julie Chambers hired Reiss to represent her in a personal injury case. She lost her job and could not meet her financial obligations due to her injuries. Reiss advanced Chambers a total of $20,100 in two loans against her anticipated monetary recovery. Her case settled for $25,000, which Reiss deposited into his client trust account (CTA). He did not distribute any money to Chambers because he calculated his costs at $29,148, including the two loans. Chambers requested the settlement money less attorney fees. Reiss believed that his office staff sent her a "Costs Expended" list that detailed the $29,148, but Chambers testified that she never received it.

B. LEGAL CONCLUSIONS[3]

Count One: Avoiding Interests Adverse to Client (Rules Prof. Conduct, rule 3-300[4])

Before an attorney enters a business transaction with a client, rule 3-300 requires that: (1) the transac-

1. In a separate case (Case No. 11-TE-18592), a different hearing judge ordered that Reiss be enrolled as an inactive member of the bar after finding that he substantially harmed a client from 2007 to 2011, and the State Bar was reasonably likely to prevail on the merits of proving acts of moral turpitude, including misappropriation and dishonesty. (§ 6007, subd. (c)(1) [involuntary inactive enrollment upon finding attorney poses threat of harm to clients or public].) The TE case is the subject of disciplinary proceedings currently pending in the hearing department. (Case No. 11-O-14067.) Unless otherwise noted, all further references to "section(s)" are to the Business and Professions Code.

2. The hearing judge's findings of fact are entitled to great weight on review. (Rules Proc. of State Bar, rule 5.155(A).) We adopt these findings in each client matter and summarize them with additional relevant facts from the record.

3. The State Bar filed two Notices of Disciplinary Charges (NDCs), which were consolidated for trial. The first NDC charged 13 counts in four client matters (Chambers, Ruff, Grizzle, and Dumont). The hearing judge granted the State Bar's request to dismiss Counts Six and Ten. The second NDC charged 10 counts in two client matters (Robert and Randall Humphreys). The hearing judge granted the State Bar's request to dismiss Counts One, Three, and Six of that NDC. We discuss the counts out of numerical order to organize Reiss's misconduct according to client matter and note that some count numbers appear more than once due to the consolidated NDCs.

4. Unless otherwise indicated, further references to "rule(s)" are to the State Bar Rules of Professional Conduct.

tion and its terms are fair and reasonable and are fully disclosed and transmitted in writing; (2) the client is advised in writing that he or she may seek independent legal advice and is given a reasonable opportunity to do so; and (3) the client consents in writing to the terms of the transaction. Reiss concedes that he failed to obtain Chambers's written consent for the loans or to provide the written disclosures required for business transactions with a client. He stipulated to facts establishing a violation of rule 3-300 and does not challenge the hearing judge's culpability finding, which we adopt.

Count Two: Failure to Account for Client Funds (rule 4-100(B)(3))

Rule 4-100(B)(3) requires an attorney to "render appropriate accounts to the client" for "all funds, securities, and other properties of a client" that come into the attorney's possession. The hearing judge dismissed this count because the State Bar failed to establish Reiss's culpability by clear and convincing evidence.[5] The State Bar did not seek review nor does it request that this count be revived. Reiss testified that he provided an accounting for client funds in the "Cost Expended" list that was sent to Chambers. This evidence supports the hearing judge's dismissal of the charge.

II. THE RUFF MATTER (10-O-03144)

A. FINDINGS OF FACT

Beginning in 2003, Gregory Ruff hired Reiss to provide legal services in several cases, including *Ruff v. Alvarez*, a civil lawsuit. Ruff paid Reiss a total of $123,000 in legal fees for the *Alvarez* case. In 2008, Ruff told Reiss that he had mistakenly overpaid $50,000 in advance fees. Reiss claims that he refunded the entire $50,000, and that the funds advanced were for investigative services, not legal fees. Ruff testified that Reiss refunded only $25,000 and, as detailed below, bank documents corroborate Ruff's testimony.

Ruff agrees that Reiss refunded him the first $25,000 in two January 2008 checks. Reiss issued one check for $12,500 from his law firm "general account" and a second check for $12,500 from his law firm "cost account."[6] Each check noted that payment was for "Refund of Attorneys Fees."

To pay the remaining $25,000, Reiss issued two checks to Ruff for $12,500 each on February 6, 2008. Again, one was from the general account (no. 8081) and the other from the cost account (no. 11564). Each check bore the handwritten notation "REFUND - Attys Fee Ruff v. Alvarez." Ruff testified that he deposited both checks but his bank notified him a few days later that the checks were returned because of insufficient funds. Reiss's own bank records establish that although the checks were initially recorded as "Paid," they were later rejected as NSF. Reiss's bank charged an "OD/REJECTED ITEM CHG" (overdraft/rejected item fee) on both checks and did not debit them against his accounts. Ruff reported the NSF checks to Reiss, who pledged to take care of the matter.

On February 21, 2008, Reiss issued two new checks for $12,500 each and deposited them directly into Ruff's bank account. As before, one check was drawn from the general account (no. 8102) and the other from the cost account (no. 11606). These checks, like the others, were initially recorded by Reiss's bank as "Paid," but were later rejected as NSF. Each check triggered an overdraft/rejected item fee to Reiss and neither check was debited against his general or cost account.

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5. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

6. Reiss's bank statements indicate that he used his cost and general accounts both to manage law firm expenses and to handle certain funds for clients. He testified that he used a "ledger" system to account for monies between his CTA and other accounts. Reiss did not produce any documentation of his ledger system.

When Ruff discovered that this second set of checks did not clear, he again reported it to Reiss. Reiss promised to "get it cleared up." Months later, on May 9, 2008, Reiss deposited into Ruff's account a single check drawn on the general account (no. 8145) for $12,500. Less than a week later, Ruff's bank reversed the deposit because Reiss's check did not clear. Reiss made no other payments and his representation of Ruff ended in 2009.

B. LEGAL CONCLUSIONS

Count Three: Moral Turpitude – Issuing NSF Checks (§ 6106[7])

[1] The State Bar alleged that Reiss committed acts involving moral turpitude because he knowingly or with gross negligence issued NSF checks to Ruff. We agree. Reiss issued *several* checks to Ruff that he knew or should have known the bank would not honor. Such a practice involves moral turpitude. (*In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 54 [issuing NSF checks on personal account constitutes act of moral turpitude].) The Supreme Court has repeatedly warned that issuing checks with insufficient funds violates "the fundamental rule of [legal] ethics – that of common honesty – without which the profession is worse than valueless in the place it holds in the administration of justice." (*Bowles v. State Bar* (1989) 48 Cal.3d 100, 109; *Segal v. State Bar* (1988) 44 Cal.3d 1077, 1088; *Bambic v. State Bar* (1985) 40 Cal.3d 314, 324.)

Reiss claims that he refunded the second $25,000 to Ruff. To support his claim, he testified that he called the operations department of his bank and confirmed that his February 6, 2008 check number 8081 for $12,500 and his February 21, 2008 check number 8102 for $12,500 had been paid. Reiss also cited bank documents that imaged the checks showing them marked as "Paid."

[2] We reject his claim. First, if Reiss's checks had cleared, he would have had no reason to issue replacement checks as late as May 2008. Second, although the *initial* bank documents show imaged checks as "Paid," Reiss's month-end final bank statements establish that those same checks were ultimately returned for insufficient funds and were not debited against the accounts. Reiss did not call witnesses from his bank or provide other documentary evidence to prove the checks were paid, despite his duty to present all favorable evidence at his disciplinary trial. (*Warner v. State Bar* (1983) 34 Cal.3d 36, 42.) The record before us proves that Reiss did not refund Ruff's $25,000 overpayment of legal fees.

Count Four: Failure to Account for Client Funds (rule 4-100(B)(3))

The State Bar alleged that Reiss failed to account for advance fees that Ruff paid him. Reiss argues that he owed no accounting to Ruff because the retainer agreement did not call for advance fees. Even though the retainer agreement states that Reiss would represent Ruff for a $3,000 retainer and $150 hourly fee thereafter, it did not prohibit Ruff from paying fees in advance. Ruff did in fact pay a total of $50,000 in advance fees, $25,000 of which Reiss did not refund. Consequently, Reiss should have provided Ruff with an accounting in order to comply with rule 4-100(B)(3).

Count Five: Failure to Refund Unearned Fees (rule 3-700(D)(2))[8]

The State Bar alleged that Reiss violated rule 3-700(D)(2) when he did not refund $25,000 to Ruff for unearned attorney fees. We agree. Ruff credibly testified that he paid Reiss this amount as legal fees, and not as investigative fees, as Reiss claimed. Ruff's testimony is corroborated by the checks' notations stating that the payments were for refund of attorney fees.

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7. Section 6106 prohibits an attorney from committing any act that involves moral turpitude, dishonesty, or corruption.

8. When an attorney's employment ends, rule 3-700(D)(2) requires the attorney to "Promptly refund any part of a fee paid in advance that has not been earned."

III. THE GRIZZLE (10-O-09819) AND DUMONT (10-O-10285) MATTERS

A. FINDINGS OF FACT

Dave Grizzle and Herve Dumont are neighbors who successfully defended a civil lawsuit filed by another neighbor. In April 2006, they separately retained Reiss to recover their defense costs from their respective insurance carriers. For the next four years, Grizzle and Dumont sought information from Reiss about the status of their cases. Grizzle tried to reach Reiss over 30 times and Dumont did the same at least 10 times.

Reiss would often not return their calls, but even when he did, he lied. He told Grizzle that he was "working with the insurance company, and still filing papers with the Court." He also told Grizzle that the insurance company "had approved the money, and they were going to write [Grizzle] a check." Reiss told Dumont on several occasions that everything was taken care of and he should not worry. In fact, Reiss had neither contacted the insurance companies nor filed the lawsuits. The clients finally called their insurance companies in 2010 and discovered that Reiss had done nothing on their cases. By this time, the statute of limitations had expired. Grizzle and Dumont filed complaints with the State Bar.

A State Bar investigator sent letters to Reiss on November 17 and December 1, 2010, requesting a written response to the complaints. Reiss failed to provide one.

On December 9, 2010, Reiss used personal funds to purchase two cashier's checks and sent one each to Grizzle and to Dumont. Grizzle received $18,600 and Dumont received $19,750. The checks covered their defense costs in the neighbor's lawsuit. Reiss included cover letters with the checks that stated: "This amount reflects reimbursement for attorneys fees paid to your defense counsel which was not reimbursed by your insurance carrier[.] [¶] Thank you for your courtesy and cooperation throughout this litigation."

B. CONCLUSIONS OF LAW[9]

Counts Seven and Nine (Grizzle) and Counts Eleven and Thirteen (Dumont): Moral Turpitude – Misrepresentations (§6106)

The State Bar alleged that Reiss committed acts of moral turpitude by making several oral misrepresentations to Grizzle and Dumont, including that their cases were progressing and would soon be settled. Reiss asserts that his misrepresentations were not intentional because he mistakenly thought that a law firm associate was handling the cases. He testified that he had been out of the office each time he spoke to his clients from 2006 to 2010, and could not confirm the status of the cases without the files. Reiss claimed that he first discovered that no work had been done on the cases in mid-2010, when he personally looked at the files.

[3a] The hearing judge disbelieved Reiss's testimony and instead relied on the testimony of Grizzle and Dumont to find that Reiss repeatedly provided them with "false and misleading [case] updates." We give great weight to testimonial credibility assessments "because the hearing judge heard and saw the witnesses and observed their demeanor. [Citations.]" (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 315; Rules Proc. of State Bar, rule 5.155(A) [hearing judge's factual findings entitled to great weight]; *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1055 [court reluctant to reverse hearing department on matters of credibility].) We find that Reiss made several oral misrepresentations to his clients.

[3b] The State Bar also alleged that Reiss made written misrepresentations to Grizzle and Dumont in the cover letters that accompanied their checks. The hearing judge found that these letters were "intentionally vague and misleading" and were crafted to conceal Reiss's failure to perform. We agree. The letters omitted critical information the clients were entitled to know – that Reiss never contacted the

9. The State Bar alleged identical ethical violations in the Grizzle and Dumont matters.

insurance companies, failed to file lawsuits, and paid the checks with personal funds, not insurance settlement monies. Moreover, Reiss implied in his letters that he had actually filed the lawsuits by thanking Grizzle and Dumont for cooperating in "this litigation." For purposes of moral turpitude, "[n]o distinction can . . . be drawn among concealment, half-truth, and false statement of fact. [Citation.]" (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315.) Reiss's letters contained such concealments, half-truths, and false statements. We find Reiss culpable of committing acts of moral turpitude by making both oral and written misrepresentations to Grizzle and Dumont.

Counts Eight (Grizzle) and Twelve (Dumont): Failure to Cooperate[10] *(§6068, subd (i))*

[4] The State Bar alleged that Reiss failed to cooperate because he did not respond in writing to the State Bar investigator's November and December 2010 letters. Although Reiss admits he did not respond in writing, he claims that he discussed the Grizzle and Dumont matters with a State Bar senior deputy trial counsel on an unspecified date in 2011. But Reiss's claim fails to address why he did not provide a *written* response as the investigator directed. Further, even if he had met with trial counsel as early as January 2011, the two-month delay from the investigator's November 17, 2010 first request is not timely cooperation. (*In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 677, 684-685 [no cooperation where attorney met with investigator more than six weeks after request for written response].) We find that Reiss failed to cooperate with the State Bar investigator.

IV. THE HUMPHREYS MATTER – C-CURE CORPORATION OF TEXAS (09-O-12479)

A. FINDINGS OF FACT

In the late 1990s, brothers and business associates Randall and Robert Humphreys hired Reiss to represent them in several business matters.[11] In a 2000 case that was resolved by binding arbitration, C-Cure Corporation of Texas (C-Cure) obtained a $50,515.36 judgment, which was later amended to $74,651.25, against Robert over a property lease. The Humphreys made no payments for seven years, and the judgment amount had nearly tripled to over $140,000. By then, the C-Cure debt was affecting their business credit, so the Humphreys asked Reiss to settle it.

In March 2007, Reiss wrote a letter to Randall informing him that he had settled the C-Cure debt. The correspondence stated: "We have negotiated a resolution of the outstanding judgments in the [C-Cure] matters. [¶] Please have a check made payable to Reiss & Johnson Attorney Client Trust account in the amount of $68,500.00 We will be preparing all of the appropriate pleadings and closing documents including full Satisfaction of Judgment, Release of Lien and Dismissal with prejudice." Unbeknownst to the Humphreys, Reiss had not negotiated any settlement of the C-Cure debt.

Following Reiss's directive, Randall issued a check for $68,500 to Reiss, who deposited it into his CTA on March 22, 2007. Less than a month later, on April 3, 2007, the CTA balance fell to $273.49, and Reiss had made no distributions on behalf of the Humphreys. Reiss claimed that he removed the money because he thought it was to be utilized as a "budget" to settle the C-Cure judgment and he knew he "was obligated to pay that toward whatever resolution it was."

Near the end of 2007, Reiss began negotiating a settlement of the C-Cure judgment. In January 2008, he settled the matter without consulting the Humphreys. To memorialize the settlement, Reiss either signed Robert's name or caused it to be signed on a forbearance agreement (dated January 30, 2008) that obligated Robert to pay a $120,000 settlement in monthly $10,000 installments beginning on January 15, 2008. If payments were not timely made, Robert would owe the judgment balance.

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10. Section 6068, subdivision (i), requires an attorney "To cooperate and participate in any disciplinary investigation."

11. We refer to the Humphreys brothers by first name to avoid confusion, not out of disrespect.

Without the Humphreys' knowledge, Reiss issued several $10,000 checks from his cost account to C-Cure's counsel to be applied against the $120,000. In 2008, he wrote five $10,000 checks when he did not have adequate funds to cover them. The bank honored three of the checks using Reiss's overdraft protection. The other two checks were returned for insufficient funds. By the time of his discipline trial in November 2011, Reiss had paid the full $120,000 and C-Cure had filed a satisfaction of judgment.[12]

The Humphreys were upset about the C-Cure judgment and having to pay $68,500 to settle it. As a result, Reiss testified that in 2008 he agreed to pay them $84,000 in $7,000 monthly payments to make up for their loss and to "stand behind this matter." To pay the debt, in November 2008, Reiss issued two $3,500 checks to Robert from his cost account. The bank did not honor the checks due to insufficient funds. Reiss testified that he paid $84,000 to the Humphreys, but he failed to present documentary evidence supporting his claim.

B. CONCLUSIONS OF LAW

[5] Count Two:[13] Moral Turpitude – Theft by False Pretenses (§ 6106)

The State Bar alleged that Reiss committed acts involving moral turpitude by using false pretenses to persuade Randall to pay him $68,500 as a settlement in the C-Cure matter. We agree. Since there had been no settlement and Reiss immediately withdrew most of the $68,500 from his CTA without paying anything to C-Cure, we find he obtained this money by false pretenses. (*Cutler v. State Bar* (1969) 71 Cal.2d 241, 252-253 [attorney's deceit of another involves moral turpitude].)

We reject Reiss's claim that the Humphreys agreed to pay him the money as an overall "budget" for resolving the C-Cure matter. Randall credibly testified that he only discussed with Reiss the "specific amount" of $68,500 for the settlement. Further, Reiss's March 2007 letter to Randall never mentioned a budget.

Count Four: Moral Turpitude – Forged Signature on Forbearance Agreement (§ 6106)

[6] The State Bar alleged that Reiss committed moral turpitude by signing Robert's name to the forbearance agreement or caused it to be signed without Robert's knowledge or consent. Reiss testified that he discussed the settlement with Robert, sent him the forbearance agreement to sign, and received it back with what he thought to be Robert's signature. The hearing judge did not believe Reiss but found credible Robert's testimony that he never signed the agreement and Randall's testimony that he did not sign on behalf of Robert. Again, we defer to these credibility findings in favor of the Humphreys and conclude that Reiss acted with moral turpitude when he signed Robert's name or caused it to be signed on the forbearance agreement. (*In re Prantil* (1989) 48 Cal.3d 227, 234 [forgery involves moral turpitude].)

Count Five: Moral Turpitude – NSF checks to C-Cure (§ 6106)

[7a] The State Bar charged that Reiss committed acts of moral turpitude because he knowingly or with gross negligence issued NSF checks from his cost account to pay C-Cure's counsel under the forbearance agreement. We agree. Reiss wrote five $10,000 checks to C-Cure's counsel when his cost account had a negative balance. And when the checks were presented for payment to the bank, the balance remained negative. Each of the five checks triggered an overdraft/rejected item fee. The bank honored three of them and rejected the other two for insufficient funds. We find that Reiss issued all five

12. The Humphreys first found out about the 2008 forbearance agreement during a 2011 deposition in a lawsuit they filed against Reiss in another matter.

13. As previously noted, Counts One, Three, and Six were dismissed.

checks when he knew or should have known that his account was negative and he lacked sufficient funds to cover them. The following chart details the banking record for each check:

Check No & Amount: 11491 $10,000
Issue Date & Account Balance:
1/25/08 (-)$4,528.44
Date Presented & Account Balance:
2/4/08 (-)$10,782.78
Outcome: On 2/4/08, bank paid check against insufficient funds and charged overdraft/rejected item fee

Check No & Amount: 11616 $10,000
Issue Date & Account Balance:
2/21/08 (-) $8,149.56
Date Presented & Account Balance:
3/3/08 (-) $6,497.06
Outcome: On 3/3/08, bank paid check against insufficient funds and charged overdraft/rejected item fee.

Check No & Amount: 11792 $10,000
Issue Date & Account Balance:
4/7/08 (-) $5,393.81
Date Presented & Account Balance:
4/11/08 (-) $4,726.65
Outcome: On 4/14/08, bank paid check against insufficient funds and charged overdraft/rejected item fee

Check No & Amount: 12277 $10,000
Issue Date & Account Balance:
8/22/08 (-) $5,672.04
Date Presented & Account Balance:
8/28/08 (-) $12,592.92
Outcome: Bank did not pay check but charged overdraft/rejected item fee on 8/28/08.

Check No & Amount: 12307 $10,000
Issue Date & Account Balance:
8/29/08 (-) $812.92
Date Presented & Account Balance:
9/5/08 (-) $1,235.37
Outcome: Bank did not pay check but charged overdraft/rejected item fee on 9/5/08

[7b] Reiss claims he is not culpable because he was entitled to rely on overdraft protection to cover any overdrawn checks. (*Rhodes v. State Bar* (1989) 49 Cal.3d 50, 58, fn. 9 [defense to moral turpitude charge if overdraft protection creates reasonably certain belief checks will be honored].) We disagree. Reiss could not *reasonably* expect that any of his $10,000 checks would be honored since his overdraft limit was $10,000, and his account balance was negative when each check was written and presented for payment. Moreover, the bank did not honor two of the $10,000 checks despite Reiss's reliance on his overdraft coverage.

[7c] Overdraft protection is "not a substitute for the proper handling of clients' money." (The State Bar of Cal., Handbook on Client Trust Accounting for California Attorneys (2011) § IV, p. 10 [referencing use of overdraft protection in CTA accounts].) We recognize that in some circumstances, establishing overdraft coverage may benefit clients by insuring that checks will not bounce due to an occasional bank error or delay resulting in an unexpected shortfall in funds. (The State Bar of Cal., Handbook on Client Trust Accounting for California Attorneys (2011) § IV, p. 10.) But overdraft protection will not relieve an attorney from unethical conduct that caused the overdraft. (State Bar of Cal. Standing Com. on Prof. Responsibility and Conduct, opn. No. 169 (2005) p. 4.) [use of overdraft protection to issue checks before funds become available in CTA may result in violation of rule 4-100].)

[7d] Here, Reiss abused his overdraft protection and, in doing so, grossly mismanaged his cost account. Reiss's bank charged an overdraft/rejected item fee more than 50 times per month for 11 straight months in 2008. Excessive use of overdraft protection is improper in any account for the purpose of covering NSF checks that are paid to or on behalf of clients. We conclude that Reiss committed acts of moral turpitude by issuing $10,000 NSF checks to C-Cure's counsel to pay on the forbearance agreement.

Count Seven: Moral Turpitude – NSF Checks to Robert Humphreys (§ 6106)

The State Bar alleged that Reiss committed acts of moral turpitude because he knowingly or with gross negligence issued two $3,500 NSF checks from his cost account to Robert on the $84,000 he promised to pay the Humphreys. We agree. Reiss's bank records show that the two checks were not honored, as detailed below:

Check No. & Amount:
12497 $3,500
Issue Date & Account Balance:
11/5/08 (-) $2,164.09
Date Presented & Account Balance:
11/17/08 $1,969.91
Outcome: Bank did not pay this check and charged overdraft/rejected item fee on 11/17/08.

Check No. & Amount:
12500 $3,500
Issue Date & Account Balance:
11/5/08 (-) $2,164.09
Date Presented & Account Balance:
11/21/08 (-) $2,348.53
Bank did not pay this check and charged overdraft/rejected item fee on 11/21/08

[7e] Reiss argues that he is not culpable because, again, he believed that his $10,000 overdraft protection would cover these checks. As we previously noted, an attorney may not rely on a bank's overdraft protection to cover NSF checks issued to or on behalf of clients. The purpose of overdraft protection is to avoid harm to the client for an *occasional* shortfall in funds due to bank errors or delay in processing funds. Reiss did not use his overdraft coverage for this purpose. Instead, he tapped it dozens of times in November 2008 to cover checks he had issued. Given Reiss's banking history of negative balances and overdraft abuse, we find that he knew, or was grossly negligent in not knowing, that the $3,500 checks to Robert would not be honored.

V. THE HUMPHREYS MATTER – WESTERN STATES WHOLESALE (09-O-12479)

A. STATEMENT OF FACTS

In 2000, Reiss represented Robert and Randall Humphreys as corporate officers of Western States Wholesale against Tracy Beblie and others in litigation to recover the cost of defective customized software they had purchased. Reiss filed a complaint but never served it. He failed to appear at a September 8, 2000 case management conference and the superior court set an Order to Show Cause (OSC) regarding dismissal for October 24, 2000.

To cover up his inaction on the case, Reiss made four misrepresentations to the court. The day before the October 24th OSC hearing, Reiss filed a declaration stating under penalty of perjury that he had missed the September 8, 2000 conference due to a calendaring error but that the parties "have informally resolved this matter," some of it "by way of settlement." At an April 2001 hearing, Reiss told the court that there was a tentative settlement. At a June 2001 hearing, Reiss told the court he was waiting for settlement funds from one party. And at an August 2001 hearing, Reiss told the court that the last installment of the settlement was due that day. These statements to the court were not true – Reiss had never even served the complaint in the lawsuit.

Reiss also lied to Randall about the status of the case. On June 20, 2001, Reiss wrote to Randall informing him that at the April and June court hearings, the superior court judge had ordered mediation and appointed a retired judge to preside over the case. Reiss also told Randall that he expected the trial to be set in October or November 2001. The superior court's minute orders establish that Reiss's statements were false.

Randall testified that Reiss told him several years later, in 2008, that the Western States Wholesale case had settled in the Humphreys' favor for $250,000, which would be paid in two $125,000 installments. Reiss never forwarded the money to Randall. At his disciplinary trial, Reiss denied that he told Randall there had been a settlement in the Western States Wholesale matter but admitted that in September 2001, he filed a Request for Dismissal of the lawsuit, which was granted.

B. CONCLUSIONS OF LAW

Counts Eight, Nine and Ten: Moral Turpitude – Misrepresentations (§ 6106)

The State Bar alleged that Reiss committed acts involving moral turpitude when he misrepresented: (1) to the superior court that the Western States Wholesale matter had settled and payment was forthcoming; (2) to Randall that the superior court ordered the case mediated, appointed a mediator, and would set the case for trial; and (3) to Randall that the case settled for $250,000. Randall's testimony and the superior court's minute orders prove that Reiss's statements were misrepresentations amounting to moral turpitude. (*Bach v. State Bar* (1987) 43 Cal.3d 848, 855-856 [attorney's false statement to judge constitutes moral turpitude warranting discipline].)

Reiss's claims he based his misstatements to the superior court on information Randall gave him about a settlement in a different case that he had litigated on behalf of Western States Wholesale. But Randall distinctly recalled that Reiss told him the Western States Wholesale case involving the Tracy Beblie defendant had been settled for $250,000. Moreover, Reiss specifically referenced "*Western States Wholesale v. Tracey Beblie, et al.*" in his June 20th letter to Randall that falsely reported the superior court's rulings and the upcoming trial date. The record establishes that Reiss's misrepresentations were not based on a mistake.

VI. AGGRAVATION AND MITIGATION

The offering party bears the burden to prove aggravating and mitigating circumstances. The State Bar must establish aggravating circumstances by clear and convincing evidence (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)[14]), while Reiss has the same burden to prove mitigating circumstances. (Std. 1.2(e).)

A. THREE SIGNIFICANT AGGRAVATING FACTORS

The hearing judge found two aggravating factors: (1) multiple acts of misconduct; and (2) significant harm. We adopt both factors and find additional aggravation for lack of insight and remorse.

1. Multiple Acts / Pattern of Misconduct (Std. 1.2(b)(ii))

[8] Reiss engaged in multiple acts of misconduct involving six clients, which is an aggravating factor. However, the most serious aggravation is found in Reiss's 10-year pattern of deception in order to cover up mismanagement of his clients' cases or for his personal economic gain. (*Levin v. State Bar* (1989) 47 Cal.3d 1140, 1149, fn.14, citing *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367 [pattern of misconduct characterized by "only the most serious instances of repeated misconduct over a prolonged period of time"].) Reiss's pattern of serious misconduct greatly aggravates this case.

2. Significant Harm (Std. 1.2(b)(iv))

Reiss significantly harmed several clients. First, he never refunded unearned attorney fees of $25,000 to Ruff. Second, he caused harm to Grizzle, Dumont, and the Humphreys when each lost the opportunity to pursue his case in court due to Reiss's inaction and dishonesty. (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 283 [attorney's failure to perform resulting in loss of cause of action is significant client harm].) Finally, Reiss harmed the administration of justice when he wasted judicial time and resources by appearing at hearings only to misrepresent the status of the Western States Wholesale case. The totality of this harm constitutes significant aggravation.

14. Unless otherwise noted, all further references to "standard(s)" are to this source.

3. Lack of Insight and Remorse (Std. 1.2(b)(v))

Lack of remorse and failure to acknowledge wrongfulness of misconduct are properly considered aggravating factors in attorney discipline cases. (*Weber v. State Bar* (1988) 47 Cal.3d 492, 506.) Without a hint of remorse, Reiss has refused to acknowledge his misconduct despite overwhelming evidence of his dishonesty and the harm he caused to his clients. While the law does not require Reiss to be falsely penitent, it "does require that [he] accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) He has not done this. We assign the most weight to this aggravating factor because Reiss's lack of insight and remorse makes him an ongoing danger to the public.

B. TWO MITIGATING FACTORS

The hearing judge found two mitigating factors: (1) no prior record of discipline; and (2) good character. We assign no credit for Reiss's lack of prior record and only nominal mitigating weight to his good character. We find an additional factor in mitigation for his community service.

1. No Prior Disciplinary Record (Std. 1.2(e)(i))

Standard 1.2(e)(i) provides that mitigation shall be considered for the "absence of any prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious." Under the standard, a respondent is entitled to have a discipline-free practice considered in mitigation if: (1) no discipline has been imposed for many years; and (2) the misconduct is not serious. Reiss meets the first requirement as he was admitted to the Bar on June 17, 1987, and practiced law for more than 13 years before he committed his first act of misconduct in 2000. (See, e.g., *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 116 [mitigation credit for nine years of discipline-free practice before misconduct began].) However, we have found Reiss culpable of committing a pattern of serious misconduct that includes repeated acts of moral turpitude, theft, dishonesty, rule violations, and failure to cooperate. In light of such serious misconduct, the issue is what significance, if any, should be given to Reiss's lack of a prior record in determining the proper degree of discipline.

The Supreme Court in *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029, has instructed on this very point: "Prior exemplary conduct and a distinguished career may be relevant as factors indicative of the probability that misconduct will not likely recur." The presence of this mitigation could signify that a lower level of discipline may fulfill the goals of attorney discipline. For instance, if the serious misconduct occurred during a "single period of aberrant behavior," the past record of discipline-free practice is a factor that suggests disbarment may be unnecessary. (*Ibid.*) "[B]ut if the attorney guilty of a pattern of serious misconduct does not show that he is presently able to avoid such misconduct, appropriate action must be taken to protect the public. [Citation.]" (*Ibid.*; see *In re Dedman* (1976) 17 Cal.3d 229, 235 [purpose of discipline proceedings is "to inquire into the fitness of the attorney to continue in that capacity for the protection of the public, the courts, and the legal profession"].) Thus, to determine the proper degree of discipline, we must ask whether Reiss's lack of a prior record is relevant to show that his misconduct will likely not recur.

[9] Here, Reiss engaged in a 10-year pattern of dishonesty and serious misconduct and has not proved significant mitigation or demonstrated his rehabilitation. In fact, he denies his many unethical actions. Given Reiss's failure to accept responsibility for his wrongdoing, we do not find his lack of prior record from over 10 years ago (before his first act of misconduct) to be relevant to prove he will avoid future misconduct. Therefore, we assign no mitigation credit for Reiss's 13-year discipline-free record.[15]

15. The Supreme Court and this court have assigned mitigation credit to attorneys with no prior record of discipline who committed serious misconduct. But those cases are not analogous here because they involved only isolated instances of wrongdoing rather than a pattern of misconduct and did not result in disbarment. (See, e.g., *Edwards v. State Bar* (1990) 52 Cal.3d 28 [12 years of discipline-free practice in one client matter where extenuating circumstances were present]; *Rodgers v. State Bar* (1989) 48 Cal.3d 300 [almost 20 years of discipline-free practice in one client matter]; *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar. Ct. Rptr. 41, 49 [17 years of discipline-free practice in one client matter with other mitigation]; *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576 [12 years of discipline-free practice in one client matter with strong mitigation]; *In re Trillo* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 59 [14 years of discipline-free practice in two client matters].)

2. Good Character (Std. 1.2(e)(vi))

The hearing judge gave "some consideration" to Reiss's evidence of good character as a factor in mitigation. We agree and assign nominal mitigating weight.

Standard 1.2(e)(vi) requires "an extraordinary demonstration of good character of the member attested to by a wide range of references in the legal and general communities and who are aware of the full extent of the member's misconduct." Reiss presented four witnesses – two former criminal clients who are business owners and two attorneys he has known for several years. Although none had extensive relationships with Reiss, each testified to his general honesty, integrity, good character, and competence.

These four witnesses do not necessarily represent a wide range of references in the legal and general communities. (*In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 590, 594-595 [character evidence from attorney, district sales manager, and department store owner not wide range of references].) But we generally give significant consideration to attorney witnesses because they have a "strong interest in maintaining the honest administration of justice." (*In the Matter of Brown*, *supra,* 2 Cal. State Bar Ct. Rptr. at p. 319.) Here, however, we discount the testimony of the two attorneys since neither was fully knowledgeable about Reiss's misconduct. (See *In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 476-477 [limited mitigation where declarants not fully aware of misconduct].)

3. Community/Pro Bono Service

Service to the community is a mitigating factor. (*Schneider v. State Bar* (1987) 43 Cal.3d 784, 799.) Between 1995 and 2010, Reiss provided pro bono legal services and participated in community activities. He volunteered 10 to 15 hours per week as a coach or administrator for youth sports programs, worked four hours per week for charitable organizations, and annually spent 100 hours providing free legal services to the California Interscholastic Federation Legal Services Volunteer Program. In addition, Reiss spent a few hours per week working at various animal protection organizations. Such commitment to the community is commendable. Yet we assign modest mitigating weight since Reiss presented only his own testimony to establish this public service. (*In the Matter of Sullivan* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 189, 193 [community service established only by respondent's testimony entitled to "modest" mitigating weight].)

4. No Additional Mitigation

Reiss argues that he should receive mitigation credit for remorse, absence of client harm, and good faith for acting in his clients' best interests. We find that he is not entitled to this additional mitigation in light of his extensive dishonesty and the harm he caused his clients.

VII. LEVEL OF DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession. (Std. 1.3.) Ultimately, we balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.) We begin our analysis with the standards and follow their guidelines whenever possible because they promote uniformity. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.)

Although several standards apply here,[16] we focus on standard 2.3 because it addresses the crux of Reiss's misconduct and imposes the most severe discipline. (Std. 1.6(a) [must apply most severe sanction when multiple acts of misconduct suggest different sanctions].) Standard 2.3 calls for actual suspension or disbarment for acts of moral turpitude, fraud, intentional dishonesty or concealment of mate-

16. Standard 2.2(b) imposes a three-month actual suspension for rule 4-100 violations not involving misappropriation; standard 2.6 imposes disbarment or suspension for section 6068 violations; standard 2.8 imposes suspension for rule 3-300 violations; and standard 2.10 calls for reproval or suspension for rule violations not specified in the standards.

rial facts depending on "the extent to which the victim of the misconduct is harmed or misled and . . . upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law." As the standard directs, we look to: (1) the seriousness of Reiss's misconduct; (2) its connection to the practice of law; and (3) any consequential harm.

For nearly a decade, Reiss displayed callous dishonesty that was central to his practice of law and caused significant harm to his clients and to the administration of justice. His many misrepresentations to the superior court undermined its ability to rely on his word as an officer of the court. (*Lebbos v. State Bar* (1991) 53 Cal.3d 37, 48 [attorneys long known as officers of the court].) His repeated lies to clients diminished their confidence in the integrity of the legal profession. Even when Reiss attempted to remedy his lies by paying defense costs to Grizzle and Dumont and $120,000 to C-Cure, he did so under a shroud of deception that involved fabricated settlements, multiple misrepresentations, and forgery. (*Read v. State Bar* (1991) 53 Cal.3d 394, 426 [dishonesty directly pertaining to practice of law warrants harshest discipline].)

[10] In sum, Reiss has engaged in a 10-year pattern of grievous misconduct and inexcusable dishonesty. After carefully considering all relevant factors, the aggravation, the mitigation, and the guiding case law, we conclude that nothing short of disbarment will adequately protect the public, the courts, and the legal profession. (*Lebbos v. State Bar, supra,* 53 Cal.3d at pp. 43-44 [disbarment where attorney with no discipline record lacked remorse for multiple acts of misconduct involving moral turpitude and dishonesty]; *Read v. State Bar, supra,* 53 Cal.3d at p. 426 [disbarment where attorney with no discipline record displayed "high degree of dishonesty"]; *Cannon v. State Bar* (1990) 51 Cal.3d 1103, 1115 [disbarment where attorney with no discipline record in six years of practice committed multiple acts of serious misconduct involving moral turpitude].)[17]

VIII. RECOMMENDATION

We recommend that James Vincent Reiss, State Bar member no. 128020, be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys.

We further recommend that he make restitution to Gregory L. Ruff in the amount of $25,000 plus 10 percent interest per annum from February 6, 2008 (or reimburse the Client Security Fund to the extent of any payment from the Fund to Gregory L. Ruff, in accordance with Business and Professions Code section 6140.5).

We further recommend that he be ordered to comply with California Rules of Court, rule 9.20 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.

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

IX. ORDER

When the hearing department recommended disbarment, it ordered Reiss involuntarily enrolled as an inactive member of the State Bar as required under section 6007, subdivision (c)(4), and Rules of Procedure of the State Bar, rule 5.111(D)(1). The involuntary inactive enrollment became effective on March 2, 2012. Reiss has remained on involuntary inactive enrollment since that time and will remain on involuntary inactive enrollment pending the final disposition of this proceeding.

We concur:

REMKE, P. J.
EPSTEIN, J.

17. Having independently reviewed all arguments set forth by Reiss, those not specifically addressed have been considered and are rejected as having no merit.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

SWAZI ELKANZI TAYLOR

A Member of the State Bar

[Nos. 10-O-05171, et al.]

Filed November 9, 2012; Modified as filed January 9, 2013

SUMMARY

Respondent was charged with 26 counts of misconduct related to his mortgage loan modification law practice. The hearing judge found that although there was insufficient evidence respondent committed acts of moral turpitude, he was culpable of violating provisions of Business and Professions Code section 6106.3 both by prematurely charging fees for mortgage loan modification services and by failing to provide the required notice to clients seeking assistance with their loan modifications. The hearing judge also found respondent charged unconscionable fees to eight clients. The hearing judge ordered a discipline including six months of actual suspension. (Hon. Richard A. Platel, Hearing Judge.)

The review department found respondent culpable of violating Business and Professions Code section 6106.3 by charging eight clients before completing all mortgage loan modification services, and by failing to provide the required notice to one client. However, respondent did not charge unconscionable fees. After balancing aggravation with mitigation, the review department affirmed the hearing judge's recommended discipline including six months' actual suspension and until respondent paid restitution in six client matters.

COUNSEL FOR PARTIES

For State Bar: Allen Blumenthal

For Respondent: Swazi Elkanzi Taylor

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **213.10 Culpability—State Bar Act Violations—Section 6068(a) (support Constitution and laws)**
222.20 Culpability—State Bar Act Violations—Section 6106.3 (violation of Civil Code § 2944.6 or 2944.7 re mortgage loan modifications)
Attorney violated section Business and Professions Code, section 6106.3 in eight client matters by charging each client for preliminary financial analysis before all mortgage loan modification services were complete. Civil Code section 2944.7, subdivision (a) plainly prohibits any person, including a legal professional, from collecting any fee related to a loan modification until each and every service contracted for has been completed. Attorney was not allowed to charge unbundled fees for individual financial analysis services until he had completed all other loan modification services listed in his retainer agreement.

[2] **204.90 Culpability—Other General Substantive Issues re Culpability**
222.20 Culpability—State Bar Act Violations—Section 6106.3 (violation of Civil Code § 2944.6 or 2944.7 re mortgage loan modifications)
Attorney may not rely on opinion of another attorney as a defense to violating the rules or sections governing attorney ethics. Attorney did not act in good faith when he chose interpretation of Civil Code section 2944.7, subdivision (a) that ignored a new statute's plain language and legislative history as well as his own knowledge of a State Bar ethics alert interpreting it.

[3] **213.10 Culpability—State Bar Act Violations—Section 6068(a) (support Constitution and laws)**
222.20 Culpability—State Bar Act Violations—Section 6106.3 (violation of Civil Code § 2944.6 or 2944.7 re mortgage loan modifications)
Attorney was culpable of violating Business and Professions Code section 6106.3 by failing to provide a separate statement that it was not necessary for the client to retain a third party mortgage loan modification negotiator as required by Civil Code section 2944.6, subdivision (a) when he charged his client for loan modification services without first providing the client the retainer agreement which contained the separate statement.

[4] **213.10 Culpability—State Bar Act Violations—Section 6068(a) (support Constitution and laws)**
222.20 Culpability—State Bar Act Violations—Section 6106.3 (violation of Civil Code § 2944.6 or 2944.7 re mortgage loan modifications)
Attorney was not culpable of violating Business and Professions Code section 6106.3 by failing to provide a separate statement that it was not necessary for the client to retain a third party mortgage loan modification negotiator as required by Civil Code section 2944.6, subdivision (a) when he the client received the retainer agreement containing that section's mandatory language the same day she authorized payment. Civil Code section 2944.6, subdivision (a) requires the information be provided as a separate statement, but does not mandate that it be in a separate document.

[5] **221.00 Culpability—State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)**
Attorney who charged illegal fees in mortgage loan modification matters did not commit acts of moral turpitude. At most, attorney negligently breached agreements but did not make intentional misrepresentations or misappropriate client funds.

[6] **290.00 Rules of Professional Conduct Violations—Illegal or unconscionable fee (RPC 4-200; 1975 RPC 2-107)**

A fee that seems, or in fact is, high is not the same as an unconscionable fee. A fee is unconscionable when it is so exorbitant and disproportionate to the services performed as to shock the conscience and often involves an element of fraud or overreaching that practically constitutes an appropriation of client funds under the guise of fees.

[7] **290.00 Rules of Professional Conduct Violations—Illegal or unconscionable fee (RPC 4-200; 1975 RPC 2-107)**

Applying the non-exclusive factors in rule 4-200(B), fees attorney charged to provide a financial analysis to clients interested in mortgage loan modifications did not represent the type of truly shocking fees that the courts have found to be unconscionable. The level of client sophistication varied, with some clients familiar with the mortgage industry. Each client approved the financial analysis charge and provided payment information; most also signed a retainer agreement. Respondent had some expertise in mortgage law and was experienced in negotiating with banking institutions. Respondent spent many hours creating the proprietary financial analysis, which generated valuable information clients could use to pursue a mortgage loan modification without assistance. Most importantly, an unrebutted expert witness testified that the financial analysis was a valuable tool for a client deciding whether to pursue a loan modification, gathering information from distressed homeowners was time-consuming, and software respondent used to create the financial analysis was not readily available to the public.

[8] **214.30 Culpability—State Bar Act violations—Section 6068(m) (communicate with clients)**

Where no credible evidence showed that mortgage lender notified respondent that it had denied client's loan modification, respondent was not culpable of failing to inform client of denial.

[9] **740.32 Mitigation—Good Character references (1.2(e)(vi))—Found but Discounted—References Unfamiliar with Misconduct**

Respondent received only modest mitigating credit for good character where most of his 11 witnesses did not have a lengthy relationship or much recent contact with respondent, and several stated they had little understanding about the discipline charges.

[10] **582.10 Aggravation—Harm—To Client—Found**

Respondent took advantage of several clients' financial desperation and exploited his fiduciary position by repeatedly charging up-front fees for loan modification services that the new laws prohibited.

[11] **591 Aggravation—Indifference to Rectification/Atonement—Found**
621 Aggravation—Lack of Remorse/Failure to Appreciate Seriousness —Found

Respondent failed to acknowledge that he may not charge any fees in loan modification cases until all services have been completed, as clearly provided in new statute and ethics alert. A respondent may freely urge any creative legal theory in good faith, but must accept responsibility for acts and come to grips with culpability. Where respondent argued against new law prohibiting the collection of up-front fees in loan modification cases, his lack of insight was assigned significant aggravating weight because it suggested his misconduct may reoccur.

[12] **106.90 Generally Applicable Procedural Issues—Issues re Pleadings —Other issues re pleadings**
130 Generally Applicable Procedural Issues—Procedure on Review (rules 5.150—5.160)
565 Aggravation—Uncharged violations

Where State Bar had notice of respondent's additional alleged acts of misconduct and failed to charge them in initial pleading and to amend charges to conform to proof at trial, respondent was denied fair opportunity to defend against additional charges, and Review Department declined State Bar's late request on review to consider them in aggravation.

[13] **901.05 Application of Standards—Standard 2.10—Applied—Suspension—Violation of Business & Professions Code**
901.10 Application of Standards—Standard 2.10—Applied—Suspension—Gravity of offense severe
901.20 Application of Standards—Standard 2.10—Applied—Suspension—Harm to victim great

Review department recommended attorney who harmed several vulnerable clients over a six-month period and who had knowledge of plain language of statute and State Bar ethics alert prohibiting collection of certain fees in mortgage loan modification matters should receive discipline including a six-month actual suspension and until he makes restitution for all the fees he illegally collected.

ADDITIONAL ANALYSIS

Culpability
Found
213.11 Section 6068(a) (support Constitution and laws)
222.21 Section 6106.3 (violation of Civil Code § 2944.6 or 2944.7 re mortgage loan modifications)
Not Found
214.35 Section 6068(m) (communicate with clients)
221.50 Section 6106 (moral turpitude, corruption, dishonesty)
290.05 Illegal or unconscionable fee (RPC 4-200; 1975 RPC 2-107)
Aggravation
Found
521 Multiple Acts of Misconduct
Discipline
1013.08 Stayed Suspension—2 years (incl. anything between 2 & 3 yrs.)
1015.04 Actual Suspension—6 months (incl. anything between 6 & 9 mos.)
1017.08 Probation—2 years (incl. anything betwen 2 & 3 yrs.)
1021 Probation Conditions—Restitution
1024 Probation Conditions—Ethics exam/ethics school

OPINION

PURCELL, J.

The Office of the Chief Trial Counsel (State Bar) has charged Swazi Elkanzi Taylor with misconduct involving loan modifications cases. After 16 days of trial, the hearing judge dismissed moral turpitude charges for fraud and misrepresentation, but found that Taylor had charged illegal *and* unconscionable fees in eight client matters. The hearing judge reasoned that Taylor made a "calculated business decision to implement a new business model for operating his law practice in a manner that subverted the clear public protection purposes of SB 94 [new loan modification laws]." After finding three factors in aggravation (multiple acts of misconduct, significant harm, and indifference) and only one factor in mitigation (good character), the hearing judge recommended discipline, including six months' actual suspension subject to three years' probation and restitution payments totaling $12,100.

The State Bar seeks review, asserting that the hearing judge erred by dismissing the moral turpitude charges. It urges us to find additional aggravation for uncharged misconduct and to assign less mitigating weight to Taylor's good character evidence. The State Bar requests that Taylor be disbarred or, at a minimum, that his actual suspension be increased. Taylor did not seek review but asks that he be exonerated on all counts because this case involves mere fee disputes that should be resolved by fee arbitration.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we find that Taylor collected illegal, but not unconscionable, fees in all eight client matters, and that the State Bar failed to prove moral turpitude. We adopt the hearing judge's aggravation and mitigation findings. Given Taylor's multiple violations of loan modification laws designed to protect the public and his lack of insight into his misconduct, a six-month actual suspension is necessary to serve the goals of attorney discipline. We affirm the hearing judge's recommended discipline, but reduce the probation period from three to two years since this is Taylor's first disciplinary matter. We also recommend that Taylor remain suspended until he makes restitution for all of the illegal fees he collected.

I. BACKGROUND AND OVERVIEW

A. Taylor's Background in Real Estate Law

Taylor was admitted to practice law in California in 2005. Initially, he performed contract work for a mortgage company and a law corporation that served as an intermediary between mortgage holders and borrowers to negotiate borrower relief such as workouts, deeds in lieu of foreclosure, and approvals of short sales. In October 2008, during the national foreclosure crisis, Taylor and another attorney formed a real estate law firm. That partnership dissolved by May 2009, and Taylor became the principal of his current firm, Taylor Mortgage Lawyers (TML). TML specializes in loan modifications, short sales, foreclosure negotiations, unlawful detainers, and bankruptcy cases.

Taylor has worked on hundreds of loan modification matters. Over time, he gained practical knowledge about the business practices of mortgage lenders, including which ones were likely to complete loan modifications. Despite his efforts to negotiate with lenders, the loan modifications often failed and Taylor would seek alternative relief for his clients such as a short sale, favorable mortgage terms, or damages against lenders for faulty practices. Taylor described the loan modification process as difficult to navigate and "analogous to the story *of Goldilocks and the Three Bears*. The household income necessary to qualify for mortgage relief mustn't be too much or too little, but must be just right."

B. Legislation Regulating Loan Modification

Around the time of TML's inception in 2009, state laws were enacted to protect homeowners facing foreclosures. California legislators sought to curb abuses by "a cottage industry that has sprung up to exploit borrowers who are having trouble affording their mortgages, and are facing default, and possible foreclosure, if they are unable to negotiate a loan modification or any other form of mortgage loan forbearance with their lender." (Sen. Com. on Banking, Finance, and Insurance, Analysis of Sen.

Bill No. 94 (2009 Reg. Sess.) as amended Mar. 23, 2009, pp. 6-7.)

On October 11, 2009, California Senate Bill number 94 (SB 94) became effective, providing two safeguards for borrowers who employ the services of someone to help with a loan modification: (1) a requirement for a separate notice to borrowers that it is not necessary to use a third party to negotiate a loan modification (codified as Civ. Code, § 2944.6);[1] and (2) a proscription against charging pre-performance compensation, i.e., restricting the collection of fees until all loan modification services are completed (codified as Civ. Code, § 2944.7).[2] The new legislation was designed to "prevent persons from charging borrowers an up-front fee, providing limited services that fail to help the borrower, and leaving the borrower worse off than before he or she engaged the services of a loan modification consultant." (Sen. Com. on Banking, Finance, and Insurance, Analysis of Sen. Bill No. 94 (2009 Reg. Sess.) as amended Mar. 23, 2009, p. 7.) A violation of either Civil Code provision constitutes a misdemeanor (Civ. Code, §§ 2944.6, subd. (c), 2944.7, subd. (b)), and is cause for imposing attorney discipline. (Bus. & Prof. Code, § 6106.3.)[3]

C. Taylor's Revisions to his Retainer Agreement

Before and after SB 94 passed, Taylor charged a flat fee for his legal services, including loan modifications. If a loan modification failed, Taylor arranged a separate fee agreement for additional services. When the new laws took effect, Taylor added the mandatory language concerning the lack of necessity to use the services of a third party as specified in Civil Code section 2944.6, subdivision (c), to his retainer agreements in 14-point bold type print. Clients were required to initial this provision. Taylor also added the mandatory language in 16-point font on a prominent spot on TML's website, and e-mailed potential clients an introduction to TML that directed them to this website.

Taylor further revised his retainer agreement with respect to his fees. Despite the new laws, Taylor thought that he could "unbundle" his legal advice and real estate consulting services in loan modification cases and charge separately for each service after it was performed. He claimed that outside sources confirmed his belief, including other attorneys, people in the legislative offices involved with SB 94, and a panel of attorneys who presented a seminar at the 2010 State Bar Annual Meeting.

However, in October 2009, around the time the new laws came into effect, Taylor viewed an ethics alert posted on the State Bar's website that clearly contradicted his theory that he could unbundle services. He testified that he was "surprised to read that the State Bar was basically saying that SB 94 completely outlawed the loan modification practice where you received any money prior to a loan mod being finalized." Consequently, he talked to colleagues about the ethics alert and they told him that "the law doesn't say that." He also called the State Bar Ethics Hotline, which did not offer any advice about the ethics alert. Taylor's testimony about the opinions he received from others is uncorroborated. Ultimately, Taylor decided to unbundle his services within loan modification cases and collect for each service separately.

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1. Civil Code section 2944.6 requires that before entering into a fee agreement, a person attempting to negotiate or arrange a loan modification must provide the borrower the following information in 14-point font "as a separate statement:"
It is not necessary to pay a third party to arrange for a loan modification or other form of forbearance from your mortgage lender or servicer. You may call your lender directly to ask for a change in your loan terms. Nonprofit housing counseling agencies also offer these and other forms of borrower assistance free of charge. A list of nonprofit housing counseling agencies approved by the United States Department of Housing and Urban Development (HUD) is available from your local HUD office or by visiting www.hud.gov.

2. The relevant portion of Civil Code section 2944.7 reads:
(a) Notwithstanding any other provision of law, it shall be unlawful for any person who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, to do any of the following:
(1) Claim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform.

3. Unless otherwise noted, all further references to "section(s)" are to the Business and Professions Code.

D. The Referral Website

In seven of the eight client matters at issue, Taylor received contact information from an internet website called LowerMyBills.com, a referral service he no longer uses. A party seeking a loan modification would enter information into the website and it would be forwarded to Taylor for a $2 referral fee. A TML case manager or attorney would then follow up by e-mail or telephone, introduce the potential client to the firm, discuss possible mortgage relief, and collect personal and financial information before representation was confirmed. The case manager presented the potential client's information to Taylor or another TML attorney, who would input the financial information of the prospective client into a spreadsheet to generate a one-page document known as TML's financial analysis.

E. The Financial Analysis (FA)

The FA listed various possibilities, such as the interest rate and length of the loan a client might expect to qualify for based on the client's financial circumstances. Taylor and his staff initially spent several hours developing the FA that was used in each potential client's case. Preparing the FA in each case often took hours because the case manager had to talk to the potential client several times to obtain accurate information. The case manager maintained logs reflecting these conversations. After Taylor received the client's financial information, he would verify it by checking tax records, real estate estimates, and title histories through internet databases.

Taylor presented Martin Andelman, an expert in mortgage loan modification calculations, to testify about the FA.[4] Andelman stated that during the time period covered in the Notice of Disciplinary Charges (NDC), Taylor's FA produced calculations that required the use of expensive proprietary software not readily available to the public. He opined that although inputting a client's financial information into Taylor's FA program might be done quickly, gathering and confirming such information could take hours and involved "a lot more time than people think." Andelman explained the difficulty of obtaining financial information from distressed homeowners, who often do not readily know accurate details about their mortgages, income, or taxes. He also viewed qualifying for certain loan modifications as involving particularly sensitive determinations that could require hundreds of questions. Overall, Andelman believed that gathering the information for and producing the FA was a significant undertaking. He concluded that Taylor's FA was a good tool to assist homeowners in deciding whether to seek loan modifications. The State Bar presented no expert evidence to rebut Andelman's testimony.

Once Taylor reviewed the FA, using his knowledge of various lenders, he would determine whether the potential client was a good candidate for a loan modification. If Taylor accepted the client, he set the fee based on the difficulty or novelty of the case. The case manager would notify the client that TML had accepted representation and that a credit card charge would be made for the FA. TML declined representation if the homeowner was not eligible for a loan modification and did not charge for the FA.

If a client verbally accepted representation, the case manager would take the client's credit card information and Taylor or another attorney would charge for the FA. Most often, before the card was charged, the case managers e-mailed the clients a copy of their FA with a retainer agreement and third party authorization form (TPA) to sign and return. Although the retainer agreement stated that representation would not start until both the client and Taylor had signed it, TML sometimes would prepare the modification package before the client returned the signed retainer. In isolated instances, TML prepared but did not e-mail the FA until shortly after the credit card was charged. After the initial charge, clients received a printed copy of the FA in the mail with a welcome packet.

4. Andelman received an MBA in finance from Pepperdine University in 1994, and a Masters Degree in market research and consumer behavior from University of Missouri in 1991. He is an expert in all aspects of loan modification, writes a blog with over 6,000,000 readers, has authored 525 in-depth articles on the foreclosure crisis, and has reviewed over 4,000 mortgage modifications.

II. FACTUAL FINDINGS - INDIVIDUAL CLIENT MATTERS

A. The Castro Matter (Case No. 10-O-05585)

Rosane Castro sought loan modifications on two mortgages totaling over $500,000. She was delinquent on at least one. Castro's contact information was sent to TML as a foreclosure inquiry from the Wisdom Company.[5]

TML case manager Luis Urgiles obtained information for the FA from a series of telephone calls with Castro. On October 23, 2009, Urgiles presented Castro's information to Taylor, who performed the FA and agreed to take the case. That day, Urgiles e-mailed Castro that TML would represent her for $3,500, to be collected in four installments. Urgiles attached a retainer agreement to an e-mail, which contained the following payment schedule:

FA:	$1,750
Preparation of Lender Package:	$ 750
Negotiator/Committee Review:	$ 500
Lender Plan:	$ 500
Total:	$3,500

On October 25, 2009, Castro signed the retainer and consented to the $1,750 charge, which was posted by Castro's bank on October 26, 2009. By early November, TML sent demand letters to Castro's lenders, EMC and GMAC Mortgage Corporations.

On November 21 and 23, 2009, TML charged additional fees totaling $750 against Castro's credit card for preparing her lender packages. In December 2009, EMC informed Castro that TML had not submitted legible copies of her pay stubs. On December 3 and 24, 2009, EMC told TML that the Castro file was complete and still under review but, unbeknownst to Taylor, EMC had closed Castro's file on December 31. On January 4, 2010, TML charged $500 to Castro's credit card for "Negotiator/Committee Review" services. In early February 2010, after several communications, Castro became frustrated with Taylor's services and demanded her money back. Taylor refunded only $500.

B. The Sukin Matter (Case No. 10-O-10241)

Alan Sukin's family home had two mortgages totaling over $900,000. He was not behind on his payments but was seeking refinancing or modification of the two loans. On December 10, 2009, TML attorney David Morrison called Sukin and discussed the loan modification process with him over a series of telephone calls. Morrison advised Sukin he would be out of the office for the holidays but would check his e-mails. Morrison sent Sukin an e-mail attaching a copy of the Loan Modification Retainer Agreement, which unbundled the retainer fee as follows:

FA:	$1,600
Preparation of Lender Package:	$1,000
Negotiator/Committee Review:	$ 500
Lender Plan:	$ 500
Total:	$3,600

Morrison then processed Sukin's FA and determined he was a candidate for modification. On December 26, 2009, Sukin faxed the signed retainer agreement to TML and provided his credit card information, which Morrison forwarded to Taylor. On December 28, 2009, Taylor charged $1,600 to Sukin's credit card. Morrison e-mailed Sukin the FA on January 4, 2010, when he returned to the office. Thereafter, Sukin and TML corresponded about detailed information TML needed for the two lender packages. On February 8, 2010, Taylor charged $1,000 to Sukin's credit card for "Preparation of Lender Package." In May 2010, Taylor submitted the modification demand packages to the lenders.

TML corresponded with the lenders through the summer and on June 30, 2010, Taylor charged $500 to Sukin's credit card for "Negotiator/Committee Review." In July, the first mortgage holder told TML it would deny Sukin's request for modification. A

5. TML received contact information in the remaining seven client matters from LowerMyBills.com.

TML case manager relayed this decision to Sukin on September 1, 2010, and discussed possible litigation against the lender. On September 30, 2010, Taylor charged the final $500 to Sukin's credit card for the "Lender Plan."

In October 2010, Taylor quoted a flat fee of $3,000 to file a complaint against the lender, and Sukin agreed to this course of action. Taylor did not prepare a written fee agreement, but charged Sukin's credit card $3,000 on October 14, 2010. A TML attorney drafted a civil complaint and prepared exhibits totaling over 100 pages, which were forwarded to Sukin in December 2010. Sukin received these documents but was dissatisfied with TML's services and decided not to go forward with the lawsuit. Taylor did not return any money, despite Sukin's request for a full refund.

C. The Ramirez Matter (Case No. 10-O-05171)

On March 15, 2010, Maria Ramirez and her daughter Bianca Quiroz met with TML case manager Sean Markie at TML's offices. Ramirez and Quiroz discussed their case, went over the FA, and signed a retainer agreement that provided for unbundled services as follows:

FA:	$1,900
Preparation of Lender Package:	$1,900
Total:	$3,800

Ramirez gave Markie her credit card information and authorized him to charge $1,000 (a portion of the FA fee), which was completed the following afternoon on March 16, 2010. After the meeting, Ramirez had misgivings about retaining TML and asked her daughter to terminate TML's representation. On March 16, 2010, in the early evening, Quiroz sent an e-mail to Markie informing him to stop the process. Later that month, Ramirez spoke with Markie about the $1,000 charge to her credit card, and Markie told her that TML would not charge the additional $900 owed for the FA. Ramirez disputed the $1,000 payment to TML with her bank, which credited the money back to her.

D. The Croxton Matter (Case No. 10-O-06472)

James Croxton had two mortgages on his family home and was behind on his payments. On April 21, 2010, TML case manager Karitza Kihm spoke with Croxton about his financial and credit card information. Kihm reviewed the information with Taylor, who prepared the FA and agreed to take the case. That day, Kihm forwarded the FA, a copy of the TPA, and the Legal Services Retainer for Croxton and his wife. The retainer agreement divided the total fee into two charges:

FA:	$1,950
Preparation of Lender Package:	$1,950
Total:	$3,900

Taylor charged $500 to the credit card on April 21, 2010, and an additional $1,300 the next day. On April 22, 2010, the Croxtons signed and returned the retainer agreement and TPA. Taylor forwarded the TPA to the Croxtons' lender on April 26, 2010. Croxton became concerned when he continued to receive calls from his lender, and questioned Taylor about his representation. In early May 2010, Croxton faxed and mailed Taylor a letter terminating his services, and demanding a refund of 90% of his $1,800. In response, Taylor mailed a letter to Croxton withdrawing from representation and included a $500 refund check.

E. The Sears Matter (Case No. 10-O-07710)

On March 25, 2010, TML case manager Richard Kurzer sent Thomas Sears an introductory e-mail that contained links to websites for TML and the Better Business Bureau. On Friday, April 23, 2010, Kurzer obtained Sears's financial information and explained TML's retainer. Taylor processed Sears's FA and agreed to take the case. Kurzer then took Sears's credit card information over the telephone after Sears agreed to TML's representation. That evening, Kurzer sent Taylor an e-mail with Sears's credit card information and a request to process the card. Taylor charged $1,950 to Sears's credit card over the weekend.

The next Monday, April 26, 2010, Kurzer e-mailed Sears his FA with copies of the Loan Modification Retainer and TPA for Sears to complete and return. The retainer agreement unbundled the total fee into two payments:

FA:	$1,950
Preparation of Lender Package:	$1,950
Total:	$3,900

Over the weekend, Sears changed his mind and tried unsuccessfully to cancel his credit card as well as the TML transaction. He did not complete the retainer agreement or the TPA. Sears disputed the $1,950 charge with his bank, which ultimately credited it back to him.

F. The Harris/Torres Matter (Case No. 10-O-08922)

Eloisa Torres, a licensed real estate agent, and Wesley Harris hired TML to prepare a loan modification package. Torres and Harris were 16 months delinquent on their home mortgage and facing a trustee sale. Torres and Harris talked to case manager Jason Holland about their eligibility for a loan modification. On April 30, 2010, they signed TML's Loan Modification Retainer, complete with credit card authorization information. The retainer unbundled Taylor's $4,000 fee into two payments:

FA:	$2,250
Preparation of Lender Package:	$1,750
Total:	$4,000

Taylor charged $2,250 to Torres's bank card in two transactions (April 30 and May 2, 2010) that cleared her account on May 3, 2010. Harris and Torres never received the FA. On May 18, 2010, TML sent a demand package to the lender and made a follow-up contact because the home was scheduled to be sold at a trustee sale on June 7, 2012. On May 24, 2010, TML electronically collected an additional $1,750. The lender proposed a payment plan for the delinquent months, but it was unaffordable. Harris filed for bankruptcy on June 2, 2010. Harris and Torres terminated TML on June 5, 2010, and requested a full refund. Taylor returned only $250.

G. The Kapadia Matter (Case No. 10-O-11186)

Harshadrai Kapadia, an accountant, was not in default, but wanted to modify his loan on one of his two properties. Taylor assigned Kurzer as case manager. In March 2010, Kurzer explained the services TML offered to Kapadia over the telephone and sent an introductory e-mail. On April 2, 2010, Kurzer collected Kapadia's information and consulted with Taylor, who performed the FA and determined Kapadia was eligible for a modification. Kurzer conveyed this to Kapadia and explained that TML would handle the matter for a $3,800 fee payable in two $1,900 installments. Kapadia accepted representation and gave Kurzer his credit card information, authorizing a charge of $1,400. As it was late Friday afternoon, Kurzer told Kapadia he would send the necessary information on Monday.

Taylor charged $1,400 to Kapadia's credit card on Sunday, April 4, 2010. On Monday, April 5, 2010, Kurzer e-mailed Kapadia the FA, TPA, and Legal Services Retainer Agreement, which unbundled the total fee as follows:

FA:	$1,900
Preparation of Lender Package:	$1,900
Total:	$3,800

Kapadia decided he did not want to proceed, and unsuccessfully attempted to cancel the $1,400 transaction with his credit card company. Taylor waived the remaining $500 for the FA.

H. The Bonneville Matter (Case No. 11-O-10610)

On April 19, 2010, TML case manager Bayo Ajigbotafe talked to Rick Bonneville about the possibility of obtaining a better rate on a mortgage held by Bonneville's wife on their home. The Bonnevilles were not in default on their mortgage. Ajigbotafe sent an e-mail explaining that Bonneville might qualify for a modification, and that a TML analyst and attorney would look at his situation. In a later conversation, Bonneville gave Ajigbotafe his financial and mortgage information. Ajigbotafe reported Bonneville's information to Taylor, who prepared the FA and determined he would be a candidate for modification.

Ajigbotafe quoted $3,600 as the service fee to apply for a loan modification, which sounded "all right" to Bonneville. Ajigbotafe recorded Bonneville's credit card information.

That night, Ajigbotafe sent Bonneville an e-mail welcoming him as a client. He attached Bonneville's FA, TPA, and Legal Services Retainer which broke down the quoted fee:

FA:	$1,800
Preparation of Lender Package:	$1,800
Total:	$3,600

The next day, April 20, 2010, an $1,800 transaction was charged to Bonneville's credit card. At approximately noon, Bonneville sent Ajigbotafe an e-mail stating: "We are not satisfied with the paper work you sent us by email" and "want to cancel any services yet to be rendered." The Bonnevilles never signed the retainer, and Taylor did not refund the $1,800.

III. CULPABILITY

A. Summary

The State Bar charged Taylor with 26 counts of misconduct in eight client matters. The hearing judge found Taylor culpable of 17 counts, including ten violations of section 6106.3, which provides: "It shall constitute cause for the imposition of discipline of an attorney within the meaning of this chapter for an attorney to engage in any conduct in violation of section 2944.6 or 2944.7 of the Civil Code." (Italics added.) Specifically, the hearing judge found eight violations of Civil Code section 2944.7 (charging pre-performance fees) plus two violations of Civil Code section 2944.6 (failing to provide a separate statement disclosing that a third-party representative was unnecessary for loan modifications). We agree with nine of those ten culpability findings: eight for charging a pre-performance fee in each of the client matters, but only one for failing to provide a separate statement.

The hearing judge also found that Taylor charged an unconscionable fee in seven client matters.[6] While the record supports that Taylor's fee for the FA was an illegal pre-performance fee for loan modification services, no credible evidence establishes that the amount of the fee was unconscionable.

Finally, we agree with the hearing judge that Taylor did not commit any acts of moral turpitude as charged in each client matter. We begin our analysis with the nine counts for which we find culpability.[7]

B. Section 6106.3: Charging Fees Before Completing All Loan Modification Services (Civ. Code, § 2944.7, subd. (a)) [Counts 2, 6, 10, 13, 17, 20, 23, and 26]

These eight counts allege violations of section 6106.3 in each client matter for charging pre-performance fees for loan modifications. Civil Code section 2944.7, subdivision (a), prohibited Taylor from charging for the FA before all loan modification services had been completed. The services subject to this advance fee prohibition are those where one "negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance . . . ." (Civ. Code, § 2944.7, subd. (a).) Taylor's first two versions of his retainer contract were titled "Loan Modification Retainer," and clearly represented that his services, including the FA, were for loan modifications. (*Mahoney v. Sharff* (1961) 191 Cal.App.2d 191, 196 [ambiguity construed against attorney who drafted contract].) Thus, under Civil Code section 2944.7, subdivision (a)(1), Taylor could not "claim, demand, charge, collect, or receive any compensation" until he had "fully performed each and every service [he] contracted to perform or represented that he . . . would perform."

Although Taylor eventually re-named his retainer agreement "Legal Services Retainer" rather than "Loan Modification Retainer," the introductory e-mails sent to the clients who received that version of the retainer agreement still characterized Taylor's

6. The NDC does not allege an unconscionable fee in the Harris/Torres matter.

7. Since the NDC alleges similar misconduct in each client matter, we have grouped the counts by charged misconduct rather than by client matter or numerical order to assist the reader.

firm, TML, as a loan modification service provider. Further, the agreement stated that the fees charged included the FA and "Preparation of a Lender Package," both of which are clearly part of a loan modification. We conclude that Taylor violated Civil Code section 2944.7, subdivision (a), in eight client matters by charging for the FA before all loan modification services were complete.

[1] Taylor presents a primary argument against his culpability: that the new statutes are ambiguous and should be interpreted to allow attorneys to charge unbundled fees for services as they are completed. We disagree.

The language of Civil Code section 2944.7, subdivision (a), plainly prohibits *any person* engaging in loan modifications from collecting *any fees* related to such modifications until *each and every* service contracted for has been completed. (*In the Matter of Jaurequi* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 56, 59 [plain language of statute controlled where meaning lacked ambiguity, doubt, or uncertainty].)[8] We find nothing ambiguous about the statute's language, or the legislative history, which provides that "legal professionals" are one of the groups the bill was designed to reach.[9] (See 4 Miller & Starr, Cal. Real Estate (3d ed. 2011) § 10:145.10 [statute directed at brokers and attorneys who, as self-styled consultants, were holding themselves out as able to facilitate loan modifications, "but usually produced no worthwhile results after collecting substantial advance fees from desperate homeowners"].)

[2] We also reject Taylor's argument that he is not culpable because he acted in good faith by consulting others before he decided to unbundle services within loan modifications and charge separately for them. Taylor acknowledged he was surprised about the State Bar ethics alert warning that an attorney may not collect any payment for loan modification services until fully completed. Although Taylor claims his colleagues disputed the accuracy of the ethics alert, he may not rely on the opinion of another attorney as a defense to violating the rules or sections governing attorney ethics. (*Sheffield v. State Bar* (1943) 22 Cal.2d 627, 632 [opinion of "fellow attorney" no defense to wrongdoing].) In sum, Taylor chose an interpretation of Civil Code section 2944.7, subdivision (a), that ignored the statute's plain language, the legislative history and, most importantly, his own knowledge of the State Bar's October 2009 ethics alert. Accordingly, we find that he did not act in good faith.

C. Section 6106.3: Failing to Provide Required Separate Statement (Civ. Code, § 2944.6, subd. (a)) [Counts 9 and 16]

The NDC charged only two violations of Civil Code section 2944.6, subdivision (a), failing to provide a separate statement about the lack of necessity for a third-party negotiator. Those violations are alleged in the Sears matter (Count 16) and in the Ramirez matter (Count 9).

[3] In the Sears matter, Taylor's assistant, Kurzer, did not send the retainer agreement to Sears until two days after TML had accepted representation and had charged him $1,950. Although Kurzer sent Sears an e-mail with a link to TML's website, which displayed the separate statement, there is no evidence Sears viewed the site. Since Taylor charged Sears for loan modification services without first providing the separate statement, he is culpable of Count 16.

[4] In the Ramirez matter, Taylor did not fail to

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8. No published case law interprets Civil Code section 2944.7, subdivision (a).

9. The legislative history provides in relevant part: "California does have a law regulating the activities of foreclosure consultants, but that law contains numerous exemptions from its requirements, including exemptions for legal professionals. . Under the provisions of the bill, persons exempt from the foreclosure consultant law would be allowed to help negotiate loan modifications on a borrower's behalf for a fee, paid after services were rendered." (Sen. Com. on Banking, Finance, and Insurance, Analysis of Sen. Bill No. 94 (2009 Reg. Sess.) as amended Mar. 23, 2009, p. 7.)

provide the separate statement. Ramirez signed the retainer agreement the day she received the FA and authorized TML to charge $1,000. The agreement contained the mandatory language at page two, which Ramirez acknowledged by initialing next to it. The statute requires that the information be provided "as a separate statement" but does not mandate that it be in a separate document, as the State Bar asserts. We dismiss Count 9 with prejudice.

D. Section 6106: Moral Turpitude [Counts 1, 5, 8, 12, 15, 19, 21, and 24]

The NDC charged moral turpitude in all eight client matters based on several actions, including that Taylor: (1) misrepresented that installment payments would be collected only after the service was complete, but instead collected a fee for the FA prior to performing any service in each client matter; (2) appropriated funds under false pretenses by requiring that the potential client give credit card information to begin services, advised that fees would not be withdrawn before the service was completed and, thereafter, withdrew fees prior to performing any service in each client matter; (3) misappropriated client funds by collecting fees when the clients had not signed the retainer agreement in the Kapadia and Bonneville matters; (4) informed the client that the loan modification application was pending when he knew it was not in the Castro matter; and (5) threatened to withdraw unearned fees from the client's bank account if his services were terminated in the Ramirez matter.

[5] The hearing judge did not find clear and convincing evidence[10] that Taylor committed any acts of moral turpitude. Instead, the hearing judge concluded that, at best, Taylor negligently breached his agreements but did not make intentional misrepresentations or misappropriate client funds when he charged the illegal fees. We defer to the hearing judge's findings of fact which clearly rested, in part, on credibility assessments of each client and Taylor, all of whom testified at trial. (Rules Proc. of State Bar, rule 5.155(A) [factual findings entitled to great weight]; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280 [hearing judge's credibility findings entitled to great weight].) Resolving all evidentiary conflicts in Taylor's favor, we agree with the hearing judge that the State Bar did not clearly and convincingly prove moral turpitude. (*Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 324 ["inferences leading to a conclusion of innocence must be drawn if equally reasonable"].)

E. Rule 4-200(B) of the State Bar Rules of Professional Conduct:[11] Unconscionable Fee [Counts 3, 7, 11, 14, 18, 22, and 25]

The NDC alleges that Taylor collected unconscionable fees in seven client matters (excluding the Harris/Torres matter). The hearing judge found Taylor culpable, reasoning that the one-page FA was of little value to the clients as a mere summary of financial information without meaningful analysis. We conclude that while the FA fees may have been high, the State Bar did not prove that they were truly unconscionable.

[6] Rule 4-200(A) specifically prohibits an attorney from entering into an agreement for, charging, or collecting an illegal or unconscionable fee. It is settled that a gross overcharge by an attorney may warrant discipline. (*Bushman v. State Bar* (1974) 11 Cal.3d 558, 563.) But a "fee that 'seems high' or even one that is in fact high is not the same as an unconscionable fee." (*Aronin v. State Bar* (1990) 52 Cal. 3d 276, 285.) A fee is unconscionable when it is so exorbitant and disproportionate to the services performed as to "shock the conscience" and often involves an element of fraud or overreaching that practically constitutes an appropriation of client funds under the guise of fees. (*In re Goldstone* (1931) 214 Cal. 490, 499.)

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10. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

11. Unless otherwise noted, all further references to "rule(s)" are to this source.

[7] To determine whether a fee meets the test of unconscionability, rule 4-200(B) provides the guidance of 11 nonexclusive factors,[12] several of which are relevant here. First, the level of client sophistication varied among Taylor's clients. Some were familiar with the mortgage industry, while others had more than one property or were not in default or behind on their payments. Still, others were unsophisticated and financially distressed. Each of Taylor's clients authorized the FA charge, provided payment information and, in most cases, signed the retainer agreement. Taylor had some expertise in mortgage law and was experienced in negotiating with banking institutions. He testified that creating the proprietary FA took many hours and it contained valuable information for clients because they could use it to pursue a loan modification without his assistance. Most importantly, Taylor presented the unrebutted expert testimony of Andelman, who explained that the FA was a valuable tool for a client in deciding whether to pursue a loan modification. Andelman also confirmed that gathering the information from distressed homeowners was time-consuming, and the software Taylor used to create the FA was not readily available to the public.

Under these circumstances, Taylor's fees for the FAs did not represent the type of truly shocking fees that the courts have found to be unconscionable.[13] We dismiss with prejudice all charges alleging unconscionable fees.[14]

F. Section 6068, subdivision (m): Failure to Inform Client of Significant Development [Count 4]

[8] Count Four alleges Taylor failed to inform Castro of a significant development – that the lender, EMC, had denied her modification packet. We agree with the hearing judge that no credible evidence establishes that EMC notified TML about the denial. We dismiss this count with prejudice.

IV. MITIGATION AND AGGRAVATION

The appropriate discipline is determined in light of the relevant circumstances, including mitigating and aggravating factors. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) Taylor must establish mitigation by clear and convincing evidence (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)),[15] while the State Bar has the same burden to prove aggravating circumstances. (Std. 1.2(e).)

A. One Factor in Mitigation: Good Character (Std.1.2(e)(vi))

[9] To qualify for mitigation credit, standard 1.2(e)(vi) calls for "an extraordinary demonstration of good character of the member attested to by a wide range of references in the legal and general commu-

12. (1) The amount of the fee in proportion to the value of the services performed.
(2) The relative sophistication of the member and the client.
(3) The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
(4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the member.
(5) The amount involved and the results obtained.
(6) The time limitations imposed by the client or by the circumstances.
(7) The nature and length of the professional relationship with the client.
(8) The experience, reputation, and ability of the member or members performing the services.
(9) Whether the fee is fixed or contingent.
(10) The time and labor required.
(11) The informed consent of the client to the fee.

13. See, e.g., *In the Matter of Harney, supra,* 3 Cal. State Bar Ct. Rptr. at pp. 273, 284 (medical malpractice fee of $266,850 in excess of statutory limit is illegal but not unconscionable because proportional to value of services rendered); *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 905 (unconscionable fee where three times the amount client agreed to pay).

14. In Count Seven (the Sukin matter), the State Bar also alleged that the $3,000 Taylor charged Sukin for litigation after the loan modification failed was unconscionable. We do not agree. TML prepared and sent Sukin a complaint and accompanying exhibits totaling over 100 pages. The State Bar presented no credible evidence that the fee for this service was unconscionable.

15. Unless otherwise noted, all references to "standard(s)" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

nities and who are aware of the full extent of the member's misconduct." Taylor presented 11 witnesses including his wife and brother, a client, several friends and four attorneys who uniformly testified to his professionalism, honesty, integrity, and tireless work ethic. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [testimony from members of bench and bar entitled to serious consideration because judges and attorneys have "strong interest in maintaining the honest administration of justice"].) These witnesses constitute a wide range of references in the legal and general communities.

However, most of the witnesses did not have a lengthy relationship or much recent contact with Taylor. Further, several stated they had little understanding about the discipline charges. These factors undermine the value of Taylor's character evidence. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 538.) Accordingly, we assign only modest mitigating credit for good character. (*In re Aquino* (1989) 49 Cal.3d 1122, 1130-1131 [seven witnesses and 20 support letters not "significant" mitigation because witnesses unfamiliar with details of misconduct].)

B. Three Factors in Aggravation

The hearing judge found three factors in aggravation: multiple acts of misconduct, significant harm, and indifference/lack of remorse. We agree.

1. Multiple Acts of Misconduct (Std. 1.2(b)(ii))

For six months, Taylor committed multiple acts of misconduct in eight client matters by collecting fees in violation of a clear statutory prohibition. His many acts of wrongdoing substantially aggravate this case.

2. Significant Harm (Std. 1.2(b)(iv))

[10] Taylor took advantage of several clients' financial desperation and exploited his fiduciary position by repeatedly charging up-front fees for loan modification services that the new laws prohibited. (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813 [parties in a fiduciary or confidential relationship do not deal on equal terms because trusted person is in superior position to exert unique influence over dependent party].) Taylor's actions significantly harmed these clients financially, particularly because he has for years failed to provide full refunds of these much needed funds.

3. Indifference/Lack of Remorse (Std. 1.2(b)(v))

[11] The hearing judge found that Taylor "expressed no remorse for his misconduct and continues to deny any wrongdoing." Lack of remorse and failure to acknowledge misconduct are "properly considered as . . . aggravating factor[s] in deciding the appropriate discipline for an attorney. [Citations.]" (*Weber v. State Bar* (1988) 47 Cal.3d 492, 506.) Taylor has failed to acknowledge that he may not charge any fees in loan modification cases until all services have been completed, as the statute and ethics alert clearly provide. Instead, he continues to assert that he can unbundle services and charge for them separately. While Taylor may freely urge any creative legal theory in good faith, he must "accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) He has not done this – he claims that he should not be disciplined for violating "a debatable point of law regarding SB-94 . . . ." The statutory prohibition against collecting up-front fees in loan modification cases is not debatable – it is the law. We assign significant weight to Taylor's lack of insight because it suggests that his misconduct may reoccur. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 781-782.)[16]

16. **[12]** The State Bar asks us to find additional aggravation for the following uncharged misconduct that it alleges Taylor committed: (1) communicating about a free consultation and charging advanced fees in violation of rule 1-400(D); (2) using false, deceptive and confusing solicitations and fee agreements; (3) using runners and cappers for referrals from LowerMyBills.com in violation of sections 6151 and 6152; and (4) paying a $3,000 fee to prepare Sukin's complaint without a written agreement in violation of section 6148, subdivision (a).

Evidence of uncharged misconduct can be considered in aggravation. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36.) But here, the State Bar had notice of all these acts and failed to charge them as misconduct either in the NDC or at trial as conforming to proof. We find that the State Bar's late request on review denies Taylor a fair opportunity to defend against these newly alleged charges and therefore decline to find additional aggravation for uncharged misconduct.

V. LEVEL OF DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession. (Std. 1.3.) We balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.) As always, we look to the standards and decisional law to recommend the fairest discipline. (*In re Silverton* (2005) 36 Cal.4th 81, 91; *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

Since we have found Taylor culpable of collecting illegal fees in violation of section 6106.3, the applicable standard is 2.10. It calls for reproval or suspension, depending on the gravity of the offense or harm to the victim, for violations of the Business and Professions Code not otherwise specified in another standard. We reject the State Bar's request that Taylor be disbarred as it is beyond what the standard suggests and because he did not engage in acts of moral turpitude, dishonesty, or corruption. Instead, we begin our analysis, as the standard directs, by looking to: (1) the seriousness of Taylor's misconduct; and (2) any consequential client harm.

Taylor's conduct is serious and the harm to his clients is significant. He repeatedly violated loan modification statutes designed to protect the consumer. The plain language of these statutes and a State Bar ethics alert provided fair notice to Taylor that he must not collect any up-front fees for loan modification services. Yet Taylor used a "payment schedule" in his retainer agreements to circumvent the protections of SB 94. He has harmed his clients by collecting illegal fees from them and, in most instances, has failed to provide full refunds.

[13] Because standard 2.10 suggests a broad range of discipline (reproval to suspension), we turn to case precedent and find instructive the case of *In the Matter of Harney, supra*, 3 Cal. State Bar Ct. Rptr. 266. In *Harney*, we used standard 2.7 (minimum six-month suspension for collecting unconscionable fee irrespective of mitigation), as a guideline for discipline, even though the fee was illegal and not unconscionable. (*Id.* at pp. 284-285.) The attorney in *Harney,* who had a prior public reproval, collected $266,850 in excess of the statutory limits in one medical malpractice case, making it an illegal fee. (*Id.* at p. 277.) We imposed discipline including a six-month suspension. (*Id.* at p. 285.) Here, Taylor collected significantly less in illegal fees and has no prior discipline, but harmed several vulnerable clients over a six-month period. Like the attorney in *Harney*, who was fully aware of the law prohibiting the excess fees, Taylor knew about the plain language of the statute and the State Bar ethics alert before he collected the illegal fees.[17]

Guided by standard 2.10, *Harney,* and the aggravating evidence, we affirm the hearing judge's recommended discipline, which includes a six-month actual suspension, but we reduce the probationary period from three years to two years. In addition, we recommend that Taylor remain suspended until he makes restitution for all the fees he illegally collected. Our recommendation will permit Taylor time to gain insight into his misconduct, while at the same time protect the public and the courts, and maintain the integrity of the legal profession.

VI. RECOMMENDATION

We recommend that Swazi Elkanzi Taylor be suspended from the practice of law for two years, execution stayed, and that he be placed on probation for two years on the following conditions:

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17. Other unconscionable fee cases present such a broad range of discipline that they do not offer helpful guidance, particularly because they were decided before the standards or involve other serious misconduct. (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar. Ct. Rptr. 980, 995, 999 [thorough discussion of broad range of discipline in unconscionable fee cases]; see, e.g., *In re Goldstone, supra,* 214 Cal. 490 [three-month suspension for unconscionable fee court viewed as dishonest for providing no service of value]; *Barnum v. State Bar* (1990) 52 Cal.3d 104 [disbarment for charging unconscionable fees plus violation of four court orders and extensive history of prior discipline]; *In the Matter of Wells, supra,* 4 Cal. State Bar Ct. Rptr. 896 [six-month suspension for illegal and unconscionable fee plus unlawful practice of law, overreaching, false information to officials, and failing to return unearned fees but substantial mitigation]; *In the Matter of Scapa and Brown* (Review. Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635 [18-month actual suspension for unconscionable fee plus violations for moral turpitude and fee-splitting].)

1. He is suspended from the practice of law for a minimum of the first six months of probation, and he will remain suspended until the following requirements are satisfied:

(a) He makes restitution to the following payees (or reimburses the Client Security Fund, to the extent of any payment from the fund to the payees, in accordance with Business and Professions Code section 6140.5) and furnishes proof to the State Bar's Office of Probation in Los Angeles:

(1) Rosane Castro in the amount of $2,500 plus 10 percent interest per year from November 23, 2009;

(2) Alan Sukin in the amount of $3,600 plus 10 percent interest per year from September 30, 2010;

(3) James Croxton in the amount of $1,300 plus 10 percent interest per year from April 22, 2010;

(4) Wesley Harris and Eloisa Torres in the amount of $3,750 plus 10 percent interest per year from May 24, 2010;

(5) Harshadrai Kapadia in the amount of $1,400 plus 10 percent interest per year from April 4, 2010; and

(6) Rick Bonneville in the amount of $1,800 plus 10 percent interest per year from April 20, 2010.

(b) If he remains suspended for two years or more as a result of not satisfying the preceding condition, he must also provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law before his suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.4(c)(ii).)

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within 30 days after the effective date of the Supreme Court order in this proceeding, he must contact the State Bar's Office of Probation in Los Angeles and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, Taylor must meet with the probation deputy either in-person or by telephone. Thereafter, Taylor must promptly meet with the probation deputy as directed and upon request of the Office of Probation.

4. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's 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 shall not receive MCLE credit for attending Ethics School.

8. 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 period of probation, if he has complied with all conditions of probation, the two-year period of stayed suspension will be satisfied and that suspension will be terminated.

PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Swazi Elkanzi Taylor be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of his actual suspension in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b)(2).)

RULE 9.20

We further recommend that Swazi Elkanzi Taylor be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

COSTS

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

We concur:

REMKE, P.J.
EPSTEIN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ARTHUR GOOTKIN LAWRENCE

A Member of the State Bar

Nos. 07-O-12696 (07-O-13600); 10-O-10811 (Cons.)

Filed March 12, 2013; as modified and corrected, April 5, 2013

SUMMARY

Respondent, who had a history of serious health problems, was charged with four counts of misconduct in three matters. Even though this was respondent's fourth disciplinary proceeding, the hearing judge recommended an 18-month actual suspension after finding that respondent committed acts involving moral turpitude, failed to maintain $800 in his client trust account on behalf of his client, and failed to comply with the probation condition of a prior discipline. (Hon. Richard A. Platel, Hearing Judge.)

In addition to the culpability findings of the hearing judge, the review department found respondent culpable of commingling. The review department determined that respondent's physical disabilities established compelling mitigation that justified deviating from standard 1.7(b) (disbarment if attorney has two or more prior discipline records unless compelling mitigation established), but recommended that he be actually suspended for three years and until he complied with standard 1.4(c)(ii) (remain actually suspended until rehabilitation, fitness and ability to practice is proven).

COUNSEL FOR PARTIES

For State Bar: Allen Blumenthal

For Respondent: David A. Clare

HEADNOTES

[1] 221.12 Section 6106 (moral turpitude, corruption, dishonesty)—Gross negligence

The Rules of Professional Conduct require an attorney to manage his trust account and maintain a trust account recordkeeping system. The failure to manage the client trust account amounts to grossly negligent conduct constituting moral turpitude.

[2 a,b] 280.00 Trust account/commingling (RPC 4-100(A); 1975 RPC 8-101(A))

Where disciplinary charges were filed two years after respondent's withdrawal of funds from trust account, and remained pending for more than three years afterwards, respondent remained obligated to maintain trust account records despite expiration of five-year retention period required by Rules of Professional Conduct. Attorney handling client funds cannot escape culpability for misconduct by failing to maintain adequate records.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[3] **725.12 Mitigation—Emotional/physical disability/illness—Without expert testimony—Found**

Recognizing that some physical disabilities are permanent, standard 1.2(e)(iv) must be considered in the context of an attorney's fitness and ability to practice law. After suffering from serious medical condition for many years, respondent is in best position to discuss impact, if any, he is currently experiencing from the medical condition. Fifteen months may not be long enough to establish that condition has permanently subsided, but it is sufficient time to establish that respondent is rehabilitated from the severity of the illnesses that contributed to his misconduct.

[4] **822.52 Application of Standards—Standard 2.2 (entrusted funds or property)—Declined to apply—Insignificant amount of funds**

Standard 2.2(a) calls for disbarment when attorney willfully misappropriates entrusted funds unless amount is insignificantly small or the most compelling mitigating circumstances clearly predominate. The first exception to standard 2.2(a) applies. Respondent misappropriated by his gross neglect, a relatively small amount of funds, which he repaid fairly quickly and before State Bar's involvement.

[5 a,b] **176 Discipline Conditions-Requirements to Show Rehabilitation**
806.51 Application of Standards—(b) Disbarment after two priors—Declined to apply—Compelling mitigation

Respondent's medical problems over the years were severe and extensive. The compelling circumstances clearly predominate and compel a look beyond a strict application of standard 1.7(b). Viewed holistically, respondent's extreme physical disabilities lessen the moral culpability of his misconduct. Thus, the public will be adequately protected by a lengthy suspension that will continue until respondent proves his rehabilitation, fitness, and ability to practice.

ADDITIONAL ANALYSIS

Procedural Issues
106.30 Issues re Pleadings—Duplicative charges

Culpability
Found
280.01 Trust account/commingling (RPC 4-100(A); 1975 RPC 8-101(A))
214.11 Section 6068(k) (comply with disciplinary probation)

Aggravation
Found
521 Multiple acts of misconduct (1.2(b)(ii))

Found but discounted or not relied on
513.10 Prior record of discipline—Contemporaneous with current misconduct

Mitigation
Declined to Find
735.50 Candor and cooperation with Bar (1.2(e)(v))

Discipline Imposed
1015.09 Actual Suspension—Three years
1024 Ethics exam/ethics school
1030 Probation Conditions—Standard 1.4(c)(ii)—Rehabilitation

OPINION

REMKE, P. J.

Respondent Arthur Gootkin Lawrence has been an attorney since 1959, and is 81 years old. For nearly 60 years, he has suffered from a neuropathic disorder called tic douloureux (trigeminal neuralgia), which is characterized by episodes of extreme and debilitating facial pain. More recently, he suffered a traumatic brain injury and underwent a craniotomy. It is undisputed that these serious physical disabilities have caused or contributed to much of his professional misconduct, but the fact remains that this is Lawrence's fourth disciplinary proceeding.

Standard 1.7(b) provides that the degree of discipline imposed on an attorney with two prior records of discipline "shall be disbarment unless the most compelling mitigating circumstances clearly predominate."[1] Although Lawrence's extreme physical disabilities do not immunize him from discipline, they do establish the most compelling mitigating circumstances and justify deviating from the standard. Based on the limited nature and extent of his misconduct, a disbarment recommendation would be excessive and punitive. Thus, under the unique facts of this case, we conclude that the goals of attorney discipline will be best accomplished by a lengthy suspension that continues until Lawrence proves his rehabilitation, fitness to practice, and present learning and ability in the law.

I. ISSUES ON REVIEW

The hearing judge found Lawrence culpable of three of the four charges: failing to maintain $800 in client funds in trust; misappropriating those funds over a four-month period in 2004; and violating the terms of his disciplinary probation by failing to take Ethics School and file his final probation report. The hearing judge did not find him culpable of a commingling charge. Concluding that Lawrence's medical problems were compelling mitigation, the judge recommended an 18-month suspension with three years' probation. But he did not include a standard 1.4(c)(ii) requirement that Lawrence remain suspended until he proves his rehabilitation, fitness to practice, and present learning and ability in the law.

The State Bar seeks review and asserts that Lawrence must be disbarred. It challenges the hearing judge's finding that Lawrence was not culpable of commingling, and disagrees with the weight given to the mitigating and aggravating evidence. The State Bar argues that Lawrence "has failed to show that he has his medical issues permanently under control so that they are not likely to cause future misconduct" and thus he "is a significant danger to cause future misconduct if he is not disbarred." Lawrence did not seek review, but requests a shorter actual suspension period and agrees to remain suspended until he satisfies standard 1.4(c)(ii).

Based on our independent review (Cal. Rules of Court, rule 9.12), we find that Lawrence is culpable of commingling funds in his trust account in 2006. We also affirm the hearing judge's findings for the 2004 trust account violations and the 2011 probation violations. Ultimately, we find that Lawrence's extreme physical disabilities establish the most compelling mitigating circumstances that clearly predominate and support a deviation from the standard's presumptive disbarment for repetitive discipline. We recommend that Lawrence be suspended for three years and until he establishes the rehabilitation requirements of standard 1.4(c)(ii).

II. FINDINGS OF FACTS AND CONCLUSIONS OF LAW

As stated, Lawrence has suffered from tic douloureux for nearly 60 years. It is characterized by episodes of extreme and debilitating facial pain, originating from the trigeminal nerve. In an attempt to control his condition, Lawrence has undergone at least 11 surgeries. In addition, he has tried to manage his condition with pain medications such as hydrocodone

1. All further references to standards are to Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

or vicodin. Due to the severity of his medical condition, Lawrence agreed to be placed on involuntary inactive status in his first disciplinary proceeding in 1981. He remained inactive and not entitled to practice until 1992.

Starting in January 2010, Lawrence's tic douloureux was again causing him severe pain and headaches. He testified that he was a "basket case" and was unable to obtain relief from the pain. He took prescription pain medication, but even increased dosages did not provide a reprieve. Thus, after seeking different treatment options, Lawrence underwent a sterotactic radiosurgery using the gamma ray knife in May 2010.

Shortly thereafter, in August 2010, Lawrence suffered a traumatic brain injury after falling at the federal courthouse in Los Angeles. He was diagnosed as suffering from a left subdural hematoma (acute) and underwent a craniotomy on the same day. Lawrence remained in the hospital for about a month and then was transferred to a convalescent hospital. While there, his right arm started to turn brown. He was sent back to the hospital for a second procedure to treat a cranial left-sided epidural abscess in October 2010. After each surgery, Lawrence was unconscious for most of his hospital stay.

In November 2010, Lawrence was released from the hospital and returned to the convalescent hospital for recovery. One month later, his neurosurgeon indicated that Lawrence "had a decreased energy level and desire to perform his daily functions" and that he "would benefit from acute physical, speech, and occupational rehabilitation." When Lawrence met with his neurosurgeon in January 2011, the doctor noted that Lawrence still had "very subtle memory difficulty." Lawrence was discharged on February 20, 2011, but he testified that he had not regained "total clear-headedness."

Lawrence also had cataracts, and after the surgeries, he experienced trouble with his vision and had difficulty reading. In December 2011, he obtained a cornea transplant in his right eye.

Due to these serious health problems, the hearing judge abated this proceeding from February 1, 2010 to June 15, 2011, and then again from November 22, 2011 to February 24, 2012. Trial was held in March 2012.

A. The Orendorff Matter
(Case No. 07-O-12696)

In September 2001, Lawrence represented Maria Orendorff in a claim she brought against Vivian Schaffer. Schaffer was insured by Mercury Insurance Company. After Lawrence settled the claim, Mercury issued a $2,500 check payable to Lawrence and Orendorff dated November 17, 2003.

In December 2003, Lawrence deposited the check into his client trust account (CTA) at Bank of America (BOA 3213). He wrote Orendorff an $800 check for "final settlement" on April 26, 2004, and she withdrew the funds on May 3, 2004. Over the four months from the deposit to payment, Lawrence was required to hold Orendorff's $800 in BOA 3213, but his CTA fell below that amount 24 times, with a balance as low as $60.07 within a month of the deposit.

Count One: Failure to Maintain Client Funds in Trust
(Rules Prof. Conduct, rule 4-100(A))[2]

Count Two: Moral Turpitude
(Bus. & Prof. Code, § 6106)[3]

Lawrence willfully violated rule 4-100(A) by failing to maintain $800 in his CTA on behalf of Orendorff. The rule requires an attorney to deposit and maintain in a CTA all funds received or held for the benefit of a client. The mere fact that the balance of BOA 3213 repeatedly fell below the $800 Lawrence should have held for Orendorff during a four-month period is a violation of the rule.

The recurring CTA deficiencies also support the moral turpitude finding by the hearing judge. (*In the Matter of Robins* (Review Dept. 1991) 1 Cal.

2. All further references to rules are to the State Bar Rules of Professional Conduct unless otherwise stated.

3. All further references to sections are to the Business and Professions Code unless otherwise stated.

State Bar Ct. Rptr. 708, 712 ["[T]he repeated dipping of respondent's trust account below the required balance constituted a basis for a finding of moral turpitude under section 6106 . . ."].) **[1]** Lawrence ignored his CTA bank statements and failed to maintain a trust account recordkeeping system or otherwise manage his CTA, all of which is required by the trust account rules. (Rule 4-100(C), Trust Account Record Keeping Standards 1.) His grossly negligent conduct clearly constitutes moral turpitude in violation of section 6106. (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 475 [attorney's poor CTA management and careless supervision of staff involved gross carelessness constituting moral turpitude].) Although Lawrence violated both rule 4-100(A) and section 6106, we assign no additional weight to the rule violation in our discipline analysis because the misconduct underlying the section 6106 violation supports the same or greater discipline. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127 [no additional weight given to rule 4-100(A) violation when same misconduct addressed by § 6106].)

B. The Inocenscio and Sisson Matter
(Case No. 07-O-13600)

In 2006, Lawrence represented Carmelita Inocenscio and Mary Ann Sisson. On October 13, 2006, he deposited $11,750 in settlement funds on their behalf into a separate CTA at Bank of America (BOA 2134). On October 23, 2006, Lawrence withdrew $8,006 from BOA 2134 to issue a $8,000 cashier's check to Inocenscio and Sisson, and cover the $6 fee for the cashier's check.

Lawrence's attorney fees totaled $2,250, but he did not withdraw the fees from his CTA at one time. Instead, he withdrew $1,250 on October 16, 2006, $750 on January 7, 2007, and $250 on February 23, 2007. He also issued a $750 check dated January 4, 2007, payable to Rhonda Walker, an attorney who worked on the case. In addition to withdrawing the attorney fees over several months, Lawrence wrote himself a $228.96 check dated October 27, 2006 for "Costs to Daily Journal," but there is no indication it was related to this or any other case.[4]

Count Five:[5] *Commingling Personal Funds (Rule 4-100(A))*

Rule 4-100(A)(2) requires an attorney to withdraw funds undisputedly belonging to the attorney or firm from his CTA at the "earliest reasonable time" after the attorney's right to those funds becomes fixed, thereby precluding the commingling of funds. The State Bar alleged that Lawrence commingled funds in his CTA by failing to promptly remove his attorney fees once the interest in the funds became fixed. The hearing judge found insufficient evidence of commingling because Lawrence could not recall the case or when his fees became fixed and the evidence was limited to the bank records from BOA 2134. We reverse the hearing judge's determination and find that Lawrence commingled funds in violation of this rule.

Due in part to Lawrence's traumatic brain injury, he does not recall what the Inocenscio and Sisson matter involved. He does not have a client file, written ledger, or any other records documenting the disbursements. Likewise, he does not recall and cannot document whether the $228.96 check for "Costs to Daily Journal" was related to this case. He was unable to say or document when his $2,250 in fees became fixed.[6] But the records establish that by October 23, 2006, Lawrence had distributed all funds associated with the case other than the attorney fees. Thus, we can infer that his fees became fixed well before he made the last fee withdrawal in February 2007. (*Arm v. State Bar* (1990) 50 Cal.3d 763, 776 [where attorney unable to document or recall, implied finding that attorney's interest in fees became fixed

4. It is clear that $11,006 of the settlement was distributed to the clients and for attorney fees. The parties did not address at trial the remaining $744.

5. The State Bar dismissed counts three and four prior to trial.

6. **[2a]** We reject Lawrence's claim that he was not required to maintain the records because the case is more than five years old. (Rule 4-0(B)(3) [attorney must maintain CTA records for no less than five years].) The final distribution occurred in 2007 and the discipline charges were filed in 2009. Lawrence was clearly on notice to preserve all relevant records.

"well before" attorney withdrew fees from trust account two months after last disbursement to clients].)

[2b] Lawrence clearly violated the rule and standards regarding preservation of the identity of client funds by failing to maintain adequate CTA records. "It would be a distortion of justice to permit a trustee, or attorney handling funds of a client, to escape responsibility by the simple act of not keeping any record or data from which an accounting might be made" and misconduct proved. (*Bruns v. State Bar* (1941) 18 Cal.2d 667, 672 [fiduciary duty to client includes maintaining adequate records to account for entrusted funds].) Lawrence's head injury and resulting memory problems illustrate the need to properly maintain these records. We find that Lawrence commingled funds in violation of rule 4-100(A) by failing to promptly withdraw his fees after his interest became fixed.

C. The Probation Matter
(Case No. 10-O-10811)

Pursuant to a June 10, 2009 Supreme Court discipline order, Lawrence was suspended for six months subject to a one-year stayed suspension and two years of probation for failing to comply with the probation conditions ordered in his 2006 discipline case. The probation conditions in the 2009 discipline order included filing quarterly reports, filing a final report, and successfully completing Ethics School within one year. Lawrence's probation was from July 2009 to July 2011.

1. First year of probation: July 2009 to July 2010

Starting in January 2010, Lawrence's tic douloureux disorder was worsening. He had gamma ray surgery in May 2010. During this time, Lawrence did not submit his quarterly reports due January 10, April 10 and July 10, 2010, and he did not attend State Bar Ethics School by July 9, 2010, as required by the Supreme Court's 2009 discipline order. He submitted his delinquent quarterly reports on July 20, 2010, but he failed to attend Ethics School.

2. Second year of probation: August 2010 to July 2011

Lawrence suffered the traumatic brain injury in August 2010. He was not discharged until February 2011, and was not fully recovered at that time. During this time period, Lawrence failed to timely submit his October 10, 2010, and January 10, April 10, and July 10, 2011 quarterly reports and his final report. Ultimately, a close friend of Lawrence's helped him correspond with the Probation Department and fill out the delinquent reports. He filed his four quarterly reports on January 26, 2012, including the July 10, 2011 quarterly report that covered April through June 2011. However, he never filed his "final report," which also was due on July 10th and covered the limited period of July 1 to 10, 2011. Lawrence still has not completed Ethics School, stating he would take the exam as soon as he obtains a driver's license.

Count One: Failure to Comply with Probation Conditions (§ 6068, subd. (k))

The State Bar charged Lawrence with probation violations for failing to timely file his 2010 and 2011 quarterly reports, failing to submit his final report, and failing to attend Ethics School. The hearing judge found that Lawrence was unable to fulfill his probation reporting obligations from January 2010 to at least February 2011 due to his severe physical problems and therefore did not base his culpability determination on the untimely reports. But he found Lawrence culpable for failing to provide proof that he attended Ethics School and failing to file his final probation report due in July 2011. (§ 6068, subd. (k) [attorney required "[t]o comply with all conditions attached to any disciplinary probation."] The State Bar does not dispute the more limited culpability finding on review, and we see no reason to disturb it.

III. MITIGATION OUTWEIGHS AGGRAVATION

The appropriate discipline is determined in light of the relevant circumstances, including aggravating and mitigating factors. (*Gary v. State Bar*

(1988) 44 Cal.3d 820, 828.) The State Bar must establish aggravation by clear and convincing evidence (std. 1.2(b)), while Lawrence has the same burden to prove mitigating circumstances. (Std. 1.2(e).) We find two factors in aggravation and one in mitigation. Our analysis, however, is not limited merely to counting the number of factors proven, but includes carefully evaluating the strength and quality of those factors on a case-by-case basis. We conclude that Lawrence's mitigation is compelling and outweighs his aggravation.

A. Two Factors in Aggravation

We agree with the hearing judge's finding of two factors in aggravation – Lawrence's prior discipline record and multiple acts of misconduct.

1. Prior Discipline Record (Std. 1.2(b)(i))

Taken as a whole, Lawrence's three prior disciplines are a significant aggravating factor.

a. Lawrence Is Privately Reproved in 1981

In November 1981, Lawrence acknowledged misconduct that occurred between 1971 and 1976 in four client matters. He stipulated to two counts of entering into an improper business transaction with a client, three counts of accepting employment without disclosing his relationship with an adverse party and having an interest in the subject matter of employment, acquiring an interest adverse to a client, improperly representing conflicting interests, and failing to act competently. His misconduct was mitigated by his tic douloureux and his inability to make interest payments on loan transactions with his clients because his assets were in receivership due to pending litigation. There were no aggravating factors. He was privately reproved for his misconduct and agreed to be enrolled as an inactive member under section 6007(b) (inactive enrollment due to insanity, mental infirmity, or illness). Lawrence remained inactive for almost 10 years, until April 1992.

The hearing judge reduced the weight given to this discipline record due to the remoteness in time. The misconduct occurred over 20 years before the misconduct in Lawrence's second discipline case and before the misconduct in this matter. The State Bar disputes reducing any weight given to the 1981 reproval.[7] We affirm the hearing judge's determination that the weight given to Lawrence's 1981 private reproval is diminished due to the remoteness in time.

b. Lawrence Is Suspended for 30 Days in 2006

On April 18, 2006, the Supreme Court suspended Lawrence for 30 days, subject to a six-month stayed suspension and two years of probation. Lawrence stipulated to misconduct occurring between 2001 and 2004 in three separate matters. He failed to competently perform legal services, failed to keep his client informed of significant developments, failed to cooperate with the disciplinary investigation, and commingled funds in his CTA. His aggravating factors included a prior record of discipline, misconduct involving trust account violations, and indifference toward rectification. There were no mitigating factors.

The trust account violations in the Orendorff matter occurred between December 2003 and May 2004, which overlap with the time Lawrence commingled funds in his second disciplinary proceeding. Since the misconduct in the Orendorff matter oc-

7. The State Bar's current position conflicts with the findings in Lawrence's 2009 discipline case, where the hearing department held: "The State Bar concedes that respondent's first imposition of discipline is exceedingly remote in time and the misconduct involved was determined to be minimal in severity, as evidenced by the private reproval ordered by the court. This court agrees and finds the imposition of a private reproval, occurring more than 20 years previous to the misconduct at issue in this proceeding, is too remote in time to merit significant weight on the issue of degree of discipline." (*In the Matter of Lawrence* (Sept. 10, 2008, State Bar Ct. case no. 07-O-11145), p. 13.) The State Bar now disputes this finding and argues the reproval is more akin to a year suspension since Lawrence stipulated to his inactive enrollment. We decline to reevaluate findings that are final from a prior record.

curred before Lawrence was aware of or disciplined for trust account violations in his second prior, he did not have the "opportunity to 'heed the import of that discipline.' [Citation.]" (*In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 171.) As a result, we consider the totality of the misconduct to determine what discipline would have been recommended had all charges been brought together. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619.) We find that Lawrence's $800 misappropriation by gross neglect would not have significantly increased the prior discipline in light of the commingling violations during the same period. Thus, we diminish the weight given to the prior discipline when considering the appropriate level of discipline for the trust account violations in Orendorff. (*Ibid.*)

c. Lawrence Is Suspended for Six Months in 2009

In his third discipline, on June 10, 2009, the Supreme Court suspended Lawrence for six months, subject to a one-year stayed suspension and two years of probation. In that matter, Lawrence was culpable of violating the terms of his disciplinary probation. He failed to timely file his quarterly reports, file his CPA reports, join the State Bar Law Practice Management and Technology Section, engage in mandatory arbitration, and make restitution. His misconduct was tempered by good faith, his tic douloureux condition, and his candor and cooperation with the State Bar. It was aggravated by his prior record of discipline and multiple acts of wrongdoing.

2. Multiple Acts of Misconduct (Std. 1.2(b)(ii))

Lawrence committed multiple acts of misconduct in three matters by misappropriating and commingling funds, and committing probation violations. Considering the nature and extent of his misconduct, these multiple acts moderately aggravate this case.

B. Compelling Mitigation

The hearing judge found two factors in mitigation: extreme physical disabilities at the time of the misconduct; and candor and cooperation during the disciplinary proceedings. We find Lawrence is entitled to mitigation credit for his extreme physical disabilities, but decline to afford mitigation for his candor and cooperation.

1. Extreme Physical Disabilities (Std. 1.2(e)(iv))

Standard 1.2(e)(iv) allows for mitigation for extreme physical disabilities that contributed to the misconduct if the attorney establishes "through clear and convincing evidence that he or she no longer suffers from such . . . disabilities." The State Bar concedes that Lawrence's serious disabilities "have caused or contributed to his misconduct for thirty years." Nevertheless, it contends that he is not entitled to any mitigating credit because "there is just no clear and convincing evidence that Lawrence's illnesses have permanently vanished or are completely under control." However, to require evidence that a disability or illness has "permanently vanished" places too high a burden on an attorney and is inconsistent with the standard.

[3] Recognizing that some physical disabilities are permanent, standard 1.2(e)(iv) must be considered in the context of an attorney's fitness and ability to practice law. The hearing judge found, "[s]ince his October 23, 2010 surgery, respondent has not suffered from the effects of tic douloureux." Further, Lawrence credibly testified that by February 2012 he had regained "total clear-headedness" following his head injury and surgeries in 2010. As he argues on review, after 60 years with the illness, he is in the best position to discuss the impact, if any, he is currently experiencing from the disorder. Approximately 15 months elapsed from Lawrence's last surgery to his testimony in March 2012. While this may not be long enough to establish that his condition has permanently subsided, we find that it is sufficient time to establish that Lawrence is rehabilitated from the severity of the illnesses that contributed to his misconduct.

Finally, any of Lawrence's remaining health concerns can be addressed in a standard 1.4(c)(ii) proceeding, which will require him to establish his ongoing rehabilitation and fitness to practice. He will not be entitled to practice law until he complies with this requirement. Accordingly, in light of their severity and duration, we find that Lawrence's extreme physical disabilities provide compelling mitigation that clearly predominates in this case.

2. No Credit for Spontaneous Candor and Cooperation (Std. 1.2(e)(v))

The hearing judge gave Lawrence mitigation credit for his cooperation with the State Bar and because he "testified candidly before the court." There is no evidence in the record that Lawrence displayed "spontaneous candor and cooperation . . . to the State Bar" as required by standard 1.2(e)(v). His cooperation and testimony fulfilled his "legal and ethical duty" to cooperate with the State Bar's disciplinary investigation (*Hipolito v. State Bar* (1989) 48 Cal.3d 621, 627, fn. 2), and to participate in the disciplinary proceeding. (§ 6068, subd. (i).) Thus, while Lawrence is not entitled to mitigation for his candor and cooperation, we consider the hearing judge's findings when weighing Lawrence's overall credibility, including on issues of his medical problems.

IV. MISCONDUCT DOES NOT CALL FOR DISBARMENT

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. 1.3.) Our analysis begins with the standards. The Supreme Court has instructed that we should follow them "whenever possible" (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11), and give them great weight to promote "the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91, internal quotations and citation omitted.) Several standards call for suspension to disbarment.[8] But we focus on standards 1.7(b) and 2.2(a), which are the most severe.

[4] Standard 2.2(a) calls for disbarment when an attorney willfully misappropriates entrusted funds unless the amount is insignificantly small or the most compelling mitigating circumstances clearly predominate. The first exception to standard 2.2(a) applies since Lawrence misappropriated by his gross neglect $800, a relatively small amount of funds, which he repaid fairly quickly and before involvement by the State Bar. (*Howard v. State Bar* (1990) 51 Cal.3d 215, 223 [$1,300 considered "relatively small sum" under std. 2.2(a)].) Therefore, we direct our focus to standard 1.7(b).

[5a] Standard 1.7(b) provides that an attorney who has two or more prior discipline records shall be disbarred unless the most compelling mitigating circumstances clearly predominate. "[T]he critical issue is whether compelling mitigating circumstances clearly predominate to warrant an exception to the severe penalty of disbarment. [Citations.]" (*In the Matter of Sullivan* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 189, 196.) Lawrence's medical problems over the years have been severe and extensive. He has been ineligible to practice law for roughly 15 of the last 30 years due to his extreme physical disabilities. While they do not excuse Lawrence's ethical lapses, the compelling circumstances clearly predominate and compel us to look beyond a strict application of the standard.[9]

8. Applicable standards: std. 1.6(a) directs that when the misconduct calls for different sanctions, we apply the most severe; std. 2.2(b) provides for at least a three-month suspension for trust account violations under rule 4-100; std. 2.3 provides for actual suspension to disbarment for moral turpitude violations under section 6106; and std. 2.10 provides for reproval or suspension for rule or section violations not specified in the standards.

9. Even in the absence of such compelling mitigation, the Supreme Court has not always ordered disbarment for recidivism (*Conroy v. State Bar* (1991) 53 Cal.3d 495 [despite two prior discipline records, one-year actual suspension for withdrawing as counsel without cooperating with successor, failing to communicate with client, making misrepresentations to client, and failing to perform competently; attorney had no mitigation and "several" aggravating factors]; *Blair v. State Bar* (1989) 49 Cal.3d 762 [despite three prior discipline records, two-year actual suspension for failing to perform with competence in three client matters; misconduct aggravated by five factors and one "marginal" mitigating factor].)

[5b] It is necessary to "examine the nature and chronology of respondent's record of discipline. [Citation.] Merely declaring that an attorney has [two prior] impositions of discipline, without more analysis, may not adequately justify disbarment in every case." (*In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136.) Lawrence's progressive discipline includes: a private reproval in 1981 for misconduct in four matters that were "minimal" in severity; a 30-day suspension in 2006 for three separate matters, including failing to competently perform, keep his client informed and cooperate with the disciplinary investigation, and commingling funds in his CTA; and a six-month suspension in 2009 for probation violations. While his current misconduct includes additional CTA and probation violations, as in his prior disciplines, there is no evidence of client harm, evil intent or bad faith. (*Arm v. State Bar, supra,* 50 Cal.3d 763, 768 [despite three prior discipline records, 18-month actual suspension for misleading a judge and commingling client funds, when tempered by "compelling mitigating circumstances" including lack of significant harm and absence of bad faith; misconduct "not sufficiently egregious" to warrant disbarment].) Viewed holistically, we agree with the State Bar's general assessment that Lawrence's extreme physical disabilities "lessen the moral culpability of his misconduct." Thus, after weighing the standards, case law, and factors in mitigation and aggravation, we conclude that the public will be adequately protected by a lengthy suspension that will continue until Lawrence proves his rehabilitation, fitness and ability to practice.

V. RECOMMENDATION

For the foregoing reasons, we recommend that Arthur Gootkin Lawrence be suspended from the practice of law for three years, that execution of that suspension be stayed, and that he be placed on four years of probation subject to the following conditions:

1. He must be suspended from the practice of law for a minimum of the first three years of his probation and until he provides proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law under standard 1.4(c)(ii).

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

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

4. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office of the State Bar and the State Bar's Office of Probation.

5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of any applicable privilege, he must fully, promptly and truthfully answer all inquiries of the State Bar's Office of Probation, and any probation monitor assigned under these conditions, that are directed to him, whether orally or in writing, relating to whether he is complying or has complied with the conditions of this probation.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of both the State Bar's 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 shall not receive MCLE credit for attending Ethics School.

8. 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 period of probation, if he has complied with all conditions of probation, the two-year period of stayed suspension will be satisfied and that suspension will be terminated.

We do not recommend that Lawrence be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE). He was ordered to take and pass the exam in his prior discipline and is suspended, effective September 18, 2007, until he complies with that requirement.

We recommend that Lawrence be ordered to comply with California Rules of Court, rule 9.20 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.

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

WE CONCUR:

EPSTEIN, J.

PURCELL, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RICHARD ALLEN LENARD

A Member of the State Bar

[Nos. 09-O-11175, et al.]

Filed April 15, 2013

SUMMARY

Respondent was charged with committing twelve acts of unauthorized practice of law (UPL) in nine states while performing contract work for consumer debt settlement companies. The hearing judge found respondent culpable of this misconduct, and recommended disbarment after finding one factor in mitigation and three in aggravation, including extensive uncharged misconduct. (Hon. Richard A. Platel, Hearing Judge.)

The review department affirmed the hearing judge's finding that Lenard is culpable of 12 instances of UPL. Although the review department found less aggravation than the hearing judge because it did not consider any uncharged misconduct, the aggravation still clearly predominated over respondent's limited mitigation for cooperation, which was not compelling. Applying standard 1.7(b), the review department affirmed the hearing judge's recommended discipline of disbarment.

COUNSEL FOR PARTIES

For State Bar: Kevin B. Taylor

For Respondent: Richard A. Lenard

HEADNOTES

[1] **101 Generally Applicable Procedural Issues—Jurisdiction**
252.10 Rules of Professional Conduct Violations—Unauthorized practice in other jurisdiction (RPC 1-300(B); 1975 RPC 3-101(B)) (practice in other jurisdictions)
In order to find culpability under rule 1-300(B) of the Rules of Professional Conduct, the State Bar Court must examine applicable out-of-state authority to determine whether a California attorney has violated professional regulations in a foreign jurisdiction.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2a,b] **252.10 Rules of Professional Conduct Violations—Unauthorized practice in other jurisdiction (RPC 1-300(B); 1975 RPC 3-101(B))**

Respondent committed UPL in violation of authority in Wisconsin and New York, which only allow attorneys currently licensed in those states to practice law there, when he: 1) held himself out to clients in those states as an attorney with knowledge and authority to settle consumer debts; 2) represented to creditors that they should follow debt collection laws or his clients were prepared to take legal action; and 3) reviewed client files to determine whether they should file for bankruptcy despite having no license to perform bankruptcies outside of California.

[3a-c] **196 Miscellaneous General Issues in State Bar Court Proceedings—Comparison to ABA Model Code and/or Model Rules**

252.10 Rules of Professional Conduct Violations—Unauthorized practice in other jurisdiction (RPC 1-300(B); 1975 RPC 3-101(B))

Respondent violated seven states' UPL rules of professional conduct, which are either identical or substantially similar to the American Bar Association's Model Rules of Professional Conduct, rule 5.5(b), prohibiting a lawyer not licensed in a state from either: 1) establishing an office or other systemic and continuous presence in the state; or 2) holding out to the public or otherwise representing that the lawyer is admitted to practice law in the state. The form of communications used by respondent—specifically the use of the term"The Law Offices of" on Legal Services Agreements and cease and desist letters, and representations that the office acted as a "law firm" for clients and provided "legal services"—was evidence that he held himself out as entitled to practice law in states where he was unlicensed. By implying he was licensed in these seven states, respondent gave the false impression to clients and creditors that he held an advantage over a non-attorney debt negotiator. He also explicitly represented to clients he would perform legal services, and informed creditors that he was representing each client using law office letterhead.

[4a-c] **196 Miscellaneous General Issues in State Bar Court Proceedings—Comparison to ABA Model Code and/or Model Rules**

252.10 Rules of Professional Conduct Violations—Unauthorized practice in other jurisdiction (RPC 1-300(B); 1975 RPC 3-101(B))

Respondent's conduct did not fall under any safe harbor provision under American Bar Association's Model Rules of Professional Conduct, rule 5.5(b), which allows out-of-state attorneys to practice temporarily in states where they are not licensed without committing UPL. First, applying the factors defined by the model rule, respondent's contact with out-of-state clients was not reasonably related to his practice in California. Likewise, his contentions that the Model Rule enabled him to provide legal services related to bankruptcy law failed where his proposed legal services were not limited to issues of bankruptcy and he was not admitted to practice law in the federal courts or any of the seven states at issue.

[5] **531 Aggravation—Pattern of Misconduct (1.2(b)(ii))—Found**

Twelve acts of UPL across nine different states constitute a pattern of misconduct.

[6] **541 Aggravation—Bad faith, dishonesty, concealment (1.2(b)(iii))—Found**

Respondent's representations involved bad faith and dishonesty where he falsely implied he could provide legal representation in states where he was not licensed, advised clients to cease contact with their creditors because he was representing their interests but provided no services beyond sending cease and desist letters, terminated representation without helping clients find local counsel as promised, and included debt settlements in scope of services agreements when he had no specific knowledge of debt collection laws in states where the clients resided.

[7] **106.90 Generally Applicable Procedural Issues—Other issues re pleadings**
130 Generally Applicable Procedural Issues—Procedure on Review
565 Aggravation—Other uncharged violations (1.2(b)(iii))—Declined to find
Review Department declined to find uncharged misconduct where State Bar had ample opportunity but did not move to amend the notices of disciplinary charges to include new charges; therefore, respondent did not have sufficient notice or opportunity to defend against them.

[8] **735.30 Mitigation—Candor and cooperation with Bar (1.2(e)(v))—Found but discounted or not relied on**
Diminished weight given for cooperation in State Bar Court proceedings after respondent entered into extensive stipulation as to facts and admission of documents, but did not stipulate to culpability and continued to dispute it before the review department.

[9] **806.10 Application of Standards—Standard 1.7 (Effect of Prior Discipline)—(b) Disbarment after two priors—Applied**
Respondent with three prior disciplines presented no compelling mitigation or other reason to depart from disbarment as provided by standard 1.7(b). The prior record of discipline revealed a disturbing repetitive theme of failing to comply with ethical obligations over the course of 15 years. Respondent's misuse of his California license to thwart the regulations of other states placed the public at risk of considerable harm due to ongoing issues of competency, where he had previously failed to supervise employees who embezzled client funds, failed to remove his disbarred partner's name from the firm CTA, and did not meet his obligations to file several probation reports or make restitution.

ADDITIONAL ANALYSIS

Culpability

Found

252.11 Rules of Professional Conduct Violations—Rule 1-300(B) (practice in other jurisdictions)

Aggravation

Found

511 Prior record of discipline (1.2(b)(i))
531 Pattern of Misconduct (1.2(b)(ii))
541 Bad faith, dishonesty, concealment (1.2(b)(iii))

Declined to find

565 Other uncharged violations (1.2(b)(iii))

Mitigation

Found but Discounted

735.30 Candor and cooperation with Bar (1.2(e)(v))

Discipline

1010 Disbarment

Other

2311 Inactive enrollment after disbarment recommendation - Imposed

OPINION

REMKE, PJ.:

This is respondent Richard Allen Lenard's fourth discipline proceeding. The hearing judge found that Lenard committed 12 acts of the unauthorized practice of law (UPL) in 9 states while performing contract work for consumer debt settlement companies. He recommended that Lenard be disbarred after finding one factor in mitigation and three factors in aggravation, including extensive uncharged misconduct.

Lenard seeks review, contending all of the work done for out-of-state clients was performed in California, and none of it constituted the practice of law. The State Bar Office of the Chief Trial Counsel (State Bar) supports the hearing judge's decision.

We have independently reviewed the record (Cal. Rules of Court, rule 9.12), considering the specific factual findings raised by the parties. (Rules Proc. of State Bar, rule 5.152(C) [any factual error not raised on review is waived by parties].) We affirm the hearing judge's finding that Lenard is culpable of 12 instances of UPL. While we find less aggravation than the hearing judge because we do not consider any uncharged misconduct, the aggravation still clearly predominates over Lenard's limited mitigation for his cooperation, which is not compelling. Given Lenard's prior record of three disciplines, the presumptive discipline in this case, absent compelling mitigation, is disbarment under standard 1.7(b) of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.[1] We see no reason to depart from this standard, and find that Lenard should be disbarred in order to protect the public, the courts, and the legal profession.

I. FACTS

This proceeding involves two consolidated Notices of Disciplinary Charges (NDC): the first filed on November 10, 2011 (NDC I), and the second filed on November 28, 2011 (NDC II), involving a total of 13 cases and 13 counts of misconduct.[2] Lenard and the State Bar stipulated to many of the facts relevant to our analysis. Our findings are based on that stipulation as well as the evidence admitted at trial.

Lenard was admitted to practice law in California in August 1991. He is not admitted to practice law in any other state or before any federal court outside California. All of the charges discussed below involve clients from states other than California.

A. Lenard Acts as Contract Attorney for Settlement Companies

Lenard contracted with three California consumer debt relief companies: Freedom Financial Management; Beacon Debt Service; and Pathway Financial Management (the Settlement Companies). These companies paid Lenard a flat fee to provide limited legal services for clients regarding their consumer debt. Lenard testified that he customarily charged the Settlement Companies between $75 to $100 per client and spent 15 to 20 minutes on each file. He also estimated that he had over 1,000 clients "in credit repair" among all three companies.

The Settlement Companies advertised through television and radio ads in a number of states. Clients who retained one of the Settlement Companies agreed to pay retainer fees of up to 12% of the balance of their debts, contingency fees of 8% of the amount by which their debts were reduced, and monthly maintenance fees of between $15 to $25. Clients also were required to make monthly payments into the Companies' "client trust accounts," and those funds were to be used to settle their debts. The Settlement Companies represented that the clients' accounts would be "handled by our legal counsel."

B. Lenard's Legal Service Agreements and Welcome Letters

In 2008 and 2009, the clients who signed up with the Settlement Companies received an "Attorney-Client Legal Service Agreement" (Legal Service

1. All further references to standards are to this source

2. The hearing judge dismissed Count 8 of NDC I, charging Lenard with commingling personal funds in his client trust account (CTA) on three occasions, in violation of rule 4-100(A) of the Rules of Professional Conduct. The State Bar does not contest this ruling on appeal. We agree with the hearing judge and discuss only the 12 remaining UPL counts.

Agreement) from the "Law Office of Richard A. Lenard" (Law Firm). All of the Legal Service Agreements were signed by both the client and someone on behalf of the "Law Office of Richard Lenard, by Richard Lenard, Attorney at Law." Nowhere in the Legal Service Agreement did it specify that Lenard was licensed to practice law only in California. Rather, the Agreement stated:

> Client acknowledges that the attorneys that comprise Law Firm are *not licensed to practice in all states*. Law Firm will use its best efforts to respond to and prevent creditors from unlawfully contacting or harassing client. Client acknowledges that Law Firm cannot guarantee that certain creditors will stop collection efforts or harassment of Client, however, in that event, Law Firm will recommend a course of action to Client, including but not limited to, assisting Client in locating an attorney licensed to practice law in the appropriate state to address creditor's actions. (Italics added.)

The Legal Service Agreement described the scope of services as follows:

> Client is hiring Law Firm for the purpose of negotiating the settlement of certain unsecured debts that Client chooses to include within the scope of Law Firm's representation. Law firm will contact the unsecured creditors included in this representation . . . to advise them that Law Firm is representing Client and that all communications related to the debt(s) in question should be directed to Law Firm.

The Agreement further listed Lenard's obligations to "competently perform the legal services described above and otherwise required under this agreement." In a separate section, the Agreement also stated that "Client authorizes Law Firm to take appropriate and legal actions as Law Firm deems necessary to settle client's accounts included in this representation . . . ."

After the Legal Service Agreements were signed, at least nine of the clients received welcome letters from Lenard, bearing the letterhead "Law Offices of Richard A. Lenard."[3] The welcome letters advised: "If you are contacted by any creditors and debt collectors we strongly advise you not to speak to them, allow us to be your one single voice. If you feel you must speak to them, please read verbatim from the script we provided to place [them] on notice that you are now represented by our law firm." If Lenard sent cease-and-desist letters to creditors, he also included copies of those letters. None of the welcome letters specified that Lenard was licensed to practice law only in California.

C. Cease-and-Desist Letters

Lenard spent approximately 15 to 20 minutes on each of the 12 client matters at issue. The only work he performed on these cases was reviewing the files in order to authorize non-attorney staff to send cease-and-desist letters to creditors, and determining that none of the clients were good candidates for bankruptcy. Lenard concedes that he had no knowledge of the debt collection or bankruptcy laws specific to each of the nine states.[4]

3. The record does not contain welcome letters sent to clients Fisher (Pennsylvania resident), Quintana (Nevada resident), or Liesinger (South Dakota resident).

4. See, e.g., 11 U.S.C. § 522(b) (bankruptcy exemptions based on state or local laws of debtor's domicile).

The cease-and-desist letters Lenard sent to his clients' creditors bore the letterhead "Law Office of Richard A. Lenard." In these letters, Lenard advised each creditor that he had "been retained . . . to stop creditor calls while the client organizes finances." He instructed the creditors not to contact his clients or they would "take appropriate legal action to have the contacts permanently stopped." These cease-and-desist letters were sent to creditors located in various states, including Utah, Delaware, and Georgia. The cease-and-desist letters did not specify that Lenard was licensed to practice law only in California.

In spite of Lenard's cease-and-desist letters, many clients were contacted by creditors. Some became subject to collection litigation. Several clients contacted Lenard to seek guidance but he did not respond. Based on Lenard's inaction, at least two of these clients, Hector Quintana and Lee Ann Liesinger, requested refunds of approximately $3,800 each. In response to their demands, both received letters of disengagement from Lenard, advising that he would no longer represent them and warning: "Please be advised that most jurisdictions have limitations, such as time or manner, in which to bring certain legal defenses or causes of action. These may be critical to preserving your rights or remedies. You are strongly advised to immediately seek local counsel in your area." Lenard never met with any of the 12 clients, nor did he appear in court in any of the nine states.

II. THIS COURT MAY DETERMINE WHETHER LENARD HAS ENGAGED IN UPL

As a preliminary matter, Lenard challenges the authority of the State Bar to bring charges based on violations of professional responsibility rules in other states, and the jurisdiction of this court to apply laws and regulations outside of California in this proceeding. These contentions lack merit.

[1] Rule 1-300(B) of the Rules of Professional Conduct[5] provides: "A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." In order to find culpability under this rule, we must necessarily determine whether a California attorney has violated professional regulations in a foreign jurisdiction. (*In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 903 [California attorney culpable of practicing law and holding herself out as entitled to practice law in violation of South Carolina statute].) Thus, we examine the applicable authority from the nine states listed in the NDCs to determine whether Lenard violated rule 1-300(B) by practicing law in violation of the regulations of those states.

III. CULPABILITY

A. Lenard Committed 12 Violations of Rule 1-300(B)

In 12 counts, the State Bar alleges that Lenard violated rule 1-300(B) by committing UPL in nine different states by practicing law without complying with local practice rules in willful violation of each state's professional regulations. We agree with the hearing judge that Lenard is culpable of all 12 counts of UPL, although we base our conclusions on different legal grounds.

The relevant details of the alleged violations are summarized below. Our analysis is divided into two groups with substantially similar laws: (1) Wisconsin and New York; and (2) the seven remaining states.

5. All further references to rules are to this source unless otherwise noted.

NDC	Count	Case No.	Client Name	Retainer Date	Client's Residency	Cease-and--Desist Letters Sent
NDC I	One	09-O-11175	Powell	7/08	Oklahoma	4 on 7/31/08
NDC I	Two	09-O-13870	Curry	12/08	Georgia	3 on 12/30/08
NDC I	Three	09-O-14231	Atha	2/09	Florida	4 on 3/5/09
NDC I	Four	09-O-16534	Fisher	1/09	Pennsylvania	3 on 1/28/09
NDC I	Five	09-O-16777	Burgess	12/08	Wisconsin	5 on 12/12/08
NDC I	Six	09-O-18627	Manfredi	9/08	New York	3 on 11/4/08
NDC I	Seven	10-O-00425	Jarrett	10/08	Florida	3 on 9/8/08
NDC II	One	10-O-02737	Quintana	7/09	Nevada	8 on 8/4/09
NDC II	Two	10-O-05950	Peguero	12/08	Florida	3 on 1/13/09
NDC II	Three	10-O-07962	Ledford	4/09	Kentucky	No evidence
NDC II	Four	10-O-10524	Padayao	6/09	Nevada	5 on 7/31/09
NDC II	Five	10-O-11144	Liesinger	11/08	South Dakota	No evidence

1. Lenard Committed UPL in Wisconsin and New York (NDC I, Counts 5 & 6)

[2a] In Wisconsin and New York, no person may practice law in the state unless currently licensed there.[6] (Wis. Sup. Ct. R. 23.02(1); N.Y. Jud. Law § 478.) Both states also prohibit holding oneself out as entitled to practice or representing the authority to practice without a license. (*Ibid.*) Lenard contends that the only actions he took – signing the Legal Service Agreements and authorizing the cease-and-desist letters – did not violate the provisions of these states. We disagree.

[2b] Lenard practiced law and held himself out

6. Limited exceptions to this rule are not applicable here.

as an attorney with the authority and knowledge to settle consumer debts to Wisconsin and New York clients Burgess and Manfredi, respectively. He also represented to their creditors that they should follow debt collection laws or his clients were prepared to take legal action. In addition, Lenard claims he reviewed their files to determine whether they should file bankruptcy, although he admitted he was "not licensed to do a bankruptcy out of state." Wisconsin and New York have both considered conduct similar to Lenard's to constitute UPL. (*Junior Ass'n. of Milwaukee Bar v. Rice* (Wis. 1940) 294 N.W. 550, 557 [practice of law includes rendering advice about settlements of claims or legal rights]; *Carter v. Flaherty* (N.Y. App. Term 2012) 953 N.Y.S.2d 814, 816 [practice of law includes giving legal advice, promising to give legal advice in future, and holding oneself out to public as capable of giving legal advice].) Accordingly, we conclude Lenard committed UPL in violation of Wisconsin and New York authorities, and by so doing, he violated rule 1-300(B).[7]

2. Lenard Committed UPL in Oklahoma, Georgia, Florida, Pennsylvania, Nevada, Kentucky, and South Dakota (NDC I Counts 1, 2, 3, 4, and 7; NDC II Counts 1, 2, 3, 4, and 5)

a. Lenard violated the applicable rules of professional conduct.

[3a] In the remaining seven states, the relevant UPL rules of professional conduct are either identical or substantially similar to the American Bar Association's Model Rules of Professional Conduct (ABA Model Rules), rule 5.5(b).[8] This rule prohibits a lawyer who is unlicensed in a state from either: (1) establishing "an office or other systematic and continuous presence" in the state; or (2) holding "out to the public or otherwise represent[ing] that the lawyer is admitted to practice law" in the state. The hearing judge found that Lenard established a systematic and continuous presence in each of the jurisdictions listed in the NDCs. Based on the limited record, we do not find clear and convincing evidence of this proscription.[9] However, we find that Lenard committed UPL by holding himself out as entitled to practice law in each of the seven states for a total of ten willful violations of rule 1-300(B).

[3b] Our analysis of UPL is not confined to a consideration of the content or underlying purpose of the Legal Service Agreements or cease-and-desist letters. We also look to the form of these communications – specifically, the use of the term "The Law Offices of Richard Lenard" and the representations that this office was acting as the "law firm" for the clients and providing "legal services." By failing to make clear that he was *only* licensed to practice law in California, these representations are evidence that Lenard held himself out as entitled to practice to clients and creditors in states in which he was unlicensed.

[3c] By implying he was licensed in the relevant states, Lenard gave the false impression to his clients and their creditors that he held an advantage over a non-attorney debt negotiator. He explicitly represented to the clients that he would provide legal services, and informed creditors that he was representing each client utilizing his law office letterhead. The written communications Lenard provided to

7. Each violation meets the state's applicable standard of proof. (*In re Disciplinary Proceedings Against Crandall* (Wis. 2011) 798 N.W.2d 183, 196 [violations must be proved by clear, satisfactory, and convincing evidence]; *In re Capoccia* (N.Y. App. Div. 2000) 272 A.D.2d 838, 844 [standard of proof in civil enforcement proceedings charging attorneys with professional misconduct is fair preponderance of evidence].)

8. All seven states have adopted a version of this rule with the same UPL restrictions. (Okla. Stat. tit. 5, ch. 1, app. 3-A, R. Prof. Conduct, r. 5.5(b); Ga. Code, State Bar R. & Regs., r. 4-102, R. Prof. Conduct, r. 5.5(b); Fla. Stat., Bar r. 4-5.5(b); 42 Pa. Cons. Stat., R. Prof. Conduct, r. 5.5(b); Ky. Rev. Stat., R. Sup. Ct., r. 3.130(5.5(b)); Nev. Rev. Stat., R. Prof. Conduct, r. 5.5(d)(2); S.D. Codified Laws, R. Prof. Conduct, app., ch. 16-18, r. 5.5(b).)

9. Clear and convincing evidence requires a finding of high probability that is so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

clients (and their creditors) in those states are evidence that he violated the applicable rules of professional conduct, as well as relevant case law and advisory authority. (*State ex rel. Oklahoma Bar Ass'n. v. Samara* (Okla. 1989) 775 P.2d 806, 807-808 [misleading use of "Attorney at Law" on suspended attorney's letterhead constitutes UPL]; *In re UPL Advisory Opinion 2003-1* (Ga. 2005) 623 S.E.2d 464 [non-attorney representing debtor in debt settlement negotiations committed UPL]; *The Florida Bar v. Tate* (Fla. 1989) 552 So.2d 1106, 1107 [out-of-state attorney engaged in UPL by handing out business cards that did not properly disclaim he was not licensed in Florida]; *Ginsburg v. Kovrak* (Pa. 1957) 11 Pa. D. & C.2d 615 [out-of-state attorney licensed in federal courts who used terms "law office" and "attorney at law" on business cards and stationery for his tax consulting business engaged in UPL]; *Discipline of Lerner* (Nev. 2008) 197 P.3d 1067, 1074-1075 [out-of-state attorney committed UPL by negotiating settlement of client insurance claims and signing demand letters]; *Kentucky Bar Ass'n. v. Brooks* (Ky. 2010) 325 S.W.3d 283, 289-290 [non-attorney who advertised "Legal Self Help" business in "Attorneys" section of yellow pages committed UPL by creating misleading impression]; *Steele v. Bonner* (S.D. 2010) 782 N.W.2d 379, 386-387 [unlicensed law school graduate engaged in UPL by rendering legal advice and holding herself out as attorney].)[10]

b. Lenard's conduct does not fall into any exception for the temporary practice of law.

[4a] In addition to defining UPL, ABA Model Rule 5.5 also provides "safe harbor provisions," which permit temporary practice in certain specified circumstances by lawyers licensed in other states.[11] We find that Lenard's conduct does not fall under any of the safe harbor provisions.

[4b] First, Lenard appears to argue that he is not culpable of UPL because one of the exceptions under ABA Model Rule 5.5(c)(4) applies, i.e., his legal services were reasonably related to his practice in California. He contends that all work was done in California and any legal opinions rendered were based on California law. However, the factors

10. Each violation meets the state's applicable standard of proof for attorney misconduct, with five states requiring proof by clear and convincing evidence and two states requiring a preponderance of the evidence. (*State ex rel. Oklahoma Bar Ass'n. v. Zimmerman* (Okla. 2012) 276 P.3d 1022, 1027 [clear and convincing]; *The Florida Bar v. Forrester* (Fla. 2005) 916 So.2d 647, 651 [clear and convincing]; *Discipline of Lerner, supra*, 197 P.3d at p. 1075 [clear and convincing]; *In re Setliff* (S.D. 2002) 645 N.W.2d 601, 605 [clear and convincing]; Ga. R. Prof. Conduct, r. 4-221(e)(2) [clear and convincing]; see also *Office of Disciplinary Counsel v. Kiesewetter* (Pa. 2005) 889 A.2d, 47, 54, fn. 5 [preponderance of evidence]; *Kentucky Bar Ass'n. Craft* (Ky. 2006) 208 S.W.3d 245, 262 [preponderance of evidence].)

11. The relevant provisions of ABA Model Rule 5.5 provide:
(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that: (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter; (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

defined in comment 14 of the ABA Model Rule[12] compel our conclusion that Lenard was not entitled to practice law even on a temporary basis in these states. Analyzing those factors, we find that he had no prior contact with the clients and they never lived in California or had substantial contact with this state. There is no evidence that California law would be relevant to any of the consumer debts in these matters. Further, Lenard has no knowledge of the specific laws of the states in which the clients resided, where they faced state collection actions and may have had assets. As such, the contact with these out-of-state clients was not reasonably related to Lenard's practice in California, and he was not authorized to provide legal services on a temporary basis under the states' versions of ABA Model Rule 5.5(c). (See Supreme Court of Ohio Board of Commissioners on Grievances & Discipline, Opn. 2011-2 (Oct. 7, 2011) Multijurisdictional Practice and Debt Settlement Legal Services [rule 5.5(c) of the Ohio Rules of Professional Conduct did not authorize out-of-state debt settlement attorneys to provide legal services on temporary basis in that state].)

[4c] Likewise, we reject any contention by Lenard that ABA Model Rule 5.5(d)(2) enabled him to provide legal services related to bankruptcy law. Primarily, Lenard's proposed services were not limited to issues of bankruptcy. More importantly, as Lenard admitted, he was not admitted to practice law in the federal courts in any of the seven states, and therefore, he was not authorized to provide bankruptcy services.

In conclusion, Lenard improperly held himself out as entitled to practice law and practiced law in Oklahoma, Georgia, Florida, Pennsylvania, Nevada, Kentucky, and South Dakota. Thus, there is clear and convincing evidence he committed UPL and violated rule 1-300(B) in the ten counts of misconduct alleged in these seven states.

IV. AGGRAVATION OUTWEIGHS MITIGATION

The offering party bears the burden of proving aggravating and mitigating circumstances. The State Bar must establish aggravating circumstances by clear and convincing evidence (std. 1.2(b)), while Lenard has the same burden to prove mitigating circumstances (std. 1.2(e)).

A. Three Factors in Aggravation

1. Prior Record of Three Disciplines (Std. 1.2(b)(i))

Lenard's prior record of three disciplines is a very significant factor in aggravation. First, on March 19, 2003, the Supreme Court ordered Lenard placed on two years of suspension, stayed, with conditions including three years of probation and a one-year actual suspension that would continue until he paid more than $6,000 in restitution to two clients. (Supreme Court S112319 (*Lenard I*).) Lenard's misconduct involved his failure to supervise employees managing his CTA, resulting in the misappropriation of funds from five clients. Lenard stipulated to failing to maintain $19,760 in client funds in his CTA, failing to adequately supervise his employees handling financial records from December 1996 through March 1998, and moral turpitude in the resulting breach of his fiduciary duties toward his clients. There was no mitigation, and in aggravation were Lenard's failure to account for entrusted funds, harm to clients, and multiple acts of misconduct and/or a pattern of misconduct.

Second, on January 13, 2005, the Supreme Court ordered Lenard placed on one year of suspension, stayed, with conditions including two years of probation and a 30-day actual suspension. (Supreme Court S128824 (*Lenard II*).) Lenard willfully failed to

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12. The factors are: "The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law."

remove his former law partner's name from his CTA until May 2002, even though the partner had been disbarred in March 2001. He also failed to promptly pay funds to another client whose settlement check was embezzled by the same office staff involved in the misconduct in *Lenard I*. Lenard was ordered to pay over $11,000 in restitution. Lenard's prior record of discipline was an aggravating factor. There was no mitigation.

Third, on October 13, 2010, the Supreme Court ordered Lenard placed on two years of suspension, stayed, with conditions including two years of probation and a one-year actual suspension. (Supreme Court S185110 (*Lenard III*).) Lenard stipulated that he violated his probation from *Lenard II* by failing to timely submit six quarterly reports to the State Bar Office of Probation from October 2005 until February 2007, and by failing to make restitution to the former client. At the time of the stipulation, he had only paid $1,500 of the more than $11,000 owed. Lenard's prior record of discipline was a factor in aggravation. He received credit in mitigation for cooperation in the discipline proceedings to the extent he stipulated to facts, conclusions of law, and level of discipline.

2. Multiple Acts/Pattern of Misconduct (Std. 1.2(b)(ii))

[5] We agree with the hearing judge that Lenard's misconduct is aggravated by its repetition. His 12 acts of misconduct also constitute a pattern of UPL across 9 different states.

3. Bad Faith and Dishonesty (Std. 1.2(b)(iii))

[6] The hearing judge found bad faith and dishonesty in aggravation based on Lenard's use of deceptive and misleading Legal Service Agreements in each of the 12 client matters. Not only did Lenard's Agreements and letters falsely imply that he could provide legal representation in the nine states, they also advised the clients to cease contact with their creditors because he was representing their interests. But after sending out cease-and-desist letters, he provided no other services. The Agreements also advised the clients that Lenard would help them find local counsel if necessary, but Lenard terminated representation of at least two clients and merely advised them to seek local counsel. Further, the scope of services included negotiating debt settlements when Lenard had no specific knowledge of debt collection laws in the states where the clients resided. We conclude that Lenard's representations involve bad faith and dishonesty, and constitute a significant aggravating factor.

[7] The hearing judge also found in aggravation that the record established uncharged violations of rules 3-310(F)(3) (accepting compensation from one other than client without client's informed written consent) and 3-110(A) (failure to perform competently) in each of the client matters. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36 [evidence of uncharged misconduct can be considered in aggravation].) But here, we decline to find this uncharged misconduct because the State Bar had ample opportunity but did not move to amend the NDCs to include these charges. Thus, Lenard did not have sufficient notice or opportunity to defend against them. (*In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 341.)

B. One Factor in Mitigation

[8] The hearing judge afforded significant mitigating credit for cooperation in these proceedings after Lenard entered into an extensive stipulation as to facts and admission of documents. However, Lenard did not stipulate to culpability and continues to dispute it. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive weight in mitigation accorded those who admit culpability as well as facts].) Accordingly, we diminish the weight given to this factor.

V. MISCONDUCT CALLS FOR DISBARMENT

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. 1.3.) We balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.) Our analysis begins with the standards. The Supreme Court has instructed that we should follow them "whenever possible" (*Id.* at p. 267, fn. 11), and give them great weight to promote "the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91, internal quotations and citation omitted.) We focus on standard 1.7(b), which is the most severe and deals with disciplinary recidivism.

Standard 1.7(b) provides that an attorney who commits professional misconduct who "has a record of two prior impositions of discipline . . . shall be disbar[red] unless the most compelling mitigating circumstances clearly predominate." The standard suggests disbarment in cases, such as this one, with multiple disciplines and little or no mitigation. (E.g., *Barnum v. State Bar* (1990) 52 Cal.3d 104, 113 [disbarment under std. 1.7(b) imposed where no compelling mitigation]; compare *Arm v. State Bar* (1990) 50 Cal.3d 763, 778-779, 781 [disbarment under std. 1.7(b) not imposed where compelling mitigation included lack of harm and no bad faith].) Since Lenard did not present compelling mitigation, we see no reason to depart from disbarment as provided for under the standard.

[9] Notably, Lenard's prior record of discipline reveals a "disturbing repetitive theme" of failing to comply with ethical obligations over the course of 15 years, which began only five years after he was admitted to the Bar. (*In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 841.) From 1996 until 1998, he failed to supervise his employees, who embezzled funds from his CTA in six client matters. His misconduct continued from 2001 to 2002, when he failed to uphold his duties to remove his disbarred partner's name from the firm CTA. And despite the opportunity to reform, Lenard's misconduct persisted from 2005 until 2010, when he did not meet his obligations to file several probation reports and make restitution. In the midst of these ongoing failures to meet the ethical requirements of his license in California, Lenard engaged in employment in which he performed little or no services of value to his clients and traded on his title of "attorney" while violating professional regulations in nine other states. Requiring legal services to be performed by licensed attorneys in each state "ensure[s] that the public is served by those who have demonstrated training and competence and who are subject to regulation and discipline." (*Discipline of Lerner, supra,* 197 P.3d at p. 1072.) Lenard's misuse of his California license to thwart the regulations of other states placed his out-of-state clients and the public in general at risk of considerable harm due to his ongoing issues of competency.

Considering his past and present misconduct, it appears that Lenard is either "unwilling or unable" to conform his behavior to the rules of professional conduct. (*Barnum v. State Bar*, *supra*, 52 Cal.3d at p. 111.) "We believe that the risk of [Lenard] repeating this misconduct would be considerable if he were permitted to continue in practice." (*McMorris v. State Bar* (1983) 35 Cal.3d 77, 85.) Disbarment is warranted and necessary to protect the public, the courts and the legal profession.

VI. RECOMMENDATION

We recommend that Richard Allen Lenard be disbarred and that his name be stricken from the roll of attorneys.

We further recommend that he must comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

Finally, we recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and that such costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VII. ORDER

The order that Lenard be enrolled as an inactive member of the State Bar pursuant to Business and Professions Code section 6007, subdivision (c)(4), effective June 9, 2012, will continue, pending the consideration and decision of the Supreme Court on this recommendation.

WE CONCUR:

EPSTEIN, J.
PURCELL, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

MARGARET ALICE SELTZER

A Member of the State Bar

[No. 11-O-12820]

Filed April 16, 2013

SUMMARY

Respondent, who had one prior record of discipline, was charged with two counts of misconduct involving one disciplinary matter. The hearing judge recommended that respondent be actually suspended for one year after finding that respondent failed to perform competently and failed to return the unearned portion of her attorney's fees. (Hon. Lucy Armendariz, Hearing Judge.)

Respondent appealed. Her arguments on appeal included the contention that the State Bar's new "streamlined" discovery rules prevented her from obtaining relevant evidence in the disciplinary proceedings. The review department found that the discovery rights under the revised Rules of Procedure of the State Bar satisfy due process. The review department agreed with the hearing judge's culpability findings, but diminished the weight of respondent's prior record of discipline and reduced the level of discipline to a six-month actual suspension.

COUNSEL FOR PARTIES

For State Bar: Cydney T. Batchelor

For Respondent: Margaret A Seltzer

HEADNOTES

[1] **130 Procedure on Review (rules 5.150-5.160)**
166 Standards of Proof/Standards of Review—Independent Review of Record
Under rule 9.12 of California Rules of Court, and rule 5.152(C) of Rules of Procedure of State Bar, Review Department independently reviews record, but considering only specific factual findings raised by parties; factual errors not raised on review are waived by parties.

[2 a,b] **130 Procedure on Review (rules 5.150-5.160)**
166 Standards of Proof/Standards of Review—Independent Review of Record
Review Department gives great deference to hearing judge's credibility findings.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[3] **111 Abatement (rules 5.50, 5.51, 5.52)**
167 Standards of Proof/Standards of Review—Abuse of Discretion
191 Effect of/Relationship to Other Proceedings

Hearing judge did not abuse discretion in denying respondent's motion to abate, filed one month before disciplinary trial, in order to protect public, where respondent's grounds for seeking abatement were not persuasive. Pending civil proceeding involving same client as disciplinary matter dealt with recovery of damages based on breach of contract and fraud, while issue in discipline matter was whether respondent performed with competence.

[4] **113 Discovery**
135.06 Rules of Procedure—Comparison of 2011 version to 1995 version
135.40 Amendments to Rules of Procedure—Subpoenas and Discovery
192 Constitutional Issues—Due Process/Procedural Rights

Respondent's discovery rights under the revised Rules of Procedure of the State Bar, which are based on similar discovery provisions in the California Administrative Procedure Act, satisfy fair trial concerns.

[5] **270.30 Rules of Professional Conduct Violations—Intentional, reckless, or repeated incompetence (RPC 3-110(A); 1975 RPC 6-101(A)(2)/(B))**

Respondent willfully violated section 3-110(A) by failing to prepare documents, failing to provide any service of value to clients, and failing to respond to her clients' phone calls and emails, particularly since the clients were concerned that the time to file a claim would expire.

[6] **277.60 Rules of Professional Conduct Violations—Failure to refund unearned fees (RPC 3-700(D)(2))**

Although respondent performed some services for clients, her work was incomplete and she never provided any work product or advice to them. Thus, clients were entitled to a refund of entire fees since they received nothing of value from respondent.

[7] **513.10 Aggravation—Prior record of discipline (1.2(b)(i))—Found but discounted—Contemporaneous with current misconduct**

Aggravating weight of respondent's prior discipline greatly diminished since the misconduct in the current proceeding occurred before the Notice of Disciplinary Charges was filed and the suspension ordered in the prior matter. Respondent did not have an opportunity to appreciate or heed the import of the earlier discipline.

[8] **805.10 Standard 1.7(a)—Effect of Prior Discipline—Current discipline greater than prior—Applied**
844.13 Standard 2.4(b)—Applied—actual suspension—Coupled with other misconduct
901.30 Standard 2.10—Violations not specified—Applied—suspension—Coupled with other misconduct

Where respondent failed to perform services, communicate with client, and refund unearned fee; no pattern of misconduct was shown; respondent did not act with dishonesty or harm client, and respondent had a prior record of one instance of discipline that was neither remote nor minimal, hearing judge's recommendation of one year actual suspension was too severe; six-month actual suspension, coupled with restitution requirement, was sufficient.

ADDITIONAL ANALYSIS

Aggravation

Found

561 Other uncharged violations (1.2(b)(iii))
591 Indifference to rectification/atonement (1.2)(b)(v))

Declined to find

525 Multiple acts of misconduct (1.2(b)(ii))
582.50 Harm to client

Discipline Imposed

1013.06 Stayed suspension - One year
1015.04 Actual suspension - Six months
1030 Standard 1.4(c)(ii) Requirement

Probation Conditions

1021 Restitution

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OPINION

EPSTEIN, J.

A construction company paid respondent Margaret Alice Seltzer a $6,000 advance fee to resolve its dispute with a school district over payment for work the company had performed on a renovation project. For two months, the three owners of the construction company repeatedly telephoned and sent email inquiries to Seltzer about the status of their matter. However, Seltzer either made excuses for her unavailability or did not respond at all. Her client finally terminated her services and asked Seltzer to return the $6,000 fee. When she refunded only $1,500, the client complained to the Office of the Chief Trial Counsel (State Bar).

The hearing judge found that Seltzer failed to perform competently, in violation of Rules of Professional Conduct, rule 3-110(A),[1] and failed to return the unearned portion of her fees, thereby violating rule 3-700(D)(2). The judge further found significant aggravation, including prior discipline, and no mitigation. Ultimately, the hearing judge recommended that Seltzer be actually suspended for one year and that she be placed on probation for two years with conditions.

Seltzer challenges the hearing judge's culpability findings and asserts that the aggravation findings are not supported by the evidence. She also contends that the judge erred by denying her motion to abate the disciplinary proceedings, and requests dismissal of all of the charges. Alternatively, Seltzer asks that the case be remanded for a new trial. The State Bar did not seek review, but requests that we affirm the decision below.

[1] We have independently reviewed the record (Cal. Rules of Court, rule 9.12), considering the specific factual findings raised by the parties. (Rules Proc. of State Bar, rule 5.152(C) [any factual error not raised on review is waived by parties].) In so doing, we find no merit to Seltzer's procedural or substantive claims. We affirm the hearing judge's findings that Seltzer failed to perform competently in violation of rule 3-110(A) because she provided no service of value to her clients, and she failed to return unearned fees in violation of rule 3-700(D)(2). Although we agree on the absence of mitigation evidence, we find less aggravation than that found by the hearing judge.

Since Seltzer's previous discipline in 2012 included a 60-day actual suspension, a greater discipline is appropriate. However, we find the one-year actual suspension recommended by the hearing judge is excessive in light of the decisional law and the applicable standards.[2] Instead, we conclude that Seltzer should be actually suspended for six months and until she satisfies her restitution obligation as set forth below, to protect the public, the courts, and the legal profession.

I. FACTUAL AND PROCEDURAL BACKGROUND

Seltzer was admitted to practice law in 1979. The present matter involved Igal Sarfaty, Yair Elor and Yuval Bobrovitch, who were the three principals of SEB Construction, Inc. (SEB). In 2009, SEB renovated a temporary administration building for the Dublin Unified School District. As the project neared completion, a dispute arose over payment for extra work SEB performed. Sarfaty, Elor and Bobrovitch met with Seltzer on November 10, 2009, to discuss options for obtaining payment from the school district, including drafting a demand letter and filing a claim. Although SEB was still negotiating with the school district, the principals considered the issue urgent as their time to present a claim was about to expire.

On November 17, 2009, the three principals signed a "Fee and Retention Agreement" on behalf of SEB, agreeing to pay Seltzer $300 per hour plus an advance fee of $6,000. Seltzer agreed to "provide legal services in connection with the evaluation of a claim against Dublin Unified School District . . . and

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

2. All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

advice concerning the pursuit of said claim. This engagement is a limited one not to exceed 20 hours of work and shall not obligate [Seltzer] to file any claim, suit, or arbitration." The fee agreement provided that it could be subsequently modified by "an oral agreement only to the extent that the parties carry it out."

Two days after signing the agreement, Sarfaty emailed Seltzer to advise her that "[a]fter speaking to my partners we would like to put a budget of 10 hours for you to review the material and to write a demand letter." He asked Seltzer to determine if a demand letter would be effective or if they should "file a claim right away." Seltzer never responded to this email.

About ten days later, Sarfaty began regularly emailing and calling Seltzer for an update but Seltzer did not respond. On December 9, 2009, Sarfaty expressed his concern in an email and asked if Seltzer had reviewed SEB's materials. She replied that she had been "out of town on an emergency and my e-mail was down." But Seltzer asserted that she had reviewed all of the documents and had a few questions. Elor responded to Seltzer's questions the next day.

Sarfaty continued to attempt to contact Seltzer regularly to request a copy of the demand letter. After about a month with no response from Seltzer, Sarfaty sought the help of another attorney, Michael Notaro, to facilitate a response from Seltzer. On January 5, 2010, Notaro called Seltzer and left a voice message. She did not return Notaro's call, but instead left a voice message for Elor, explaining that she had been sick and dealing with emergencies, but had almost completed the demand letter. Elor responded by email on January 8, asking Seltzer: "Are you now ready and able to assume our case? And why couldn't you let us know what is going on . . . ?" Elor also requested that Seltzer call Sarfaty to discuss how they should proceed.

When Seltzer failed to contact Sarfaty, the SEB principals asked Notaro to terminate her, which he did by letter dated January 14, 2010. In that letter, Notaro requested the "return of the entire $6,000 which you collected from SEB immediately. As I understand it, no legal work has been performed in this matter." Seltzer responded the same day, disputing that she had not performed the requested legal services. She asserted: "I had performed a preliminary analysis, done some work on the demand letter we discussed, and needed additional documentation and factual information." Seltzer confirmed she would stop working on the matter as requested.

SEB obtained new counsel, David Anderson, to represent it in its dispute with the school district. He contacted Seltzer on February 11, 2010, and asked for SEB's construction documents, which she immediately sent to him. On January 22 and February 4, 2010, Seltzer sent two invoices to SEB, charging $3,300 through December 31, 2009, and an additional $1,200 for the following services: reviewing documents; legal research; preparing a chronology and a factual background; review and analysis of the contract; drafting and revising a demand letter; and one telephone conference with Elor.[3] Despite the work specified in her invoice, Seltzer never provided SEB with a preliminary analysis, an evaluation of the merits of their claim, or a draft of the demand letter.[4] Nor did she provide SEB with any advice about how to proceed against the school district. On February 11, 2010, Seltzer sent SEB a $1,500 check, which her cover letter described as "the balance from the trust account."

SEB complained to the State Bar, and on October 6, 2011, the State Bar filed a Notice of Disciplinary Charges (NDC) alleging two counts of misconduct. One month before the trial below was set to begin, Seltzer filed a motion for abatement

3. **[2a]** The hearing judge found that Seltzer was not credible in claiming that she had performed these services between November 17, 2009 and January 14, 2010, because she had previously told her clients that she was out of town, sick or had unforeseen emergencies during this time period. We give great deference to the judge's credibility finding.(*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280 [hearing judge's credibility findings entitled to great weight].)

4. At trial, Seltzer produced a draft demand letter, a chronological description of SEB's construction documents and negotiations with the school district, and a legal memorandum. It was the first time the SEB principals had seen any of these documents.

pursuant to rule 5.50 of the Rules of Procedure of the State Bar, pending the conclusion of a civil matter, *Seltzer v. SEB Construction, Inc.* Seltzer filed this action in San Francisco Superior Court after she rejected SEB's non-binding arbitration award for attorney fees. The hearing judge denied her motion for abatement on January 20, 2012.

[2b] The matter was submitted after a four-day trial. The hearing judge found that Seltzer was not credible because her trial testimony was inconsistent and often contradicted by other witnesses. In contrast, the hearing judge found the other witnesses to be credible and their testimony was corroborated by documentary evidence. We give these credibility determinations great weight. The hearing judge concluded that Seltzer was culpable of violating rule 3-110(A) and rule 3-700(D)(2) and that there were five factors in aggravation, with no mitigation. Seltzer appeals these findings.

II. NO ABUSE OF DISCRETION IN DENIAL OF MOTION TO ABATE TRIAL

[3] Seltzer maintains that the hearing judge should have granted her motion to abate the disciplinary proceedings until the trial in *Seltzer v. SEB Construction, Inc.* had concluded. She argues that the issues in both proceedings concern the "time spent on the matter [involving SEB] and the value of the services performed." Seltzer also claims she was unable to obtain relevant evidence in these proceedings due to the State Bar's new "streamlined" discovery rules, and thus abatement was necessary for her to utilize the discovery tools available to her in the civil action.

Rule 5.50 of the Rules of Procedure of the State Bar permits consideration of any relevant factor in determining whether to grant a motion for abatement, including "the need to dispose of the proceeding at the earliest time . . . ." Seltzer delayed filing her abatement motion until one month before her disciplinary trial, and this was her second discipline proceeding within one year. Thus, the hearing judge did not abuse her discretion by proceeding with the trial in light of the State Bar's interest in protecting the public, safeguarding the integrity of the legal system and maintaining public confidence in the legal profession. (*In the Matter of Respondent L* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 454, 461 [order of abatement is procedural matter reviewable for abuse of discretion].)

Moreover, Seltzer's justifications for abating the discipline trial are not persuasive. Discipline matters are sui generis and the issue here is whether Seltzer performed with competence, while the civil proceeding dealt with recovery of damages based on breach of contract and fraud. **[4]** Furthermore, Seltzer's discovery rights under the revised Rules of Procedure of the State Bar, rule 5.65 et seq., which are based on similar discovery provisions in the California Administrative Procedure Act (Gov. Code sections 11507.5 et seq.), satisfy fair trial concerns. (See, e.g., *Cimarusti v. Superior Court* (2000) 79 Cal.App.4th 799, 809 [prehearing discovery procedures in Administrative Procedure Act sufficient to satisfy due process].) We find that the hearing judge properly exercised her discretion in denying Seltzer's motion to abate these proceedings.

III. CULPABILITY FOR TWO COUNTS OF MISCONDUCT

A. Count One: Failure to Perform Legal Services with Competence (Rule 3-110(A))

Seltzer was charged in Count One with violating rule 3-110(A), which provides that an attorney "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." The hearing judge determined that Seltzer willfully violated the rule by failing to provide: (1) an evaluation of SEB's claim against the school district; (2) a demand letter; and (3) advice to SEB about how to proceed with the case. Clear and convincing evidence supports this culpability determination.[5]

5. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

Seltzer argues that she fully and competently performed in accordance with the terms of the Fee and Retention Agreement with SEB. She insists that she was hired only to gather information to evaluate SEB's claim and to counsel Elor about his negotiations with the school district. She testified: "There were no deliverables on this engagement, none." According to Seltzer's interpretation of the fee agreement, she "wasn't necessarily supposed to do anything."

Bobrovitch and Sarfaty credibly testified that they hired Seltzer to review their construction documents and write a demand letter, and that she agreed to complete that task in short order. The various emails between them and Seltzer corroborate Bobrovitch and Sarfaty's understanding of their agreement with her, as does Seltzer's invoice indicating she spent six hours drafting and revising a demand letter and her voice message to Elor assuring him that she was almost finished with her draft of the letter. We thus reject Seltzer's interpretation of the fee agreement. (*Beard v. Goodrich* (2003) 110 Cal.App.4th 1031, 1037 [court considers extrinsic evidence concerning parties' intentions to determine if contract language is reasonably susceptible to interpretation urged by party]; *Mahoney v. Sharff* (1961) 191 Cal.App.2d 191, 196 [fee agreement prepared by attorney is "most strongly" construed against attorney].)

In an attempt to cure the inconsistency between her position that she was not hired to draft a demand letter and her billing statement that she did in fact prepare such a letter, Seltzer explained that she "started drafting [the demand letter] just as an ongoing exercise" so that she would have a draft prepared "if it turns out . . . I am hired to send a demand letter." Her explanation is disingenuous at best.

[5] We conclude that Seltzer willfully violated section 3-110(A) by failing to prepare a demand letter and case evaluation, or to provide any service of value to SEB. After two months, Seltzer's "meager and incomplete effort" to advise SEB about its construction dispute constituted a reckless failure to perform with competence. (*In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 950; see *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 399 [attorney failed to perform competently when he agreed to prosecute case but failed to do so]; *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 979 [attorney failed to perform competently by taking no action toward purpose client retained him to accomplish].) Seltzer's repeated failure to respond to her clients' phone calls and emails is additional evidence that she failed to perform legal services with competence, particularly since the clients were concerned that the time to file a claim against the school district would expire. "Adequate communication with clients is an integral part of competent professional performance as an attorney." (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 782.)

B. Count Two: Failure to Return Unearned Fees (Rule 3-700(D)(2))

[6] The hearing judge found Seltzer violated rule 3-700(D)(2) by failing to refund $4,500 of the $6,000 advance fee that SEB paid. We agree. When a client terminates an attorney's services, the attorney is obligated to account for any fees paid and return to the client any unearned portion of those fees. (Rule 3-700(D)(2).) Seltzer's clients demanded return of the entire $6,000 fee, but she sent them only $1,500, along with two statements describing the time and professional services she believed justified her retention of $4,500. Although Seltzer may have performed some services on SEB's behalf, her work was incomplete. More importantly, she never provided any work product or advice to the clients. (*In the Matter of Kennon* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 267, 275 [attorney not entitled to retain advance fee where client did not receive draft or final trust agreement].) We find that Seltzer's clients were entitled to a refund of the entire $6,000 since they received nothing of value from her. (*In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 323-324 [violation of rule 3-700(D)(2) where insufficient evidence of work performed and attorney did not obtain result for which he was retained].)

IV. AGGRAVATION AND MITIGATION

The appropriate discipline is determined in light of the relevant circumstances, including mitigating and aggravating factors. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) Seltzer must establish mitigation by clear and convincing evidence (std. 1.2(e)), while the State Bar has the same burden to prove aggravating circumstances. (Std. 1.2(b).)

A. Three Factors in Aggravation

The hearing judge found five factors that aggravated Seltzer's misconduct: (1) a prior discipline record; (2) uncharged misconduct; (3) lack of insight; (4) multiple acts of misconduct; and (5) significant client harm. We agree that Seltzer's prior record, lack of insight and uncharged misconduct are aggravating factors. We do not find that her wrongdoing is further aggravated by multiple acts of misconduct or client harm.

1. Prior Record of Discipline (Std. 1.2(b)(i))

On October 24, 2012, the Supreme Court suspended Seltzer for 60 days and until she made restitution, subject to a one-year stayed suspension and two years of probation. (Supreme Ct. case no. S204059; State Bar Ct. case no. 08-O-13227.) Seltzer was found culpable of six counts of misconduct in two client matters, including the unauthorized practice of law, failing to cooperate with the State Bar investigation, failing to keep a client informed of a significant development, charging and collecting an illegal fee and failing to promptly return a client's file.

Standard 1.2(b)(i) provides that an attorney's prior record of discipline shall be considered as an aggravating circumstance. However, merely citing Seltzer's disciplinary history, without more analysis, does not provide adequate guidance as to the aggravating weight to be assigned. Rather, "we must examine the nature and chronology of the respondent's record of discipline." (*In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136.)

[7] In Seltzer's prior matter, the NDC was filed in October 2011 and the Supreme Court ordered discipline in October 2012, both of which occurred *after* the misconduct in the present case. Therefore, Seltzer did not have an opportunity to appreciate or heed the import of the earlier discipline. Accordingly, we find the aggravating weight of Seltzer's prior discipline is greatly diminished. (*In the Matter of Miller, supra,* 1 Cal. State Bar Ct. Rptr. at p. 136 [prior discipline given less weight where imposed after commencement of second disciplinary proceeding].)

2. Uncharged Misconduct (Std. 1.2(b)(iii))

The hearing judge found Seltzer culpable of uncharged misconduct in aggravation for her failure to maintain the disputed fee in her CTA, in violation of rule 4-100(A)(2). This rule provides that "when the right of the member . . . to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved." When SEB's attorney terminated Seltzer, he demanded return of the entire $6,000 advance fee. Thereafter, Seltzer withdrew $4,500 from her CTA as payment for her fee. Seltzer was not permitted to set her fees unilaterally (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1037), and once she became aware that SEB disputed her right to the funds held in her CTA, she was required to maintain that amount in her account until the dispute was resolved. (*In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 758 [if client contests fees, disputed funds must be placed in trust account until conflict is resolved].) The hearing judge properly considered the rule violation as aggravation because Seltzer's own evidence and testimony at trial established the rule 4-100(A) violation. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36.)

3. Lack of Insight (Std. 1.2(b)(v))

We assign the most significant aggravation to Seltzer's lack of insight. Despite all of the evidence to the contrary, Seltzer remains unwavering in her belief that there was never "any action item or ball in my court to do anything" and that "there is no issue that I did whatever I was asked to do within a reasonable time frame." In her earlier discipline case, we admonished Seltzer about her unwillingness

to even consider whether her position was meritless, citing to *In re Morse* (1995) 11 Cal.4th 184. In *Morse*, the Supreme Court found an attorney "went beyond tenacity to truculence" when he was unwilling to consider the appropriateness of his position. (*Id.* at p. 209.) Seltzer's continued lack of insight remains of serious concern.

4. No Multiple Acts of Misconduct (Std. 1.2(b)(ii))

We do not agree with the hearing judge that Seltzer engaged in multiple acts of wrongdoing. She was charged with only two counts of misconduct, which do not constitute multiple acts. (*In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 177 [no aggravation for multiple acts of wrongdoing when respondent culpable of three ethical violations].)

5. No Harm to Client (Std. 1.2(b)(iv))

We do not adopt the hearing judge's finding of client harm. The State Bar did not present specific evidence that depriving SEB of the $4,500 resulted in significant harm to the company. Further, there is no evidence that Seltzer's failure to competently provide legal services adversely affected SEB's ultimate ability to obtain satisfaction from the school district.

B. No Factors in Mitigation

We agree with the hearing judge that no mitigating factors are present.

V. LEVEL OF 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. 1.3.) Ultimately, we balance all relevant factors on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.)

[8] We begin our analysis with the standards, which the Supreme Court instructs us to follow "whenever possible." (*In re Young*, *supra*, 49 Cal.3d at p. 267, fn. 11.) We give them great weight to promote "the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91, internal citation and quotations omitted.) Seltzer's violations of rule 3-110(A) and rule 3-700(D)(2) each call for reproval or suspension, depending on the seriousness of the misconduct and the extent of harm to the client.[6] We also are guided by standard 1.7(a), which calls for progressively more severe discipline when, as here, the attorney has a prior record, unless the prior discipline is remote in time and the offense was minimal in severity. Seltzer's prior misconduct is neither remote nor minimal.

The decisional law suggests that the one-year actual suspension recommended by the hearing judge is too severe. The hearing judge sought guidance from only one case: *In the Matter of Trillo* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 59, where the attorney's misconduct included failing to provide legal services for which he was hired, failing to return unearned fees, failing to maintain client funds in a proper trust account, and dishonesty. (*Id.* at pp. 68-69.) While the gravamen of Trillo's misconduct was the failure to perform with competence, his transgressions were much more serious than Seltzer's. They involved multiple acts of wrongdoing and dishonesty, including Trillo's misrepresentation to his client that he was a partner in a law firm. (*Id.* at p. 69.) Moreover, his actions significantly prejudiced his client, who was unable to enforce an award due to Trillo's lack of competence. (*Id.* at p. 65.) Seltzer's conduct did not involve dishonesty or multiple acts, and she did not cause client harm. Thus, we find little guidance from *Trillo*.

6. Standard 2.4(b) provides that the failure to perform services not demonstrating a pattern of misconduct or the failure to communicate with a client "shall result in reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client." Standard 2.10, which applies to rule 3-700(D)(2) violations, similarly provides for "reproval or suspension according to the gravity of the offense or the harm, if any, to the victim . . . ."

Instead, we look to decisions where an attorney's failure to perform with competence was aggravated by prior misconduct. Such comparable case law supports discipline that includes a six-month actual suspension. (*In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366 [six-month actual suspension where attorney failed to perform services competently by failing to distribute assets and close estate for five years, aggravated by prior record of discipline, lack of insight, harm to beneficiaries and minimal mitigation evidence]; *In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459 [six-month actual suspension for reckless failure to perform competent legal services for incarcerated client, failure to return unearned fees, and failure to respond to client's status inquiries, aggravated by multiple acts of misconduct, harm to client and indifference, with nominal mitigation for belated cooperation].)

We conclude that a six-month actual suspension will provide Seltzer with time to reflect on her ethical responsibilities to her clients and to gain insight into her misconduct. Further, Seltzer should remain suspended until she pays $4,500 plus interest in restitution to SEB. "It is common in State Bar matters involving the failure to perform services to require as a rehabilitative condition, restitution of unearned fees kept by the attorney and to deem as unearned the entire fee when only preliminary services were performed which did not result in benefit to the client." (*In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219, 231.)

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Margaret Alice Seltzer be suspended from the practice of law for one year, that execution of that suspension be stayed, and that she be placed on probation for two years on the following conditions:

1. She must be suspended from the practice of law for a minimum of the first six months of the period of her probation and remain suspended until the following conditions are satisfied:

a. She pays SEB Construction, Inc. $4,500 plus 10 percent interest per year from January 14, 2010, and furnishes satisfactory proof of payment to the State Bar Office of Probation in Los Angeles.

b. If she remains suspended for two years or longer, she must provide proof to the State Bar Court of her rehabilitation, fitness to practice and learning and ability in the general law. (Std. 1.4(c)(ii).)

2. She must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of her probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including her current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, she must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

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

5. She must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, she must state whether she has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of her probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, she must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are

directed to her personally or in writing, relating to whether she is complying or has complied with the conditions contained herein.[7]

7. 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 period of probation, if Seltzer has complied with all conditions of probation, the one-year period of stayed suspension will be satisfied and that suspension will be terminated.

VII. RULE 9.20

We further recommend that Margaret Alice Seltzer be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

VIII. COSTS

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

WE CONCUR:

REMKE, P. J.
PURCELL, J.

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7. Since Seltzer was ordered to complete and pass a course of the State Bar's Ethics School in her prior matter, we do not recommend it here. Similarly, since she was ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in her prior matter, we do not order it again in these proceedings.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JOHN YOUNG SONG

A Member of the State Bar

[No. 11-O-11436]

Filed May 10, 2013

SUMMARY

Respondent was charged with intentionally misappropriating $112,293 from a client by making at least 65 unauthorized withdrawals from his client trust account (CTA) over a three-year period. The hearing judge found respondent culpable of failure to maintain client funds in trust and moral turpitude. The hearing judge found that respondent's misconduct was aggravated by multiple acts of misconduct and lack of remorse/insight, and mitigated by no prior discipline, cooperation, good character, community/pro bono service, and payment of restitution. Finding the mitigation was not compelling, the hearing judge applied standard 2.2(a) and recommended disbarment. (Hon. Donald F. Miles, Hearing Judge.)

The review department adopted the hearing judge's findings except for one factor in mitigation—payment of restitution. While respondent's remaining four mitigating factors were substantial, they were not compelling nor did they predominate over his serious misconduct and the aggravating factors. The review department affirmed the hearing judge's recommended discipline of disbarment.

COUNSEL FOR PARTIES

For State Bar: Allen Blumenthal

For Respondent: John Y. Song

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a-c] 221.00 Culpability—State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)

Where an attorney knowingly converts client funds for his or her own purpose, the attorney clearly violates section 6106. Respondent's defense that he was entitled to CTA funds as compensation for post-judgment legal services lacked merit where the contingency fee agreement did not provide for compensation for these services, and the client did not otherwise agree to pay it. Likewise, respondent's claim that the withdrawals from the CTA were temporary loans lacked merit because he never obtained his client's consent to withdraw the money as loans or for any other reason.

[2] 106.90 Generally Applicable Procedural Issues—Other issues re pleadings
521 Aggravation—Multiple Acts of Misconduct (1.2(b)(ii))—Found

Multiple acts of misconduct as aggravation are not limited to the counts pleaded. Respondent's 65 improper CTA withdrawals were multiple acts of misconduct that constitute significant aggravation.

[3] 591 Aggravation—Indifference to rectification/atonement (1.2(b)(v))—Found

Although respondent acknowledged his misconduct and expressed regret for his misappropriation at oral argument before review department, the record provided clear and convincing evidence of lack of insight and remorse. Throughout proceedings before the hearing judge respondent denied culpability for wrongdoing and argued the reasonableness of his conduct; in face of those actions, occasional utterances at trial that he feels remorse were not persuasive. Lack of insight was assigned the most significant weight in aggravation because it showed respondent was an ongoing danger to the public.

[4] 710.35 Mitigation—Long practice with no prior discipline record (1.2(e)(i))—Found but discounted or not relied on—Present misconduct too serious

Respondent's 12-years of discipline-free practice before misappropriation from CTA was assigned limited weight in mitigation; respondent acted dishonestly for three years, during which time he made 65 unauthorized withdrawals from his CTA that did not reflect aberrational misconduct, and he demonstrated lack of insight about his misappropriations.

[5] 740.32 Mitigation—Good character references (1.2(e)(vi))—Found but discounted or not relied on—References unfamiliar with misconduct

Limited weight was assigned to good character evidence from relevant communities where respondent failed to establish that his witnesses knew the full extent of his misconduct. Many witnesses believed the charges against respondent were due to mistake or misunderstanding, and some did not know respondent had stipulated to facts establishing his misconduct.

[6] 745.51 Mitigation—Remorse/restitution/atonement (1.2(e)(vii))—Declined to find—Coerced or belated restitution

Respondent's restitution payment to his client of misappropriated funds was assigned no mitigation credit. Although repayment occurred before the State Bar investigation, it was not spontaneous. Rather, respondent waited until his client reappeared with her attorney, demanded payment, and ultimately filed a lawsuit against him.

[7 a,b] 725.32 Mitigation—Emotional/physical disability/illness (1.2(e)(iv))—Found but discounted or not relied on—Lack of causal relation to misconduct
725.36 Mitigation—Emotional/physical disability/illness (1.2(e)(iv))—Found but discounted or not relied on—Inadequate showing of rehabilitation

Respondent established that he suffered from anxiety and depression for years. However, the review department assigned no mitigating weight to his emotional difficulties where one expert did not believe respondent committed wrongdoing and neither of respondent's experts opined that his emotional problems actually caused him to misappropriate client funds. Further, where respondent's experts did not provide specifics about his future prognosis or stage of recovery, there was no clear and convincing evidence that he no longer suffers from emotional problems.

[8 a-c] 822.10 Application of Standards—Standard 2.2 (Entrusted Funds or Property)—(a) Sanctions for misappropriation—Applied—Disbarment

Attorney who misappropriated entrusted funds bore heavy burden to overcome standard 2.2(a)'s disbarment presumption. Respondent's misappropriation of $112,293 over three years placed him on the most serious end of the discipline spectrum for misappropriation. Respondent treated his CTA like an open-ended line of credit, and his 65 withdrawals in three years for personal matters show his conduct was not aberrational. While his extensive community and pro bono service, cooperation with the State Bar, good character, and 12-years of practice without discipline were substantial mitigation, he did not prove two important rehabilitative factors—recognition of wrongdoing and recovery from the emotional problems he claims led to his wrongdoing. Thus, future personal struggles could trigger similar serious misconduct. Because respondent's overall mitigation was not the most compelling, nor did it clearly predominate, disbarment was warranted.

ADDITIONAL ANALYSIS

Culpability

Found

280.01 Trust account/commingling (RPC 4-100(A); 1975 RPC 8-101(A))
221.11 Section 6106 (moral turpitude)—Deliberate dishonesty/fraud

Mitigation

Found

735.10 Candor and cooperation with Bar (1.2(e)(v))
765.10 Substantial pro bono work

Found but Discounted or not relied on

710.35 Long practice with no prior discipline record (1.2(e)(i))

Discipline

1010 Disbarment

Other

2311 Inactive enrollment after disbarment recommendation—Imposed

OPINION

PURCELL, J

John Young Song intentionally misappropriated $112,293 from a client by making at least 65 unauthorized withdrawals from his client trust account (CTA) over a three-year period. At trial, Song testified that he took the money as payment for post-judgment work on his client's case and as a loan to support his elderly parents.

The hearing judge found Song culpable of two counts of misconduct: (1) failure to maintain client funds in trust; and (2) moral turpitude due to misappropriation. The hearing judge further found that Song's case was aggravated by two factors (multiple acts of misconduct and lack of remorse/insight), and mitigated by five factors (no prior discipline, cooperation, good character, community/pro bono service, and payment of restitution).

A misappropriation case of this amount and duration generally calls for disbarment under standard 2.2(a)[1] unless "the most compelling mitigating circumstances clearly predominate." The hearing judge concluded the mitigation was not compelling, and recommended that Song be disbarred.

Song seeks review. He argues that disbarment is excessive because he presented compelling mitigation and his conduct was aberrational. The Office of the Chief Trial Counsel (State Bar) supports the hearing judge's disbarment recommendation. The issue before us is whether Song's mitigation is compelling enough to warrant deviation from the discipline recommended under standard 2.2(a).

We have independently reviewed the record (Cal. Rules of Court, rule 9.12), the standards, and the relevant case law. We adopt the hearing judge's findings except for one factor in mitigation – payment of restitution. While Song's remaining four mitigating factors are substantial, they are not compelling nor do they predominate over his serious misconduct and the aggravating factors. Like the hearing judge, we recommend standard 2.2(a)'s presumptive discipline of disbarment to protect the public and the courts, and to maintain high standards for the legal profession.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

In June 2001, Song filed a complaint in superior court on behalf of Son Young Lee, a long-time family friend. Lee sought $130,000 from defendants Richard and Grace Kim (*Lee v. Kim*) as payment on a promissory note. Song's initial fee agreement provided that Lee would pay him $150 per hour for legal services, plus a $4,000 non-refundable "retainer fee." Under the agreement, Song was entitled to place a lien for unpaid legal fees on any causes of action. Lee regularly paid the hourly fees for over a year, but stopped in August 2002 because they became onerous.

On November, 19, 2002, Lee and Song entered into a new fee agreement that changed Lee's payment from an hourly fee to a contingency fee. This agreement provided that Song would receive 15% of any judgment. Further, he would reimburse Lee for advanced costs up to $10,000 if more than $19,500 in attorney fees were awarded. No provision for post-judgment legal services or appellate work was included, but Song was authorized to place a lien for his fees and advanced costs on "any sums received." Neither of Song's fee agreements advised Lee to seek the advice of independent counsel about the attorney's liens.

On November 27, 2002, the jury in *Lee v. Kim* awarded Lee $130,000, plus post-judgment interest. Song performed additional legal services when the Kims subsequently appealed and filed for bank-

1. All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

2. Our factual background is based on the hearing judge's findings, Song's pretrial Stipulation as to Facts, and the trial evidence. (Rules Proc. of State Bar, rule 5.155(A) [hearing judges factual findings entitled to great weight on review].)

ruptcy. In August 2004, the bankruptcy court discharged Lee's judgment. Yet, on September 30, 2005, Song unexpectedly received a $145,528.77 check ($130,000 judgment plus post-judgment interest) from the Kims' title insurance company that was payable to Song on behalf of Lee. Song deposited the check into his CTA and was required to maintain $133,699 as Lee's share of the proceeds.[3]

From 2005 to 2007, Song and his office staff tried unsuccessfully to contact Lee. In 2005, Song sent three letters requesting a response. The letters were not returned and Lee did not respond. Song also telephoned Lee five times but did not reach her. Thereafter, he instructed his staff to continue trying to contact Lee, and followed up a few times during 2006 and 2007, to no avail. Song believed Lee would eventually contact him.

Song held Lee's funds in his CTA for nearly two years. But in early March 2007, he began to routinely withdraw money from the account. Song made at least 65 unauthorized withdrawals from 2007 to 2010, in amounts ranging from approximately $1,000 to $15,000. By August 12, 2010, when he made the last withdrawal, the CTA balance dropped to $21,406, which was $112,293 less than he should have maintained for Lee.

Song admitted he took Lee's money from his CTA but extensively explained his reasoning. He claimed he was entitled to charge $23,128 against Lee's funds for his post-judgment legal fees incurred in opposing the Kims' bankruptcy and appeal. He further claimed he withdrew the remaining funds as temporary loans to support his elderly parents, who had health and financial problems. Song emphasized that as the first-born son of immigrants, he felt tremendous cultural pressure to care for his parents without help from other family members – a concept known as the "filial son." In his written response to the Notice of Disciplinary Charges (NDC), Song asserted that "circumstances beyond his control caused him to appropriate portions thereof [from his CTA] from time to time." At trial, he testified that he did not "misappropriate" any money since he "fully intended to pay it back," and contended that Lee "would have consented" to lend it to him.

Lee did not appear at Song's discipline trial. Instead, Song testified that Lee became aware sometime in 2010 "through the grapevine" of her close-knit community that he had received the judgment in *Lee v. Kim*. Lee hired a new attorney who contacted Song about payment. In response, Song convened a family meeting seeking money to repay Lee. When he failed to timely pay her, she filed a civil lawsuit against him on September 8, 2010, based on his failure to pay the Kim settlement proceeds to her at an earlier date. The next day, Song's parents gave him their entire retirement savings of $139,500, which he deposited into his CTA.[4] On September 27, 2010, Song sent Lee a check for $133,699.

Two months later, the State Bar notified Song of its investigation. In April, 2011, Song paid Lee $80,000 to settle the civil lawsuit. The State Bar filed the NDC on March 21, 2012.

II. CULPABILITY

A. COUNT ONE: FAILURE TO MAINTAIN CLIENT FUNDS IN TRUST (RULES PROF. CONDUCT, RULE 4-100(A))[5]

Rule 4-100(A) requires that "funds received or

3. This amount is calculated under the contingency fee agreement as follows: $145,528 less $21,829 as Song's 15% contingency fee, plus $10,000 as reimbursement to Lee for costs.

4. Song's father, a minister for 47 years, testified by written declaration. He was aware that his son felt cultural pressure to financially support and care for him and his wife, particularly when illness and home foreclosure struck in 2007. Even so, he stated: "My wife and I never could have imagined that [Song] was using some of the moneys in his trust account to assist us. Had we known, we would have stopped it immediately."

5. All further references to rules are to this source unless otherwise noted.

held for the benefit of clients" shall be deposited in a CTA. Under this non-delegable duty, an attorney must maintain these client funds in trust until outstanding balances are settled. (*In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 123.) Song admitted he took Lee's funds from his CTA for personal use, and that the account balance repeatedly fell below the amount he should have held for her. Song therefore violated rule 4-100(A).

B. COUNT TWO: MORAL TURPITUDE – MISAPPROPRIATION OF CLIENT FUNDS (BUS. & PROF. CODE, § 6106)[6]

[1a] Section 6106 prohibits an attorney from engaging in any act involving moral turpitude, dishonesty, or corruption. "There is no doubt that the wilful misappropriation of a client's funds involves moral turpitude. [Citations.]" (*Bate v. State Bar* (1983) 34 Cal.3d 920, 923.) Where, as here, an attorney knowingly converts client funds for his or her own purpose, the attorney clearly violates section 6106. (*Jackson v. State Bar* (1975) 15 Cal.3d 372, 382.)

[1b] Song conceded he took Lee's money from his CTA, but presents two defenses to the misappropriation charge. First, he claims he was entitled to $23,128 to pay for his post-judgment legal services. This defense lacks merit. The contingency fee agreement did not provide for compensation for these services, and Lee did not otherwise agree to pay it. In the absence of client consent, an attorney may not unilaterally withhold entrusted funds even though he may be entitled to reimbursement. (*Most v. State Bar* (1967) 67 Cal.2d 589, 597.)

[1c] Next, Song argues that his withdrawals were merely temporary loans to help him support his parents. He testified that Lee, as a close family friend, would have agreed to, and in fact later ratified, these so-called loans. Song claims Lee told him she "would have consented had [he] asked." His argument has no merit in the context of attorney discipline. As a fiduciary, an attorney may not borrow client funds without first satisfying the requirements of rule 3-300, one of which is client consent.[7] Song never obtained Lee's consent to withdraw the money as loans or for any other reason. We find that Song misappropriated Lee's entrusted funds in violation of section 6106. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1033 [withdrawing funds from CTA without authority is clear and convincing proof of § 6106 violation].)[8]

III. AGGRAVATION AND MITIGATION

The offering party bears the burden of proof for aggravation and mitigation. The State Bar must establish aggravating circumstances by clear and convincing evidence. (Std. 1.2(b).)[9] Song has the same burden to prove mitigating circumstances. (Std. 1.2(e).)

A. TWO FACTORS IN AGGRAVATION

The hearing judge found two aggravating factors: (1) multiple acts of misconduct (std. 1.2(b)(ii)); and (2) lack of insight and remorse. (Std. 1.2(b)(v).) We agree.

1. Multiple Acts of Misconduct (Std. 1.2(b)(ii))

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6. All further references to sections are to this source unless otherwise noted.

7. Rule 3-300 requires attorneys securing loans from clients to: (1) adhere to terms that are fair and reasonable and fully disclosed in writing to the client; (2) advise in writing that the client may seek the advice of an independent lawyer and give the client a reasonable opportunity to seek that advice; and (3) obtain the client's written consent to the loan terms.

8. For discipline purposes, we consider Song's culpability for this count only since the misconduct underlying both counts is the same - misappropriation of Lee's funds.

9. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

[2] Song asserts that the hearing judge erred in assigning aggravation for this factor because he was charged with and found culpable of only one count of moral turpitude for misappropriating funds. His argument is misplaced because multiple acts of misconduct as aggravation are not limited to the counts pleaded. (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 555.) Here, we view Song's 65 improper CTA withdrawals as multiple acts of misconduct that constitute significant aggravation. (*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 two years].)

2. Lack of Insight and Remorse (Std. 1.2(b)(v))

Lack of remorse and failure to acknowledge wrongdoing are aggravating factors in attorney discipline cases. (*Weber v. State Bar* (1988) 47 Cal.3d 492, 506.) Although Song acknowledged his misconduct and expressed regret for the misappropriation at *oral argument*, the record below provides clear and convincing evidence that he lacks insight and remorse.

[3] Song testified at the hearing below: "I did not misappropriate. I fully had intentions of giving back the money. I never – and also it wasn't, I believe, volitional. I had felt tremendous pressure. It wasn't a voluntary deed in the common sense." At trial, Song vowed not to repeat his "stupid" and "naïve" mistakes, but on review, he argues that misappropriating his client's entrusted funds was not willful or volitional. The hearing judge properly concluded that Song lacked remorse and insight: "Throughout this proceeding [Song] has denied culpability for any wrongdoing and has argued the reasonableness of his conduct. In the face of those actions, his occasional utterances at trial that he feels remorse for his actions are not particularly persuasive." We assign the most significant aggravating weight to this factor because Song's lack of insight makes him an ongoing danger to the public. (See *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 519 [justifying use of CTA funds for office expenses based on intent to repay raises "concern as to whether respondent has recognized the extent of his wrongdoing, and cast[s] a shadow on his other evidence of remorse"].)

B. FOUR FACTORS IN MITIGATION

Song introduced evidence of six factors in mitigation: (1) no prior discipline record; (2) candor and cooperation; (3) restitution as remorse/recognition of wrongdoing; (4) good character; (5) community service and pro bono work; and (6) extreme emotional difficulties. The hearing judge afforded mitigation credit for the first five factors but gave no credit for extreme emotional difficulties. As detailed below, we assign varying degrees of credit to four factors (no discipline record, cooperation, good character, and pro bono/community service) and no credit to two factors (payment of restitution as remorse and extreme emotional difficulties).

1. Limited Credit for Lack of Prior Discipline Record (Std. 1.2(e)(i))

Song was admitted to the Bar in June 1995 and practiced law for 12 years before he began to misappropriate Lee's funds. The hearing judge reduced the weight of this factor because Song's misconduct was serious and spanned three years. Song asserts that the hearing judge erred and urges us to assign full mitigation credit. We agree with the hearing judge.

[4] Standard 1.2(e)(i) provides for mitigation in the absence of discipline over many years and where the present misconduct is not serious. However, where the misconduct is serious, the Supreme Court in *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029, explained that a prior record of discipline-free practice is most relevant for mitigation where the misconduct is aberrational and unlikely to recur. Here, Song conducted himself dishonestly for three years. The 65 unauthorized withdrawals he made from his CTA do not reflect aberrational misconduct. And, as we discussed, he has shown a lack of insight by offering ill-founded explanations for his misappropriations. Consequently, we are not persuaded by Song's 12-year record of discipline-free practice that he will avoid future misconduct. The hearing judge properly assigned limited weight to this factor.

2. Credit for Cooperation (Std. 1.2(e)(v))

Song stipulated to facts that established his culpability and facilitated the trial. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive weight in mitigation accorded those who admit culpability and facts].) He is entitled to mitigating credit for his cooperation.

3. Limited Credit for Good Character (Std. 1.2(e)(vi))

[5] Standard 1.2(e)(vi) provides for mitigation for "an extraordinary demonstration of good character . . . attested to by a wide range of references in the legal and general communities and who are aware of the full extent of the member's misconduct." Song presented two witnesses and numerous declarations in support of his good character. His father, his brother (a public interest attorney), medical professionals, businessmen, several attorneys, and a retired judge uniformly praised Song as hard-working, competent, generous, honest, and trustworthy. Yet many witnesses believed that the charges against Song were due to a mistake, an accounting problem, or a misunderstanding. Moreover, some did not know that Song had stipulated to facts establishing his misconduct. (*In re Aquino* (1989) 49 Cal.3d 1122, 1130-1131 [seven witnesses and 20 support letters not significant mitigation because witnesses unfamiliar with details of misconduct].) Although Song proved his good character from the relevant communities, he failed to establish that his witnesses knew the full extent of his misconduct. We therefore assign limited weight to Song's good character evidence.

4. Significant Credit for Community Service and Pro Bono Work

Song's community service and pro bono work are mitigating factors. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) Beginning at age nine, he served as an interpreter for the parishioners in his father's church. Before becoming an attorney, he provided translation for Korean immigrants and traveled to Mexico to build homes and provide shoes to the poor. After graduating from law school, he founded the Korean American Coalition in Orange County and served as its president for three years. In 1996, he received the "Chung Sol Award" for his outstanding community service. Song has handled several pro bono cases and testified that he has "never forsaken a client due to money." He described his deeply held commitment to these causes, which was corroborated by some of his witnesses. We find that Song's commendable service to his community properly merits significant mitigation.

5. No Credit for Remorse/Recognition of Wrongdoing or Payment of Restitution (Std. 1.2(e)(vii))

[6] The hearing judge assigned some mitigation credit for Song's restitution payment to Lee before the State Bar began its investigation. But this repayment was not spontaneous. Rather, Song waited until Lee reappeared with her attorney, demanded payment, and ultimately filed a lawsuit against him. "Restitution paid under the threat or force of disciplinary, civil or criminal proceedings is not properly considered to have any mitigating effect. [Citations.]" (*Hitchcock v. State Bar* (1989) 48 Cal.3d 690, 709.) We assign no mitigation credit for Song's repayment to Lee.[10]

6. No Credit for Extreme Emotional Difficulties (Std. 1.2(e)(iv))

To receive mitigation under this standard, an attorney: (1) must prove that he or she suffered from extreme emotional difficulties at the time of the professional misconduct, (2) which an expert establishes were directly responsible for the misconduct, and (3) he or she no longer suffers from such difficulties. Song established the first requirement – he has suffered from anxiety and depression for years. However, he failed to prove the other two requirements – that these difficulties were respon-

10. We also reject Song's request for mitigation for hiring an accountant to better manage his CTA because it does not address his intentional misappropriation of client funds.

sible for his misconduct and that he is fully rehabilitated from his problems.

Song testified that he has taken antidepressants and undergone therapy for at least ten years to treat his inferiority complex resulting from stringent cultural expectations of him. Song believed that his emotional difficulties caused a deep depression which, along with financial pressures, clouded his judgment. He testified that his misconduct would not recur because medication and therapy have alleviated his depression, his finances have stabilized, and his father has released him from his "filial son" obligations.

Song also presented the declarations of two treatment providers. Dr. Oliver Nguyen, his longtime friend and treating physician, has prescribed medication for his anxiety and depression since 2005. Dr. Elizabeth Kim, a psychologist and family friend, has counseled Song since the late 1990s for anxiety and stress related to "unimaginable" cultural pressure to succeed and provide for his family. Song's brother corroborated Dr. Kim's assessment of family pressures.

[7a] We commend Song's progress and commitment to ongoing therapy but find that this record falls short of establishing that his emotional difficulties caused the misconduct. (See *In re Naney* (1990) 51 Cal.3d 186, 197 [emotional distress from marital difficulties and similar problems not mitigating unless directly responsible for misconduct].) First, Dr. Nguyen did not believe Song had committed any wrongdoing since he thought the State Bar charges were "the result of a misunderstanding." Second, neither expert opined that Song's emotional problems actually caused him to misappropriate client funds. (*Ibid.* [expert testimony that stress may cause impaired judgment and distortion of values fell short of establishing that attorney's marital problems caused misappropriations].)

[7b] Further, Song failed to prove he is fully rehabilitated from his emotional difficulties. His experts did not provide specifics about future prognosis or his stage of recovery. Dr. Nguyen stated: "Recently, Mr. Song is doing much better with controlling his blood pressure, anxiety, and depression . . . Mr. Song's conditions continue to improve and I believe he is making good progress." Dr. Kim acknowledged: "Mr. Song has made great progress in reigning in his depression, stress and feelings of hopelessness. I am confident that Mr. Song will continue to progress positively in coping with the stressors in his life." These generalized appraisals do not prove by clear and convincing evidence that Song no longer suffers from emotional problems. (See *In re Lamb* (1989) 49 Cal.3d 239, 246 [proof of complete, sustained recovery and rehabilitation must be established to qualify for mitigation credit for emotional problems].) We assign no mitigating weight to Song's emotional difficulties.

IV. LEVEL OF 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. 1.3.) Our analysis begins with the standards, which the Supreme Court has instructed us to follow "whenever possible" (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11) to promote consistency. (*In re Silverton* (2005) 36 Cal.4th 81, 91.) Standard 2.2(a) applies here because it is the most severe, and deals specifically with misappropriations.[11]

Under standard 2.2(a), an attorney who misappropriates entrusted funds should be disbarred unless "the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate . . . ." This standard "correctly recognizes that willful misappropriation is grave misconduct for which disbarment is the usual form of discipline." (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 38; see *Grim v. State Bar* (1991) 53 Cal.3d 21, 29 [misappropriation is grievous breach of professional ethics violating basic notions of honesty]; *Howard v. State Bar* (1990) 51 Cal.3d 215,

11. The other applicable standard, 2.3, calls for disbarment or suspension for acts of moral turpitude, depending on the extent to which the victim is harmed or misled, the magnitude of the misconduct, and the degree to which the misconduct relates to the practice of law.

221 [willful misappropriation of client funds is theft].) Song bears a heavy burden to overcome the standard's disbarment presumption. In evaluating whether an attorney has proved compelling mitigation that clearly predominates, we carefully consider the particular set of facts and circumstances before us on a case-by-case basis, weighing all aggravating and mitigating factors. (*In re Young, supra,* 49 Cal.3d at p. 266.)

[8b] We acknowledge that Song presented substantial mitigation through his extensive community and pro bono service, cooperation with the State Bar, good character, and 12-year discipline-free record. Even so, he did not prove two important rehabilitative factors in mitigation – recognition of wrongdoing and full recovery from the emotional problems he claims led to his wrongdoing. Thus, we have concerns that future personal struggles could trigger similar serious misconduct. (*Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1073 ["Without assurance that Kaplan's emotional problems are solved, we must be concerned that routine marital stresses or medical emergencies in the future will trigger similar behavior"]; *Grim v. State Bar, supra,* 53 Cal.3d at p. 31 ["It is precisely when the attorney's need or desire for funds is greatest that the need for the public protection afforded by the rule prohibiting misappropriation is greatest"].)

[8c] In the final analysis, Song's overall mitigation is not "the most compelling," nor does it "clearly predominate" when weighed against his egregious wrongdoing and the aggravating factors. (Std. 2.2(a).) Unfortunately, Song chose to honor financial obligations to his family at the expense of the duties he owed to his client. Many attorneys experience financial and emotional difficulties comparable to Song's. "While these stresses are never easy, we must expect attorneys to cope with them without engaging in dishonest activities as did respondent." (*In the Matter of Spaith, supra,* 3 Cal. State Bar Ct. Rptr. at p. 522.) "Misappropriation of a client's funds simply cannot be excused or substantially mitigated because of an attorney's needs, no matter how compelling." (*Hitchcock v. State Bar, supra,* 48 Cal.3d at p. 709.) The severe sanction of disbarment is warranted here and is consistent with relevant case law.[12]

V. RECOMMENDATION AND ORDER

We recommend that John Young Song be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys admitted to practice in this state.

We recommend that Song be ordered to comply with California Rules of Court, rule 9.20 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.

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

The hearing department ordered Song involuntarily enrolled as an inactive member of the State Bar as required by section 6007, subdivision (c)(4), and Rules of Procedure of the State Bar, rule 5.111(D). The involuntary inactive enrollment became effective on August 14, 2012, and Song has remained on involuntary inactive enrollment since that time and will remain on involuntary inactive enrollment pending the final disposition of this proceeding.

WE CONCUR:

REMKE, P. J.
EPSTEIN, J.

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12. See generally, *Grim v. State Bar, supra,* 53 Cal.3d 21 (disbarred for disappropriating $5,546, despite good character and cooperation); *Gordon v. State Bar* (1982) 31 Cal.3d 748 (disbarred for misappropriating over $27,000, despite 13 years of discipline-free practice, financial difficulties, emotional difficulties due to divorce, remorse, and lack of harm); *In the Matter of Spaith, supra,* 3 Cal. State Bar Ct. Rptr. 511 (disbarred for misappropriating $40,000, aggravated by client harm and uncharged misconduct, despite 15 years of discipline-free practice, emotional problems, restitution, remorse, good character, community service, cooperation by stipulating to culpability and community service).

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

BRADLEY LYNN JENSEN

A Member of the State Bar

[No. 11-C-11890]

Filed September 20, 2013, as modified October 11, 2013

SUMMARY

The review department adopted a hearing judge's findings that the facts and circumstances surrounding an attorney's misdemeanor violation of Penal Code section 273a, subdivision (b) (child endangerment), did not involve moral turpitude but did involve other misconduct warranting discipline. In aggravation, the review department agreed with the hearing judge that the attorney had a prior record of discipline. It also adopted the hearing judge's findings of remorse and community service in mitigation. However, it did not adopt the finding that the attorney proved good character. Additionally, the review department considered mitigating the attorney's cooperation. The review department agreed with the hearing judge that disbarment under standard 1.7(b) would be unjust and adopted the hearing judge's disciplinary recommendation of a 120-day actual suspension.

COUNSEL FOR PARTIES

For State Bar: Cydney Tabor Batchelor

For Respondent: Bradley L. Jensen

HEADNOTES

[1 a-c] 1519 Substantive Issues in Conviction Matters—Nature of Underlying Conviction—Other Crimes
1527 Substantive Issues in Conviction Matters—Moral Turpitude—No Moral Turpitude
1691 Admissibility and/or Effect of Record in Criminal Proceeding

Where respondent was convicted of misdemeanor child endangerment for leaving his nine-month-old daughter alone in hotel room for 40 minutes, fact of conviction established respondent's guilt of all elements of crime, but hearing was required to determine whether facts and circumstances involved moral turpitude. Where State Bar failed to introduce clear and convincing evidence that respondent lied to police, no moral turpitude was established.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2 a,b] 102.90 Other improper prosecutorial conduct
130 Procedure on Review
192 Constitutional Issues - Due Process/Procedural Rights

Where State Bar conceded at trial that respondent's conviction did not involve moral turpitude, but argued on review that conviction did involve moral turpitude, State Bar's unexplained change of position was troubling, because it denied respondent opportunity to develop trial record on the issue.

[3 a,b] 142.20 Evidentiary Issues—Hearsay—Insufficiency to Support Finding (rule 5.104(D) (2011))

Police reports offered by the State Bar did not clearly and convincingly establish respondent's dishonesty, for purposes of finding that crime involved moral turpitude, because the reports contained significant inconsistencies and multi-layered hearsay making the statements not the sort of evidence on which responsible persons are accustomed to rely.

[4a-c] 1531 Substantive Issues in Conviction Matters—Other Misconduct Warranting Discipline—Found

Not every violation of law by an attorney merits discipline and the court must examine the facts and circumstances to decide if the attorney has committed criminal conduct that is disciplinable. An attorney's conviction for child endangerment by leaving his daughter unattended in a hotel room falls at the very low end of misconduct justifying professional discipline since it is unrelated to the practice of law but reflects poorly on the attorney's judgment and on the legal profession in general.

[5] 513.90 Aggravation—Prior record of discipline—Found but discounted or not relied on—Other reason

Attorney's two prior records of discipline from 2007 and 2011 were assigned limited aggravating weight given the nature and extent of the prior misconduct, the minimal discipline imposed, the fact the attorney committed some of the misconduct in his second disciplinary case before his wrongdoing in the first disciplinary case, and because the misconduct in the second disciplinary case occurred before the attorney was disciplined in the first disciplinary case.

[6] 142.20 Evidentiary Issues—Hearsay—Insufficiency to Support Finding (rule 5.104(D) (2011))
545 Aggravation—Intentional misconduct, bad faith, etc. (1.2(b)(iii))—Declined to Find

Where State Bar's evidence that respondent lied to law enforcement included inconsistencies and hearsay statements, evidence did not clearly and convincingly establish aggravating factor of dishonesty.

[7] 588.50 Aggravation—Harm (1.2(b)(iv))—To all of the above (or unspecified, or other)—Declined to find

Where victim of respondent's crime of misdemeanor child endangerment suffered only potential harm from being left alone in hotel room, and child's vulnerability had already been considered in finding that respondent's crime warranted discipline, Review Department declined to consider harm as aggravating factor. In addition, fact that hotel staff, police, and child services personnel had to participate in criminal investigation did not, by itself, clearly and convincingly prove significant harm to the public or the administration of justice.

[8] 740.51 Mitigation—Good character references(1.2(e)(vi))—Declined to find—Insufficient number of references

Attorney not entitled to mitigation for good character because he presented the testimony of only two character witnesses.

[9] 745.10 Mitigation—Remorse/restitution/atonement (1.2(e)(vii))—Found
Attorney's admission that his actions evidenced a significant lapse in judgment, his willingness to accept discipline, and his post-conviction voluntary enrollment in parenting courses beyond those required as a condition of probation established acceptance of responsibility for misconduct and warranted significant weight in mitigation.

[10] 735.10 Mitigation—Candor and cooperation with Bar (1.2(e)(v))—Found
Where attorney stipulated to admission of documents which established his culpability for misconduct warranting discipline and assisted the prosecution, such cooperation warranted considerable weight in mitigation.

[11a-d] 806.59 Application of Standards—Standard 1.7 (Effect of Prior Discipline)—(b) Disbarment after two priors—Declined to apply—Other reason
The Supreme Court has not automatically applied standard 1.7(b) even in the absence of compelling mitigation. We must examine an attorney's prior discipline cases along with present misconduct to determine the appropriate aggravating weight. Disbarring the attorney under standard 1.7(b) would be unjust because his prior misconduct overlapped, he was not a recidivist offender who failed to learn from past disciplines and his present misconduct was not more serious than his prior ethical misconduct.

[12] 901.90 Application of Standards—Standard 2.10—Violations Not Specified Above—Applied—Suspension—Other reason
1554.10 Application of Standards—Conviction Cases—No Moral Turpitude But Discipline Warranted (Standard 3.4)—Applied
For a single misdemeanor crime not involving moral turpitude and unrelated to practice of law, a short actual suspension is appropriate. Where attorney committed misdemeanor violation of Penal Code section 273a, subdivision (b) (child endangerment) and where the misconduct was aggravated by two prior records of discipline but mitigated by cooperation, remorse and pro bono service, the appropriate discipline recommendation was a 120-day actual suspension.

ADDITIONAL ANALYSIS

Aggravation
Declined to find
584.50 Harm—To public
586.50 Harm—To administration of justice

Mitigation
Found
765.10 Substantial pro bono work

Discipline
1024 Ethics school/ethics exam
1613.06 Stayed suspension—One year
1615.03 Actual suspension—Three months (incl. anything between 3 and 6 mos.)

OPINION

PURCELL, J.

The State Bar appeals a hearing judge's discipline recommendation based on Bradley Lynn Jensen's misdemeanor child endangerment conviction. Jensen left his nine-month-old daughter in a crib in a hotel room for at least 40 minutes while he took his toddler son for a walk. The hearing judge found that the facts and circumstances surrounding the conviction did not involve moral turpitude but did involve other misconduct warranting discipline. The judge recommended a 120-day actual suspension subject to a one-year stayed suspension and two-years' probation.

The State Bar renews its trial request that Jensen be disbarred since this is his third discipline case.[1] His two prior records are from 2007 and 2011, for which he received a 90-day stayed suspension and a 30-day actual suspension, respectively. The State Bar asserts that the present case is aggravated because Jensen lied to law enforcement upon his arrest. It also alleges, for the first time on review, that this dishonesty amounts to moral turpitude and further supports disbarment. Jensen did not appeal, and accepts the recommended discipline.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we note that the trial evidence was very limited. The State Bar presented no witnesses. Instead, it relied on documents the parties stipulated to, including the record of conviction, the police report, and a suspected child abuse report. However, these documents establish little more than the conviction itself and do not prove moral turpitude or that Jensen was dishonest. Jensen testified and presented evidence of three factors in mitigation: extensive community service, remorse, and cooperation with the State Bar.

Our goal in this conviction proceeding is to determine the proper professional discipline, not to impose punishment for a crime. Jensen's isolated act of parental neglect demonstrates a serious lack of judgment about the safety of his child. But it minimally constitutes grounds for professional discipline because it does not involve moral turpitude and is entirely unrelated to the practice of law. While we give some weight to Jensen's prior discipline cases, we agree with the hearing judge that disbarring him under standard 1.7(b) for "leaving a baby alone in a hotel room for approximately 40 minutes would be a disproportionate level of discipline." We adopt the hearing judge's recommended discipline.

I. FINDINGS OF FACT[2]

On March 14, 2011, Jensen and his two young children accompanied his wife to Los Angeles for her work-related project. They stayed in a hotel in Santa Monica. In the early evening, with his wife at work and his nine-month-old daughter napping in a crib, Jensen left the hotel with his three-year-old son. He planned to pick up a baby bottle that his wife was going to drop off at the hotel's front desk, and then take his son for a walk. His daughter's crib was placed in the bathtub of the hotel room, with two of the crib legs inside the bathtub and two on the outside. Since the crib frame rested on the bathtub ledge, the outside legs were an inch above the floor.

After Jensen left the room, his wife dropped off the bottle at the hotel desk. A bellman took it to the room and discovered the baby crying in the bathroom. He contacted hotel staff, who tried to call Jensen five times over 20 minutes. When they could not reach him, they notified the authorities. Jensen was gone for at least 40 minutes.[3]

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[1] Standard 1.7(b) of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct directs that an attorney with a record of two prior disciplines shall be disbarred unless the most compelling mitigating circumstances clearly predominate. All further references to standards are to this source.

[2] Our findings are based on the parties' Pretrial Stipulation to the Admission of the State Bar's Exhibits, the trial evidence, and the hearing judge's undisputed findings.

[3] Without offering an excuse for leaving his daughter unattended, Jensen testified he had been distracted that day because it was the birthday of his sister, who had been killed in a drunk-driving accident: "It was weighing on me in a context and a condition where I shouldn't have been watching the children by myself, in a hotel or someplace other than our home, and the stresses of trying to – it was a straw that was among other straws that were on my back or on my mind at the time.

Two police officers responded and were waiting in the room when Jensen returned. The officers did not permit him to attend to his daughter, and he became upset, angry, and confrontational. The officers questioned him about his whereabouts and the length of time he had been away. Jensen explained why he left the room. His cell phone communications with his wife, Kristine, substantiated his statements.[4]

According to the police reports, Jensen told the officers he was gone for no more than about 10 minutes, and he had not walked farther than the large tree in the valet area. The report stated that the hotel security video, which had an inaccurate digital time stamp, showed that Jensen pushed a stroller "E/B on Wilshire Bl. . . .[and] then walks N/B on the entrance driveway of the hotel, past the large tree near the valet area . . . [and] then uses a ramp located just east of the south hotel entrance and enters the hotel via a side door."

Jensen testified at the hearing below that he never told the officers he had been gone only 10 minutes: "I told more than one officer on March 14, 2011, that I would make trips up and down the hallway or up and down the elevator, in what I estimated to be 10 minutes, at certain times, but I didn't say that I was only gone for 10 minutes." He also testified that he was absent from the room for about 40 minutes when he returned to discover the officers. The State Bar presented no evidence to rebut Jensen's testimony.

The officers concluded that Jensen had left his daughter in an unsafe environment. Both children were immediately taken into protective custody. Jensen was arrested and charged with a violation of Penal Code section 273a, subdivision (b), misdemeanor child endangerment.[5]

In November 2011, he pled no contest, and the superior court sentenced him to two years of informal probation, imposed a fine, granted credit for one day in jail, and ordered him to complete 52 weeks of parenting classes.[6] At his discipline trial, Jensen testified: "I take this very seriously. I could not be more soul-seared by what happened." He sought out and attended parenting classes in addition to those ordered by the superior court. There is no evidence establishing that Jensen ever failed to comply with his criminal probation.

II. NO MORAL TURPITUDE IN THE FACTS AND CIRCUMSTANCES SURROUNDING THE CONVICTION

[1a] For purposes of attorney discipline, Jensen's conviction proves he is guilty of all requisite elements of his crime. (Bus. & Prof. Code § 6101, subd. (a).)[7] After the State Bar transmitted his conviction record to us, we referred it to the hearing department to determine whether the facts and circumstances of the crime involved moral turpitude or other misconduct warranting discipline and, if so, what discipline should be imposed. (§ 6102, subd. (e); *In re Morales* (1983) 35 Cal.3d 1, 5-6.)

[2a] The State Bar prosecutor conceded at closing argument that Jensen's conduct did *not* involve moral turpitude: "We argue that this case does not involve moral turpitude, but it does involve other conduct that should receive discipline in this matter." The hearing judge agreed.

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[4] The relevant text messages read: Kristine: "I have bottle in the car. Assuming I should drop it off right! There's also baby food in the Trader Joes bag" 6:10 PM
Kristine: "Bottles coming upstairs :)" 6:18 PM
Jensen: "G and I are out for a walk. H is napping in crib in bathroom. What time do you come back tomorrow?" 6:18 PM

[5] This section provides: "Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor."

[6] The maximum penalty allowed for this crime includes six months in jail, 48 months' probation, 52 weeks of child abuser's treatment program, and issuance of a criminal protective order. (Pen. Code, §§ 19 & 273a, subd. (c).)

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

[1b][3a] The State Bar now contends that Jensen's misconduct involved moral turpitude in part because he lied to the police officers about (1) leaving the room for only 10 minutes and (2) not leaving the hotel property.[8] But for reasons detailed below, the police reports offered by the State Bar do not clearly and convincingly establish Jensen's dishonesty. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552 [clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command unhesitating assent of every reasonable mind].)

[1c][3b] First, the statements in the reports were contradicted by Jensen's testimony, which the State Bar did not rebut and the hearing judge accepted. (Rules Proc. of State Bar, rule 5.155(A) [hearing judge's factual findings entitled to great weight on review].) Next, the reports contained significant inconsistencies among the responding officers, as the hearing judge noted.[9] Finally, some statements were made by hotel staff and involved multi-layered hearsay, including descriptions of images on a security videotape on which the time stamp was incorrect. These hearsay statements within the reports are not the "sort of evidence on which responsible persons are accustomed to rely. . . ." (Rules Proc. of State Bar, rule 5.104(C).) Without evidence that reconciles the inconsistencies or adequately rebuts Jensen's testimony, we do not find clear and convincing evidence of his dishonesty. Resolving all doubts in Jensen's favor (*Alberton v. State Bar* (1984) 37 Cal.3d 1, 11), the hearing judge correctly found no moral turpitude in the facts and circumstances surrounding his conviction.

III. JENSEN'S MISCONDUCT WARRANTS PUBLIC DISCIPLINE

[4a] Even if an attorney commits a crime that does not involve moral turpitude, we may still recommend discipline if "other misconduct warranting discipline" surrounds the conviction. (*In re Kelley* (1990) 52 Cal.3d 487, 494-495 [Supreme Court imposes discipline for misconduct not amounting to moral turpitude as exercise of its inherent power to control practice of law and to protect legal profession and public].) But not every violation of law by an attorney merits discipline. (*Id.* at p. 496; *id.* at pp. 499-500 (conc. opn. of Mosk, J.); *id.* at p. 500 (dis. opn. of Panelli, J.).) In fact, "the integrity of the profession cannot require professional discipline in addition to criminal sanctions for every violation of law as an example to others." (*In the Matter of Respondent I* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 260, 271.) We must therefore examine the facts and circumstances surrounding Jensen's crime, and not merely look to the conviction, to decide if he has committed misconduct that is disciplinable. (See *In re Gross* (1983) 33 Cal.3d 561, 566 [misconduct, not conviction, warrants discipline]; *In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 589, fn. 6 [whether acts underlying conviction amount to professional misconduct "is a conclusion that can only be reached by an examination of the facts and circumstances surrounding the conviction"].)

[4b] In this case, few facts were presented beyond those necessary to constitute the conviction. Based on this limited record, we find that Jensen's actions fall at the very low end of misconduct justifying professional discipline. (Compare *In the Matter of Respondent I, supra*, 2 Cal. State Bar Ct. Rptr. 260 [no professional discipline for two drunk-driving convictions while on inactive status where attorney sought immediate treatment and posed no risk to clients after reinstatement] with *In re Kelley, supra*, 52 Cal.3d at pp. 495-496 [public reproval for two drunk-driving convictions where attorney disrespected legal system by committing second offense while on probation for first and had continuing alcohol abuse problem].) In particular, we note that leaving his

[8] **[2b]** Without explanation, the State Bar changed its position as to whether the facts and circumstances surrounding the conviction involve moral turpitude. Such a change is troubling at this late date because it denies Jensen an opportunity to have developed the trial record on this issue. (See *In re Strick* (1983) 34 Cal.3d 891, 898 [attorney is entitled to "procedural due process in proceedings which contemplate the deprivation of his license to practice his profession"]; *Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 422-423 [points not raised at trial not considered on appeal].)

[9] "[M]y quick review [of the reports] indicates that the police officers were a little – kind of all around the lot here on what they saw happen, some of them. We have 40 minutes, 50 minutes, 90 minutes . . . . We have the description that the child was in the bathtub, when I don't think the child was ever in the bathtub, unless you count the crib being in the bathtub means that the child was left unattended in the bathtub."

daughter unattended at the hotel had nothing to do with the practice of law, his child was not injured, and no substance abuse was involved. Further, his wife of 13 years testified that he is a good father: "Mr. Jensen is very diligent about the safety of his children, and concerned for their welfare, and concerned about being the best parent that he can be." She also attested that his "short lapse in parenting judgment was unfortunate, but it was a one-time occurrence," and he is "remorseful to the depths of his soul." Jensen has assumed full responsibility for his actions, taken classes on proper parenting, and shown remorse for and recognition of his misconduct.

[4c] Even so, we believe that the totality of circumstances surrounding Jensen's conviction warrants discipline, a conclusion he does not dispute. Foremost, his daughter was particularly vulnerable to a risk of harm because she was only nine months old. At that age, 40 minutes is a significant period of time to leave an infant alone. Further, the child was left in a crib in a hotel bathroom, a dangerous place for an unsupervised baby. Finally, Jensen had no legitimate or emergency justification to leave. His misconduct resulting in a child endangerment conviction reflects poorly on his judgment and on the legal profession in general, and properly calls for public discipline.[10]

IV. AGGRAVATION AND MITIGATION

The offering party bears the burden of proof for aggravation and mitigation. The State Bar must establish aggravating circumstances by clear and convincing evidence. (Std. 1.2(b).) Jensen has the same burden to prove mitigating circumstances. (Std. 1.2(e).)

A. One Aggravating Factor

The hearing judge found one factor in aggravation based on Jensen's two prior records of discipline. We agree. However, we reject the State Bar's request for additional aggravation for dishonesty and significant harm.

1. Two Prior Records of Discipline (Std. 1.2(b)(i))

[5] Jensen was admitted to practice law in California in 1996. He has two prior records of discipline from 2007 and 2011. The hearing judge assigned limited aggravation to these cases, given the nature and extent of the prior misconduct, the minimal discipline imposed, and the fact that Jensen committed some of the misconduct in his second case before his wrongdoing in the first case. We also note that the misconduct in the second case occurred between 2002 and 2004, before he was disciplined in the first case in 2007. For these reasons, we also assign limited aggravating weight to Jensen's prior record. (See *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618-619 [diminished aggravating weight for two acts of contemporaneous misconduct charged in separate cases].)

2007 Discipline (In re Jensen on Discipline
(Oct. 22, 2007, S155013)
Cal. State Bar Ct. No. 05-O-04598)

In October 2007, the Supreme Court ordered discipline, including a 90-day stayed suspension, for Jensen's misconduct in a 2003 family law case. He filed a dissolution petition and prepared a marital settlement agreement, but incompetently failed to finalize the case. In mitigation, he had practiced law for seven years without discipline and took responsibility for his wrongdoing by refunding $3,000 in attorney fees. No aggravating circumstances were present.

2011 Discipline (In re Jensen on Discipline
(April 4, 2011, S190322)
Cal. State Bar Ct. Nos. 06-O-13965, 07-O-11738)

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[10] The Supreme Court has imposed discipline for crimes not involving moral turpitude and unrelated to the practice of law. (See *In re Hickey* (1990) 50 Cal.3d 571 [30 days' suspension for carrying concealed weapon involving alcohol and violence]; *In re Titus* (1989) 47 Cal.3d 1105 [public reproval for carrying concealed, loaded firearm and reckless driving]; *In re Otto* (1989) 48 Cal.3d 970 [six months' suspension for assault and domestic violence].)

In April 2011, the Supreme Court ordered discipline, including a 30-day actual suspension, for Jensen's misconduct in two client matters.

The first matter occurred in 2002, before Jensen committed misconduct in his 2007 discipline case. He prepared and filed a meritless opening appellate brief with the California Court of Appeal. He stipulated that he took and continued employment with the objective to present a claim that was not warranted under existing law.

The second matter occurred two years later in 2004, before Jensen was charged or found culpable in his 2007 discipline case. During a personal dispute over maintenance service on his car, Jensen sent three letters using the letterhead, name, and signature of another attorney. He also called the manager of the service company, identified himself as the other attorney, and threatened criminal and civil recourse if the dispute was not resolved.

Jensen stipulated that he was culpable of: (1) moral turpitude for sending letters in another attorney's name in order to mislead the manager; and (2) threatening to pursue criminal recourse to obtain an advantage in a civil dispute. In mitigation, he did not cause harm, was experiencing serious family problems, and successfully completed the State Bar Court Alternative Discipline Program (ADP). His 2007 discipline case was an aggravating factor.

2. No Aggravation for Dishonesty (Std. 1.2(b)(iii)) or Harm (Std. 1.2(b)(iv))

[6] The State Bar argues that the present case is aggravated because Jensen lied to law enforcement. As noted, the inconsistencies among the police reports and the hearsay statements therein do not clearly and convincingly establish that he was dishonest.

[7] The State Bar also seeks aggravation for the "potential" harm he exposed his daughter to when he left her unattended. Standard 1.2(b)(iv) provides for aggravation where the attorney's misconduct "harmed significantly a client, the public or the administration of justice." We find that the State Bar's claim is speculative. Moreover, we relied on the daughter's vulnerability as a factor that proved Jensen's misconduct warrants discipline. We do not consider it again in aggravation. (*In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 68 [where factual findings used to find culpability, it is improper to again consider in aggravation].)

Finally, the State Bar alleges that Jensen harmed the public and the administration of justice because the police, child services, and hotel staff members had to participate in the criminal investigation. But no evidence establishes specific, cognizable harm to the hotel or these public agencies. The fact that law enforcement agencies and hotel staff responded to the report that a child was left alone does not by itself clearly and convincingly prove significant harm to the public or the administration of justice.

B. Three Mitigating Factors

The hearing judge found three factors in mitigation – good character, community service, and remorse. Of these factors, we assign credit for community service and remorse but not for good character. In addition, we credit Jensen for his cooperation with the State Bar.

1. No Credit for Good Character (Std. 1.2(e)(vi))

[8] Jensen presented the testimony of two character witnesses – his wife and an attorney he knew through the State Bar Lawyer Assistance Program (LAP). The State Bar argues that two witnesses are insufficient to establish good character under standard 1.2(e)(vi), which requires an extraordinary demonstration of good character from a wide range of references in the legal and general communities. We agree and assign no mitigating weight to this factor. (*In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 840 [two character witnesses not mitigating under std. 1.2(e)(vi)].)

2. Credit for Community Service/Pro Bono Work

Pro bono work and community service are mitigating factors. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) Jensen testified that he performed extensive community service. He volunteered at his church twice a week, served as president of the Sunday school, and played the organ and piano at services. He assisted church members and fellow LAP participants with legal and administrative issues. He has served as a mentor for an at-risk youth. After his twin son passed away in 2008, and his surviving premature son required heart surgery, Jensen and his wife volunteered at the hospital neonatal unit. The couple is currently organizing a service project to assist families with members who are hospitalized.

The State Bar urges only modest mitigating weight for Jensen's community service because he "offered no corroborative testimony or documentary evidence to establish such service." (*In the Matter of Shalant, supra,* 4 Cal. State Bar Ct. Rptr. at p. 840 [limited mitigation weight for community service established only by attorney's own testimony].) But Jensen's wife, who is in a position to know about his daily activities, corroborated most of his testimony. We assign considerable mitigation to Jensen's commendable community service.

3. Credit for Remorse and Recognition of Wrongdoing (Std. 1.2(e)(vii))

[9] Standard 1.2(e)(vii) provides mitigation for "objective steps promptly taken by the member spontaneously demonstrating remorse, recognition of the wrongdoing found or acknowledged which steps are designed to timely atone for any of the consequences of the member's misconduct." We find that Jensen promptly accepted responsibility for his misconduct. He pled no contest to the criminal charge. At his discipline trial, he admitted his actions showed a "significant lapse in judgment" and that he made a "stupid" mistake. He also stated: "I am here to serve my penance. I am here to take my just discipline on this." Finally, he voluntarily enrolled in and attended parenting courses beyond those ordered as a condition of his criminal probation. His wife and a law colleague described him as remorseful and completely devoted to his family. This evidence merits significant mitigation.

4. Credit for Cooperation (Std. 1.2(e)(v))

[10] Although the hearing judge did not find cooperation as mitigation, we assign it considerable weight. At trial, Jensen entered into a stipulation with the State Bar admitting documents that established his culpability for other misconduct warranting discipline. His actions assisted the prosecution. On review, he continues to admit culpability and accepts the hearing judge's recommended discipline. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [extensive weight in mitigation given to those who admit culpability and facts].)

V. LEVEL OF DISCIPLINE

Our goal is to recommend the appropriate discipline to protect the public, the courts, and the legal profession. (Std. 1.3.) Ultimately, we balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.) We begin with the standards, which are guidelines we follow whenever possible to promote uniformity. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.)

A. No Disbarment under Standard 1.7(b)

Standard 1.7(b) provides that an attorney should be disbarred for a third discipline unless the most compelling mitigating circumstances clearly predominate. Jensen's mitigation (community service/pro bono work, remorse, and cooperation) is not compelling nor does it clearly predominate over his misconduct and the aggravation of his two prior disciplines.

[11a] However, the Supreme Court has not automatically applied standard 1.7(b) even in the absence of compelling mitigation. (See, e.g., *Conroy v. State Bar* (1991) 53 Cal.3d 495 [one-year suspension for failing to act competently and

misrepresentations involving moral turpitude with no mitigation and two prior disciplines]; *Blair v. State Bar* (1989) 49 Cal.3d 762 [two years' actual suspension for failing to perform in three client matters with "extensive prior disciplinary record" including three suspensions and "marginal" mitigation].) Under the Supreme Court's guidance, we also have not reflexively applied the standard in every case but rather have done so "with an eye to the nature and extent of the prior record. [Citations.]" (*In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, 217); see *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697 [limited nature and extent of two prior discipline records do not justify disbarment].)

[11b] We therefore must examine each of Jensen's discipline cases along with his present misconduct to determine the appropriate aggravating weight. "Merely declaring that an attorney has [two prior] impositions of discipline, without more analysis, may not adequately justify disbarment in every case." (*In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136.) Jensen's 2007 discipline was not serious; he failed to finalize a dissolution case that resulted in a 90-day stayed suspension. In contrast, his 2011 discipline was very serious. It concerned two client matters and involved his poor judgment and dishonesty for filing a frivolous appeal and posing as another attorney. Yet it was significantly mitigated by lack of harm, serious family problems, and successful completion of ADP over a three-year period. Minimal discipline (30-day actual suspension) was imposed.

Most importantly, as stated, all of Jensen's prior misconduct occurred between 2002 to 2004 – almost three years before his first discipline was imposed in 2007. It would be improper to penalize an attorney for two "priors" based on the timing of the complaints rather than the true chronology of the misconduct. (*In the Matter of Miller, supra,* 1 Cal. State Bar Ct. Rptr. at p. 136 ["To properly fulfill [the] purposes of lawyer discipline, we must examine the nature and chronology of respondent's record of discipline"].) The State Bar argues that full weight should be given to the prior discipline cases due to the common thread of dishonesty running through the 2011 case and the present matter. We reject this argument because the State Bar never clearly and convincingly proved that Jensen was dishonest in the present case.

[11c] We conclude that the nature and extent of Jensen's prior disciplines do not justify disbarment. (*In the Matter of Buckley* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 201, 205, fn. 2 [even on third discipline, disbarment not proper if manifestly disproportionate to cumulative misconduct].) Jensen is not a recidivist offender who failed to learn from his past disciplines. His present misconduct took place on a day he was not working as a lawyer compared to his past misconduct which primarily occurred in his law practice. Further, this is not a case where Jensen committed increasingly serious misconduct – a parent's lack of judgment in caring for a child is professionally less concerning than impersonating an attorney, filing a frivolous appeal, or failing to finalize a lawsuit. "[P]art of the rationale for considering prior discipline as having an aggravating impact is that it is indicative of a recidivist attorney's inability to conform his or her conduct to ethical norms. . . ." (*In the Matter of Sklar, supra,* 2 Cal. State Bar Ct. Rptr. at p. 619.)

[11d] Given Jensen's remorse, cooperation, and efforts to learn about avoiding parental neglect, we agree with the hearing judge that disbarring him under standard 1.7(b) would be unjust. (See *Blair v. State Bar, supra,* 49 Cal.3d at p. 776, fn. 5 [clear reasons for departure from standards should be shown].) However, we do find guidance in standard 1.7(a), which provides that discipline should be progressive. Since Jensen previously received a 30-day suspension, the presumption we follow in this case is that he should receive a longer suspension.

B. 120-Day Actual Suspension Is Appropriate Discipline under the Standards

Standard 3.4 is most apt and provides that conviction of a crime involving "other misconduct warranting discipline" should result in a sanction appropriately reflecting the nature and extent of the misconduct. In doing so, we look to and balance the totality of the circumstances, the nature of the crime, the facts and circumstances surrounding the convic-

tion, and the aggravating and the mitigating circumstances. (*In re Larkin* (1989) 48 Cal.3d 236, 244.) We also examine comparable precedent to ensure consistency among discipline cases. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

[12] There is little guidance for discipline when an attorney with a prior record is convicted of misdemeanor child endangerment. We have, however, recommended a short period of actual suspension for attorneys with prior disciplines who commit a single misdemeanor crime that does not involve moral turpitude and is unrelated to the practice of law. (See, e.g., *In the Matter of Buckley, supra,* 1 Cal. State Bar Ct. Rptr. 201 [public reproval for misdemeanor solicitation of lewd act in public place aggravated by two prior private reprovals]; *In the Matter of Anderson, supra*, 2 Cal. State Bar Ct. Rptr. 208 [60-day actual suspension for five drunk-driving convictions aggravated by two prior reprovals]; *In the Matter of Bouyer* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 888 [90-day actual suspension for misdemeanor conviction of failing to file reports of state employment taxes with state aggravated by three prior disciplines for which respondent on probation at time of crime].) Considering these cases and standard 3.4's directive that discipline reflect the nature and extent of Jensen's misconduct, we believe that the hearing judge's recommended discipline including a 120-day actual suspension will adequately protect the public and preserve the integrity of the legal profession.

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Bradley Lynn Jensen be suspended from the practice of law for one year, that execution of that suspension be stayed, and that Bradley Lynn Jensen be placed on probation for two years with the following conditions:

1. He must be suspended from the practice of law for the first 120 days of the period of his probation.

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

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

5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's 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 shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

8. He must comply with all conditions of his criminal probation and must so declare under penalty of perjury in any quarterly report required to be filed with the Office of Probation. If he has completed probation in the criminal matter, or completes it during the period of his disciplinary probation, he must provide satisfactory documentary evidence of that criminal probation completion in the next quarterly report. If such satisfactory evidence is provided, he will be deemed to have fully satisfied this probation condition.

9. 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 period of probation, if he has complied with all conditions of probation, the one-year period of stayed suspension will be satisfied and that suspension will be terminated.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We do not recommend that Bradley Lynn Jensen be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners since he previously did so in 2012 as ordered in *In re Jensen on Discipline* (April 14, 2011, S190322).

VIII. RULE 9.20

We further recommend that Bradley Lynn Jensen be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

IX. COSTS

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

I CONCUR:
EPSTEIN, J.

REMKE, P. J.

I respectfully dissent.

The fundamental question here is whether attorney sanctions should be imposed on Bradley Lynn Jensen based on his misdemeanor conviction for child endangerment under Penal Code section 273a, subdivision (b).[11] Based on the record in this case, the answer is no.

It is undisputed that Jensen's conviction does not inherently involve moral turpitude and that professional discipline is warranted only if the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline. (*In re Rohan* (1978) 21 Cal.3d 195, 203 (lead opn. of Clark, J.) I agree with the majority that the surrounding circumstances do not support a finding of moral turpitude, but disagree with the conclusion that they constitute other misconduct warranting discipline.

Jensen's conduct involved a single, isolated act of leaving his napping nine-month-old daughter in her crib alone in a hotel room for approximately 40 minutes while he took his restless three-year-old son for a walk. While his behavior was decidedly irresponsible *and* criminal, it does not warrant professional discipline. It did not involve the practice of law, a

[11] The record establishes that Jensen's conviction relates to the provision that penalizes any person who "willfully causes or permits [a] child to be placed in a situation where his or her person or health may be endangered," but "under circumstances or conditions other than those likely to produce great bodily harm or death." (Pen. Code, § 273a, subd. (b).)

violation of a court order, or other acts of dishonesty; it did not include violent acts or result in harm to his child or any third party; and it did not occur as a result of alcohol or substance abuse – factors listed in the cases cited by the majority that indicate an attorney's conviction may constitute other misconduct warranting discipline. Furthermore, Jensen has accepted responsibility for his conduct, shown his sincere remorse, and taken corrective action to avoid any such future transgressions – factors negating the need for discipline as a preventive measure to avert potential professional problems.[12]

"[I]t would be unreasonable to hold attorneys to such a high standard of conduct that every violation of the law, however minor, would constitute a ground for professional discipline." (*In re Kelley, supra,* 52 Cal.3d at p. 496.) That is the case here. Jensen's regrettable behavior in his personal life was a violation of the Penal Code, but it does not signify misconduct that "demeans the integrity of the legal profession and constitutes a breach of the attorney's responsibility to society." (*In re Rohan, supra,* 21 Cal.3d at p. 204 (lead opn. of Clark, J.).) Since the conduct surrounding his conviction did not involve moral turpitude, impair the performance of his professional duties, or otherwise affect his fitness as a member of the bar, "we should leave the matter to the sanction of the criminal law or public opprobrium." (*In re Kelley, supra,* 52 Cal.3d at p. 500 (conc. opn. of Mosk, J.).) Accordingly, I would dismiss this proceeding.

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[12] *In re Kelley* (1990)52 Cal.3d 487, 498 (heightened need for discipline where attorney fails to recognize alcohol problem and potential effect on her professional practice); *In re Brown* (1995) 12 Cal.4th 205, 216-217 (discipline "imposed only if the criminal conduct reflects directly and adversely on the attorney's fitness to practice law"); see *In re Gross* (1983) 33 Cal.3d 561, 566 ("primary concern in these disciplinary proceedings is to protect the public, the courts and the legal profession itself from attorneys who are not fit to practice law").

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JACK CHIEN-LONG HUANG

A Member of the State Bar

[Nos. 11-O-15502 et al.]

Filed January 16, 2014

SUMMARY

The review department adopted a hearing judge's findings that an attorney violated loan modification laws, failed to competently perform, failed to promptly return client files and failed to promptly pay client funds. Contrary to the hearing judge's dismissals, the review department also found the attorney aided and abetted the unauthorized practice of law. In aggravation, the review department agreed with the hearing judge that the attorney committed multiple acts of misconduct and caused client harm. It also adopted the hearing judge's findings of no prior disciplinary record, cooperation, good character and remorse. The review department increased the hearing judge's recommended discipline from six months actual suspension to two years which would continue until restitution was paid and compliance with standard 1.2(c)(1) was met.

COUNSEL FOR PARTIES

For State Bar: Brandon Tady

For Respondent: Ellen Pansky

HEADNOTES

[1] **176 Issues re Discipline Conditions—Requirement to Show Rehabilitation (etc.) (Standard 1.2(c)(1), 1986 Standard 1.4(c)(ii))**
801.11 Effective date/retroactive application of interim Standards
Although case was submitted for ruling prior to effective date of 2014 revision of Standards, amended version of standard 1.2(c)(1), requiring showing of rehabilitation before resumption of practice after suspension, would apply to respondent when he became eligible to petition to resume practice.

[2] **222.20 Substantive Issues in Disciplinary Matters Generally—Culpability—State Bar Act Violations—Section 6106.3 Mortgage Loan Modifications—Not Found**
Where record revealed that attorney complied with statute governing loan modification services by providing client with required statement that third party negotiator was not necessary, Review

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

Department disagreed with finding that attorney violated Business and Professions Code 6106.3, and dismissed charge.

[3a-c] **252.00 Substantive Issues in Disciplinary Matters Generally—Culpability—Rules of Professional Conduct Violations—Rule 1-300(A) (former 3-101(A))—(aiding unauthorized practice)**

Where respondent entered into "legal representation agreements" with loan modification clients, but his standard procedure was that nonattorney employees performed all services contemplated by such agreements, and he was not involved unless his staff consulted him, respondent in essence created a lay negotiating service that permitted nonlawyers to practice law without his oversight. While some services provided under the agreements could legally have been performed by nonlawyers, when they were performed in respondent's law office, they nonetheless constituted the practice of law. Accordingly, respondent violated rule 1-300(A) of Rules of Professional Conduct, which prohibits aiding the unauthorized practice of law.

[4] **106.30 Issues re Pleadings—Duplicative Charges**
220.40 Culpability—Business and Professions Code—Section 6105 (lending name for use by nonattorney)
252.00 Culpability—Rules of Professional Conduct—Aid unauthorized practice (RPC 1-300(A))

Where respondent was found culpable of aiding the unauthorized practice of law, in violation of rule 1-300(A) of the Rules of Professional Conduct, and charges that respondent lent his name for use by non-attorneys, in violation of Business and Professions Code section 6105, were based entirely on same facts, section 6105 charges were duplicative.

[5] **204.10 Culpability—Wilfulness requirement**
214.30 Culpability—Business and Professions Code—Section 6068(m) (communicate with clients)

Where respondent was unable to access client contact information because his former office staff locked him out of his office, hearing judge properly found respondent not culpable of failing to communicate with clients in violation of Business and Professions Code section 6068(m).

[6a-c] **844.11 Standard 2.4—Applied—Actual Suspension—Extent of misconduct great**
844.12 Standard 2.4—Applied—Actual Suspension—Harm to client great
844.13 Standard 2.4—Applied—Actual Suspension—Coupled with other misconduct
901.05 Standard 2.10—Applied—Suspension—Violation of Business & Professions Code
901.10 Standard 2.10—Applied—Suspension—Gravity of offense not severe
901.20 Standard 2.10—Applied—Suspension—Harm to victim small

Where attorney operated a high-volume loan modification practice with little or no involvement and violated loan modification laws, aided and abetted the unauthorized practice of law, failed to competently perform, failed to promptly return client files and failed topromptly pay client funds and where the misconduct was aggravated by multiple acts and client harm but mitigated by no prior disciplinary record, cooperation, good character and remorse, the appropriate discipline was a two year actual suspension to continue until payment of restitution and satisfaction of standard 1.2(c)(1).

[7] **801.11 Effective date/retroactive application of interim Standards**
Where respondent's case was submitted for ruling in 2013, former standards applied, rather than equivalent provisions of standards adopted effective January 1, 2014. However, new standards did not conflict with former ones.

ADDITIONAL ANALYSIS

Culpability

Found

222.21 Section 6016.3 (mortgage loan modification)
252.01 Aid unauthorized practice (RPC 1-300(A); 1975 RPC 3-101(A))
270.31 Intentional, reckless, or repeated incompetence (RPC 3-110(A); 1975 RPC 6-101(A)(2)/(B))
277.51 Failure to release client papers/property (RPC 3-700(D)(1); 1975 RPC 2-111(A)(2))
280.51 Pay client funds on request (RPC 4-100(B)(4); (1975 RPC 8-101(B)(4))

Not Found

214.35 Section 6068(m) (communicate with clients)
220.45 Section 6105 (lending name for use by non-attorney)
221.50 Section 6106 (moral turpitude, etc.)
222.25 Section 6106.3 (mortgage loan modification)

Aggravation

Found

521 Multiple acts of misconduct
582.10 Harm to client

Mitigation

Found

735.10 Candor and cooperation with Bar
745.10 Remorse/restitution/atonement

Found but discounted or not relied on

710.34 No prior discipline record
740.31 Good character references

Discipline

1013.09 Stayed suspension—Three years
1015.08 Actual suspension—Two years
1017.09 Probation—Three years
1021 Restitution
1024 Ethics exam/ethics school
1030 Standard 1.2(c)(i) Rehabilitation Requirement

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OPINION

PURCELL, J.

This case illustrates ethical problems that arise when an attorney fails to supervise nonlawyers in a high-volume law practice. The State Bar's Office of the Chief Trial Counsel (State Bar) charged Jack Chien-Long Huang with misconduct in nine client matters involving loan modifications. The hearing judge dismissed all charges in one matter for lack of proof. In the remaining eight, Huang stipulated to and the hearing judge found him culpable of violating loan modification laws and failing to competently perform. In addition to this stipulated misconduct, the judge found Huang culpable of failing to promptly return client files or timely pay funds in two matters. However, in each client matter, the judge dismissed charges that Huang aided and abetted the unauthorized practice of law (UPL), permitted misuse of his name, and committed acts of moral turpitude. The judge recommended discipline including a six-month suspension after considering two factors in aggravation (multiple acts of misconduct and client harm) and four factors in mitigation (no prior record, candor and cooperation, good character, and remorse).

The State Bar seeks review, asserting Huang is culpable of most of the dismissed charges, particularly aiding and abetting UPL. It urges a two-year suspension, continuing until he proves his fitness to practice law in a standard 1.2(c)(1) hearing.[1] Huang supports the hearing judge's recommendation.

Based on our independent review of the record (see Cal. Rules of Court, rule 9.12), we affirm the hearing judge's: (1) dismissal of the charges in one client matter; (2) all but one culpability finding in the eight remaining client matters; and (3) each factor in aggravation and mitigation. The primary contested issue on review is whether Huang is culpable for the dismissed charges of aiding and abetting UPL and, if so, the appropriate level of discipline. We conclude Huang is culpable and also give less weight to his mitigation. Accordingly, increased discipline is warranted. We recommend that Huang be suspended for two years and until he pays restitution and complies with standard 1.2(c)(1).

I. BACKGROUND AND OVERVIEW[2]

A. Loan Modification Laws

Effective October 11, 2009, the law was amended to regulate an attorney's performance of loan modification services. The new provisions supplied two safeguards for borrowers who employ the services of someone to help with a loan modification: (1) a requirement for a separate notice to borrowers in 14-point bold type that it is not necessary to use a third party to negotiate a loan modification (Civ. Code, § 2944.6, subd. (a)); and (2) a proscription against charging pre-performance compensation, i.e., restricting the collection of fees until all loan modification services are completed. (Civ. Code, § 2944.7, subd. (a).) The laws were designed to "prevent persons from charging borrowers an up-front fee, providing limited services that fail to help the borrower, and leaving the borrower worse off than before he or she engaged the services of a loan modification consultant." (Sen. Com. on Banking, Finance, and Insurance, Analysis of Sen. Bill No. 94 (2009-2010 Reg. Sess.) as amended Mar. 23, 2009, pp. 5-6.) A violation of either Civil Code provision constitutes a misdemeanor (Civ. Code, §§ 2944.6, subd. (c), 2944.7, subd. (b)), and is cause for imposing attorney discipline. (Bus. & Prof. Code, § 6106.3, subd. (a).)[3]

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1. **[1]** As of January 1, 2014, standard 1.2(c)(1) replaced standard 1.4(c)(ii) of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. Although this case was submitted for ruling in 2013, the new standard will apply when Huang is eligible to petition to terminate his suspension. However, the new standard does not conflict with the former. All further references to standards are to this source, and references to the earlier version will be designated "former standards."

2. The facts of this case are based on the parties' stipulations as to facts, admission of documents, and conclusions of law, as well as the trial evidence and the hearing judge's findings. (Rules Proc. of State Bar, rule 5.155(A) [hearing judge's factual findings entitled to great weight on review].)

3. All further references to sections are to the Business and Professions Code unless otherwise noted.

B. Huang Commenced a Loan Modification Practice

After admission to the Bar in 2006, Huang practiced law in his Newport Beach office with another attorney, Angela Wang. In June 2009, Huang met Robert Campoy and Andres Martinez, nonattorneys seeking legal advice about operating their loan modification business, National Mitigation Services (NMS), in Corona, California. Huang told them that the Department of Real Estate was "cracking down" on loan modifications. He advised them about compliance issues.

Months later, the three met again. Campoy and Martinez told Huang that the Orange County District Attorney's Office (OCDA) seized the files of Christopher Diener, an attorney with whom they had associated. The OCDA took computer equipment and approximately 100 of their loan modification files, which it would release only to another attorney willing to assume responsibility for these clients. Since Huang had been experiencing financial problems and wanted to expand his law practice, he decided to take on this role.

In August 2009, Huang met with representatives from the OCDA and the State Bar. He confirmed that only Diener, not Campoy or Martinez, was the subject of criminal charges. He explained he planned to hire NMS staff to help process the loan modification files. The representatives cautioned him that he must comply with pending loan modification laws or they would "shut him down." Huang assured them he would, and the OCDA released the files to him.

On October 1, 2009, about a week before the new loan modification laws became effective, Huang opened a branch office in Corona under the fictitious business name Jack Law Group to handle loan modification and bankruptcy cases. Campoy and Martinez closed NMS and notified clients that their cases would be processed by Huang's firm. Huang hired Campoy and Martinez as co-managers of the Corona office, along with four to six loan modification processors from NMS.

C. Huang's Office Procedures for Processing Loan Modification Cases

Huang established office procedures at the new Corona branch and used a "Legal Representation Agreement" that provided for "fixed legal fees" ranging from $2,000 to $3,200 for loan modification services. He instructed his staff that: (1) they could not give legal advice or make promises about obtaining a loan modification; (2) only Campoy or Martinez could provide the Legal Representation Agreement to clients; (3) if the bank denied a loan modification application, the case should be referred to Huang; and (4) if a client complained or asked to speak to him, a meeting should be arranged. At times, Huang would meet with staff to go over certain files. He promoted an open-door policy to discuss cases, and reprimanded or terminated employees who did not follow his procedures.

Huang designed the loan modification process to occur in three stages: (1) client intake; (2) compliance; and (3) submission to the bank. If the lender refused to modify the loan, Huang was to meet with the client to discuss other legal strategies such as a short sale, bankruptcy, or wrongful foreclosure lawsuit. If the lender agreed to consider a loan modification, Martinez would present the potential client with the Legal Representation Agreement and, pursuant to the contract, "fixed legal fees" would be charged. After a processor completed the loan modification package and submitted it to the lender, the client's check was deposited—before all legal services were performed.

However, as discussed below, Huang's procedures were flawed from the start because he created a lay negotiating service where nonlawyers practiced law. His nonattorney staff performed all the loan modification services outlined in his Legal Representation Agreement—they met with clients, gave advice, collected legal fees, prepared the loan modification package, and negotiated with the lender. Huang did not properly supervise his staff's work on loan modification cases.

D. Huang Lost Control of his Corona Law Office

Between 2009 and 2010, Huang's loan modification and bankruptcy practice grew dramatically. His website and radio and television advertisements in English and Spanish attracted many new clients. By September 2011, the Corona office had accepted between 500 and 800 loan modification clients and Huang was depositing $50,000 monthly into his general account. He made Martinez a signatory on the account, increased his staff to 30, and started charging new clients a monthly service fee of $350. Also, his free bankruptcy consultations grew to 30 per month, with 15 filings. Huang spent three to four days per week in the Corona office and attorney Wang moved from the Newport Beach office to work in Corona on a full-time basis.

In March 2011, Huang discovered accounting irregularities and that his employees were violating office procedures. For example, Campoy and Martinez were not permitting clients to meet with Huang and were covering up complaints. By September 2011, Huang realized he had lost control of the Corona office and decided to close it. On September 6, 2011, he fired his entire staff of 30, including Campoy and Martinez, and instructed them to stop working on files. The employees ignored his demand and continued to work with Campoy and Martinez under a new firm name of "MarCam Law Group," after associating with a new attorney, Charlotte Spadaro. When Huang attempted to retrieve his files, Campoy and Martinez released only the bankruptcy cases, changed the locks, and threatened physical violence if he returned.

On September 26, 2011, Huang sent a cease-and-desist letter to Campoy and Martinez, attempting to dissociate himself from them and the Corona office. He also took steps to shut down the website. Huang notified the Riverside County District Attorney's Office and the State Bar, and cooperated with them in describing his activities and relationship with Campoy and Martinez. With the help of his secretary, he reconstructed a partial client list and sent letters informing clients of his status.

Huang testified at his disciplinary trial that he is currently practicing bankruptcy and foreclosure litigation with a "drastically reduced" workload. He explained: "I don't take on anything that I cannot handle." He has made full restitution to most clients on installment payment plans, and filed a lawsuit in 2012 against Campoy and Martinez seeking damages, an accounting, and injunctive relief.

II. UNDISPUTED CULPABILITY IN EIGHT CLIENT MATTERS

The State Bar charged Huang with 49 counts of misconduct based on the complaints of nine loan modification clients. The hearing judge dismissed all five charges in one matter (Zamarripa, Case No. 11-O-19312) for insufficient proof because the client's testimony was not credible.[4] The record supports these dismissals, and we adopt them. The hearing judge found culpability for 21 counts in the eight remaining client matters. Huang does not contest these findings, and we adopt all but one. We summarize the facts and culpability in these eight client matters.

A. Chinchilla Matter (Case No. 11-O-15502)

In March 2011, Rosa Chinchilla met with Huang's employee, Koretza Kihm, at the Corona office to discuss a possible loan modification. Huang introduced himself to Chinchilla and told her they would take good care of her; he never met with her again or performed any work on her case. Kihm advised Chinchilla that she qualified for a loan modification. As a result, Chinchilla hired Huang and signed a "Legal Representation Agreement" to provide "Mortgage Loan Modification Assistance" and "Mitigation Work" for "fixed legal fees" of $3,000. Huang stipulated he did not provide Chinchilla with a separate statement informing her she need not pay a third party to arrange a loan modification. Chinchilla paid the $3,000 fee. In May 2011, Campoy told Chinchilla that she did not qualify for a loan modification and, instead, should pursue a short sale. A few days later, Chinchilla demanded a full refund. By May 2013, Huang repaid Chinchilla's full fee with interest.

4. Those charges were for failure to competently perform, failure to employ means consistent with the truth, failure to communicate, failure to maintain client funds in trust, and moral turpitude by misappropriation.

Huang stipulated to the following misconduct: (1) he did not render all services he contracted to perform before he collected fees in violation of section 6106.3; (2) he failed to perform competently by not supervising his nonattorney staff, resulting in their giving of inconsistent legal advice to Chinchilla, in violation of the Rules of Professional Conduct, rule 3-110(A)[5]; and (3) he did not provide a separate statement that it is not necessary to use a third party to negotiate a loan modification in violation of section 6106.3.

B. Smith Matter (Case No. 11-O-16082)

In May 2009, Randy, Roberta, and Susan Smith hired NMS to obtain a loan modification; they paid $1,995 in fees. In August, an NMS representative informed them their lender authorized a trial loan modification, but this was false. In October 2009, the Smiths were told that their case was transferred to Law Offices of Jack Huang, all loan modification documents had been submitted to the lender, and further fees should be paid to Huang. Huang informed the Smiths they owed an additional $1,500 under a "new payment plan," but they refused to pay until the loan modification had been secured. In December 2009, Kelly Yandell, a Huang employee, directed the Smiths to send their lender a cashier's check for $1,603.42 for the trial loan modification. The Smiths sent the check but the lender returned it to Jack Law Group because no trial loan modification had ever been arranged.

In January 2010, Yandell emailed the Smiths a "Legal Representation Agreement" for Jack Law Group for "fixed legal fees" of $2,000 for "Mitigation Work" and/or "Mortgage Restructuring/Modification." The Smiths did not sign the agreement and shortly thereafter received a notice of Trustee's Sale. The Smiths demanded that Martinez return their cashier's check, but he refused unless they paid a $1,500 outstanding balance to Jack Law Group. Huang's office turned the matter over to a collection agency and the Smiths disputed the debt. Eventually, Campoy returned the cashier's check but did not produce the client file the Smiths had requested.

Huang stipulated to the following misconduct: (1) he did not render all services he contracted to perform before he collected fees in violation of section 6106.3; and (2) he failed to perform competently by not performing any services of value and failing to supervised his nonattorney staff resulting in their representing to the Smiths that they had a trial modification when in fact that was not true in violation of rule 3-110(A).

The hearing judge found Huang culpable of two additional violations: rule 4-100(B)(4)[6] for delaying return of the Smiths' cashier's check for a year after they requested it, and rule 3-700(D)(1)[7] for not releasing the Smiths' file to them despite their April 2011 request. We agree. (See *In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rtpr. 725, 735 [six-week delay in disbursing client's share of settlement without compelling reason violated rule 4-100(B)(4)]; *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 958 [two-month delay providing file to new attorney violated rule 3-700(D)(1)].)

C. Solarzano Matter (Case No. 11-O-16524)

In August 2010, after hearing a radio advertisement, Efren Solarzano met with Huang's employee, David Preciado, who promised him a loan modification. Huang did not meet with Solarzano at any time nor did he supervise Preciado. Solarzano signed a "Legal Representation Agreement" wherein Huang agreed to provide "Mortgage Restructuring/Modification Assistance" and "Mitigation Work" for "fixed fees" of $2,500. Solarzano paid the fee. Around June 2011, Preciado told Solarzano the lender agreed to accept reduced payments for two years. Solarzano requested the offer in writing, but Preciado would not comply. When Solarzano demanded a full

5. All further references to rules are to this source. Rule 3-110(A) provides that an attorney must not "intentionally, recklessly, or repeatedly fail to perform legal services with competence."

6. This rule requires an attorney to promptly "pay or deliver, as requested by the client, any funds, securities, or other properties" in the attorney's possession that the client is entitled to receive.

7. This rule requires an attorney, upon termination of employment, to promptly release, at the client's request, all client papers and property.

refund, Preciado refused to pay it. In June 2013, Huang repaid Solarzano's fee with interest.

Huang stipulated to the following misconduct: (1) he did not render all services he contracted to perform before he collected fees in violation of section 6106.3; and (2) he failed to perform competently by not supervising his nonattorney staff in violation of rule 3-110(A).

D. Cortez Matter (11-O-18784)

In October 2010, after hearing a radio advertisement, Elvia Cortez consulted with "Araceli," one of Huang's employees, to discuss a loan modification. Arcaceli promised she would be able to obtain the loan modification. Cortez signed a "Legal Representation Agreement" with Huang to provide "Mortgage Restructuring/Modification Assistance" and "Mitigation Work" for "fixed legal fees" of $3,000. Cortez paid the fee in four installments. On January 21, 2011, the day after the final installment was paid, Cortez received a letter from the lender denying her request for a loan modification. In May 2011, Cortez met for the first time with Huang and demanded a full refund. Huang advised her to file for bankruptcy, but she declined. The lender sold her home at a foreclosure sale that month. By May 2013, Huang repaid Cortez's fee with interest.

Huang stipulated to the following misconduct: (1) he did not render all services he contracted to perform before he collected fees in violation of section 6106.3; and (2) he failed to perform competently by not supervising his nonattorney staff in violation of rule 3-110(A).

E. Monroy Matter (11-O-19333)

In September 2010, after hearing a radio advertisement, Santa Monroy consulted with Martinez to discuss a loan modification; she never met with Huang. Monroy signed a "Legal Services Agreement" for Huang to provide "Mortgage Restructuring/Modification Assistance" and "Mitigation Work" for "fixed legal fees" of $3,200. Monroy paid the fee in installments plus an additional $350 "Monthly File Management Fee." In January 2011, Monroy received a letter from the lender denying her request for a loan modification because it had not received all requested documents. In April 2011, Monroy received another letter from the lender notifying her that Huang had not confirmed he represented her. In August 2011, Monroy terminated Huang's services and demanded a full refund. By May 2013, Huang repaid Monroy's fee with interest.

Huang stipulated to the following misconduct: (1) he did not render all services he contracted to perform before he collected fees in violation of section 6106.3; and (2) he failed to perform competently by not supervising his nonattorney staff in violation of rule 3-110A.

F. Pourtemour Matter (12-O-10134)

In October 2010, after hearing a radio advertisement, Michele Pourtemour met with Preciado and another nonattorney about a possible loan modification. Huang's staff told Pourtemour her case was easy and she should receive a loan modification within two months. She signed a "Legal Representation Agreement" with Huang to provide "Mortgage Restructuring/Modification Assistance" and "Mitigation Work" for "fixed legal fees" of $3,000, payable in four installments. She paid the first installment of $1,500 that day. Huang did not meet with Pourtemour nor did he supervise Preciago or other nonattorneys handling the case.

In December 2010, Pourtemour's lender notified her that it was foreclosing on her home. Pourtemour contacted Huang employee, Vanessa Griego, who told her she would arrange for the foreclosure sale to be stopped. Griego contacted the wrong lender, which left Pourtemour to obtain an extension of the foreclosure sale by herself. When Pourtemour complained, Yandell told her the lender approved a permanent loan modification, and instructed her to send a mortgage payment to her lender, which she did. A few days later, the lender foreclosed on Pourtemour's house, denying it had ever approved a loan modification. Huang did not provide Pourtemour with her loan modification file after she requested it. In June 2013, Huang refunded $1,500 to Pourtemour, but he still owes her interest.

Huang stipulated to the following misconduct: (1) he did not render all services he contracted to perform before he collected fees in violation of section 6106.3; and (2) he failed to perform competently by not supervising his nonattorney staff in violation of rule 3-110(A).

The hearing judge also found Huang culpable of violating rule 3-700(D)(1) for not releasing the Pourtemour's file to her despite her repeated requests. We agree.

[2] However, we disagree with the hearing judge's conclusion that Huang violated section 6106.3 by failing to provide a separate statement informing Pourtemour that it is not necessary to use a third party to negotiate a loan modification. The record reveals that Huang provided the separate statement with the Legal Representation Agreement. He is therefore not culpable of this charge, and we dismiss it.

G. Lopez Matter (12-O-12540)

In August 2010, after hearing a radio advertisement, Rodolfo and Lorena Lopez consulted with Araceli Ferrera, one of Huang's employees, to discuss a loan modification. Ferrera promised that Jack Law Group would save their home. She told the couple that their bank confirmed by telephone that they qualified for a loan modification, and Huang would charge $3,000 to handle their case. When they objected to the fee, Ferrera and another nonattorney employee negotiated the fee to $2,500, payable in five monthly installments. Rodolfo Lopez signed a "Legal Representation Agreement" with Huang to provide "Mortgage Restructuring/ Modification Assistance" and "Mitigation Work" for the $2,500 in renegotiated "fixed legal fees."

Between August 2010 and February 2011, the Lopezes requested status updates. Their assigned processor and his manager assured them the application was proceeding well. But in February 2011, the clients were notified their house was scheduled for a Trustee's Sale the following month. In June 2013, Huang refunded $2,500 to the Lopezes, but still owes them interest.

Huang stipulated to the following misconduct: (1) he did not render all services he contracted to perform before he collected fees in violation of section 6106.3; and (2) he failed to perform competently by not supervising his nonattorney staff in violation of rule 3-110(A).

H. Covarrubias Matter (12-O-14025)

In July 2011, after hearing a radio advertisement, Jesus Covarrubias hired Huang to complete a loan modification. Covarrubias met with nonattorney employee, Juan Sanchez, and paid a $3,000 fee in two $1,500 payments. He later paid an additional $500 to MarCam Law Group and in October 2011 learned that Jack Law Group and/or MarCam Law Group was trying to secure a short sale rather than a loan modification, without his permission. He went to the Corona office and demanded a full refund, but one of Huang's nonattorney staff refused. Covarrubias obtained a loan modification without Huang's assistance in April 2012. By May 2013, Huang refunded the full fee with interest.

Huang stipulated to the following misconduct: (1) he did not render all services he contracted to perform before he collected fees in violation of section 6106.3; and (2) he failed to perform competently by not supervising his nonattorney staff in violation of rule 3-110(A).

III. HUANG AIDED AND ABETTED UPL

[3a] The State Bar charged Huang with aiding and abetting UPL in each client matter in violation of rule 1-300(A).[8] The hearing judge found him not culpable. We disagree. Huang aided and abetted UPL by allowing nonattorneys to practice law and by failing to supervise their work.

8. This rule states "A member shall not aid any person or entity in the unauthorized practice of law."

[3b] The practice of law embraces a wide range of activities, such as giving legal advice and preparing documents to secure client rights (*People v. Merchants Protective Corp.* (1922) 189 Cal. 531, 535), as well as negotiating a settlement or agreement (*Morgan v. State Bar* (1990) 51 Cal.3d 598, 603-604 [negotiating settlement with opposing counsel constitutes practice of law]). Huang entered into a "Legal Representation Agreement" with his clients wherein he described the scope of his "Attorney's Duties" and the specific services for which he was entitled to collect "fixed legal fees," including case analysis, financial analysis, package preparation, "live" calls to the lender, negotiation, and follow-up. Under his standard procedures, he was not involved in any case unless his staff consulted him. Thus, in a routine client request for loan modification, Huang knew that nonattorneys performed *all* legal services under his fee agreement. These activities constituted the practice of law. (See *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 543 [activity constitutes practice of law if it involves application of legal knowledge and technique].)

[3c] In essence, Huang created a lay negotiating service that permitted nonlawyers to practice law and elevated profit above the clients' interests. When attorneys employ such a practice, they are culpable of aiding and abetting UPL. (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520 [attorney aided and abetted UPL by relying on nonattorneys to prepare and file client documents]; *In the Matter of Bragg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 615, 625 [attorney aided UPL by permitting nonlawyer staff to accept clients in his name and conduct negotiations with little or no input from him].) Clearly, the clients contracted with the "Jack Law Group" and paid "fixed legal fees" for legal services and case analysis by an attorney; instead the work was performed by lay individuals. Huang's lack of oversight provided fertile ground for his employees to engage in UPL and make misrepresentations to his clients. "Although [loan modification] services might lawfully have been performed by . . . brokers, and other laymen, it does not follow that when they are rendered by an *attorney, or in his office,* they do not involve the practice of law. People call on lawyers for services that might otherwise be obtained from laymen because they expect and are entitled to legal counsel." (*Crawford v. State Bar* (1960) 54 Cal.2d 659, 667-668, italics added.) By delegating all the work on loan modification cases to nonattorney staff, Huang failed to "competently evaluate the client's claim and represent the client appropriately." (*In the Matter of Bragg, supra,* 3 Cal. State Bar Ct. Rptr. at p. 626.) Accordingly, we find he violated rule 1-300(A) in all eight client matters.[9]

IV. AGGRAVATION AND MITIGATION

The State Bar must establish aggravating circumstances by clear and convincing evidence[10] (former std. 1.2(b)), and Huang has the same burden to prove those in mitigation (former std. 1.2(e)). The parties do not contest the hearing judge's aggravation findings that Huang committed multiple acts of misconduct and caused significant client harm. Nor do they contest the findings in mitigation that Huang has no prior record of discipline, proved good character, displayed remorse, and was cooperative. We adopt these factors in mitigation and aggravation and reject Huang's request for additional mitigation for his good faith interpretation of loan modification laws. Overall, we find that the aggravation slightly outweighs the mitigation given the minimal weight we assign to Huang's three and one-half years of discipline-free practice and his limited good character evidence.

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9. **[4]** **[5]** The State Bar also charged Huang in each client matter with: (1) permitting Campoy and Martinez to misuse his name in violation of section 6105; and (2) moral turpitude in violation of section 6106 for misleading clients into believing he ran the loan modification practice. The hearing judge dismissed these charges, which we adopt; the State Bar conceded at oral argument that the section 6105 charge is duplicative of the rule 1-300(A) violation (aiding and abetting UPL), and we find insufficient proof of the moral turpitude charge. We further agree with the hearing judge's dismissal of three counts of failing to communicate in violation of section 6068, subdivision (m) in the Smith, Pourtemour, and Covarrubias matters since Huang was unable to access client contact information after being locked out of his office. (See *In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509 [attorney not culpable for failing to communicate where there was evidence that secretary hid client letters for four months]; *In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622 [for ethical violation to be willful, there must be proof of intent to commit act or omission].)

10. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

V. DISCIPLINE DISCUSSION

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. (Former std. 1.3.) Ultimately, we balance all relevant factors on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.) To determine the proper discipline, our Supreme Court instructs us to follow the standards "whenever possible." (*Id.* at p. 267, fn. 11.)

[6a] Former standards 2.4(b) (failure to perform services) and 2.10 (encompassing aiding and abetting UPL and violating loan modification laws) apply to Huang's most serious misconduct.[11] These standards call for reproval to suspension depending on the extent of the misconduct and the degree of client harm. Huang's conduct was serious and the harm to his clients was significant. He disregarded loan modification statues that "provided fair notice to [Huang] that he must not collect any up-front fees for loan modification services." (*In the Matter of Taylor* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 221, 236.) Moreover, he harmed clients by collecting unauthorized legal fees and depriving them of their money when they were financially vulnerable.

Given the broad range of discipline suggested by the standards (reproval to suspension), we look to case law for guidance. (See, e.g., *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) Our research reveals no single decision that addresses Huang's varied misconduct. However, individual cases guide us on aspects of Huang's wrongdoing, including violation of loan modification laws,[12] aiding and abetting UPL,[13] and failing to competently perform.[14]

Overall, we view Huang's culpability, mitigation, and aggravation to be most analogous to *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411. The attorney in *Jones* was suspended for two years because he failed to competently perform, formed a partnership with nonlawyers, split fees with them, and aided and abetted UPL in more than 350 personal injury cases over two years. (See *id.* at p. 420.) Jones's lack of supervision allowed "a nonlawyer to operate a large-scale personal injury practice" involving illegal and fraudulent practices. (*Id.* at p. 415.) The misconduct was aggravated by multiple acts and significant harm to medical lienholders, and was mitigated by good character, community activities, objective steps taken to make the lienholders whole, and full cooperation with the State Bar and other authorities. (*Id.* at p. 419.)

[6b] Like the attorney in *Jones,* Huang implemented office procedures so he could run a high-volume loan modification practice with little or no personal involvement. As we concluded in *Jones,* "inadequate supervision . . . made possible exactly

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11. **[7]** As of January 1, 2014, standard 2.5 replaces standard 2.4, and standard 2.15 replaces standard 2.10. Since this case was submitted for ruling in 2013, former standards 2.4 and 2.10 apply. However, the new standards do not conflict with the former ones.

12. *In the Matter of Taylor, supra,* 5 Cal. State Bar Ct. Rptr. 221 (six-month suspension for eight counts of charging pre-performance loan modification fees and one count of failing to provide loan modification separate statement; aggravated by client harm, multiple acts, no remorse and mitigated by good character).

13. *In the Matter of Bragg, supra,* 3 Cal. State Bar Ct. Rptr. 615 (one-year suspension for incompetent performance, fee splitting with nonlawyer, moral turpitude, violation of agreement in lieu of discipline, and disobedience of court order; aggravated by uncharged misconduct involving aiding UPL and mitigated by good character, community service, and remedial changes in office procedure).

14. *In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468 (two-year suspension for failing to competently perform, communicate, account, maintain client funds in trust and moral turpitude for permitting nonlawyers to conduct initial client interviews, prepare retainers and negotiate settlements; aggravated by prior private reproval, multiple acts, client harm, uncharged misconduct involving fee splitting, no rehabilitation or effort to atone for wrongdoing and mitigated by cooperation).

what transpired here." (*In the Matter of Jones, supra,* 2 Cal. State Bar Ct. Rptr. at p. 420.) Huang's employees accepted clients for representation, directed them to pursue loan modifications, promised them successful outcomes, advised other remedies such as a short sale, negotiated legal fees, and even made misrepresentations. Although Huang claims he was not aware of much of his employees' conduct, his operation was designed to fail since he rarely, if ever, managed client cases despite his agreement to provide his legal services. Nor did he approve or supervise his staff's work. Our Supreme Court has acknowledged that while "an attorney cannot be held responsible for every detail of office procedure, he must accept responsibility to supervise the work of his staff." (*Vaughn v. State Bar* (1972) 6 Cal. 3d 847, 857].)

[6c] Given 28 counts of misconduct in eight client matters, aggravating factors that slightly outweigh mitigation, and guidance from comparable case law, we recommend the discipline urged by the State Bar—that Huang be suspended for two years, continuing until he completes restitution and satisfies standard 1.2(c)(1). A lesser discipline would not protect the public, the courts, or the legal profession.

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Jack Chien-Long Huang be suspended from the practice of law for three years, that execution of that suspension be stayed, and that Huang be placed on probation for three years on the following conditions:

1. He must be suspended from the practice of law for a minimum of the first two years of the period of his probation, and remain suspended until the following conditions are satisfied:

a. He pays 10% interest to Michele Pourtemour that accrued on the principal amount of $1,500 from October 20, 2010 (or reimburses the Client Security Fund to the extent of any payment from the Fund to Michele Pourtemour, in accordance with Business and Professions Code section 6140.5) and pays 10% interest to Rodolfo and Lorena Lopez that accrued on the principal amount of $2,500 from August 21, 2010 (or reimburses the Client Security Fund to the extent of any payment from the Fund to the Lopezes, in accordance with Business and Professions Code section 6140.5), and furnishes satisfactory proof to the State Bar Office of Probation in Los Angeles; and,

b. He provides proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

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

5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's 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 shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

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 period of probation, if Huang has complied with all conditions of probation, the three-year period of stayed suspension will be satisfied and that suspension will be terminated.

PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Huang be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of his actual suspension in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

RULE 9.20

We further recommend that Huang be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

COSTS

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

WE CONCUR:

REMKE, P. J.
EPSTEIN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

HENRY EDWARD GUZMAN

[No. 11-O-17734 et al.]

Filed May 12, 2014

SUMMARY

The Office of the Chief Trial Counsel (OCTC) requested review of a hearing judge's decision recommending a one-year actual suspension after finding respondent culpable of 18 counts of misconduct in four client matters including two counts of misappropriation of client funds totaling $8,646.34, and two counts of moral turpitude. (Hon. Richard A. Honn, Hearing Judge.)

The review department found six additional counts of culpability and additional aggravation and increased the discipline recommendation to disbarment.

COUNSEL FOR PARTIES

For OCTC: Charles A. Murray

For Respondent: No Response Filed

HEADNOTES

[1 a,b] 221.12 State Bar Act Violations—Section 6106—moral turpitude —(gross negligence)—Found

Where respondent allowed his staff to access his client trust account (CTA) records without supervision, failed to regularly monitor CTA, and took no action to protect his clients or his CTA for lengthy period after learning that his office manager was under investigation for fraud, and balance in respondent's CTA dipped below amount held in trust for client, respondent was culpable of moral turpitude based on gross negligence.

[2] 253.00 Rules of Professional Conduct Violations—Improper solicitation (RPC 1-400(C), 1975 RPC 2-101(B))

Where client's unchallenged testimony was that photographer who appeared at scene of car accident gave client respondent's business card, and told client he would send photos to respondent and respondent would represent client, and respondent confirmed receipt of photos and sent staff

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Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

person to obtain client's signature on retainer agreement, improper solicitation was shown by clear and convincing evidence, and Review Department reversed hearing judge's finding of no culpability.

[3] **221.19 State Bar Act Violations—Section 6106—moral turpitude (other factual basis)—Found**

Where respondent's standard retainer agreement gave him unqualified authority to settle clients' cases, and respondent negotiated settlements and released clients' claims without their knowledge or consent, respondent breached his fiduciary duty by overreaching. Accordingly, Review Department reversed hearing judge's finding that respondent was not culpable of moral turpitude.

[4 a,b] **214.30 State Bar Act Violations—Section 6068(m) (communicate with clients)**
273.30 Rules of Professional Conduct Violations—Conflicts of interest (RPC 3-310; 1975 RPC4-101 & 5-102)
277.20 Rules of Professional Conduct Violations—Prejudicial withdrawal (RPC 3-700(A)(2); 1975 RPC 2-111(A)(2))

Where respondent stipulated he accepted representation of clients, and evidence showed respondent did not obtain clients' informed written consent to waive potential conflict, and case was later transferred to new attorney without clients' knowledge or consent, Review Department reversed hearing judge and found respondent culpable of violations of rules 3-310(C)(1) and 3-700(A)(2), and section 6068(m).

[5] **221.11 State Bar Act Violations—Section 6106—Moral Turpitude—Deliberate dishonesty/fraud**

Where respondent failed to inform client that her case had been dismissed due to respondent's fault; concealed facts from client regarding his ongoing neglect of her case; and falsely reassured her after she contacted him, Review Department reversed hearing judge and found respondent culpable of moral turpitude based on misrepresentations to client.

[6] **520 Aggravation—Multiple acts of misconduct**
530 Aggravation—Pattern of misconduct

Where respondent was culpable of 24 counts of misconduct in four client matters over four-year period, respondent committed multiple acts of misconduct, but was not culpable of pattern of misconduct, as his actions did not amount to serious misconduct over prolonged period of time.

[7] **590 Aggravation—Indifference to rectification/atonement (iterim Standard 1.5(g); 1986 Standard 1.2(b)(v))**

Where respondent refused at trial to take responsibility for mismanagement of his client trust account; did not recognize that retainer agreement giving him complete control over clients' cases constituted overreaching; and failed to respond when State Bar argued for disbarment in Review Department, respondent's misconduct was aggravated by his indifference to his wrongdoing.

[8] **735.30 Candor and cooperation with the Bar (1.6(e); 1986 Standard 1.2(e)(v)) —Found but discounted or not relied on**

Where respondent entered into stipulation as to facts and documents, but stipulation was not extensive, involved easily provable facts, and did not admit culpability, respondent's cooperation was assigned limited weight as a mitigating factor.

[9a-d] **802.61 Application of Standards— Determination of Appropriate Sanction —Most severe applicable sanction to be used (1.7(a))**
822.35 Application of Standards—Sanctions for misappropriation—Applied—actual suspension for gross negligence (2.1(b))
842.10 Application of Standards—Habitual disregard of client interests—disbarment (interim 2.5(a))—Applied
844.52 Application of Standards—Multiple matters but no habitual disregard—Declined to apply—disbarment—Other aggravating factors
831.50 Application of Standards—Moral Turpitude (interim 2.7) —Applied—Disbarment—Presence of other aggravation

Where multiple discipline standards applied to respondent's misconduct, Review Department focused on standards calling for most severe discipline. Where respondent was found culpable of 24 counts of misconduct, involving nine different statute and rule violations, spanning four years, and involving four client matters, in two of which respondent misappropriated significant funds through gross negligence, and respondent habitually disregarded his duties as an attorney and lacked recognition and remorse, high risk that respondent would engage in additional misconduct warranted disbarment.

ADDITIONAL ANALYSIS

Culpability Found

214.31	Section 6068(m) (communicate with clients)
221.11	Section 6106 (deliberate dishonesty /fraud)
253.01	Improper solicitation(RPC 1-400(C); 1975 RPC2-101(B))
270.31	Intentional, reckless, or repeated incompetence (RPC 3-110(A); 1975 RPC 6-101(A)(2)/(B))
273.31	Conflicts of interest (RPC 3-310; 1975 RPC 4-101 & 5-102))
277.21	Prejudicial withdrawal (RPC 3-700(A)(2); 1975 RPC 2-111(A)(2))
280.01	Trust account/commingling (RPC 4-100(A); 1975 RPC 8-101(A))
280.21	Notify client re receipt of funds (RPC 4-100(B)(1); 1975 RPC 8-101(B)(1))
280.41	Maintain records of client funds (RPC 4-100(B)(3); 1975 RPC 8-101(B)(3))
280.51	Pay client funds on request (RPC 4-100(B)(4); 1975 RPC 8-101(B)(4))

Aggravation

Found

521	Multiple acts of misconduct (1.5(b); 1986 Standard 1.2(b)(ii))
582.10	Harm to client interim Standard (1.5(f); 1986 Standard 1.2(b)(iv))
591	Indifference to rectification/atonement (1.5(g) [former 1.2(b)(v)])

Declined to find

535	Pattern of misconduct (1.5(c); 1986 Standard 1.2(b)(ii))

Mitigation

735.30	Candor and cooperation with Bar (1.6(e); 1986 Standard 1.2(e)(v))

Found but discounted or not relied on

710.35	Long practice with no prior discipline record (1.6(a); 1986 Standard 1.2(e)(i))—Present misconduct too serious

Discipline

1010	Disbarment
1021	Restitution

Other

2311	Inactive Enrollment After Disbarment Recommendation (Section 6007(c)(4))—Imposed

OPINION

EPSTEIN, J.

This case involves a personal injury attorney who disregarded his professional and ethical obligations for three years. Prompted by several client complaints, the Office of the Chief Trial Counsel of the State Bar (OCTC) investigated and charged respondent Henry Edward Guzman with numerous acts of serious misconduct in four client matters. The hearing judge found Guzman culpable of 18 counts of misconduct, including two counts of misappropriation of client funds totaling $8,646.34, and two counts of moral turpitude.[1] After finding two factors in aggravation (multiple acts and significant harm) and two in mitigation (no prior discipline and cooperation), the judge recommended a one-year suspension.

OCTC appeals and asks that we find Guzman culpable of all 24 counts of misconduct, and seeks disbarment. Guzman did not file a response.

Based on our independent review (Cal. Rules of Court, rule 9.12), we find Guzman culpable of 24 counts of misconduct. We adopt the hearing judge's findings in aggravation, plus an additional factor due to Guzman's indifference towards the consequences of his misconduct. We also give less weight to Guzman's mitigation evidence than was afforded by the hearing judge. Having considered the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct[2] and the relevant decisional law, we recommend that Guzman be disbarred.

I. BACKGROUND

A. Guzman's Personal Injury Practice

Guzman was admitted to practice law in California on August 25, 1999, and committed misconduct from early 2008 through 2012. During this time, Guzman maintained a solo practice, handling personal injury cases on a contingency fee basis. "[O]n all personal injury matters," Guzman testified he used a form retainer agreement, which included the following language:

> The Client hereby specifically authorizes The Attorney to settle his/her claims without instituting litigation, to receive the settlement proceeds; and to take a percentage of the recover in payment of his/hers fees. Client further authorizes The Attorney to endorse The Client's name on checks paid in settlement claims, to have the proceeds placed in The Attorney's Client Trust Account, and for The Attorney to with draw attorney's fees from the account. (Errors in original.)

The retainer agreement also authorized Guzman to unilaterally dismiss his clients' lawsuits without the clients' consent.

B. Guzman's Relationship with Claudia Wheeles

Guzman subleased an office from his former law school classmate, Steven Siebig.[3] The two attorneys were not partners and maintained separate bank accounts and records. However, they relied on the same staff for administrative support, including office manager Claudia Wheeles and a few of her family members.

Due to the nature of Guzman's practice, he spent the majority of his time in court. Since his staff handled the day-to-day activities, Guzman provided them with access to his client and banking records, including his client trust account (CTA) records. Guzman also permitted Wheeles to make deposits

1. Guzman was charged with 25 counts of misconduct. The hearing judge granted OCTC's motion to dismiss Count One in case no. 11-O-17734 in the interests of justice, and he dismissed six other counts on the merits.

2. All further references to standards are to this source, and reflect the modifications to the standards that are effective as of January 1, 2014.

3. Sometime around early 2010, Siebig moved his offices to a different suite. Guzman moved with Siebig, but retained his phone number. In June 2011, Guzman began working from his home and around that time also obtained a new phone number.

into his CTA and to use his signature stamp, although she was not an approved signatory to his CTA or authorized to make withdrawals. Guzman said he "tried to" reconcile his CTA every month until the end of 2010.

Guzman testified that two investigators from the Auto Insurance Fraud Division of the Los Angeles County District Attorney's Office visited him in early September 2010. They advised that the DA's office "believed [Wheeles] was taking advantage of individuals, including other attorneys, doctors, and clients regarding personal injury matters" and that Guzman was also a possible victim. Nevertheless, he continued to rely on Wheeles to manage his legal practice for almost nine months. During this time, Guzman did not question her about the DA's investigation nor did he take any action to protect his clients or his CTA. His inaction persisted even after he became aware in the Fall of 2010 that Wheeles was stealing some of his mail, including his CTA statements. He testified that by the end of 2010, he could not reconcile his CTA accounts.

Yet Guzman waited until May 26, 2011, to fire Wheeles and then did so by fax. Shortly thereafter, Guzman returned to his office to find that Wheeles had absconded with most of his client files, his CTA ledger, and other office items. Guzman ultimately came to believe that Wheeles had been using his signature stamp without authorization to make withdrawals from his CTA. At the time of his trial, Guzman had not recovered any of his stolen client files from Wheeles.[4]

II. CASE NUMBER 11-O-17734 ZAMORA MATTER

A. Factual Background

On June 27, 2007, Araceli Zamora was involved in a car accident. On July 23, 2007, Guzman agreed to represent her and notified the insurance company for the driver who was at fault that he was representing Zamora. As a result of her accident, Zamora incurred $4,767 in medical expenses from four different providers. From September to October 2007, Zamora received bills from three of the providers and notified Guzman via fax about these bills. Guzman did not respond. Over the next year and a half, Zamora paid a total of $1,868 to the three providers. She was not reimbursed for these expenses.

On December 1, 2008, Guzman's office faxed a letter to the driver's insurance company and asked it to evaluate Zamora's claim in light of the $4,767 in medical expenses. Guzman then agreed to a settlement without Zamora's knowledge or consent, resulting in a $7,800 payment on December 22, 2008. The settlement check was deposited into Guzman's CTA on March 10, 2009. He testified he did not know why the funds were not deposited for more than two months. Guzman did not inform Zamora about the settlement offer or the receipt of the settlement funds.

Pursuant to Guzman's contingency fee agreement, Guzman was entitled to one-third of the settlement or $2,600 as his fees, and Zamora was to receive $5,200. On July 22, 2009, before distributing any funds to Zamora, Guzman allowed his CTA to dip to $635, resulting in a misappropriation of $4,564.92. At trial, he was not able to explain why he did not notice the drop in funds, although he believed Wheeles caused it by using his signature stamp to steal funds from his CTA.

Between December 2008 and August 2011, Zamora called Guzman's office at least ten times concerning her case, but he did not return her calls. Zamora was experiencing difficult financial circumstances, requiring her to borrow money from relatives and rely on her unemployment checks to pay her medical expenses from the car accident. Finally, unable to reach Guzman, Zamora contacted the driver's insurance company in August 2011 and learned for the first time that her case had been settled two and a half years earlier.

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4. Guzman located the Licerio/Jaramillo and Haro client matter files in Siebig's filing cabinet. He did not recover the files for the Zamora or Darpinian client matters.

On August 13 and September 6, 2011, Zamora sent Guzman letters demanding payment of the settlement money. On October 3, 2011, Guzman's attorney, Michael Magasin, whom Guzman hired to assist him with the fallout from the Wheeles' investigation, wrote and offered to pay Zamora $3,900 as her portion of the settlement funds and purported to provide an accounting for the case. Zamora did not respond. At trial, Guzman claimed that a January 25, 2010 check for $3,809 drawn against his CTA represented payment to Zamora for the car accident case. However, his claim is inconsistent with other more credible evidence.[5]

B. Culpability

OCTC established by clear and convincing evidence[6] that Guzman committed two violations of Business and Professions Code section 6068, subdivision (m),[7] by failing to inform Zamora of the December 2008 settlement offer and by failing to respond to her multiple requests for information for over two years. In addition, the evidence is clear and convincing that Guzman failed to notify Zamora when he received the settlement funds on her behalf, in violation of rule 4-100(B)(1) of the Rules of Professional Conduct,[8] failed to provide any accounting of his services until almost three years after he received the settlement in violation of rule 4-100(B)(3),[9] and failed to promptly pay Zamora her share of the settlement funds in spite of her repeated requests in violation of rule 4-100(B)(4).[10]

[1a] Guzman misappropriated $4,564.92 when he allowed Zamora's $5,200 settlement in his CTA to dip to $635 in July 2009. (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 474 ["The mere fact that the balance in an attorney's trust account has fallen below the total of amounts deposited in and purportedly held in trust, supports a conclusion of misappropriation"].) OCTC concedes that this misappropriation was the result of gross carelessness. Guzman allowed his staff to access his CTA records without supervision, gave Wheeles his signature stamp without regularly monitoring his CTA, and took no corrective action to protect his clients or his CTA for almost nine months after he learned that Wheeles was under investigation for fraud upon attorneys and clients. Such gross negligence constitutes an act of moral turpitude in willful violation of section 6106.[11] (*Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020 [moral turpitude finding proper for gross carelessness in failing to maintain trust account]; *Palomo v. State Bar* (1984) 36 Cal.3d 785, 795 [attorney has "personal obligation of reasonable care to comply with the critically important rules for the safekeeping and disposition of client funds. [Citations]".)

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5. OCTC maintains that the $3,809 check paid to Zamora represented a portion of the funds owed to her for settlement of an earlier trip-and-fall lawsuit that Guzman filed on behalf of Zamora against McDonald's Corporation. The record indicates that Siebig took over the McDonald's lawsuit from Guzman at some point, and obtained a settlement of $50,000.

6. Clear and convincing evidence must leave no substantial doubt and be sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

7. Section 6068, subdivision (m) requires attorneys "[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services." All further references to sections are to this source.

8. Rule 4-100(B)(1) provides a member shall "[p]romptly notify a client of the receipt of the client's funds, securities, or other properties." All further references to rules are to the Rules of Professional Conduct unless otherwise noted.

9. Rule 4-100(B)(3) provides a member shall "[m]aintain complete records of all funds, securities, and other properties of a client coming into the possession of the member or law firm and render appropriate accounts to the client regarding them . . . ."

10. Rule 4-100(B)(4) provides a member shall "[p]romptly pay or deliver, as requested by the client, any funds, securities, or other properties in the possession of the member which the client is entitled to receive."

11. Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

Guzman's failure to maintain $5,200 in funds in his CTA is also a violation of rule 4-100(A) as charged.[12] However, we assign no additional weight to it because the misconduct underlying the section 6106 violation supports the same or greater discipline. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127.)

III. CASE NUMBER 11-O-18399 LICERIO AND JARAMILLO MATTER

A. Factual Background

On December 19, 2008, Chris Licerio was involved in a car accident while driving with his girlfriend, Maryann Jaramillo, and their child. Licerio testified that a photographer appeared at the accident scene, took pictures of the car accident, gave him Guzman's business card, and told him he would send the photos to Guzman. The next day, Licerio called Guzman at his office. Guzman confirmed he had received the accident photos and would represent Licerio. Shortly thereafter, a man whom Licerio believed was a co-worker or employee of Guzman's, came to the couple's house with a model to recreate the accident. At the meeting, Licerio and Jaramillo signed Guzman's retainer agreement. They were not provided with and did not sign conflict waivers.

In August 2010, the insurer for the at-fault driver communicated a settlement offer to Guzman's office and provided general claim release forms. Guzman did not discuss the settlement offer with Licerio or Jaramillo. Instead, he, or one of his staff, executed the release forms using Licerio or Jaramillo's names without any indication that someone else had actually signed the releases. When asked why he did not obtain the clients' authorization to settle the case and why he signed their names on the releases without their knowledge, Guzman testified "I ha[d] the authority pursuant to the retainer agreement and my power of attorney that they signed off on."

On August 27, 2010, the insurer sent Guzman's office three settlement checks, totaling $12,000. On September 1, 2010, Guzman deposited the checks into his CTA. He did not inform Licerio or Jaramillo that he received the checks. Based on the retainer agreement, Guzman was entitled to $4,000 as his fee, which left $8,000 to be held on behalf of his three clients. On October 29, 2010, before disbursing any settlement funds to his clients, Guzman's CTA dipped to a low of $3,918, making the misappropriation $4,081.

From December 2010 through August 2011, Licerio repeatedly called Guzman's office and requested return calls. Licerio was concerned because he was unable to pay several invoices he received from medical providers since he was unemployed due to his injuries. Guzman did not return the calls. Jaramillo contacted the couple's own insurer and learned that the case had been settled for $12,000. The couple again contacted Guzman. In October 2011, more than a year after receiving the settlement, Guzman finally acknowledged he had received the money. The couple demanded payment and received their $8,000 share of the settlement in July 2012, almost two years after the funds had been deposited in Guzman's CTA. However, Guzman never provided an accounting.

B. Culpability

Guzman accepted the representation of Licerio, Jaramillo, and their child, in a matter in which a potential conflict existed, without obtaining their informed written consent, in violation of rule 3-310(C)(1).[13] Guzman also committed two separate violations of section 6068, subdivision (m), by failing to inform his clients of the August 2010 settlement offer and by failing to respond to multiple requests for information between December 2010 and August 2011. He violated rule 4-100(B)(1) by failing to notify his clients that he had received $12,000 in settlement

12. Rule 4-100(A) provides: "All funds received or held for the benefit of clients . . . shall be deposited in one or more identifiable bank accounts labeled 'Trust Account,' 'Client's Funds Account' or words of similar import . . . No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith . . . ."

13. Rule 3-310(C)(1) provides that a member shall not, without the informed written consent of each client, accept representation of more than one client in a matter in which the interests of the clients potentially conflict.

funds on their behalf. He also failed to provide an accounting of his services for the relevant time period, in violation of rule 4-100(B)(3), and failed to promptly pay his clients their share of the settlement funds, in violation of rule 4-100(B)(4).

[1b] OCTC concedes that Guzman's misappropriation of $4,081.42 in settlement funds held in trust for Licerio and Jaramillo ($8,000 - $3,918.58) resulted from gross negligence, in willful violation of section 6106. We find that Guzman's carelessness here is highlighted by the fact the misappropriation occurred *after* Guzman was contacted by the DA's office about Wheeles. (See *Lipson v. State Bar*, *supra*, 53 Cal.3d at p. 1020; *Palomo v. State Bar*, *supra*, 36 Cal.3d at p. 795.) Although Guzman's failure to maintain the necessary $8,000 in his CTA is also a violation of rule 4-100(A), we assign no additional weight to this violation because the misconduct underlying the section 6106 violation supports the same or greater discipline. (*In the Matter of Sampson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 127.)

1. Improper Solicitation

[2] The hearing judge found that OCTC failed to provide clear and convincing evidence that a solicitation was made on Guzman's behalf in violation of rule 1-400(C).[14] We disagree. Licerio provided *unchallenged* testimony that the photographer who appeared at the accident scene gave him Guzman's card and told Licerio that he would forward the photos to Guzman who was "going to be representing" him. The next day, Guzman confirmed that he had received the photos when Licerio called and he told Licerio that he would be his attorney. Shortly thereafter, someone who worked for Guzman appeared at Licerio and Jaramillo's home and obtained their signatures to Guzman's retainer agreement. We find Licerio's testimony to be credible and constitutes clear and convincing evidence that Guzman made an improper solicitation through the photographer. We therefore reverse and find a violation of rule 1-400(C).

2. Settling Without Authorization

[3] We also do not agree with the hearing judge's dismissal of the charge that Guzman committed acts involving moral turpitude in violation of section 6106 by placing his clients' signatures on client release forms, releasing all of their claims and causes of action without their knowledge or consent, and negotiating a settlement without their knowledge or consent. Such conduct involves overreaching and constitutes moral turpitude. (*Levin v. State Bar* (1989) 47 Cal.3d 1140, 1144-1148 [attorney who settled claim without client's knowledge or consent culpable of moral turpitude even though retainer agreement gave attorney power to settle cause of action and endorse checks or releases].)

Guzman's testimony that his retainer agreement provided him with complete and unqualified authority to settle his clients' cases only serves to reinforce our conclusion that he breached his fiduciary relationship by overreaching. Clients have the unilateral right to control the outcome of their cases, including the right to settle or to refuse to settle a claim. Attempts by an attorney to restrict a client's right to control his or her case are invalid and evidence of overreaching. (*Hall v. Orloff* (1920) 49 Cal. App. 745, 749-750 [clause in retainer agreement between attorney and client prohibiting client from settling lawsuit without consent of attorney is void against public policy]; *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 989 [language in retainer agreement intended to prohibit client from settling or dismissing case without attorney's consent was void and evidence of overreaching].) " 'The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party.' [Citation.]" (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813.) The provisions of Guzman's retainer agreement giving him unfettered authority to settle or dismiss a case on any terms were in utter

14. Rule 1-400(C) provides: "A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship . . . ."

disregard of Licerio's and Jaramillo's right to retain control of the outcome of their case. Guzman's actions in signing the releases for Licerio and Jaramillo without their knowledge or consent, together with his retainer agreement permitting him to do so, are clear and convincing evidence of Guzman's overreaching. We therefore reverse the hearing judge and find that Guzman violated section 6106.

III. CASE NUMBER 12-O-12012 DARPINIAN MATTER

A. Factual Background

In February 2010, Aaron Darpinian, his wife, and their son were involved in a car accident. Guzman stipulated that he accepted representation of the Darpinians on or about February 26, 2010. Mr. Darpinian testified neither he, his wife, or child was presented with conflict waiver forms. He also testified he was not happy with the representation by Guzman's office and was coerced into staying when advised by Guzman's staff that they would impose a lien for their fees if he left the firm.

Sometime during the spring of 2011, the Darpinian matter was transferred to another attorney, William Crader, without the Darpinians' knowledge or consent.[15] After receiving a letter from Crader, Mr. Darpinian contacted his insurance company and was informed by phone that Guzman withdrew as attorney in the matter. In December 2011, Crader notified the at-fault driver's insurance company that his associate, Ilu J. Ozekhome, would be handling the case. Mr. Darpinian testified the case was then settled "without us," and he has not received any settlement money.

B. Culpability

[4a] Guzman was charged with: (1) accepting representation of parties in potential conflict without obtaining their informed written consent, in violation of rule 3-310(C)(1); (2) failing to receive the Darpinians' consent before transferring their case to another lawyer and, thereby, failing to take reasonable steps to avoid reasonably foreseeable prejudice to the Darpinians in violation of rule 3-700(A)(2);[16] and (3) failing to inform the Darpinians that their case had been transferred to another attorney in violation of section 6068, subdivision (m). The hearing judge dismissed the entire Darpinian matter, finding that Guzman's office had never informed the Darpinians that they had been accepted as clients and therefore Guzman was unaware of their case. We disagree.

[4b] Guzman stipulated that he accepted the representation of the Darpinians. Having admitted to this predicate fact, we find he breached his non-delegable professional duties owed to the Darpinians in willful violation of rule 3-310(C)(1), rule 3-700(A)(2), and section 6068, subdivision (m). Accordingly, we reinstate Counts Nineteen through Twenty-One in the Darpinian matter and find Guzman culpable of the charges alleged in all three counts.

IV. CASE NUMBER 12-O-13348 HARO MATTER

A. Factual Background

On October 7, 2008, Maria Haro was injured while riding on a bus. She hired Guzman to represent her and signed his fee agreement. Haro testified she did not believe that signing the fee agreement gave Guzman the power to dismiss her case.

Early in the representation, one of Guzman's office staff told Haro to be patient as her case would take two to three years to resolve. Over the next three years, Haro tried without success to obtain information about her personal injury claim. In fact, at one point, she lost track of Guzman, but finally located him. She spoke with him on the phone for the first time in September 2011 — three years after she had retained him. He put her off, saying he did not have her file in front of him, told her "not to worry," and promised to call back. After another two weeks

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15. The record is not clear as to whether Wheeles or someone else transferred the case to Crader's office.

16. Rule 3-700(A)(2) provides: "A member shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice" to his client.

passed, she sent him a letter. Only then did he agree to meet her in person.

Haro and her husband testified they met with Guzman in October 2011, and he told them that Haro's case was active, and a mediation would take place, followed by a March 2012 trial. After that meeting, Haro heard nothing from Guzman. When she checked the court's website, she discovered that her case had been dismissed more than seven months earlier. Haro then sought assistance from another attorney who told her the "case was already too old."

For his part, Guzman testified that he filed a summons and complaint in the Los Angeles County Superior Court in October 2010 "to protect the statute on these cases, just in case the claimant, in this case Ms. Haro, wants to proceed with the claim and try to, I guess, settle the claim with the insurance company." Guzman did not serve the summons and the complaint as he was "deciding whether or not to proceed with [Haro's] case." Then, having unilaterally decided not to proceed, Guzman let the 60-day service period run without serving the summons and complaint. He did not appear at two hearings on orders to show cause (OSC) regarding the failure to submit proof of service of the summons and complaint. On March 1, 2011, the superior court dismissed Haro's case pursuant to Code of Civil Procedure, section 575.2.[17]

Guzman also testified that he informed Haro in writing in January 2011, prior to the dismissal, that her case "would be dismissed if there were no appearances made on her behalf, or if she wanted to continue with the case . . . to either sub into the case herself personally or to hire new counsel." Guzman did not have evidence of the letter to corroborate his testimony even though he had Haro's file. He testified he had no other communication with Haro until she contacted him nine months later in September.

B. Culpability

We affirm the hearing judge's culpability findings that Guzman failed to perform legal services with competence, in willful violation of rule 3-110(A).[18] He failed to timely serve the summons and complaint and did not appear at two OSC hearings, resulting in the dismissal of Haro's case. He also failed to respond promptly to reasonable status inquiries and to communicate significant developments to her. Guzman did not respond to numerous calls and messages from Haro for three years, failed to advise her that he had moved his office, and did not promptly advise Haro that her case had been dismissed.

[5] The judge found insufficient evidence to support a charge of moral turpitude on the grounds that Guzman made misrepresentations to Haro. We disagree. First, Guzman did not tell Haro it was his fault that her case had been dismissed. Moreover, from October 2010 through September 2011, Guzman hid from Haro that: (1) he had filed a complaint on her behalf; (2) he did not serve the summons and complaint within the 60-day period because of *his* neglect; (3) the court issued two OSCs threatening dismissal; (4) he made the decision not to appear at the OSC hearings; (5) Haro could have appeared at those hearings; and (6) Haro had grounds to challenge the dismissal. In addition, during their *single* phone conversation in early September 2011, Guzman brushed Haro off, told her not to worry, and hid her case status from her for at least another two weeks. Accordingly, we reverse the hearing judge and find Guzman committed acts of moral turpitude in violation of section 6106. (*Fitzpatrick v. State Bar* (1977) 20 Cal.3d 73, 87-88 [making statements to one's clients about their lawsuits that attorney knows to be false, is dishonest conduct falling within section 6106]; *Stevens v. State Bar* (1990) 51 Cal.3d 283, 289 [purposely misleading client about case status is dishonest and involves moral turpitude].)

17. Code of Civil Procedure, section 575.2 permits courts to impose sanctions up to and including dismissal for failure to comply with local rules, which in this case was the failure to comply with the "fast-track" case management rule requiring service of summons and complaint within 60 days.

18. Rule 3-110(A) provides: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

V. AGGRAVATION AND MITIGATION

We determine the appropriate discipline in light of the relevant circumstances, including mitigating and aggravating factors. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) OCTC must establish aggravation by clear and convincing evidence (std. 1.5), while Guzman has the same burden to prove mitigating circumstances (std. 1.6). The hearing judge found two aggravating factors: multiple acts of misconduct and client harm. We find additional aggravation due to Guzman's failure to understand the nature of his misconduct. We agree with the hearing judge's two findings in mitigation (no prior discipline record and cooperation), although we assign minimal weight to these two factors.

A. Aggravation

1. Multiple Acts of Misconduct (Std. 1.5(b)); Pattern of Misconduct (Std. 1.5(c))

[6] The hearing judge correctly found that Guzman committed multiple acts of misconduct in four client matters. We do not agree with OCTC that Guzman's conduct constitutes a pattern of misconduct warranting disbarment under standard 1.5(c). (*Young v. State Bar* (1990) 50 Cal.3d 1204, 1217 [pattern of misconduct limited to " 'most serious instances of repeated misconduct over a prolonged period of time' "].) Nevertheless, Guzman is culpable of 24 counts of misconduct during a four-year period, and we assign significant weight in aggravation to his recurring inattention to his CTA and client matters.

2. Significant Client Harm (Std. 1.5(f))

The hearing judge found that Guzman significantly harmed Zamora and Licerio. We agree. The settlements in both cases were designed to compensate the clients for their personal injuries. Zamora incurred medical expenses when she was already facing financial difficulties. She was forced to borrow money to pay those expenses to avoid credit problems. To date, it is unclear whether Zamora has ever received her share of the car accident settlement proceeds.

Similarly, Licerio was unable to obtain the necessary medical attention for his back injuries incurred in the accident. At the time of trial, he had been unable to work for five years due to his injuries. Since the settlement was intended to compensate Guzman's clients for personal injuries, we find his failure to promptly distribute their funds to them is particularly harmful. (See *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060-1061 [misappropriation of $1,229.75 of personal injury settlement "was especially harmful" to client because amount significant and meant to reimburse for personal injuries]; *In the Matter of Blum* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 403, 409, 413 [significant client harm for six-month delay in distributing $5,618.25 in medical malpractice settlement proceeds].)

In addition, we find significant harm to Haro, whose lawsuit was dismissed due to Guzman's inaction, thereby depriving Haro of her day in court. Overall, we assign substantial aggravation for the client harm caused in these three matters.

3. Indifference (Std. 1.5(g))

[7] At trial, Guzman refused to take responsibility for mismanagement of his CTA, claiming he was "not the one who caused the dip[s]." Guzman misses the point. He had a non-delegable duty to properly manage his CTA, to monitor and safeguard the account, and to take prompt corrective and protective measures. Also, to this day, he does not recognize the overreaching inherent in his fee agreements, which gave him complete control over his clients' causes. Finally, we observe that Guzman failed to respond to OCTC's appeal, thereby depriving this court of any consideration of factual or legal issues he might deem relevant to our consideration of his culpability and/or discipline.

B. Mitigation

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

Standard 1.6(a) provides mitigation in the absence of a prior record of discipline. This discipline is Guzman's first, entitling him to mitigation credit for his eight years of discipline-free practice. However, we assign negligible weight to this factor because

Guzman's misconduct is serious, it is not aberrational, and he does not appreciate the consequences of his actions. (But see *In the Matter of Reiss* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 206, 218 [no mitigation credit given to lack of prior discipline record where attorney engaged in extensive dishonesty with no acceptance of responsibility for misconduct and no evidence of rehabilitation].)

2. Cooperation (Std. 1.6(e))

[8] Guzman entered into a stipulation as to facts and documents. The stipulation, however, was not extensive, involved easily provable facts, and he did not admit to culpability. We therefore assign this factor limited weight. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more mitigating weight accorded when admission to culpability as well as facts].)

VI. LEVEL OF DISCIPLINE

[9a] 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.) The Supreme Court instructs us to follow the standards "whenever possible." (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) We give them great weight to promote consistency (*In re Silverton* (2005) 36 Cal.4th 81, 91), but are not required to follow them in a "talismanic fashion." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) While many standards apply here, we focus on standards 2.1(b), 2.5(a) and (b), and 2.7 because these call for the most severe discipline, including disbarment.[19]

[9b] To begin, we observe that Guzman is culpable of 24 counts of misconduct, involving nine different rule and code violations, spanning a period of at least four years, and involving four client matters. We find that the $8,646.34 Guzman misappropriated in two client matters is a significant amount.[20] (*Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1361, 1368 [misappropriation of $1,355.75 not insignificant].) Moreover, the misappropriation was the result of gross negligence amounting to recklessness, considering Guzman's failure to monitor his CTA or his office staff. Yet, at trial, Guzman sought to blame Wheeles rather than accept responsibility for the misappropriation. In addition, we weigh heavily his overreaching in having his clients sign a fee agreement that ceded to him the unfettered right to control their cases, and after abandoning or settling their cases without their knowledge or consent, disappearing from view. Not surprisingly, this repeated course of conduct resulted in significant harm to multiple clients.

[9c] Guzman also allowed Haro's lawsuit to be dismissed, while lying to her that the matter was being properly handled. Again, having unilaterally decided to abandon her case as meritless, Guzman failed to protect Haro's right to preserve her own cause. Similarly, in the Darpinian matter, Guzman's inadequate office practice allowed his client's case to be transferred to another attorney without authorization. As with the misappropriation, Guzman was unwilling to accept responsibility at trial for this misconduct and did not demonstrate any recognition of its seriousness. His failure to participate on review, knowing that OCTC was seeking his disbarment, further illustrates his indifference to these serious matters.

[9d] Given Guzman's habitual disregard of his

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19. Multiple standards govern here, providing for discipline from reproval to disbarment. Standard 1.7(a) states that when multiple sanctions apply, the most severe discipline shall be imposed. Standard 2.1(b) states that disbarment or actual suspension is appropriate for misappropriation involving gross negligence. Standard 2.7 states that disbarment or actual suspension is appropriate for moral turpitude depending on the magnitude of the misconduct and the extent to which the misconduct harmed or misled the victim. Standard 2.5(a) states that disbarment is appropriate for the failure to perform legal services where the conduct demonstrates a pattern or multiple client matters. And standard 2.5(b) states that actual suspension is appropriate for the failure to perform or communicate in multiple client matters where the conduct does not demonstrate a pattern of misconduct.

20. The total misappropriation reflects $4,564.92 in the Zamora matter and $4,081.42 in the Licerio and Jaramillo matter.

duties as an attorney and his attendant lack of recognition and remorse, we find a high risk that he may engage in additional professional misconduct if permitted to continue practicing law. Under such circumstances, disbarment has been the usual discipline and is supported by comparable case law. (*Chang v. State Bar* (1989) 49 Cal.3d 114, 128-129 [disbarment in first discipline where attorney misappropriated just over $7,000 in isolated instance of misappropriation and posed risk of future misconduct due to indifference and lack of candor]; *In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 346-348 [disbarment recommended in first discipline where attorney showed "great likelihood" of engaging in future misconduct after he "demonstrated clear disrespect for his clients and a nearly complete lack of appreciation for his professional obligations " over four years in seven matters by, among other things, attempting to settle cases without client authority, filing lawsuit against client wishes, demonstrating habitual non-responsiveness to clients, and belatedly or never refunding unearned fees]; *In the Matter of Steele* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 708, 724 [disbarment recommended in first discipline where attorney's reckless law office management and lack of CTA oversight for more than two years resulted in misappropriation of over $25,000 and demonstrated attorney's favoring of his "own financial interest over the interests of his clients and the requirements of the law"].) Guided by the facts of this case, the standards, and the case law, we are persuaded disbarment is warranted.

VII. RECOMMENDATION

We recommend that Henry Edward Guzman be disbarred and that his name be stricken from the roll of attorneys.

We further recommend that he make restitution to Araceli Zamora in the amount of $5,200 plus 10 percent interest per year from December 22, 2008[21] (or reimburse the Client Security Fund to the extent of any payment from the Fund to Zamora, in accordance with section 6140.5) and furnish satisfactory proof to the State Bar Office of Probation in Los Angeles.

We further recommend that he comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter.

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

IX. ORDER

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

We concur:

REMKE, P. J
PURCELL, J.

21. This amount represents her portion of the $7,800 settlement for her claims arising from the car accident on June 27, 2007.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

GEORGE TIMOTHY SMITHWICK

A Member of the State Bar

[No. 11-O-11334]

Filed May 16, 2014

SUMMARY

The Office of the Chief Trial Counsel (OCTC) requested review of a hearing judge's decision recommending a 60-day actual suspension after respondent stipulated to: 1) splitting fees with a non-lawyer entity; 2) failing to perform legal services with competence; 3) failing to refund unearned fees; and 4) failing to provide the State Bar with notice that he employed a resigned attorney. (Hon. Pat E. McElroy, Hearing Judge.)

The review department upheld the 60-day actual suspension recommended by the hearing judge and added the requirement that respondent remain suspended until he completed restitution.

COUNSEL FOR PARTIES

For OCTC: Cydney T. Batchelor

For Respondent: Douglas L. Rappaport
Joanna P. Sheridan

HEADNOTES

[1a-d] 119 Other Pretrial Matters
151 Evidentiary Effect of Stipulations
199 Other Miscellaneous General Issues
Where respondent and State Bar stipulated to facts, legal conclusions on culpability, and discipline, but Supreme Court remanded matter for reconsideration of discipline in light of Standards, parties remained bound by stipulation with regard to facts and culpability. State Bar Court permitted parties to present additional evidence on aggravation and mitigation, and reconsidered degree of discipline. However, State Bar was bound by original stipulation that respondent's misconduct was not serious.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2] **582.39 Aggravation—Harm to client—Found but Discounted—Other reason**
Although attorney stipulated to causing significant client harm, minimal weight assigned to harm as aggravating factor where foreclosure of client's home and misrepresentations made by company representatives occurred before respondent accepted client's case.

[3a,b] **710.10 Mitigation—Long practice with no prior discipline record—Found**
Where attorney had practiced for over 30 years without prior discipline, and State Bar stipulated that present misconduct was not serious, attorney's lack of prior record was entitled to significant weight in mitigation. Even if present misconduct had been serious, lack of prior record still would have established that respondent's misconduct was not likely to recur, where misconduct occurred during single, relatively short period of aberrant behavior, respondent voluntarily ceased committing misconduct before authorities or State Bar became involved, and respondent was remorseful and accepted responsibility for misconduct.

[4] **735.10 Mitigation—Candor and Cooperation with OCTC—Found**
Significant mitigating weight given for candor and cooperation with OCTC where attorney stipulated to material facts, culpability and discipline because it greatly conserved resources.

[5] **740.31 Mitigation—Good Character References—Found but Discounted or not relied on—Insufficient number of references**
Modest mitigation credit for good character where attorney presented four witnesses from varied backgrounds that included an attorney.

[6] **616.53 Aggravation—Failure to make restitution—Declined to find—Inability to make full restitution**
616.59 Aggravation—Failure to make restitution—Declined to find—Other reason
Where respondent's clients could not be located despite State Bar's efforts to find them, Review Department declined to consider respondent's delay in paying restitution as aggravating factor.

[7] **715.50 Mitigation—Good faith—Declined to find**
Where respondent was unaware of duty to report to State Bar that respondent had engaged services of resigned attorney, Review Department reversed hearing judge's consideration of this fact in mitigation as good faith, because attorneys are not rewarded for ignorance of their ethical responsibilities.

[8a,b] **802.61 Application of Standards—Standard 1.7(a)—Most severe applicable sanction to be used**
844.13 Application of Standards—Performance, communication, or withdrawal—Multiple matters but no habitual disregard (interim Standard2.5(b)) —Applied-actual suspension—Coupled with other misconduct
901.90 Application of Standards—Violations Not Specified Above (interim Standard 2.15)—Applied-Suspension—Other reason

Where respondent's most serious ethical violations resulted from his affiliation and fee-sharing with a non-lawyer entity, Review Department applied discipline standard most applicable to that misconduct, rather than standard applicable to respondent's failure to perform legal services in multiple matters. Case law in matters involving similar misconduct was inapplicable in light of respondent's compelling mitigation, including long practice without a prior record, candor and cooperation, good character, pro bono work and community service, and remorse and recognition of wrongdoing. Given that respondent's misconduct was not likely to recur, totality of circumstances warranted imposing actual suspension for 60 days and until respondent completed restitution.

ADDITIONAL ANALYSIS

Culpability

Found

252.31 Sharing fee with non-lawyer (RPC 1-320(A); 1975 RPC 3-102(A))
252.61 Employment of lawyer not eligible to practice (RPC 1-311)
270.31 Intentional, reckless, or repeated incompetence (RPC 3-110(A); 1975 RPC 6-101(A)(2)/(B))
277.61 Failure to refund unearned fees (RPC 3-700(D)(2); 1975 RPC 2-111(A)(3))

Aggravation

Found

521 Multiple acts of misconduct (1.5(b) 1986 Standard 1.2(b)(ii))

Declined to find

584.50 Harm to public
586.50 To administration of justice

Mitigation

Found

745.10 Remorse/restitution/atonement (1.6(g) Standard 1.2(e)(vii))

Found but discounted or not relied on

765.31 Substantial pro bono work—Insufficient evidence

Discipline

1013.06 Stayed suspension—One year
1015.02 Actual suspension—two months

Probation Conditions

1021 Restitution
1024 Ethics exam/ethics school
1030 Standard 1.2(c)(1) Rehabilitation Requirement (1986 Standard 1.4(c)(ii))

OPINION

REMKE, P. J.

George Timothy Smithwick practiced law for over 30 years without discipline until he agreed to accept contingency fee cases from a company specializing in lender liability lawsuits, which he later learned was disreputable. His relationship with the company ended within a year and before the involvement of the authorities. Following contact from the Office of the Chief Trial Counsel of the State Bar (OCTC), Smithwick fully cooperated in the investigation and stipulated to his culpability to resolve the matter before disciplinary charges were filed. In particular, he stipulated to: (1) splitting fees with a non-lawyer entity; (2) failing to perform legal services with competence; (3) failing to refund unearned fees totaling $15,740; and (4) failing to provide the State Bar of California with notice that he employed a resigned attorney. The hearing judge recommended a 60-day actual suspension due to Smithwick's extreme remorse, years of practice without discipline, and attempts to make amends.

OCTC appeals and seeks at least a six-month suspension. It concedes Smithwick had an unblemished record for a lengthy period, but stresses that he abdicated his professional duties owed to at least 12 clients and caused significant harm. Smithwick asks that we affirm the recommended discipline due to a lack of malevolent intent and his compelling mitigation. We agree with Smithwick and affirm the hearing judge's 60-day recommendation, but add a condition that Smithwick remain suspended until he submits full restitution as specified below.

I. SIGNIFICANT PROCEDURAL HISTORY

[1a] This case has an unusual procedural history. Over two years ago, Smithwick and OCTC entered into a stipulation as to facts, conclusions of law, and disposition (Stipulation), which recommended a one-year *stayed* suspension. The Stipulation was then approved by the hearing department. In June 2012, our Supreme Court issued an order returning the Stipulation "for further consideration of the recommended discipline in light of the applicable attorney discipline standards. (*In re Silverton* (2005) 36 Cal.4th 81, 89-94; see *In re Brown* (1995) 12 Cal.4th 205, 220.)" (*Smithwick on Discipline* (June 12, 2012, S199709).)

[1b] Following the return, OCTC asserted that it was entitled to reopen the investigation, add charges of misconduct, conduct discovery, and present supplemental evidence on culpability and aggravation — without moving to withdraw from or modify the Stipulation. After the hearing judge rejected OCTC's argument, it petitioned for interlocutory review. We denied the petition and concluded that the parties were bound to the stipulated facts and conclusions of law "unless a motion to withdraw or modify is granted," but not bound to the level of discipline.

OCTC then filed a motion to modify the Stipulation. It did not seek to modify the *facts* in the Stipulation — only the legal conclusions based on the limited stipulated facts. Alternatively, OCTC asked to withdraw from the Stipulation. The hearing judge denied the motion but permitted the parties to provide evidence to expand on the agreed-upon aggravating and mitigating factors in the Stipulation. Neither party sought interlocutory review of the order.

[1c] The hearing judge held a two-day trial in February 2013. She again instructed the parties that they were bound by the conclusions of law in the Stipulation, but were "permitted to add evidence supporting aggravation and mitigation." Neither party objected. Thus, pursuant to the Supreme Court's return order, the primary issue is "the recommended discipline in light of the applicable attorney discipline standards."

II. FACTS AND CULPABILITY

The trial evidence is limited, providing few facts beyond those set forth in the Stipulation. We adopt and summarize the hearing judge's findings, adding relevant facts from the record. (Rules Proc. of State Bar, rule 5.155(A) [judge's findings entitled to great weight].)

A. Factual Background

US Loan Auditors, LLC, US Loan Auditors, Inc., US Legal Advisors, and My US Legal Services (collectively My US Legal) were companies partially owned by non-attorneys. Distressed homeowners hired My US Legal to file predatory lender lawsuits and paid the company advance attorney fees in monthly installments. My US Legal would then hire contract attorneys to represent the homeowners. The company paid the contract attorneys $250 per month as attorney fees for each client, using funds from the homeowner's monthly installments to My US Legal.

Smithwick was admitted to the Bar in 1979. Thirty years later, in 2009, his former law school classmate, Dan Whaley, suggested he work as a My US Legal contract attorney. In late July 2009, Smithwick agreed to take referral cases from My US Legal. He believed in the validity of some predatory lender lawsuits, but did not have the means as a sole practitioner to litigate cases against banks. My US Legal agreed to provide the necessary staffing and support to help him on the cases he accepted. Smithwick took them on a contingency fee basis, but understood that if the client paid My US Legal advance costs, the company would disburse those funds to him.

Smithwick stipulated that as a contract attorney for My US Legal, he hired Whaley to work in his law office. He was aware that Whaley had resigned from the State Bar, but believed he was petitioning for reinstatement. Smithwick failed to serve the State Bar with written notice that he employed Whaley. At trial, Smithwick testified that he actually considered Whaley an employee of My US Legal since he himself did not pay Whaley, but admitted he "use[d] him to help on the cases."

At first, My US Legal did not disburse any funds to Smithwick. But then in December 2009, Whaley told him that the contract attorneys would begin receiving $250 per month for each client for costs. Smithwick did not expect these payments when he first became affiliated with My US Legal, and was unaware that the source of the money was the homeowners' monthly installment payments to the company for legal services.

Smithwick represented at least 12 homeowners who were under contract with My US Legal. He stipulated that he did not perform any work of value on the homeowners' behalf, but My US Legal paid him a total of $15,740. His acceptance of those unearned advance fees constituted impermissible fee splitting with a non-lawyer. Smithwick testified that he decided to end his relationship with My US Legal after about six to eight months because he was not receiving the necessary support for his cases. He found attorneys to handle his existing cases and substituted out of all but one case, which he continued to work on. He concluded his relationship with My US Legal no later than June 2010. In October 2010, the Attorney General of California filed a complaint against the company. Subsequently, My US Legal filed a bankruptcy petition whereby a trustee became responsible for distributing funds to the homeowners, including any victims of Smithwick's misconduct.

Smithwick initially agreed to refund the $15,740 from My US Legal to the trustee handling the company's bankruptcy. He was unaware of the total amount each client had paid to My US Legal since he did not know about the clients' installment payments. Upon learning that the trustee could use the money to pay creditors other than the homeowners Smithwick represented, Smithwick gave the funds to his disciplinary attorney for deposit into the attorney's trust account until Smithwick could determine the amount of each of his clients' refunds. Smithwick notified his clients by certified and regular mail that he would reimburse them and asked how much they had paid My US Legal. His efforts were unsuccessful. Although he stipulated to representing 12 clients through My US Legal, at the conclusion of his disciplinary trial, Smithwick agreed to reimburse a total of 19 individuals.[1]

1. OCTC obtained My US Legal invoices bearing Smithwick's name in 19 cases, totaling $13,730. The invoices were not offered in evidence. Instead, the parties created a summary, listing 19 last names and the amounts owed but no other identifying facts (e.g., first names, addresses, case numbers, or payment dates). The parties also stipulated that Smithwick would have one year to locate and pay the individuals. Any funds not disbursed would be paid to the State Bar Client Security Fund (CSF).

Smithwick stated he is "embarrassed." He feels "bad and ashamed" that he was affiliated with a company that gave "false hope" and "misled" people who were trying to keep or recover their homes.

B. Culpability

Smithwick stipulated to violating four of the Rules of Professional Conduct as a result of his association with My US Legal: (1) rule 1-320(A) by splitting legal fees with My US Legal, a non-attorney entity; (2) rule 3-110(A) by failing to perform any work of value on his clients' behalf; (3) rule 3-700(D)(2) by failing to refund unearned fees totaling $15,740; and (4) rule 1-311 by failing to notify the State Bar in writing that he employed Whaley, a resigned attorney. These legal conclusions are not in dispute, and we adopt them.

III. MITIGATION OUTWEIGHS AGGRAVATION

The appropriate discipline is determined in light of the relevant circumstances, including mitigating and aggravating factors. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) Smithwick must establish mitigation by clear and convincing evidence (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.6),[2] while OCTC has the same burden to prove aggravating circumstances. (Std. 1.5.)

A. Two Aggravating Factors

1. Multiple Acts (Std. 1.5(b))

For approximately eight months, Smithwick committed multiple acts of misconduct in at least 12 client matters by splitting fees with My US Legal, a non-lawyer entity. This wrongdoing, coupled with his three other stipulated ethical violations, aggravates this case. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646–647 [three instances of misconduct considered multiple acts].)

2. Significant Client Harm (Std. 1.5(f))

The parties stipulated that Smithwick's misconduct caused significant client harm,[3] but failed to provide any specific facts to support this aggravating factor. To prove the extent of harm at trial, OCTC called only one of Smithwick's former clients, Jerdie Harris, to testify. Harris is the one client that Smithwick continued to represent after he ended his affiliation with My US Legal. She is a retired postal worker who refinanced her home by taking out a second mortgage in 2006, and ultimately fell behind on the payments as a result of unscrupulous actions by her mortgage broker. In March 2009, Harris's neighbor suggested she contact My US Legal. Harris paid My US Legal $3,500 to perform a forensic audit of her second mortgage.

Harris testified that she met with Whaley after the audit and was led to believe that she could get "rich" due to her "bad loan." She believed My US Legal would "save" her home and agreed to pay the company $1,000 per month. Harris paid My US Legal $1,800 in June 2009, but made no other payments. That same June, Harris's home was sold pursuant to foreclosure. A month later, My US Legal assigned Smithwick to her case. Harris did not meet him until the first mediation in her predatory lending lawsuit. Smithwick represented her until 2012 when she received $36,000 from a settlement Smithwick negotiated with her mortgage broker's insurance company.

[2] It is clear that Harris was significantly harmed by My US Legal. She was a homeowner in a desperate situation who was given false promises about saving or reacquiring her home. She paid a considerable amount of money, did not receive what

2. All further references to standards are to this source, and reflect the modifications to the standards effective January 1, 2014.

3. The hearing judge found Smithwick's misconduct caused significant harm to clients, the public, and the administration of justice. With no facts in the record to prove harm to the public or the administration of justice, we only afford aggravating weight for client harm.

she paid for, and then lost her home two months after she hired the company. But we cannot attribute Harris's loss of her home or the misrepresentations made by My US Legal representatives to Smithwick. Both occurred before he accepted her case. (See, e.g., *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411, 420 [refusing to hold attorney "separately responsible for each item of harm which occurred without proof of his actual knowledge"].) Without any other supporting facts, we assign minimal weight in aggravation to client harm.

B. Five Mitigating Factors

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

[3a] Standard 1.6(a) provides for mitigation in the absence of discipline over many years coupled with present misconduct that is not serious. At the time of his misconduct, Smithwick had practiced law for over 30 years without discipline. The hearing judge gave this factor significant weight. **[1d]** Although OCTC stipulated that Smithwick's misconduct was *not* serious, it now argues that the Stipulation should be ignored, the misconduct be deemed serious, and any weight given to this factor be diminished. We reject OCTC's attempt to circumvent the Stipulation to support its position on discipline.[4]

[3b] Moreover, even when misconduct is serious, our Supreme Court explained in *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029, that a prior record of discipline-free practice is most relevant for mitigation if it occurred during a "single period of aberrant behavior" and is unlikely to recur. (*Ibid.*) That is the case here. Smithwick voluntarily severed his relationship with My US Legal before the authorities or OCTC became involved, he has accepted responsibility for his misconduct, and he is truly remorseful. He did not knowingly split fees with My US Legal, and his misconduct lasted for a relatively short period. These facts establish that his misconduct is not likely to recur. Accordingly, we agree with the hearing judge and give Smithwick's 30-year discipline-free practice significant weight in mitigation.

2. Candor and Cooperation (Std. 1.6(e))

[4] Smithwick displayed candor to and cooperation with OCTC during these proceedings. Before OCTC filed disciplinary charges, he stipulated to the material facts, culpability, and discipline as a result of his association with My US Legal. This greatly conserved resources and we afford it significant weight. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 ["more extensive weight in mitigation is accorded those who . . . willingly admit their culpability as well as the facts"].)

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

Under standard 1.6(f), a mitigating circumstance is "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." Smithwick presented testimony from a former client, a friend who was a teacher and school administrator, a paralegal who was a former employee, and an attorney. Two of the witnesses had reviewed the Stipulation, and all of them knew about his misconduct to varying degrees. Collectively, they described Smithwick as honest, caring, and a man with unquestionable integrity. They also testified that he has great compassion for his clients and frequently reduces the bills of those with limited means. All but the former client had maintained continual contact with Smithwick for nearly two decades. (See *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591-592 [significant weight given to testimony of two attorneys and fire chief who had long-standing familiarity with attorney and broad knowledge of his good character, work habits, and professional skills].)

[5] While four witnesses may not always meet the standard's requirements, Smithwick's character evidence is entitled to mitigation credit for two reasons. First, the witnesses were from varied backgrounds. (See *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [testimony from attorneys, judges, employer, and

4. Although there have been only minor modifications to the record during the lengthy pendency of this case, OCTC stipulated to a one-year stayed suspension in 2011, argued for a two-year actual suspension after trial in 2013, and now seeks six months.

psychologist constitutes sufficient cross-section of witnesses to provide picture of present character].) Second, we give serious consideration to the testimony of the attorney witness, who corroborated Smithwick's character for honesty and his dedication to clients. (*In the Matter of Brown*, *supra*, 2 Cal. State Bar Ct. at p. 319 [attorney testimony entitled to serious consideration due to "strong interest in maintaining the honest administration of justice"].) Accordingly, modest mitigation credit is given for the character evidence provided by the four witnesses.

4. Pro Bono Work and Community Service

Pro bono work and community service mitigate an attorney's misconduct. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) The school administrator character witness testified that Smithwick was very involved at his children's school, he provided pro bono legal services, he led a father's group who donated their time for field trips, and he assisted with establishing an education foundation. We give modest weight to this factor because we know little about the extent of his involvement, and the record contains no other evidence about his pro bono or community service activities. (See *In the Matter of Dyson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 280, 287 [little mitigation for minimal testimony regarding pro bono activities].)

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

Smithwick repeatedly expressed remorse for his involvement with My US Legal while accepting responsibility for his misconduct. He ended his relationship with the company within eight months upon the realization that he lacked the ability to fulfill his ethical responsibilities to his clients. Smithwick also deposited over $15,000 into his disciplinary attorney's trust account to repay the clients he represented through My US Legal.

[6] We reject OCTC's contention that Smithwick's ongoing failure to make restitution directly to the clients should be considered in aggravation. The original stipulation required Smithwick to pay $15,740 to the trustee in the company's bankruptcy proceeding within 22 months of the effective date of discipline. Then at trial, OCTC agreed that payment should go to the clients instead of the trustee, if possible, within one year of the effective date of discipline. However, the clients cannot be located. As stated by the deputy trial counsel, My US Legal is "defunct. The Attorney General shut them down. OCTC did make effort to locate additional clients and was unable to do so." Under these circumstances, we decline to penalize Smithwick for the delay in making restitution.

6. No Mitigation for Good Faith (Std. 1.6(b))

[7] The hearing judge gave Smithwick mitigation for good faith because he was unaware that he was required to give the State Bar written notice that he had engaged the services of Whaley, who had resigned from the Bar. We decline to do the same because we do not reward attorneys for ignorance of their ethical responsibilities. (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 937 [attorney culpable of misconduct even if unaware of ethical obligation to notify Bar that he employed resigned attorney].)

IV. APPROPRIATE DISCIPLINE IS 60-DAY SUSPENSION

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.) Ultimately, we balance all relevant factors on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.) To determine the proper discipline, the Supreme Court instructs us to follow the standards "whenever possible." (*Id.* at p. 267, fn. 11.)

[8a] Under standard 2.5(b), actual suspension is appropriate for failing to perform legal services in multiple client matters. However, Smithwick's most serious ethical violations result from his affiliation and fee sharing with My US Legal, a non-lawyer entity. (Std. 1.7(a); see *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628

[applying standard most relevant to gravest aspect of attorney's misconduct].) This misconduct falls under standard 2.15, which provides that "[s]uspension not to exceed three years or reproval is appropriate for a violation of a provision of the Rules of Professional Conduct not specified in these Standards."

Given the broad range of discipline (reproval to three years), we also seek guidance from case law. (See, e.g., *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) Although no case is exactly equivalent to Smithwick's circumstances, we focus on the three most similar fee splitting cases, which range in suspensions from six months to two years.[5] But we do not apply them because, as discussed below, the misconduct in those cases is far more serious than Smithwick's

In *In the Matter of Nelson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178, the attorney formed a law partnership with a non-lawyer, who was deemed an "administrator." The two agreed to share legal fees, and the administrator was used as a runner and capper. The administrator also was allowed to obtain clients without Nelson's review and to settle claims with insurers, and was a signatory on Nelson's trust account. After six months of paying for cases, Nelson ended the partnership. He turned his law practice over to an attorney he was unfamiliar with and who had only practiced law for a short time. The attorney subsequently misappropriated settlement proceeds from at least three clients. We determined that Nelson's "entire law practice . . . was derived from paying non-lawyers for referral of cases" — a practice involving corruption in violation of Business and Professions Code section 6106. (*Id.* at pp. 187, 189.) Nelson was culpable of other ethical violations, including abandoning his clients without avoiding foreseeable prejudice to them. There were no circumstances that aggravated Nelson's misconduct, and the mitigating circumstances included voluntary withdrawal from illegal conduct, remorse and regret, and rehabilitation. Nelson was suspended for six months.

In *Gassman v. State Bar* (1976) 18 Cal.3d 125, the attorney employed an individual who served as secretary, bookkeeper, and paralegal assistant for almost three years. Gassman split fees with the employee and his failure to supervise allowed the employee to cash checks from his account without authorization. His lack of supervision led to the deposit of his client's $15,000 settlement check into his commercial bank account where it was used to pay personal expenses. He also made false representations to a number of clients and failed to provide promised legal services over a four-year period. His gross neglect and abandonment of his clients constituted moral turpitude. The Supreme Court did not discuss any mitigating or aggravating factors, but suspended Gassman for one year.

Finally, in *In the Matter of Jones, supra,* 2 Cal. State Bar Ct. Rptr. 411, an inexperienced attorney abdicated his professional duties for over two years. He permitted "a nonlawyer to operate a large scale personal injury practice involving capping, forgery and other illegal and fraudulent practices." (*Id.* at p. 415.) Jones was unaware that his office administrator practiced law in Jones's name, handled millions of dollars, collected over $600,000 in attorney fees without providing legal services, and misused $60,000 withheld from clients for medical provider payments. Jones's breach of his fiduciary duties constituted moral turpitude. In aggravation, he committed multiple acts of misconduct and caused considerable harm to medical providers. His misconduct was mitigated by reporting the office administrator to the police and cooperating with the authorities, good character and community activities and paying nearly $57,000 of his own money to medical providers. Jones was suspended for two years and until he proved his rehabilitation and fitness to practice.

As noted, Smithwick's case is far less egregious than *Nelson*, *Gassman,* and *Jones*. Moral turpitude did not surround his misconduct, and it did not involve capping, forgery, misappropriation, forming a partnership with a non-lawyer or a total lack of supervision over his practice. Nor did Smithwick

5. In recommending a 60-day actual suspension, the hearing judge relied on two cases where the attorneys' many years of discipline-free practice significantly mitigated their misconduct, but the misconduct was not similar to Smithwick's. (*In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735; *Layton v. State Bar* (1990) 50 Cal.3d 889.) While a discipline-free practice is a relevant factor, we consider "the level of discipline imposed in previous cases where the misconduct was most similar to that which occurred [in the instant matter]." (*In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 917.)

abdicate his professional duties to Whaley. Although Whaley assisted on his cases, Smithwick maintained control over them and his client files. He had no agreement to share fees with My US Legal, agreed to take clients on a contingency fee basis, and was unaware that the clients paid advance attorney fees to the company. Smithwick believed the payments he received from Whaley were for costs. Moreover, his fee sharing involved a smaller volume of cases, considerably less money, and a shorter period of time.[6]

This is not to suggest that Smithwick's conduct is excusable. He clearly should have done a more thorough investigation into Whaley's and My US Legal's backgrounds before accepting cases from the company. Under the circumstances, Smithwick's failure to investigate may have been unreasonable, but it was not reckless. And although the deceitful practices of Whaley and My US Legal were reprehensible and undoubtedly harmed vulnerable homeowners, we cannot impute the malicious conduct of others to Smithwick.

[8b] Smithwick's compelling mitigation (lack of a prior discipline record, candor and cooperation, good character, pro bono work and community service, remorse and recognition of wrongdoing) clearly outweighs the aggravating factors (multiple acts and minimal client harm). In particular, comparing the short duration of his misconduct to his 30 years of discipline-free practice, it is unlikely that misconduct will recur. The totality of the circumstances warrants affirming the 60-day suspension recommended by the hearing judge with the added requirement that Smithwick remain suspended until he finalizes restitution.

V. RECOMMENDATION

For the foregoing reasons, we recommend that George Timothy Smithwick be suspended from the practice of law for one year, that execution of that suspension be stayed, and that he be placed on probation for one year on the following conditions:

1. He is suspended from the practice of law for a minimum of the first 60 days of probation, and will remain suspended until the following requirements are satisfied:

(a) He makes restitution to Jerdie Harris in the amount of $1,800 plus 10 percent interest per year from June 30, 2009 (or reimburses the Client Security Fund to the extent of any payment from the Fund to the payee, in accordance with Business and Professions Code section 6140.5) and furnishes satisfactory proof to the State Bar's Office of Probation in Los Angeles (Office of Probation);

(b) He pays $13,940 to the Client Security Fund and furnishes proof to the Office of Probation;[7] and

(c) If he remains suspended for two years or more for not satisfying the preceding conditions, he must also provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law before the suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within 30 days after the effective date of the Supreme Court order in this proceeding, he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation deputy either in-person or by telephone. Thereafter, he must promptly meet with the probation deputy as directed and upon request of the Office of Probation.

4. Within 10 days of any change in the informa-

6. In addition to *Jones*, OCTC asserts that *In the Matter of Oheb, supra,* 4 Cal. State Bar Ct. Rptr. 920, supports its recommended discipline. That case is not helpful because it involved an attorney who was disbarred following his felony conviction for accepting referrals of fraudulent personal injury claims (Pen. Code, § 549), misconduct involving moral turpitude. As the facts demonstrate and OCTC concedes, the misconduct in *Oheb* is far more egregious than here.

7. Due to limited information and prior unsuccessful efforts to locate clients, we find the restitution provision recommended by the hearing judge is impractical (i.e., use due diligence for one year to pay clients and then pay remainder to CSF). The funds to CSF will be credited against any CSF payments to Smithwick's My US Legal clients.

tion required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's 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 shall not receive MCLE credit for attending Ethics School.

8. 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 period of probation, if he has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

If Smithwick remains suspended for 90 days or more for not satisfying the preceding restitution condition, we further recommend that he be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 120 and 130 calendar days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

We also recommend that Smithwick be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

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

WE CONCUR:

EPSTEIN, J.
PURCELL, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ANNA CHRISTINA YEE

A Member of the State Bar of California

[No. 12-O-13204]

Filed May 21, 2014

SUMMARY

Respondent, who had no prior record of discipline, was charged with one count of moral turpitude for reporting to the State Bar that she was in full compliance with her Minimum Continuing Legal Education (MCLE) requirements when she was not actually in compliance. The hearing judge found that respondent was grossly negligent in affirming her compliance and recommended a stayed suspension and probation. (Hon. Lucy Armendariz, Hearing Judge.)

The Office of the Chief Trial Counsel of the State Bar appealed seeking a 30-day actual suspension on the grounds that respondent intentionally misrepresented her MCLE compliance, caused significant harm to the administration of justice, and her factors in mitigation were not significant. The review department agreed with the hearing judge that respondent's inaccurate compliance report was a result of gross negligence amounting to moral turpitude, not intentional misrepresentation. The review department, however, found that the imposed discipline was excessive and reduced the level of discipline to a public reproval.

COUNSEL FOR PARTIES

For State Bar: Allen Blumenthal

For Respondent: Merri A. Baldwin

Gen Fujioka

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a,b] **221.12 Culpability—State Bar Act Violations—Section 6106 (moral turpitude, etc.)—Found—Gross negligence**

The requirement that attorneys submit an accurate MCLE compliance affirmation is essential to maintaining public confidence in the legal profession. Attorneys must accurately report compliance because the MCLE program is based on an honor system. Respondent was grossly negligent, and thereby culpable of an act of moral turpitude, when she affirmed her MCLE compliance without making any effort to confirm that she completed the required education and had the records to prove it.

[2] **130 Procedure on Review**
162.11 State Bar's burden of proof—clear and convincing standard
164 Proof of Intent

Where State Bar presented no evidence or witnesses to rebut respondent's testimony that her inaccurate report of her MCLE compliance was unintentional, and hearing judge declined to find that respondent acted intentionally, Review Department rejected argument that respondent's conduct intentionally misrepresented her MCLE compliance.

[3 a,b] **130 Procedure on Review**
586.50 Aggravation—Harm to administration of justice—Declined to find

Where State Bar did not argue at trial that respondent's inaccurate reporting of her MCLE compliance harmed administration of justice because State Bar expended resources to conduct investigation, it waived argument regarding this potential aggravating factor, and Review Department declined to consider it.

[4] **710.10 Mitigation—Long practice with no prior discipline record (1.6(a); 1986 Standard 1.2(e)(i))—Found**

Where respondent was a licensed attorney for 22 and one-half years before her misconduct, but she worked in non-attorney positions for 12 years, she was entitled to credit for 10 and one-half years of discipline-free practice, which is significant mitigation.

[5 a-c] **801.41 Deviation from standards—Found to be justified**
802.63 Effect of mitigation on appropriate sanction
835.50 Interim standard 2.7 (moral turpitude, etc.)—Declined to apply —Compelling mitigation
1092 Miscellaneous Substantive Issues re Discipline —Excessiveness of discipline

Where respondent's misconduct in inaccurately reporting her MCLE compliance was a one-time error, she had a long period of practice with no discipline, and an exemplary record of pro bono and community service, and she caused no harm to the public or the judicial system, and where, most significantly, she immediately accepted responsibility, rectified the situation, and implemented a corrective plan to avoid future problems. It was appropriate under these unique circumstances to deviate from the standard calling for disbarment or actual suspension for acts of moral turpitude. Even a 30-day actual suspension was excessive; public reproval was adequate to serve the goals of attorney discipline.

[6] **801.11 Effective date/retroactive application of interim Standards**

Where case was submitted to Review Department after amendments to standards became effective January 1, 2014, and amendments did not conflict with former standards, Review Department applied amended version.

ADDITIONAL ANALYSIS

Mitigation

Found

735.10	Candor and cooperation with Bar (1.6(e); 1986 Standard 1.2(e)(v)])
740.10	Good character references (1.6(f); 1986 Standard 1.2(e)(vi)])
745.10	Remorse/restitution/atonement (1.6(g); 1986 Standard 1.2(e)(vii)])
765.10	Substantial pro bono work

Discipline

1045	Public Reproval—Without conditions

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OPINION

PURCELL, J.:

This case demonstrates the consequences of an attorney's failure to accurately report compliance with Minimum Continuing Legal Education (MCLE) requirements to the State Bar.

A hearing judge recommended that respondent Anna Christina Yee be disciplined for affirming her MCLE compliance when, in fact, she had not taken any courses during the relevant reporting period. Yee mistakenly recalled that she had completed the courses, and did not check or maintain any records to confirm if her recollection was accurate. When randomly audited by the State Bar, she corrected her error and submitted proper proof of compliance. The Office of the Chief Trial Counsel of the State Bar (OCTC) charged Yee with committing an act of moral turpitude by making an intentional misrepresentation or by gross negligence. The hearing judge found her culpable based on gross negligence, and recommended a stayed suspension and probation.

OCTC appeals, seeking a 30-day actual suspension. It argues: (1) Yee intentionally misrepresented her MCLE compliance; (2) harm to the State Bar is an aggravating factor; and (3) Yee's mitigation is not significant. Yee did not appeal.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we agree with the hearing judge that Yee's inaccurate compliance report was the result of gross negligence amounting to moral turpitude; it was not an intentional misrepresentation. However, we believe a stayed suspension and probation is excessive discipline. Yee's wrongdoing was an aberrational event during her 22-year unblemished legal career, and she proved five factors in mitigation while OCTC proved none in aggravation. Further, Yee accepted responsibility for her misconduct and revised the way she tracks her MCLE proof of compliance. Accordingly, she poses no threat to the public, nor is a suspension or probation necessary to reinforce her understanding of her future ethical obligations. Even so, public discipline is necessary to make clear to Yee, members of the State Bar, and the public that attorneys face serious consequences for failing to accurately report compliance with their MCLE requirements.[1] We order that Yee be publicly reproved.

I. FACTS[2]

Yee was admitted to the Bar in California in 1988. She has worked in non-attorney positions for several years and does not currently practice law. Because she maintains active membership with the State Bar, she must complete 25 MCLE hours every three years.

On January 31, 2011, Yee submitted her MCLE compliance card online for the period from February 1, 2008 to January 31, 2011. She marked it: "I affirm the following . . . I have complied with the 25-hour MCLE requirement." The online reporting process required her to "review and confirm," and "verify" the information before submitting it. The instructions further directed her to: "Retain your proof of compliance (certificates or attendance, etc.) for at least one year in case you are audited. The State Bar does not keep a record of your MCLE courses. It is your responsibility to maintain your own MCLE records."[3]

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1. The Supreme Court adopted California Rules of Court, rule 9.58 (renumbered as rule 9.31, effective January 1, 2007), which authorized the State Bar to establish and administer a "minimum continuing legal education program." Rules of the State Bar of California, title 2, Rights and Responsibilities of Members, rules 2.50-2.93 are the State Bar's governing rules for its MCLE program. All further references to rules are to this source unless otherwise noted.

2. Yee entered a stipulation as to facts and admission of all documents. We summarize those undisputed facts as well as the hearing judge's factual findings. (Rules Proc. of State Bar, rule 5.155(A) [hearing judge's fact findings entitled to great weight]; *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 315.)

3. We take judicial notice of the *current* online compliance card that requires an attorney to verify MCLE compliance under penalty of perjury rather than by affirmation. (Evid. Code, §§ 452, subd. (h), 459, subd. (a).)

In October 2011, State Bar Member Services notified Yee that she had been randomly selected for an audit and requested proof of her MCLE compliance. Yee's practice had been to take a 25-hour bundle of online courses and store the attendance certificates on her computer. But when she checked after receiving the State Bar audit notification, she could not find her attendance records. Nor could she recall the name of the course provider or locate evidence showing she paid for any courses. Subsequently, in February 2012, Yee completed a 25-hour bundle of online courses, submitted proof to the State Bar Membership Records, and paid a $75 late fee.

Thereafter, OCTC began an investigation. On May 3, 2012, an investigator wrote to Yee requesting that she provide proof of completion of the MCLE courses listed in her compliance statement. Yee could not, and responded: "At the time I made the affirmation, I recalled and believed that I had complied. In reviewing my records, I now believe that I made a mistake." She explained, "I transitioned to a new job in mid-February 2009 and recall that I took classes prior to starting my new job. . . . I cannot find a record of those classes. [¶] . . . [¶] . . . [I]t is possible that I may have confused classes that I took to satisfy the prior compliance period with the current . . . period." Yee acknowledged that "my records were and are lacking" and accepted responsibility for her "error in memory and recordkeeping." She detailed corrective actions to avoid future problems, including "completing 13.5 credits on March 21-23, 2012 of the necessary 25 credits that will count toward my 2015 compliance reporting period" and "improving my recordkeeping for MCLE credits by keeping a concrete paper folder and not simply email and electronic records."

In October 2012, OCTC filed this disciplinary action. At trial, Yee admitted that she did not verify her records before submitting the compliance card, and testified that she regrets her conduct: "I wish I had checked my records before I submitted the form. If I had done that, I would have found out that I couldn't find my records, and then I would have done something about that." However, she explained she had a "vivid" recollection and a "distinct memory of doing my MCLE's" based on the young age of her children at the time, who were in the room while she took the online courses. She also presented evidence that she lost all data stored on her hard drive in 2009 due to a computer crash. Yee's 20-year partner corroborated her testimony.

II. CULPABILITY

The Notice of Disciplinary Charges (NDC) charged one count alleging a violation of Business and Professions Code section 6106, which provides: "The commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension."[4] OCTC alleged that Yee reported to the State Bar that she was in full compliance with the MCLE requirements when she knew, or was grossly negligent in not knowing, that she was not in compliance. The hearing judge found her culpable of moral turpitude based on gross negligence, not intentional misrepresentation. We agree.

A. Yee's Failure to Accurately Report MCLE Compliance Was an Act of Moral Turpitude by Gross Negligence

The Supreme Court has held that gross negligence amounts to moral turpitude when there "is a breach of the fiduciary relationship that binds an attorney to the most conscientious fidelity to the interests of his client." (*Lowe v. State Bar* (1953) 40 Cal.2d 564, 570.) In *Call v. State Bar* (1955) 45 Cal.2d 104, 109, the Court noted that "[s]ome cases have said that gross negligence involves moral turpitude in that such conduct is a breach of his fiduciary duty, but in each instance there was a misrepresentation or other improper action, and the statements must be read in light of the additional facts."[5] Cases

4. All further references to sections are to this source.

5. *Stephens v. State Bar* (1942) 19 Cal.2d 580, 582-583 (false representations); *Trusty v. State Bar* (1940) 16 Cal.2d 550, 553-554 (misrepresentations); *Waterman v. State Bar* (1936) 8 Cal.2d 17, 20 (habitual neglect and violation of Rules of Professional Conduct).

that followed *Call* concluded that gross negligence constituted moral turpitude where an attorney breached his fiduciary duty owing to a particular individual. (See, e.g., *Grove v. State Bar* (1967) 66 Cal.2d 680, 683-684 [habitual disregard of clients' interest through gross negligence is moral turpitude].) However, the Supreme Court has not excluded circumstances where gross negligence may affect the public in general. (*Vaughn v. State Bar* (1972) 6 Cal.3d 847, 859 [attorney's grossly negligent supervision of office staff amounted to moral turpitude; Supreme Court noted: "In some instances, as in the matter before us, an attorney's gross negligence may also affect non-clients with whom he deals or even the public generally"].)

[1a] Requiring attorneys to submit accurate MCLE compliance affirmations is essential to maintaining public confidence in the legal profession. "The aim of continuing legal education is to provide continuing assurance to the public that all California attorneys, no matter how many years may have passed since their law school graduation and State Bar admission, have the knowledge and skills to provide their clients with high quality legal services." (*Warden v. State Bar* (1999) 21 Cal.4th 628, 654 (dis. opn. of Kennard, J.).) Attorneys must accurately report compliance because the MCLE program is based on an honor system where random audits serve as the only enforcement check. In turn, the State Bar relies on self-reporting by attorneys to accurately represent to the public, the courts, and other members of the Bar that they are eligible to practice law.[6]

[1b] The record reveals that Yee *affirmed* her MCLE compliance without making any effort to confirm its accuracy. (See § 20 ["'oath' includes affirmation"]; Black's Law Dict. (8th ed. 2004) p. 64, col. 1 [to declare by affirmation means to "solemnly declare rather than swear under oath"].) Like other solemn declarations, an affirmation gives "the additional imprimatur of veracity," and reasonably notifies others that the statements are true and complete. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 786 [describing impression given by pleadings signed under penalty of perjury].) Yee's compliance statement represented not only that she completed the required education but that she also had the records to prove it.[7] In fact, neither was true. Given the importance to the public that attorneys have current knowledge and skill through continuing education, we find that Yee's failure to verify her MCLE compliance before affirming it constitutes gross negligence amounting to moral turpitude for discipline purposes. Unlike our dissenting colleague, we believe case law supports our finding. (See, e.g., *Sanchez v. Bar* (1976) 18 Cal.3d 280, 283-285 [gross negligence amounting to moral turpitude where attorney who knew client's case was in danger of dismissal inaccurately reported case status to client without first checking client's file]; *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 155 [gross negligence amounting to moral turpitude where attorney filed verification his clients were out of county without first confirming that fact].)

B. Yee Did Not Intentionally Misrepresent Her MCLE Compliance

[2] We reject OCTC's argument that Yee intentionally misrepresented her MCLE compliance. The hearing judge, who saw and heard Yee testify, concluded: "the court has not heard clear and convincing evidence that respondent intentionally misrepresented the status of her MCLE compliance." Since OCTC did not present evidence or witnesses to rebut Yee's testimony, "[w]e are reluctant, therefore, to ascribe to [Yee] a specific intent to deceive when the hearing judge who considered [her] testimony and that of other witnesses found none." (*In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9, 15; see *In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 241 [great weight afforded to hearing judge's findings on respondent's intent, state of mind, and reasonable beliefs].)

6. A member who fails to comply with a notice of noncompliance is administratively enrolled as inactive without a hearing and is not eligible to practice law. (Rule 2.92.) Enrollment as inactive terminates when the member submits proof of MCLE compliance and pays a noncompliance fee. (Rule 2.93.)

7. Rule 2.90 defines noncompliance as failure to: (a) complete the required education during the compliance period or an extension of it; (b) report compliance or claim exemption from MCLE requirements; (c) keep a record of MCLE compliance; or (d) pay fees for noncompliance. Further, rule 2.73 requires attorneys to keep a copy of their MCLE courses for a year after they report compliance and to provide it to the State Bar upon demand.

III. AGGRAVATION AND MITIGATION

OCTC must establish aggravating circumstances by clear and convincing evidence under standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.[8] Yee has the same burden to prove mitigation. (Std. 1.6). The hearing judge found no aggravation, and credited Yee for five mitigating factors. We agree and find Yee's overall mitigation to be compelling.

A. No Aggravating Factors

[3a] OCTC did not argue any factors in aggravation at trial. On review, it contends that Yee's misconduct caused significant harm to the administration of justice because OCTC expended resources to conduct an investigation. (Std. 1.5(f).) We reject this contention.

[3b] The record does not establish significant harm to OCTC, particularly since Yee immediately acknowledged her wrongdoing to the investigator, submitted proof of compliance, and paid a late fee. Further, section 6086.10 permits OCTC to recover its costs. But most importantly, OCTC waived the issue on review by failing to claim harm as an aggravating factor at trial. (See *Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 422-423 [points not raised in trial court not considered on appeal]; *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, 589 [OCTC's request for finding in aggravation denied when raised for first time on review].)

B. Five Mitigating Factors

[4] *1. No Prior Record of Discipline (Std. 1.6(a))*

Standard 1.6(a) permits mitigation for the absence of any prior record of discipline over many years of practice. Yee was a licensed attorney for 22 and one-half years before she committed misconduct. Since she worked in non-attorney positions for 12 years, we credit her with 10 and one-half years of discipline-free practice, which is a significant mitigating factor. (*In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 177 [appropriate to depreciate years of practice by time not spent practicing law]; *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [significant weight for more than ten years of practice].)

2. Candor/Cooperation (Std. 1.6(e))

Spontaneous candor and cooperation with the State Bar is a mitigating circumstance. (Std. 1.6(e).) Yee is entitled to mitigation credit for admitting her misconduct to the investigator before trial and at the hearing below, and for stipulating to certain facts and to admission of all exhibits. (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50 [stipulation to relevant facts assists prosecution and is mitigating].)

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

Standard 1.6(f) permits 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." Eleven witnesses from varied backgrounds testified about Yee's many qualities, but particularly her character for honesty. Most witnesses knew her personally or professionally for more than a decade, and described her as driven, honest, and trustworthy to a fault. These witnesses included six chief executives from private institutions, a reverend, a former member of the State Bar Board of Trustees, a pro tem judge, and two attorneys. The quality and quantity of Yee's character evidence warrants significant mitigating weight, especially because we give serious consideration to the testimony of attorney and judge witnesses who have a "strong interest in maintaining the honest administration of justice." (*In the Matter of Brown, supra,* 2 Cal. State Bar Ct. Rptr. at p. 319.)

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8. All further references to standards are to this source.

4. Remorse/Recognition of Wrongdoing (Std. 1.6(g))

"[P]rompt objective steps, demonstrating spontaneous remorse and recognition of the wrongdoing" is entitled to mitigation. (Std. 1.6(g).) Yee acknowledged that her MCLE attendance records were lacking. She also changed her record-keeping practices, and stated that she "significantly regrets and intends never to repeat" her mistake. We assign mitigation credit to Yee's remorse and recognition of wrongdoing.

5. Pro Bono Work and Community Service

Pro bono work and community service may mitigate an attorney's misconduct. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) We agree with the hearing judge that Yee's extensive community service is compelling mitigation. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 667 [mitigation assigned for demonstrated legal abilities and zeal in undertaking pro bono work].)

Several witnesses corroborated Yee's testimony about her longstanding commitment to the public. Since the mid-1990s, Yee has volunteered to better the quality of life in neglected communities. She sits on numerous non-profit boards of organizations endeavoring to improve community welfare, child development, employment, and affordable housing. She has also provided pro bono services with the Volunteer Legal Services Referral Panel and has worked with the Asian Pacific Islander Wellness Center, the San Francisco Enterprise Community Board, and the Mayor's Welfare Reform Task Force. Even her career path for more than a decade has involved public service work on issues of community development for low-income and vulnerable communities.

IV. 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.) We begin with the standards, which the Supreme Court instructs us to follow whenever possible. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) But they do not mandate a particular discipline (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994), nor must they be followed in "talismanic fashion." (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Instead, we balance all relevant factors, including aggravation and mitigation, on an individual case basis. (*Sugarman v. State Bar* (1990) 51 Cal.3d 609, 618.)

[5a] Standard 2.7 is most applicable to Yee's misconduct. It instructs that "[d]isbarment or actual suspension is appropriate for an act of moral turpitude" and that the "degree of sanction depends on the magnitude of the misconduct and the extent to which the misconduct harmed or misled the victim and related to the member's practice of law."[9] OCTC urges us to recommend a 30-day suspension under standard 2.7, but offers no California case that addresses the standard's application to the unique factual circumstances before us.

[5b] Considering these circumstances, we find that a lesser discipline than called for in standard 2.7 is appropriate. As to Yee's wrongdoing, her failure to accurately report MCLE compliance was a one-time error, although it was related to the practice of law. As to other relevant considerations, we note that Yee maintained an active law practice for 10 and a half years without discipline, has an exemplary record of pro bono and community service, and her misconduct caused no harm to the public or the judicial system. But the most significant feature of this case is that Yee immediately accepted responsibility for her wrongdoing, rectified the situation, and implemented a corrective plan to avoid future problems.

9. **[6]** Effective January 1, 2014, standard 2.7 replaced standard 2.3. Since this case was submitted after the effective date, we apply the new version. The amendments do not conflict with the former standards.

[5c] Standard 1.7(c) provides that a lesser discipline than called for in the applicable standard is appropriate in "cases of minor misconduct, where there is little or no injury to a client, the public, the legal system, or the profession and where the record demonstrates that the member is willing and has the ability to conform to ethical responsibilities in the future." Such are the circumstances here. Given Yee's compelling mitigation, the lack of aggravating circumstances, and her genuine recognition of wrongdoing, a public reproval will adequately serve the goals of attorney discipline and at the same time inform the public and members of the State Bar that failing to comply with MCLE requirements may result in discipline.[10]

V. ORDER

Anna Christina Yee is ordered publicly reproved, effective on the date our opinion in this matter becomes final. (Rules Proc. of State Bar, rule 5.127(B).)

VI. COSTS

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

I CONCUR:

EPSTEIN, J.

REMKE, P. J.

I respectfully dissent.

The sole issue is whether an attorney who *honestly but mistakenly* affirms compliance with her Minimum Continuing Legal Education (MCLE) requirements committed an act of moral turpitude subject to attorney discipline. Based on the record in this case, the answer is no.

I agree with the majority and the hearing judge that Anna Christina Yee did not intentionally misrepresent her compliance with the MCLE requirements, but disagree with the conclusion that her "inaccurate compliance report was the result of gross negligence amounting to moral turpitude." As stated by our Supreme Court and cited by the majority, "[s]ome cases have said that gross negligence involves moral turpitude in that such conduct is a breach of his fiduciary duty, but in each instance there was a misrepresentation or other improper action, and the statements must be read in light of the additional facts." (*Call v. State Bar* (1955) 45 Cal.2d 104, 109.) In this case, no such additional facts render Yee's conduct an act of *moral turpitude*, e.g., fraud, dishonesty, or an intentional breach of a duty owed to a client. (*Ibid*; see *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 321 [attorney's misappropriation constituted rule violation but not Bus. & Prof. Code, § 6106 violation where no dishonesty].)

Yee mistakenly recalled that she had completed the MCLE courses. When randomly audited by the State Bar, she admitted her mistake, corrected her error, and submitted proper proof of compliance. In other words, the process worked. To turn this matter into a discipline case, and worse yet, a case of moral turpitude, is a disservice to the attorney discipline system. Accordingly, I would dismiss this proceeding.

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10. Comparable case law supports a public reproval as the proper discipline. (See *Gendron v. State Bar* (1983) 35 Cal.3d 409 [public reprimand where attorney was grossly negligent amounting to moral turpitude for failing to investigate and declare conflicts in criminal case; 30-year discipline-free record weighed heavily]; *Vaughn v. State Bar*, *supra*, 6 Cal.3d 847 [public reproval where attorney was grossly negligent amounting to moral turpitude for failing to supervise work of associate attorney and clerical staff]; see also *Kentucky Bar Ass'n. v. Keesee* (Ky. 1995) 892 S.W.2d 578 [public reprimand where attorney earned only 5 of 15 MCLE credits, ignored notices, and did not seek extension to complete his MCLE requirements]; *In re Shelhorse* (Mo. 2004) 147 S.W.3d 79 [public reprimand where attorney failed to comply with MCLE requirements or respond to inquiries by disciplinary authorities; no prior disciplinary history and misconduct did not directly harm client or public].)

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

KENNETH BRUCE TISHGART

A Member of the State Bar

[Nos. 12-O-12598 (12-O-13571)]

Filed October 22, 2014

SUMMARY

In his fourth disciplinary proceeding, respondent was charged with engaging in the unauthorized practice of law, and committing acts of moral turpitude by holding himself out as entitled to practice law while suspended. The hearing judge found respondent culpable and recommended his disbarment since he had no mitigation and three prior records of discipline. (Hon. Patrice E. McElroy, Hearing Judge.)

Respondent appealed seeking a reversal of the hearing judge's decision on the ground that it was not supported by evidence, particularly since his actions during suspension followed the advice of counsel. The review department adopted the hearing judge's culpability findings and conclusions, but assigned respondent mitigation credit for his stipulation. The review department concluded that in view of respondent's current misconduct and prior disciplinary record, disbarment was appropriate under standard 1.8(b), which replaced former standard 1.7(b).

COUNSEL FOR PARTIES

For State Bar: Cydney T. Batchelor

For Respondent: Kenneth Bruce Tishgart

HEADNOTES

[1 a-c] **213.10 Culpability—State Bar Act Violations—Section 6068(a) (support Constitution and laws)**
230.00 Culpability—State Bar Act Violations—Section 6125 (practice of law while not active member)
231.00 Culpability—State Bar Act Violations—Section 6126 (unauthorized practice-misdemeanor)

Where an attorney's actions, taken as a whole, create a false impression of ability to practice law while on suspension, this constitutes unauthorized practice of law in violation of Business and Professions Code sections 6125 and 6126, upon which is predicated a violation of section 6068, subdivision (a). Here, respondent paid for television advertisements, recorded voice messages for the law office, failed to provide a disclaimer in the advertisements and voice messages that he was not entitled to practice law, failed to identify any other attorney as working for the law office, maintained a website for the law office that described his abilities and qualifications as an attorney, took no steps to correct the false impression of an insurance company and chiropractor as to his status as an attorney, and failed to ensure that no stationary identifying him as an attorney was used by the law office where he worked.

[2] **213.10 Culpability—State Bar Act Violations—Section 6068(a) (support Constitution and laws)**
230.00 Culpability—State Bar Act Violations—Section 6125 (practice of law while not active member)
231.00 Culpability—State Bar Act Violations—Section 6126 (unauthorized practice-misdemeanor)

The practice of law embraces a wide range of activities, including giving legal advice and preparing documents to secure legal rights. Where, during disciplinary suspension, respondent told a client he would take her case; communicated with Medicare and an insurance company on the client's behalf; negotiated a settlement, and endorsed a settlement check, these actions constituted the practice of law, and established respondent's culpability of unauthorized practice.

[3] **162.20 Standards of Proof/Standards of Review—Respondent's burden in disciplinary matters**
204.90 Culpability—Other general substantive issues re culpability
230.00 Culpability—State Bar Act Violations—Section 6125 (practice of law while not active member)
231.00 Culpability—State Bar Act Violations—Section 6126 (unauthorized practice-misdemeanor)

The opinion of another attorney is not a defense to a violation of the rules or statutes governing attorney ethics. Where respondent claimed to have followed the advice of ethics counsel regarding permissible conduct during his suspension, but in fact continued to use his designation as an attorney in advertisements and on his website and stationery, totality of evidence left no doubt that respondent engaged in the unauthorized practice of law while suspended.

[4] **221.11 Culpability—State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)—Found—Deliberate dishonesty/fraud**

Attorney's concealment of his suspension or creation of false impression of present ability to practice when consulted by a former client seeking representation is an act of moral turpitude in violation of Business and Professions Code section 6106.

[5 a-c] **801.11 Effective date/retroactive application of interim Standards**
801.45 Deviation from standards—Found not to be justified
806.10 Application of Standards—Standard 1.8(b)—Disbarment after two priors —Applied

Although former standard 1.7(b) was amended and replaced by standard 1.8(b), disbarment was warranted under both former and new standards, where respondent had two instances of prior discipline, and failed to present compelling mitigation. Respondent committed his current misconduct while under actual suspension and on probation for prior disciplinary matters. His continued poor performance after multiple discipline, inability and unwillingness to conform to his ethical responsibilities, and lack of compelling mitigation warranted imposition of the presumptive discipline of disbarment under standard 1.8(b).

ADDITIONAL ANALYSIS

Culpability
Found
213.11 Section 6068(a) (support Constitution and laws)
Not Found
253.15 False/misleading communication (RPC 1-400(D); 1975 RPC 2-101(A))
270.35 Intentional/reckless/repeated incompetence (RPC 3-110(A); 1975 RPC 6-101(A)(2)/(B))

Aggravation
Found
511 Prior record of discipline (1.5(a); 1986 Standard 1.2(b)(i))
521 Multiple acts of misconduct (RPC 3-110(A); 1975 RPC 6-101(A)(2)/(B))

Mitigation
Found but discounted or not relied on
735.30 Candor and cooperation with Bar (1.6(e); 1986 Standard 1.2(e)(v))

Discipline
1010 Disbarment

Other
2311 Involuntary inactive enrollment following disbarment recommendation —Imposed

OPINION

HONN, J.

This is the fourth disciplinary proceeding for Kenneth Bruce Tishgart. In this latest matter, a hearing judge found that Tishgart engaged in the unauthorized practice of law (UPL) and committed acts of moral turpitude by holding himself out as entitled to practice law while he was on disciplinary suspension. Because Tishgart had no mitigation and three prior records of discipline, the hearing judge recommended disbarment.

Tishgart seeks review and contends that the hearing judge's findings and conclusions are not supported by the evidence, particularly since he followed the advice of ethics counsel "to the letter" while suspended. He asserts he is "not guilty of any of the charges brought," and urges that the hearing judge's "decision requires reversal." The Office of the Chief Trial Counsel of the State Bar (OCTC) did not seek review but asks that we uphold the disbarment recommendation.

Based on our independent review of the record (Cal. Rules of Court, rule 9.12), we adopt the hearing judge's findings and conclusions that Tishgart engaged in UPL and committed acts of moral turpitude while on disciplinary suspension. We assign some mitigation credit for Tishgart's stipulation, but, in view of the present misconduct and Tishgart's prior disciplinary record, we recommend that he be disbarred to protect the public, the courts, and the legal profession.

I. BACKGROUND

Tishgart was admitted to practice law in California in December 1980. His three previous records of discipline resulted in a public reproval in 1992, a 90-day actual suspension in 2010, and an 18-month actual suspension in 2011. The orders from the second and third disciplines led to his continuous suspension from the practice of law since July 25, 2010.

On September 25, 2012, OCTC filed the Notice of Disciplinary Charges (NDC) in the present case, charging Tishgart with five counts of misconduct in two client matters. In the first matter (Case No. 12-O-12598), Tishgart was charged with one count each of UPL and misleading advertising in violation of Business and Professions Code section 6068, subdivision (a),[1] rule 1-400(D) of the Rules of Professional Conduct, rule 1-400(D),[2] and two counts of acts involving moral turpitude for engaging in UPL and misleading advertising in violation of section 6106. The hearing judge dismissed the charges for misleading advertising and moral turpitude on the ground that rule 1-400(D) did not apply to suspended attorneys or was duplicative of the UPL charges. In the second matter (Case No. 12-O-13571), Tishgart was alleged to have failed to perform with competence in violation of rule 3-110(A). The hearing judge dismissed the incompetence charge for lack of adequate notice and insufficient evidence. On review, OCTC does not challenge the dismissals, and we affirm them.

II. FACTS

Prior to his suspension in July 2010, Tishgart consulted with ethics counsel for "suspension planning." Counsel advised Tishgart that while suspended, he may not give legal advice; proceed under the firm name "The Law Offices of Kenneth B. Tishgart;" use stationery bearing that name; and use his likeness or voice in any capacity as an attorney. Ethics counsel also informed Tishgart that he could work in a law office, but only if it was operated by another licensed attorney and Tishgart's non-attorney capacity was clearly indicated.

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1. All further references to sections are to this source.

2. All further references to rules are to this source unless otherwise noted.

Nevertheless, as Tishgart stipulated, he paid for television advertisements while suspended that aired throughout 2011 to June 2012. These ads were broadcasted over 70 times, encouraging accident victims to call the "Tishgart Law Office" and referencing a telephone number with a recording of Tishgart's voice message. That message confirmed to the caller that he or she had reached Tishgart, who would be returning the call. The telephone number was the same number previously used by "The Law Offices of Kenneth B. Tishgart." No disclaimer stated that Tishgart was suspended or not entitled to practice law. No other attorney with the name Tishgart worked at the "Tishgart Law Office" at the time. There was no mention of Zach Nethercot, who was the licensed attorney hired to operate the Tishgart Law Office while Tishgart was under suspension.

Tishgart also stipulated that he maintained a website with the address www.tishgartlaw.com on the Internet from June 25, 2012 to March 5, 2013. Each of the website's two pages had the caption "Ken Tishgart [¶] Attorney at Law." The first page described Tishgart as a skilled attorney with experience representing individuals injured in premises liability cases.[3] The second page instructed: "Contact the office of Kenneth Tishgart at (800) 696-3396 or by email at [sic] to arrange for a consultation to determine the strength of your case." The bottom of the page stated: "©2010 Kenneth B. Tishgart Attorney at Law – California Personal Injury Lawyers – serving the communities of California . . . ."

In addition, Tishgart agreed in January 2011 to represent a former client, Rebecca Anne Deleon Ambrosio, in a car accident case without informing her of his suspension or that the firm was being operated by Nethercot. Tishgart had her sign a Fee and Representation Agreement that also did not include either fact. Despite Nethercot's signature on the agreement, Ambrosio believed she had retained Tishgart as her attorney. On Ambrosio's behalf, from January 2011 through February 2012, Tishgart corresponded with Farmers Insurance, the defendant's insurance company, and with Douglas R. Patterson, D.C., who was Ambrosio's treating chiropractor. Tishgart never disclosed that he was suspended or that Nethercot was representing Ambrosio in his stead. In March 2012, Tishgart negotiated a settlement for Ambrosio and endorsed the settlement check made payable to Ambrosio and the Law Offices of Kenneth B. Tishgart.

Ambrosio testified that she did not know that Tishgart was suspended until she initiated an Internet search of his name in 2012, nor did she have any knowledge of Nethercot. She denied that she received letters from Tishgart in January 2011 and October 2011 purportedly informing her of Tishgart's suspension. Throughout the case, she referred to Tishgart as her attorney in her correspondence with various parties.

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3. Under the heading "Practice Areas" and subheading "Premises Liability," the website's first page stated:

If you have been seriously injured as the result of a premises liability accident in California, it is important that you contact an experienced premises liability lawyer to protect your rights. Skilled California slip and fall accident attorney Kenneth Tishgart is dedicated to representing clients who have suffered bodily injuries as a result of negligence on the part of property owners. If you have been the victim of a premises liability injury in the state of California, contact Tishgart Law Office for a free consultation.

III. CULPABILITY

We adopt the hearing judge's conclusion that Tishgart violated section 6068, subdivision (a),[4] by engaging in UPL in contravention of sections 6125 and 6126,[5] and committed acts of moral turpitude prohibited by section 6106.[6]

A. Violation of Section 6068, Subdivision (a), for Engaging in UPL

An attorney on "actual suspension" is disqualified from the practice of law and from holding himself or herself out as entitled to practice during the suspension period. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1);[7] *Arm v. State Bar* (1990) 50 Cal.3d 763, 775.) Accordingly, a suspended attorney commits UPL by holding himself or herself out as practicing or as entitled to practice law. (*Crawford v. State Bar* (1960) 54 Cal.2d 659, 666.) "Both express and implied representations of ability to practice are prohibited. [Citation.]" (*In re Naney* (1990) 51 Cal.3d 186, 195.)

[1b] We find clear and convincing evidence[8] that Tishgart is culpable of UPL by giving a false impression of his ability to practice law when he: (1) paid for television advertisements between 2011 and June 2012 for "Tishgart Law Office" and referenced the same telephone number he used for the "Law Offices of Kenneth B. Tishgart;" (2) recorded his voice message for Tishgart Law Office informing the caller that he or she had reached Tishgart, who would return the call; (3) failed to provide a disclaimer in the advertisement or voice message that he was not entitled to practice law; (4) failed to identify Nethercot or any other licensed attorney in the advertisement or voice message; (5) maintained a website with the heading "Ken Tishgart, Attorney at Law" that described his abilities, qualifications, and contact information as an attorney, and encouraged the public to "[c]ontact the office of Kenneth Tishgart" for a consultation; (6) did not inform Ambrosio that he was not entitled to practice law; (7) took no steps to correct the false impression Farmers Insurance and Ambrosio's chiropractor had that he was Ambrosio's attorney; and (8) failed to ensure that the Tishgart Law Office used no stationery that identified him as an attorney.

[1c] Taken as a whole, these acts create a false impression that Tishgart had the ability to practice law while he was on suspension. "[A]n attorney cannot expressly or impliedly create or leave undisturbed the false impression that he or she has the present or future ability to practice law when in fact he or she is or will be on suspension." (*In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar. Ct. Rptr. 83, 91 [suspended attorney created false impression of present ability to practice by using terms "Member, State Bar of CA" and honorific "ESQ." next to his signature on job application].)

[2] In addition, Tishgart actually practiced law while on suspension. Ambrosio testified that "[h]e said that he's going to take my case" during their initial conversation about her accident. Tishgart then communicated with Medicare and Farmers Insurance on her behalf, negotiated her settlement, discussed it with Ambrosio, and endorsed the reissued settlement check from Farmers Insurance. The practice of law embraces a wide range of activities,

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

5. **[1a]** A violation of section 6068, subdivision (a), is predicated on violations of sections 6125 and 6126. (*In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 236-237.) Section 6125 provides: "[n]o person shall practice law in California unless the person is an active member of the State Bar." Section 6126 prohibits an individual who is not an active member of the State Bar from holding himself or herself out as entitled to practice law.

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

7. All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

8. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

including giving legal advice and preparing documents to secure legal rights. (*People v. Merchants Protective Corp.* (1922) 189 Cal. 531, 535.) Tishgart's actions constitute the actual practice of law, which independently establishes his UPL. (See *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 543 [activity constitutes practice of law if it involves application of legal knowledge and technique]; *Farnham v. State Bar* (1976) 17 Cal.3d 605, 612 [suspended attorney committed UPL by informing client he would accept his case and prepare complaint].)

[3] Tishgart maintains that he is not culpable of engaging in UPL because he followed the advice of ethics counsel. However, the opinion of another attorney is not a defense to a violation of the rules or sections governing attorney ethics. (*Sheffield v. State Bar* (1943) 22 Cal.2d 627, 632 [opinion of "fellow attorney" no defense to wrongdoing].) Moreover, Tishgart did not follow the ethics counsel's advice since he continued to use his designation as an attorney in television advertisements, a website marketing his legal services, and on his stationery. The totality of the evidence in this case leaves no doubt that Tishgart engaged in UPL. (See *Crawford v. State Bar, supra,* 54 Cal.2d at p. 669 ["The individual acts . . . are not necessarily determinative. A consideration of the entire pattern of conduct is necessary"].)

B. Violation of Section 6106 by Engaging in UPL

[4] Section 6106 provides that an act involving moral turpitude "constitutes a cause for disbarment or suspension." Moral turpitude "includes creating a false impression by concealment as well as affirmative misrepresentations." (*In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 910; see *Grove v. State Bar* (1965) 63 Cal.2d 312, 315 [for purposes of moral turpitude there is no distinction between concealment, half-truth, and false statement of fact].) The hearing judge found Tishgart culpable of moral turpitude.

Tishgart claims that Ambrosio's testimony denying knowledge of his suspension is not believable since evidence showed that two letters he claimed he sent to Ambrosio informed her of his suspension and the fee agreement she signed bore Nethercot's signature. However, the hearing judge found that Ambrosio credibly testified that she only found out that Tishgart was suspended when she searched for his name on the Internet in February 2012. Despite Tishgart's claim on review that Ambrosia was a "confused and self-contradicting witness," the hearing judge's credibility determination to the contrary is entitled to great weight. (See *Conner v. State Bar* (1990) 50 Cal.3d 1047, 1055 [credibility determinations made by judge who heard and saw witness entitled to great weight]; see also Rules Proc. of State Bar, rule 5.155(A) [hearing judge's findings of fact entitled to great weight on review].)

We agree with the hearing judge's finding of moral turpitude.[9]

IV. AGGRAVATION AND MITIGATION

Standard 1.5, Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, requires OCTC to establish aggravating circumstances by clear and convincing evidence.[10] Standard 1.6 requires Tishgart to meet the same burden to prove mitigation.

A. Aggravating Circumstances

The hearing judge found two factors in aggravation based on Tishgart's prior records of discipline and multiple acts of misconduct. We agree.

1. Three Prior Records of Discipline (Std. 1.5(a))

We consider Tishgart's prior records of discipline as significant aggravation, particularly since he committed the present misconduct while still on suspension and probation. (*In the Matter of Bouyer*

9. Having independently reviewed all arguments set forth by Tishgart, those not specifically addressed have been considered and rejected as having no merit.

10. All further references to standards are to this authority.

(Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 888, 892-893 [record of three prior disciplines was serious aggravating factor].)

TISHGART I (1992 PUBLIC REPROVAL)

In October 1992, Tishgart was publicly reproved for violating rule 5-200(A).[11] He stipulated that while he was representing a defendant in an eviction proceeding in October 1989, he obtained a three-day stay of the writ of execution of eviction that the municipal court inadvertently signed after an ex parte application. Despite the court's contrary order denying the stay after the noticed hearing, Tishgart filed the three-day stay of the writ of execution with the court clerk and presented it to the Sheriff's Office to stop defendant's eviction. Tishgart was given mitigation for no prior record of discipline, candor and cooperation, and severe stress due to serious personal matters. In aggravation, Tishgart was found to have harmed the effective administration of justice.

TISHGART II (2010 90-DAY SUSPENSION)

On June 25, 2010, the Supreme Court ordered Tishgart suspended from the practice of law for two years, stayed, and placed him on probation for two years on the condition that he be actually suspended for 90 days. Tishgart was found to have violated rule 3-110(A)[12] by failing to competently perform legal services in two client matters between July 2004 and December 2005. In the first matter, Tishgart failed to supervise an inexperienced contract attorney, who was unprepared for trial, resulting in the dismissal of the case. In the second matter, the client's case was dismissed because Tishgart failed to prosecute the matter, appear for hearings, and pay sanctions. His prior public reproval, multiple acts of misconduct, and harm to clients were considered as aggravation. There were no mitigating factors.

TISHGART III (2011 18-MONTH SUSPENSION)

On February 2, 2011, the Supreme Court ordered Tishgart suspended from the practice of law for four years, stayed, and placed on probation for five years on the condition that he be actually suspended for 18 months and until he complied with former standard 1.4(c)(ii).[13] Tishgart stipulated that he violated section 6103[14] by willfully disobeying a court order. He also violated section 6106 by misappropriating through gross negligence $4,805 of the client's funds as attorney's fees between July 2009 and December 2009. Tishgart's two prior disciplines were considered as aggravation, while his candor, cooperation, and remorse were found in mitigation.

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

Tishgart's numerous acts of UPL and moral turpitude for engaging in UPL establish multiple acts of misconduct. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646-647 [three instances of misconduct considered aggravating as multiple acts].)

B. Mitigating Circumstances

Although the hearing judge found no mitigation, under our duty to independently review the record, we assign some mitigation credit for Tishgart's stipulation as to facts and admission of documents. (Std. 1.6(e); *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive mitigation accorded to those who admit culpability as well as facts].) But we assign only minimal mitigation since Tishgart provided limited details and stipulated to facts that were easily provable. (*In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 567 [limited mitigating weight for belated stipulation concerning easily provable facts].)

11. Rule 5-200(A) requires that an attorney "employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth."

12. Rule 3-110(A) provides that an attorney "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

13. The standards were amended in 2014. Since this case was submitted after the effective date, we apply the new version.

14. Section 6103 provides that "willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension."

V. DISCUSSION

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.) We balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266; see *Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

The standards provide us with guidelines in determining the appropriate level of discipline to recommend and should be followed "whenever possible." (*In re Young, supra*, 49 Cal.3d at p. 267, fn. 11.) We give them great weight to promote consistency. (*In re Silverton* (2005) 36 Cal.4th 81, 91.) In addition to the standards, we look to comparable cases for assistance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

Because the trial in this case occurred in 2013, the hearing judge properly based her disbarment recommendation on former standard 1.7(b), which stated that disbarment "shall" be imposed on any attorney who has been disciplined on two previous occasions "unless the most compelling mitigating circumstances clearly predominate."

[5a] Although the standards were amended and renumbered effective January 1, 2014, our consideration of the new standards compels the same discipline as recommended by the hearing judge. Former standard 1.7(b) was replaced by standard 1.8(b), which provides that "[i]f a member has two or more records of discipline, disbarment is appropriate in the following circumstances, unless the most compelling mitigating circumstances clearly predominate. . . .[¶] 1. Actual suspension was ordered in any one of the prior disciplinary matters; [¶] 2. The prior disciplinary matters coupled with the current record, demonstrate a pattern of misconduct; or [¶] 3. The prior disciplinary matters coupled with the current record demonstrate the member's unwillingness or inability to conform to ethical responsibilities." We find that standard 1.8(b) is applicable to Tishgart's misconduct.[15]

[5b] Tishgart committed the present misconduct while still under actual suspension and on probation for his 2010 and 2011 disciplinary matters. His continued poor performance on probation even after previously being suspended gives this court no reason to believe that a lesser discipline than disbarment is warranted. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112 [disbarment imposed when attorney's probation violations left court no reason to believe he will comply with lesser discipline].) Tishgart's previous public discipline and actual suspensions put him on notice and gave him the opportunity "to reform his conduct to the ethical strictures of the profession." (*Arden v. State Bar* (1987) 43 Cal.3d 713, 728.) His culpability in the present action "indicates either his unwillingness or inability to do so." (*Ibid.*) Thus, "the risk of petitioner repeating this misconduct would be considerable if he were permitted to continue in practice." (*McMorris v. State Bar* (1983) 35 Cal.3d 77, 85.) In view of Tishgart's prior actual suspensions, his unwillingness or inability to conform to his ethical responsibilities, and his lack of compelling mitigation, we adopt the presumptive discipline suggested by standard 1.8(b) and recommend Tishgart's disbarment to protect the public, the courts, and the legal profession.[16]

VI. RECOMMENDATION

We recommend that Kenneth Bruce Tishgart be disbarred and that his name be stricken from the roll of attorneys.

We further recommend that he must comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, after the effective date of the Supreme Court's order in this matter.

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15. Other applicable standards are 2.6(a), which provides for disbarment or actual suspension when an attorney engages in UPL while on actual suspension, and 2.7(a), which requires disbarment or actual suspension for an act of moral turpitude.

16. **[5c]** Since Tishgart failed to present compelling mitigation, his disbarment is warranted under both the former and the new standards. (See *Barnum v. State Bar, supra,* 52 Cal.3d at p. 113 [disbarment under former std. 1.7(b) imposed where no compelling mitigation].)

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

VII. ORDER

The order that Kenneth Bruce Tishgart be involuntarily enrolled as an inactive member of the State Bar pursuant to section 6007, subdivision (c)(4), effective June 20, 2013, will remain in effect pending the final disposition of this proceeding.

WE CONCUR:

PURCELL, P. J.
EPSTEIN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

MICHAEL R. CARVER

[No. 11-H-16868]

Filed November 6, 2014, amended December 4, 2014

SUMMARY

After respondent failed to respond to a notice of disciplinary charges, a hearing judge entered respondent's default and enrolled respondent as inactive. Respondent sought relief from the default in the hearing department on three occasions, and in each instance, his request was denied. After the third denial, respondent filed a petition for interlocutory review, which the review department denied. The Office of the Chief Trial Counsel of the State Bar then filed a petition for disbarment. The hearing judge granted the petition over respondent's opposition.

Respondent again petitioned for interlocutory review, which the review department granted after finding that the hearing judge erred in concluding that disbarment was mandatory. The review department remanded to the hearing judge to exercise his discretion in considering the appropriate relief. On remand, the hearing judge recommended respondent be suspended from the practice of law for two years and until he proves his rehabilitation to practice after finding respondent failed to satisfy his reproval conditions from an earlier discipline. The hearing judge credited respondent's period of inactive enrollment against the recommended period of actual suspension. (Hon. Donald F. Miles, Hearing Judge.)

Respondent sought review. The review department found a 90-day actual suspension with conditions and a two-year probationary period to be appropriate discipline and found the hearing judge committed error in crediting respondent's period of inactive enrollment.

COUNSEL FOR PARTIES

For State Bar: Charles A. Murray, Allen Blumenthal

For Respondent: Michael R. Carver

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **107 Generally Applicable Procedural Issues—Default/Relief from Default**
126 Generally Applicable Procedural Issues—Petition for Disbarment after Default
130 Generally Applicable Procedural Issues—Procedure on Review
Where hearing judge properly granted respondent limited relief from default, to extent of requiring hearing on State Bar's petition for disbarment after default, and respondent sought review of hearing judge's ultimate decision, Review Department declined to dismiss respondent's petition for review, exercising its power to permit respondent to participate in proceeding notwithstanding default.

[2 a,b] **107 Generally Applicable Procedural Issues—Default/Relief from Default**
126 Generally Applicable Procedural Issues—Petition for Disbarment after Default
135.06 Amendments to Rules of Procedure—Comparison of 2011 to 1995 version
135.50 Amendments to Rules of Procedure—Defaults and Trials
Prior to 2011, the Rules of Procedure of the State Bar permitted imposition of a discipline less than disbarment even if the defaulting attorney did not seek relief from default. (See former rule 200 et seq. of the Rules of Procedure of the State Bar.) The rules now require that when a member's default has been entered and the member fails to have it set aside or vacated, the Office of the Chief Trial Counsel must file a petition seeking the member's disbarment. (Rule 5.85(A).) In turn, a hearing judge must grant the petition and recommend disbarment provided (1) the member has failed to file a response to the petition for disbarment or (2) the court has denied a motion to set aside or vacate the default. (Rule 5.85(F)(1).)

[3] **107 Generally Applicable Procedural Issues—Default/Relief from Default**
130 Generally Applicable Procedural Issues—Procedure on Review
135.50 Amendments to Rules of Procedure—Defaults and Trials
166 Standards of Proof/Standards of Review—Independent Review of Record
A member in default has various opportunities to seek relief from default. (Rules Proc. of State Bar, rules 5.83(A), (C), (D), and 5.85(E).) Because the effects of a default may deny a disposition of the case on the merits irrespective of the charges or potential mitigation, the review department closely scrutinizes orders denying relief from default and any doubts must be resolved in favor of the member.

[4 a-c] **107 Generally Applicable Procedural Issues—Default/Relief from Default**
126 Generally Applicable Procedural Issues—Petition for Disbarment after Default
135.50 Amendments to Rules of Procedure—Defaults and Trials
167 Standards of Proof/Standards of Review—Abuse of Discretion
Where respondent filed opposition to petition for disbarment after default, and sought review of hearing judge's order granting petition, and Review Department remanded to permit hearing judge to exercise discretion regarding what relief was appropriate, hearing judge did not abuse discretion on remand by declining to set aside default except for limited purpose of conducting hearing on culpability, aggravation, and level of discipline, in which respondent was not permitted to participate. Hearing judge also properly deemed allegations in notice of disciplinary charges to be admitted. By allowing his default to be entered, respondent waived right to participate in proceedings, to make evidentiary objections, and to present evidence in mitigation.

[5] **107 Generally Applicable Procedural Issues—Default/Relief from Default**
251.10 Culpability—Rules of Professional Conduct Violations—Obey Discipline Conditions (RPC 1-110)

Hearing judge properly deemed allegations in notice of disciplinary charges to be admitted by virtue of respondent's default. Where admitted allegations showed respondent had received public reproval with conditions attached in prior discipline matter, and had failed to comply with certain conditions, hearing judge properly found clear and convincing evidence that respondent violated conditions of prior disciplinary order, in violation of rule 1-110.

[6] **541 Aggravation—Intentional misconduct, bad faith, dishonesty, etc. (interim Standard 1.5(d))—Found**

Where respondent repeatedly misrepresented facts underlying his untimely response to notice of disciplinary charges and lack of notice of disciplinary proceeding, and asserted that misrepresentations were merely "technically inaccurate," respondent's inability to understand high degree of honesty expected of attorneys constituted significant factor in aggravation.

[7] **615 Aggravation—Lack of candor/cooperation with Bar (interim Standard 1.5(l))—Declined to find**

Where respondent failed to file motion to set aside default until after original trial date was set, adverse consequences of failure to file timely motion were sufficient sanction, and Review Department declined to find, in addition, that respondent's failure to cooperate with State Bar constituted aggravating factor.

[8 a-c] **107 Generally Applicable Procedural Issues—Default/Relief from Default**
126 Generally Applicable Procedural Issues—Petition for Disbarment after Default
135.50 Amendments to Rules of Procedure—Defaults and Trials
801.45 Application of Standards—General Issues—Deviation from standards—Found not to be justified
891 Application of Standards—Interim 2.10 (Violation of Discipline Conditions—Actual Suspension)—Applied
1092 Miscellaneous Substantive Issues re Discipline—Excessiveness of Discipline

Where respondent's default was set aside for limited purpose of conducting discipline hearing, neither amended default rules nor discipline standards provided for presumptive discipline of disbarment. Even two-year actual suspension was excessive discipline for violation of probation conditions attached to prior public reproval. Rather, appropriate discipline, under standard 2.10 and case law, was 90-day actual suspension and lengthy probation with conditions.

[9] **1099 Miscellaneous Substantive Issues re Discipline—Other Miscellaneous Issues**
2329 Issues in Other Section 6007 Proceedings—Miscellaneous Issues re Section 6007(e)

Hearing judge erred in recommending that respondent receive credit toward his period of actual suspension for the time he had been on involuntary inactive enrollment pursuant to section 6007(e). Neither the statute nor the case law authorizes the State Bar Court to credit a member's period of involuntary inactive enrollment, under subdivision (e), toward a period of actual suspension.

[10 a,b] **101 Generally Applicable Procedural Issues—Jurisdiction**
105 Generally Applicable Procedural Issues—Service of Process
106.20 Generally Applicable Procedural Issues—Issues re Pleadings—Adequate notice of charges

Actual notice is not a necessary element of proper service in disciplinary proceedings, and service is deemed completed upon mailing to respondent's official membership address. State Bar Court therefore had jurisdiction to hear disciplinary case even where respondent did not personally receive service of notice of disciplinary charges, motion for entry of default, and default order, all of which were sent to respondent's official membership records address.

[11] **541 Aggravation—Intentional misconduct, bad faith, dishonesty, etc. (interim Standard 1.5(d))—Found**
565 Aggravation—Uncharged violations (interim Standard 1.5(d)) —Declined to find

Where respondent made misleading statements in connection with efforts to set aside default in disciplinary proceeding, hearing judge's finding in aggravation that respondent acted with dishonesty was not improper finding of uncharged misconduct, but proper finding that dishonesty surrounded respondent's underlying misconduct.

[12] **103 Generally Applicable Procedural Issues—Disqualification/Bias of Judge**

Where hearing judge adequately responded to motions to disqualify him, and different hearing judge properly considered and denied motions, and respondent failed on review to show arbitrariness, legal error, or prejudice, Review Department rejected argument that hearing judge should have been disqualified.

ADDITIONAL ANALYSIS

Culpability

Found

251.11	Obey discipline conditions (RPC Rule 1-110; 1975 RPC 9-101)

Aggravation

Found

511	Prior record of discipline (1.5(a); 1986 Standard 1.2(b)(i))

Found but discounted or not relied on

523	Multiple acts of misconduct (1.5(b); 1986 Standard 1.2(b)(ii))

Declined to find

586.50	Harm to administration of justice (1.5(f); 1986 Standard 1.2(b)(iv))

Discipline

1013.08	Stayed Suspension—Two years
1015.03	Actual Suspension—Three months
1017.08	Probation—Two years
1024	Ethics exam/ethics school
2321	Inactive Enrollment for Failure to Answer—Imposed

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OPINION

EPSTEIN, J.

I. SUMMARY

This is a default case stemming from respondent Michael R. Carver's misdemeanor convictions in 2008 for driving without a license and resisting arrest after he failed to come to a full stop at an intersection. As a result of these convictions, this court imposed a public reproval with certain conditions. Carver failed to comply with those conditions, and he did not respond to a Notice of Disciplinary Charges (NDC) alleging his non-compliance. As a consequence, the hearing judge entered Carver's default and enrolled him inactive beginning February 18, 2012 and continuing to the present. Carver sought relief from the default in the hearing department on three occasions, and in each instance, his request was denied. After the third denial, Carver filed a petition for interlocutory review, which we denied, finding no error of law or abuse of discretion.

The Office of the Chief Trial Counsel of the State Bar (OCTC) then filed a petition for disbarment under the new default rules, as amended in 2011.[1] The hearing judge granted the petition over Carver's opposition, and Carver again petitioned for interlocutory review. We granted his second petition, finding that the hearing judge erred in concluding that disbarment was mandatory in Carver's case and we "declined to interpret the new rules as mandating disbarment after a respondent files a response to the petition for disbarment." We believed that since Carver had participated in the proceedings, the hearing judge should have considered what, if any, relief was appropriate under the new default rules before granting the petition for disbarment. We left Carver's default in place and remanded the case to the hearing judge to exercise his discretion in considering the appropriate relief. Carver remained on inactive status.[2]

Upon remand, the hearing judge indicated that he would not set aside the default, although in effect, he did so for the purpose of holding a limited hearing as to Carver's culpability, mitigation, and aggravation. However, Carver was not permitted to participate in the hearing. Such actions are authorized in attorney discipline cases under the default rules. The hearing judge also reconsidered the appropriate discipline in light of the evidence adduced at that hearing. Upon finding that Carver failed to satisfy his reproval conditions and that his misconduct was aggravated by four factors, including dishonesty, the judge recommended that Carver be suspended from the practice of law for two years and until he proves his rehabilitation in accordance with standard 1.2(c)(1) of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.[3] In error, however, the hearing judge credited Carver's period of inactive enrollment against the recommended period of actual suspension.

Carver now appeals and asks us to vacate his default in its entirety and remand the matter for a new hearing or, alternatively, impose no more than a stayed suspension. OCTC does not seek review.[4] Based on our independent review (Cal. Rules of Court, rule 9.12), we affirm the hearing judge's

1. Unless otherwise noted, all further references to rules are to the Rules of Procedure of the State Bar, adopted effective January 1, 2011, which were in effect at the time of the hearing below. The default rules were subsequently amended and renumbered, effective July 1, 2014, but these recent revisions do not affect the analysis herein.

2. We recognize that our order of December 19, 2012 may have engendered confusion, owing in part to the brevity of the heading, which stated: "Rule 5.85 is Not Mandatory: Hearing Judge has Discretion to Order Appropriate Relief After Respondent files Response to Petition for Disbarment."
To clarify, the heading should have read: "Rule 5.85 Is Not Mandatory *Insofar As* a Hearing Judge has Discretion to Order Appropriate Relief *When* a Respondent Files a Response to a Petition for Disbarment." We note that the text of our order is consistent with this latter heading.

3. On January 1, 2014, the standards were revised and renumbered. Since this case was submitted for ruling in 2014, we apply the new standards. All further references to standards are to the new standards, and references to the earlier version will be designated former standards.

4. **[1]** However, OCTC contends we should dismiss the appeal because Carver remains in default and is not permitted to appeal, citing rule 5.82 of the Rules of Procedure of the State Bar. Under rule 5.82(3), we have the power to allow Carver to participate further in this disciplinary proceeding, and we do so here in permitting him to seek review of the hearing judge's June 26, 2013 decision, which fully disposed of the matter. (See *In the Matter of Stansbury* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 103, 106 [authorizing plenary review of decisions and orders fully disposing of proceedings in hearing department following default].)

decision to deny the petition for disbarment and effectively set aside the default for the limited purpose of holding a hearing. Based on the record before us, we adopt his findings as to culpability, mitigation, and all but one factor in aggravation. However, case law does not support a two-year suspension for Carver's misconduct in violating his reproval conditions. At the present time, Carver has been on suspension for more than two and one-half years. We conclude that a 90-day actual suspension with conditions and a two-year probationary period are more appropriate under the case law, with no credit given for Carver's inactive enrollment.

II. BACKGROUND

A. Prior Disciplinary Proceeding

Carver has been a member of the State Bar since 1999. In 2008, he was driving his car when he was pulled over by a police officer for failing to come to a full stop. Ignoring the officer's requests that he remain in his car, Carver was arrested and convicted of driving without a license and resisting an officer.

On January 6, 2011, we referred this matter to the hearing department for a determination of whether the facts and circumstances surrounding the misdemeanors involved moral turpitude or other misconduct warranting discipline. OCTC and Carver stipulated that the misconduct did not involve moral turpitude and that it was mitigated by a lack of prior discipline. There was no aggravation. The parties further stipulated that a public reproval with conditions was warranted. In April 2011, the hearing judge signed an order imposing the public reproval with conditions, including, inter alia, that Carter must: (1) contact the Office of Probation within 30 days and schedule a meeting with a probation deputy to discuss his probation terms; (2) submit written quarterly reports; and (3) submit with his quarterly reports a statement under penalty of perjury that he was in compliance with all conditions of his probation in the criminal matter.

B. Current Proceeding

Carver did not timely comply with the conditions of his reproval. On December 1, 2011, OCTC filed and served an amended NDC, charging him with a violation of rule 1-110 of the Rules of Professional Conduct.[5] The NDC was served on Carver by certified mail, return receipt requested, at his official membership records address, which was a Postal Annex mailbox. (Rule 5.25(B).) The NDC advised Carver in bold-face, capital letters that failure to respond to the charges would result in the entry of his default, preclude his further participation in the proceedings, and result in an order recommending disbarment should he fail to have his default vacated or set aside.

On December 8, 2011, the court filed and served Carver by first-class mail at his membership records address with a Notice of Assignment and Notice of Initial Status Conference, which was set for January 9, 2012. Shortly before the status conference was to commence, the OCTC prosecutor sent Carver an email stating: "This is a reminder that the initial in-person status conference in your matter is scheduled for today @9:45 before Judge Miles." Carver responded: "What is this about? You send me an email at 9 AM in Tustin for a hearing at 9:45." The prosecutor responded that she was merely extending a courtesy reminder as the court had already served him with notice of the hearing.

Carver then emailed: "I have a couple of unopened letters. A Postal Annex employee signed for them without my consent while I was out of town. I was going to mail them back to the source. Whoever thinks I got proper notice of something is mistaken."

Carver did not appear at the January 9th status conference. The OCTC prosecutor then sent a follow-up email the same morning, advising him that the matter had been heard in his absence and that the judge had ordered pretrial statements to be filed by March 5, 2012, and a trial date had been set for March

5. Rule 1-110 of the Rules of Professional Conduct states: "A member shall comply with conditions attached to public or private reprovals. . . ."

20th. She also alerted Carver that the hearing judge expected OCTC to file a default motion if Carver did not respond to the NDC, and she asked him if he intended to file a response. Carver replied: "I haven't seen a complaint. How about I get properly served?" The OCTC prosecutor responded that Carver had indeed been properly served at his official membership address, but she inquired: "Is there an additional address that you would like to provide for future pleadings?" She also followed up immediately by emailing a copy of the NDC to Carver.

On January 10th, the OCTC prosecutor warned Carver via email that she would file a default motion if she did not receive his response by January 12, 2012. Also on January 10th, the hearing judge served Carver with an order setting a March 20, 2012 trial date.

Carver took no action. On January 17, 2012, OCTC filed a motion for entry of default, served on Carver by certified mail, return receipt requested, at his membership records address. The motion advised Carver in bold-face, capital letters that should he fail to respond, the court would enter his default, deem the factual allegations in the NDC admitted, preclude his further participation in the proceedings, and recommend disbarment if he failed to have his default vacated or set aside.

Carver did not file an opposition to the motion or a response to the NDC. The hearing judge granted OCTC's motion and entered Carver's default on February 2, 2012. Pursuant to this order, which was served on Carver, the judge placed him on involuntary inactive enrollment, effective February 18, 2012, in accordance with rule 5.82(1) of the Rules of Procedure of the State Bar and section 6007, subdivision (e)(1) of the Business and Professions Code. Carver remains on inactive enrollment pursuant to this order.

On April 2, 2012 — four months after he was served with the NDC, two months after his default was entered, and two weeks after his trial date had passed — Carver finally responded by filing a "Petition" seeking to set aside the default.[6] He did not, however, submit a proposed response to the NDC as required by rule 5.83(E). The hearing judge denied the petition on April 17, 2012, finding that Carver failed to establish good cause. In a second attempt to seek relief, Carver filed an amended petition on April 26, 2012, this time including a proposed verified response to the NDC. On May 8, 2012, the hearing judge again denied Carver's petition, finding that the NDC had been properly served, that Carver also had actual notice of the pendency of the proceedings as of January 9, 2012, and that none of the stated grounds for relief justified his delay in waiting until after the trial date to file his petition.

Carver sought relief for a third time on May 29, 2012, when he filed a request for reconsideration of the hearing judge's prior default order. The hearing judge again denied the request, finding that Carver had failed to show relief was justified. Carver sought interlocutory review. We summarily denied his petition on July 18, 2012, finding no error of law or abuse of discretion by the hearing judge. OCTC then filed a petition for disbarment after default on August 10, 2012, which Carver opposed. The hearing judge granted OCTC's petition and filed a decision recommending Carver's disbarment.

Carver filed a second petition for interlocutory review, which we granted. By order dated December 19, 2012, we concluded that the hearing judge committed an error of law because Carver had filed a response to the petition and the record did not indicate that the judge had first considered what, if any, relief was appropriate under the new default rules before recommending Carver's disbarment. We reversed the hearing judge's order and remanded the matter for a determination of the appropriate relief, if any, to be granted. However, we declined to vacate the default or return Carver to active status.

On remand, the hearing judge denied OCTC's petition for disbarment, concluding that Carver's "multiple attempts to have his default set aside show that he has not abandoned his law license" and that

6. Although identified as a "petition," rule 5.83(C) provides for relief upon the filing of a motion to set aside a default.

Carver had "participated in his prior discipline case and the alleged misconduct in this case would not alone warrant disbarment. Disbarring [Carver] under the circumstances presented [] would be based solely on his default. Such an outcome would not advance the ends of justice." The hearing judge then held a hearing as to culpability, aggravation, and mitigation. As the rules of procedure permit in attorney discipline cases, the judge did not afford Carver full relief from default and ordered that the facts alleged in the NDC were deemed admitted. He also prohibited Carver from participating in the hearing, and ordered that he remain on inactive enrollment. In the same order, the judge notified OCTC under section 455 of the Evidence Code that he was considering taking judicial notice of the pleadings and documents in Carver's court file as potential evidence of bad faith, dishonesty, and lack of candor and cooperation in aggravation.

On June 26, 2013, the hearing judge filed his decision finding Carver culpable as charged of violating rule 1-110 of the Rules of Professional Conduct. The judge also found extensive aggravation with no mitigation, and recommended that Carver be suspended for two years and until he provided proof of his rehabilitation. The judge recommended Carver receive credit for his period of actual suspension from April 2, 2012, the date he first sought relief from the entry of default. Carver filed a request for review on July 30, 2013.

III. ANALYSIS

A. Procedural Issues Relating to Default

[2a] The availability and extent of relief from default have been a source of contention and confusion in this case. This is not surprising, given that the consequences of default changed dramatically when the Rules of Procedure of the State Bar were amended in 2011. Prior to 2011, the rules permitted imposition of a discipline less than disbarment even if the defaulting attorney did not seek relief. (See former rule 200 et seq. of the Rules of Procedure of the State Bar.) These rules frequently resulted in multiple proceedings against members who had essentially abandoned their law licenses and never sought to participate in the proceedings.

[2b] In order to obviate these multiple proceedings by non-responding members, the new rules require that when a member's default has been entered *and* the member fails to have it set aside or vacated, OCTC *must* file a petition seeking the member's disbarment under rule 5.85(A). In turn, a hearing judge *must* grant the petition and recommend disbarment *provided* (1) the member has failed to file a response to the petition for disbarment *or* (2) the court has denied a motion to set aside or vacate the default. (Rule 5.85(E)(1).)[7]

[3] What should not be overlooked, however, is that the new rules also provide a defaulted member with various opportunities to seek relief both before and after OCTC has filed a petition for disbarment.[8] Moreover, the hearing judge retains wide discretion to fashion appropriate relief under the new rules, as the judge *may*: (1) vacate the default subject to appropriate conditions; (2) set aside the default for limited purposes only; or (3) deny the motion if the judge decides the member has not made the required showing. (Rule 5.83(H).) Because the effects of a default may deny a disposition of the case on the merits irrespective of the charges or potential mitigation, we closely scrutinize orders denying relief from default and "any doubts . . . must be resolved in favor of [the member seeking relief]." (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233; *In the Matter of Morone* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 207, 215.) The hearing judge may require "very slight" evidence to justify it, as long as the granting of such relief will not cause prejudice. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478 ["when a party in

7. We wish to make clear that any interpretation of our December 19, 2012 interlocutory order to the contrary would be incorrect.

8. The opportunities for relief include: (1) a stipulation to vacate default that must be approved by the hearing judge (rule 5.83(A)); (2) a timely motion to set aside default (rule 5.83(C)); (3) a late-filed motion to set aside default (rule 5.83(D)); and (4) a motion to set aside default filed in response to petition for disbarment (rule 5.85(D)). Also, an improperly entered default may be vacated by motion of a party or on the Court's own motion at any time while the State Bar Court has jurisdiction over the matter. (Rule 5.83(C).)

default moves promptly to seek relief, very slight evidence is required to justify a trial court's order setting aside a default"].)

[4a] Carver contends the hearing judge erred on remand by again refusing to set aside his default in its entirety. He is mistaken—the hearing judge acted according to the new default rules and well within his discretion when he, in essence, set aside the default for the limited purpose of conducting a hearing on culpability, aggravation, and level of discipline. To the extent Carver seeks to have his entire default set aside, we decline to do so. We have twice considered whether the judge abused his discretion in refusing to set aside the default in its entirety and we twice refused to set it aside. We see no basis for considering the issue again.

B. Culpability for Violation of Rule 1-110 of the Rules of Professional Conduct

[5] The hearing judge properly deemed as admitted the factual allegations in the NDC in accordance with rule 5.82(2).[9] The admitted allegations show Carver received the reproval order in his prior case, which contained certain conditions, and he then violated those conditions. First, Carver failed to timely contact his probation officer by meeting with the officer approximately two months after the deadline. Second, Carver failed to file the required quarterly reports. Third, Carver failed to report his compliance with the probation conditions in his underlying criminal matter. We affirm the hearing judge's finding that OCTC established by clear and convincing evidence[10] that Carver failed to comply with conditions attached to a public reproval in violation of rule 1-110 of the Rules of Professional Conduct.

C. Significant Aggravation and No Mitigation

The appropriate discipline is determined in light of the relevant circumstances, including mitigating and aggravating factors. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) Although Carver was properly precluded from offering evidence in mitigation in accordance with rule 5.82(3),[11] OCTC has the burden of proving aggravation by clear and convincing evidence under standard 1.5.

We affirm the hearing judge's finding that Carver's 2011 public reproval constitutes an aggravating circumstance under standard 1.5(a). His prior misconduct was recent and his defiance of a police order demonstrates a lack of respect for the rule of law, which reflects negatively on the legal profession.

The hearing judge also correctly found that Carver committed multiple acts of misconduct by violating three separate conditions of his public reproval, which aggravate this case. (Std. 1.5(b); *In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 529 [failure to cooperate with probation monitor and failure to timely file probation reports constituted multiple acts of misconduct].) However, since these violations fall within a single reproval order, we give only modest weight to this factor. (*In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 177.)

[6] Of far greater significance is the hearing judge's proper finding in aggravation that Carver acted with dishonesty in his efforts to set aside his default. (Std. 1.5(d).) More than once, Carver misrepresented to OCTC the facts underlying his untimely response to the NDC and his lack of notice of these proceedings. His assertion that some misrepresentations were merely "technically inaccurate" underscores his inability to understand the high degree of honesty expected of attorneys practicing in this state. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 647 ["specious and unsupported arguments in an attempt to evade culpability" reveal lack of appreciation for obligations as attorney].)

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9. Rule 5.82(2) provides that when the court enters a default, the facts alleged in the NDC will be deemed admitted.

10. Clear and convincing evidence must leave no substantial doubt and be sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

11. Rule 5.82(3) provides: "except as allowed by these rules or ordered by the Court, the member will not be permitted to participate further in the proceeding and will not receive any further notices or pleadings unless the default is set aside on timely motion or by stipulation. . . ."

[7] We do not adopt the hearing judge's finding that Carver's failure to file his motion to set aside his default until after the original trial date was evidence that he did not cooperate with OCTC. (Std. 1.5(f) [aggravating circumstance may include significant harm to the administration of justice].) He already has faced adverse consequences due to his failure to file his motion for relief from default, and we find it would be unjust to ascribe yet another sanction for this same conduct.

Finally, we adopt the hearing judge's finding that Carver is not entitled to mitigation.

IV. DISCIPLINE ANALYSIS

[8a] We turn now to the appropriate level of discipline. The primary purpose of attorney discipline is not to punish an erring attorney but to protect the public, the profession, and the courts. (*Hipolito v. State Bar* (1989) 48 Cal.3d 621, 626.) Standard 2.10 applies to violations of conditions attached to discipline. It provides: "Actual suspension is appropriate for failing to comply with a condition of discipline. The degree of sanction depends on the nature of the condition violated and the member's unwillingness or inability to comply with disciplinary orders."

We are concerned about Carver's prior probation violations and his disregard of his duty as an attorney to participate in these proceedings until after his default was entered. His unwillingness or inability to comply with the conditions imposed by a Supreme Court order "demonstrates a lapse of character and a disrespect for the legal system that directly relate to an attorney's fitness to practice law and serve as an officer of the court. [Citation.]" (*In re Kelley* (1990) 52 Cal.3d 487, 495.) Moreover, the aggravation in this case — particularly Carver's disingenuous and manipulative conduct in seeking to vacate his default — is significant.

[8b] Nevertheless, a two-year actual suspension is not supported by the case law, even for defaulting attorneys.[12] Carver argues that this discipline is "grossly excessive," relying on three default cases for support. (*Conroy v. State Bar* (1990) 51 Cal.3d 799 [member in default actually suspended for 60 days for violating reproval condition]; *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697 [member in default actually suspended for 90 days for failing to comply with two conditions attached to private reproval]; *In the Matter of Posthuma* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 813 [member in default publicly reproved for failure to comply with conditions attached to private reproval].) We agree. The discipline for probation violations has ranged from 90 days to one year of actual suspension.[13] Based on the level of culpability for Carver's public reproval violations, we find that a 90-day period of actual suspension with conditions and a lengthy probation is consistent and appropriate discipline. It is worth noting that Carver could be disbarred if he violates his probation in the future. (Std. 1.8(b) [disbarment for third case unless compelling mitigation clearly predominates].)

[9] We find the hearing judge erred in recommending that Carver receive credit toward his period of actual suspension for the time he has been on involuntary inactive enrollment. Following entry of Carver's default, the hearing judge correctly ordered his involuntary inactive enrollment effective February 18, 2012, pursuant to section 6007, subdivision (e). Neither the statute nor the case law, however, authorizes the State Bar Court to credit a member's period of involuntary inactive enrollment, under subdivision (e), toward a period of actual suspension. (Compare § 6007, subd. (e), with § 6007, subd. (d)(3), wherein the legislature expressly provides credit for involuntary inactive enrollment.) Carver is therefore not entitled to receive credit toward his period of actual suspension for the time he has been inactive.

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12. **[8c]** We disagree with OCTC's suggestion that disbarment is the presumptive discipline here. Carver's default was set aside for the limited purpose of conducting a discipline hearing, and neither the current default rules nor the discipline standards support presumptive disbarment under such circumstances.

13. See *In the Matter of Parker* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 747 (90-day actual suspension where attorney twice failed to submit satisfactory evidence of compliance with approved substance abuse recovery program; violation breached condition directly related to attorney's one prior record of discipline resulting from his DUI conviction); *In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302 (six-month suspension for violating probation condition to pay restitution directly related to attorney's underlying misconduct; aggravated by two prior records of discipline and no mitigation); *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81 (one-year suspension where attorney's prior discipline record was misconduct underlying probation revocation proceeding and violations included failure to timely file first quarterly report and make restitution).

V. JURISDICTIONAL AND CONSTITUTIONAL CHALLENGES

Carver asserts this matter should be dismissed due to various jurisdictional and constitutional deficiencies.[14] We find that his assertions do not merit dismissal.

A. Carver's Jurisdictional Challenge Based on Improper Service Is Unavailing

[10a] Carver contends this court is without jurisdiction to hear this matter because he did not personally receive service of the NDC, the motion for entry of default, and the default order. These pleadings were sent to Carver's current address listed on his official membership records and were received by an employee of the Postal Annex.

[10b] Actual notice is not a necessary element of proper service in disciplinary proceedings, and service is deemed completed upon mailing. (Rules 5.25(B), 5.26(C) and (F); Bus. & Prof. Code, § 6002.1, subd. (c); *Middleton v. State Bar* (1990) 51 Cal.3d 548, 558-559 [under rules applicable to disciplinary proceedings, service is completed upon mailing; actual receipt not required to effect service]; *Baca v. State Bar* (1990) 52 Cal.3d 294, 303 [service of notice of entry of default complete where State Bar records showed notice mailed to member at address shown on official membership records].) Moreover, Carver admitted that he had actual notice of these proceedings on January 9, 2012 — *before* OCTC filed the motion for entry of default.

B. Carver's Due Process Challenges to the Proceedings on Remand Are Meritless

Carver claims that the hearing judge abridged his due process rights on remand by: (1) denying him the opportunity to participate in the proceedings; (2) prohibiting him from submitting evidence on issues of culpability and mitigation; and (3) improperly taking judicial notice of his own files as evidence of aggravation without giving him an opportunity to object.

[4b] As we noted *ante*, the hearing judge on remand acted within his discretion in granting only limited relief from Carver's default. As such, the judge properly deemed the allegations of the NDC admitted and prohibited Carver's further participation in the proceedings, including submission of evidence regarding his culpability and factors in mitigation. (Rule. 5.82(2) and (3); *In the Matter of Morone*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 211 [the "legal effect of the entry of default was to admit the allegations" set forth in NDC and to preclude further participation].)

[4c] Carver cannot now be heard to complain about the consequences of his default since he willfully allowed it to be entered, having repeatedly failed to respond to OCTC and the court despite receiving notice of the charges against him and warnings of the adverse consequences of failing to answer. He therefore waived his right to participate in the proceedings, including the right to make evidentiary objections. (See *Bowles v. State Bar* (1984) 48 Cal.3d 100, 108-109 ["[P]etitioner's absence from the hearing was the result of his own indifference to and disregard of his statutory duties; any hearsay objection must therefore be deemed waived"].)

C. Carver Incorrectly Argues the Hearing Judge Found Uncharged Misconduct

[11] Carver also incorrectly asserts that the hearing judge's finding of dishonesty was improper because it was tantamount to uncharged misconduct in aggravation. The hearing judge properly found that dishonesty *surrounded* Carver's misconduct due to his misleading statements in his efforts to set aside his default. Therefore, this finding does not constitute uncharged misconduct.

D. Carver's Efforts to Disqualify the Hearing Judge Are Without Merit

[12] Carver contends that the hearing judge should have been disqualified because he failed to specifically address the allegations in Carver's two

14. Those jurisdictional and constitutional issues not specifically addressed herein have been considered and rejected as lacking in factual and/or legal support.

verified statements of disqualification. We disagree. The hearing judge adequately responded to the motions to disqualify him in his answers, and another hearing judge then properly considered and denied the motions. Carver failed to show that the hearing department acted arbitrarily or committed legal error, and he further failed to make any showing of prejudice. (*In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 241 [absent actual prejudice, party not entitled to relief from hearing judge's procedural ruling]; *In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, 695].)

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Michael R. Carver be suspended from the practice of law for two years, that execution of that suspension be stayed, and that he be placed on probation for two years on the following conditions:

1. Carver must be suspended from the practice of law for a minimum of the first 90 days of the period of his probation.

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

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

4. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's 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 shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

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 period of probation, if Carver has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Carver be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

VIII. CALIFORNIA RULES OF COURT, RULE 9.20

We do not recommend that Carver be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule because he has not been in practice for any period during the past two years.

IX. COSTS

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

WE CONCUR:

PURCELL, P. J.
McELROY, J.*

*Hearing Judge of the State Bar Court, assigned by the Presiding Judge pursuant to rule 5.155(F)

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

CHARLES GADSDEN KINNEY

A Member of the State Bar

[Nos. 09-O-18100 (09-O-18760)]

Filed December 12, 2014

SUMMARY

Respondent, an attorney with 31 years of discipline-free practice, was charged with eight counts of misconduct in connection with his pursuit of unjust and frivolous actions as a plaintiff and attorney in multiple lawsuits. The hearing judge found culpability for two counts of maintaining unjust actions and one count of moral turpitude, found respondent not culpable on one count of moral turpitude, and dismissed the remaining counts as duplicative. The hearing judge also found three factors in aggravation, including "enormous harm to the administration of justice and to the public," but nonetheless concluded disbarment was inappropriate, given Kinney's 31 years of discipline-free practice. Instead, the hearing judge recommended Kinney be actually suspended for three years and until he provides his rehabilitation and fitness to practice. (Hon. Pat. E. McElroy, Hearing Judge.)

Respondent and the State Bar both sought review. On appeal, respondent requested dismissal, arguing the evidence was insufficient to establish culpability on any charge and that he was merely trying to protect his and his client's property rights in an ethical manner. The State Bar sought disbarment. The review department agreed with the hearing judge's culpability findings except as to moral turpitude—the review department reversed the hearing judge's finding of no culpability on one count of moral turpitude but found culpability for a second moral turpitude count that the hearing judge had rejected. The review department also disagreed with the hearing judge's assignment of significant mitigation based on 31 years of discipline-free practice. Rather, since Kinney's misconduct was serious, part of a pattern, and highly likely to recur, the review department assigned no mitigation for the lack of prior discipline and ultimately concluded disbarment was the only discipline adequate to protect the public, the courts, and the legal profession.

COUNSEL FOR PARTIES

For State Bar: Allen Blumenthal

For Respondent: Charles Gadsden Kinney, in pro. per.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a-d] **106.30 Generally Applicable Procedural Issues—Issues re Pleadings —Duplicative charges**
213.30 Culpability—State Bar Act Violations—Section 6068(c) (counsel only legal actions/defenses)
271.00 Culpability—Malicious/frivolous litigation (RPC 3-200)
Respondent was culpable of maintaining unjust actions where he unreasonably persisted in pursuing numerous lawsuits after unqualified losses at trial and on appeal, repeatedly filed unmeritorious motions, pleadings, and other papers, engaged in tactics that were frivolous or intended to cause unnecessary delay, and acted with disregard for two vexatious litigant rulings. However, charges of violations of rule 3-200(A) based on same facts were properly dismissed as duplicative.

[2] **191 Miscellaneous Issues in State Bar Court Proceedings —Effect of/Relationship to Other Proceedings**
213.30 Culpability—State Bar Act Violations—Section 6068(c) (counsel only legal actions/defenses)
State Bar Court gives strong presumption of validity to superior court's findings if supported by substantial evidence, and may rely on court of appeal opinion in case where attorney was party as conclusive determination of civil matters strongly similar or identical to charged disciplinary conduct. Where respondent had been ruled a vexatious litigant by both trial and appellate courts, and rulings were supported by clear and convincing evidence, respondent was culpable of maintaining unjust actions in violation of section 6068(c).

[3] **221.19 Culpability—State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)—Found—Other factual basis**
Respondent was culpable of moral turpitude for noncompliance with court orders and serious and habitual abuse of the judicial system where he acted with "unclean hands" in suing his neighbors without attempting informal resolution, sought to use the judicial system as a weapon to inflict onerous litigation costs on neighbors for his own benefit, abused the judicial system in bringing at least 16 meritless appeals, and acted in bad faith for years by disregarding a vexatious litigant pre-filing order and pursuing his property interests in the guise of being plaintiff's counsel rather than the plaintiff.

[4] **213.30 Culpability—State Bar Act Violations—Section 6068(c) (counsel only legal actions/defenses)**
Respondent was culpable of maintaining an unjust action by filing frivolous appeals, recycling previously rejected arguments, and resubmitting essentially the same complaint as "amended," resulting in wasteful, expensive relitigation of resolved matters.

[5] **221.50 Culpability—State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)—Not Found**
Respondent was not culpable of moral turpitude based on a "serious, habitual abuse of the judicial system," even though he filed frivolous appeals, recycled previously rejected arguments, and resubmitted essentially the same complaint as "amended," because he did not have a personal interest in the actions and acted at the direction of his clients.

[6] **530 Aggravation—Pattern of misconduct (1.5(c); 1986 Standard 1.2(b)(ii))**
Respondent demonstrated a pattern of misconduct by repeatedly engaging in vexatious litigation for more than six years in one set of related cases and committing an ethical violation in another set of litigations during the same period, because he committed serious instances of repeated misconduct over a prolonged period of time.

[7] **584 Aggravation—Harm—To public—(interim Standard 1.5(f); 1986 Standard 1.2(b)(iv))**
586 Aggravation—Harm—To administration of justice—(interim Standard 1.5(f); 1986 Standard 1.2(b)(iv))
Respondent caused significant harm to the public and to the administration of justice where his relentless litigation campaigns inflicted serious financial and emotional harm on the opposing parties, causing them to spend considerable time and money defending against baseless claims, and clogging the court system for manifestly improper purposes.

[8] **191 Miscellaneous Issues in State Bar Court Proceedings—Effect of/ Relationship to Other Proceedings**
591 Aggravation—Indifference to rectification/atonement (interim Standard 1.5(g); 1986 Standard 1.2(b)(v))—Found
Where respondent unsuccessfully sought restraining order seeking to halt disciplinary proceedings three days before trial, this was additional evidence of aggravating factor that respondent failed to accept responsibility for his actions.

[9] **710.56 Mitigation—Long practice with no prior discipline record (1.6(a))—Declined to find—Present misconduct likely to recur**
710.59 Mitigation—Long practice with no prior discipline record (1.6(a))—Declined to find—Other reason
Respondent was not entitled to mitigation for lack of prior discipline, despite his 31 years of discipline-free practice, where the misconduct was serious, part of a pattern, and highly likely to recur.

[10] **831.10 Application of Standards—Interim Standard 2.7 (Moral Turpitude, etc.)—Applied—Disbarment—Extent of harm to victim great**
831.20 Application of Standards—Interim Standard 2.7 (Moral Turpitude, etc.)—Applied—Disbarment—Magnitude of misconduct great
831.50 Application of Standards—Interim Standard 2.7 (Moral Turpitude, etc.)—Applied—Disbarment—Presence of other aggravation
Disbarment was the only discipline adequate to protect the public, the courts, and the legal profession, where respondent used his legal knowledge to repeatedly abuse the court system through relentless lawsuits, his conduct was significantly aggravated by a lengthy pattern of wrongdoing, significant harm to others, disregard for the court process, and a total lack of insight into his harmful behavior, and he failed to establish any mitigation.

ADDITIONAL ANALYSIS

Culpability

Found

213.31 Section 6068(c)

Not Found

271.05 Malicious/frivolous litigation (RPC 3-200; 1975 RPC 2-110)

Aggravation

Found

521 Multiple acts of misconduct (1.5(b); 1986 Standard (1.2(b)(ii))

Mitigation

Declined to find

715.50 Good faith (1.6(b); 1986 Standard (1.2(e)(ii))

740.50 Good character references (1.6(f)); 1986 Standard (1.2(e)(vi))

Discipline

1010 Disbarment

2311 Inactive Enrollment After Disbarment Recommendation—Imposed

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OPINION

HONN, J.

This matter concerns Charles Gadsden Kinney's actions as a plaintiff and attorney in a series of lawsuits in Los Angeles and as an attorney in several lawsuits in El Dorado County. Described as a "relentless bully" by one superior court judge, Kinney was declared a vexatious litigant in 2008 by the Los Angeles County Superior Court. In a scathing, published opinion in 2011, the Court of Appeal, Second Appellate District, also declared him a vexatious litigant, warning "Kinney's conduct must be stopped, immediately." (*In re Kinney* (2011) 201 Cal. App. 4th 951, 960.) The Court of Appeal, Third Appellate District, described the El Dorado County lawsuits as baseless, deemed Kinney's appeals frivolous, and awarded sanctions jointly and severally against Kinney and his client.

In 2012, the Office of the Chief Trial Counsel of the State Bar of California (OCTC) charged Kinney with eight counts of misconduct. The hearing judge found him culpable of two counts of maintaining unjust actions and one count of moral turpitude. The judge also found three factors in aggravation, including "enormous harm to the administration of justice and to the public." The judge further found Kinney to be "unrepentant and relentless." Yet the judge concluded disbarment was not appropriate, given Kinney's 31 years of discipline-free practice. The judge recommended that he be actually suspended for three years and until he proves his rehabilitation and fitness to practice law.

Both parties seek review. Kinney requests dismissal, arguing that OCTC presented insufficient evidence to establish culpability for any charge and that he was merely trying to protect his and his client's property rights in an ethical manner. OCTC urges disbarment. Based on our independent review (Cal. Rules of Court, rule 9.12), we find that Kinney's previously unblemished career simply does not mitigate his egregious, harmful misconduct, particularly since, by every indication, he appears likely to continue such misconduct in the future. We recommend Kinney's disbarment as the only discipline adequate to protect the public, the courts, and the legal profession.

I. BACKGROUND[1]

The underlying lawsuits stem from residential property disputes between neighbors. The hearing judge's 34-page decision provides a detailed summary of the cases' procedural histories as well as the legal and factual issues involved. We adopt those findings, except where noted, and summarize those relevant to our analysis below. For the most part, however, the specific facts of the disputes are not material to whether Kinney is culpable as charged, if any misconduct is aggravated or mitigated, and whether we should affirm the discipline recommendation. Instead, the pertinent facts are those demonstrating Kinney's unreasonable, unethical pursuit of his and his client's grievances, the significant harm he caused, and his lack of insight into his misconduct.

II. THE FERNWOOD CASES (LOS ANGELES COUNTY)

A. Factual Background

In the fall of 2005, Kinney and Kimberly Jean Kempton[2] purchased a home, as tenants in common, on Fernwood Avenue in the Silver Lake neighborhood of Los Angeles. From June 2006 through May 2009, the pair brought six lawsuits "over basically two things – the fence and the driveway," suing their neighbors (including an 18-year old boy), the previous owner of his house and her real estate broker, and the City of Los Angeles (the Fernwood cases).

1. This is Kinney's first discipline since he was admitted to practice in 1975.

2. OCTC initiated this proceeding against both Kinney and Kempton in 2012. After a four-day trial in April 2013, the court took the matter under submission. In June 2013, prior to rendering her decision, the hearing judge severed Kinney's and Kempton's matters and terminated the proceeding against Kempton due to her death in a June 7, 2013 traffic accident.

As declared in Superior Court Judge Elizabeth Grimes's August 7, 2007 statement of decision in one suit, Kinney acted with "unclean hands" in initiating and pursuing the Fernwood cases. According to Judge Grimes, Kinney admitted he knew *before* he bought the house that he was "buying litigation" yet "made no effort to talk to his neighbors and try to resolve his differences before filing a series of lawsuits." And the neighbors' trial testimony was marked by "deep emotion" well beyond witnesses' typical nervousness. In summary, Judge Grimes concluded that "Kinney is a relentless bully. He has not committed fraud or theft, which is ordinarily the case when courts find unclean hands. Yet he has robbed his neighbors of the peace and sanctuary of their homes, and 'mocked the system' with his baseless litigation against the City and its citizens."[3]

Though Kinney and Kempton "continually – and resoundingly – lost their cases in the trial courts" (*In re Kinney*, *supra*, 201 Cal.App.4th at p. 953), they repeatedly and unsuccessfully appealed each case. They persisted despite thousands of dollars in sanctions and harsh reprimands. The reasons the appeals failed are telling. One appeal was deemed as nothing more than a "grudge suit." Others were dismissed as duplicative or frivolous, for incoherent briefing, or for failure to present a discernible theory of recovery.

The courts tried twice to curb Kinney's litigation behavior. In November 2008, the Los Angeles County Superior Court granted defendants' motion and declared Kinney a vexatious litigant subject to a pre-filing order. (Code Civ. Proc., § 391.7.) The judge found Kinney had "[i]n the immediately preceding seven year period commenced, prosecuted, or maintained at least five litigations that have been finally determined against him or have been pending at least two years without going to trial or hearing." (See Code Civ. Proc., § 391, subd. (b)(1).) Separately, the judge determined that Kinney had repeatedly filed unmeritorious motions, pleadings, and other papers citing to four state and federal appellate court opinions from earlier, unrelated litigations.[4] (Code Civ. Proc., § 391, subd. (b)(3).)

Yet even after Kinney was declared a vexatious litigant, he did not stop. Instead, Kempton simply became the sole plaintiff with Kinney as the attorney in all the cases. This tactic ultimately provoked the Second District Court of Appeal to act. In 2011, the appellate court issued an order to show cause (OSC) why Kinney should not be declared a vexatious litigant.

In ruling on the OSC, the appellate court declared Kinney to be a vexatious litigant in the strongest possible terms. (Code Civ. Proc., § 391, subd. (b)(1), (3) & (4).) It pointed to Kinney's abominable history in the Fernwood cases, both at trial and on appeal, and to similar conduct in other litigations. (*In re Kinney*, *supra*, 201 Cal.App.4th at p. 954.) The court also found that Kinney used Kempton as a puppet or conduit for his abusive litigation practices while he purportedly acted as her attorney. Kinney acknowledged this behavior, telling the trial court that "the only reason he was not the named plaintiff is because ' "I'm a vexatious litigant and it takes too long to get approval" to sue.' " (*Id.* at p. 959.)

Also, the appellate court found that Kinney stood to benefit personally from the outcome of the litigation as a co-owner of the property. Echoing prior characterizations, the court concluded "he pursues obsessive, meritless litigation against the hapless residents of this state who have the misfortune to be his neighbors. Kinney has demonstrated a pattern of using the judicial system as a weapon in an unrelenting quest to get advantages that he does not deserve, imposing onerous litigation costs on his opponents that he does not incur himself because he is a lawyer." (*In re Kinney, supra,* 201 Cal.App.4th at p. 959.) The court prohibited Kinney from filing any new litigation (or pursuing appeals and writ petitions), in either his or Kempton's name, without first obtaining leave of court. The court sent a copy of its opinion to the State Bar.

At Kinney's disciplinary hearing, OCTC presented the neighbors' testimony to describe the harm caused by the Fernwood cases.

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3. As discussed below, the defendant neighbors testified in Kinney's discipline trial hearing. We find their testimony to be entirely consistent with Judge Grimes' findings, including the specific harm they suffered as well as the overall negative impact on the neighborhood.

4. *Kinney v. Overton* (Jul. 18, 2007, G037708) (nonpub. opn.); *Payne v. Schmidt* (Feb. 22, 2006, A109971, A110630) (nonpub. opn.); *Luc v. Chiu* (Oct. 2, 2001, A093519) (nonpub. opn.); *Van Scoy v. Shell Oil Company* (9th Cir. 2001) 11 Fed. Appx. 847 (9th Cir. 2001) (nonpub. opn.).

Carolyn Cooper, a single mother, had owned her home for more than 20 years when Kinney bought the house next door. When he named her in three lawsuits between 2006 and 2009, Cooper spent $180,000 defending those suits and related appeals. She was forced to take a second job, almost depleted the equity in her home, borrowed money from relatives, and sought additional financial aid for her son's tuition. She testified that Kinney's behavior was "very intimidating and threatening." Beyond the "totally devastating" legal expenses, she felt that she was "under attack, not just me, but my neighborhood, my child." Her son, Michael Olivares, flew in from New York to testify about the all-consuming stress his mother suffered from the lawsuits.

Judy and Jeffrey Harris, also long-time residents sued by Kinney, testified about the "six years of hell" they endured. Mr. Harris stated: "It felt very much like we were being attacked, at war. It basically dominated our life for the period of the trials." He stated that "our privacy was being invaded constantly, our property was trespassed on a daily or a weekly basis, and that they were using our property in a way that would be provoking us, so that they could use that against us."

The Harrises' son, Benjamin, was 18 years old when he was also sued by Kinney. He testified that he continually feared being served during school hours. He described the experience as a real hardship for his family and neighborhood. Further, he wondered: "how many hours am I never going to get back because of this? How many family dinners? How many birthday parties? How many missed opportunities with my friends, I guess, how much anxiety because of this?"

Michelle Clark, the previous owner of Kinney's property, testified she owed her attorneys over $200,000 and continues to suffer the negative emotional fallout from the suits, including the ongoing fear of being sued again by Kinney.

Each neighbor stated Kinney never made any effort to apologize for the harm caused by the lawsuits.

B. Conclusions of Law[5]

Count Two: Failure to Maintain a Just Action (Bus. & Prof. Code, § 6068, subd. (c))[6]

Kinney is charged with maintaining an unjust action by filing meritless lawsuits and actions regarding his Fernwood property, by failing to address the merits of the litigation, and for all the reasons set forth in *In re Kinney, supra*, 201 Cal.App.4th 951. The hearing judge correctly found Kinney culpable.

[1b] Under section 6068, subdivision (c), an attorney must maintain only those actions or proceedings that appear "legal or just." **[2]** Generally, we give a strong presumption of validity to the superior court's findings if supported by substantial evidence. (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 947.) And we may rely on a court of appeal opinion to which an attorney was a party as a conclusive legal determination of civil matters "which bear a strong similarity, if not identity, to the charged disciplinary conduct." (*In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 117.) **[1c]** The record provides clear and convincing evidence[7] supporting the 2008 and 2011 vexatious litigant rulings. Kinney unreasonably persisted in pursuing numerous lawsuits after unqualified losses at trial and on appeal; repeatedly filed unmeritorious motions, pleadings, and other papers; and engaged in tactics that were frivolous or intended to cause unnecessary delay. Accordingly, we conclude that Kinney maintained unjust actions.

[1d] Count Three is based primarily on the same misconduct as alleged in Count Two (failure to maintain a just action). We therefore adopt the hearing judge's dismissal of this count with prejudice as duplicative.

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5. **[1a]** We adopt the hearing judge's dismissal of Count One (malicious prosecution in violation of Rules Prof. Conduct, rule 3-200(A)) as duplicative of Count Two. In *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060, the Supreme Court instructed that little, if any, purpose is served by duplicate allegations of misconduct in State Bar proceedings.

6. All further references to sections are to the Business and Professions Code.

7. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

Count Four: Moral Turpitude (§ 6106) [8]

OCTC alleges that Kinney committed acts of moral turpitude by: (1) pursuing a " 'persistent and obsessive campaign of litigation terror,' " and (2) using Kempton as his puppet in the Fernwood cases. The hearing judge found that Kinney was persistent and obsessive, but "not corrupt or dishonest," and his "relentless litigation did not constitute serious, habitual abuse of the judicial system that involved moral turpitude." The judge also found no clear and convincing evidence that Kempton was Kinney's strawman or puppet. We disagree. The record clearly establishes the allegations as true, and the decisional law supports a finding of moral turpitude.

[3] From the outset, Kinney acted with "unclean hands" and sued his neighbors without attempting any informal resolution. He sought to use the judicial system as a weapon to inflict onerous litigation costs on the neighborhood's long-term residents for his own benefit. Being a lawyer, he himself did not suffer those expenses, and thus was able to continue his abuse of the judicial system by bringing at least 16 meritless appeals. Finally, and most importantly, Kinney acted in bad faith for years by disregarding the vexatious litigant pre-filing order, and pursuing his property interests in the guise of being plaintiff's counsel rather than the plaintiff. That Kempton also stood to benefit has no bearing on the fact that she was a puppet for Kinney's machinations. This course of misconduct clearly constitutes moral turpitude. (See *Maltaman v. State Bar, supra*, 43 Cal.3d at pp. 950-951 [noncompliance with court order supports § 6106 violation if attorney acted in bad faith,]; *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, 186 ["serious, habitual abuse of the judicial system constitutes moral turpitude"].)

III. THE SMEDBERG LITIGATIONS (EL DORADO COUNTY)

A. Factual Background

The Smedberg litigations involve three separate lawsuits and six appeals, based on an easement on land owned by Kinney's clients, Gerald and Robin Toste, benefitting their neighbors, the Smedbergs.

In 1977, the Smedbergs bought 11 acres in El Dorado County, which were divided into five parcels, with the hope that one or more would become a place for their children to build homes. The east portion of the property was difficult to access because of a creek. The property, however, had the benefit of an easement that would allow the Smedbergs to build a driveway across the adjacent property for easier access.

In 1999, the Tostes bought the adjacent property, unaware that the Smedbergs held the easement. In 2006, the Smedbergs began construction. Upon inquiry from the Tostes, the title company acknowledged its failure to report the easement and offered to reimburse them for actual loss to their property, including fees and costs. When the Tostes responded by blocking construction, the title company stated it would not provide legal representation should the Smedbergs sue.

The Smedbergs initially sued, seeking to quiet title and for an injunction. At this point, the Tostes hired Kinney. The court issued a preliminary injunction prohibiting the Tostes from interfering with the Smedbergs' use of the easement, and Kinney filed an answer and cross-complaint seeking to extinguish the easement. In 2007, Gerald Toste was found guilty of contempt for violating the injunction and ordered to serve a 60-day jail sentence. Kinney's successive attempts to have the contempt order set aside were denied by the Third District Court of Appeal. The Smedbergs prevailed at a jury trial, and were awarded compensatory and punitive damages and a permanent injunction. The Tostes twice sought appellate review. The appellate court affirmed the trial court's judgment, assessed sanctions jointly and severally against Kinney and his clients, and deemed the second appeal "frivolous," stating "no reasonable attorney could have thought that the Tostes' recycled versions of previously rejected appellate arguments

8. Section 6106 makes it a cause for disbarment or suspension for an attorney to commit any act involving moral turpitude, dishonesty, or corruption.

could possibly succeed." Undeterred, Kinney filed petitions for review in the California Supreme Court on the two appeals. Both petitions were denied.

In a second lawsuit, the Tostes, through Kinney, sued El Dorado County and the Superior Court of El Dorado County alleging a dangerous easement condition and inverse condemnation. After the first and second amended complaints were dismissed without prejudice, Kinney essentially restated the same facts and claims in a third amended complaint. It was dismissed with prejudice. Kinney then twice unsuccessfully sought review in the Court of Appeal, and then filed a petition for review in the California Supreme Court, which was denied.

In a third suit, the Tostes, again through Kinney, filed against the title company, seeking his attorney fees and damages caused by the company's refusal to defend the Smedbergs' lawsuit. The court granted summary judgment in favor of the title company, and Kinney unsuccessfully appealed.

As with the Fernwood cases, the unlucky neighbors suffered harm from these suits. Bonnie Smedberg testified her family has spent upwards of $115,000 on the litigation, and that her children want nothing to do with the property because of the lawsuits. She and her husband Kenneth have undergone counseling for the frustration, stress, and depression inflicted by the lawsuits.

B. Conclusions of Law[9]

Count Six: Failure to Maintain a Just Action (§ 6068, subd. (c))

[4] Kinney is charged with maintaining an unjust action by pursuing meritless lawsuits and actions regarding the Tostes' El Dorado County property and by failing to address the merits of the litigation. We affirm the hearing judge's culpability finding. However, we focus less than the hearing judge did on whether any triable issue existed at the outset of the litigation. Instead, we find Kinney's misconduct to be his filing of frivolous appeals, recycling previously rejected arguments, and resubmitting essentially the same complaint as "amended." (*In the Matter of Lais*, *supra*, 4 Cal. State Bar Ct. Rptr. 112, 118 [citing *Sorenson v. State Bar* (1991) 52 Cal.3d 1036 as an example of an attorney's wasteful, expensive relitigation of matters resolved in prior suit as a violation of § 6068, subd. (c)].)

Count Seven is based in large part on the same misconduct as alleged in Count Six. We therefore adopt the hearing judge's dismissal of this count with prejudice as duplicative.

Count Eight: Moral Turpitude (§ 6106)

OCTC alleges that Kinney committed acts of moral turpitude, either intentionally or through gross negligence, by bringing and maintaining meritless lawsuits and actions regarding the Tostes' property. The hearing judge found moral turpitude because despite "repeated lawsuits, recycled arguments, six appeals, and even a 60-day jail sentence for [his client], Kinney continued to wage his frivolous litigations against the Smedbergs."[10]

[5] We do not find moral turpitude and accordingly dismiss Count Eight. Unlike the Fernwood cases, Kinney was not a plaintiff here, and the record does not establish he had an interest in the Tostes' property. The evidence establishes that Kinney was acting at the direction of the Tostes. In fact, the Tostes testified on Kinney's behalf at the discipline trial, confirming that they believed their claims against the Smedbergs and others were sound and wanted Kinney to proceed with the lawsuits. While Kinney's conduct supports the allegations in Counts Five and Seven, we do not find that his representation of the Tostes qualifies as a "serious, habitual abuse of the judicial system." (*In the Matter of Varakin*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 186.)

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9. We adopt the hearing judge's dismissal of Count Five (malicious prosecution in violation of Rules of Prof. Conduct, rule 3-200(A)) as duplicative of Count Six.

10. OCTC mistakenly states that the hearing judge dismissed Count Eight.

IV. AGGRAVATION AND MITIGATION[11]

A. Aggravation

We find four factors in aggravation, each bearing significant weight.[12]

First, Kinney committed multiple acts of misconduct. (Std. 1.5(b).)

[6b] Second, he demonstrated a pattern of misconduct by repeatedly engaging in vexatious litigation for more than six years in the Fernwood cases and committing an ethical violation in the Smedberg litigations during this same period. (Std. 1.5(c); *Levin v. State Bar* (1989) 47 Cal. 3d 1140, 1149, fn. 14, citing *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367 [most serious instances of repeated misconduct over prolonged period of time characterized as pattern of misconduct].) **[7]** Third, Kinney significantly harmed the public and the administration of justice. (Std. 1.5(f).) As shown by witness testimony, Kinney's relentless litigation campaigns inflicted serious financial and emotional harm on his Fernwood neighbors and on the Smedbergs. Not only did he force them to spend considerable time and money defending themselves against baseless claims, but he clogged the court system for manifestly improper purposes. We emphatically agree with the hearing judge that Kinney's actions constituted an "outrageous waste of judicial resources."

[8] Fourth, Kinney's misconduct is aggravated by his utter failure to accept responsibility for his actions and his failure to atone for the resulting harm. (Std. 1.5(g)); *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511 [while the law does not require Kinney to be falsely penitent, it "does require that [he] accept responsibility for his acts and come to grips with his culpability. [Citation]."] Indeed, three days prior to his discipline trial, he sought a temporary restraining order against the State Bar to stop the proceedings, arguing that the State Bar is violating his federal rights. The request was denied. We adopt the hearing judge's finding that this is additional aggravating evidence.[13]

B. Mitigation

[9] We disagree with the hearing judge's finding that Kinney's conduct is significantly mitigated by his 31 years of discipline-free practice. Standard 1.6(a) establishes that mitigation may include the "absence of any prior record of discipline over many years of practice coupled with present misconduct, which is not deemed serious." When the misconduct is serious, however, a discipline-free record is most relevant when the misconduct is aberrational and unlikely to recur. (*Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029; *In the Matter of Reiss* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 206, 218.) As Kinney's misconduct is serious, part of a pattern, and highly likely to recur, we assign no mitigation under standard 1.6(a).

We adopt and affirm the hearing judge's decision finding no mitigation for Kinney's claims of good faith (std. 1.6(b)), and good character (std. 1.6(f)) ["extraordinary good character" may mitigate misconduct]).

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11. The appropriate discipline is determined in light of the relevant circumstances, including aggravating and mitigating factors. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) OCTC must establish aggravation by clear and convincing evidence (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.5 [hereafter standards]), while Kinney has the same burden to prove mitigating circumstances (std. 1.6). These standards reflect modifications effective January 1, 2014. Since this case was submitted for ruling in 2014, the new standards apply.

12. **[6a]** The standards now establish multiple acts and pattern of misconduct as distinct categories of aggravation. The hearing judge concluded Kinney's multiple violations demonstrate only a "borderline pattern of misconduct." We find that his violations constitute a pattern.

13. Kinney testified in his discipline trial that he was "finished with lawsuits" related to the Fernwood property. We observe, however, that he writes in his opening brief that he has pending civil rights claims against the City of Los Angeles in federal district court and a pending appeal in the Ninth Circuit regarding the jurisdiction of the judges who declared him a vexatious litigant.

V. DISCIPLINE[14]

Standard 2.7 provides: "Disbarment or actual suspension is appropriate for an act of moral turpitude, dishonesty, fraud, corruption or concealment of a material fact. The degree of sanction depends on the magnitude of the misconduct and the extent to which the misconduct harmed or misled the victim and related to the member's practice of law." Either disbarment or actual suspension is also appropriate for maintaining an unjust action. (Std. 2.8(a).)

[10] Kinney used his legal knowledge to repeatedly abuse the court system through his relentless lawsuits. His misconduct goes beyond vexatious litigation as it involves significant aggravation, including a lengthy pattern of wrongdoing, significant harm to others, disregard for the court process, and a total lack of insight into his harmful behavior. At the same time, Kinney has failed to establish any mitigation. Given these circumstances, we conclude that he should be disbarred under standard 2.7. (See *Lebbos v. State Bar* (1991) 53 Cal.3d 37, 45 [disbarment for multiple acts of moral turpitude and dishonesty, including pattern of abuse of judicial officers and court system]; *In the Matter of Varakin*, *supra,* 3 Cal. State Bar Ct. Rptr. 179 [disbarment for 30-year attorney sanctioned for filing frivolous motions and appeals over 12-year period who lacked insight and refused to change].)

The hearing judge concluded the attorney misconduct in *Varakin* was more serious than Kinney's and the misconduct in *Rosenthal v. State Bar* (1987) 43 Cal.3d 612 was more extensive; therefore, the cases do not support disbarment here. We disagree. We consider Kinney's lengthy periods of extremely harmful misconduct and aggravation more than sufficiently serious and extensive to support a disbarment recommendation.

Seven years after Judge Grimes identified Kinney as a "relentless bully," six years after he was first declared a vexatious litigant, and almost four years after a Court of Appeal warned in a published opinion that Kinney "must be stopped immediately," he continues to clog the court system with his meritless claims and motions. We find that Kinney is unfit to practice, and we recommend his disbarment. Requiring Kinney to undergo a full reinstatement proceeding after he is disbarred is the only measure that can adequately protect the public, the courts, and the legal profession.[15]

VI. RECOMMENDATION

We therefore recommend that Charles Gadsden Kinney be disbarred and that his name be stricken from the roll of attorneys licensed to practice in this state. We further recommend that he be ordered to comply with the provisions of rule 9.20 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order in this matter. Finally, we recommend that the State Bar be awarded costs in accordance with section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

VII. ORDER OF INACTIVE ENROLLMENT

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

WE CONCUR:

PURCELL, P. J.
EPSTEIN, J.

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14. The purpose of attorney discipline is not to punish the attorney but to protect the public, the courts, and the legal profession. (Std. 1.1(a).)

15. Having independently reviewed all arguments set forth by Kinney, those not specifically addressed have been considered and rejected as having no merit.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

CLINTON EDWARD PARISH

A Member of the State Bar

[No. 12-O-15242]

Filed February 5, 2015

SUMMARY

Both parties appeal from the hearing judge's decision finding that respondent, knowingly, or with reckless disregard for the truth, made one factual misrepresentations about his opponent during a judicial campaign, in violation of rule 1-700 of the State Bar Rules of Professional Conduct and issuing an order of admonishment. (Hon. Pat McElroy, Hearing Judge.)

The Office of the Chief Trial Counsel of the State Bar sought a public reproval, arguing that respondent made five misrepresentations and/or misleading statements. Respondent sought dismissal, arguing he did not violate the rule. The review department affirmed the hearing judge's culpability findings and recommended a public reproval with conditions.

COUNSEL FOR PARTIES

For State Bar: Allen Blumenthal

For Respondent: Clinton E. Parish

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a-c] **193 Miscellaneous General Issues—Constitutional Issues—Other**
256.00 Culpability—Rules of Professional Conduct Violations—Violation of ethics rules for judicial candidates (RPC 1-700)

Attorneys cannot be disciplined for speech that is protected by the First Amendment. However, because attorneys are officers of the court, reasonable speech restrictions may be imposed on them. Rule 1-700, which regulates speech by attorney candidates for judicial office, burdens a category of speech at the core of First Amendment freedoms, but false statements are not protected speech and may be basis for discipline if made intentionally or with reckless disregard for truth. Objective "reasonable attorney" test, rather than subjective test, is properly applied in determining whether statement was made with reckless disregard for truth. Attorney judicial candidate, who made a false claim that his opponent was involved in corporate fraud and bribery, was culpable of violating rule 1-700 because he made the factual misrepresentation knowingly or with reckless disregard for the truth as viewed under an objective standard.

[2 a,b] **162.11 Standards of Proof/Standards of Review—Quantum of Proof—State Bar's burden—Clear and convincing standard**
256.00 Culpability—Rules of Professional Conduct Violations—Violation of ethics rules for judicial candidates (RPC 1-700)

Rule 1-700, on its face, prohibits attorney judicial candidates only from making false statements, not misleading ones. State Bar has burden of proving falsity of statements by clear and convincing evidence. Attorney judicial candidate was not culpable for violating rule 1-700 for engaging in truthful but misleading or potentially misleading speech about his opponent.

[3] **745.10 Mitigation—Remorse/restitution/atonement (1.6(g); 1986 Standard 1.2(e)(vii))—Found**

Attorney judicial candidate was entitled to significant mitigation for his remorse and recognition of wrongdoing for issuing a prompt statement of regret and suspending judicial campaign after learning he had falsely connected opponent to bribery and corporate fraud.

[4] **586.50 Aggravation—Harm to administration of justice (1.5(f); 1986 Standard 1.2(b)(iv))—Declined to find**

Attorney judicial candidate's misrepresentation about opponent was not shown to have caused harm where attorney lost election by significant margin and extensive media coverage exposed the statement as false prior to the election.

[5] **120 Generally Applicable Procedural Issues—Conduct of Trial**
130 Generally Applicable Procedural Issues—Procedure on Review
148 Evidentiary Issues—Witnesses
169 Miscellaneous Issues re Standard of Proof/Standard of Review

Review Department will not grant relief on the basis of evidentiary errors without a showing of prejudice. Hearing judge properly permitted State Bar to call respondent as first witness, even though respondent had not yet decided whether to testify on his own behalf. State Bar also properly called witnesses without prior disclosure of their statements, where witnesses had made no written or recorded statements, and respondent could not show prejudice because he knew witnesses' identities, and had a summary of their testimony, in advance of trial.

[6] **801.45** **Application of Standards—Deviation from standards —Found not to be justified**
903.05 **Application of Standards—Interim 2.15—Violations Not Specified—Applied—Reproval—Violation of RPC only**
903.30 **Application of Standards—Interim 2.15—Violations Not Specified—Applied—Reproval--Other mitigating factors**
1093 **Miscellaneous Issues re Discipline—Inadequacy of Discipline**
1094 **Miscellaneous Issues re Discipline—Admonition in Lieu of Discipline**
Standards for attorney discipline should be followed whenever possible. Where applicable standard provided for suspension or reproval, hearing judge erred in resolving case by issuing admonition. Despite extensive mitigation, attorney judicial candidate's recklessly false allegation implicating opponent in bribery and fraud warranted public discipline, because it threatened to erode public confidence in the judiciary. Accordingly, public reproval was appropriate discipline.

ADDITIONAL ANALYSIS

Culpability
Found
256.01 Violation of ethics rules for judicial candidates (RPC 1-700)
Not Found
256.05 Violation of ethics rules for judicial candidates (RPC 1-700)
Mitigation
Found
740.10 Good character references (1.6(f); 1986 Standard 1.2(c)(vi))
Discipline
1024 Ethics exam/ethics school
1041 Public reproval with conditions

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OPINION

HONN, J.

In this matter of first impression, we consider whether Clinton Edward Parish knowingly, or with reckless disregard for the truth, made factual misrepresentations about himself or his opponent during his judicial campaign, in violation of rule 1-700 of the State Bar Rules of Professional Conduct.[1]

Both parties appeal from the hearing judge's decision finding Parish made a false accusation that his opponent, who was a sitting judge, was involved in a bribery and corporate fraud scheme. The parties further challenge the order recommending an admonition. (Rules Proc. of State Bar, rule 5.126.) The Office of the Chief Trial Counsel of the State Bar (OCTC) seeks a public reproval, arguing that Parish made five misrepresentations and/or misleading statements. Parish argues he unknowingly made one false statement about his opponent and further contends he is not culpable of violating rule 1-700 because OCTC failed to prove he made the statements with a reckless disregard of the truth. In the alternative, Parish requests we affirm the order of admonition.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we agree with the hearing judge that Parish's statement accusing his opponent of involvement in bribery and corporate fraud was a factual misrepresentation made with reckless disregard for the truth. As such, Parish is culpable of violating rule 1-700. We also agree that the other four campaign statements alleged in the Notice of Disciplinary Charges (NDC) do not violate the rule, that extensive mitigating circumstances are present, and that the record does not support a finding of significant harm. We disagree with the hearing judge, however, that this matter should be resolved with an order of admonition, which is not discipline. Instead, we find Parish's reckless statement implicating a judge with bribery requires public discipline to maintain the integrity of the legal profession and to preserve public confidence in the impartiality of the judiciary. Therefore, we order Parish publicly reproved with the condition that he successfully complete the State Bar's Ethics School.

I. PARISH'S JUDICIAL CAMPAIGN[2]

As a Yolo County deputy district attorney and a political neophyte, Parish mounted a campaign to unseat Judge Daniel Maguire in Yolo County Superior Court during the June 2012 election cycle. Parish spent the majority of his campaign going door-to-door and appearing at events to meet people and ask for their votes and their money. For campaign strategy and messaging, Parish relied heavily on his trusted advisor, Kirby Wells, who had extensive campaign experience. Parish also enlisted the aid of two paid political consultants — first Frank Ford and then Aaron Park. When Ford left the campaign in March 2012, Parish began working with Park, who was highly recommended by Wells. Park and Wells agreed that Ford had not been "aggressive" enough in the campaign.

A. Campaign Mailer Targeting Judge Maguire

Judge Maguire worked as a deputy legal affairs secretary for then-Governor Arnold Schwarzenegger from 2005 until his appointment to the bench by the governor in late 2010. As a key component of its strategy, the Parish campaign sought to emphasize the connection between Judge Maguire and Governor Schwarzenegger, who was generally unpopular

1. Rule 1-700(A) states: "A member who is a candidate for judicial office in California shall comply with Canon 5 of the Code of Judicial Ethics." In turn, the relevant portion of Canon 5 provides: "A candidate for election or appointment to judicial office shall not . . . knowingly, or with reckless disregard for the truth, misrepresent the identity, qualifications, present position, or any other fact concerning the candidate or his or her opponent." (Former Cal. Code Jud. Ethics, Canon 5B(2), renumbered and amended as Canon 5B(1)(b) effective Jan. 1, 2013.) All further references to rules are to the State Bar Rules of Professional Conduct unless otherwise noted.

2. Our factual findings are based on the hearing judge's findings (see Rules Proc. of State Bar, rule 5.155(A) [hearing judge's factual findings entitled to great weight on review]), Parish's verified response to the Notice of Disciplinary Charges, the parties' stipulation, the trial testimony of Parish, Judge Daniel Maguire, and other witnesses, and the documents admitted into evidence.

in Yolo County. To this end, in March 2012, the campaign began preparing two different mailers — one for Republican voters and the other for Democrats. The Republican mailer described Judge Maguire as a Schwarzenegger "political appointee." The one sent to Democrats was more targeted. It prominently featured a photo of the scowling governor next to the statement: "If you knew Arnold picked your Judge, would you be happy?" On the reverse side, the text read:

Dan Maguire was Arnold's Bagman:

- Dan Maguire was quoted defending the Protocol Foundation — used to hide $1.7 million in Arnold's Travel Expenses.

- As part of Arnold's inner circle, Dan Maguire was part of Arnold's legal team that made decisions including commuting the sentence of convicted murderer Esteban Nunez. Fabian Nunez (Estaban's [sic] father) is the former Speaker of the Assembly and current business partner of Arnold.

- Dan Maguire was involved in a sordid case of corporate fraud that involved payment of bribes in Russia.

- Dan Maguire received a political appointment (never elected) and took the bench only three weeks before Arnold's last-day Commutation of Esteban Nunez' sentence!

California suffered through 7 years of Arnold - you can stop it in Yolo County!

1. The Mailer Contained A False Statement

Parish concedes the statement implicating Judge Maguire in bribery and corporate fraud was "actually false." He learned it was false after the mailer had been delivered to homes in Yolo County in May, but he could have ascertained this fact before sending it out. The accusation was brought to Parish's attention in March via an email from Wells in which he referenced an attached article, and stated "if I read this right," the law firm Judge Maguire had previously worked for "was doing the legal work for a bunch of Russian mobsters." Parish read the email, but not the attached article nor did he conduct any research to establish the accuracy of Wells's assessment. Indeed, the email provided no factual support to accuse Judge Maguire of bribery or corporate fraud. In addition, though he relied entirely on Wells's conclusions about Judge Maguire on this issue, Parish did not ask Wells to identify the steps he had taken, if any, to vet the accusation. Finally, Judge Maguire testified that perfunctory online research would have disclosed the lack of any factual support to validate the accusation.

In contrast to his hands-off handling of the bribery accusation, Parish was heavily involved with crafting the statement about the commutation of convicted murderer Esteban Nunez's sentence. He exercised caution in preparing the statement because his campaign did not have "direct evidence" that Judge Maguire was personally involved in the decision. Parish met with the parents of Nunez's victim, who claimed then-attorney Maguire was personally involved in the decision to commute the sentence and that he was appointed to the bench for this reason. Parish credibly testified he believed these claims.

Parish concluded that Maguire was involved with the commutation of Esteban Nunez's sentence even though he had left his job months before the decision to commute was announced. Based on his experience in the district attorney's office, Parish reasoned the decision to commute would "take time," involving the bureaucratic process.

As for the statement that Judge Maguire defended the Protocol Foundation, it is undisputed the foundation paid $1.7 million of Schwarzenegger's travel expenses. The payments were not reported on standard state disclosure forms. Instead, the governor's staff prepared memos about the expenses. This practice attracted the attention of watchdog groups and the Los Angeles Times, which questioned Maguire about it in his capacity as the governor's deputy legal affairs secretary. (Pringle, *Details lacking in travel costs for governor*, Los Angeles Times (Dec. 10, 2007).) The Times article did not directly quote Maguire about the Governor's cost memoranda, but instead stated: "Maguire in-

sisted that the memos are public records that satisfy disclosure rules." In drafting the related statement for the mailer, Parish and his campaign relied on the Times article.

2. The Fallout From The Campaign Mailer And Parish's Response

The mailer was sent on May 15, 2012. It was controversial, and the fallout was immediate. Judge Maguire asked his colleague, another Yolo County Superior Court judge, to prepare a robocall for voters condemning the mailer, which he did. In addition, local newspapers printed several articles, portraying the mailer in a negative light. Within days of the mailer's delivery, Parish's key followers withdrew their support, including the Yolo County sheriff and the district attorney, the Winters Police Officers Association, and the Yolo County Republican Party.

Parish quickly and formally acknowledged the inaccuracy of the statement about Judge Maguire's involvement in bribery and corporate fraud. He said he regretted including it in the mailer. Parish fired Park and stopped actively fundraising and campaigning. The election took place on June 5; Parish was resoundingly defeated, receiving only 23% of the vote.

B. Parish's Campaign Statements About Himself

Two of Parish's statements about himself are also before us. In May 2012, Parish's campaign staff placed approximately 75 4' x 6' signs near highways in Yolo County, with the following text:

LAW ENFORCEMENT'S CHOICE
CLINT
PARISH
JUDGE
BECAUSE EXPERIENCE MATTERS

Parish testified the intended message was to state his name and announce that he was seeking the position of judge. The references to "law enforcement's choice" and "experience" related to a key campaign strategy to tout his experience as a deputy district attorney and assert that it qualified him more than Judge Maguire to adjudicate criminal matters. Also, Parish testified that he was widely known in Yolo County as a deputy district attorney—not a sitting judge. His other campaign materials clearly indicated as much. Parish explained that he decided not to modify "Judge" with the word "for" to save money and to avoid cluttering signs that would be viewed by people driving by at 65 miles per hour.

In the second statement about himself, Parish's campaign website posted a photo of Parish and a uniformed officer in front of Winters' Police Department. The caption stated: "Clint Parish has been endorsed by the Winter's [sic] Police Department." In fact, Parish was endorsed by the Winters Police Officers Association — not the police department. Parish promptly corrected the error when it was brought to his attention.

II. PARISH IS CULPABLE OF VIOLATING RULE 1-700 BY MAKING ONE FACTUAL MISREPRESENTATION

On February 12, 2013, OCTC charged Parish with one count of violating rule 1-700. The NDC alleged Parish made five misrepresentations: (1) asserting Judge Maguire "while in private practice, was involved 'in a sordid case of corporate fraud that involved payment of bribes in Russia . . .' "; (2) asserting Judge Maguire "was 'part of Arnold's legal team that made decisions including commuting the sentence of convicted murderer Esteban Nunez . . .' "; (3) asserting Judge Maguire "was 'quoted defending the Protocol Foundation — used to hide $1.7 million in Arnold's Travel Expenses' "; (4) stating on signs " 'Law Enforcement's Choice Clint Parish Judge Because Experience Matters,' [when] in truth and in fact [Parish] was not a judge"; and (5) posting a photo of himself with a uniformed officer in front of Winters' Police Department with the caption: " 'Clint Parish has been endorsed by the Winter's [sic] Police Department,' [when] in truth and in fact [Parish] had not been endorsed by the Winters' Police Department."

Under rule 1-700 and Canon 5, attorneys who are candidates for judicial office may not make misrepresentations about themselves or their oppo-

nents. We fully acknowledged in *In the Matter of Anderson* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 775 (*Anderson*) that we cannot discipline an attorney for speech that is protected by the First Amendment. However, we also recognize that "attorneys occupy a special status and perform an essential function in the administration of justice. Because attorneys are officers of the court with a special responsibility to protect the administration of justice, courts have recognized the need for the imposition of reasonable speech restrictions upon them." (*Ibid.*)

[1a] As a content-based restriction on judicial campaign speech, rule 1-700 "burdens a category of speech that is 'at the core of our First Amendment freedoms' — speech about the qualifications of candidates for public office." (*Republican Party of Minnesota v. White* (2002) 536 U.S. 765, 774 [153 L.Ed.2d 694, 122 S.Ct. 2528], internal quotations omitted.) At the same time, false statements are not protected speech and may be the basis of attorney discipline if made intentionally or with reckless disregard for the truth. (See *Standing Committee on Discip. v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1437 (*Yagman*); *In the Matter of Anderson, supra,* 775 (*Anderson*).) Considering these general principles and the language of rule 1-700 in determining whether each of Parish's five campaign statements violated the rule, we ask: (1) if the statement was a misrepresentation of fact about Parish or Judge Maguire; and, if so, (2) whether Parish made the factual misrepresentation knowingly or with reckless disregard for the truth.

In his first statement, Parish made an unequivocally false claim that Judge Maguire was involved in corporate fraud, including payment of bribes in Russia. Parish argues he is not culpable of violating rule 1-700 because he did not know his statement was false or subjectively entertain serious doubt as to its truth. As such, he urges us to adopt the subjective malice test set forth in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254 [11 L.Ed.2d 686, 84 S.Ct. 710].

We find otherwise. In *In the Matter of Anderson, supra,* 3 Cal. State Bar Ct. Rptr. 775, we adopted the Ninth Circuit Court of Appeal's reasoning found in *Yagman, supra,* 55 F.3d at p. 1437 and *U.S. Dist. Court for E.D. of Wash. v. Sandlin* (9th Cir. 1993) 12 F.3d 861, 867 (*Sandlin*), that the purely subjective standard applicable to defamation cases is not suited to attorney disciplinary proceedings. Under the objective standard, a court must determine "what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances." (*Sandlin, supra,* 12 F.3d at p. 867; accord, *Yagman, supra,* 55 F.3d at p. 1437.)[3] Reckless disregard is shown if the attorney had no reasonable factual basis for making the statements, considering their nature and the context in which they were made." (*Yagman, supra,* 55 F.3d at p. 1437.) The inquiry "may take into account whether the attorney pursued readily available avenues of investigation." (*Ibid.*, fn. 13.)

[1b] We agree with the Ninth Circuit's conclusion that the "objective malice standard strikes a constitutionally permissible balance between an attorney's right to criticize the judiciary and the public's interest in preserving confidence in the judicial system. Lawyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken." (*Yagman, supra,* at p. 1438.)

[1c] Applying this standard, we find Parish did not act as a reasonable attorney in publishing the statement that Judge Maguire was involved in bribery and corporate fraud. Wells's email did not provide any support to implicate Judge Maguire in such misconduct. Minimal research would have alerted Parish that the accusation was baseless, but he conducted no research. His unquestioning reliance

3. States which have considered this issue in the context of attorney discipline have applied the objective standard for a determination of constitutional malice. (See, e.g., *Ramirez v. State Bar* (1980) 28 Cal.3d 402; *In re Terry* (Ind. 1979) 394 N.E.2d 94; *Louisiana State Bar Ass'n v. Karst* (La. 1983) 428 So.2d 406, 409; *In re Graham* (Minn. 1990) 453 N.W.2d 313, 321-322; *In re Westfall* (Mo. 1991) 808 S.W.2d 829, 837; *In re Holtzman* (N.Y. 1991) 577 N.E.2d 30, 34; but see *State Bar v. Semaan* (Tex.Civ.App. 1974) 508 S.W.2d 429, 432-33.)

on Wells was unreasonable given the defamatory nature of the accusation. (*Sandlin, supra*, 12 F.3d at p. 867 [attorney acted unreasonably by wrongfully accusing judge of ordering court reporter to alter transcript of court proceedings before results of court reporter's deposition were disclosed; see also *Ramirez v. State Bar, supra,* 28 Cal.3d 402 [upholding sanctions where attorney made false statements about judges based solely on conjecture without investigating whether allegations were factually substantiated].) Clear and convincing evidence establishes that Parish violated rule 1-700.[4]

[2a] However, OCTC failed to establish that Parish's statement asserting Judge Maguire was "part of Arnold's legal team that made decisions including commuting the sentence of convicted murderer Esteban Nunez" was false. (*In the Matter of Anderson, supra*, 3 Cal. State Bar Ct. Rptr. at p. 785 [OCTC has burden to demonstrate falsity].) The mailer accurately stated Maguire was part of the governor's small legal team.[5] OCTC did not establish by clear and convincing evidence that the decision to commute Nunez's sentence was the governor's alone rather than made in consultation with his legal team. Moreover, another statement in the flier indicates Judge Maguire was on the bench before the commutation occurred. The statement stops short of falsely claiming Maguire was personally responsible for making the decision. Because we do not find OCTC established a false statement of fact, we conclude there is no violation of rule 1-700.[6]

OCTC urges us to read the rule as prohibiting more than factual misrepresentations. It asks us to discipline Parish for "subtly" creating "the false impression" and creating "by innuendo the false impression" that Judge Maguire was involved in the decision to commute the criminal sentence. It contends it is "unfair and dishonest" to "imply" Judge Maguire's involvement. OCTC argues an attorney is required to refrain from misleading and deceptive acts without qualification and cites to cases that find no distinction is to be made among concealment, half-truth, and false statement of fact. However, these discipline cases consider attorney representations to clients and to judges in the courtroom — they are not cases that consider the regulation of core First Amendment speech. (See, e.g., *In re Naney* (1990) 51 Cal.3d 186; *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166.)

[2b] OCTC asks that we discipline Parish for engaging in truthful but misleading or potentially misleading speech. But on its face, rule 1-700, and Canon 5 to which it refers, only reach factual *misrepresentations*. They do not purport to regulate true statements that may be misleading or true statements that might imply or suggest through innuendo that voters draw false conclusions.[7]

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4. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

5. Judge Maguire testified the governor had one legal affairs secretary and four to five deputy legal secretaries.

6. We therefore do not need to reach the issue of whether Parish acted recklessly. Nevertheless, we agree with the hearing judge that "it was reasonable to speculate" Judge Maguire was involved in the decision based on our findings of fact above. Parish also acted reasonably, as opposed to recklessly, in drafting a statement that did not claim more than he could support with facts.

7. During the briefing period in this matter, OCTC provided the court with an Ohio Supreme Court case, *In re Judicial Campaign Complaint Against O'Toole* (Ohio, Sep. 24, 2014, No. 2012-1653) 2014 WL 4746648, which interpreted an Ohio rule that prohibited not only false speech by judicial candidates but also "true speech that is nevertheless misleading." The Ohio Supreme Court found that a regulation of true but misleading statements was a content-based regulation that must overcome the presumption of unconstitutionality. Applying the strict scrutiny standard, the Supreme Court held "that the state has a compelling government interest in ensuring truthful judicial candidates, but that the rule is not narrowly tailored to meet its purpose, because it overreaches to speech that is true but that would be deceiving or misleading to a reasonable person." (*Id.* at p. 5.)

Next, we consider Parish's statement that Maguire was quoted defending the Protocol Foundation. The Los Angeles Times article described Judge Maguire's acknowledgment that the governor's travel expenses were funded by the Protocol Foundation. The article also states Maguire "insisted" the expense memos satisfied the public disclosure rules. In his reference to the Los Angeles Times article, Parish reasonably characterized Judge Maguire's defense of the Governor's handling of foundation contributions. This statement again is not false, and accordingly is not disciplinable under rule 1-700.

As for Parish's statements about himself, the facts do not show he was attempting to use his campaign sign to claim he was a sitting judge. It was a reasonable representation of a candidate's name and the office he sought. And his claim to be "law enforcement's choice" accurately reflected the support he enjoyed from several police officers' associations as well as the county sheriff. Likewise, the caption on Parish's website misstating that he was supported by the police department when in fact he was supported by the police officers' association does not rise to the level of a rule 1-700 violation. It was a de minimis mistake in light of his endorsement by the police officers' association and promptly corrected.

III. EXTENSIVE MITIGATION AND NO AGGRAVATION[8]

[3] Parish is entitled to significant mitigation for his remorse and recognition of wrongdoing. (Std. 1.6(g).) Parish issued a prompt statement of regret and suspended his campaign once he learned he had falsely connected Judge Maguire to bribery and corporate fraud. The importance of these steps is underscored by the new directive in the California Code of Judicial Ethics that candidates "take appropriate corrective action if the candidate learns of any misrepresentations made in his or her campaign statements or materials." (Cal. Code Jud. Ethics, canon 5B(2) (2013.) Further, during his trial and at oral argument before this Court, Parish demonstrated genuine contrition and acknowledged he had committed an error in judgment. Finally, he apologized to Judge Maguire at his disciplinary trial — a sincere, albeit belated, expression of remorse — which Judge Maguire accepted.

The hearing judge also assigned mitigation credit to Parish's lack of prior discipline (std. 1.6(a)), his "extraordinary good character" (std. 1.6(f)), and his pro bono work. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) OCTC does not challenge these findings, and we adopt and affirm them. We highlight that Parish practiced law for 11 years without incident, including many years of service to the Yolo County District Attorney's Office. He also presented the testimony of nine character witnesses from a broad cross-section of the legal and non-legal communities, who uniformly attested to his character, integrity, and dedication. We find Parish's pro bono work to be particularly commendable as he generously offered his time to volunteer for a variety of organizations in his community. He also cooked on a regular basis at the Ronald McDonald House in San Francisco as a way of giving back for the help his family received when his child was ill.

[4] OCTC asks us to find that Parish's misconduct is aggravated because he caused "significant harm." (Std. 1.5(f).) OCTC presented no evidence that Parish caused harm, and the hearing judge found none. Indeed, given the extensive media coverage in a small county about the campaign mailer, the robocall condemning it, the rapid distancing by former supporters, and Parish's decision to stop actively campaigning, we find no clear and convincing evidence of harm to Maguire or to the administration of justice. The lopsided election outcome in Maguire's favor also weighs strongly against a finding of harm.

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8. The Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence (hereafter, standards). Standard 1.6 requires Parish to meet the same burden to prove mitigation.

IV. PARISH'S PROCEDURAL CHALLENGES FAIL

[5] Parish challenges the fairness of various aspects of his disciplinary proceeding. His challenges all lack merit. Contrary to his contention, the hearing judge properly allowed OCTC to call Parish as its first witness before he made the determination whether to testify on his own behalf. Moreover, Parish has made no showing of prejudice. (*In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 241 [absent actual prejudice, party not entitled to relief on evidentiary ruling].) Parish's argument that we should strike the testimony of two witnesses, including Judge Maguire, because OCTC failed to disclose their statements is unfounded. OCTC had no written statements or recordings of these witnesses to provide prior to trial and there were no exculpatory statements to produce. Further, Parish failed to show prejudice since he knew about the witnesses, received a summary of their testimony, and had the opportunity to contact and interview them both before trial. Finally, the hearing judge did not err in sustaining a relevance objection to a question to Judge Maguire about whether he had ever given an interview from the courthouse. Again, Parish failed to show that he suffered any prejudice as a result of the hearing judge's evidentiary ruling.

V. A PUBLIC REPROVAL IS APPROPRIATE DISCIPLINE

[6] The Supreme Court instructs us to follow the standards "whenever possible" (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11), and give them great weight to promote consistency (*In re Silverton* (2005) 36 Cal.4th 81, 91). Standard 2.15 provides that suspension or reproval is the appropriate discipline in this case. Yet the hearing judge opted to resolve this case with an order of admonition. (Rules Proc. of State Bar, rule 5.126.) She concluded that any imposition of discipline would be punitive in nature and fail to serve the purposes of attorney discipline.[9]

We are cognizant that Parish has already paid a heavy professional price for the campaign mailer, and that his misconduct was neither malicious nor intentional. We appreciate the significant steps he took to mitigate the effects of his false statement and find his misconduct unlikely to recur.

Even so, Parish's reckless decision to implicate Judge Maguire in bribery and corporate fraud warrants public discipline. "Ethical rules that prohibit false statements impugning the integrity of judges . . . are not designed to shield judges from unpleasant or offensive criticism, but to preserve public confidence in the fairness and impartiality of our system of justice." (*Yagman, supra*, 55 F.3d at p. 1437.) False allegations of bribery and fraud uniquely threaten to erode public confidence in the judiciary. Accordingly, we find that a public reproval with the condition that Parish successfully complete the State Bar's Ethics School is the appropriate and necessary discipline in this conviction proceeding.

VI. ORDER

Clinton Edward Parish is ordered publicly reproved, to be effective 15 days after service of this opinion and order. (Rules Proc. of State Bar, rule 5.127(A).) He must comply with the specified condition attached to the public reproval. (Cal. Rules of Court, rule 9.19; Rules Proc. of State Bar, rule 5.128.) Failure to comply with this condition may constitute cause for a separate proceeding for willful breach of rule 1-110.

Parish is ordered to comply with the following condition:

Within one year of the effective date of this public reproval, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's 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 shall not receive

9. 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.)

MCLE credit for attending Ethics School. (Rule 3201.)

VII. COSTS

Costs are awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

WE CONCUR:

PURCELL, P. J.

EPSTEIN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

MARK DANIEL WENZEL

A Member of the State Bar

[No. 12-C-15595]

Filed January 26, 2015

SUMMARY

Respondent was convicted of a misdemeanor for placing video cameras in restaurant bathrooms in order to record patrons while they used the facilities. The hearing judge found that the crime involved moral turpitude, and recommended a one-year suspension. Both parties appealed.

The Review Department affirmed the hearing judge's conclusion that the crime involved moral turpitude, but concluded, based on respondent's longstanding and unresolved substance abuse problem, that the discipline should be increased to include actual suspension for two years and until respondent proved his rehabilitation and fitness to practice law.

COUNSEL FOR PARTIES

For State Bar: Brandon K. Tady

For Respondent: David Alan Clare

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a-c] **1514.30 Conviction Proceedings—Nature of Underlying Conviction—Nonviolent Misdemeanor Sex Offenses**
1519 Conviction Proceedings—Nature of Underlying Conviction—Other Crimes
1525 Conviction Proceedings—Moral Turpitude—Found; Basis Not Specified
1528 Conviction Proceedings—Moral Turpitude—Definition
1691 Conviction Proceedings—Miscellaneous Issues—Admissibility and/or Effect of Record in Criminal Proceeding

Criminal conduct not related to the practice of law and not committed against a client reveals moral turpitude if it shows a deficiency in character traits necessary for the practice of law, or involves such a serious breach of duty or such flagrant disrespect for law and societal norms as to be likely to undermine public confidence in and respect for the legal profession. Where respondent was convicted of a misdemeanor for repeatedly placing video cameras in restaurant bathrooms to obtain secret recordings to view for sexual gratification, conviction was conclusive proof that respondent acted with intent to invade the privacy of restaurant patrons, and respondent's crime involved moral turpitude.

[2] **163 Standards of Proof/Standards of Review—Proof of Wilfulness**
725.59 Mitigation—Emotional/physical disability/illness (1.6(d); 1986 Standard 1.2(e)(iv))—Declined to find—Other reason
1525 Conviction Proceedings—Moral Turpitude—Found; Basis Not Specified

Where respondent admitted that he hid cameras in restaurant bathrooms for specific purpose of making surreptitious recordings, and that he knew at the time his actions were unethical and illegal, and where respondent's psychiatrist was unaware of respondent's prior similar conduct, had not directly observed respondent in manic state, and based his opinion solely on respondent's version of the facts, psychiatrist's opinion that respondent was not responsible for his misconduct due to bipolar disorder was contrary to evidence, and did not preclude finding that respondent's criminal conduct involved moral turpitude.

[3] **710.36 Mitigation—Long practice with no prior discipline record (1.6(a); 1986 Standard 1.2(e)(i))—Found but discounted or not relied on—Present misconduct likely to recur**

When present misconduct is serious, long record of practice without prior discipline is most relevant when misconduct is aberrational. Where respondent with over 30 years of discipline-free practice planned and repeatedly committed misdemeanor even after having time to reflect on and consider consequences of misconduct, misconduct could not be characterized as aberrational or unlikely to recur. Accordingly, respondent's lack of prior record warranted only modest mitigation.

[4] **725.56 Mitigation—Emotional/physical disability/illness (1.6(d); 1986 Standard 1.2(e)(iv))—Declined to find—Inadequate showing of rehabilitation**

Where respondent failed to establish that his bipolar disorder was directly responsible for his many acts of misconduct, and admitted to long-standing substance abuse problem with which he continued to struggle, and no evidence showed that respondent was no longer at risk of committing future misconduct, respondent was not entitled to mitigating credit for bipolar disorder.

[5] **735.10 Mitigation—Candor and cooperation with Bar (1.6(e)); 1986 Standard 1.2(e)(v))—Found**

Where respondent entered into an extensive stipulation that disclosed his intent in committing misdemeanor, and volunteered facts regarding his prior similar misconduct, respondent's admissions entitled him to significant mitigation.

[6] **740.31 Mitigation—Good character references (1.6(f); 1986 Standard 1.2(e)(vi))—Found but discounted or not relied on—Insufficient number or range of references**

Where respondent's seven character witnesses all came from a narrow cross-section of the legal community, his good character evidence was not entitled to substantial weight in mitigation.

[7 a, b] **1093 Miscellaneous Substantive Issues re Discipline—Inadequacy of Discipline**

1553.89 Application of Standards to Discipline Based on Criminal Conviction—Misdemeanor involving moral turpitude (interim 2.11(c))—Applied - actual suspension—Other reason

Discipline standard applicable to misdemeanor convictions involving moral turpitude provides for disbarment or actual suspension. Where respondent repeatedly committed serious misconduct and did not demonstrate reform, appropriate discipline was actual suspension for two years and until proof of rehabilitation and fitness to practice.

ADDITIONAL ANALYSIS

Aggravation

Found

521 Multiple acts of misconduct (1.5(b); 1986 Standard 1.2(b)(ii))
584.10 Harm to public (interim 1.5(f); 1986 Standard 1.2(b)(iv))
588.10 Harm to others (interim 1.5(f); 1986 Standard 1.2(b)(iv))

Mitigation

Found

745.10 Remorse/restitution/atonement (1.6(g); 1986 Standard 1.2(e)(vii))
765.10 Substantial pro bono work

Discipline

1024 Ethics exam/ethics school
1613.08 Stayed suspension—two years
1615.08 Actual suspension—two years
1617.09 Probation—three years
1630 Standard 1.2(c)(i) Rehabilitation Requirement

OPINION

PURCELL, P. J.:

On four separate occasions during a two-month period, respondent Mark Daniel Wenzel hid a small video camera in a unisex public restroom at Coffee Bean restaurants in Los Angeles. Each time, the camera was found by a patron or employee and turned over to the police, but not before it recorded individuals using the toilet. Wenzel was convicted of a misdemeanor violation of Penal Code section 647, subdivision (j)(1) (viewing into restroom by means of instrumentality), and the criminal court imposed a suspended sentence and probation with conditions.

The hearing judge found that Wenzel's actions involved moral turpitude and recommended discipline, including a one-year suspension. Both the Office of the Chief Trial Counsel (OCTC) and Wenzel appeal. OCTC requests a two-year suspension, as it did at trial, and that Wenzel be required to prove his rehabilitation and fitness to practice law at a formal hearing before he can be reinstated. Wenzel argues his conviction does not involve moral turpitude and that even a one-year suspension is too harsh given older yet comparable case law.

The primary issues in this conviction referral matter are: (1) whether the facts and circumstances surrounding Wenzel's criminal conviction involve moral turpitude; and (2) the appropriate level of discipline in light of the nature of his wrongdoing and the likelihood that he will commit misconduct in the future.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we agree with the hearing judge that Wenzel's conviction involves moral turpitude and that several aggravating circumstances are present. But we do not agree that the mitigation evidence establishes Wenzel is unlikely to commit further misconduct, particularly in light of his longstanding substance abuse problem. We note that he had a relapse involving methamphetamines in 2013, just two months before his disciplinary trial. Although the criminal court has punished Wenzel for his criminal acts, significant professional discipline is also warranted to protect the public and preserve the integrity of the legal profession. We recommend increasing Wenzel's discipline to include a two-year suspension that is to continue until he proves his rehabilitation and fitness to practice law — a heavy burden that is necessary to address his egregious misconduct and ongoing substance abuse problem.

I. FACTS

A. Wenzel's Professional Background

Wenzel has been a member of the State Bar since 1980. He is an accomplished trial attorney who has practiced law for decades. Beyond his practice, he has a record of service to the legal profession, particularly to the American Board of Trial Advocates (ABOTA). In 2010, he was honored with a civility award given by the Los Angeles ABOTA chapter. Wenzel has published articles in legal journals and has participated in many pro bono activities. He is co-founder and chairman of a University of California law school scholarship fund.

B. Wenzel's Surreptitious Recordings of Restaurant Customers, His Wife, and His Wife's Friend[1]

On November 23, 2011, Wenzel placed a small video camera, which he happened to have with him, in a restroom of a Coffee Bean restaurant. He then sat on the patio drinking coffee while he waited for the camera to record patrons using the toilet. When he suspected his recording device had been discovered, he fled; in fact, an employee found it and turned it over to the police. Soon thereafter, Wenzel purchased video pen recorders and hid them in various Coffee Bean restrooms on December 21, 2011, January 3, 2012, and January 17, 2012. He stipulated that he positioned his recorders under the sink to "record unsuspecting victims using the toilet."

[1] The undisputed facts regarding the recordings from the Coffee Bean restaurants and Wenzel's home are established by the record of conviction, an extensive stipulation, and the trial testimony of Wenzel, a Coffee Bean Company employee, and a Coffee Bean patron.

On each occasion, a patron or employee found the recorder and gave it to the police.

The recording devices and Wenzel's cell phone contained videos of Coffee Bean patrons using the restroom. Adult male patrons at the Coffee Bean restaurants were recorded urinating; one was filmed defecating. One patron was taped using the toilet on two occasions and found the camera both times. Wenzel also taped himself having sex with his wife, and further taped his wife's best friend entering the Wenzels' guest bedroom before she undressed outside the view of the camera. He testified that his wife repeatedly refused to be recorded having sex, but he secretly did so on at least two occasions; he also tried to record her undressed without her knowledge or permission. Wenzel admitted he hid a pen video recorder on New Year's Eve 2011 in a guest bedroom in an effort to film his wife's friend undressing.

C. Wenzel's Misdemeanor Conviction and Its Effect on His Legal Career

Wenzel was charged with four misdemeanors. He pled no contest to one count of violating Penal Code section 647, subdivision (j)(1) (looking into a place in which the occupant has a reasonable expectation of privacy by means of an instrumentality "with the intent to invade the privacy of a person or persons inside"), and the other charges were dismissed. At his criminal sentencing on July 17, 2012, he received a suspended sentence and was placed on summary probation for 24 months. He was ordered to perform 200 hours of community service; pay fines and fees; continue counseling and medical treatment; avoid all Coffee Bean restaurants; cease owning any recording equipment except a cell phone; and refrain from threatening, using violence against, annoying, or harassing any person or witness in the case.

After Wenzel's conviction, his law firm fired him. One partner explained: "we just thought it would be best for our practice and the continuation of our business that at that point that Mark no longer be with us." Another partner conceded that Wenzel was let go "for the good of the firm." For his part, Wenzel voluntarily resigned his ABOTA board membership to avoid embarrassing the organization.

D. Admitted Facts and Circumstances Surrounding the Crime

In this disciplinary proceeding, Wenzel stipulated to certain facts and circumstances surrounding his criminal acts and testified about his motive and thought process. He testified he had hoped to view "some girl's rear end or something like that" and conceded the recordings were "of a sexual nature." Recalling his thinking after the first incident, Wenzel said: "[T]here's an argument going on in my head, 'No, don't do that. That's crazy. That's terrible. How horrible.' " He further recalled that after placing the camera, again he thought: " 'I'll never do that again. What the hell am I doing? I could get in trouble. What do I think I'm doing?' " And finally, Wenzel volunteered that years earlier, in 2009, he had hidden a camera in a Coffee Bean restroom but never recovered it.

E. Wenzel's Conduct Significantly Harmed His Victims

The Coffee Bean Regional Supervisor testified that the employees feared for their safety during the time of the incidents. Consequently, the company spent considerable resources to protect employee and customer safety. Later, the company was sued because of the recordings. In addition, the twice-victimized patron testified he "was very disappointed that one of such responsibility [an attorney] had abused that responsibility in this way." He testified that he stopped going to the Coffee Bean restaurants, which caused him to lose a place that he cherished: "I just don't feel comfortable going there anymore specifically because of this incident."

F. Testimony of Wenzel's Psychiatrist

Wenzel presented testimony and reports from Dr. Lewis Engel,[2] his psychiatrist, for his type II bipolar disorder. Dr. Engel, who treated Wenzel since April 2009, opined that the criminal misconduct

[2] Dr. Engel prepared a report regarding Wenzel and then revised it several times. The last revision in evidence is dated April 24, 2013, two days before his April 26, 2013 testimony in these proceedings.

was "caused by a medical illness that is outside of Mr. Wenzel's conscious control." Dr. Engel reported that in November 2011, Wenzel's work-related sleep deprivation "triggered a hypomanic episode," i.e., his action in placing a camera in a Coffee Bean restaurant. He opined that the hypomania was unexpected as Wenzel had never before suffered "hypomanic or manic symptoms." He further asserted that the three videos that followed were triggered by Wenzel's use of prednisone to treat his bronchitis. Dr. Engel reported he does "not believe Mr. Wenzel to be at risk of repeating this behavior as his treatment has been modified to address the future risk [of] having hypomania triggered. His newfound awareness of the importance of sleep maintenance will further contribute to his stability."

Dr. Engel based his opinion on his 30 years of experience treating mood and anxiety disorders and a single conversation with Wenzel on February 9, 2012 — three weeks after his arrest and the day after his police interview. Wenzel had not visited Dr. Engel around the time of the recordings in December 2011 and January 2012. Notably, Wenzel told Dr. Engel at their February meeting "that he had never engaged in this kind of activity before," which was untrue. It was not until Dr. Engel's testimony on April 26, 2013, that he learned of Wenzel's attempted secret recording at a Coffee Bean restaurant years earlier in 2009.

The hearing judge did not accept Dr. Engel's opinion that Wenzel's conduct was caused by a medical illness. Instead, the judge found that Wenzel acted intentionally because he "envisioned an opportunity to secretly record his victims, planned his course of action, and acted on his plan on numerous occasions."

G. Wenzel's Substance Abuse

Wenzel admits he has struggled with alcoholism since the 1980s and has used illegal drugs periodically since becoming a member of the Bar. Though he has maintained long periods of sobriety, he was drinking heavily at the time of his misconduct. Following his arrest, Wenzel returned to regularly attending Alcoholic Anonymous meetings and was sober for approximately one year. However, in late January, two months before the disciplinary trial below, he testified he relapsed and used methamphetamine.

II. FACTS AND CIRCUMSTANCES INVOLVE MORAL TURPITUDE

After the State Bar transmitted his conviction records to us, we referred this matter to the hearing department to determine whether the facts and circumstances surrounding Wenzel's crime involve moral turpitude or other misconduct warranting discipline and, if so, the appropriate level of discipline. (See Bus. & Prof. Code, § 6102, subd. (e).) **[1a]** The California Supreme Court has explained that "[c]riminal conduct not committed in the practice of law or against a client reveals moral turpitude if it shows a deficiency in any character trait necessary for the practice of law (such as trustworthiness, honesty, fairness, candor, and fidelity to fiduciary duties) or if it involves such a serious breach of a duty owed to another or to society, or such a flagrant disrespect for the law or for societal norms, that knowledge of the attorney's conduct would be likely to undermine public confidence in and respect for the legal profession." (*In re Lesansky* (2001) 25 Cal.4th 11, 16.) We agree with the hearing judge that the definition of moral turpitude is met here.

[1b] On four occasions, Wenzel intentionally hid cameras in public restrooms to obtain secret recordings to view for his sexual gratification. Arguably, the first event may have been opportunistic. However, the other occasions involved advanced planning with a clear purpose and a complete disregard for the privacy rights of others. Nothing in the record indicates that Wenzel took precautions to ensure that children were not among his victims, and his conduct stopped only upon his arrest. Without question, his crime is likely to undermine public confidence in and respect for the legal profession — clear evidence of this fact being the testimony of the twice-victimized Coffee Bean patron and Wenzel's law firm's decision to let him go.

Further, Dr. Engel's opinion that Wenzel is not responsible for his misconduct due to a bipolar disorder is contrary to the evidence. **[1c]** First,

Wenzel's conviction is conclusive proof that he acted "with the intent to invade the privacy" of the Coffee Bean patrons, in violation of Penal Code section 647, subdivision (j)(1). (See Bus. & Prof. Code § 6101, subd. (a).) **[2]** Second, Wenzel admitted he hid the cameras for the specific purpose of making surreptitious recordings and that he knew at the time his actions were unethical and illegal. Finally, as the hearing judge noted, Dr. Engel's opinion lacks reliability because it was formed: (1) without knowledge of Wenzel's prior attempt to record a victim in 2009; (2) absent a firsthand observation of Wenzel in a manic state; and (3) relying solely on Wenzel's historical version of events. Moreover, Dr. Engel is neither a forensic psychiatrist nor an expert in the criminal standards for mental illness.

II. THE AGGRAVATION OUTWEIGHS THE MITIGATION[3]

Neither party challenges the hearing judge's findings in aggravation. We adopt and affirm them as supported by the record. Wenzel committed multiple acts of misconduct (std. 1.5 (b)), and his misconduct caused significant harm to his victims and to the public (std. 1.5(f)).

The hearing judge found six factors in mitigation. We find four factors and assign significantly less weight to each of them than the hearing judge did.

[3] First, the hearing judge found that Wenzel's 30-plus years of discipline-free practice is significant mitigation. We find that only modest mitigation is warranted despite Wenzel's lengthy practice. When the misconduct is serious, as it decidedly was here, a long record without discipline is *most* relevant when the misconduct is aberrational. (Std. 1.6(a) [mitigation for no prior record of discipline over many years coupled with present misconduct that is not serious]; see *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [where misconduct is serious a long discipline-free practice is most relevant where misconduct is aberrational].) Each time Wenzel returned to the Coffee Bean to commit his pre-planned crime, he did so after he had time to reflect on and consider the consequences of his misconduct. Under these circumstances, we cannot say his misconduct was aberrational or is unlikely to recur.

[4] As for the second factor in mitigation, Wenzel is not entitled to mitigating credit for his bipolar disorder. (Std. 1.6(d).)[4] He did not establish that his disease was directly responsible for the many acts of misconduct he committed. Also, Wenzel testified to his long-standing substance abuse problem and methamphetamine use just two months before his hearing, indicating he continues to struggle with this problem. Moreover, no evidence establishes that these difficulties are resolved or that Wenzel is no longer at risk of committing future misconduct.

[5] Third, Wenzel is entitled to significant mitigation for entering into an extensive stipulation that disclosed his intent in hiding the cameras. (Std. 1.6(e) [mitigation for spontaneous cooperation to the victims of misconduct or to State Bar].) He also volunteered that he engaged in similar behavior in 2009. For these admissions, he is entitled to significant mitigation. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 ["more extensive weight in mitigation is accorded those who . . . willingly admit their culpability as well as the facts"].)

[6] Fourth and fifth, the hearing judge assigned substantial mitigation to Wenzel's extraordinary good character (std. 1.6(f) [mitigation for extraordinary good character attested to by wide range of references in legal and general community who are aware of misconduct]), and strong mitigation for his pro bono work (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785). We adopt the pro bono mitigation finding but

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[3] The Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence (hereafter, standards). Standard 1.6 requires Wenzel to meet the same burden to prove mitigation.

[4] Standard 1.6(d) provides mitigation credit for "extreme emotional difficulties or physical or mental disabilities suffered by the member at the time of the misconduct and established by expert testimony as directly responsible for the misconduct, provided that such difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse, and the member established by clear and convincing evidence that the difficulties or disabilities no longer pose a risk that the member will commit misconduct."

assign only moderate weight to his overall good character. Wenzel presented seven witnesses — each a lawyer who knows him both personally and professionally. Six are members with Wenzel in the Los Angeles chapter of ABOTA. All uniformly attested to his good character, integrity, and legal skills, and each believed the misconduct was aberrant and not in keeping with the Wenzel they know as a person and as an attorney. Despite this laudatory character testimony, it is limited to a narrow cross-section of the legal community and is therefore not entitled to substantial weight. (*In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 476-477 [character evidence given limited weight when not from wide range of references]; but see *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration given to testimony of attorneys given their "strong interest in maintaining the honest administration of justice"].)

Finally, we assign some mitigation credit to Wenzel's remorse and recognition of his wrongdoing. (Std. 1.6(g) [mitigation for prompt objective steps that demonstrate spontaneous remorse and recognition of wrongdoing and timely atonement].) He expressed genuine contrition to his wife and his wife's friend. Due to legal considerations, he was not able to do the same for the Coffee Bean Company or the victims. Overall, he stated he was remorseful, although his focus was primarily on his and his family's suffering, and not that of his victims.

III. TWO-YEAR ACTUAL SUSPENSION IS PROPER DISCIPLINE

We begin by acknowledging that "the aim of attorney discipline is not punishment or retribution; rather, attorney discipline is imposed to protect the public, to promote confidence in the legal system, and to maintain high professional standards." (*In re Brown* (1995) 12 Cal.4th 205, 217; Std. 1.1.) It is not our role to punish Wenzel for his crime — the superior court has done so by sentencing him in the criminal proceeding. Instead, our objective is to recommend the professional discipline that will advance the goals of attorney discipline and, particularly in this case, preserve public confidence in the profession. We accomplish this by following the standards whenever possible, and balancing all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266, 267, fn. 11.) We conclude that the recommended discipline should be increased.

[7a] Standard 2.11(c) provides for a wide range of discipline for Wenzel's misconduct. It instructs that disbarment or actual suspension is appropriate for misdemeanor convictions involving moral turpitude. The hearing judge recommended a one-year suspension, reasoning that Wenzel was "unlikely to reoffend" because he: (1) recognized and accepted his wrongdoing; (2) consulted a physician; and (3) entered into a stipulation. OCTC contends that notwithstanding the judge's findings, Wenzel's misconduct is very serious and calls for disbarment or a two-year actual suspension, which is in the upper range of discipline suggested by standard 2.11(c). Wenzel urges no suspension because: (1) his misconduct did not involve moral turpitude;[5] and (2) even assuming moral turpitude is found, comparable case law provides for a no more than a stayed suspension. We find, as did the hearing judge, that disbarment is not warranted. However, a period of actual suspension is clearly appropriate given the seriousness of Wenzel's misconduct. To determine the proper length of suspension to recommend, we look to case law. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311 [case law provides guidance on discipline].)

As the hearing judge noted, no published case law discusses the specific crime Wenzel committed, and little relevant law addresses discipline for misdemeanors where the facts and circumstances constitute moral turpitude based on similar misbehavior. Wenzel relies on *In re Safran* (1976) 18 Cal.3d 134. Safran was convicted of two misdemeanors for annoying or molesting a child under 18 years (former Pen. Code, § 647a, amended and renumbered as Penal Code § 647.6 by stats. 1987, ch. 1418, § 4.3)

[5] This argument lacks merit as Wenzel's misconduct involves moral turpitude.

and had previously been convicted of indecent exposure. The facts and circumstances, although not recited in the opinion, were found to have involved moral turpitude, and Safran received a three-year stayed suspension. In mitigation, Safran was undergoing and was committed to continuing psychiatric treatment. The *Safran* court found that "a period of probation under intensive supervision by the State Bar will adequately protect the public and the profession." (*Id.* at p. 136.)

While *Safran* has similarities to Wenzel's case, it is distinguishable for two reasons. First, it was decided nearly 40 years ago before the standards were in effect. The current applicable standard calls for a period of *actual* suspension as the minimum appropriate discipline for misdemeanor convictions involving moral turpitude. Second, the facts and circumstances surrounding Wenzel's crime are serious, while little is known about the facts and circumstances in *Safran*. In comparison, Safran was convicted of two counts of sexual misconduct while Wenzel repeatedly made surreptitious recordings of patrons in a public restroom and of his wife for his personal and sexual gratification. His acts involved premeditation with conscious disregard of the fundamental privacy rights of individuals unwittingly exposed to his lens. Wenzel's actions threaten the public's confidence in our profession as expressed by one victimized patron's disappointment that an attorney would engage in such conduct. The threat posed by his misconduct is also reflected in Wenzel's decision to step down from the ABOTA Board. Perhaps most tellingly, Wenzel's own law firm could not stand by him professionally. Just as his long-time colleagues were compelled to let Wenzel go for the "good of the firm," we take his misconduct seriously and impose significant discipline for the good of the profession.

Also different from *Safran*, a stayed suspension here would not adequately protect the public because we do not find that Wenzel is unlikely to commit future misconduct. As noted, Dr. Engel's opinion is not a reliable indicator of Wenzel's future conduct, and Wenzel's substance abuse remains a concern given his recent illegal drug use. Simply put, Wenzel needs more time to demonstrate he will not commit future misconduct, is managing his emotional issues, and has dealt with his substance abuse problem. As to Wenzel's mitigation, his character witnesses' continued faith in him is a testament to their loyalty to him, not an objective assessment of whether he will repeat his actions. Nor does Wenzel's current recognition of his wrongdoing have predictive value about his future misconduct because he admitted he knew his actions were wrong when he made the secret recordings.

[7b] After considering all the relevant factors and the range of discipline suggested by standard 2.11(c) (actual suspension to disbarment), we conclude Wenzel must be suspended for a lengthy period – at the high end of the standard's range – and then prove he is rehabilitated. Given his serious misconduct *and* his failure to demonstrate reform, we recommend a two-year actual suspension and a requirement that Wenzel present proof at a formal hearing of his rehabilitation and present fitness to practice law pursuant to standard 1.2(c)(1). This discipline is appropriate under standard 2.11(c) to protect the public, the courts, and the legal profession. It also sends the proper message that repeated acts of moral turpitude such as Wenzel's will result in significant professional sanctions, even when the underlying criminal conduct involves a single misdemeanor conviction.

IV. RECOMMENDATION

For the foregoing reasons, we recommend that Mark Daniel Wenzel be suspended for two years, that execution of that suspension be stayed, and that he be placed on probation for three years with the following conditions:

1. He is suspended from the practice of law for a minimum of the first two years of the period of his probation and until he provides proof to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

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

5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's 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 shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

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 period of probation, if he has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Mark Daniel Wenzel be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of his actual suspension in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

VI. RULE 9.20

We further recommend that Mark Daniel Wenzel be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

VIII. COSTS

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

I CONCUR:
EPSTEIN, J.

McELROY, J.,* dissenting.

I agree with the majority that the facts and

*Hearing Judge of the State Bar Court, assigned by the Presiding Judge pursuant to rule 5.155(F) of the Rules of Procedure of the State Bar.

circumstances surrounding Wenzel's misdemeanor conviction involve moral turpitude, but respectfully disagree as to the appropriate level of discipline. I would affirm the hearing judge's recommendation of a one-year actual suspension, subject to a two-year stayed suspension, and three years' probation. Although Wenzel's misconduct is clearly serious and involves moral turpitude, there is no controlling case law directly on point and certainly none that supports the two-year suspension recommended by my colleagues.

A one-year actual suspension is unquestionably significant discipline for Wenzel's misconduct given his 30 years of discipline-free practice. Further, it is well within the range of discipline suggested by standard 2.11(c) (disbarment or actual suspension appropriate for misdemeanor conviction involving moral turpitude). Wenzel has admitted his misconduct and sought therapy to address the emotional problems that led to his wrongdoing. Accordingly, I believe that a one-year actual suspension, the requirement of a formal reinstatement hearing, and three years of State Bar probation monitoring will serve the goals of attorney discipline without being punitive.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

LYNNE MARGERY ROMANO

A Member of the State Bar

[12-J-15277]

Filed April 30, 2015

SUMMARY

Respondent was suspended indefinitely by a federal bankruptcy court for participating in multiple abusive bankruptcy filings in order to mislead the court and defraud creditors. Respondent's misconduct also involved aiding her paralegal in the unauthorized practice of law.

The State Bar brought disciplinary proceedings on the basis of respondent's suspension by the bankruptcy court. The hearing judge recommended that respondent be suspended for two years and until she proved her rehabilitation and fitness to practice. On the State Bar's appeal, the Review Department affirmed the hearing judge's findings as to culpability and aggravation, but found fewer mitigating circumstances, and concluded that disbarment was the appropriate sanction for respondent's pattern of misconduct involving intentional dishonesty in the course of the practice of law.

COUNSEL FOR PARTIES

For State Bar: Brandon K. Tady

For Respondent: Arthur L. Margolis

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **191 Miscellaneous General Issues—Effect of/Relationship to Other Proceedings**
1933.20 Discipline in Other Jurisdictions—Special Substantive Issues—Limitation of Issues
1935.10 Discipline in Other Jurisdictions—Disciplinable Misconduct—Found
Order issued by federal bankruptcy court in California suspending respondent from practice for misconduct was conclusive evidence that respondent was culpable of professional misconduct in California.

[2 a,b] **252.00 Rules of Professional Conduct Violations—Aid unauthorized practice (1-300(A))**
270.30 Rules of Professional Conduct Violations—Intentional, reckless, or repeated incompetence (3-110(A))
Where respondent repeatedly failed to review bankruptcy petitions prepared by paralegal before they were filed; filed petitions and supporting documents that were incomplete and contained false statements; failed to investigate corporate status of entities on whose behalf she filed bankruptcy petitions, and failed to supervise her paralegal, respondent was culpable both of reckless failure to perform competently, and of aiding her paralegal's unauthorized practice of law.

[3] **221.11 State Bar Act Violations—Section 6106 (moral turpitude, etc.)—Found —Deliberate dishonesty/fraud**
Where respondent intentionally filed bankruptcy petitions on behalf of sham corporations for the purpose of delaying foreclosures, and such petitions contained false information and material omissions, respondent's scheme to defraud creditors by abusing the bankruptcy system and misleading the court constituted moral turpitude.

[4] **106.30 Generally Applicable Procedural Issues—Issues re Pleadings —Duplicative charges**
213.40 State Bar Act Violations—Section 6068(d) (do not mislead courts and judges)
221.11 State Bar Act Violations—Section 6106 (moral turpitude, etc.)—Found —Deliberate dishonesty/fraud
Where respondent was found culpable of moral turpitude for filing bankruptcy petitions containing misrepresentations and material omissions, charge that respondent violated section 6068(d) based on same misconduct was duplicative, and was therefore dismissed.

[5 a,b] **521 Aggravation—Multiple acts of misconduct (1.5(b); 1986 Standard 1.2(b)(ii)) —Found**
530 Aggravation—Pattern of misconduct (1.5(c); 1986 Standard 1.2(b)(ii))
801.11 Application of Standards—Effective date/retroactive application of interim Standards
Filing of 82 fraudulent bankruptcy petitions within period of just over three years demonstrated both multiple acts of misconduct and a pattern of misconduct, which were a single aggravating factor under former standard 1.2(b)(ii), but are now two separate aggravating factors under standards 1.5(b) and 1.5(c).

[6] **595.90 Aggravation—Indifference to rectification/atonement (interim Standard 1.5(g); 1986 Standard 1.2(b)(v))—Declined to find—Other reason**
625.20 Aggravation—Lack of remorse/failure to appreciate seriousness (interim Standard 1.5(h); 1986 Standard 1.2(b)(vi))—Declined to find—Failure of proof
Respondent's statements to bankruptcy court that she believed she was doing the right thing for her clients, and was using her abilities to help people who were scared, were not clear and convincing evidence that respondent was indifferent to, or failed to understand, her misconduct in filing multiple improper bankruptcy petitions.

[7] **710.35 Mitigation—Long practice with no prior record (1.6(a); 1986 Standard 1.2(e)(i))—Found but discounted or not relied on—Present misconduct too serious**
710.36 Mitigation—Long practice with no prior record (1.6(a); 1986 Standard 1.2(e)(i))—Found but discounted or not relied on—Present misconduct likely to recur
Where respondent's misconduct was serious, involved intentional dishonesty, and continued over three and a half years, and respondent's only evidence that it was aberrational consisted of a short letter from a psychologist who had only treated respondent for six months and who did not testify at trial, respondent's record of 22 years in practice without prior discipline was entitled to only minimal credit in mitigation.

[8] **725.59 Mitigation—Emotional/physical disability/illness (1.6(d); 1986 Standard 1.2(e)(iv))—Declined to find—Other reason**
Where respondent's misconduct began two years before the onset of the stressful circumstances to which her therapist partially attributed her misconduct, respondent did not demonstrate by clear and convincing evidence that her emotional difficulties were responsible for her misconduct, and thus was not entitled to mitigating credit for these difficulties.

[9] **740.31 Mitigation—Good character references (1.6(f); 1986 Standard 1.2(e)(vi))—Found but discounted or not relied on—Insufficient number or range of references**
Where respondent's five character witnesses consisted of her husband, two attorneys, a law firm librarian, and the owner of a real estate business, respondent's evidence of good character was entitled only to limited weight, because her witnesses did not constitute a broad range of references from both the legal and general communities.

[10] **745.31 Mitigation—Remorse/restitution/atonement (1.6(g); 1986 Standard 1.2(e)(vii))—Found but discounted or not relied on—Coerced or belated restitution**
Where respondent apologized to bankruptcy court for her misconduct in filing improper bankruptcy petitions, explained she realized her conduct was not justified by her intent to help her clients, and disgorged wrongfully obtained fees pursuant to sanctions order, her belated expressions of remorse and payment of sanctions showed recognition of wrongdoing and were entitled to moderate weight in mitigation.

[11] **831.20 Application of Sanctions—Interim Standard 2.7 (Moral turpitude, fraud, etc.)—Applied-Disbarment—Magnitude of misconduct great**
831.30 Application of Sanctions—Interim Standard 2.7 (Moral turpitude, fraud, etc.)—Applied-Disbarment—Related to practice of law
831.35 Application of Sanctions—Interim Standard 2.7 (Moral turpitude, fraud, etc.)—Applied-Disbarment—Impact on administration of justice
Where most severe sanction applicable to respondent's misconduct was disbarment or actual suspension for moral turpitude (interim Standard 2.7), and respondent's intentional filing of fraudulent bankruptcy petitions continued over three-year period, respondent's pattern of misconduct involving recurring type of dishonesty warranted disbarment.

ADDITIONAL ANALYSIS

Culpability
Found
252.01 Aid unauthorized practice (RPC 1-300(A); 1975 RPC 3-101(A))
270.31 Intentional, reckless, or repeated incompetence (RPC 3-110(A); 1975 RPC 6-101(A)(2)/(B))
Not found
213.45 Do not mislead court and judges (Section 6068(d))
320.01 Misleading conduct during trial (RPC 5-200; 1975 RPC 7-105(l))
Aggravation
Found
586.11 Harm to administration of justice (1.5(f); 1986 Standard 1.2(b)(iv))
Mitigation
Found but discounted or not relied on
735.30 Candor and cooperation with Bar (1.6(e); 1986 Standard 1.2(e)(v))
Discipline
1010 Disbarment
2311 Involuntary Inactive Enrollment After Disbarment Recommendation—Imposed

OPINION

EPSTEIN, J.:

Lynne Margery Romano was suspended indefinitely by the United States Bankruptcy Court for the Central District of California for professional misconduct after the court found she participated in a "series of abusive bankruptcy case filings for the sole purpose of delaying foreclosure." Indeed, over the course of three years, Romano filed 82 fraudulent bankruptcy petitions on behalf of sham petitioners in order to mislead the court and defraud creditors. Her scheme involved her paralegal, whom she aided in the unauthorized practice of law (UPL). The bankruptcy court admonished that her tactics were "not acceptable in [bankruptcy court] or any other court as a pattern of behavior for an attorney." (*In re the Disciplinary Proceeding of Lynne Romano* (Bankr. C.D. Cal. 2012) 2:12-mp-00104-TA.)

In this reciprocal disciplinary matter brought pursuant to section 6049.1, subdivision (a) of the Business and Professions Code,[1] the hearing judge suspended Romano for two years and until she proves her rehabilitation and fitness to practice. The Office of the Chief Trial Counsel of the State Bar (OCTC) appeals the hearing judge's recommendation, seeking Romano's disbarment. Romano has not appealed, and asks that we uphold the hearing judge's recommended discipline.

After independently reviewing the record under rule 9.12 of the California Rules of Court, we affirm the hearing judge's findings of culpability and aggravation, but find fewer mitigating circumstances. Based on the scope of Romano's pattern of misconduct — involving intentional dishonesty in the course of the practice of law — we conclude that disbarment is necessary to protect the courts, the public, and the legal profession.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Romano was admitted to practice law in California on June 10, 1986, and has no prior record of discipline.

A. Romano's Misconduct in the United States Bankruptcy Court

Romano's misconduct stems from her abuse of the bankruptcy laws in the United States Bankruptcy Court for the Central District of California. As a real estate attorney who provided loan modification services to her clients, she did not regularly practice in bankruptcy court. With the assistance of Joseph Quartell, an independent contractor paralegal, Romano filed 82 Chapter 7 bankruptcy petitions for the sole purpose of delaying foreclosure proceedings to afford her clients time to obtain loan modifications or to effect short sales of their properties. She had no intention of obtaining bankruptcy relief for her clients. She also devised a fraudulent scheme involving sham petitioners to shield her clients from any adverse effects on their personal credit ratings resulting from filing the bankruptcy petitions.

Romano caused her clients to transfer fractional interests in their real property to corporations for no consideration and then filed for bankruptcy protection for those corporations. The majority of the corporations were fictional as they had not filed Articles of Incorporation with the Secretary of State, while other corporations were suspended by the Secretary of State. None of these entities was entitled to file bankruptcy petitions. In most instances, after the petitions were filed, the corporations transferred the fractional real property interests back to the individual clients. Most of the petitions were also incomplete as they did not include the required schedules. Moreover, many of Romano's clients failed to appear at their creditors' meetings.

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[1] Section 6049.1, subdivision (a), provides that "a certified copy of a final order . . . determining that a member of the State Bar committed professional misconduct in [another] jurisdiction shall be conclusive evidence that the member is culpable of professional misconduct in this state . . . ." subject to certain exceptions not relevant here. Further references to sections are to the California Business and Professions Code.

Romano was the attorney of record on all of the petitions, beginning in 2008, although Quartell prepared most of them. Romano did not supervise him and failed to review most petitions before they were filed. In fact, she relied on Quartell for his bankruptcy expertise. By 2012, she had filed 82 fraudulent petitions, 73 of which were dismissed.

B. Romano Is Suspended Indefinitely for Filing 82 Bankruptcy Petitions in Bad Faith

In February 2012, the Office of the United States Trustee filed an application for an order directing Romano to show cause why she should not be sanctioned and directed her to disgorge fees and explain why the 82 petitions were not filed in bad faith. After an evidentiary hearing, the court issued an order in March 2012, finding Romano engaged in abusive tactics for the sole purpose of delaying foreclosures to allow her clients to seek loan modifications or short sales of their property. The bankruptcy court also found that: (1) Romano failed to supervise a non-lawyer paralegal, Quartell, who performed work on almost all of the bankruptcy petitions;

(2) she allowed Quartell to sign documents on her behalf without her review; (3) she aided and abetted UPL; (4) her bankruptcy filings misled the court; and (5) the filings delayed cases and placed a burden on third parties.

Based on these findings, the bankruptcy court ordered Romano to disgorge $18,500 in fees and referred the matter to the U.S. Bankruptcy Court Disciplinary Committee, which concluded that Romano violated rules 3-110(A), 1-300(A), and 5-200 of the California Rules of Professional Conduct.[2] Romano was suspended indefinitely from practicing law in the United States Bankruptcy Court for the Central District of California, with the opportunity to apply for reinstatement after no less than five years. Additionally, the court barred her from indirectly practicing law in the bankruptcy court, from representing any debtor in connection with any bankruptcy matter in any jurisdiction, and from associating with anyone who participates in debtor representation in any jurisdiction. The court further ordered her to participate in at least six hours of continuing legal education in ethics.

Romano did not appeal the bankruptcy court's order.

C. The California State Bar Reciprocal Disciplinary Proceeding

Based on the United States Bankruptcy Court's disciplinary order, OCTC filed a Notice of Disciplinary Charges (NDC) in December 2012, charging Romano with professional misconduct under section 6049.1. OCTC alleged that Romano's misconduct in the bankruptcy court constituted violations of the following: rule 3-110(A) (failure to perform with competence); rule 1-300(A) (aiding UPL); rule 5-200 (seeking to mislead a judge); and sections 6106 (moral turpitude) and 6068, subdivision (d) (seeking to mislead a judge). The hearing judge dismissed the rule 5-200 charge as duplicative of the section 6068, subdivision (d), charge. On review, OCTC does not challenge this dismissal, and we affirm it.

[1] The bankruptcy court's final order is conclusive evidence that Romano is culpable of professional misconduct in California. (§ 6049.1, subd. (a).) During the hearing below, Romano stipulated to facts establishing her professional misconduct. Accordingly, the hearing judge considered only the degree of discipline to be imposed. (§ 6049.1, subd. (b)(1).)

Following a one-day trial, the hearing judge found that Romano's ethical violations were aggravated by multiple acts of wrongdoing and significant harm to the public and the administration of justice. The judge found mitigation in Romano's lack of a prior discipline record, extreme emotional difficulties, cooperation during these disciplinary proceedings, good character, and remorse and recognition of

[2] The California Rules of Professional Conduct and the California Business and Professions Code are applicable to all attorneys who appear in the United States Bankruptcy Court for the Central District of California pursuant to Local Civil Rule 83-3.1.2 of the United States District Court for the Central District of California. Further references to rules are to the Rules of Professional Conduct.

wrongdoing. The hearing judge recommended that Romano be suspended for two years and until she proves her rehabilitation and fitness to practice pursuant to a proceeding under standard 1.2(c)(1) of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.[3] OCTC seeks review of that disciplinary recommendation.

II. CULPABILITY

A. Rule 3-110(A) (Failure to Perform with Competence)[4]

[2a] The hearing judge found that Romano violated rule 3-110(A), and we agree. Romano repeatedly: (1) failed to review bankruptcy petitions prepared by Quartell before they were filed; (2) filed petitions and supporting documents that were incomplete and contained false statements; (3) failed to investigate the corporate status of the entities on whose behalf she filed bankruptcy petitions; and (4) failed to supervise a nonlawyer paralegal. Her failure to oversee her bankruptcy practice was "so remiss as to be reckless." (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127 [failure to supervise personal injury practice and fulfill trust fund responsibilities violated rule 3-110(A)].)

B. Rule 1-300(A) (Aiding UPL)[5]

[2b] The hearing judge correctly found that Romano aided Quartell's UPL by failing to supervise his work. Since she did not review the petitions Quartell prepared and filed, she allowed a nonlawyer to practice law on her behalf. This misconduct violated rule 1-300(A). (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 520 [attorney aided and abetted UPL by relying on nonattorneys to prepare and file client documents].)

C. Sections 6106 and 6068, subdivision (d) (Moral Turpitude and Seeking to Mislead a Judge)[6]

[3] The hearing judge also correctly found that Romano was culpable of violating section 6106 by intentionally filing bankruptcy petitions on behalf of sham corporations specifically to delay foreclosures rather than to obtain bankruptcy relief. Romano knowingly engaged in a scheme to defraud creditors, which abused the bankruptcy system and misled the court. The 82 fraudulent petitions contained false information and material omissions. "Such serious, habitual abuse of the judicial system constitutes moral turpitude in violation of section 6106." (*In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, 186; see also *Bach v. State Bar* (1987) 43 Cal.3d 848, 855.)

[4] The misrepresentations and material omissions in the bankruptcy petitions and their filings for an improper purpose also violated section 6068, subdivision (d). But we dismiss this charge as duplicative of the section 6106 charge because the same misconduct underlies both violations. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 786-787 [dismissal of § 6068, subd. (d), charge proper where underlying misconduct covered by § 6106 charge supporting identical or greater discipline].)

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3. Further references to standards are to this source.

4. Rule 3-110(A) provides: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

5. Rule 1-300(A) provides that an attorney "shall not aid any person or entity in the unauthorized practice of law."

6. Section 6106 provides in relevant part: "The commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension." Section 6068, subdivision (d), requires an attorney "[t]o employ . . . those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."

III. AGGRAVATION AND MITIGATION

OCTC must establish aggravating circumstances by clear and convincing evidence under standard 1.5.[7] Romano has the same burden to prove mitigation. (Std. 1.6.)

The hearing judge found that multiple acts of wrongdoing, a pattern of misconduct, and significant harm to the public and the administration of justice were aggravating circumstances. The judge afforded mitigating credit for 22 years of discipline-free practice, extreme emotional difficulties, cooperation, good character, and remorse and recognition of wrongdoing. We agree with the aggravation findings and all but two of the mitigating factors. As detailed below, we afford no mitigating credit for Romano's lengthy period of discipline-free practice or her emotional difficulties.

A. Aggravating Circumstances

1. Multiple Acts (Std. 1.5(b)) and Pattern of Misconduct (Std. 1.5(c))

[5a] The hearing judge found that the misconduct underlying Romano's numerous violations of the Rules of Professional Conduct and Business and Professions Code constitute multiple acts of misconduct. He also found that the filing of 82 fraudulent bankruptcy petitions between September 2008 and January 2012 demonstrated a pattern of misconduct. We agree. (*Levin v. State Bar* (1989) 47 Cal.3d 1140, 1149, fn. 14 ["the most serious instances of repeated misconduct over a prolonged period of time" demonstrate pattern of misconduct].)[8] Romano does not dispute these findings and we consider this to be serious aggravation.

2. Significant Harm (Std. 1.5 (f))

Romano's repeated misuse of the bankruptcy system to delay foreclosures resulted in a "waste of judicial time and resources" for a lengthy period. (*In the Matter of Varakin, supra*, 3 Cal. State Bar Ct. Rptr. at p. 189.) This is a serious aggravating circumstance.

3. No Aggravation for Indifference (Std. 1.5 (g))

[6] Romano made statements in her response and hearing before the bankruptcy court that she "believed [she] was doing the right thing for [her] clients" and that she was using her abilities "to help people who were scared." (*In re Woodman, Inc.* (Bankr. C.D. Cal. 2012) 1:08-bk-17123-MT.) OCTC argues that those explanations demonstrated her indifference and failure to understand the wrongfulness of her misconduct. (Std. 1.5(g).) We do not find this is clear and convincing evidence of indifference.

B. Mitigating Circumstances

1. Minimal Credit for Prior Discipline-Free Practice (Std. 1.6(a))

[7] Standard 1.6(a) provides for mitigation in the absence of discipline over many years coupled with present misconduct that is not serious. At the time of her misconduct, Romano had practiced law for 22 years without discipline. The hearing judge gave this factor significant weight. However, we afford it minimal weight because Romano's misconduct was most serious, involved intentional dishonesty, and continued over three and a half years. Also, we give no weight to a statement by Romano's psychologist, who characterized her misconduct as "an aberration from her normal conduct" and "unlikely to recur." Romano was only in treatment for six months at the time her therapist offered that opinion. Moreover, she did not produce her psychologist as a witness; rather, the psychologist's opinion was contained in a three-paragraph letter that had little, if any, persuasive value in the absence of testimony and cross-examination. Given the lengthy period of her misconduct and the magnitude of the fraudulent

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[7] Clear and convincing evidence must leave no substantial doubt and must be sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

[8] **[5b]** The hearing judge evaluated multiple acts and a pattern of misconduct collectively under former standard 1.2(b)(ii). The new standards specify these as separate aggravating circumstances. Whether considered under the former or new standards, Romano's multiple acts and pattern of misconduct are deemed serious.

scheme, Romano did not prove that her misconduct was aberrational, even in the face of her 22 years of discipline-free practice. (Cf. *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [prior record of discipline-free practice is most relevant for mitigation if it occurred during a "single period of aberrant behavior" and is unlikely to recur].)

2. No Credit for Emotional Difficulties (Std. 1.6(d))

The hearing judge considered Romano's emotional difficulties in mitigation. Suffering from extreme emotional or physical difficulties at the time of the misconduct may be considered as mitigation if: (1) the difficulties are "established by expert testimony as directly responsible for the misconduct;" and (2) it is established clearly and convincingly that the difficulties "no longer pose a risk" of future misconduct. (Std. 1.6(d).)

[8] We do not assign any mitigating credit for Romano's emotional difficulties because no clear and convincing evidence establishes that they were directly responsible for her misconduct. Romano's therapist's letter indicated that two main factors contributed to her misconduct — life and health circumstances and her tendency to represent the "underdog." In 2010, Romano was distracted, anxious, and distressed by symptoms she experienced indicating she might have breast or cervical cancer, and because her mother became ill, eventually requiring open-heart surgery. However, Romano filed her first improper bankruptcy petition in 2008, well before she and her mother developed medical issues. Thus, she failed to establish the nexus between her emotional difficulties and her misconduct.

3. Minimal Mitigation for Cooperation with OCTC (Std. 1.6(e))

"[S]pontaneous candor and cooperation displayed . . . to the State Bar" is a mitigating circumstance under standard 1.6(e). The hearing judge correctly afforded very limited weight for cooperation because Romano entered into a stipulation at the end of the hearing. The timing and nature of the stipulation, which admitted facts that were easily proven, obviated very little in terms of OCTC's preparation for trial. (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50 [stipulation to easily provable facts mitigating if facts assisted prosecution of case].)

4. Limited Weight for Good Character (Std. 1.6(f))

[9] Standard 1.6(f) authorizes mitigating credit for an extraordinary demonstration of 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 member's misconduct. Romano presented a declaration from one individual and testimony from four witnesses that included her husband, two attorneys, a law firm librarian, and a real estate business owner. The witnesses characterized Romano as a person with high moral character and integrity. They deemed her honest, caring, and a very competent lawyer. The witnesses knew about Romano's misconduct but maintained a positive opinion of her ethics and moral character because they believed her actions were aberrational and completely out of character. Even with these positive assessments, the hearing judge properly assigned limited weight to this factor because the five witnesses "hardly constituted a broad range of references from the legal and general communities. [Citations]." (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 387 [three attorneys and three clients did not constitute broad range of references].)

5. Moderate Weight for Remorse and Recognition of Wrongdoing (Std. 1.6(g))

[10] The hearing judge assigned minimal weight to Romano's remorse and recognition of wrongdoing. (Std. 1.6(g).) At the time of her hearing to show cause why she should not be sanctioned, Romano apologized and explained that she had come to the realization that she could not justify her conduct merely because her intent was to help her clients. She also disgorged $18,500 in wrongfully obtained fees,

although she did so pursuant to a court-imposed sanctions order. Her expressions of remorse, although somewhat belated, show a recognition of wrongdoing, as does her payment of the sanctions. Accordingly, we assign moderate weight to Romano's remorse.

IV. DISBARMENT IS WARRANTED

When recommending discipline for professional misconduct, our primary purposes are to protect the public, the courts, and the legal profession, maintain high professional standards, and preserve public confidence in the legal profession. (Std. 1.1.) In arriving at an appropriate discipline, "we must consider the underlying conduct and review all relevant aggravating and mitigating circumstances. [Citation.]" (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 932.) Our analysis begins with the standards. The Supreme Court instructs us to follow them "whenever possible." (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) Although not binding, we give them great weight to promote "the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91.)

[11a] When two or more standards are applicable, standard 1.7(a) guides us to consider the most severe sanction. We accordingly focus on standard 2.7, which applies to misconduct constituting moral turpitude and provides for disbarment or actual suspension depending on "the magnitude of the misconduct and the extent to which the misconduct harmed or misled the victim and related to the member's practice of law." Romano intended to defraud creditors and the bankruptcy court. Her efforts involved an elaborate scheme whereby she utilized sham petitioners, primarily corporations that were non-existent or not in good standing, to hold a fractional interest in her clients' real property in order to shield those clients from poor credit ratings. She did not intend to obtain bankruptcy discharges for her clients, only to delay foreclosures. Over the course of three years, Romano had the opportunity to consider the consequences of her behavior each time she filed another petition. And yet she continued unabated until the bankruptcy trustee took action. Romano's misconduct was most serious, it significantly harmed the judicial system, and it was directly related to her practice.

In light of the broad range of potential discipline for Romano's misconduct, we look to case law for further guidance. The hearing judge found three cases instructive in recommending that Romano be suspended for two years and until she proved her rehabilitation and fitness to practice: *In the Matter of Lybbert* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 297 (two-year suspension); *In the Matter of Jones* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411 (two-year suspension); and *In the Matter of Valinoti*, *supra*, 4 Cal. State Bar Ct. Rptr. 498 (three-year suspension). While we find some similarities to these cases, the instant matter is in fact distinguishable in that Romano's fraud encompassed 82 separate matters and occurred over three and a half years, which is twice as long as the misconduct in *Lybbert*. Furthermore, there were no aggravating circumstances in *Lybbert*, whereas Romano has serious aggravation.

Romano's misconduct to some extent also mirrors *In the Matter of Jones, supra,* 2 Cal. State Bar Ct. Rptr. 411 and *In the Matter of Valinoti, supra*, 4 Cal. State Bar Ct. Rptr. 498. Both of these cases involved attorneys who abdicated their responsibilities and aided others in UPL for over two years with dire consequences. A significant distinction however, is that both the *Jones* and the *Valinoti* cases involved gross neglect, whereas Romano repeatedly committed intentional fraud on the court. Moreover, the attorney in *Jones* established significant mitigation, while Romano's mitigation is minimal and greatly outweighed by the aggravation.

[11b] We ultimately conclude that the record in this case clearly evidences a pattern of misconduct involving a recurring type of dishonesty. As such, we look to the directive of the Supreme Court as stated in *Lebbos v. State Bar* (1991) 53 Cal.3d 37, 45: "Multiple acts of misconduct involving moral turpitude and dishonesty warrant disbarment." Such is the case here. Given the scope of Romano's misconduct and the seriousness of the evidence in aggravation, which outweighs the mitigation, we conclude that no discipline other than disbarment will adequately protect the public, the courts, and the legal system.

V. RECOMMENDATION

We recommend that Lynne Margery Romano be disbarred and that her name be stricken from the roll of attorneys.

We further recommend that she must comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter.

Finally, we recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and that such costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VI. ORDER

Pursuant to section 6007, subdivision (c)(4), and rule 5.111(D)(1) of the Rules of Procedure of the State Bar, Lynne Margery Romano is ordered enrolled inactive. The order of inactive enrollment is effective three days after service of this opinion. (Rules Proc. of State Bar, rule 5.111(D)(1)).

WE CONCUR:

HONN, Acting P. J.

McELROY, J.*

*Hearing Judge of the State Bar Court, assigned by the Presiding Judge pursuant to rule 5.155(F) of the Rules of Procedure of the State Bar.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

MARC ANTHONY GUILLORY

A Member of the State Bar

[Nos. 12-C-11576, 12-C-11759, 12-C-12032, 12-C-12883 (Cons.)]

Filed May 19, 2015

SUMMARY

Respondent had one alcohol-related misdemeanor driving conviction prior to his admission to the bar, and three convictions for driving under the influence of alcohol after his admission, while he was employed as a deputy district attorney. The last two convictions arose from incidents that occurred while respondent was on probation for his second offense, and was driving with a suspended license. Respondent repeatedly attempted to use his position as a prosecutor to influence the arresting officers.

The Review Department held that under the facts and circumstances surrounding respondent's crimes, his convictions involved moral turpitude, even though they were misdemeanors and were not committed in the practice of law or against a client. The Review Department further agreed with the hearing judge that the appropriate discipline was actual suspension for two years and until respondent proves his rehabilitation and fitness to practice.

COUNSEL FOR PARTIES

For State Bar: Donald R. Steedman

For Respondent: Marc A. Guillory

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **120 Generally Applicable Procedural Issues—Conduct of Trial**
148 Evidentiary Issues—Witnesses
162.20 Standards of Proof/Standards of Review—Respondent's burden in disciplinary matters

Where respondent's therapist chose not to testify, in order to preserve confidential nature of therapeutic relationship, and respondent did not subpoena the therapist and did not identify any other evidence he was prevented from introducing, Review Department rejected respondent's argument that he was prevented from presenting evidence regarding his abstention from alcohol.

[2] **159 Evidentiary Issues—Miscellaneous**
191 Miscellaneous General Issues—Effect of/Relationship to Other Proceedings
1699 Other Miscellaneous Issues in Conviction Cases
2603 Issues in Admissions Moral Character Proceedings —Special Procedural Issues—Waiver of Confidentiality

Members of the State Bar may be disciplined on the basis of their pre-admission misconduct. State Bar Moral Character Committee's consideration for moral character purposes of respondent's pre-admission misdemeanor conviction did not bar State Bar Court from considering it for discipline purposes. Records relating to respondent's admission to the State Bar were admissible in his post-admission disciplinary proceeding, especially where respondent failed to object at trial to being questioned about such records.

[3 a-e] **1511 Conviction Proceedings—Nature of Underlying Conviction —Driving Under the Influence**
1523 Conviction Proceedings—Moral Turpitude—Found Based on Facts and Circumstances
1528 Conviction Proceedings—Moral Turpitude—Definition

Misdemeanor convictions for driving under the influence do not establish moral turpitude per se, but may involve moral turpitude depending on the surrounding circumstances. Where respondent repeatedly attempted to leverage his position as a criminal prosecutor to avoid arrest; lied to arresting officers about his alcohol consumption and the conditions of his suspended driver's license; committed two drunk driving offenses while on probation for an earlier drunk driving conviction; and broke his promise, during his consideration for admission to the State Bar, that he would not drink and drive again, his conduct showed lack of respect for the integrity of the legal system and the profession, contempt for the law, and disregard for public safety, and thus involved moral turpitude.

[4] **543.10 Aggravation—Intentional misconduct, bad faith, etc. (interim Standard 1.5(d); 1986 Standard 1.2(b)(iii))—Found but discounted or not relied on —Duplicative of section 6106 charge**
586.31 Aggravation—Harm to Administration of Justice (interim Standard 1.5(f); 1986 Standard 1.2(b)(iv))—Found but discounted or not relied on —Duplicative of other charges

Where State Bar Court, in finding that respondent's misdemeanor crimes involved moral turpitude, had already considered respondent's bad faith in making false statements to arresting officers and making improper use of his position as a prosecutor, as well as his harm to the administration of justice in violating the law and his criminal probation, it would be improper to consider those facts in aggravation.

[5 a,b] **1553.89 Application of Standards in Conviction Cases—Interim Standard 2.11(c) (misdemeanor involving moral turpitude)—Applied-actual suspension —Other reason**

Under standard providing that disbarment or actual suspension is appropriate for misdemeanor convictions involving moral turpitude, where respondent had four alcohol-related driving convictions, and did not present persuasive evidence that he understood the extent of his alcohol problem and was truly on path to rehabilitation, appropriate discipline was actual suspension for two years and until respondent proved rehabilitation and fitness to practice.

ADDITIONAL ANALYSIS

Aggravation

Found

521 Multiple Acts of misconduct (1.5(b); 1986 Standard 1.2(b)(ii))

591 Indifference to rectification/atonement (1.5(k); interim Std. 1.5(g); 1986 Standard 1.2(b)(v))

Mitigation

Declined to find

710.53 Long practice with no prior discipline record (1.6(a); 1986 Standard 1.2(e)(i))

725.56 Emotional/physical disability/illness (1.6(d); 1986 Standard 1.2(e)(iv))

740.51 Good character references—Insufficient number or range of references (1.6(f); 1986 Standard 1.2(e)(vi))

Discipline

1024 Ethics exam/ethics school

1613.09 Stayed Suspension—Three years

1615.08 Actual Suspension—Two years

1617.10 Probation—Four years

1630 Standard 1.2(c)(i); (1986 Standard 1.4(c)(ii)) Rehabilitation Requirement)

OPINION

PURCELL, P.J.:

This case demonstrates that significant professional discipline may be imposed for multiple misdemeanor convictions of driving under the influence (DUI) where the surrounding facts and circumstances involve moral turpitude. Between 1999 and 2012, Marc Anthony Guillory was convicted of four alcohol-related driving offenses. He appeals the hearing judge's recommendation that he be actually suspended for two years and until he demonstrates his rehabilitation. Guillory also challenges the judge's moral turpitude finding and seeks no more than a six-month actual suspension. The Office of the Chief Trial Counsel of the State Bar (OCTC) does not appeal and submits that the discipline recommendation should be affirmed.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we agree with the hearing judge that the facts and circumstances surrounding Guillory's convictions involve moral turpitude. We base our conclusion on the following facts: (1) Guillory attempted to use his position as an assistant deputy district attorney to avoid arrest; (2) his cousin died in one of his alcohol-related driving incidents; (3) he repeatedly drove with a blood alcohol concentration (BAC) well above the legal limit; and (4) he violated his criminal probation by driving on a suspended license at the time of his two most recent arrests for DUI.

From the start of his career, Guillory has been on notice that the State Bar considers alcohol-related driving convictions to be a serious matter. His first conviction occurred while he was in law school, and it affected his admission to the Bar. He promised the Moral Character Committee (Committee) during the admissions process that he would not drink and drive again. Nevertheless, he did so repeatedly after becoming an attorney, evidencing a lack of concern for public safety and respect for the legal system. Given these circumstances, as well as the serious aggravation (multiple acts and indifference) and lack of mitigation, we affirm the hearing judge's recommendation of a two-year actual suspension with conditions, including proof of his rehabilitation and fitness to practice law.

I. FACTUAL BACKGROUND

A. Guillory's Four Alcohol-Related Driving Convictions[1]

In June 1999, while in law school, Guillory was driving his cousin home from a party when he collided with a disabled airport shuttle bus on the side of the road. His cousin was killed. Police officers at the scene observed Guillory to be under the influence of alcohol and unable to operate the vehicle. Guillory was arrested for felony DUI after he failed a field sobriety test. Two hours later, his blood test showed a 0.06 percent BAC.[2] He later pled nolo contendere and was convicted of a "wet reckless" misdemeanor violation of Vehicle Code section 23103, subdivision (a). (See Veh. Code, § 23103.5 [requiring statement as to alcohol or drug involvement when prosecution agrees to reckless driving after charging DUI].)

In seeking admission to the Bar in 2001, Guillory underwent an informal examination by the Committee to discuss his wet reckless conviction and his cousin's death. He told the Committee members that he drank only two beers the night of the accident.[3] During the Committee's examination, Guillory characterized the accident and loss of his cousin as tragic, and his drinking and driving as aberrational. Guillory acknowledged to the Committee that alcohol played a role in his arrest, but insisted it did not cause the accident. He promised not to drink and drive again.

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1. Guillory's convictions are conclusive proof, for the purposes of attorney discipline, of the elements of the crimes committed. (See Bus. & Prof. Code, § 6101, subds. (a) & (e); *In the Matter of Posthuma* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 813, 820.)

2. An expert toxicologist testified at the hearing below that Guillory's BAC would likely have been 0.09 percent at the time of the accident. Since 1990, the legal definition of DUI impairment has been 0.08 percent BAC.

3. Guillory admitted during his hearing in the present case that he had also consumed alcohol-spiked punch. The expert forensic toxicologist who testified below opined that based on Guillory's BAC, he would have had to have consumed the equivalent of four 12-ounce cans of beer with a 0.05 percent alcohol content.

After his June 2001 admission to the Bar, Guillory worked as a criminal prosecutor in San Bernardino from 2002 to 2006 and in San Francisco from 2006 to 2012. Both agencies praised his outstanding performance. He prosecuted an array of crimes, including DUIs and criminal gang activity. While working in San Francisco, he was convicted of three DUIs.[4]

First, in early 2008, Guillory pled nolo contendere to a misdemeanor DUI following his December 2007 arrest in El Cerrito, California. At the time, he had a BAC of 0.18 percent.[5] He was stopped after changing lanes without signaling and forcing other vehicles, including a motorcycle, to maneuver out of his way to avoid a collision. Guillory was sentenced to two days in jail, three years' probation, and three months in the First Offender Program. As a probation condition, he was ordered not to drive with any measurable amount of alcohol in his system.

Second, in March 2010, Guillory pled nolo contendere to a misdemeanor DUI (with one prior DUI conviction) following his December 2009 arrest in Oakland, California. His BAC was 0.15 percent.[6] He was stopped for speeding and weaving his vehicle between lanes while talking on a cell phone. At the time, he was on criminal probation from his 2008 DUI case, and was driving on a suspended license. When an officer asked about his license, Guillory said he was permitted to drive to and from his job on a restricted license. In fact, he was not driving to or from work, nor was he permitted to drive for any reason. Guillory also said he drank only one glass of wine.[7] He was sentenced to 15 days in jail, three years' probation, and an 18-month Second Offender Program.

Third, in December 2012, Guillory pled nolo contendere to a misdemeanor DUI (with two prior DUI convictions) following his December 2011 arrest in Martinez, California. He had a BAC of 0.24 percent.[8] He was arrested at 2:20 a.m. when an officer found him passed out in the driver's seat of his car in a traffic lane at an intersection. The engine was running with the car in drive and Guillory's foot on the brake. The arresting officer had difficulty waking him. When Guillory finally awoke, he was disoriented and exited the car without placing it in "park" or setting the emergency brake. When asked, he first told the officer he had not been drinking and then admitted he had two beers.[9] As before, at the time of his arrest, Guillory was on probation and driving with a suspended license. This time, he was sentenced to 180 days' electronic home detention and five years' probation. He was also ordered not to drink alcohol or enter bars.

Before each arrest, Guillory tried to persuade the officers not to arrest him because he was a prosecutor in San Francisco. For example, in the 2007 arrest, the officer testified that Guillory showed his deputy district attorney identification in order to influence him. The officers present at the 2009 arrest testified that they believed Guillory was engaging in "badging," i.e., showing his credentials in an effort to obtain leniency. Further, the 2009 arrest report states that he kept asking one officer to let him go, saying "you don't have to do this, you can just let me go, I work for you guys." Finally, the 2011 arresting officer testified: "[H]e showed me he had a San Francisco district attorney badge [and insisted] that he was well known in San Francisco among police officers, and I should let him go." Guillory could not recall clearly whether he had tried to influence the

4. A misdemeanor DUI may be charged under Vehicle Code section 23152, subdivision (a), for driving under the influence of any alcoholic beverage, or under subdivision (b) for driving a vehicle with 0.08 percent or more, by weight, of alcohol in his or her blood, or under both. Guillory entered a plea to subdivision (a) in his first two DUI cases, and to subdivision (b) in his third DUI case.

5. OCTC presented the testimony of the arresting officer and the 2007 arrest report.

6. OCTC presented the testimony of two officers present at the arrest and the 2009 arrest report.

7. The expert witness testified Guillory would have had to have consumed seven 4-ounce glasses of wine with a 0.12 percent alcohol content.

8. OCTC presented the testimony of the arresting officer and the 2011 arrest report.

9. The expert witness testified Guillory would have had to have consumed a minimum of twelve 12-ounce cans of beer with a 0.05 percent alcohol content.

officers, but admitted: "I was a guy that was almost twice the legal limit, who was trying to not be arrested."

After his third DUI, Guillory was terminated from the San Francisco District Attorney's Office. He is now a sole practitioner in Oakland, California.

B. Guillory's Personal Problems and Alcohol Abuse

From 2007 through 2011, Guillory dealt with significant personal problems. His beloved grandmother died. He also went through a contentious divorce and child custody dispute that required him to fly to and from Los Angeles frequently for visitation and to attend custody hearings. His divorce was emotionally and financially draining. And he experienced considerable stress on the job as a gang prosecutor. Guillory maintains that these trying circumstances caused his alcohol abuse, which led to his three DUI convictions, the loss of his job, and the present disciplinary charges.

Despite the toll alcohol has taken, Guillory equivocated at his discipline hearing as to whether he considers himself an alcoholic; however, he now declares he abstains from drinking. After his third DUI, Guillory completed a one-month outpatient rehabilitation program and joined the State Bar's monitored Lawyer Assistance Program (LAP), which supports and verifies sobriety. Yet, while in the program, Guillory tested positive for an unauthorized substance in December 2012, missed two lab tests around the same time, and dropped out of the program for more than a month before returning for several months. Ultimately, in June 2013, Guillory chose to formally leave the monitored LAP, but claims he continued with the support aspect of the program. The acting director of LAP testified that he could confirm only four months of sobriety for Guillory, and opined that three years of continuous sobriety and stability is "the gold standard." Guillory did not present other evidence to demonstrate his efforts to maintain his sobriety.[10]

II. PRE-ADMISSION CONVICTION IS ADMISSIBLE

On review, Guillory challenges the admission and use of his 1999 wet reckless conviction and evidence relating to his 2001 moral character proceeding. His argument lacks merit.

[2] The Supreme Court has established that members may be disciplined on the basis of pre-admission conduct. (*Stratmore v. State Bar* (1975) 14 Cal.3d 887, 891 ["[W]e have authority to discipline [a member] for his pre-admission misconduct"].) In addition, the doctrine of res judicata does not bar us from considering Guillory's 1999 conviction because the Committee previously addressed that conviction *only* for admission purposes, not for discipline. (*Ibid.* [admitting member to practice is adjudication of requisite moral character for admission, not disciplinary proceeding].) Finally, contrary to Guillory's contention, we may consider evidence relating to his admissions process as "[a]ll State Bar records pertaining to admissions . . . shall be available to [OCTC] for use in the investigation and prosecution of complaints against members of the State Bar." (Bus. & Prof. Code, § 6086.2.) Notably, in the hearing below, OCTC extensively questioned Guillory about his testimony before the Committee, and Guillory did not object on confidentiality grounds. (*In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, 522 [objections waived if not timely raised when evidence offered at trial].)

III. FACTS AND CIRCUMSTANCES INVOLVE MORAL TURPITUDE

[3a] After the State Bar transmitted Guillory's conviction records to us, we referred this matter to the hearing department to determine whether the facts and circumstances surrounding Guillory's crimes involve moral turpitude or other misconduct warranting discipline and, if so, the appropriate level of discipline. (See Bus. & Prof. Code, § 6102, subd. (e).) Guillory challenges the hearing judge's moral turpitude finding, arguing that "the courts have spe-

[10] [1] We reject Guillory's claim that he was prevented from presenting evidence regarding his abstention from alcohol. His LAP therapist chose not to testify to preserve the confidential nature of their therapeutic relationship. Guillory did not subpoena her testimony, and has failed to identify other evidence he claims he was prevented from introducing.

cifically held that DUI crimes do not involve moral turpitude." In fact, while the California Supreme Court established that misdemeanor DUI convictions do not establish moral turpitude *per se*, it also held that the circumstances surrounding a misdemeanor DUI *may* involve moral turpitude. (*In re Kelley* (1990) 52 Cal.3d 487, 494.)

[3b] The issue before us is whether the facts and circumstances surrounding Guillory's crimes, which were not committed in the practice of law or against a client, reveal moral turpitude. We are guided by the California Supreme Court's most recent definition of moral turpitude: "a deficiency in any character trait necessary for the practice of law (such as trustworthiness, honesty, fairness, candor, and fidelity to fiduciary duties) or if it involves such a serious breach of a duty owed to another or to society, or such a flagrant disrespect for the law or for societal norms, that knowledge of the attorney's conduct would be likely to undermine public confidence in and respect for the legal profession." (*In re Lesansky* (2001) 25 Cal.4th 11, 16.) We find that the facts and circumstances surrounding Guillory's four alcohol-related driving offenses meet this definition of moral turpitude.

[3c] In particular, we are troubled by Guillory's repeated attempts to leverage his position as a criminal prosecutor to avoid arrest and his lies to the officers about his alcohol consumption. He incorrectly characterizes this behavior as typical conduct for a person facing arrest. In fact, Guillory's persistent efforts to exploit his insider status as an attorney in the criminal justice system demonstrate a disturbing lack of respect for the integrity of the legal system and the profession. (See *In re Rohan* (1978) 21 Cal.3d 195, 203 [conscious decision to not file income tax returns "evinces an attitude on the part of the attorney of placing himself above the law"]; *In the Matter of Burns* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 406, 416 [discipline system is responsible for preserving integrity of legal profession as well as protection of public].)

[3d] Guillory exhibited further contempt for the law by twice violating his probation, twice driving with a suspended license, and falsely asserting to an officer that he was permitted to drive without a license. This behavior compounds his three arrests, each time with a high BAC, and shows disdain for the law and for societal norms. He also demonstrated complete disregard for public safety given his most recent arrest where he was found unconscious and then incoherent behind the wheel of his stopped vehicle on a public street, with a 0.24 percent BAC. Guillory should be well aware of the harm that can result from drinking and driving, considering his cousin's death, the extensive court-ordered alcohol education he underwent after his DUI conviction, and his firsthand experience with DUI offenders. (See *Seide v. State Bar* (1989) 49 Cal.3d 933, 938 [applicant's conduct surrounding conviction for drug trafficking more egregious due to prior law enforcement background].)

[3e] We view Guillory's three post-admission DUIs through the lens of his first wet reckless conviction, which affected his consideration for admission. During that process, the State Bar made clear to him that illegal drinking and driving is contrary to an attorney's professional obligations. Guillory acknowledged as much by promising not to drink and drive again. Nevertheless, he broke that promise. We agree with the hearing judge that Guillory's "repeated alcohol-related criminal conduct, which has spanned a period of 12 years or more, shows a wanton disregard for the safety of the public . . . . Such conduct clearly involves moral turpitude."[11]

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11. We distinguish *In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, a case in which we found that the circumstances surrounding multiple misdemeanor DUI convictions did not involve moral turpitude. *Anderson* involved a *former* criminal prosecutor who had prosecuted drunk drivers and then had four DUI convictions and multiple convictions for driving without a valid license over nine years. *Anderson*, however, did not involve an *active* criminal prosecutor attempting to use his position to evade criminal responsibility or an attorney with firsthand knowledge from his admissions process that his drinking and driving was within the State Bar's purview and concern. Most notably, we decided *Anderson* before the Supreme Court articulated its definition of moral turpitude in *Lesansky* — upon which we rely here.

IV. SERIOUS AGGRAVATION AND NO MITIGATION[12]

A. Aggravation

The hearing judge found that multiple acts (std. 1.5(b)) and indifference toward rectification or atonement for the consequences of the misconduct (std. 1.5(g)) were aggravating factors. We agree. Guillory's four alcohol-related driving convictions are multiple acts that constitute significant aggravation, and his indifference is a serious aggravating factor for several reasons.

First, he minimizes the extent of his alcohol abuse problem, characterizing it as "situational" rather than chronic. This perspective conflicts with his multiple DUI convictions and his inability to stop abusing alcohol for years despite increasingly negative criminal and professional consequences. (See *Kelley*, *supra*, 52 Cal.3d at p. 495 [two convictions for alcohol-related driving offenses and surrounding circumstances "are indications of a problem of alcohol abuse"].)

Second, he has not demonstrated a sustained period of abstinence from alcohol, having relapsed in December 2012, a year after his last DUI arrest and less than a year before his discipline hearing. Nor has he offered proof of his commitment to a recovery program.

Third, he minimizes the harm caused by his drinking and driving. At the hearing below, he steadfastly denied the role his drinking played in his cousin's death. He emphasized that he was never held criminally liable for the death, and pointed to the comparative negligence of the bus company. But two officers at the scene in 1999 observed Guillory to be under the influence of alcohol and concluded that he could not operate a vehicle. One officer testified at the hearing below: "I would say the driver being under the influence of alcohol would be the primary cause of the crash."

Finally, Guillory claimed that his DUIs caused no harm because they did not result in actual bodily harm or property damage. This attitude shows a lack of insight into the inherent danger in drinking and driving, and the evasive action required by motorists to avoid his reckless driving. (*People v. Eribarne* (2004) 124 Cal.App.4th 1463, 1467 [The "very reason why driving with a blood-alcohol level of 0.08 percent or higher has been criminalized is precisely because such conduct presents a threat of physical injury to other persons"]; see also *People v. Ford* (1992) 4 Cal.App.4th 32, 38-39 ["The Legislature has declared 'that problems related to the inappropriate use of alcoholic beverages adversely affect the general welfare of the people of California. These problems, which constitute the most serious drug problem in California, include . . . substantial fatalities, permanent disability, and property damage which result from driving under the influence of alcoholic beverages and a drain on law enforcement, the courts, and penal system which result from crimes involving inappropriate alcohol use.' [Citation.]")[13]

B. Mitigation

Guillory seeks credit for his unblemished career before his first DUI in 2007 (std. 1.6(a)),[14] the

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12. The Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence (hereafter standards). Standard 1.6 requires Guillory to meet the same burden to prove mitigation.

13. [4] The hearing judge found aggravation for Guillory's bad faith for making false statements to the officers and the improper use of his badge (std. 1.5(d)), and for significant harm to the administration of justice (std. 1.5(g)) for his violations of the law and his probation. However, the judge properly declined to assign aggravating weight to these factors because they were already considered in assessing culpability. (See *In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 68 [improper to consider factual findings in aggravation already used to determine culpability].)

14. Standard 1.6(a) provides mitigation credit for an "absence of any prior record of discipline over many years of practice coupled with present misconduct, which is not deemed serious."

personal problems which contributed to his misconduct (std. 1.6(d)),[15] and his ethics and good character during his tenure as a district attorney (std. 1.6(f)).[16] The hearing judge found that Guillory did not prove any mitigating factors. We agree.

When Guillory committed his first DUI, he had been an attorney for only six years, an insufficient period of time to qualify for mitigation under standard 1.6(a). (See *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 417 [six or seven years of unblemished practice insufficient period to consider as substantial mitigation].) As for his personal problems, we accept that Guillory's emotional and financial difficulties contributed to his alcohol abuse and DUIs. But absent evidence of a sustained commitment to sobriety, he is at risk of committing misconduct if faced with future stressors. (Std. 1.6(d) [must prove that problems no longer pose risk that attorney will commit future misconduct].) Also, the two attorney witnesses who testified to his good character do not represent a wide range of references in the legal and general communities required to demonstrate extraordinary good character. Finally, while Guillory's hard work and success as a deputy district attorney are commendable, they do not entitle him to mitigation credit under standard 1.6(f).

V. A TWO-YEAR ACTUAL SUSPENSION IS PROPER DISCIPLINE

We begin our disciplinary analysis in this conviction proceeding by acknowledging that our role is not to punish Guillory for his criminal conduct, but to recommend professional discipline. (*In re Brown* (1995) 12 Cal.4th 205, 217 [The "aim of attorney discipline is not punishment or retribution; rather, attorney discipline is imposed to protect the public, to promote confidence in the legal system, and to maintain high professional standards"]; std. 1.1.) We do so by following the standards whenever possible and balancing all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266, 267, fn. 11.)

Standard 2.11(c) states that disbarment or actual suspension is appropriate for criminal convictions involving moral turpitude. OCTC submits that a two-year actual suspension with conditions, including proof of rehabilitation, should be affirmed. Guillory seeks a revised discipline recommendation of a six-month actual suspension.

Our review of the case law reveals no published cases recommending discipline for misdemeanor DUIs involving moral turpitude.[17] Accordingly, we have considered cases involving other types of misdemeanors where the surrounding facts involve moral turpitude.

In *In re Alkow* (1966) 64 Cal.2d 838, the Supreme Court imposed a six-month suspension for misdemeanor vehicular manslaughter involving moral turpitude where the attorney had a history of driving while visually impaired and violating his probation, and had received more than 20 traffic violations. Before the accident, he tried to renew his license, but failed the eye examination. The Supreme Court stated that Alkow "must have known that injury to others was a possible if not probable result of his driving" due to his poor vision. (*Id.* at p. 840.)

In *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111-112, the Supreme Court imposed a one-year

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15. Standard 1.6(d) provides mitigation credit for "extreme emotional difficulties or physical or mental disabilities suffered by the member at the time of the misconduct and established by expert testimony as directly responsible for the misconduct, provided that such difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse, and the member established by clear and convincing evidence that the difficulties or disabilities no longer pose a risk that the member will commit misconduct."

16. Standard 1.6(f) provides mitigation credit 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."

17. Misdemeanor cases not involving moral turpitude generally result in minimal discipline. (See e.g., *Kelley, supra*, 52 Cal.3d 487 [public reproval for attorney's second DUI conviction and violation of criminal probation]; *In the Matter of Respondent I* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 260 [two DUI convictions warranted no discipline]; but see *In re Carr* (1988) 46 Cal.3d 1089 [six-month suspension for two DUI convictions].)

actual suspension for a misdemeanor conviction involving moral turpitude and dishonesty. The attorney in *Chadwick* conspired with another to lie to the Securities and Exchange Commission about his stock purchase, but presented compelling mitigation that justified the one-year suspension.

Although aspects of *Chadwick* and *Alkow* are similar to this matter, those cases considered discipline for a single, albeit serious, conviction that did not involve illegal alcohol-related driving. Moreover, *Alkow* was decided in 1966 and, as the hearing judge correctly noted, "discipline imposed in 1966, is no longer applicable, in light of current societal rejection of impaired driving, especially drunk driving, and the implementation of standards for attorney sanctions that were adopted in 1986." (See *People v. Ford, supra*, 4 Cal.App.4th at p. 38 ["The community's interest in prosecuting driving under the influence cases has increased dramatically"].) Additionally, the facts here reveal Guillory's unacceptable attempts to corrupt the legal process to preserve his own interests — such instances of his dishonesty permeated his arrests. (*In re Glass* (2014) 58 Cal.4th 500, 524 ["Honesty is absolutely fundamental in the practice of law; without it ' " ' "the profession is worse than valueless in the place it holds in the administration of justice." ' " ' [Citation.]"].)

[5a] After considering the relevant factors and the range of discipline suggested by standard 2.11(c) (actual suspension to disbarment), we conclude Guillory should be suspended for a lengthy period and thereafter prove he is rehabilitated. "We cannot and should not sit back and wait until [Guillory's] alcohol abuse problem begins to affect [his] practice of law." (*Kelley*, 52 Cal.3d at p. 495.) Despite four alcohol-related driving convictions, Guillory has not presented persuasive evidence that he understands the extent of his alcohol problem and is truly on a path to rehabilitation. Therefore, discipline should be imposed now in an effort to protect the public from potential harm and to preserve the integrity of the profession.

[5b] We agree with the hearing judge's recommendation: a two-year actual suspension and a requirement that Guillory present proof at a formal hearing of his rehabilitation and fitness to practice law, pursuant to standard 1.2(c)(1). This discipline sends the proper message that DUIs involving moral turpitude, depending on the facts and circumstances, may result in severe professional sanctions. (See generally *Kelley*, *supra*, 52 Cal.3d at p. 496 ["Although it is true that petitioner's misconduct caused no harm to her clients, this fact alone does not insulate her from discipline aimed at ensuring that her potentially harmful misconduct does not recur"].)

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Marc Anthony Guillory be suspended for three years, that execution of that suspension be stayed, and that he be placed on probation for four years with the following conditions:

1. He must be suspended from the practice of law for a minimum of the first two years of the period of his probation and until he provides proof to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

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

5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's 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 shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

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 period of probation, if he has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Marc Anthony Guillory be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of his actual suspension in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

VIII. RULE 9.20

We further recommend that Marc Anthony Guillory be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

IX. COSTS

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

WE CONCUR:

EPSTEIN, J.

HONN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DEBORAH ANN ELDRIDGE

A Member of the State Bar

[No. 12-O-13553]

Filed October 9, 2015, modified December 8, 2015

SUMMARY

In a prior disciplinary proceeding, respondent was suspended from practice for two years and ordered to comply with rule 9.20 of the California Rules of Court. Respondent substituted out of all her cases before the suspension order went into effect. In at least one client matter that was still pending at the time the suspension order was filed, however, respondent failed to send the written notice required by rule 9.20. Despite this omission, respondent filed the declaration of compliance required by rule 9.20.

Respondent was charged with failing to comply timely with rule 9.20 as ordered, and with committing an act of moral turpitude by making a false statement in her declaration of compliance. The hearing judge dismissed the case on respondent's motion, finding that because the client, opposing counsel, and the opposing party were all made aware of the suspension before its effective date, the prophylactic effect of rule 9.20 had been served. On the State Bar's appeal, the Review Department held that a motion to dismiss under the Rules of Procedure cannot be used as a summary judgment motion, and that in any event, respondent was obligated to send the rule 9.20 notice in all her cases that were pending as of the date the suspension order was filed, not as of the date it went into effect, and that strict compliance with rule 9.20 is required. Accordingly, the Review Department reversed the dismissal and remanded for further proceedings.

COUNSEL FOR PARTIES

For State Bar: Allen Blumenthal

For Respondent: Jonathan I. Arons

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a, b] **106.10 Issues re Pleadings—Sufficiency of pleadings to state grounds for action sought (rules 5.124(C), (E))**
106.20 Issues re Pleadings—Adequate notice of charges (rules 5.41 and 5.124(C), (D), (E))
117 Generally Applicable Procedural Issues—Dismissal (rules 5.122-5.124)
140.20 Evidentiary Issues—Rights of Parties (rule 5.104(B) (2011))

Rule 5.124 of the Rules of Procedure of the State Bar provides specific and limited grounds for dismissal. Where respondent's pretrial motion to dismiss did not argue that notice of disciplinary charges failed to state a legally disciplinable offense or to give sufficient notice of the charges, but rather sought dismissal on merits, relying on declarations and supporting documents, motion was equivalent to summary judgment motion, which is not provided for under rule 5.124. Hearing judge erred in granting motion to dismiss based on pretrial factual findings, thereby deriving State Bar of its right to present evidence of respondent's culpability at trial.

[2 a, b] **175 Issues re Conditions Imposed as Part of Discipline—Required Notification re Imposition of Discipline (Cal. Rules of Court, rule 9.20; Standard 1.4(f))**
221.00 Culpability—State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)
1913.49 Cal. Rules of Ct., Rule 9.20 Violation Proceedings—Special Substantive Issues—Adequacy of Compliance—Adequacy of Compliance Generally

For purposes of rule 9.20 of California Rules of Court, requiring attorneys to give advance notice of impending disciplinary suspension, notice is required for all cases pending as of filing date of suspension order, not effective date. Where respondent's declaration of compliance with rule 9.20 stated that respondent had given required notice in all cases pending as of suspension order's filing date, but State Bar alleged that respondent failed to do so in one client matter, respondent's having given informal notice of impending suspension and having substituted out of case prior to suspension order's effective date was not a defense. Notice of disciplinary charges thus properly alleged both violation of rule 9.20 and act of moral turpitude in filing false declaration.

[3] **1913.49 Cal. Rules of Ct., Rule 9.20 Violation Proceedings—Special Substantive Issues—Adequacy of Compliance—Adequacy of Compliance Generally**

For purpose of determining whether an attorney has violated rule 9.20 of California Rules of Court, requiring attorneys to give advance notice of impending disciplinary suspension, strict compliance is required. Compliance with prophylactic effect of rule is not a defense.

ADDITIONAL ANALYSIS

[None.]

OPINION AND ORDER

THE COURT.*

The Office of the Chief Trial Counsel of the State Bar (OCTC) appeals a hearing judge's dismissal of this case prior to trial. Deborah Ann Eldridge moved to dismiss the underlying charges that alleged her failure to comply with rule 9.20 of the California Rules of Court,[1] as ordered by the Supreme Court in a prior disciplinary matter. Upon our independent review of the limited record (rule 9.12), we find, inter alia, that the hearing judge improperly dismissed the matter. We therefore reverse the dismissal and remand for further proceedings consistent with this opinion.

I. RELEVANT FACTS

In a prior disciplinary proceeding, on April 27, 2010, the California Supreme Court imposed discipline and ordered that Eldridge be suspended for two years and additionally that she comply with rule 9.20, subdivisions (a) and (c).[2] (*In re Deborah Ann Eldridge on Discipline* (S180385), State Bar Court Case Nos. 06-O-13222 (08-O-12330, 08-O-13969, 08-O-13970).) On May 26, 2010, Eldridge substituted out of the case in which she represented Bonnie Siminski. The Supreme Court's April 27, 2010 order (SCO) became effective on May 27, 2010. The following day, Eldridge filed the required rule 9.20 declaration, stating under penalty of perjury:

"I notified all clients and co-counsel, in matters that were pending on the date upon which the order to comply with rule 9.20 was filed by certified or registered mail, return receipt requested, of my consequent disqualification to act as an attorney after the effective date of the order of suspension/disbarment, and in those cases where I had no co-counsel, I urged the clients to seek legal advice elsewhere, calling attention to any urgency in seeking another attorney. [¶]...[¶]

"I notified all opposing counsel or adverse parties not represented by counsel in matters that were pending on the date upon which the order to comply with rule 9.20 was filed by certified or registered mail, return receipt requested, of my disqualification to act as an attorney after the effective date of my suspension, . . . and filed a copy of my notice to opposing counsel/adverse parties with the court, agency or tribunal before which the litigation was pending for inclusion in its files."

However, as of that date, Eldridge had not mailed a rule 9.20 notice to Siminski.

On June 10, 2013, OCTC filed a two-count Notice of Disciplinary Charges (NDC) alleging that Eldridge: (1) failed to timely comply with rule 9.20 as ordered; and (2) committed an act of moral turpitude, in violation of Business and Professions Code section 6106, by making a false statement in her compliance declaration. Before trial commenced, Eldridge filed a motion to dismiss, pursuant to rule 5.124 of the Rules of Procedure of the State Bar [grounds for dismissal], claiming not only that she had complied with rule 9.20, "but the spirit of the rule was followed in that pertinent parties were made aware of Ms. Eldridge's pending suspension."[3]

On October 21, 2013, the hearing judge granted Eldridge's motion, over OCTC's objection,

*Before Purcell, P. J., Epstein, J., and Honn, J.

1. Subsequent references to rules shall refer to this source unless otherwise noted.

2. In relevant part, subdivision (a) provides that an attorney must: "Notify all clients being represented *in pending matters* and any co-counsel of his or her [suspension] and his or her consequent disqualification to act as an attorney after the effective date of the [suspension], and in the absence of co-counsel, also notify the clients to seek legal advice elsewhere. [¶] . . . [¶] Notify opposing counsel *in pending litigation* or, in the absence of counsel, the adverse parties of the [suspension] and consequent disqualification to act as an attorney after the effective date of the [suspension], and file a copy of the notice with the court, agency, or tribunal before which the litigation is pending for inclusion in the respective file or files." (Italics added.)

In relevant part, subdivision (c) provides that, "[w]ithin such time as the order may prescribe after the effective date of the member's [suspension], the member must file with the Clerk of the State Bar Court an affidavit showing that he or she has fully complied with those provisions of the order."

3. In her declaration, Eldridge attested that she had substituted out of all of her cases in April 2010, except the Siminski matter. In that case, she attests that she had informed Siminski, the opposing party, and his attorney in January 2010 of her impending suspension.

and dismissed the matter with prejudice. The judge found that Siminski, her former husband (the adverse party in the litigation), and his attorney were all "aware of the impending suspension and substitution of counsel well in advance of the filing or effective date of [the SCO]." As such, the hearing judge concluded that "[t]he prophylactic effect of rule 9.20 was served."

II. DISCUSSION

A. Standard of Review

In evaluating a ruling that disposes of an entire proceeding, we must independently review the record, and may adopt findings, conclusions, and a decision or recommendation different from those of the hearing judge. (Rule 9.12.) The record in this matter is limited because the motion to dismiss preceded trial.

B. Pretrial Summary Judgment Motion Not Permitted

[1a] Eldridge brought her motion pursuant to rule 5.124 of the Rules of Procedure of the State Bar, which provides specific and limited grounds for dismissal. She did not argue that the NDC failed either to state a legally disciplinable offense or to give sufficient notice of the charges. (See Rules Proc. of State Bar, rule 5.124 (C), (E).) Instead, Eldridge sought a dismissal on the merits, arguing that she had not violated rule 9.20 or committed acts involving moral turpitude. She relied on her and Siminski's declarations and other supporting documents. However, the State Bar Rules of Procedure, including rule 5.124, do not provide for such a pretrial summary judgment motion. (*In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, 376 [no pretrial summary judgment procedure available in State Bar disciplinary proceedings; appropriate time to present evidence in defense is at hearing on merits]; see also *In the Matter of Tady* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 121, 125-126.)[4]

[1b] Moreover, all parties have the right to present evidence at trial to support their respective positions (Rules Proc. of State Bar, rule 5.104(B)). Due to the dismissal, OCTC was denied that opportunity to prove that Eldridge misrepresented her compliance with rule 9.20, thereby committing an act of moral turpitude.[5] As the judge based her dismissal, in part, on pretrial factual findings, we conclude that she erred in dismissing the matter.

C. SCO Filing Date Is Operative Date

[2a] We also find the judge erred in that she dismissed the proceeding on grounds that the rule 9.20 violation alleged in the NDC does not constitute a disciplinable offense. To begin, the judge observed that Eldridge did not represent Siminski in litigation at the time the SCO went into effect "as she had properly substituted out of the litigation" a day earlier. This conclusion overlooks that the *filing* date, not the *effective* date, of the SCO establishes the timeframe for determining whether client or litigation matters are considered "pending" and whether notification is required under rule 9.20. As the Supreme Court instructed in *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 under [rule 9.20] is the filing date of [the Supreme Court] order for compliance therewith and not any later 'effective date.' These provisions clearly contemplate *advance* notice to *existing* clients of the attorney's prospective inability to represent their interests."[6]

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4. The other subsections of rule 5.124 are clearly inapplicable to the relief sought by Eldridge.

5. In her rule 9.20 declaration, Eldridge stated under penalty of perjury that she mailed notice to all clients and co-counsel "in matters that were pending on the date upon which the order to comply with rule 9.20 was *filed*...." (Italics added.) Similarly, she stated that she mailed notice to opposing counsel (or unrepresented adverse parties) "in matters that were pending on the date upon which the order to comply with rule 9.20 was *filed*...." (Italics added.)

6. The former rule 955 is replaced with the reference to the current rule 9.20 for purposes of clarity.

The Supreme Court added: "The rule's purpose in providing for adequate protection of clients would be totally defeated if . . . only those clients still remaining on the effective date of suspension need receive notice *at that late date* that their attorney can act no further in their behalf." (*Ibid.*, original italics.)

[3] Further, the hearing judge's finding that the "prophylactic effect of rule 9.20 was served" is not a defense to a rule 9.20 violation. To the contrary, the Supreme Court has found that strict compliance with an attorney's obligations under rule 9.20 is required. (See *Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187 ["[n]othing on the face of [rule 9.20] or in our prior practice distinguishes between 'substantial' and 'insubstantial' violations" of the rule].)[7] **[2b]** Accordingly, the NDC properly alleges rule 9.20 and moral turpitude violations, both of which must be considered on the merits at trial.

III. ORDER

For the reasons set forth above, we reverse the hearing judge's dismissal order and remand this matter to the Hearing Department for further proceedings consistent with this opinion, including a trial on issues of culpability, and, if found, a recommendation as to the appropriate level of discipline.

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7. The hearing judge properly analyzed the issue of Eldridge's compliance with rule 9.20 in an earlier matter, State Bar Court case no. 12-V-12477. There, Eldridge sought to show that she was prepared to return to the practice of law after her two-year suspension arising from another discipline in Supreme Court case no. S180385, State Bar Court case no. 06-O-13222. Citing *Athearn v. State Bar, supra*, 32 Cal.3d 38, the hearing judge referred to Eldridge's failure to strictly comply with rule 9.20 as one of the reasons she should not be reinstated.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

MALCOLM B. WITTENBERG

A Member of the State Bar

[No. 12-O-18050]

Filed October 21, 2015, modified December 8, 2015

SUMMARY

In a prior disciplinary proceeding, respondent was suspended from practice in California due to a conviction for insider trading. For the same reason, the United States Patent and Trademark Office filed a complaint against him, after which respondent resigned from federal patent and trademark practice. After his California suspension was lifted, respondent began representing clients in trademark matters again, without first seeking readmission to the patent and trademark bar as required by federal regulations in effect at the time. As a result, disciplinary charges were filed; respondent was found culpable of unauthorized practice of law in another jurisdiction, in violation of rule 1-300(B) of the Rules of Professional Conduct, and the hearing judge recommended his disbarment.

Respondent sought review, arguing he should not be disbarred because his good faith belief that he could resume practicing trademark law constituted compelling mitigation, and because Business and Professions Code section 6077 precludes disbarment as a sanction for violations of the Rules of Professional Conduct. The Review Department rejected these arguments, and agreed with the hearing judge's disbarment recommendation.

COUNSEL FOR PARTIES

For State Bar: Allen Blumenthal

For Respondent: Doron Weinberg

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **801.12 Application of Standards—Effective date/retroactive application of 2015 Standards**

Where request for review was submitted for ruling after effective date of July 1, 2015 revision of Standards for Attorney Sanctions for Professional Misconduct, Review Department applied revised version of standards in considering appropriate discipline.

[2] **740.31 Mitigation—Good character references (1.6(f); 1986 Standard 1.2(e)(vi))—Found but discounted or not relied on—Insufficient number or range of references**

Review Department assigned minimal weight to character evidence provided by three attorneys who were aware of respondent's misconduct, because number and range of references was insufficient to warrant more mitigation.

[3 a-c] **715.50 Mitigation—Good faith (1.6(b); 1986 Standard 1.2(e)(ii))—Declined to find**

Respondent's honest belief that his reinstatement to practice in California permitted him also to resume practicing trademark law without applying for reinstatement to patent and trademark bar was not objectively reasonable, and therefore did not provide a basis for finding good faith as a mitigating circumstance. Expert witness's testimony that respondent's belief was reasonable did not establish respondent's good faith, where expert admitted that respondent's exclusion from practice by federal agency applied to trademark as well as patent law.

[4 a,b] **802.62 Application of Standards–Standard 1.7 (1986 Standard 1.6) (Determination of Appropriate Sanctions)—(b) Effect of Aggravation**
915.10 Application of Standards—Standard 2.10 (interim Standard 2.6) (Unauthorized Practice of Law)—Applied to other forms of unauthorized practice—Disbarment

Where respondent, an experienced patent and trademark practitioner prior to his earlier disciplinary suspension, resumed representing trademark clients after his reinstatement to practice in California, without carefully determining his eligibility to do so under federal regulations, respondent exhibited a cavalier attitude towards applicable regulations. This gave rise to concern about protection of the public from future misconduct, where respondent's prior misconduct also involved placing self-interest ahead of client interest or respect for and adherence to law, and respondent still did not seem to recognize error and seriousness of his behavior.

[5] **805.10 Application of Standards—Standard 1.8 (1986 Standard 1.6) (Effect of Prior Discipline)—Current discipline greater than prior—Applied**
915.10 Application of Standards—Standard 2.10 (interim Standard 2.6 (Unauthorized Practice of Law)—Applied to other forms of unauthorized practice—Disbarment

Where respondent began engaging in unauthorized practice of federal trademark law immediately after his prior California suspension ended, and prior discipline had involved serious offense justifying three-year actual suspension, disciplinary standard providing for more severe sanctions in subsequent disciplinary matters made disbarment recommendation appropriate for present offense.

[6] **193 Miscellaneous General Issues—Constitutional Issues—Other**
801.30 Application of Standards—Effect of standards as guidelines
801.45 Application of Standards—Deviation from standards—Found not to be justified
1099 Miscellaneous Substantive Issues re Discipline—Other Miscellaneous Issues

Statutes regarding legal disciplinary system are not exclusive, but rather supplementary to California Supreme Court's disciplinary authority over members of California bar. Given Supreme Court's partial delegation of its disciplinary authority to State Bar Court, and its instruction that State Bar Court should follow disciplinary standards whenever possible, statute providing for actual suspension of up to three years for violations of Rules of Professional Conduct did not preclude State Bar Court from recommending disbarment for rules violation when otherwise justified by disciplinary standards.

ADDITIONAL ANALYSIS

Culpability
Found
252.11 Unauthorized practice in other jurisdiction (RPC 1-300(B))
Aggravation
Found
511 Prior disciplinary record
521 Multiple acts of misconduct
Discipline
1010 Disbarment
2311 Inactive enrollment after disbarment recommendation—Imposed

OPINION

HONN, J.:

This is Malcolm B. Wittenberg's second disciplinary proceeding. In his first one, he was actually suspended from the practice of law for three years, continuing until he proved his rehabilitation and fitness to practice, arising from his conviction for insider trading in federal court. The hearing judge in this proceeding found Wittenberg culpable of violating rule

1-300(B) of the Rules of Professional Conduct[1] by engaging in the unauthorized practice of law (UPL) in 300 to 400 trademark matters before the United States Patents and Trademark Office (USPTO). The judge recommended Wittenberg be disbarred.

Wittenberg appeals the hearing judge's discipline recommendation. The issue before us is the level of discipline because Wittenberg does not challenge culpability. Instead, he argues that his good faith belief that he was authorized to practice trademark law before the USPTO constitutes mitigation sufficient to warrant a suspension, not disbarment. He also argues that the disbarment recommendation is prohibited by Business and Professions Code section 6077,[2] which limits State Bar Court suspension recommendations to three years for rules violations. The Office of the Chief Trial Counsel of the State Bar (OCTC) did not appeal, but asks that we uphold the disbarment recommendation.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we affirm the hearing judge's culpability findings, as well as the aggravating and mitigating circumstances. We reject Wittenberg's claims on review and agree with the judge's recommendation that disbarment is necessary to protect the public, the profession, and the courts.

I. WITTENBERG DOES NOT CHALLENGE CULPABILITY

Rule 1-300(B) provides: "A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." The hearing judge found Wittenberg culpable of violating this rule by practicing trademark law before the USPTO in violation of its regulations. Wittenberg does not challenge this finding, and we agree he is culpable. Wittenberg's admitted trademark practice before the USPTO from late 2005 through 2012, after he was excluded and never reinstated, provides clear and convincing evidence of the rule violation, as summarized below.[3]

Generally, to practice before the USPTO in patent matters, practitioners must have a technical degree, pass an examination that demonstrates proficiency and knowledge of patent law, and maintain good moral fitness. In contrast, the single requirement to practice trademark law is membership in good standing in the Bar of any United States jurisdiction. Practitioners in patent matters receive a USPTO registration number, but no such number is required for trademark practice.

Prior to 2004, Wittenberg was qualified to practice patent and trademark law. After graduating from college in 1968, he worked for the USPTO as a patent examiner for five years. This employment allowed him to obtain his USPTO patent registration number without taking the examination. He was admitted to practice law in Virginia in 1973 and in California four years later. As an experienced patent and trademark lawyer, Wittenberg spent a considerable portion of his career practicing before the USPTO.

A. Wittenberg's Criminal Conviction and Subsequent Virginia, USPTO, and California Disciplines

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1. All further references to rules are to the Rules of Professional Conduct of the State Bar.

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

3. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

In 2001, Wittenberg pled guilty to one count of insider trading, in violation of 15 United States Code sections 78j and 78ff and 17 Code of Federal Regulations part 240.10b-5. His conviction resulted from his purchase of 2,000 shares of stock in a company he represented after he learned of a pending merger. Once the merger was complete, Wittenberg sold his shares for a $14,000 profit. Following his guilty plea, the federal district court sentenced him to three years' supervised probation, including a one-month stay in a halfway house and three months of home confinement.

As a result of his felony conviction, Wittenberg was placed on interim suspension in California in 2001 and disbarred in Virginia in 2002. In 2003, the USPTO Office of Enrollment and Discipline (OED) filed a complaint against him. Subsequently, he submitted a resignation affidavit, which the USPTO accepted. In June 2004, the USPTO ordered that Wittenberg "be excluded on consent from practice before the United States Patent and Trademark Office," and ordered the OED to publish a notice in the "Official Gazette," which stated that Wittenberg had been excluded from practice before the USPTO "in patent and trademark law cases beginning July 1, 2004."[4] The USPTO final decision also recited that Wittenberg's resignation affidavit contemplated that he will pursue the USPTO's formal reinstatement process should he wish to later have the exclusion lifted; and, in that process, the USPTO Director of OED will conclusively presume certain facts as to the complaint against him. (See former 37 C.F.R. § 10.160 [reinstatement proceeding after resignation or exclusion], repealed by 78 Fed.Reg. 20180 (Apr. 3, 2013).)[5]

In June 2005, after Wittenberg's felony conviction was final, the California Supreme Court disciplined him. (*In re Malcolm B. Wittenberg on Discipline* (June 15, 2005, S130169) Cal. State Bar Ct. no. 01-C-01358.) He received a three-year actual suspension, continuing until he proved his rehabilitation and fitness to practice law, pursuant to former standard 1.4(c)(ii) of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.[6] He was given credit for the time he spent on interim suspension. After satisfying the standard 1.4(c)(ii) requirements, he became eligible to practice law in California again in October 2005.

B. Wittenberg Resumes Practicing Before USPTO

Wittenberg admits that he never sought readmission to practice before the USPTO, yet he practiced trademark law from late 2005 through October 2012. He acknowledged that he openly practiced before the USPTO in 300 to 400 matters. He claims that he was authorized to practice trademark law once his California suspension was lifted because he was then considered a member in good standing of a Bar of the United States. Wittenberg testified that "numerous" other practitioners agreed that he was able to practice trademark law once his suspension was lifted.

C. USPTO Prohibits Wittenberg's Trademark Practice

In 2012, the USPTO discovered that Wittenberg was violating the June 2004 exclusion order. It advised him and his clients that he was not authorized to practice law or to file any documents with the office. Initially, Wittenberg objected, but eventually he acquiesced and ceased practicing before the USPTO.

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4. Wittenberg's expert testified that "excluded" means disbarred.

5. All further references to the Code of Federal Regulations are to the former USPTO procedural rules, which were revised in 2013, unless otherwise noted.

6. Former standard 1.4(c)(ii) provided that actual suspension for two years or more requires proof, satisfactory to the State Bar Court, of rehabilitation, fitness to practice, and present learning and ability in the general law before a member may be relieved of the actual suspension.

II. AGGRAVATION OUTWEIGHS MITIGATION[7]

A. Aggravation

The hearing judge correctly found two factors in aggravation. Wittenberg committed multiple acts of misconduct by repeatedly practicing before the USPTO while excluded (std. 1.5(b)), and he has a prior discipline record (std. 1.5(a)). As previously discussed, on June 15, 2005, the California Supreme Court disciplined Wittenberg for his 2001 insider trading conviction. In 1999, Wittenberg learned that his client, Forte Software Inc., intended to merge with Sun Microsystems. He took advantage of this information and purchased a total of 2,000 shares of Forte stock on two separate occasions. After the merger was complete, he sold his shares for a $14,000 profit.

During the Securities and Exchange Commission investigation, Wittenberg falsely represented that he was unaware of the pending merger when he made the initial stock purchase. His false statement constituted an act of moral turpitude. Multiple acts, harm to the public, and a lack of candor aggravated his misconduct. The mitigating factors included his lengthy years of discipline-free practice, good character, pro bono and community service activities, and that his behavior was deemed aberrational. As noted above, he received a five-year stayed suspension, five years' probation with conditions, including being suspended for three years and until he complied with the requirements in former standard 1.4(c)(ii). We ascribe considerable weight to Wittenberg's prior record as an aggravating factor.

B. Mitigation

[2] The hearing judge afforded "great consideration" to Wittenberg's good character evidence. (Std. 1.6(f).) Three attorneys testified on his behalf. They all were aware of the charges against him and of his felony conviction. They described Wittenberg as "one of the most skilled patent attorneys" who possessed the highest character and integrity. They labeled his felony conviction a "mistake" or "lapse in judgment" that did not negatively impact their opinions of him. They also found it admirable that he mentored other attorneys in the patent and intellectual property law community. Though these laudatory character assessments came from attorneys (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration to attorneys' testimony for their "strong interest in maintaining the honest administration of justice"]), we assign minimal weight to this factor as the number of references is insufficient to warrant more mitigation (*In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 476 [character testimony from three attorneys not sufficiently wide range of references]).

[3a] Wittenberg argues that the hearing judge erred by declining to afford mitigating credit for his good faith. (Std. 1.6(b).) We agree with the hearing judge. To establish good faith as a mitigating circumstance, the belief must be "honestly held and objectively reasonable." (*Ibid*; see also *In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653.) The regulations in effect in 2005 provided: "A practitioner who is suspended or excluded from practice before the Office . . . shall not engage in unauthorized practice of patent, trademark and other non-patent law before the Office." (37 C.F.R. § 10.158.) Since he was a member in good standing in California, Wittenberg testified that he believed his trademark practice was authorized. Though there is no dispute that Wittenberg honestly believed he was authorized to practice trademark law before the USPTO beginning in late 2005, his belief was not objectively reasonable because he consented to and was ordered excluded from practicing before the entire office.

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7. Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Wittenberg to meet the same burden to prove mitigation.

[1] Effective July 1, 2015, the standards, were revised and renumbered. Because this request for review was submitted for ruling after the July 1, 2015, effective date, we apply the revised version of the standards. All further references to standards are to the revised version of this source unless otherwise noted.

[3b] In addition to the exclusion order, Wittenberg's resignation affidavit[8] and the regulations in effect at the time of his exclusion contemplated his reinstatement. (See 37 C.F.R. § 10.133(b) and (c).) A reinstatement procedure was included in the regulations when Wittenberg was excluded from the USPTO and later after he resumed his unauthorized practice. (37 C.F.R.§§ 10.160 and 11.60 (§ 11.60 currently in effect.) The regulations also prohibited UPL by practitioners excluded from practice before the USPTO. (37 C.F.R. § 10.158(a).) This prohibition remained in place, but was modified to specifically state that reinstatement was not automatic. (37 C.F.R. § 11.58(a) (currently in effect).) Thus, Wittenberg's reinstatement to practice law in California in 2005 was immaterial to his eligibility to practice before the USPTO after he was excluded.

[3c] Wittenberg argues the hearing judge erred by ignoring the uncontradicted testimony of his expert, Paul Vapnek, who stated it was reasonable for Wittenberg to believe he was authorized to practice before the USPTO once his California suspension ended. However, as Vapnek acknowledged, Wittenberg's exclusion was not restricted to his patent law practice, but applied to any trademark practice as well. Moreover, the OED notice specifically stated he was excluded from practicing in patent *and* trademark cases. Accordingly, we find Vapnek's testimony does not establish Wittenberg's good faith.

III. DISBARMENT IS THE APPROPRIATE DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to maintain high professional standards; and to preserve public confidence. (Std. 1.1) The discipline analysis begins with the standards. (*In re Silverton* (2005) 36 Cal.4th 81, 91.) In recommending disbarment, the hearing judge found former standard 2.6(a) (renumbered as standard 2.10(a)) most apt as it provides for disbarment or actual suspension for engaging in UPL.

[4a] Wittenberg was an experienced practitioner before the USPTO, yet he continued to represent numerous trademark clients for nearly six and a half years after he was excluded from practice before the office. He never sought reinstatement, although the regulations in effect at the time of his exclusion and thereafter required such a process before resuming practice before the USPTO. The affidavit he executed regarding his exclusion also referenced such a process. We agree with the hearing judge that Wittenberg, as a long-time practitioner in his field, knew or should have known about the regulatory scheme and that he was engaging in UPL. However, rather than carefully determining what, if anything, he was required to do before resuming his practice, he assumed that his 2005 relief from actual suspension in California allowed him to resume practice before the USPTO. This exhibits, at best, a cavalier attitude toward compliance with the regulations that apply to practitioners in the field of law to which he has devoted much of his career.

[4b] We share the hearing judge's concern about protection of the public from future misconduct because this disciplinary proceeding involves some of the same characteristics of Wittenberg's prior wrongdoing. In both matters, Wittenberg placed self-interest ahead of client interest or respect for and adherence to the law. He still does not seem to recognize the error and seriousness of his behavior. His position remains that he could practice trademark law before the USPTO after being reinstated to practice in California. Neither the facts nor the law supports such a belief. Wittenberg does not acknowledge his misconduct, making it unlikely he will modify his behavior. His continued assertion of this position makes it clear that he is unwilling or unable to conform to the ethical responsibilities demanded of California attorneys. (Std. 1.7(b).)

[5] In addition to standard 2.10(a), standard 1.8(a) is relevant to our analysis. It provides that if "a member has a single prior record of discipline, the sanction must be greater than the previously imposed

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8. As noted above, Wittenberg swore in his resignation affidavit that "*if he applies for reinstatement*, the OED Director will conclusively presume, for the limited purpose of determining the *application for reinstatement*, that the facts upon which the complaint is based are true." (Italics added.)

sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust." The exception to standard 1.8(a) does not apply here. Wittenberg's prior discipline was not remote—he began engaging in UPL before the USPTO immediately after his California suspension ended. Moreover, he committed a serious offense involving moral turpitude, which justified actual suspension of three years and until he proved his rehabilitation and fitness to practice law. Because he has again departed from the rules of professional conduct, "whether deliberately or by want of care, we must respond with appropriate seriousness." (*In re Silverton*, *supra*, 36 Cal.4th at p. 92.) Pursuant to standard 1.8(a), the discipline imposed here should be more severe than the three-year actual suspension ordered by the Supreme Court in his prior disciplinary matter. Given the severity of the prior discipline, the hearing judge's recommendation of disbarment for the present offense is appropriate.

[6] Finally, we reject Wittenberg's claim that section 6077 prohibits us from recommending his disbarment because it exceeds the three-year suspension provided for in the statute.[9] First, "'[n]othing in [the State Bar Act (Bus. & Prof. Code, §§ 6000-6172)] shall be construed as limiting or altering the powers of the Supreme Court of this State to disbar or discipline members of the bar . . . .'" (*Stratmore v. State Bar* (1975) 14 Cal.3d 887, 889, quoting § 6087.) Second, the Supreme Court has instructed us to follow the standards "whenever possible." (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.)[10] Moreover, the Supreme Court has "chosen to utilize the assistance of the State Bar Court in deciding admissadmission and discipline matters." (*Obrien v.* Jones (2000) 23 Cal.4th 40, 50.) "'[T]he State Bar is not an entity created solely by the Legislature or within the Legislature's exclusive control, but rather is a constitutional entity subject to this court's expressly reserved, primary, inherent authority over admission and discipline . . . . Statutes [regarding the] disciplinary system are not exclusive—but are supplementary to, and in aid of, our inherent authority in this area.' [Citation.]" (*Ibid.*) The Court has also "rejected an assertion that [it] may utilize the State Bar's existing disciplinary structure only if [it] acquiesce[s] in all legislative determinations regarding the disciplinary system. [Citation.]" (*Ibid.*) Since the Supreme Court has delegated its power to the State Bar Court to act on its behalf in disciplinary matters subject to its review (§ 6087), we are not prohibited from making a disbarment recommendation for a rules violation. (*Obrien v. Jones, supra,* 23 Cal.4th at pp. 49-50.)[11] Such a recommendation is necessary here.

IV. DISBARMENT RECOMMENDATION

We recommend that Malcolm B. Wittenberg be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice in California.

We further recommend that he must comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter.

Finally, we recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and that such costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

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9. Section 6077 provides: "For a willful breach of any of these rules, the board has power to discipline members of the State Bar by reproval, public or private, or to recommend to the Supreme Court the suspension from practice for a period not exceeding three years of members of the State Bar."

10. The Supreme Court "'will not reject a recommendation arising from application of the Standards unless [it has] grave doubts as to the propriety of the recommended discipline.'" (*In re Silverton, supra,* 36 Cal.4th at p. 91.)

11. See *In re Silverton, supra,* 36 Cal.4th 81 (Supreme Court applied former standard 1.7(a) and imposed progressive discipline to disbar attorney second time for rules violations where prior discipline involved felony fraud and grand theft convictions).

V. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

The order that Malcolm B. Wittenberg be involuntarily enrolled as an inactive member of the State Bar pursuant to Business and Professions Code section 6007, subdivision (c)(4), effective June 22, 2014, will remain in effect pending consideration and decision of the Supreme Court on this recommendation.

WE CONCUR:

PURCELL, P. J.

STOVITZ, J.*

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*Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

MICHAEL R. CARVER

A Member of the State Bar

[No. 12-O-12062]

Filed April 12, 2016

SUMMARY

Respondent was found culpable of acting with moral turpitude by knowingly, or with gross negligence, engaging in the unauthorized practice of law (UPL) while on suspension arising from prior discipline. Respondent had two previous disciplinary matters. First, he received a public reproval with conditions based on misdemeanor convictions for driving without a valid license and resisting arrest. Following that, he was suspended from the practice of law for 90 days for failing to comply with the conditions of the public reproval. In recommending discipline including a 90-day actual suspension, the hearing judge failed to consider the second disciplinary matter because it was pending on review and not yet final. The Office of the Chief Trial Counsel requested review. (Hon. Richard A. Honn, Hearing Judge.)

The Review Department held that Respondent did knowingly commit UPL amounting to moral turpitude by maintaining willful blindness to his ineligible status. The Review Department also found that the hearing judge erred in not considering the disciplinary matter that was not yet final. Applying Standard 1.8, the Review Department recommended respondent be disbarred because his misconduct over several years demonstrated unwillingness to follow ethical rules. In making this recommendation, the Review Department found no compelling mitigation and held there was reason to depart from the guiding disciplinary standards.

COUNSEL FOR PARTIES

For State Bar: Charles A. Murray

For Respondent: Michael R. Carver

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **213.10 State Bar Act Violations—Section 6068(a) (support Constitution and laws)**
230 State Bar Act Violations—Section 6125 (practice of law while not active member)
231 State Bar Act Violations—Section 6126 (unauthorized practice—misdemeanor)

Respondent committed unauthorized practice of law in violation of sections 6068(a), 6125, and 6126 by filing and serving court documents and making court appearances on his client's behalf while not an active member of the State Bar.

2 [a, b] **221 State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)**

Respondent committed an act of moral turpitude in violation of section 6106 by practicing law while on inactive status. Although OCTC did not prove respondent knew he had been enrolled inactive, record established that respondent knew there was a high probability this would occur. Moreover, by changing his membership address, respondent purposely avoiding receiving notice from the State Bar regarding his membership status. He also failed to check his membership status before filing documents and appearing in court. Respondent's willful blindness was tantamount to having actual knowledge that he was ineligible to practice law.

[3] **135.50 Procedural Issues—Amendments to Rules of Procedure—Defaults and Trials**
510 Aggravation—Prior record of discipline
802.21 Application of Standards—Standard 1.2 (Definitions)—Prior record of discipline

Under rule 5.106(A), hearing judge should have considered previous disciplinary order as a prior record of discipline even though it was not yet final.

[4a-d] **801.30 General Issues re Application of Standards—Effect of standards as guidelines**
801.45 General Issues re Application of Standards—Deviation from standards—Found not to be justified
801.47 General Issues re Application of Standards—Deviation from standards—Necessity to explain
806.10 Application of Standards—Standard 1.8(b) (Effect of Prior Discipline—Disbarment after two priors)—Applied

In analyzing standards, Review Department applies three-step analysis: first, determining which standard specifies the most severe sanction for the misconduct at issue; second, analyzing whether an exception exists; and third, determining and explaining whether there is any reason to depart from the presumptive discipline prescribed by the standard. Where respondent had two prior records of discipline, including one actual suspension; respondent's conduct demonstrated unwillingness or inability to conform to ethical responsibilities and disrespect for legal system, and respondent failed to show compelling mitigation or any reason to depart from presumptive discipline under standard 1.8, disbarment was appropriate under this analysis.

ADDITIONAL ANALYSIS

Culpability

Found

213.11 Section 6068(a) (support Constitution and laws)
221.19 Section 6106 (moral turpitude)—Other factual basis
230.01 Section 6125 (practice of law while not active member)
231.01 Section 6126 (unauthorized practice—misdemeanor)

Aggravation

Found

511 Prior record of discipline (1.5(a))
541 Intentional misconduct, bad faith, dishonesty, misrepresentation, concealment (1.5(d), (e), (f))
590 Indifference to rectification/atonement (1.5(k))

Declined to find

588.50 Harm (1.5(j))

Mitigation

Found but discounted or not relied on

740.31 Good character references (1.6(f))

Declined to find

725.50 Emotional/physical disability/illness (1.6(d))

Discipline

1010 Disbarment
2311 Involuntary Inactive Enrollment After Disbarment Recommendation—Imposed

OPINION

PURCELL, P. J.

This is Michael R. Carver's third disciplinary matter since his 1999 admission to the State Bar of California. He received a public reproval with conditions in 2011, based on his misdemeanor convictions for driving without a valid license and resisting arrest (*Carver I*). In 2015, he was suspended from the practice of law for 90 days for failing to comply with the conditions of his reproval (*Carver II*).

In the present case, a hearing judge found Carver culpable of acting with moral turpitude by knowingly, or with gross negligence, engaging in the unauthorized practice of law (UPL) while on suspension. In recommending discipline, including a 90-day actual suspension, the judge considered *Carver I* in aggravation, but declined to consider *Carver II* because it was pending on review and not yet final.

The Office of the Chief Trial Counsel of the State Bar (OCTC) appeals. It argues that Carver knowingly committed UPL and that the hearing judge erred by not considering *Carver II* as an aggravating factor. OCTC contends that Carver's two prior discipline records render disbarment appropriate under our disciplinary standards. Carver did not seek review or file a responsive brief in this appeal.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we agree with the hearing judge that Carver committed UPL amounting to moral turpitude, but clarify that he did so with willful blindness to his ineligible status, equivalent to knowledge, and not through gross negligence. We also find that the judge erred by not considering *Carver II*, as required by the State Bar Rules of Procedure directing that prior disciplinary records are admissible, whether final or not.

After reviewing both of Carver's prior disciplines, we conclude that he should be disbarred. His misconduct over several years demonstrates that he is unable or unwilling to follow ethical rules. Further, he failed to prove compelling mitigation. We cannot discern from the record any reason to depart from the guiding disciplinary standards indicating that disbarment is the appropriate discipline.

I. PROCEDURAL SUMMARY

On October 31, 2013, OCTC filed a two-count Notice of Disciplinary Charges (NDC). The hearing judge held a two-day trial beginning on May 23, 2014. The parties submitted closing briefs and post-trial supplemental briefs addressing whether the judge should consider *Carver II*, which was pending on review. On September 26, 2014, the judge issued a decision finding Carver culpable on both counts, noting that he did not consider *Carver II* as an aggravating factor, and recommending discipline including a 90-day actual suspension.

Carver failed to file a responsive brief and has therefore waived any challenge to the hearing judge's factual findings. (Rules Proc. of State Bar, rule 5.152(C) ["Any factual error that is not raised on review is waived by the parties"].)[1] He was also precluded from appearing at oral argument before the Review Department. (Rule 5.153(A) [failure to file timely responsive brief precludes party from appearing at oral argument, absent authorization from Presiding Judge].) The record clearly and convincingly supports the hearing judge's material factual findings,[2] which we adopt, except where noted, and summarize below. (Rule 5.155(A) [great weight given to hearing judge's findings of fact].)

II. CARVER'S DISCIPLINE HISTORY

A. *Carver I*

Carver was arrested on April 22, 2008, for two misdemeanor violations—driving without a valid license (Veh. Code, § 12500, subd. (a)) and resisting or obstructing a police officer (Pen. Code, § 148, subd. (a)(1)). In 2008, a jury found him guilty of the

1. All further references to rules are to the Rules of Procedure of the State Bar of California unless otherwise noted.

2. Clear and convincing evidence leaves no substantial doubt and must be sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

Vehicle Code violation, but could not reach a verdict on the Penal Code violation; a second trial in 2009 resulted in a conviction of the Penal Code violation. Carver was sentenced for the Vehicle Code violation in 2008 and for the Penal Code violation in 2009. The matter was referred to the State Bar, and in early 2011, Carver stipulated to a public reproval with conditions based on these convictions.

B. *Carver II*

In November 2011, OCTC filed an NDC initiating *Carver II* and charging him with violating his reproval conditions from *Carver I.* The alleged violations included failing to timely contact his probation officer, file required quarterly reports, and report his compliance with the probation conditions in his underlying criminal matter.

1. Carver Evaded Service of the NDC

At the time OCTC commenced *Carver II,* Carver's official membership address was a private mailbox company, which he believed would not accept certified mail on his behalf. Nevertheless, a company employee signed for Carver's certified mail without authorization. Thereafter, Carver refused to open the mail, which contained either the NDC or the amended NDC filed in *Carver II*, or both.

Carver did not timely respond to the *Carver II* NDC or appear at a status conference. As a result, an OCTC prosecutor informed him by email that the hearing judge expected OCTC to file a default motion if Carver did not respond to the NDC. Carver replied that he had not seen a complaint or been properly served. The prosecutor countered that Carver had in fact been properly served at his official membership address, and promptly emailed him a copy of the NDC. On January 10, 2012, the prosecutor warned that she would move for his default if she did not receive his response by January 12, 2012. Carver took no action.

2. Carver Was Ineligible to Practice Law as of February 18, 2012

On February 2, 2012, and upon motion by OCTC, a hearing judge entered Carver's default (the Default Order) under rule 5.80(D), and enrolled him as inactive, effective three days after service of the Default Order. On February 15, 2012, the Hearing Department properly served the Default Order on Carver at his new membership address via both certified and U.S. Mail, along with a signed proof of service and a copy of its letter notifying the Supreme Court of his impending inactive status. By this time, Carver had changed his membership address from the private mailbox company to a U.S. Mail post office box that he knew could not accept certified mail. At trial, Carver testified that he did not sign for or pick up mail from his post office box from January 2012 until roughly March 10, 2012. On February 18, 2012, Carver was enrolled as inactive, pursuant to Business and Professions Code, section 6007, subdivision (e)[3] (involuntary inactive enrollment required when default has been entered and served), and he became ineligible to practice law.

3. Carver Served and Filed Documents and Appeared in Court While Inactive

On March 1, 2012, two weeks after being enrolled inactive, Carver served a notice of his limited scope representation upon the Department of Child Support Services, informing it that he intended to appear at an upcoming hearing on behalf of his client. On March 2, 2012, Carver made two appearances for his client in Orange County Superior Court: first, before a court commissioner, by filing an objection and a supporting declaration seeking to disqualify the commissioner; and second, when his case was transferred to the Honorable David Belz, by stating his appearance for his client before the judge. Judge Belz informed Carver that he was not enrolled as an active member of the State Bar.[4] Carver acted surprised, and claimed that a membership dues issue must have caused the status change.

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3. All further references to sections are to the Business and Professions Code unless otherwise noted.

4. We note that Carver's appearance before Judge Belz occurred on March 2, 2012, not on April 13, 2012, as the hearing judge found.

4. Discipline Imposed in *Carver II*

A hearing judge later granted Carver limited relief from his *Carver II* default (rule 5.83(H)(3)), found him culpable of violating his reproval conditions, and recommended discipline. In November 2014, we affirmed culpability and recommended discipline including a 90-day actual suspension. (*In the Matter of Carver* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 348, 354.)[5]

III. CARVER IS CULPABLE OF UPL

A. Carver Committed UPL (Count One)

[1] Like the hearing judge, we find that Carver held himself out as entitled to practice law and actually practiced law when he was not an active member of the State Bar, as alleged in Count One of the NDC. By filing and serving court documents and making court appearances on his client's behalf, Carver violated sections 6068, subdivision (a), 6125, and 6126.[6] (*In re Utz* (1989) 48 Cal.3d 468, 483, fn. 11 [practice of law includes doing and performing services in any matter pending in court, providing legal advice and counsel, and preparing legal instruments through which rights may be secured].) We assign no disciplinary weight for these violations, however, as they are based on the same facts that underlie our culpability finding for moral turpitude, discussed below, which supports the same or greater discipline. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127 [declining to assign additional disciplinary weight for lesser-included violation].)

B. Carver's UPL Amounts to Moral Turpitude (Count Two)

[2a] The hearing judge found, as alleged in Count Two of the NDC, that Carver committed an act of moral turpitude in violation of section 6106[7] by engaging in UPL when he knew, or was grossly negligent in not knowing, that he was an inactive member of the State Bar. OCTC argues that Carver "knew of the default and inactive enrollment and intentionally practiced law," as opposed to acting with gross negligence.[8] Resolving all reasonable doubts in Carver's favor (*Lee v. State Bar* (1970) 2 Cal.3d 927, 939), we find that OCTC did not prove that Carver knew *in fact* that he had been enrolled inactive at the time he committed UPL.

[2b] But the record establishes that Carver was aware that OCTC intended to move for his default in mid-January 2012, and he therefore knew there was a high probability he would be ordered inactive. Moreover, he purposely avoided receiving notice from the State Bar that would advise him of any alteration to his status by changing his membership address of record to one that could not receive certified mail, by failing to pick up or review mail sent to that address, and by not checking the status of his license before practicing law.[9] Indeed, he willfully

5. By order filed May 4, 2015, we took judicial notice of our opinion in *Carver II*. We now take judicial notice, sua sponte, of the Supreme Court's order filed March 20, 2015 (S223636), imposing the discipline recommended in our *Carver II* opinion. (Rule 5.156(B).)

6. Section 6125 prohibits the practice of law in California without active State Bar membership; section 6126 prohibits an attorney from advertising or holding himself out as entitled to practice law without active State Bar membership; and section 6068, subdivision (a), requires that an attorney support state laws. (See *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 506 [appropriate method of charging violations of §§ 6125 and 6126 is by charging violation of § 6068, subd. (a)].)

7. Section 6106 provides, in pertinent part: "The commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension."

8. Either finding may form the basis of a moral turpitude charge (*In the Matter of Mason* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 639, 641-642 [attorney appearing in court knowing he was suspended involved moral turpitude]; *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 91 [UPL through gross negligence may violate § 6106].) The distinction is relevant, however, to determine the appropriate discipline for UPL under the standards: "The degree of sanction [for UPL] depends on whether the member *knowingly* engaged in the unauthorized practice of law." (Std. 2.10(a), (b), italics added.)

9. By changing his membership address to avoid service, Carver acted in bad faith in contravention of the purpose of section 6002.1, which requires each member to keep the State Bar apprised of his current address and provides that the State Bar will serve notice initiating any disciplinary proceeding via certified mail at that membership address. (§ 6002.1, subds. (a), (c).)

blinded himself to the fact that he was not eligible to practice. Thus, Carver is culpable of moral turpitude by committing UPL through willful blindness, which is tantamount to having actual knowledge that he was ineligible to practice law. (Cf., e.g., *Global-Tech Appliances, Inc. v SEB S.A.* (2011) 563 U.S. 754, 766-768 [finding willful blindness equivalent to knowledge in patent infringement case]; *Levy v. Irvine* (1901) 134 Cal. 664, 671-672 [finding creditor's "willing ignorance is to be regarded as equivalent to actual knowledge" of debtor's insolvency].)

IV. SIGNIFICANT AGGRAVATION OUTWEIGHS LIMITED MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct[10] requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Carver to meet the same burden to prove mitigation.

A. Aggravating Circumstances

1. Prior Discipline

Carver's misconduct is significantly aggravated by his two prior discipline records because they demonstrate his ongoing disrespect for the law. (Std. 1.5(a) [prior record of discipline is aggravating circumstance].) In *Carver I*, Carver defied a police order, evidencing his "lack of respect for the rule of law, which reflect[ed] negatively on the legal profession." (*In the Matter of Carver*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 355.) Then he disobeyed disciplinary orders in *Carver II*, and disregarded a court order in the present case. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443-444 [similarities between prior and current misconduct render previous discipline more serious, as they indicate prior discipline did not rehabilitate]; *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112 ["Other than outright deceit, it is difficult to imagine conduct in the course of legal representation more unbefitting an attorney" than willful violation of court orders].) Finally, he was dishonest during the proceedings in *Carver II* and attempted to portray his misstatements as merely "technically inaccurate," revealing his "inability to understand the high degree of honesty expected of attorneys . . . ." (*In the Matter of Carver*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 355.)

2. Concealment

Carver concealed the reason for his inactive status from Judge Belz when he claimed that it must have been related to non-payment of his State Bar dues. (Std. 1.5(f) [concealment is aggravating circumstance].) His claim was disingenuous because he knew that OCTC intended to move for his default in *Carver II*, which would have caused his inactive enrollment. We assign moderate aggravation for Carver's concealment.[11]

3. Indifference

We agree with the hearing judge that Carver demonstrated indifference toward his misconduct by maintaining an untenable legal claim—that he was not properly served with pleadings in *Carver II* and therefore was not required to obey any default order enrolling him as inactive. (Std. 1.5(k) [indifference toward rectification or atonement for consequences of misconduct is aggravating circumstance]; *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State

10. The standards were revised and renumbered effective July 1, 2015. Because this request for review was submitted for ruling after that date, we apply the revised version of the standards, and all further references to standards are to this source.

11. The hearing judge found that Carver's efforts to avoid service involved bad faith, dishonesty, or concealment, and warranted aggravation under former standard 1.5(d) (as revised, eff. Jan. 1, 2014). We agree that Carver acted in bad faith, but afford no aggravation for it because we relied on those facts to find him culpable of moral turpitude. (*In the Matter of Sampson*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 132-133.)

Bar Ct. Rptr. 631, 647 [use of unsupported arguments to evade culpability reveals lack of appreciation for misconduct and ethical obligations]; *Weber v. State Bar* (1988) 47 Cal.3d 492, 506 [lack of remorse and failure to acknowledge wrongdoing are aggravating factors].) Moreover, Carver has underscored his indifference by failing to respond to this appeal. We assign considerable aggravating weight to Carver's overall indifference.[12]

B. Mitigating Circumstances

1. Good Character

Carver is entitled to mitigation if he proved "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).) He presented the testimony of one character witness and the declarations of four others. Those witnesses included an attorney, a law graduate employed by the State of Arizona, a paralegal, and two clients.[13] Each attested that Carver is honest and has good character. One client testified that Carver was "very fair, and went beyond the call of duty."

The hearing judge found that this character evidence warrants only moderate mitigating weight because the witnesses did not represent a broad cross-section of the legal and general communities. (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50 [assigning diminished mitigation for character evidence from four witnesses who did not constitute wide range of references in legal and general communities].) We agree.[14]

2. No Mitigation for Extreme Emotional Difficulties

Carver may receive mitigation for extreme emotional difficulties if: (1) he suffered from them at the time of his misconduct; (2) the difficulties are established by expert testimony as being directly responsible for the misconduct; and (3) the difficulties no longer pose a risk for future misconduct. (Std. 1.6(d).) The hearing judge assigned substantial mitigation to Carver's stressful personal circumstances at the time of the misconduct. We afford no mitigation on this point because Carver did not establish a nexus between his difficulties and his misconduct; he did not commit UPL out of distraction due to personal stressors, but rather because he deliberately avoided receiving notice that his law license was inactive.

V. DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession. (Std. 1.1.) We balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.)

A. Rule 5.106

[3] As noted, the hearing judge should have considered *Carver II* as a prior discipline record. Rule 5.106(A) expressly defines a "prior record of discipline" to include, inter alia, "findings and decisions (*final or not*) reflecting or recommending that discipline be imposed on a party," including "recommended discipline that the Court of last resort in the jurisdiction has not yet approved." (Italics added.)[15] Rule 5.106(E) directs the judge to analyze non-final prior records of discipline in making a discipline recommendation, as follows:

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12. OCTC claims Carver caused significant harm to his client, the Department of Child Support Services, the superior court, and "another party whose case could not be scheduled on [March 2, 2012] because [Carver] had taken it." (Std. 1.5(j) [providing aggravation for "significant harm to the client, the public, or the administration of justice"].) We reject these claims as speculative; the record lacks clear and convincing evidence of specific harm to these parties.

13. The decision below mistakenly states that Carver presented six character witnesses.

14. We reject OCTC's argument that a further reduction in mitigation is warranted because the witnesses were not aware of the full extent of Carver's misconduct. The witnesses were aware of the charges but still did not believe Carver had acted unethically.

15. Similarly, standard 1.2(g) defines "[p]rior record of discipline" as including recommendations of discipline (final or not).

A record of prior discipline is not made inadmissible by the fact that the discipline has been recommended but has not yet been imposed. If a record of prior discipline that is not yet final is admitted, the Court shall specify the disposition:

(1) if the non-final prior discipline recommendation is adopted; and

(2) if the non-final prior discipline recommendation is dismissed or modified.

The hearing judge reasoned that the rule "does not apply to the pending review matter, because there has been no final decision of the State Bar Court, and therefore, no recommendation to the Supreme Court within the meaning of rule 5.106(E)." This analysis is contrary to the rule's language and to the decisional law establishing that finality is not required for the judge to consider cases pending in review as prior discipline records. (E.g., *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 497-498 [hearing judge properly considered matter as prior discipline, even though only Hearing Department decision and recommendation had been issued].) Further, the hearing judge's approach would deprive the Supreme Court of the required alternate recommendations where neither party seeks review and the Hearing Department's decision becomes the final recommendation. (Rule 5.111(C) [decision final unless timely request for review filed].) We conclude that the discipline in *Carver II* was a "prior record of discipline" under rule 5.106(A), and the hearing judge was obligated to consider it and specify alternate dispositions as provided in rule 5.106(E).[16]

B. Disbarment Is Appropriate Pursuant to Standard 1.8(b)

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 Silverton* (2005) 36 Cal.4th 81, 91-92.) Importantly, the Supreme Court has instructed us to follow the standards "whenever possible" (*In re Young, supra*, 49 Cal.3d at p. 267, fn. 11), and also to look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

[4a] We use a three-step approach to analyze the standards.

First, we determine which standard (or standards) specifies the most severe sanction for the at-issue misconduct. (Std. 1.7(a) [most severe sanction shall be imposed where multiple sanctions apply].) Here, that standard is 1.8(b) as it addresses Carver's disciplinary history and it calls for disbarment, which is the most severe of the applicable sanctions.[17] Standard 1.8(b) provides that disbarment is appropriate where an attorney has two or more prior records of discipline if: (1) an actual suspension was ordered in any of the prior disciplinary matters; *or*

(2) the prior and current disciplinary matters demonstrate a pattern of misconduct; *or* (3) the prior and current disciplinary matters demonstrate the attorney's unwillingness or inability to conform to ethical responsibilities. Carver has two prior records of discipline, an actual suspension was imposed in *Carver II*, and his prior and current disciplinary matters reveal that he is unwilling or unable to conform to his ethical responsibilities. Additionally, his failure to comply with the *Carver I* reproval conditions demonstrated a lapse of character and a disrespect for the legal system that directly relate to his fitness to practice law and to serve as an officer of the court. (*In the Matter of Carver*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 356.) His criminal conduct underlying *Carver I* (driving without a valid license and resisting arrest) suggests the same lapse, as does his UPL involving moral turpitude in the present case.

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16. The hearing judge expressed concern about the feasibility of recommending alternate disciplines, under rule 5.106(E), to address all potential "modified" discipline outcomes that could result on review. While a judge cannot anticipate every possible outcome, the rule requires the court to provide such alternate dispositions addressing any specific modified discipline outcome (or outcomes) that it views as reasonably likely.

17. The following standards also apply: 2.10 (disbarment or actual suspension is the presumed sanction for UPL by a member who is enrolled involuntarily as inactive under section 6007, subdivision (e), with the degree of sanction depending on whether the member acted knowingly); and 2.11 (disbarment or actual suspension is the presumed sanction for an act of moral turpitude, with the degree of sanction depending on the magnitude of the misconduct, the extent to which it harmed or misled the victim, its impact on the administration of justice, and the extent to which it related to the member's practice of law).

[4b] Second, we analyze whether Carver's case falls within an exception to standard 1.8(b), which permits us to deviate from recommending disbarment where "the most compelling mitigating circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current misconduct." Carver does not qualify for an exemption because his present misconduct did not occur at the same time as the misconduct underlying his two prior discipline cases, and his mitigation for good character is neither compelling nor does it predominate over the significant aggravation for two prior discipline records, concealment, and indifference.

[4c] Third, we consider whether there is any reason to depart from the discipline called for by standard 1.8(b). We acknowledge that disbarment is not mandatory as a third discipline under this standard even where compelling mitigating circumstances do not clearly predominate. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-507 [disbarment is not mandatory in every case of two or more prior disciplines, even where no compelling mitigating circumstances clearly predominate; analysis under former std. 1.7(b)]; *In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136 [to fulfill "purposes of lawyer discipline, we must examine the nature and chronology of respondent's record of discipline"].) But if we deviate from recommending the presumptive discipline of disbarment, we must articulate reasons for doing so. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons for departure from standards]; see also stds. 1.2(i), 1.7(c).) Having failed to file a responsive brief, Carver has not identified a reason for us to depart from applying standard 1.8(b), and we cannot articulate any, given his varied misconduct over several years, his dishonesty in *Carver II,* and his bad faith and willful blindness to his professional obligations in the present case.

[4d] The State Bar and this court have been required to intervene three times to ensure that Carver adheres to the professional standards required of those who are licensed to practice law in California. Probation and suspension would be inadequate to prevent him from committing future misconduct that would endanger the public and the profession. (See *Barnum v. State Bar*, *supra*, 52 Cal.3d at pp. 112-113 [disbarment imposed where attorney's probation violations left court no reason to believe he would comply with lesser discipline].) Standard 1.8(b) and the decisional law support our conclusion that the public and the profession are best protected if Carver is disbarred.[18]

VI. RECOMMENDATION

We recommend that Michael R. Carver be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice in California.

We also recommend that he must comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter.

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

VII. ORDER

Pursuant to section 6007, subdivision (c)(4), and rule 5.111(D)(1), Carver is ordered enrolled inactive. The order of inactive enrollment is effective three days after service of this opinion. (Rule 5.111(D)(1).)

WE CONCUR:

EPSTEIN, J.
STOVITZ, J.*

18. Compare *Barnum v. State Bar*, *supra*, 52 Cal.3d at p. 113 (disbarment where three prior disciplines; depression was not "most compelling" mitigation when weighed against risk of recurrence of misconduct), and *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 80 (disbarment where two prior disciplines and attorney was unable to conform conduct to ethical norms; no mitigation), with *In the Matter of Lawrence* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 239, 246-248 (three-year actual suspension where three prior disciplines; attorney suffered extreme physical disabilities that caused or contributed to misconduct for 30 years and mitigation outweighed aggravation).

* Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

State Bar Court
Review Department

In the Matter of

JOSEPH LYNN DECLUE

A Member of the State Bar

[Nos. 14-O-00482 (14-O-03093)]

Filed May 10, 2016

SUMMARY

A hearing judge found respondent culpable of illegally charging and collecting advance fees for loan modification services in violation of Civil Code section 2944.7 in two client matters. The hearing judge found respondent's misconduct unmitigated, but aggravated by his prior record of discipline, significant harm to clients, failure to make restitution, and uncharged misconduct, including failure to perform competently and aiding and abetting the unauthorized practice of law (UPL). Applying standard 2.18, as well as standard 1.8(a), the hearing judge recommended a six-month actual suspension. (Hon. Patricia E. McElroy.)

Respondent sought review, claiming the recommended discipline was too severe and arguing that he did not take advance fees for loan modification services, but rather for pre-litigation services. The Review Department adopted the hearing judge's culpability findings and the recommended discipline. The record clearly established that the clients engaged respondent's firm for the sole purpose of securing loan modification services.

COUNSEL FOR PARTIES

For State Bar: Cydney Tabor Batchelor

For Respondent: Samuel C. Bellicini

HEADNOTES

[1] **130 Generally Applicable Procedural Issues—Procedure on Review (rules 5.150-5.169)**
146 Evidentiary Issues—Judicial Notice
159 Evidentiary Issues—Miscellaneous Evidentiary Issues
Where a party seeks to take judicial notice and augment record on review under rule 5.165(D) of the Rules of Procedure of the State Bar, motion must be identified as such and filed and served as separate pleading on the date the opening brief is due to be filed; making such request in a responsive brief is procedurally improper.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

[2a-c] **204.90 General substantive issues re culpability—Other general substantive issues re culpability**
222.20 State Bar Act Violations—Section 6106.3 (violation of Civil Code § 2944.6 or 2944.7 re mortgage loan modifications)
Where respondent was the owner and sole supervising attorney of a firm, respondent owed non-delegable fiduciary duty to each client accepted and could not avoid culpability by shifting responsibility onto employees. Accordingly, where respondent's firm took over loan modification matter, and respondent's employees then collected fees before performing services, respondent was culpable of violating statute precluding collection of advance fees in loan modification matters.

[3] **162.11 Standards of Proof/Standards of Review—Quantum of Proof Required—Clear and convincing standard**
State Bar disciplinary proceedings are not criminal, and State Bar Court does not impose criminal penalties. Accordingly, Review Department rejected respondent's argument that because his misconduct could form the basis for a criminal misdemeanor conviction, OCTC was required to prove his culpability beyond a reasonable doubt.

[4a-c] **222.20 State Bar Act Violations—Section 6106.3 (violation of Civil Code § 2944.6 or 2944.7 re mortgage loan modifications)**
Where record, including client's credible testimony, indicated that client entered into fee agreement for sole purpose of securing loan modification or forbearance, litigation services performed by respondent were ancillary to ultimate purpose of loan modification. Accordingly, all services encompassed within fee agreement were subject to provision of Civil Code section 2944.7 precluding collection of fees prior to rendition of services.

[5] **511 Aggravation—Prior record of discipline—Found**
802.21 Application of Standards—Standard 1.2 (Definitions)—Prior record of discipline
Where respondent continued to commit misconduct of same nature after stipulating to discipline in prior matter, prior discipline warranted significant aggravating weight even though some of current and prior misconduct overlapped.

[6a-d] **805.10 Application of Standards—Standard 1.8(a) (current discipline greater than prior)—Applied**
901.05 Application of Standards—Standard 2.18, 2.19—Applied-suspension—Violation of Business & Professions Code
Where respondent was found culpable of illegally charging and collecting advance fees in violation of Civil Code § 2944.7 in two client matters, and misconduct was aggravated by prior record of discipline, significant harm to clients, failure to make restitution, and uncharged misconduct, including failure to perform services and aiding and abetting unauthorized practice of law, six-month actual suspension was warranted under standard 2.18. Standard 1.8(a) also applied, making it appropriate to impose a greater sanction than respondent's prior discipline.

ADDITIONAL ANALYSIS

Culpability

Found

222.21 Section 6106.3 (violation of Civil Code § 2944.6 or 2944.7 re mortgage loan modifications)

Aggravation

Found

561 Uncharged violations (1.5(h))
582.10 Harm to client (1.5(j))
616.10 Failure to make restitution (1.5(m))

Discipline

1013.08 Stayed Suspension—Two years
1015.04 Actual Suspension—Six months
1017.08 Probation—Two Years
1021 Restitution

OPINION

HONN, J.

Joseph Lynn DeClue appeals a hearing judge's decision finding him culpable of illegally charging and collecting advance fees for loan modification services in two client matters. The judge found DeClue's misconduct was unmitigated, but aggravated by his prior record of discipline, significant harm to clients, failure to make restitution, and uncharged misconduct, including failure to perform competently and aiding and abetting his non-attorney staff's unauthorized practice of law (UPL).

DeClue challenges both culpability findings. He also asserts that, even if we find him culpable, the hearing judge's recommended discipline, including a six-month actual suspension, is too severe. DeClue contends that a two-year stayed suspension is appropriate. The Office of the Chief Trial Counsel of the State Bar (OCTC) does not appeal, and it supports the judge's culpability and discipline recommendations.

We review the record independently (Cal. Rules of Court, rule 9.12), but afford great weight to the hearing judge's factual findings (Rules Proc. of State Bar, rule 5.155(A)), which we adopt with minor modifications, as noted. We find that clear and convincing evidence[1] supports DeClue's culpability on both counts. Thus, we adopt the recommended discipline, which is within the range provided by the standards[2] and is consistent with the decisional law.

I. PROCEDURAL HISTORY

DeClue was admitted to practice law in California in 1993. On September 25, 2014, OCTC filed its two-count Notice of Disciplinary Charges (NDC). On February 18, 2015, the parties filed a Stipulation as to Undisputed Facts and Admission of Exhibits, and the Hearing Department began a two-day trial. The hearing judge submitted the case on February 20, 2015, and issued the decision on May 5, 2015. We summarize and incorporate the judge's key factual findings herein and supplement them with additional facts from the record.

II. LEGAL AND FACTUAL BACKGROUND

A. Background Regarding 2009 Loan Modification Legislation

On October 11, 2009, Civil Code Section 2944.7 (Section 2944.7) became effective. The legislation was designed to "prevent persons from charging borrowers an up-front fee, providing limited services that fail to help the borrower, and leaving the borrower worse off than before he or she engaged the services of a loan modification consultant." (Sen. Com. on Banking, Finance, and Insurance, Analysis of Sen. Bill No. 94 (2009 Reg. Sess.) as amended Mar. 23, 2009, p. 7.) Under Section 2944.7, subdivision (a), it is "unlawful for any person who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, to . . . [¶] . . . [c]laim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform." A violation of this section is a misdemeanor. (Section 2944.7, subd. (b)), as well as a basis for attorney discipline (Bus & Prof. Code, § 6106.3, subd. (a).)[3]

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1. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

2. Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. The standards were revised and renumbered effective July 1, 2015. Because this request for review was submitted for ruling after that date, we apply the revised version of the standards, and all further references to standards are to this source.

3. All further references to sections are to the Business and Professions Code unless otherwise noted. Section 6106.3, subdivision (a), provides: "It shall constitute cause for the imposition of discipline of an attorney within the meaning of this chapter for an attorney to engage in any conduct in violation of Section 2944.6 or 2944.7 of the Civil Code."

B. Background Regarding Millenia Law Group

In August 2012, DeClue opened Millenia Law Group (Millenia). He hired One World Alliance (OWA), a company owned and operated by non-attorneys Robert Campoy and Andres Martinez, to manage Millenia. DeClue wanted to expand his foreclosure defense practice, and knew that Campoy and Martinez had experience managing mortgage loan modifications.

Campoy and Martinez previously had operated National Mitigation Services (NMS), a loan modification business. In 2009, they transferred NMS's business to Jack Law Group, a firm they managed under attorney Jack Huang's supervision. In 2011, Huang discovered accounting irregularities and learned that employees were disregarding office procedures, preventing clients from meeting with Huang, and covering up client complaints. (*In the Matter of Huang* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 296, 300.)[4] By fall of 2011, Huang realized he had lost control of the law office, and fired his entire staff, including Campoy and Martinez. (*Ibid.*) However, the employees continued to work with Campoy and Martinez under a new firm name of 'MarCam Law Group,' and associated with a new attorney, Charlotte Spadaro. (*Ibid.*)

In the spring of 2012, OCTC charged Huang with misconduct—violating loan modification laws, failing to supervise Campoy and Martinez, and aiding and abetting Campoy and Martinez's UPL, among other charges—for which Huang ultimately received a two-year actual suspension. (*In the Matter of Huang, supra*, 5 Cal. State Bar Ct. Rptr. at p. 298.) Spadaro was disbarred in July 2013.

DeClue was aware of Spadaro's disciplinary troubles before he hired OWA. He knew Campoy and Martinez had created and managed MarCam Law Group (MarCam), and associated with Spadaro. He had also reviewed the NDC filed against Huang and knew about Campoy and Martinez's alleged involvement in the charged wrongdoing. DeClue testified that he attributed Huang's disciplinary troubles to Huang's own management failures, not to Campoy and Martinez. Despite these warning signs, DeClue entrusted Campoy and Martinez with managing his law practice. He hired OWA, paid it up to $175,000 per month to manage Millenia, gave them substantial control over office administration and client matters, and failed to closely supervise their work.

III. THE ORNELAS MATTER (14-O-00482)

In the fall of 2012, Millenia acquired roughly 200 cases from MarCam when it dissolved. One case was that of Juan and Teresa Ornelas. The Ornelases had entered into a Legal Representation Agreement with Spadaro in June 2012, agreeing to pay $3,000 initially, plus a monthly $500 "case management service" fee for loan modification services. The agreement stated that: "the service provided is strictly assistance with the loan modification request." The Ornelases did not enter into a separate fee agreement with DeClue when Millenia took over their case. Instead, Millenia continued to bill and collect monthly case management fees from the Ornelases pursuant to their fee agreement with MarCam. Teresa Ornelas credibly testified that a Millenia employee informed her that MarCam had become Millenia, which would continue working on their loan modification.

From November 2012 through May 2013, Millenia charged and collected $2,000 (in $500 increments) from the Ornelases for loan modification services under the MarCam representation agreement.[5] However, their loan was not modified, and the hearing judge found they were not provided any loan modification services of any value. DeClue does not

4. [1] OCTC's requests in its responsive brief for judicial notice of this court's complete files in the *Huang* matter and in *In the Matter of Spadaro*, our unpublished opinion in case no. 09-O-15762, are denied as procedurally improper. (Rules Proc. of State Bar, rule 5.156(D) [motion to augment record on review "must be identified as such and filed and served as a separate pleading on the date the appellant's opening brief is due to be filed"].)

5. Relying on Millenia's credit card transaction receipts for three of the payments and the date of Teresa's check for the fourth, we find that Millenia received fees on or about November 28, 2012, December 6, 2012, January 28, 2013, and May 2, 2013.

contest this finding, which is supported by the record, including his own testimony that he had no contact with the Ornelases and no knowledge of their case. The Ornelases ultimately terminated Millenia and requested a refund of their fees. A Millenia employee refused Teresa's request. DeClue returned $500 to the Ornelases days before his discipline trial, but has not refunded the remaining $1,500.

Count 1: Collecting Illegal Advance Fees
(§ 6106.3, subd. (a))

[2a] OCTC charged that DeClue agreed to negotiate a residential loan modification for the Ornelases and thereafter collected a total of $2,000, before he had fully performed each and every service he had contracted to perform, in violation of Section 2944.7 and of Business and Professions Code section 6106.3. The hearing judge correctly found DeClue culpable.

DeClue admits he collected the Ornelases' fees in violation of Section 2944.7, but claims he did not willfully violate section 6106.3 because: (1) he had no contract with the Ornelases; (2) his OWA employees handled their case, including collecting fees, without his knowledge; and (3) OWA deposited all but $500 of those fees in its own separate bank account over which DeClue had no control or authority. DeClue made similar claims during trial—that the Ornelases were not Millenia clients because OWA provided the services and collected the fees illegally—but the hearing judge did not credit DeClue's testimony on this point. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025,1032 [hearing judge "is best suited to resolving credibility questions"].) In fact, the judge found that the Ornelases were DeClue's clients, that he received $2,000 for performance of loan modification services, and that he did not provide any loan modification services of any value. We adopt these findings, which are supported by the record, and reject DeClue's claims that he did not violate section 6106.3

To begin, DeClue admitted at trial that he took over MarCam's caseload. Further, the Ornelases credibly testified that they paid Millenia for loan modification services. The documentary evidence supports the hearing judge's findings that DeClue received $2,000 before performing loan modification services. It includes, inter alia: (1) receipts, invoices, and statements from Millenia reflecting the Ornelases' payments (some of which included amounts carried forward from original MarCam billings and payments); (2) Millenia's file for the Ornelas matter, which contained a copy of the MarCam representation agreement and a loan modification packet bearing Millenia's name; and (3) DeClue's response to OCTC's investigative letter, in which he admits that he obtained the Ornelases' case from Spadaro, and that "Millenia Law continued MarCam Law's efforts to defend the Ornelas property."

[2b] We reject DeClue's attempt to avoid culpability by shifting responsibility onto his OWA employees. As the sole supervising attorney at Millenia, he owed non-delegable fiduciary duties to each client the firm accepted. That DeClue elected to drastically expand his practice by hiring OWA to staff and manage it did not relieve him of those obligations. (*Bernstein v. State Bar* (1990) 50 Cal.3d 221, 231 [retained attorney is not personally required to do all work on client matter, but "an attorney who accepts employment necessarily accepts the responsibilities of his trust (citations)"].) DeClue willfully allowed OWA to accept and contract with new clients, handle their matters, and collect fees on his behalf with minimal, if any, supervision. He facilitated Millenia's failures vis-à-vis the Ornelases and is responsible for them.

[2c] By assuming the Ornelases' MarCam contract, DeClue agreed to provide loan modification services. He then collected fees before performing any service he had agreed to perform, and in fact any service of value, in violation of Section 2944.7. Thus, he is culpable under section 6106.3, subdivision (a).[6]

6. **[3]** At oral argument, DeClue argued that OCTC was required to prove his culpability beyond a reasonable doubt because Section 2944.7 may form the basis for a criminal misdemeanor conviction. We reject this argument. These proceedings are not criminal, and we do not impose criminal penalties. (Std. 1.1; compare with Pen. Code, § 1096 [requiring proof of guilt "beyond a reasonable doubt" in "criminal actions"].) We therefore apply the clear and convincing burden of proof required in discipline proceedings. (Rules Proc. of State Bar, rule 5.103.)

IV. THE ANDINYAN MATTER (14-O-03093)

On May 21, 2013, Sarkis Andinyan hired Millenia to perform loan modification services. Andinyan met with a Millenia paralegal, Paul Vierra, signed Millenia's Legal Representation Agreement (the First Agreement), and paid Millenia $4,000, pursuant to the agreement. The First Agreement provided that the scope of Millenia's work would include: (1) pre-litigation discovery relating to "Foreclosure Defense" (although the agreement acknowledged that "No Active Foreclosure" was in progress); and (2) pursuit of a settlement through "Alternative Dispute Resolution (ADR) which may result in a workout agreement such as a loan restructure and cancellation of foreclosure proceedings." Regarding ADR, the agreement stated: "This is an accommodation and there is ***no charge*** for this service." (Emphasis in original.)

Millenia then submitted a loan modification request to Bank of America, N.A., on Andinyan's behalf, and DeClue sent several letters to the bank regarding Andinyan's loan. In each letter, DeClue stated that Andinyan had retained him to "assist with any/all loan assistance, work out options, and/or alternatives to a foreclosure . . . ."

In June 2013, Bank of America denied Millenia's loan modification request. Vierra then advised Andinyan that he would have to pursue litigation to obtain a loan modification. Based on Vierra's advice, Andinyan entered into a new Legal Representation Agreement (the Second Agreement) with Millenia on September 27, 2013, for litigation against Bank of America. Under the Second Agreement, Andinyan agreed to pay $6,000 by September 27, 2013 (the date of the agreement), plus a $1,000 "Monthly Case Management Fee," by November 1, 2013. Andinyan made the initial $6,000 payment on September 27, 2013, and then paid the $1,000 monthly case management fees in November and December 2013 and January 2014, for a total of $3,000. Meanwhile, in November 2013, Millenia filed a civil complaint on Andinyan's behalf against Bank of America and others, alleging, inter alia, that the lender failed to agree to modify Andinyan's home mortgage when doing so was both appropriate and statutorily required.

After making his third monthly payment, Andinyan contacted Millenia and learned that Vierra no longer worked there. Andinyan then had his first contact with DeClue. Andinyan testified that DeClue told him: "Mr. Vierra doesn't know what he was doing, and the [Second Agreement] that [Andinyan] signed is not legitimate." DeClue told Andinyan in order to pursue litigation with the goal of obtaining a loan modification, Andinyan would need to sign and make payments under a new contract. Andinyan declined to sign a new contract, demanded a refund of the $13,000 he had paid, and directed DeClue to cease litigation. To date, DeClue has not refunded any portion of these payments, although Andinyan was able to recover $3,000 by stopping payment on his credit card.

Count 2: Collecting Illegal Advance Fees (§ 6106.3, subd. (a))

OCTC alleged that DeClue collected $4,000 from Andinyan on May 21, 2013, under the First Agreement, and $6,000 from Andinyan on September 27, 2013, and an additional $3,000 in monthly payments, pursuant to the Second Agreement. OCTC charged that the agreements violated Section 2944.7, in violation of section 6106.3, subdivision (a). The hearing judge correctly found DeClue culpable as charged.

[4a] DeClue asserts that he did not violate Section 2944.7 because neither of his agreements with Andinyan was for loan modification services, but merely a first step in litigation. According to DeClue, the First Agreement was for pre-litigation investigation and possible settlement, with no charge for loan modification work and the Second Agreement was to litigate civil causes of action against Bank of America. We reject these arguments.

[4b] Section 2944.7 defines "service" broadly to include "each and every service the person contracted to perform or represented that he or she would perform." Here, the record, including Andinyan's credible testimony, established that Andinyan entered into both representation agreements for the *sole* purpose of securing a loan modification or other forbearance, and that he com-

municated that purpose expressly and repeatedly to DeClue and DeClue's employee, Vierra.[7] (*In the Matter of Lindmark* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 668, 676 [ambiguities in attorney-client fee agreements construed in client's favor and against attorney, who has superior knowledge].) The litigation services Millenia performed in the Andinyan matter served only as a pretext to that ultimate purpose—loan modification. All services encompassed within the two agreements, accordingly, were subject to Section 2944.7.

[4c] DeClue charged Andinyan for these loan modification services before Millenia had fully performed each and every service it had contracted to perform. He collected initial fees under each contract before performing any service and continued to collect monthly fees before performing each and every service.[8] This conduct violated Section 2944.7. (*In the Matter of Taylor* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 221, 231-232 [statute prohibits charging or collecting any fees before full performance].) Hence, we affirm the hearing judge's culpability finding.

V. NO MITIGATION AND SIGNIFICANT AGGRAVATION[9]

The hearing judge found DeClue's misconduct aggravated by a prior record of discipline, significant harm to his clients, failure to pay restitution, and uncharged misconduct. The judge found DeClue failed to prove any mitigating circumstances. We adopt the judge's findings, except that we find DeClue's prior misconduct warrants full aggravating weight.

DeClue has one prior record of discipline for which he received a two-year stayed suspension and two years of probation, effective in April 2014 (*DeClue I*). (Std. 1.5(a).) In *DeClue I*, he stipulated to misconduct in two client matters: one in which he violated Section 2944.7 by demanding, charging, collecting and receiving advance fees for loan modification services; and a second matter in which he demanded advance fees for loan modification services, violating Section 2944.7, and also violated rule 3-110(A) of the Rules of Professional Conduct[10] by failing to supervise non-attorney staff.

The hearing judge afforded only limited aggravation for *DeClue I* because she found that the misconduct there, spanning from September 2012 through February 2013, occurred contemporaneously with the misconduct here. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618-619 [aggravating force of prior discipline generally diminished if underlying misconduct occurred during period of present misconduct].) OCTC argues this reduction was improper, and we agree.

[5] Though some of DeClue's prior and current misconduct overlapped, he continued to collect illegal advance fees from Andinyan on December 10, 2013, and January 8, 2014, *after* he signed the *DeClue I* stipulation on November 19, 2013. As he was on notice of his prior misconduct and continued to commit violations of the same nature, *DeClue I* warrants significant aggravating weight. (*In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 564 [significant weight for prior record where misconduct at issue occurred before

7. DeClue asserts the representation agreements could not have been for loan modification services because Bank of America lacked authority to offer Andinyan a loan modification. This argument is unavailing. Irrespective of the bank's ability to grant such relief, the record establishes that DeClue attempted to negotiate a loan modification.

8. DeClue testified at trial and notes in his appellate briefs that his OWA employees deposited Andinyan's fees into OWA's own bank account, not Millenia's. We find this fact irrelevant. That OWA may have taken control of the funds after collecting them on DeClue's behalf does not change the fact that DeClue charged and collected them illegally to begin with.

9. Standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires DeClue to meet the same burden to prove mitigation.

10. All further references to rules are to this source. Rule 3-110(A) of the Rules of Professional Conduct provides: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

prior discipline imposed, but after respondent was on notice of ethically questionable nature of his similar conduct underlying prior record]; *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443-444 [similarities between prior and current misconduct render previous discipline more serious, as they indicate prior discipline did not rehabilitate].)

Like the hearing judge, we find DeClue caused significant harm to his clients by exploiting their financial desperation and depriving them of funds collected illegally. We assign substantial aggravating weight on this basis. (Std. 1.5(j).)

DeClue's conduct is also significantly aggravated by his failure to pay restitution. (Std. 1.5(m).) To date, he has not repaid any of the $10,000 he owes Andinyan and has repaid only $500 to the Ornelases. Of particular concern is DeClue's opinion that he should not have to repay either Andinyan or the Ornelases because OWA deposited all but $500 of the fees—the $500 DeClue repaid the Ornelases—into its own bank account. His attitude, expressed at trial and in his opening brief on appeal, reflects a lack of appreciation for the non-delegable fiduciary duties DeClue owes to clients and for his responsibility in facilitating OWA's wrongdoing.

Last, the hearing judge correctly found aggravation for uncharged misconduct. (Std. 1.5(h); *Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36 [evidence of uncharged misconduct may be aggravating if based on attorney's own testimony].) DeClue's own testimony and exhibits demonstrate that he failed to perform competently by failing to supervise non-attorney staff (rule 3-110(A)) and that he aided and abetted UPL (rule 1-300(A).)[11] (*In the Matter of Malek-Yonan* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627, 634 [rule 3-110(A) includes duty to supervise work of staff]; *In the Matter of Huang* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 296 [attorney culpable of failing to perform competently and aiding and abetting UPL, where he delegated all loan modification work to staff whom he failed to supervise, and thereby failed to competently evaluate each client's claim and represent each client appropriately].)

DeClue admits he failed entirely to supervise the Ornelas matter. We find he also failed to properly supervise the Andinyan matter. He allowed Vierra to provide legal advice and to enter into, and charge and collect fees under, the Second Agreement that DeClue did not know about and later informed Andinyan was "not legitimate." DeClue's testimony, in conjunction with his clients', additionally supports the hearing judge's finding that DeClue aided and abetted UPL by relinquishing legal responsibilities—conducting initial legal consultations, providing legal advice to Andinyan, and performing loan modification services for both the Ornelases and Andinyan—to unsupervised non-attorney employees.

VI. DISCIPLINE[12]

[6a] In determining the proper discipline, we begin with the standards, which promote the consistent application of disciplinary measures and are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 91 [Supreme Court will not reject recommendation arising from standards, absent grave doubts as to propriety of recommended discipline].) Here, the hearing judge's recommended six-month actual suspension is within the range provided by applicable standard 2.18, which directs that disbarment or actual suspension is the presumed sanction for a violation of the Business and Professions code not otherwise specified in another standard.[13]

(*In the Matter of Taylor, supra,* 5 Cal. State Bar Ct. Rptr. at p. 236 [applying precursor to standard 2.18, where respondent collected illegal fees in violation of § 6106.3].)

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11. Rule 1-300(A) provides: "A member shall not aid any person or entity in the unauthorized practice of law."

12. 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.)

13. [6b] Standard 1.8(a) also applies and provides that "[i]f a member has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct not serious enough that imposing greater discipline would be manifestly unjust."

We also give due consideration to the decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) The guiding case addressing violations of the 2009 loan modification laws is *In the Matter of Taylor, supra*, 5 Cal. State Bar Ct. Rptr. 221. Taylor received a six-month actual suspension for charging pre-performance loan modification fees in eight client matters and failing to provide the required loan modification disclosures in one case. Multiple acts of wrongdoing, significant client harm, and lack of remorse aggravated the misconduct, and he proved only one mitigating circumstance—good character. Like DeClue, Taylor failed to fully refund the illegally collected payments.

[6c] Taylor's misconduct is more serious than DeClue's in that it involved eight client matters compared to the two at issue here. But the aggravating circumstances surrounding DeClue's misconduct are far more significant than those in *Taylor*. In particular, DeClue continued collecting illegal fees after stipulating to culpability in *DeClue I* for misconduct of the very same nature. In contrast, Taylor had no prior record of discipline.

In addition, DeClue exhibited poor judgment in ceding office and case management responsibilities to OWA when he knew about OCTC's allegations in the *Huang* NDC. Given his knowledge of Campoy's and Martinez's questionable backgrounds, it was ethically irresponsible for DeClue to employ them without diligently and thoroughly supervising their work.

[6d] Under these circumstances, the hearing judge properly imposed discipline comparable to that in *Taylor*, regardless of the fact that DeClue committed fewer violations. We conclude a six-month actual suspension is necessary to impress upon DeClue the seriousness of his misconduct and to protect the public, the courts, and the legal profession.

VII. RECOMMENDATION

For the foregoing reasons, we recommend that Joseph Lynn DeClue be suspended from the practice of law for two years, that execution of that suspension be stayed, and that DeClue be placed on probation for two years on the following conditions:

1. He must be suspended from the practice of law for a minimum of the first six months of his probation, and remain suspended until the following conditions are satisfied:

a. He makes restitution to the following payees (or reimburses the Client Security Fund to the extent of any payment from the Fund to the payees, in accordance with Business and Professions Code section 6140.5) and furnishes satisfactory proof to the State Bar Office of Probation in Los Angeles:

(i) Juan and Teresa Ornelas, in the amount of $1,500, plus 10 percent interest per year from May 2, 2013; and

(ii) Sarkis Andinyan, in the amount of $10,000, plus 10 percent interest per year from January 8, 2014.

b. If he remains suspended for two years or more as a result of not satisfying the preceding requirement, he also must provide proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

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

5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

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 period of probation, if he has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VIII. PROFESSIONAL RESPONSIBILITY EXAMINATION AND ETHICS SCHOOL

We do not recommend that DeClue be ordered to take and pass the Multistate Professional Responsibility Examination or to attend the State Bar's Ethics School, as he recently was required to do so. On March 26, 2014, in case No. S215978, the Supreme Court ordered DeClue to: (1) take and pass the Multistate Professional Responsibility Examination; and (2) provide the Office of Probation satisfactory proof of his attendance at a session of the State Bar Ethics School and passage of the test given at the end of that session.

IX. RULE 9.20

We further recommend that DeClue be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

X. COSTS

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

WE CONCUR:

PURCELL, P. J.
EPSTEIN, J.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

GREGORY MOLINA BURKE

A Member of the State Bar

[Nos. 12-O-17622 (12-O-18037; 13-O-11787; 13-O-12643)]

Filed June 3, 2016

SUMMARY

In his third disciplinary proceeding, a hearing judge found respondent culpable of misconduct in three client matters, including failing to obey court orders, engaging in the unauthorized practice of law (UPL), and violating his duty to maintain a just action. The hearing judge also found some mitigation for cooperation and two circumstances in aggravation, including respondent's prior discipline record. However, the hearing judge declined to apply standard 1.8(b) (disbarment is presumptive discipline when attorney has two or more prior disciplines), and recommended a one-year actual suspension to continue until respondent satisfied unpaid sanctions orders. (Hon. Yvette D. Roland, Hearing Judge.)

The Office of the Chief Trial Counsel of the State Bar (OCTC) appealed and sought disbarment. The Review Department adopted the hearing judge's culpability findings, but found additional charged misconduct for UPL, moral turpitude arising from the UPL, and failing to obey a court order. The Review Department also gave more weight in aggravation, including significant weight to respondent's two prior disciplines, and, pursuant to standard 1.8(b), recommended that respondent be disbarred.

COUNSEL FOR PARTIES

For State Bar: Brandon K. Tady, Esq.

For Respondent: Gregory Molina Burke

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **130 Generally Applicable Procedural Issues—Procedure on Review (rules 5.150-5.160)**

Where respondent did not request review or file responsive brief on appeal, respondent waived any claim of factual error in record. (Rules Proc. of State Bar, rule 5.152(C).)

[2] **130 Generally Applicable Procedural Issues—Procedure on Review (rules 5.150-5.160)**

Where respondent did not request review or file responsive brief on appeal, respondent was precluded from appearing at oral argument. (Rules Proc. of State Bar, rule 5.153(A).)

[3 a, b] **204.10 Substantive Issues—Culpability—General—Wilfulness requirement**
204.20 Substantive Issues—Culpability—General—Intent requirement
230.00 State Bar Act Violations—Section 6125 (practice of law while not active member)
231.00 State Bar Act Violations—Section 6126 (unauthorized practice—misdemeanor)
913 Application of Standards—Standard 2.10(b)—Practice while inactive or on suspension for non-disciplinary reasons

Where respondent practiced law while suspended for non-payment of child support, OCTC was not required to establish that respondent knowingly committed unauthorized practice of law in order to prove respondent violated sections 6125 and 6126. It was sufficient to prove respondent's conduct was willful. Under standard 2.10(b), knowledge is simply a factor in determining degree of discipline.

[4 a, b] **213.10 State Bar Act Violations—Section 6068(a) (support Constitution and laws)**
230.00 State Bar Act Violations—Section 6125 (practice of law while not active member)
231.00 State Bar Act Violations—Section 6126 (unauthorized practice—misdemeanor)

Where respondent signed and served discovery responses and made court appearance on client's behalf while suspended, respondent violated sections 6068, subdivision (a), 6125, and 6126, regardless of whether OCTC showed respondent knowingly committed unauthorized practice of law, because respondent acted purposefully when he created impression he was entitled to represent client.

[5 a-d] **162.11 Standards of Proof/Standards of Review—Clear and Convincing Standard**
221.00 State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)
230.00 State Bar Act Violations—Section 6125 (practice of law while not active member)
231.00 State Bar Act Violations—Section 6126 (unauthorized practice—misdemeanor)

Where respondent was unaware of his suspension until last minute of three-minute telephonic case management conference and then provided three responses to judge's instructions during remaining very brief period (no more than one minute) and under circumstances where respondent did not have

reasonable opportunity to withdraw, Review Department upheld hearing judge's finding that respondent was not culpable of moral turpitude because OCTC did not present clear and convincing evidence that respondent practiced law with requisite level of intent, guilty knowledge, or, at a minimum, gross negligence.

[6] **220.00 State Bar Act Violations—Section 6103, clause 1 (disobedience of court order)**

When sanctions order does not specify due date, there is no bright-line test for "reasonableness" that applies to elapsed time of payment after issuance of sanctions order. Instead, timing of payment is just one factor among others to be considered.

[7] **220.00 State Bar Act Violations—Section 6103, clause 1 (disobedience of court order)**

Where considerable efforts were required by opposing counsel to collect sanctions over ten-and-a-half-month period, including constantly sending letters and emails to respondent requesting payment of sanctions, calling respondent, and, after several unsuccessful requests, filing liens, respondent's failure to pay sanctions for nearly 11 months was not reasonable and respondent was culpable of violating section 6103.

[8 a-c] **106.30 Procedural Issues—Issues re Pleadings—Duplicative charges**
213.10 State Bar Act Violations—Section 6068(a) (support Constitution and laws)
230.00 State Bar Act Violations—Section 6125 (practice of law while not active member)
231.00 State Bar Act Violations—Section 6126 (unauthorized practice—misdemeanor)

Where respondent, after learning that he was suspended from practice, attempted to negotiate settlement of clients' case and appeared for a client at a deposition, respondent was culpable of violating section 6068(a) by his unauthorized practice of law, but this violation was given no weight, because respondent was also found culpable of moral turpitude based on same facts.

[9] **162.20 Standards of Proof/Standards of Review—Respondent's burden in disciplinary matters**
169 Standards of Proof/Standards of Review—Miscellaneous Issues re Standard of Proof/Standard of Review
221.00 State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)

Where respondent knew he was suspended at time he entered into settlement negotiations, respondent was culpable of act of moral turpitude, even though, prior to attempting to settle case, respondent advised opposing counsel of respondent's suspension and contacted State Bar's Ethics Department. Contacting State Bar employee for advice is not a defense to a violation of rules or statutes governing attorney's professional responsibilities.

[10 a, b] **162.20 Standards of Proof/Standards of Review—Respondent's burden in disciplinary matters**
221.00 State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)
230.00 State Bar Act Violations—Section 6125 (practice of law while not active member)
231.00 State Bar Act Violations—Section 6126 (unauthorized practice —misdemeanor)

Where respondent appeared at client's deposition two days after he learned of his suspension for failure to pay child support, respondent's knowing unauthorized practice of law constituted act of moral turpitude. Respondent was not entitled to assume he had been reinstated after becoming current on child support, because respondent knew his status could be confirmed on State Bar's website.

[11 a, b] **191 Miscellaneous General Issues—Effect of/Relationship to Other Proceedings**
213.30 State Bar Act Violations—Section 6068(c)—Counsel only legal actions/ defenses

Where respondent refused to dismiss defendants after learning they were not parties to contract at issue; trial court awarded sanctions against respondent; and Court of Appeal affirmed, finding respondent's action was frivolous, Court of Appeal's finding of frivolousness was entitled to strong presumption of validity, and respondent was culpable of maintaining an unjust action.

[12 a-c] **510 Aggravation—Prior record of discipline**
802.21 Application of Standards—Standard 1.2 (Definitions)—Prior record of discipline

For purposes of analyzing respondent's prior record as aggravation, date OCTC filed notice of disciplinary charges in prior disciplinary proceeding is most relevant. As of that date, respondent is put on notice that charged conduct is disciplinable. Accordingly, where respondent committed additional misconduct after filing of notice in prior proceeding, hearing judge erred in giving diminished weight to prior discipline because it overlapped with present misconduct. Rather, respondent's current misconduct was significantly aggravated by prior records demonstrating continuing unwillingness or inability to conform conduct to ethical norms, especially where prior and present misconduct both involved unauthorized practice of law and repeated violations of sanctions orders.

[13] **595 Aggravation—Indifference to rectification/atonement—declined to find**

Where respondent asserted that his failure to pay sanctions was due to clients' failure to adhere to agreement to pay, and that in practicing while suspended, he relied on statements of State Bar employees as to his status, these statements did not clearly and convincingly establish indifference toward rectification or atonement in aggravation of his misconduct.

[14] **584.50 Aggravation—Harm—To public—Declined to find**
Where record did not establish that action brought by respondent's clients was unjust or unjustified, fact that opposing party had to pay attorney fees to defend itself did not establish that respondent's conduct caused significant harm to that party.

[15 a, b] **801.45 Application of Standards—Deviation from standards—Found not to be justified**
806.10 Application of Standards—Standard 1.8 (1986 Standard 1.7) (Effect of Prior Discipline)—(b) Disbarment after two priors—Applied
Where (a) respondent received 60-day actual suspension in first prior disciplinary matter and nine-month suspension in second prior disciplinary matter; (b) respondent's past and current misconduct demonstrated his unwillingness or inability to fulfill his ethical responsibilities; and (c) respondent's nominal mitigation was not compelling, nor did it predominate over the significant aggravation of respondent's two prior discipline records and his multiple acts of misconduct, disbarment was appropriate under standard 1.8(b).

ADDITIONAL ANALYSIS

Culpability

Found

213.11 Section 6068(a) (support Constitution and laws)
213.31 Section 6068(c) (counsel only legal actions/defenses)
220.01 Section 6103, clause 1 (disobedience of court order)
221.19 Section 6106 (moral turpitude, corruption, dishonesty)—Other factual basis
230.01 Section 6125 (practice of law while not active member)
231.01 Section 6126 (unauthorized practice—misdemeanor)

Not found

221.50 Section 6106 (moral turpitude, corruption, dishonesty)

Aggravation

Found

511 Prior record of discipline (1.5(a))
521 Multiple acts of misconduct (1.5(b))

Mitigation

Found but discounted or not relied on

735.30 Candor and cooperation with Bar (1.6(e))

Discipline

1010 Disbarment
2311 Involuntary Inactive Enrollment After Disbarment Recommendation—Imposed

OPINION

EPSTEIN, J.

This is Gregory Molina Burke's third disciplinary proceeding since his admission to the California State Bar in 1997. In the present case, a hearing judge found Burke culpable of misconduct in three client matters, including failing to obey court orders, engaging in the unauthorized practice of law (UPL), and violating his duty to maintain a just action. The judge further found some mitigation for his cooperation and two circumstances in aggravation, including Burke's prior discipline record. However, the hearing judge declined to apply disciplinary standard 1.8(b),[1] which presumptively provides for disbarment when an attorney has two or more prior disciplines, because she concluded that the misconduct that was the subject of Burke's second State Bar Court proceeding occurred during the same period as the misconduct that presently is before us. The hearing judge accordingly recommended a one-year actual suspension to continue until Burke satisfies the unpaid sanctions orders.

The Office of the Chief Trial Counsel of the State Bar (OCTC) appeals. It argues that Burke is culpable of additional counts of misconduct that the hearing judge dismissed involving additional UPL, moral turpitude arising from the UPL, and another failure to obey a court order. OCTC asserts that the evidence in mitigation is not compelling and does not clearly predominate over the evidence in aggravation, which it maintains is serious because it involves multiple acts, harm to clients, and, most significantly, a history of two prior disciplines that warrants the application of standard 1.8(b). OCTC accordingly is seeking disbarment.

[1] Because Burke did not request review or file a responsive brief on appeal, he waived any claim of factual error in the record. (Rules Proc. of State Bar, rule 5.152(C) [factual error not raised on review is waived].) **[2]** For the same reason, he was precluded from appearing at oral argument. (Rules Proc. of State Bar, rule 5.153(A) [failure to file responsive brief precludes appearance at oral argument absent authorization from Presiding Judge].)

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we adopt the hearing judge's culpability findings, but we find additional charged misconduct for UPL, moral turpitude arising from the UPL, and failing to obey a court order. We give more weight in aggravation, including significant weight to Burke's prior discipline. After the filing of a notice of disciplinary charges in his second disciplinary matter for the same or similar misconduct as that which is before us now, Burke was on notice that his present misconduct was ethically questionable. Yet he continued to commit wrongdoing that lasted at least until the time of the hearing below.

In fact, Burke has continually committed misconduct since 2008, some of which echoes the misconduct before us. Based on this record, we are unable to justify a departure from standard 1.8(b), which provides for disbarment as the appropriate discipline. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons for departure from standards].) Accordingly, we recommend that Burke be disbarred to protect the public, the profession, and the administration of justice.

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 29, 2011, the California State Bar Member Services Department (Member Services) sent Burke a Notice of Intent to Suspend Bar Membership (Notice of Intent) for his failure to pay court-ordered child support. On December 1, 2011, the California Supreme Court filed an order suspending Burke from the practice of law, commencing on December 29, 2011, pursuant to rule 9.22 of the

1. Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. The standards were revised and renumbered effective July 1, 2015. Because this request for review was submitted for ruling after that date, we apply the revised version of the standards, and all further references to standards are to this source.

California Rules of Court, which authorizes suspension of State Bar members for failure to comply with a judgment or order for child or family support. The Supreme Court's order provided that Burke's suspension would continue until terminated by further order of the Court.

The Supreme Court did not serve the order on Burke. Instead, on December 29, 2011, a Member Services employee prepared a letter to be sent to Burke with a copy of the order (Suspension Notice). Although the employee placed the Suspension Notice in the internal mail outbox on December 29, 2011, it was not postmarked until January 3, 2012. Burke testified that he never received the Notice of Intent and did not receive the Suspension Notice until January 10, 2012. The hearing judge found this testimony to be credible, and we give this finding great weight. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 [hearing judge best suited to resolve credibility questions due to first-person observations of witnesses' demeanor]; Rules Proc. of State Bar, rule 5.155(A).) Moreover, OCTC does not contest this credibility finding on appeal.

After Member Services notified the Supreme Court on January 6, 2012 that Burke had satisfied his child support obligation, the Court issued an order on January 23, 2012 terminating Burke's suspension. As we discuss below, between January 3, 2012 and January 23, 2012, Burke engaged in the practice of law while on suspension.

On October 28, 2013, OCTC filed a 17-count NDC, alleging five counts of UPL, five counts of moral turpitude arising from UPL, five counts of failing to obey court orders, one count of charging an illegal fee, and one count of maintaining an unjust action. The parties entered into a pretrial stipulation and supplemental stipulation of facts. During the three-day trial in January 2015, OCTC presented the testimony of two State Bar employees and three attorneys who were opposing counsel in separate litigation matters involving Burke's clients. Burke represented himself, and offered his own testimony and documentary evidence. The hearing judge found Burke culpable of four counts of failing to obey a court order, one count of engaging in UPL, and one count of violating his duty to maintain a just or legal action. The judge dismissed the remaining counts for lack of clear and convincing evidence.[2]

II. ANALYSIS

A. The Herman Norris Matter (Case No. 12-O-17622)

Burke represented plaintiff Herman Norris in a medical malpractice lawsuit, *Norris v. St. Bernardine's Medical Center, et al.* (the Norris case). On January 3, 2012, Burke prepared and served the defendant with responses to requests for admissions and to interrogatories (collectively, the Responses). Burke signed the Responses as "counsel for the Plaintiff." In addition, he appeared telephonically at a case management conference (CMC) on January 4, 2012, and stated he was "appearing on behalf of the plaintiff Herman Norris."

Two-thirds of the way through the three-minute CMC, opposing counsel informed the judge that the State Bar website indicated that Burke was not eligible to practice law. While on the telephonic CMC, Burke immediately checked the State Bar website and confirmed his suspension. He told the court, "I'm not understanding why it states that. I'm going to have to call the bar today and figure this out."[3] The judge did not acknowledge Burke's

2. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.) OCTC does not contest the hearing judge's dismissals of Count Two (moral turpitude arising from UPL), Count Ten (UPL), Count Eleven (moral turpitude arising from UPL), and Count Twelve (illegal fee). We have reviewed the record regarding these counts and affirm their dismissals. Accordingly, we shall not address them further.

3. Burke testified that he knew he was overdue on his child support prior to November 29, 2011, but was unaware that the Department of Social Services had notified the State Bar of his delinquency.

comment about his suspension, nor did she terminate the CMC. Instead, she scheduled another CMC in 90 days, and instructed the parties that she would be setting trial dates in September or October. Burke responded: "Very good, your Honor." The judge then set April 3rd for the next CMC, to which Burke responded: "Fine." The court concluded by asking: "Parties waive notice?" to which Burke responded: "Yes, your Honor." At that point, the hearing was adjourned.

1. Counts One and Three: Burke's UPL Violated Business and Professions Code Sections 6068, Subdivision (a), 6125, and 6126

The NDC charged Burke with holding himself out as entitled to practice law and practicing law by signing and serving the Responses in the Norris case on January 3, 2012 (Count One) and by appearing telephonically at the CMC on January 4, 2012 (Count Three), thereby willful violating Business and Professions Code, section 6068, subdivision (a).[4] The hearing judge found that OCTC did not establish that Burke's conduct was knowing or willful since he credibly testified he had not received either the Notice of Intent or the Suspension Notice until after he took those actions. She therefore dismissed the charges.

We reverse the hearing judge's dismissal of Counts One and Three. **[3a] [4a]** In order to prove that Burke violated sections 6125 and 6126, it is not necessary for OCTC to establish that Burke knowingly committed UPL. Such knowledge is simply a factor in determining the degree of sanction under standard 2.10(b), which provides for discipline whether or not a member had knowledge he or she was committing UPL.[5] (*In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 318-319 [violations of §§ 6125, 6126, and 6068, subd. (a), established by single court appearance by attorney who did not know of his involuntary inactive enrollment].) It is sufficient that OCTC merely prove Burke's conduct was willful. (*In the Matter of Thomson* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966, 975.) **[4b]** That is to say, OCTC need not show that Burke "intended the consequences of his acts or omissions, it simply requires proof that he intended the act or omission itself." (*In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 309.) By signing and serving documents on January 3, 2012, and making a court appearance on January 4, 2012 on Norris's behalf, Burke "acted purposefully when he created the impression he was entitled to represent [Norris] as [his] attorney." (*In the Matter of Thomson, supra*, 4 Cal. State Bar Ct. Rptr. at p. 975.) Since Burke willfully practiced law while suspended, we find him culpable as charged.

2. Count Four: Burke Did Not Commit Acts of Moral Turpitude (Section 6106)

In Count Four, Burke was charged with knowingly or with gross negligence practicing law because he appeared telephonically at the Norris CMC on January 4, 2012, while on suspension. OCTC concedes that Burke did not have notice of his suspension when he initially appeared at the CMC, but it argues that Burke is nevertheless culpable of moral turpitude in violation of section 6106[6] because he did not immediately withdraw from the telephonic hearing once he was made aware of his suspension. The concurring and dissenting opinion is in agreement with OCTC's position.

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4. All further references to sections are to the Business and Professions Code unless otherwise noted. Section 6068, subdivision (a), requires an attorney "[t]o support the Constitution and laws of the United States and of this state." A violation of section 6068, subdivision (a), is established when an attorney violates sections 6125 and 6126. (*In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 236-237.) Section 6125 provides: "No person shall practice law in California unless the person is an active member of the State Bar." Section 6126 prohibits holding oneself out as entitled to practice law while on suspension.

5. **[3b]** Because Burke was suspended for non-payment of child support, we look to standard 2.10(b), which provides: "Suspension to reproval is the presumed sanction when a member engages in the practice of law or holds himself or herself out as entitled to practice law when he or she is on inactive status or actual suspension for non-disciplinary reasons. . . . The degree of sanction depends on whether the member knowingly engaged in the unauthorized practice of law."

6. Section 6106 provides in relevant part: "The commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension."

[5a] We disagree, and instead adopt the hearing judge's dismissal of Count Four because we find insufficient evidence of moral turpitude. A close reading of the transcript of the CMC discloses that Burke learned of his suspension during the last minute of a three-minute telephonic conference. (A copy of the CMC transcript is attached as Appendix A, *post.*) And indeed, during that last minute, the superior court judge immediately took the initiative and instructed the attorneys as to how she intended to proceed with a follow-up CMC and trial date. At that point Burke merely replied to her instructions with the following statements: "Very good, your Honor," "Fine," and "Yes, your Honor." Thereafter, the proceeding immediately terminated.

[5b] The concurring and dissenting opinion concludes that Burke committed UPL because he knew he was suspended when he gave these three responses during the last minute of the CMC. However, the issue here is not whether he had knowledge of his suspension, but whether, in responding to the court's final instructions, Burke practiced law with the requisite level of intent, guilty knowledge, or, at a minimum, gross negligence to prove moral turpitude. (*In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 241.) We do not find this conduct to be clear and convincing evidence of moral turpitude. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 620 [no clear and convincing evidence of knowing UPL when suspended attorney appeared at proceeding solely to advise court he followed its instructions about resolving client's case].) "Although the term 'moral turpitude' found in section 6106 has been defined very broadly by the Court (e.g., *Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 110), the Supreme Court has always required a certain level of intent, guilty knowledge or wilfulness before placing the serious label of moral turpitude on the attorney's conduct. [Citations.] At the very least, gross negligence has been required. [Citations.]." (*In the Matter of Respondent H, supra*, 2 Cal. State Bar Ct. Rptr. at p. 241.)

[5c] In this case, the hearing judge was in the best position to assess the issues of Burke's actions, intent, state of mind, and reasonable beliefs bearing on whether moral turpitude was involved in this matter. She concluded that the proof fell short of moral turpitude. We are obligated to give great weight to the hearing judge's finding. (Rules Proc. of State Bar, rule 5.155(A).) Moreover, her finding is supported by uncontradicted evidence that: (1) Burke appeared at the CMC without any knowledge of his suspension; (2) he was not deceptive or dishonest to the court and counsel about his status; (3) he was merely the recipient of instructions from the court; and (4) the colloquy with the superior court occurred during a very brief period of no more than one minute and under circumstances where he did not have a reasonable opportunity to withdraw.

[5d] It is well settled that all reasonable doubts must be resolved in favor of the respondent. (*In the Matter of Respondent H, supra*, 2 Cal. State Bar Ct. Rptr. at p. 240.) On this record, it would be manifestly unjust to find that Burke is culpable of moral turpitude. (Compare *In the Matter of Tishgart* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 338, 343-344 [intentional concealment of suspension is act of moral turpitude]; *In the Matter of Mason* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 639, 641-642 [moral turpitude found where attorney knew of his suspension one month prior to appearing in court to obtain continuance]; *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 91[moral turpitude found where attorney had knowledge of suspension but was grossly negligent by omitting status from job application].)

B. The Topa Matter (Case No. 12-O-18037)

Burke represented Robert Castaneda, Raj Champaneri, and 1st American Warehouse Mortgage Inc. as co-plaintiffs in a civil suit against Topa Insurance Co. to obtain coverage for, among other things, litigation expenses incurred in an underlying lawsuit, including Burke's legal fees (the Topa case).

On May 4, 2011, the Los Angeles County Superior Court ordered Champaneri to provide documents and responses to Topa's discovery requests. The court further ordered Burke and Champaneri to pay Topa sanctions of $1,000 by May 26, 2011 for their discovery delay. Champaneri eventually paid the sanctions on April 10, 2013, nearly two years later.

In the meantime, Burke's 60-day suspension arising from *Burke I* became effective on August 7, 2011. He informed defendant's counsel, James Henshall and Alan Yuter, of his suspension on August 15, 2011. Three days later, Burke attempted to negotiate a settlement of the Topa case during a call with Henshall and Yuter. In an email to Yuter the next day, Burke stated, "It is my understanding that your client is willing to pay my outstanding fees incurred in the underlying matter at its panel counsel rate to resolve the matter." Burke signed this communication, "Gregory M. Burke, Esq." Yuter and Henshall testified that they believed Burke was seeking to settle the entire case.

On January 6, 2012, Burke appeared on behalf of Champaneri at a deposition in the Topa case, two days after he learned that he had been suspended for failure to pay child support. When Henshall advised him that he was not eligible to practice law, Burke expressed surprise, after which he and his client left the deposition.

Henshall sought sanctions for the aborted deposition, and on March 9, 2012, the court ordered Burke to pay sanctions of $2,255. He had not paid these sanctions at the time of his disciplinary trial. On March 28, 2012, the court also ordered Castaneda, Champaneri, and Burke to pay sanctions of $2,340 for failure to timely respond to discovery. Burke's client eventually paid the sanctions 11 months later in February 2013.

1. Counts Five, Six, and Seven: Burke Failed to Obey Court Orders (Section 6103)

OCTC charged Burke with three counts of willfully violating section 6103[7] for disobeying the superior court's sanctions orders of May 4, 2011 (Count Five), March 9, 2012 (Count Six), and March 28, 2012 (Count Seven). The hearing judge found Burke culpable of Counts Five and Six, but dismissed Count Seven. We conclude Burke is culpable of all three counts.

To prove failure to obey a court order under section 6103, OCTC must establish that the attorney " 'knew what he was doing or not doing and that he intended either to commit the act or to abstain from committing it.' [Citations.]" (*King v. State Bar* (1990) 52 Cal.3d 307, 314.) It is undisputed that Burke was aware of the three sanctions orders, yet he failed to timely pay any of the sanctions or seek relief. (*In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 868 [despite financial hardship, attorney culpable of misconduct for failure to pay court-ordered sanctions when attorney fails to seek relief from order].)

The May 4, 2011 sanctions order required payment by May 26, 2011, but it was not paid by Burke or his client until almost two years later. The March 9, 2012 order did not specify a deadline for payment, but the sanctions had not been paid at the time of Burke's disciplinary trial in January of 2015—almost three years after issuance of the order. On this record, the hearing judge correctly found Burke culpable of violating section 6103, as charged in Counts Five and Six, by disobeying the May 4, 2011 and March 9, 2012 orders. (*In the Matter of Respondent Y*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 867-868 [attorney must comply with sanctions order within reasonable time].)

The hearing judge found Burke was not culpable of violating section 6103 as alleged in Count Seven because the March 28, 2012 sanctions were paid on February 10, 2013. Since the order did not provide a specific time for payment, she concluded that a ten-and-a-half-month delay was not unreasonable. In so concluding, the hearing judge relied on *In the Matter of Respondent Y*, *supra*, 3 Cal. State Bar Ct. Rptr. 862, noting that our opinion in that case "alludes to the fact that payment of a sanctions order within one year is not inherently unreasonable."

This interpretation is erroneous. In *Respondent Y*, we did not establish a temporal measurement as the sole criterion for what may or may not be deemed

7. Section 6103 provides that an attorney's "willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension."

reasonable compliance with a sanctions order. Rather, we found under the facts of that case that "whatever a reasonable amount of time would have been for respondent to have paid the sanction ordered, much more than a year elapsed during which he failed to comply [and] it appears that respondent still has not yet paid the sanctions." (*Id.* at p. 868.) **[6]** To be clear, when a sanctions order does not specify a due date, there is no bright-line test for "reasonableness" that applies to the elapsed time of payment after the issuance of the order. Instead, the timing of the payment is but one factor among others to be considered.

[7] In this case, OCTC points to the considerable efforts required by opposing counsel to collect the sanctions over the ten-and-a-half-month period. Opposing counsel testified that he was "constantly sending letters and emails to Mr. Burke, requesting payment of the sanctions." He also called Burke to seek payment and to communicate that Topa wanted to avoid placing liens on the property of Burke or his clients. After several unsuccessful requests, opposing counsel felt compelled to file liens, and only then were the sanctions paid.[8] Under these circumstances, Burke's failure to pay the sanctions for nearly 11 months was not reasonable, and he is culpable of violating section 6103 as charged in Count Seven.

2. Counts Eight and Thirteen: Burke's UPL Violated Sections 6068, Subdivision (a), 6125, and 6126

[8a] Count Eight of the NDC charged Burke with UPL by attempting to negotiate a settlement for his clients in the Topa case on August 18, 2011, while he was on suspension. We adopt the hearing judge's finding that Burke violated section 6068, subdivision (a): "Without question, the communications by respondent on his letterhead stationery, while he was suspended from practice, attempting to settle two matters constituted the unauthorized practice of law." (*In the Matter of Thomson*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 975.)

The hearing judge properly rejected Burke's testimony that he was merely trying to satisfy a lien for his fees, not settle the entire case. Burke presented no evidence of any lien and his emails merely referred to "resolving the matter." Opposing counsel testified that he construed Burke's email as an offer to settle the case, and therefore, he obtained his clients' authorization to settle the litigation. **[8b]** Although we find Burke culpable of UPL as alleged in Count Eight, we assign no weight to this misconduct since, as discussed below, we also find a violation of section 6106 based on the same facts alleged in Count Nine, which supports the same or greater discipline. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127 [declining to assign additional disciplinary weight for lesser-included violation].)

[8c] Count Thirteen of the NDC charged Burke with UPL for appearing on behalf of his client, Champaneri, at a deposition on January 6, 2012 while he was suspended, in violation of sections 6125 and 6126, thereby willfully violating section 6068, subdivision (a). The hearing judge concluded Burke was not culpable, finding he was unaware of his suspension because he had not received the Suspension Notice by mail. As noted, Burke learned of his suspension during the CMC for the Norris case, which was two days before the deposition in the Topa case. Accordingly, we find Burke knowingly engaged in UPL. Again, we assign no weight for this violation, as it is based on the same facts that underlie our culpability finding under section 6106, discussed below in Count Fourteen, which supports the same or greater discipline.

3. Counts Nine and Fourteen: Burke's UPL Involved Moral Turpitude (Section 6106)

[9] Count Nine charged Burke with knowingly or with gross negligence holding himself out as entitled to practice law and actually practicing law while suspended when he negotiated a settlement for his clients in the Topa case, thereby committing an act of moral turpitude. The hearing judge dismissed

8. Opposing counsel testified that the sanctions were paid after he received a call from a finance company attempting to arrange a real estate deal involving Castaneda that could not go forward until the liens were removed.

Count Nine because Burke advised opposing counsel of his suspension and contacted the State Bar's Ethics Department prior to attempting to settle the case. However, contacting a State Bar employee for advice is not a defense to a violation of the rules or statutes governing an attorney's professional responsibilities. (*Sheffield v. State Bar* (1943) 22 Cal.2d 627, 632 ["no employee of The State Bar can give an attorney permission to violate the Business and Professions Code or the Rules of Professional Conduct"].) We thus reverse the hearing judge's dismissal and find Burke culpable as alleged in Count Nine of an act of moral turpitude in violation of section 6106 since he knew he was suspended at the time he entered into settlement negotiations in the Topa case.

[10a] Similarly, we find Burke culpable of moral turpitude under Count Fourteen for knowingly or with gross negligence holding himself out as entitled to practice law when he appeared at Champaneri's deposition The hearing judge erred in dismissing this count because, as noted above, Burke appeared at the deposition two days after he learned of his suspension. Such knowing UPL constitutes an act of moral turpitude.[9] (*In the Matter of Mason, supra*, 3 Cal. State Bar Ct. Rptr. at pp. 641-642 [attorney sought continuance while suspended; misconduct involved moral turpitude because attorney appeared in court knowing he was suspended].)

C. The Amended Topa Matter
(Case No. 13-O-12643)

On May 4, 2012, Burke filed amendments to the Topa complaint, substituting Superior Claims Services (SCS) and CRES Insurance Services (CRES) for Doe defendants. Counsel for SCS and CRES requested that Burke dismiss his clients because they were not parties to the contract at issue, and therefore the breach of contract claim lacked legal and evidentiary support. Burke did not respond to this request. CRES and SCS thus were required to file answers and motions for summary judgment. Subsequently, their counsel again requested that they be dismissed, and advised Burke he would seek sanctions if they were not. Burke again failed to respond.

In October 2012, CRES and SCS filed motions for sanctions pursuant to Code of Civil Procedure section 128.7.[10] On January 8, 2013, the superior court granted the motions, and ordered Burke to pay $27,334 to SCS and CRES. The order was affirmed by the California Court of Appeal, which found that Burke did not have a colorable claim for breach of contract against SCS and CRES. Burke had not paid the sanctions at the time of the disciplinary trial.

1. Count Sixteen: Burke Violated His Duty to Maintain Only Just Actions (Section 6068, Subdivision (c))

[11a] OCTC charged that Burke violated section 6068, subdivision (c),[11] because he failed to maintain a legal or just action when he amended the Topa complaint to add defendants SCS and CRES, and then refused to dismiss them when he knew they were not involved. The Court of Appeal's finding that Burke's action was frivolous is entitled to a strong presumption of validity. (*In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 118 [finding of Court of Appeal re frivolous appeal as violating § 6068, subd. (c), entitled to strong presumption of validity].)

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9. **[10b]** Like the hearing judge, we find Burke's testimony unpersuasive that he believed he was entitled to appear at the deposition with Champaneri because he had learned the day before that Member Services had received a release from DCSS showing he was current with his child support. Burke could not reasonably rely on this information to establish he was reinstated since he was well aware that his status could be confirmed on the State Bar's website.

10. Section 128.7 authorizes a court to impose sanctions against a party or its attorney if a pleading is presented for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and which contains allegations and other factual contentions that lack evidentiary support.

11. Section 6068, subdivision (c), provides that it is the duty of an attorney "[t]o counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense."

[11b] We accordingly adopt the hearing judge's determination that Burke willfully violated section 6068, subdivision (c), by refusing to dismiss defendants SCS and CRES from the Topa case. (*In the Matter of Scott* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 446, 457 [violation of § 6068, subd. (c), arising from pursuit of action in civil proceeding based on factual allegations attorney knew he could not prove].)

2. Count Seventeen: Burke Failed to Obey a Court Order (Section 6103)

OCTC charged Burke with disobeying the court order of January 8, 2013, requiring him to pay the $27,334 monetary sanctions, in willful violation of section 6103. The hearing judge found him culpable as charged. We agree. Burke stipulated that he was aware of the order. Although the sanctions order did not designate a deadline for payment, it was filed over two years before Burke's disciplinary trial and had not been paid or set aside at the time of the trial. (*In the Matter of Respondent Y*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 867-868 [sanctions not paid at time of disciplinary hearing, more than one year after issuance of order].)

D. The Valley Matter (Case No. 13-O-11787)
Count Fifteen: Burke Failed to Obey a Court Order (Section 6103)

Count Fifteen charged Burke with disobeying the superior court's sanctions order, in willful violation of section 6103. Burke represented John and Lynette Valley in civil litigation against National Title Company. On July 25, 2012, the Alameda County Superior Court issued an order compelling the Valleys to serve verified amended responses to National Title's discovery requests and to produce responsive documents. The court further ordered Burke to pay sanctions of $2,150 to the defendant. Burke stipulated that he was aware of the order but had not paid the sanctions at the time of the disciplinary trial. The hearing judge found him culpable of willfully violating section 6103. We agree.

III. SIGNIFICANT AGGRAVATION OUTWEIGHS LIMITED MITIGATION[12]

The hearing judge found two factors in aggravation and one in mitigation. We adopt those findings, but assign more weight in aggravation.

A. Aggravating Circumstances

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

[12a] Standard 1.5(a) provides that a prior record of discipline may be an aggravating circumstance. Citing *In the Matter of Sklar*, *supra*, Cal. State Bar Ct. Rptr. 602, the hearing judge gave diminished weight to Burke's two prior disciplines because she found the prior misconduct overlapped with the present misconduct. As we explain below, we give full weight in aggravation to Burke's two prior disciplines.

Burke I

In 2008 and 2009, eight electronic debits and checks from Burke's client trust account (CTA) were returned for insufficient funds because Burke did not properly supervise his wife, who acted as his secretary and bookkeeper. In 2011, Burke stipulated to culpability for commingling funds, in violation of the California Rules of Professional Conduct, rule 4-100(A),[13] and for failing to perform with competence, in violation of rule 3-110(A). He also stipulated to discipline including a 60-day actual suspension and a two-year probation for CTA violations, which the Supreme Court thereafter ordered, effective August 7, 2011. Burke sent certified letters to his clients advising them that he would be suspended from August 8, 2011 to October 8, 2011.

Burke II

Almost immediately after the Supreme Court ordered the discipline in *Burke I*, he again engaged in misconduct. In early August 2011, after the issuance

12. Standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Burke to meet the same burden to prove mitigation.

13. All further references to rules are to the California Rules of Professional Conduct unless otherwise noted.

of the Court's discipline order, but prior to its effective date, Burke concealed his impending suspension from opposing counsel in a single matter. And while on actual suspension, Burke committed UPL in mid-August 2011. Then in October of 2011, Burke misrepresented that he had not committed UPL on his quarterly probation report.

Thereafter, on June 28, 2012, OCTC filed an NDC in *Burke II*, charging him with 13 counts of misconduct, including disobeying two separate sanctions orders that had been issued in May and August 2010, engaging in UPL while suspended as the result of discipline imposed in *Burke I*, and moral turpitude by reason of his misrepresentations.

In our opinion filed on October 3, 2014, we found Burke culpable of knowingly engaging in UPL involving moral turpitude, disobeying the two 2010 sanctions orders, and moral turpitude due to misrepresentations on his quarterly probation reports, concealing his suspension from opposing counsel, and knowingly engaging in UPL. We recommended that he be actually suspended for nine months and until he paid the court-ordered sanctions. The Supreme Court ordered the imposition of the recommended discipline on March 3, 2015.

[12b] For purposes of analyzing Burke's prior record as aggravation, we consider most relevant the date OCTC filed the NDC in *Burke II*, which was June 28, 2012. In that NDC, Burke was charged, inter alia, with failing to obey two sanctions orders in 2010. Therefore, as of late June 2012, he was put on notice that his failure to pay sanctions was disciplinable misconduct. (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 283 [filing of formal charges puts attorney on notice charged conduct is ethically questionable]; see also *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 564.) Yet, after that date, Burke continued to fail to timely pay five sanctions orders, three of which remained unpaid at the time of the trial below.

[12c] We conclude that Burke's current misconduct is significantly aggravated by his two prior discipline records as they demonstrate a continuing unwillingness or inability to conform his conduct to ethical norms. (*In the Matter of Sklar, supra,* 2 Cal. State Bar Ct. Rptr. at p. 619 ["part of the rationale for considering prior discipline as having an aggravating impact is that it is indicative of a recidivist attorney's inability to conform his or her conduct to ethical norms [citation]"].) We further note that his prior and present misconduct involve both UPL and repeated violations of sanctions orders. This commonality renders Burke's prior records particularly serious. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443-444 [similarities between prior and current misconduct render previous discipline more serious, as they indicate prior discipline did not rehabilitate]; see also *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112 ["Other than outright deceit, it is difficult to imagine conduct in the court of legal representation more unbefitting an attorney" than willful violation of court orders].)

2. Multiple Acts of Misconduct

We adopt the hearing judge's conclusion that Burke's misconduct is aggravated by multiple acts of wrongdoing. (Std. 1.5(b) [multiple acts of wrongdoing are aggravating circumstance].) Burke is culpable of 12 acts of misconduct in four client matters. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646-647 [three instances of misconduct considered multiple acts].)

3. No Additional Aggravation

[13] We are not persuaded by OCTC's argument that additional aggravation is warranted because Burke demonstrated lack of insight by blaming others for his misconduct. We found Burke's assertions unavailing that: (1) his clients had agreed to pay the sanctions and therefore were responsible for the non-payment; and (2) he relied on statements by State Bar employees as to his status. Although these statements did not aid in his defense, we do not think this testimony clearly and convincingly establishes his "indifference toward rectification or atonement for the consequences of the misconduct." (Std. 1.5(k).)

[14] Likewise, we reject OCTC's contention Burke caused significant harm to Topa because the company had to pay attorney fees in defending itself

against the lawsuit brought by Burke's clients. The record does not establish that the case against Topa was unjust or unjustified or that the litigation caused "significant harm to the client, the public, or the administration of justice." (Std. 1.5(j).)

B. One Mitigating Circumstance

Burke is entitled to some mitigation credit for cooperating with OCTC by stipulating to certain facts prior to trial. (Std. 1.6(e).) Because the facts were easily provable, however, the weight of the mitigation is limited. (*In the Matter of Kaplan*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 567.)

IV. DISBARMENT IS APPROPRIATE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession. (Std. 1.1.) We balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.) We begin with the standards. (*In re Silverton* (2005) 36 Cal.4th 81, 91.)

Standard 1.7(a) directs that when, as here, multiple sanctions apply, the most severe shall be imposed.[14] Thus, we focus on standard 1.8(b) because it provides for disbarment as the appropriate discipline when a member has two or more prior records of discipline, and if: (1) an actual suspension was ordered in any of the prior disciplinary matters; or (2) the prior and current disciplinary matters demonstrate a pattern of misconduct; or (3) the prior and current disciplinary matters demonstrate the attorney's unwillingness or inability to conform to ethical norms.

[15a] Burke's case meets two of these criteria—he received a 60-day actual suspension in *Burke I* and a nine-month suspension in Burke II. Moreover, his past and current misconduct demonstrates his unwillingness or inability to fulfill his ethical responsibilities. His misconduct began in 2008 with trust account violations, and has continued ever since. He received a 60-day suspension in *Burke I* yet committed additional wrongdoing in *Burke II* while he was on probation in *Burke I*. He then committed the same misconduct again in the present case as that for which he had been charged in *Burke II*. His repeated acts of UPL and his multiple failures to obey court orders are even further evidence that he is unwilling or unable to conform to the professional responsibilities expected of attorneys who practice law in California.

[15b] We acknowledge that standard 1.8 allows for a departure from the presumptive discipline of disbarment where "the most compelling mitigating circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current misconduct." Such is not the case here. Burke's nominal mitigation for stipulating to facts is not compelling, nor does it predominate over the significant aggravation of his two prior discipline records and his multiple acts of misconduct in four client matters. While standard 1.8(b) is not inflexible (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-507 [applying former std. 1.7(b)]), we can discern no reason to depart from it here, particularly given Burke's present misconduct and its similarity to his past discipline record (*Blair v. State Bar*, *supra*, 49 Cal.3d at p. 776, fn. 5 [requiring clear reasons for departure from standards]). We accordingly conclude that Burke's disbarment is appropriate and necessary to protect the public, the courts, and the legal profession.

V. RECOMMENDATION

We recommend that Gregory Molina Burke be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys admitted to practice in this state.

We also recommend that Burke be ordered to comply with California Rules of Court, rule 9.20 and

14. In addition to standard 1.8, other applicable standards include: 2.10, which provides for suspension to disbarment for UPL, depending on whether the member acted knowingly and whether it is predicated on a suspension for non-disciplinary reasons; 2.11, which provides for disbarment or actual suspension for moral turpitude, with the degree of sanction depending on the magnitude of the misconduct, the extent to which it harmed or misled the victim, its impact on the administration of justice, and the extent to which it related to the member's practice of law; and 2.18, which provides for disbarment or actual suspension for any violation of a provision of Article 6 of the Business and Professions Code not otherwise specified therein.

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.

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

VI. ORDER

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

I CONCUR:

STOVITZ, J.*

Concurring and Dissenting Opinion of PURCELL, P. J.

I concur with the recommendation that Burke be disbarred under standard 1.8(b). But I respectfully dissent from the majority's dismissal of Count Four on grounds that Burke's UPL did not constitute moral turpitude. I would find him culpable because he knowingly, or with gross negligence, committed UPL.

During a brief telephonic CMC, Burke discovered and acknowledged on the record that the State Bar website showed he was suspended. Yet he continued to represent his client at the hearing, ultimately agreeing to the judge's suggested timeframe for a continued trial, to a new CMC date, and to the judge's request for notice waiver for the scheduled CMC. Burke's continued appearance at the hearing after he learned of his suspension clearly constitutes the practice of law.

I disagree with the majority that Burke did not have "a reasonable opportunity to withdraw" due to the short duration of the CMC. The duration of the UPL is not dispositive; Burke's knowledge of his suspension is. Once he discovered it, he had both an affirmative duty to immediately withdraw and a reasonable opportunity to do so simply by informing the judge that he could not proceed due to his suspended status. And while the majority identified Burke's limited participation at the hearing and the judge's affirmative questioning to support its conclusion, I conclude that the burden is on the attorney, not the judge, to react appropriately should the attorney learn that he or she is suspended from the practice of law.

Acknowledging that not every act of UPL equates to moral turpitude, yet guided by case law, I would find Burke culpable of moral turpitude because he either knowingly, or at least through gross negligence, practiced law without a license by representing his client at a court hearing after he discovered his suspension. (*In the Matter of Mason*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 641–642 [attorney sought continuance while suspended; misconduct involved moral turpitude because attorney appeared in court knowing he was suspended]; see also *In the Matter of Wyrick*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 91 [attorney was culpable of moral turpitude by gross negligence for representing to judicial arbitrator he was entitled to practice law while he was suspended]; compare authority cited by the majority with *In the Matter of Heiner*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 319 [holding only that "[e]vidence that an attorney made a single court appearance *while ignorant of his or her inactive status* is insufficient to establish . . . the attorney acted with moral turpitude" (italics added).]

Finally, the majority in citing to *In the Matter of Sklar*, *supra*, 2 Cal. State Bar Ct. Rptr. 602, 620 observed that there was no knowing UPL where the suspended attorney appeared in court solely to advise the court that he had followed instructions about resolving his client's case. But the majority did not take note that the judge indicated on the record that the client in that proceeding was without counsel and then continued the trial to permit the client to hire new counsel.

*Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

KIMBERLY ALLYSON HANSEN

A Member of the State Bar

No. 11-O-17874

Filed September 14, 2016

SUMMARY

In her third disciplinary proceeding, a hearing judge found respondent culpable of acts of dishonesty constituting moral turpitude. The hearing judge also found two factors in mitigation and three factors in aggravation, including respondent's two prior records of discipline. The hearing judge applied standard 2.11 (disbarment or actual suspension is presumptive discipline for an act of moral turpitude) and recommended an 18-month actual suspension. (Hon. Yvette D. Roland, Hearing Judge.)

Both respondent and the Office of the Chief Trial Counsel of the State Bar (OCTC) appealed. Respondent sought dismissal, while OCTC sought disbarment pursuant to standard 1.8(b) (disbarment is presumptive discipline when attorney has two or more prior disciplines). The Review Department affirmed the hearing judge's culpability findings, and clarified that respondent's deceptive acts were intentional. The Review Department also affirmed the hearing judge's mitigation and aggravation findings, and assigned weight to specific aggravating factors. In addition, the Review Department analyzed standard 1.8(b) and declined to apply it because respondent's two other disciplinary matters occurred after her misconduct in the present case. The Review Department adopted the hearing judge's recommended 18-month actual suspension, and further recommended that respondent's suspension continue until she establishes her rehabilitation, fitness to practice, and present learning and ability in the law.

COUNSEL FOR PARTIES

For State Bar of California: Brandon Keith Tady, Esq.

For Respondent: Kevin P. Gerry, Esq.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **106.30 Generally Applicable Procedural Issues—Issues re Pleadings—Duplicative charges**
213.40 State Bar Act Violations—Section 6068(d) (do not mislead courts and judges)
221.00 State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)

Where section 6106 moral turpitude charge for making misrepresentations to a tribunal and section 6068, subdivision (d) charge for seeking to mislead a judge were based on the same misconduct, section 6068, subdivision (d) charge dismissed as duplicative.

[2 a-f] **213.40 State Bar Act Violations—Section 6068(d) (do not mislead courts and judges)**
221.00 State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)

Where respondent intentionally deceived Workers' Compensation Appeals Board (WCAB) by making misrepresentations, omitting material facts, and presenting half-truths, and allowed WCAB to take action in reliance on misrepresentations, respondent was culpable of acts of moral turpitude. WCAB's eventual awareness of true facts did not negate respondent's culpability, because misleading a court or tribunal constitutes moral turpitude whether or not respondent succeeds in perpetrating fraud, and respondent had continuing, affirmative duty to timely advise WCAB of changed circumstances affecting pending cases.

[3] **130 Procedural Issues—Procedure on Review**
165 Standards of Proof/Standards of Review—Adequacy of Hearing Department Decision
166 Standards of Proof/Standards of Review—Independent Review of Record
204.20 Substantive Issues—Culpability—General substantive issues re culpability—Intent requirement
221.00 Culpability—Section 6106 (moral turpitude, corruption, dishonesty)

Lack of clarity in hearing judge's decision, as to whether moral turpitude culpability finding was based on intentional or grossly negligent conduct, was problematic for purposes of ascertaining seriousness of misconduct and assessing corresponding discipline. Review Department clarified, based on misrepresentations in documents respondent drafted and filed, that respondent intentionally deceived tribunal.

[4] **191 Miscellaneous General Issues—Effect of/Relationship to Other Proceedings**

Workers' Compensation Appeals Board (WCAB) findings are entitled to strong presumption of validity where supported by substantial evidence. Where respondent was subject to WCAB sanctions order, and where sanctioned misconduct bore strong similarity, if not identity, to charged disciplinary misconduct, WCAB findings constituted conclusive legal determination of respondent's conduct in perpetrating fraud on WCAB.

[5 a, b] **135.50 Amendments to Rules of Procedure—Defaults and Trials**
136.20 Revised Rules of Practice (2009 and 1995 versions)—Division II, Hearing Department (rules 1200-1270)
159 Evidentiary Issues—Miscellaneous Evidentiary Issues
510 Aggravation—Prior record of discipline (1.5(a))

802.21 Application of Standards—Standard 1.2 (Definitions)—Prior record of discipline

Under rule 5.106(D) of Rules of Procedure, prior record of discipline was properly considered for purposes of aggravation and level of discipline after respondent's culpability was established. Hearing judge therefore properly denied respondent's request to strike evidence of prior discipline record pursuant to rule 1260 of the State Bar Court Rules of Practice.

[6 a, b] **510 Aggravation—Prior record of discipline (1.5(a))**
802.21 Application of Standards—Standard 1.2 (Definitions)—Prior record of discipline

Where misconduct underlying present proceeding occurred before charges were filed in respondent's other two disciplinary proceedings, Review Department afforded less weight to aggravating force of respondent's discipline history. Prior, not subsequent, discipline is considered indicative of recidivist attorney's inability to conform conduct to ethical norms. Under such circumstances, Review Department considered totality of respondent's misconduct to determine appropriate aggravating weight.

[7] **106.30 Generally Applicable Procedural Issues—Issues re Pleadings—Duplicative charges**
525 Aggravation—Multiple acts of misconduct (1.5(b))—Declined to find
535.90 Aggravation—Pattern of misconduct (1.5(c))—Declined to find—Other reason

Where finding that respondent was culpable of moral turpitude already accounted for respondent's pattern of telling half-truths, Review Department rejected OCTC's request for finding of aggravation under either multiple acts of wrongdoing or pattern of misconduct.

[8] **806.59 Application of Standards—Standard 1.8 (Effect of Prior Discipline)—(b) Disbarment after two priors—Declined to apply—Other reason**

Standard 1.8(b) is intended as deterrent to recidivism, which is not at issue when present misconduct predates attorney's other discipline cases. Accordingly, where misconduct underlying present proceeding occurred before respondent's other two disciplinary proceedings, Review Department declined to apply presumptive discipline of disbarment under standard 1.8(b).

[9 a-e] **833.90 Application of Standards—Standard 2.11 (Moral Turpitude, Fraud, etc.)—Applied Suspension—Other reason**

Where respondent was found culpable of acts of moral turpitude for intentionally deceiving Workers' Compensation Appeals Board, and where respondent had two prior records of discipline but standard 1.8(b) was not applied, based on totality of respondent's misconduct in her three cases that spanned more than eight years and involved repeated probation violations and two instances of moral turpitude for making misrepresentations to separate tribunals, and in light of respondent's lack of insight into the seriousness of her misconduct, appropriate discipline included three years stayed suspension, three years probation, and actual suspension of 18 months and until respondent establishes her rehabilitation, fitness to practice, and present learning and ability in the law.

[10 a, b] **176 Issues re Conditions Imposed as Part of Discipline—Requirements to Show Rehabilitation (etc.) (Standard 1.2(c)(1))**
590 Aggravation—Indifference to rectification/atonement (1.5(k))

Where respondent's lack of insight into the seriousness of her misconduct and repeated and continuing failure to appreciate the importance of her professional responsibilities raised additional

concerns about the potential for future misconduct, Review Department recommended actual suspension of 18 months and until respondent establishes her rehabilitation, fitness to practice, and present learning and ability in the law.

ADDITIONAL ANALYSIS

Culpability

Found

221.11 Section 6106 (moral turpitude, corruption, dishonesty)—Deliberate dishonesty/fraud

Not found

213.45 Section 6068(d) (do not mislead courts and judges)

Aggravation

Found

586.10 Harm to administration of justice (1.5(j))

591 Indifference to rectification/atonement (1.5(k))

Found but discounted or not relied on

513.90 Prior record of discipline (1.5(a))—Other reason

Mitigation

Found but discounted or not relied on

735.30 Candor and cooperation with Bar (1.6(e))

740.31 Good character references (1.6(f))—Insufficient number or ranges of references

740.32 Good character references (1.6(f))—References unfamiliar with misconduct

740.39 Good character references (1.6(f))—Other reason

Discipline

1013.09 Stayed Suspension—Three years

1015.07 Actual Suspension—18 months

1017.09 Probation—Three Years

1024 Ethics exam/ethics school

1030 Standard 1.2(c)(1) Rehabilitation Requirement

OPINION

EPSTEIN, J.:

This is Kimberly Allyson Hansen's third discipline proceeding. It arises from her representation of two defendants before the Workers' Compensation Appeals Board (WCAB or Board). The WCAB imposed sanctions against Hansen and three other attorneys from her law firm after concluding that they had intentionally misled the Board, causing it to take unwarranted action.

The hearing judge in the instant disciplinary matter determined that Hansen's participation in the workers' compensation case involved acts of dishonesty constituting moral turpitude. She further found three factors in aggravation (two prior records of discipline, significant harm, and lack of insight) and two factors in mitigation (cooperation and good character). The judge recommended discipline that included an 18-month actual suspension, relying on disciplinary standard 2.11,[1] which provides for disbarment or actual suspension for an act of moral turpitude.

Both Hansen and the Office of the Chief Trial Counsel of the State Bar (OCTC) appeal. Hansen asserts that this case should be dismissed because she made no misrepresentations to the WCAB, but rather was merely zealously representing her clients. OCTC supports the hearing judge's culpability findings, but requests that we find more aggravation and less mitigation, and that we recommend disbarment pursuant to standard 1.8(b), which applies, under certain circumstances, when an attorney has two or more prior records of discipline.

Having independently reviewed the record (Cal. Rules of Court, rule 9.12), we find that Hansen is culpable of acts of moral turpitude, in violation of Business and Professions Code section 6106.[2] As the WCAB aptly observed: "The problem was not that the attorneys zealously represented their client; it was that they did so by misleading the WCAB, by concealing material facts, and by supporting their position with half-truths."

We do not apply standard 1.8(b), as urged by OCTC, because Hansen's two other disciplinary matters occurred after her misconduct in the present case. Instead, we agree with the hearing judge that an 18-month actual suspension is appropriate under standard 2.11 in light of Hansen's repeated acts of dishonesty before the WCAB, which echo her earlier dishonesty before a bankruptcy court. Moreover, she committed multiple probation violations and failed to appear at her probation revocation hearing, which demonstrate a disregard of her professional responsibilities. And she has continued to exhibit a lack of insight into the seriousness of her misconduct before the WCAB and the State Bar Court. For this reason, we recommend that Hansen's suspension should continue until she establishes her rehabilitation, fitness to practice law, and present learning and ability in the law in satisfaction of standard 1.2(c)(1). Such a showing will ensure that the public, the courts, and the legal profession are adequately protected.

I. FACTUAL AND PROCEDURAL BACKGROUND[3]

Hansen was admitted to the practice of law in California on December 10, 1993. At all times relevant to this matter, she worked as a vice-president at the law firm of Stockwell, Harris, Woolverton & Muehl (Stockwell) and was an experienced workers' compensation attorney. As detailed below, Hansen and three other attorneys from Stockwell

1. Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. The standards were revised and renumbered effective July 1, 2015. Because this request for review was submitted for ruling after that date, we apply the revised version of the standards, and all further references to standards are to this source.

2. All further references to sections are to the Business and Professions Code unless otherwise noted.

3. We base the factual background on the parties' Stipulation as to Undisputed Facts and Admission of Documents, 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).)

were sanctioned by the WCAB for engaging in a protracted effort to deceive the Board about the status of a pending case, causing it to engage in wasteful and, ultimately, unwarranted actions.

A. The WCAB Proceedings

Louis Speight, an employee of Vulcan Materials Company, Western Division (Vulcan), submitted a workers' compensation claim for work-related injuries, which was denied by Vulcan's claims adjuster, Zurich North America (Zurich). Speight filed an application with the WCAB in December 2008 for adjudication of his claim, naming Vulcan and Zurich as defendants (the *Speight* matter). The Stockwell firm represented both Vulcan and Zurich, and Hansen was the attorney with primary responsibility for the matter.

In order to evaluate Speight's alleged injuries, Hansen sent a letter to Speight's counsel in February 2009, offering to use the services of an Agreed Medical Examiner (AME). She also submitted a Request for Qualified Medical Evaluator Panel (First QME Request) to the Department of Industrial Relations, Division of Workers' Compensation Medical Unit (the Medical Unit).

The Medical Unit responded on May 20, 2009, advising that it was unable to process the First QME Request "due to the lack of all necessary information." Hansen was directed to "resubmit [her] request as soon as possible with all of the information and attachments [she] submitted already." The Medical Unit also informed Hansen that her First QME Request had been filed prematurely.

One week later, Speight's counsel sent Hansen a settlement demand letter, notifying her that he intended to file a Declaration of Readiness to Proceed to trial, and forwarding a report by Speight's treating physician. Since Hansen objected to the treating physician's report, she submitted a second request for a QME panel (Second QME Request) on June 5, 2009. On July 22, 2009, the Medical Unit notified Hansen it was rejecting her second request because it also lacked "all necessary information." One week later, on July 28, 2009, Hansen submitted a third QME panel request to the Medical Unit (Third QME Request).

1. Vulcan and Zurich Seek to Delay Trial

Kevin White, an associate with the Stockwell firm, attended a mandatory settlement conference (MSC) on behalf of Vulcan and Zurich.[4] In the Pretrial Conference Statement filed with the court, White objected to the medical report by Speight's physician and to setting the matter for trial, asserting that the Defendant was entitled to a QME panel and that the Medical Unit had not issued a panel despite the Defendant's timely request. The Workers' Compensation Administrative Law Judge (ALJ) overruled White's objection and set the matter for trial.

White sought relief from the WCAB by preparing a Petition for Removal[5] requesting that the Medical Unit be ordered to issue a QME panel and that the ALJ's trial-setting order be vacated. In this petition, he represented that the Defendant had made "a timely and proper request for the issuance of a QME panel" but "the Industrial Medical Council never issued the panel." He argued that the Defen-

4. Although they were named co-defendants, Vulcan was self-insured, and appeared in the *Speight* matter through Zurich. The WCAB referred to the two entities collectively as "Defendant," and we shall do the same.

5. Pursuant to Labor Code section 5310, a petition for removal, which is intended to seek the WCAB's interlocutory review of orders not considered final, but which result in significant prejudice and irreparable harm to the petitioner. (Cal. Code Regs., tit. 8, § 10843.)

dant "should not be paralyzed because the Industrial Medical Unit failed to issue the requested [QME] panel" and that the Defendant would suffer extreme prejudice without additional discovery. He further argued that the ALJ improperly applied California Code of Regulations, title 8, section 30, subdivision (d)(3)[6] "to retroactively deny [D]efendant's right to discovery. . . ."

White failed to disclose to the WCAB that the Medical Unit had timely advised Hansen that the First and Second QME Requests were deficient.

On September 28, 2009, three weeks after the Petition for Removal was filed and before the WCAB ruled on it, the Medical Unit issued a QME panel in response to Hansen's Third QME Request. Although Hansen did not draft, review, or file the Petition for Removal, she was aware of it within 30 to 45 days after it was filed. Nevertheless, she did not inform the WCAB that the Medical Unit had issued a QME panel on September 28, 2009, or that the Medical Unit had previously responded to her First and Second QME Requests.

2. The WCAB Orders Issuance of QME Panel and Vacates Trial

The WCAB granted the Petition for Removal on December 21, 2009, on the grounds that the ALJ should have ordered the matter off calendar to allow the Defendant to obtain a QME panel. Still, Hansen did not notify the Board that a QME panel had already been assigned three months earlier, and she again remained silent when the WCAB issued a second order on March 9, 2010, rescinding the ALJ's trial-setting order and directing the Medical Unit's Medical Director to issue a QME panel.

Three weeks later, the WCAB learned of the true state of affairs when the Medical Director filed a verified Petition for Reconsideration, a Petition to Reopen the Record, and an Offer of Proof, which disclosed that the Medical Unit had in fact timely responded to Hansen, advising her that the First and Second QME Requests had been denied for procedural deficiencies and that the Third QME Request had been granted and a panel had been issued several months earlier. The Medical Director attested that rule 30(d)(3) had no bearing on the Medical Unit's actions. The director asked the WCAB to vacate its March 9, 2010 order on the grounds that it "was procured by [D]efendant by fraud," and "[t]he evidence does not justify the findings of fact."

In response, Hansen filed an Answer to Petition for Reconsideration (Answer), denying that the Petition for Removal misrepresented the actions of the Medical Unit. She asserted instead that it had merely stated the Medical Unit "never issued the panel," and she averred that any omissions in the Petition for Removal were "irrelevant." She also continued to assert that the ALJ had incorrectly applied rule 30(d)(3) retroactively, which had prompted the filing of the Petition for Removal. The majority of her Answer involved criticizing the Medical Director's attorney, who she maintained had "unjustly and recklessly" accused her of drafting and filing the Petition for Removal.[7] Hansen accordingly asked for sanctions against the Medical Director and his counsel.

3. The WCAB Imposes Sanctions on Hansen et al.

The WCAB did not take lightly the fact that its orders to the ALJ to vacate the trial-setting order

6. Former California Code of Regulations, title 8, section 30, subdivision (d)(3) (effective Feb. 17, 2009) (hereafter rule 30(d)(3)) provided that whenever an injury or illness claim of an employee has been denied, only the *employee* may request a QME panel. In the *Speight* matter, the Defendant's attorney requested the panel.

7. White drafted the Petition for Removal and another Stockwell attorney, Lisa Hanhart, signed and filed it.

and to the Medical Unit to issue a QME panel were based on a distorted version of the record. In its August 12, 2010 Opinion and Notice of Intention to Impose Sanctions (August 12, 2010 Opinion), the Board concluded that it had been misled by Hansen and her colleagues: "Although one could argue that [D]efendant's statements regarding the Medical Director's failure to issue a panel were literally true, those statements were deceptive and misleading. By failing to inform the [WCAB] that the Medical Director had *denied*, with explanation of the reasons, [D]efendant's February 13 and June 5, 2009 requests, [D]efendant painted an incomplete and distorted picture that appears to have been intended to, and did in fact, mislead the [WCAB], resulting in the [WCAB] taking the action requested by [D]efendant." (Italics in original.)

The WCAB did not hold Hansen responsible for preparing or filing the Petition for Removal, but stated it would nevertheless impose sanctions against her because she drafted, signed, and filed the Answer, which the WCAB found "continued [D]efendant's pattern of presenting half-truths." The Board also found fault with Hansen's failure to withdraw the Petition for Removal or to notify the WCAB once the QME panel had been issued. As a consequence, the WCAB rescinded its earlier order to the Medical Director and reinstated the earlier trial-setting order of the ALJ.

Undeterred by the WCAB's criticism, Hansen and the other Stockwell attorneys filed a Verified Reply to the Notice of Intent to Impose Sanctions (Reply) on September 1, 2010, requesting a hearing before the Board. For the first time, Hansen disclosed the complete procedural history of the three QME panel requests. However, to justify her previous actions and those of the other Stockwell attorneys, she argued that the failure to disclose the relevant information was not at issue at the MSC and that the ALJ had wrongfully applied rule 30(d)(3).

In its final order, filed on August 23, 2011 (Final Order), the WCAB rejected all of Hansen's assertions, including her rule 30(d)(3) argument, finding that "[t]he retroactivity issue was nothing but a red herring." Instead, the WCAB found that "the Reply continues defense counsel's pattern of misstating the facts in a manner that casts their behavior in a more innocent light than is merited," and it characterized the Reply as "unapologetic and defiant." The WCAB made clear that it had been deceived and had taken unjustified action based on that deception: "Defense counsel maintain that they did not *intend* to mislead us, but it was apparent from our March 9, 2010 Opinion and Decision After Removal that we had been misled.... [B]ut they took no steps to enlighten us. Remarkably, they responded with hostility when the Medical Director exposed our error in her petition for reconsideration." (Italics in original.)

Citing its responsibility to ensure that its decisions "are just and are based on a full understanding of all the material facts," the WCAB imposed sanctions on all of the Stockwell attorneys, with Hansen receiving a sanction of $2,500, the maximum permitted by statute. (Lab. Code, § 5813; see also Cal. Code Regs., tit. 8, § 10561.)

B. Discipline Proceedings

As a consequence of the WCAB's actions, OCTC initiated these proceedings against Hansen and White[8] by filing a Notice of Disciplinary Charges (NDC) in May 2014, alleging violations of section 6068, subdivision (d) (seeking to mislead judge)[9] and section 6106 (moral turpitude).[10] On the first day of trial, the parties filed a Stipulation as to Undisputed Facts and Admission of Documents. At the conclusion of the four-day trial, the hearing judge granted Hansen's

8. OCTC brought charges against only Hansen and White. Therefore, we have not considered the conduct of the other two Stockwell attorneys unless relevant. The hearing judge's decision became effective as to White on May 28, 2016.

9. Section 6068, subdivision (d), requires an attorney "[t]o employ . . . those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."

10. Section 6106 states in relevant part: "The commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension."

motion to dismiss with respect to Count One on the grounds that it was duplicative and denied the motion as to Count Two. The judge filed her decision on October 13, 2015.

II. HANSEN IS CULPABLE OF MISREPRESENTATIONS TO THE WCAB

In defending her conduct, Hansen offers this court many of the same arguments she made to the WCAB, to wit: (1) she did not make misrepresentations to the Board; (2) a change in the law affecting the Defendant's right to a QME panel justified her conduct; and (3) the WCAB issued its sanctions against her based on its erroneous understanding of her involvement in the *Speight* matter. The WCAB found these arguments unavailing, and so do we.

A. Count One: Section 6068, Subdivision (d) [Seeking to Mislead Judge]

[1] Count One alleges, inter alia, that Hansen made misrepresentations to the WCAB in violation of section 6068, subdivision (d). The hearing judge dismissed this count because the same facts are alleged in Count Two as a violation of section 6106. We agree that Count One is duplicative, and we affirm the dismissal with prejudice. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 786-787 [dismissing § 6068, subd. (d), count as duplicative of allegation of violation of § 6106].)

B. Count Two: Section 6106 [Moral Turpitude (Misrepresentation)]

[2a] In Count Two, OCTC alleges, inter alia, that Hansen committed acts involving moral turpitude or dishonesty because she misrepresented to the WCAB that although Defendant "had repeatedly requested a qualified medical evaluator panel to the Medical Director . . . , such requests were ignored, when, in fact, defendants' first two requests were denied in writing for being defective and their final request was granted." It further alleges that Hansen knew or was grossly negligent in not knowing that her representations were false.

[2b][3] The hearing judge found Hansen culpable of moral turpitude as charged, although the judge's decision is unclear as to whether culpability is based on intentional or grossly negligent conduct. At oral argument, OCTC acknowledged that the lack of clarity on this issue was "problematic" in ascertaining the seriousness of the found misconduct and in assessing the corresponding discipline. We agree, and clarify that the record establishes that Hansen intentionally deceived the WCAB. We base this conclusion on the misrepresentations contained in the Answer and Reply, which she authored in part and filed on behalf of the Defendant.

[2c] The WCAB found that after White had filed the Petition for Removal containing the initial misrepresentations, Hansen and her colleagues continued to omit material facts and present half-truths to justify their conduct. The Board stated in its Final Order: "In their Reply, and in all previous filings, they admit no error on their part, but, instead, with selective omission of material detail, cast blame on [Speight's] attorney, the [ALJ], the . . . Medical Unit, the Medical Director's counsel, and the [WCAB]." These selective omissions establish Hansen's culpability since "[n]o distinction can . . . be drawn among concealment, half-truth, and false statement of fact. [Citation.]" (*In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 156 [concealment of material fact misleads judge as effectively as false statement].)

[2d] Hansen argues that she is not culpable of perpetuating the fraud on the Board since the WCAB was fully aware of the facts at the time she filed the Answer and the Reply. However, misleading statements to a court or tribunal constitute moral turpitude whether or not the attorney actually succeeds in perpetrating a fraud. (*Bach v. State Bar* (1987) 43 Cal.3d 848, 852-853, 855.) Hansen had a duty to affirmatively advise the court of the true state of affairs *before* it took action. The WCAB recently reminded attorneys appearing before it "of their continuing duty to timely advise the WCAB (i.e., both the Appeals Board and the [ALJs]) of any material change in circumstances that could substantially affect cases pending before it." (*Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 [2014 WL 4975935, at *10, fn. 24] (Appeals Board en banc).)

[2e][4] It is significant that Hansen failed to convince the WCAB of her honest intentions because it was "in a better position than this reviewing court to pass upon truthfulness." (*Lee v. State Bar* (1970) 2 Cal.3d 927, 940.) The WCAB findings are particularly persuasive here since the Board itself was the target of the fraud, and took action in reliance on the misrepresentations. We would be hard-pressed to second-guess the Board's own finding that *it* was deceived, and we thus give a strong presumption of validity to this finding, which is supported by substantial evidence. (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 947; see also *Foster v. Workers' Comp. Appeals Bd.* (2008) 161 Cal.App.4th 1505, 1509 ["WCAB's findings on questions of fact are conclusive where supported by substantial evidence. [Citations.]"].) Furthermore, we may rely on the WCAB's findings because Hansen was a party who was subject to the sanctions order, which is a conclusive legal determination of her conduct in perpetrating the fraud on the Board. That misconduct bears "a strong similarity, if not identity, to the charged disciplinary conduct." (*In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 117.)

[2f] We thus conclude that Hansen is culpable of acts of moral turpitude, as charged in Count Two, because she intentionally misled the WCAB while representing the Defendant in the *Speight* matter.

III. SIGNIFICANT AGGRAVATION OUTWEIGHS MITIGATION

Standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence.[11] Standard 1.6 requires Hansen to meet the same burden to prove mitigation. Applying these standards, the hearing judge found three factors in aggravation and two in mitigation.

A. AGGRAVATION

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

[5a] During the trial, OCTC offered Exhibits 30 and 31 as evidence of Hansen's disciplinary history. On appeal, Hansen renews her trial objection to the admission of the records of her two other disciplinary matters, citing to the State Bar Court Rules of Practice, rule 1260.[12] We deny Hansen's request to strike this evidence. At the close of the trial proceedings (but before the matter was submitted), the hearing judge stated she would "hold off on the admission of those two documents" until after she received a closing brief and written objections from the parties. According to the State Bar Court Exhibit Log, the hearing judge did not admit Exhibits 30 and 31 until the date she filed her decision on October 13, 2015.

[5b] In that decision, the hearing judge properly ruled on the admissibility of Exhibits 30 and 31 after making her culpability findings, and only then considered the exhibits as evidence of aggravation. (Rules Proc. of State Bar, rule 5.106(D).) Having exercised our independent review of the record, we have concluded that Hansen is culpable, and therefore we too consider her disciplinary history for the purposes of aggravation and discipline. To the extent Hansen challenges the weight to be afforded to her disciplinary history, we give consideration herein to that argument.

[6a] The hearing judge correctly considered Hansen's discipline record as aggravation under standard 1.5(a), but the judge did not analyze the chronology of her other two discipline matters or specify the weight to be given to this factor. Hansen's disciplinary history is unusual in that the NDC in

11. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

12. Hansen initially objected at trial only to admission of Exhibit 31 as evidence in aggravation on the grounds that it was not a prior record since that proceeding post-dated the misconduct subject to the instant proceeding. In her Closing Brief filed in the Hearing Department, Hansen changed course and objected to admission of both Exhibits 30 and 31 on the basis that they could not be admitted prior to a finding of culpability under rule 1260 of the State Bar Court Rules of Practice.

Hansen I was filed in October 2010 and the motion to revoke probation, which initiated *Hansen II*, was filed in March 2012, both of which occurred *after* the misconduct that is the subject of this proceeding. We therefore afford less weight to the aggravating force of Hansen's discipline history because we consider prior, not subsequent, discipline as "indicative of a recidivist attorney's inability to conform his or her conduct to ethical norms [citation] . . . ." (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 619, 602.)

Hansen I.[13] In December 2003, Hansen made misrepresentations to the United States Bankruptcy Court in a Chapter 7 bankruptcy petition that she and her husband jointly filed concerning the number and amount of encumbrances on her residence. In February 2004, Hansen also altered and then recorded a deed of trust so that it misstated the amount of the loan it secured. Inexplicably, OCTC did not file an NDC in *Hansen I* until October 28, 2010. On July 27, 2011, the Supreme Court ordered, inter alia, that Hansen be actually suspended for 30 days and placed on probation for two years as the result of a stipulation to one count of misconduct for gross negligence in committing acts of moral turpitude. No aggravating circumstances were involved. In mitigation, Hansen had no prior record of discipline, cooperated with the State Bar, and provided one good character letter and one letter describing her membership in a non-profit organization.

Hansen II.[14] Between approximately September 2011 and May 2012, Hansen failed to comply with several probation conditions from *Hansen I*, including failing to participate in a scheduled telephonic Office of Probation meeting, provide proof of completion of six hours of MCLE-approved courses, and timely submit a quarterly report. In aggravation, Hansen had one prior record of discipline, engaged in multiple acts of misconduct, and failed to participate in the probation revocation proceeding. No mitigating factors were established. On September 25, 2012, the Supreme Court ordered Hansen's probation revoked, and further ordered that she be actually suspended for one year and placed on probation for two years, subject to conditions.

[6b] *In the Matter of Sklar, supra,* 2 Cal. State Bar Ct. Rptr. at p. 619 guides us to look at the totality of Hansen's misconduct. In so doing, we observe a troubling repetition of misrepresentations before two judicial tribunals, the first occurring in 2003 and the second between 2009 and 2010. We also find a recurring disregard for adherence to her professional responsibilities. In *Hansen II*, Hansen violated several conditions of her probation and then failed to participate in the revocation proceedings. In view of these circumstances, we assign moderate weight to Hansen's prior discipline.

2. Significant Harm (Std. 1.5(j))

The hearing judge correctly found that Hansen significantly harmed the administration of justice. (Std. 1.5(j).) The WCAB found in its August 12, 2010 Opinion that "[b]y presenting half-truths and failing to disclose material facts," the Stockwell attorneys delayed the *Speight* matter for nearly a year. Further, the WCAB found in its Final Order that the conduct of Hansen and the other Stockwell attorneys resulted in a "massive waste of time and energy," particularly the unnecessary use of judicial resources.[15]

3. Indifference and Lack of Insight (Std. 1.5(k))

The hearing judge found that Hansen demonstrated indifference because, even at her discipline trial, she failed to appreciate that asserting half-truths, concealing material facts, and failing to correct the

13. Supreme Court case no. S193233; State Bar Court case no. 07-O-12444.

14. Supreme Court case no. S193233; State Bar Court case no. 12-PM-12254.

15. **[7]** We reject OCTC's request that we find a fourth aggravating circumstance under either standard 1.5(b) (multiple acts of wrongdoing) or standard 1.5(c) (pattern of misconduct) based on Hansen's conduct before the WCAB. Although the hearing judge found she engaged in a "pattern of telling half-truths," our finding of moral turpitude already accounts for this misconduct.

record regarding the Medical Unit's responses constituted misconduct. We agree, and find this is a significant factor in aggravation. At trial, Hansen continued to blame others and to justify her conduct using the very factual and legal arguments that the WCAB had unequivocally rejected. As the WCAB observed, Hansen and the other Stockwell attorneys remained "unapologetic and defiant." Such lack of insight into her wrongdoing raises this court's concern that her misconduct will recur.

B. Mitigation

1. Cooperation (Std. 1.6(e))

We agree with the hearing judge's assignment of limited mitigation credit for Hansen's cooperation with the State Bar during trial. Although she entered into an extensive factual stipulation, most of those facts were easily provable. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443 [factual stipulation merits some mitigation]; *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive mitigation for those who admit culpability].)

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

Standard 1.6(f) authorizes mitigating credit 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 [attorney's] misconduct." Hansen presented five good character witnesses, all of whom are attorneys.[16] All of the attorneys attested that Hansen is an honest, highly capable, organized, and knowledgeable attorney. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [character testimony from attorneys is valuable given their "strong interest in maintaining the honest administration of justice"].)

But even with these positive assessments, the judge properly assigned limited mitigation credit as only two witnesses were aware of the full extent of the misconduct charged against Hansen. (*In re Aquino* (1989) 49 Cal.3d 1122, 1131 [seven witnesses and 20 letters of support not "significant" evidence of mitigation because witnesses were unfamiliar with details of misconduct].) Moreover, the remaining witnesses did not constitute a wide range of references from the legal and general communities, as required by the standard. (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 387 [three attorneys and three clients do not constitute broad range of references].) We thus assign limited mitigation credit to Hansen's good character evidence.

IV. 18-MONTH ACTUAL SUSPENSION IS APPROPRIATE DISCIPLINE

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

At the outset, we observe that standard 1.1 specifies that 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

16. Three individuals testified at trial, and two submitted declarations. In addition, the managing partner testified both as a percipient witness and as a character witness. Given the Stockwell firm's involvement in the WCAB matter, the hearing judge found the managing partner was not an impartial witness and gave little or no weight to his character testimony. We give great deference to this determination. (See *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280 [hearing judge's credibility findings entitled to great weight].)

confidence in the profession; and to maintain high professional standards for attorneys. Hansen argues that no discipline should be imposed and that this matter should be dismissed since she is not culpable of any wrongdoing. OCTC asserts that because this is Hansen's third disciplinary proceeding, disbarment is the appropriate discipline under standard 1.8(b).[17]

[8] OCTC acknowledged in its Closing Trial Brief filed below that the chronology of Hansen's discipline matters is "problematic" if we are to apply standard 1.8(b) because the misconduct presently before us occurred *before* her other two disciplinary proceedings. Due to this unusual chronology, we assigned diminished weight to the aggravating effect of Hansen's discipline history, citing to the rationale articulated in *In the Matter of Sklar*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 619. For the same reason, we do not believe that the presumptive discipline of disbarment under standard 1.8(b) should be applied. This standard is intended as a deterrent to recidivism, which is not at issue when, as here, the misconduct predates the attorney's other discipline cases. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons for departure from standards].)

[9a] Instead, we look to standard 2.11, which provides for disbarment or actual suspension as the presumed sanction for acts of moral turpitude. Standard 2.11 guides us to consider "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 member's practice of law."

[9b] Given the range of discipline in standard 2.11, we look for additional guidance to the decisional law involving misrepresentations to the court. A review of relevant cases involving similar attorney misconduct discloses a broad spectrum of discipline imposed. (See, e.g., *Grove v. State Bar* (1965) 63 Cal.2d 312 [in pre-standards case, public reprimand where attorney with previous private reproval intentionally misled judge into believing opposing party had defaulted]; *Bach v. State Bar*, *supra*, 43 Cal.3d 848 [60-day actual suspension where attorney with prior public reproval intentionally misled judge about whether he was ordered to produce client at hearing]; *In the Matter of Chesnut* (Review Dept. 1994) 4 Cal. State Bar Ct. Rptr. 166 [six-month actual suspension where attorney with prior 15-day actual suspension falsely represented to two judges he had personally served opposing party]; *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490 [six-month actual suspension where attorney with prior 90-day actual suspension falsely stated to judge he had witness under subpoena]; *Davis v. State Bar* (1983) 33 Cal.3d 231 [one-year actual suspension where attorney with two prior disciplines but no previous actual suspension knowingly submitted false answer to court and failed to competently perform legal services]; *Arm v. State Bar* (1990) 50 Cal.3d 763

[18-month actual suspension where attorney with three prior disciplines, including 60-day actual suspension, misled court about impending disciplinary suspension during further hearing of matter].)

[9c] We acknowledge that the 18-month actual suspension recommended by the hearing judge is at the severe end of the disciplinary continuum as developed in the decisional law, and it constitutes significant discipline. But we adopt her recommendation based on the totality of Hansen's misconduct, which would justify an 18-month suspension had all of the misconduct been brought as one case. (*In the Matter of Sklar*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 619.) Indeed, Hansen's misconduct in her three cases spans more than eight years and involves repeated probation violations and two instances of moral turpitude for making misrepresentations to separate judicial tribunals. Notably, Hansen made the misrepresentations to better her own personal

17. Standard 1.8(b) instructs that if a member has two or more prior records of discipline, disbarment is appropriate (unless the most compelling mitigating circumstances clearly predominate or the prior misconduct occurred during the same time period as the current misconduct) if actual suspension was previously ordered, or if the prior and current misconduct demonstrate a pattern or an inability to conform to ethical responsibilities.

position. And in the instant case, the deceptions to the WCAB occurred over many months, even after the Board warned Hansen that she was wading into deep ethical waters and facing possible sanctions. Yet she pressed on, essentially doubling down on her efforts to justify her conduct. Her presentation of half-truths and concealment of material facts significantly and adversely impacted the administration of justice. Furthermore, all of the misconduct was directly related to her practice of law before the WCAB.

[9d] [10a] Of course, Hansen had the right to defend herself from the imposition of sanctions, but even now, on appeal, she seems unable to recognize that her conduct was to any extent improper, much less unethical. Instead, she remains steadfast in her belief that the only person who is culpable of dishonesty is the Medical Director's counsel. We find that Hansen's unwillingness even to consider that her actions might be inappropriate goes "beyond tenacity to truculence." (*In re Morse* (1995) 11 Cal.4th 184, 209.)

[9e] [10b] The WCAB fittingly described this case as "an unfortunate and avoidable scenario in which the attorneys, rather than acknowledging error, created a much graver situation by misrepresenting and distorting facts, blaming others, and creating an overall fiction to justify their actions." Hansen's failure to appreciate the importance of her professional responsibilities, which in the past was evidenced by her failure to comply with her prior probation conditions and her failure to appear at her revocation proceeding, continues to the present in that she disavows any wrongdoing in the face of significant sanctions by the WCAB. This raises additional concerns about the potential for future misconduct, and for this reason, we recommend that the 18-month period of actual suspension should continue until Hansen establishes her rehabilitation, fitness to practice law, and present learning and ability in the law in satisfaction of standard 1.2(c)(1). Such a showing is necessary to ensure that the public, the courts, and the legal profession are adequately protected. (*In the Matter of Luis* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 737, 742-743 [reinstatement hearing offers public protection through formal proceeding designed to ensure moral fitness and legal learning before attorney permitted to return to practice of law].)

V. RECOMMENDATION

For the foregoing reasons, we recommend that Kimberly Allyson Hansen be suspended from the practice of law for three years, that execution of that suspension be stayed, and that she be placed on probation for three years on the following conditions:

1. She must be suspended from the practice of law for a minimum of the first 18 months of the period of her probation and until she provides proof to the State Bar Court of her rehabilitation, fitness to practice, and learning and ability in the general law. (Std. 1.2(c)(1).)

2. She must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of her probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to section 6002.1, subdivision (a), including her current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, she must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

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

5. She must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, she must state whether she has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of her probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, she must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to her personally or in writing, relating to whether she is complying or has complied with the conditions contained herein.

7. Within one year after the effective date of the discipline herein, she must submit to the Office of Probation satisfactory evidence of completion of the State Bar's 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 she shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

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 period of probation, if she has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VI. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Hansen be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of her actual suspension, and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

VII. RULE 9.20

We further recommend that Hansen be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

VIII. COSTS

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

We concur:

PURCELL, P. J.
STOVITZ, J.*

* Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ROBERT ALAN MURRAY

A Member of the State Bar

[14-O-00412]

Filed Nov. 10, 2016

SUMMARY

During plea discussions in a child molestation case, respondent, a district attorney, added two fabricated lines to the defendant's transcribed statement that made it appear the defendant had confessed to an even more egregious offense than he was charged with—one that carried a life sentence. Respondent then sent the false document to the public defender. Despite several opportunities to correct the record, respondent failed to do so until nine days later, when the public defender requested the original recording from which the statement had been transcribed. Even then, respondent claimed it was all a joke, and that he had forgotten about it. By that time, the public defender had relied on the altered evidence as genuine and confronted his client with it, causing the client to lose confidence in his attorney. The superior court rejected respondent's joke defense and found that he acted deliberately. It further found that his outrageous prosecutorial misconduct interfered with the defendant's constitutional right to counsel, and, as a result, it dismissed all charges against the defendant. The Court of Appeal affirmed the decision in a published opinion, agreeing that respondent's misconduct was deliberate and egregious.

A hearing judge found respondent culpable of an act of moral turpitude by gross negligence. Even though the hearing judge found that respondent created a risk of significant harm to the pending criminal case, and failed to take any precautionary steps or prompt curative measures to make it understood that his actions were a prank, he recommended only a 30-day actual suspension. The Review Department gave the criminal court findings prima facie weight, found respondent acted intentionally and in a manner wholly inappropriate and unbecoming of an experienced prosecutor, and increased the recommended discipline to a one-year actual suspension.

COUNSEL FOR PARTIES

For State Bar: Brandon K. Tady, Esq.

For Respondent: Jonathan I. Arons, Esq.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1a-e] **166 Standards of Proof/Standards of Review—Independent Review of Record**
169 Standards of Proof/Standards of Review—Miscellaneous Issues re Standard of Proof/Standard of Review
191 Miscellaneous General Issues in State Bar Court Proceedings—Effect of/ Relationship to Other Proceedings
204.20 Culpability—General substantive issues—Intent requirement
Decisions by criminal and appellate courts finding respondent's misconduct as prosecutor intentional and deliberate were entitled to strong presumption of validity and prima facie weight in State Bar Court, even though respondent was not technically party to criminal case, because disciplinary charges arose from same prosecutorial misconduct. Review Department affords hearing judge's factual findings great weight, but must independently assess record and may make different findings or conclusions. Where hearing judge failed to give proper weight to court decisions in criminal case, and record demonstrated validity of other courts' findings, Review Department rejected hearing judge's conclusion that respondent's misconduct was grossly negligent, and found it intentional.

[2a-c] **221.00 State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)**
221.11 State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)—Found—Deliberate dishonesty/fraud
As officers of the court and representatives of the People, prosecutors must meet standards of candor and impartiality not demanded of other attorneys, and are held to an elevated standard of conduct. Respondent, a prosecutor, acted egregiously and outrageously, and committed an act of moral turpitude, when he intentionally altered a criminal defendant's statement to add a false confession, thereby prejudicing the defendant's right to fair trial, compromising the case, and bringing about the dismissal of the criminal charges.

[3] **193 Miscellaneous General Issues—Constitutional Issues—Other**
204.90 Culpability—Other general substantive issues re culpability
Prosecutors have no First Amendment right to engage in speech that creates substantial likelihood of material prejudice to criminal proceeding or to parties' rights to a fair trial. Where prosecutor's misconduct prejudiced criminal defendant's right to fair trial, State Bar Court would not entertain First Amendment free speech defense to resulting disciplinary charges.

[4] **106.30 Generally Applicable Procedural Issues—Issues re Pleadings—Duplicative charges**
213.10 State Bar Act Violations—Section 6068(a) (support Constitution and laws)
221.00 State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)
Where charge against respondent prosecutor of failing to comply with Constitution and laws, based on respondent's willful violation of criminal defendant's constitutional rights, overlapped with moral turpitude charge based on same misconduct, charge of failing to comply with law was properly dismissed as duplicative.

[5a,b] **169 Miscellaneous Issues re Standard of Proof/Standard of Review**
213.10 State Bar Act Violations—Section 6068(a) (support Constitution and laws)
Where respondent prosecutor inserted false confession in criminal defendant's statement before disclosing statement to defense counsel, respondent at least violated spirit of statutory scheme governing discovery in criminal prosecutions. Nonetheless, where hearing judge dismissed disciplinary charge of failing to comply with law, on ground that prosecutor did not withhold items subject to disclosure, and Office of Chief Trial Counsel did not challenge dismissal on appeal, Review Department upheld dismissal.

[6] **584.10 Aggravation—Found—Harm (1.5(j))—To Public**
586.12 Aggravation—Found—Harm (1.5(j))—To Administration of Justice —Specific interference with justice
Where respondent criminal prosecutor falsified evidence in pending criminal matter, resulting in dismissal of criminal charges, respondent's misconduct caused significant harm to victim, defendant, and administration of justice. Such egregious prosecutorial misconduct violates basic notions of ethics, integrity, and fairness; erodes confidence in law enforcement and criminal justice system, and puts public at risk. Accordingly, respondent's misconduct was aggravated by significant harm he caused.

[7] **221.11 State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)—Found—Deliberate dishonesty/fraud**
543.10 Aggravation—Intentional misconduct—Found but discounted or not relied on—Duplicative of section 6106 charge
Where Review Department found that respondent acted intentionally in committing act of moral turpitude, it declined to give intentionality additional weight in aggravation. Factors giving rise to culpability for moral turpitude should not be given double weight by considering them again in aggravation.

[8] **745.39 Mitigation—Found But Discounted–Remorse/restitution/atonement (1.6(g))—Other reason**
Where respondent failed to admit falsification of evidence until confronted by opposing counsel, and took no prompt remedial action despite opportunity to do so, respondent's subsequent expression of remorse for his wrongdoing was not entitled to significant weight in mitigation.

[9a, b] **833.90 Application of Standards—Standard 2.11 (Moral Turpitude, Fraud, etc.)—Applied—Suspension—Other reason**
1093 Miscellaneous Substantive Issues re Discipline—Inadequacy of Discipline
Where prosecutor intentionally committed act of moral turpitude by altering criminal defendant's statement to add false confession, resulting in dismissal of charges and thus causing significant harm to victim, public, and administration of justice, 30-day actual suspension was insufficient. To emphasize seriousness of misconduct, appropriate discipline was one-year actual suspension.

ADDITIONAL ANALYSIS

Culpability

Not Found

213.15 Section 6068(a) (support Constitution and laws)

Mitigation

Found

710.10 Long practice with no prior discipline (1.6(a))
740.10 Good character references (1.6(f))
765.10 Substantial pro bono work

Found but discounted or not relied on

735.30 Candor and Cooperation with Bar (1.6(e))

Discipline

1024 Ethics exam/ethics school
1613.08 Stayed suspension—Two years
1615.06 Actual suspension—One year
1617.08 Probation—Two years

OPINION

HONN, Acting P.J.:

During plea discussions in a child molestation case, Kern County prosecutor Robert Murray added two fabricated lines of testimony to the defendant's transcribed statement that made it appear that the defendant had admitted to having sexual intercourse with a 10-year-old child—an offense that carries a life sentence. Murray then transmitted the false document to the public defender. When confronted by the public defender nine days later, and despite several opportunities to correct the record, Murray claimed it was all a joke. The Kern County Superior Court did not see Murray's actions the same way and found his conduct to be so "egregious," "outrageous," and "conscience-shocking" that it violated the defendant's constitutional rights to counsel and to a fair trial. In light of the prejudicial impact, the superior court dismissed all criminal charges against the defendant. The California Court of Appeal affirmed the dismissal in a published opinion.

The matter was referred to the State Bar. A hearing judge found Murray culpable of grossly negligent conduct amounting to moral turpitude and recommended a 30-day actual suspension. The Office of the Chief Trial Counsel of the State Bar (OCTC) appeals, arguing the discipline is "grossly inadequate" given Murray's intentional behavior and the magnitude of the harm he caused, and requests a one-year actual suspension. Murray does not appeal and contends, as the hearing judge found, that he was trying to create a moment of levity and ease relations with the public defender, and that he did not intend to deceive anyone or affect the outcome of the case.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we agree with the courts of record in this matter. We find that Murray deliberately created and inserted a fraudulent document into a criminal prosecution while he was actively negotiating a resolution by plea agreement. This altered evidence bore no indicia of being a "prank," and Murray made no prompt effort thereafter to control the consequences. Murray's behavior is wholly inappropriate and unbecoming of an experienced prosecutor, who is expected to adhere to the highest standards of ethical conduct and to act as a gatekeeper to the fair administration of justice. We therefore recommend a one-year actual suspension to protect the public and to maintain integrity and confidence in the legal profession.

I. PROCEDURAL BACKGROUND

On June 16, 2014, OCTC filed a Notice of Disciplinary Charges (NDC), charging Murray with one count of violating Business and Professions Code section 6106 (moral turpitude—misrepresentation/falsification of evidence)[1] and two counts of violating section 6068, subdivision (a) (failure to comply with laws).

Trial commenced on August 25, 2015, included four days of testimony, and was followed by post-trial briefing. On December 16, 2015, the hearing judge issued his decision, finding Murray culpable on the count of moral turpitude; the judge dismissed the other two counts and recommended a 30-day actual suspension.

II. FACTUAL BACKGROUND

On June 18, 2013, the Kern County District Attorney's Office charged Efrain Velasco-Palacios (Palacios or defendant) with five counts of lewd and lascivious conduct with a child—a charge with a maximum prison term of 16 years. The child—the 10-year-old daughter of Palacios's live-in girlfriend—alleged that Palacios improperly touched her chest and vaginal area, but did not accuse him of any penetrative acts. When interviewed by the police, Palacios, who primarily spoke Spanish, blamed the young girl for coming on to him, but denied that he had sex with her. He admitted, however, to hugging her, touching her breasts, kissing her, and placing messages on Facebook, asking her to go on vacation with him, telling her that he loved her, and stating that he wanted to "be grabbing [her] body again" and to "make love to [her] again."[2]

1. All further references to sections are to the Business and Professions Code unless otherwise noted.

2. Palacios's statement to the police was audio-recorded and then later translated into English for use in the criminal trial.

During pretrial settlement talks, Murray met with Ernest Hinman, the public defender appointed to represent Palacios, and offered a plea bargain of eight years. Hinman conveyed the offer to Palacios, who rejected it. Hinman continued to try to persuade Palacios to make a counteroffer and informed Murray that he believed Palacios would ultimately agree to a plea.

While Hinman was making these efforts, Murray told him he was considering re-interviewing the victim and reexamining the evidence to determine whether penetrative acts had occurred, and if so, dismissing the charges and refiling the case as an enhanced crime, which carried a life sentence. Murray also informed Hinman that a plea offer would likely be unavailable if the charges were refiled. Hinman insisted that although Palacios had made several admissions in his statement to the police, he did not admit to penetration. Murray disagreed and said he would review the file, which he did on October 21, 2013. He testified that he became frustrated when he realized Hinman was right and the evidence did not support the greater charge. He then added the following two lines to the end of Palacios's transcript that implied that Palacios had had sexual intercourse with the child:

[Officer Martinez]: You're so guilty you child molester.

[Palacios]: I know. I'm just glad she's not pregnant like her mother.

During normal business hours that same day, Murray emailed the altered transcript to Hinman from his office email account. Nothing in the text, font, or formatting of the alteration, or in the manner in which the altered document was delivered, signaled anything unusual. And there was some truth in Murray's manufactured admission because, in fact, the girl's mother was pregnant by Palacios. After sending the transcript to Hinman, Murray turned his attention to other pressing matters, and claimed he forgot about it.

Murray later defended his actions as a "joke." He testified in these proceedings that he was carrying an unusually heavy caseload at the time, including several infant homicide cases, and he underestimated the emotional toll it was taking as he struggled to cope with it. He stated that it was out of character for him to play a "prank" like this, but it was an attempt to deal with the stress through humor.

Hinman read the altered transcript within several days of receiving it. He did not recognize the false confession to be anything but genuine and had no reason to believe Murray was playing a "prank" on him. He testified: "There were some jokes over the years [with Murray], but the relationship between us was not one of, you know, playing a prank with a piece of evidence. I'd never seen that or heard of that before, ever. . . . I wouldn't have expected any prosecutor or defense attorney on a case to do that." Instead, Hinman was troubled that his copy of the transcript was incomplete. He was also reluctant to raise the issue directly with Murray; he did not want to alert Murray to any incriminating statements by Palacios that Murray might have overlooked.

Hinman then conducted a videoconference with his incarcerated client, asking him about the last two lines of the transcript, and informing him that an admission of penetration could be used to file more serious charges against him. Palacios denied making the statement. He later testified to the superior court that he initially had a good relationship with Hinman and was comfortable with Hinman representing him at trial; however, after Hinman approached him with falsified evidence, he "did not feel safe" and "[did not] even trust in [his] attorney anymore."

On October 28, 2013, the parties appeared in court for what was scheduled to be the first day of trial. Several other matters were also on calendar that day, and Murray and Hinman sat in different areas without talking. When the Palacios matter was called, Hinman asked for a continuance, and the court postponed the matter to November 5, 2013. Murray did not mention the fabricated lines in the transcript to Hinman.

Officer Martinez, who conducted the initial interview with Palacios, had been subpoenaed to testify and was also present in court that day. Martinez and Murray had never met before, and they left together to discuss the case at Murray's office.

When Murray provided Martinez with a copy of Palacios's transcribed statement, he realized that the false confession was still included. He told Martinez to ignore those lines as they were a joke, and provided him with an accurate copy. However, Murray made no effort at that time to contact Hinman to set the record straight with him. Martinez testified in these proceedings that he did not think Murray's "joke" was funny.

On October 30, 2013, nine days after receiving the falsified transcript, Hinman emailed Murray to request a copy of the exact CD that Murray's transcriber/interpreter had used. Murray did not respond. Later that same morning, when they both arrived for a scheduled court hearing, Hinman asked if Murray had received his email. Murray said he had, and then disclosed that he had fabricated the last two lines of Palacios's statement. Hinman testified that he was "shocked."

After discussing the matter with his supervisors, on November 15, 2013, Hinman filed a motion to dismiss the criminal charges against Palacios, alleging outrageous prosecutorial misconduct. The District Attorney's Office filed an opposition that included Murray's sworn affidavit describing the purported circumstances of the creation and transmission of the altered document. After the opposition was filed, the Public Defender's Office removed Hinman from the case, citing the appearance of impropriety.

On December 17, 2013, the superior court held a full evidentiary hearing on the motion to dismiss. Judge Staley, a retired criminal court judge, presided over the matter and heard argument and evidence, including the testimony of Hinman, Murray, and Palacios. At the conclusion of the two-day hearing, Judge Staley granted the motion to dismiss. Notably, in his written ruling, the judge expressly rejected Murray's joke excuse, finding that Murray acted intentionally:

> Murray sent Hinman a fabricated version of a statement that the defendant made to law enforcement. This was done through common ordinary criminal discovery channels. This version had added fabrications that were highly material. These fabricated additions fit directly into what Murray had told Hinman he was lacking, a fact which frustrated him. He sent this the same day he told Hinman that he could not find the evidence he needed for the greater charges.
>
> Murray did not reveal this *intentional* fabrication that same day, the next day, or even within a week. Murray revealed the fact of the fabrication only after nine days and then only after Hinman indicated that he felt that there might be some abnormality with those 'new' statements.
>
> It was also not revealed until after the [*sic*] Hinman had questioned his client about making these statements. This had a prejudicial effect on the attorney-client relationship. The fabrication was 'in play' while the [*sic*] Murray knew Hinman was attempting to encourage his client to make counter offers to settle the case.
>
> Even as a joke, a fact which was not proven, it does shock the conscience of the court. Could it have been done as a joke and been less outrageous? Possibly, if followed up with contact immediately and before the defense had the opportunity to act on the case with the fabricated admissions in mind. But those are not the facts of this case, as orchestrated by Murray.
>
> Instead, Murray claims to have forgotten about having provided the fabricated version, despite this being a unique joke, in that he had never done anything like this before. Forgetting was attributed by the People to the press of other business, other cases which demanded Murray's time and attention, while this defendant and his attorney were left to respond to the fabrication. Again, Murray was fully aware of his caseload and its requirements. [¶]
>
> This court does not believe that it can tolerate such outrageous conduct that results in the deprivation of basic fundamental constitutional rights that are designed to provide basic fairness.
>
> The prosecutor's conduct was egregious, outrageous, and it shocked the conscience of this court.

(*People v. Velasco-Palacios* (Super. Ct. Kern County, 2013, No. TF006398), italics added.)

The District Attorney's Office sought appellate review. On February 24, 2015, after briefing and oral argument (conducted by the State Attorney General's Office), the California Court of Appeal issued a published opinion upholding the dismissal of the case against Palacios. Specifically, the Court of Appeal affirmed the superior court's findings that Murray's actions were deliberate, prejudicial, and violative of the defendant's constitutional rights:

> Here, the trial court found Murray *deliberately* altered an interrogation transcript to include a confession that could be used to justify charges carrying a life sentence, and he distributed it to defense counsel during a period of time when Murray knew defense counsel was trying to persuade defendant to settle the case. Further, Murray did not reveal the alterations until nine days later, and only then when he was directly confronted about the fabricated lines by defense counsel. This is egregious misconduct and, as is shown . . . it directly interfered with defendant's attorney-client relationship. Because Murray clearly engaged in egregious misconduct that prejudiced defendant's constitutional right to counsel, the trial court was correct in finding Murray's actions were outrageous and conscience shocking in a constitutional sense.

(*People v. Velasco-Palacios* (2015) 235 Cal.App.4th 439, 447, italics added.)

III. MURRAY INTENTIONALLY CREATED AND TRANSMITTED A FALSE CONFESSION

A. Count One: Section 6106 (Moral Turpitude—Misrepresentation/Falsification of Evidence)[3]

In Count One of the NDC, OCTC alleged that Murray committed an act of moral turpitude when he knowingly created and transmitted Palacios's false confession to Hinman. At trial, Murray contested the charge, maintaining that his actions were an ill-conceived attempt at humor and that he did not intend to deceive anyone. The hearing judge agreed, but found Murray culpable of gross negligence. In what the judge described as a "joke-gone-bad," he found that Murray created a risk of significant harm to the pending criminal case and failed to take any precautionary steps or prompt curative measures to make it understood that the altered document was actually a "prank" document.

[1a] On review, Murray accepts the gross negligence finding, but we do not. Although the hearing judge's factual findings are afforded great weight, we must independently assess the record and may make different findings or conclusions. (Rules Proc. of State Bar, rule 5.155(A).)

[1b] The record undeniably demonstrates that Murray intentionally altered Palacios's statement. Murray himself testified that it was an "intentional" act. Moreover, both the superior court and the Court of Appeal found that Murray acted with purpose and motive. Both courts expressly rejected his "joke" defense and found that he "intentionally" and "deliberately" fabricated Palacios's statement to influence plea negotiations. Judge Staley found that the manufactured confession supplied the missing piece of evidence that Murray told Hinman he was lacking. Judge Staley also did not believe Murray's testimony that the press of business caused him to "forget" to notify Hinman of the fabrication since Murray claimed it was a "unique joke" in that he had never done anything like it before. Instead, the judge found that Murray was aware of his caseload and had ample time and opportunity to correct the record, yet he did nothing for nine days, and only when confronted by Hinman. By then, Hinman had used the altered material to try and encourage Palacios to settle the case.

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

[2a] Murray's actions prejudiced Palacios's right to a fair trial, compromised the entire case, and resulted in the dismissal of all criminal charges against Palacios.[4] Such conduct by a seasoned prosecutor is more than irresponsible or inattentive (as gross negligence denotes)—it is egregious and outrageous, and it shocks the conscience of the court. **[1c]** The criminal courts came to this conclusion, and, as a matter of law, the findings of these courts are entitled to a strong presumption of validity and prima facie weight. (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 947 [findings of other tribunals made under preponderance of evidence standard given strong presumption of validity in State Bar proceedings if supported by substantial evidence]; *In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 117-118) [court of appeal opinion to which attorney was party is, at minimum, considered prima facie determination of matters bearing strong similarity, if not identity, to charged disciplinary conduct].)[5]

[1e] While the hearing judge acknowledged the prior criminal court decisions and the appellate opinion, he failed to give them the proper weight. In fact, he gave them no weight at all, and then proceeded to explain how the evidence Murray presented in this proceeding differed from the criminal case. (*In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 206 [respondent has right to introduce evidence to controvert, temper or explain prior findings].) For the most part, the hearing judge said he was aided by "the far more revealing testimony" of Hinman, Chief Deputy Kang of the Public Defender's Office, Officer Martinez, and Murray, which, according to the hearing judge, "substantially undermine[d] many of the [criminal court] findings and conclusions." However, the record is clear that Murray was the only one who firmly believed his actions were a joke, as Hinman, Chief Deputy Kang, and Officer Martinez testified otherwise.

When Hinman was asked if he thought Murray's intent was to play a joke, he testified: "I don't know." He further testified that Murray would have been "stupid" to try and intentionally alter evidence because "he would have been caught, unless there was a plea in the case." Hinman's point is important because this is precisely what the criminal courts found—that Murray was trying to entice a plea with trumped-up facts and the threat of new, more serious charges.

Hinman's supervisor, Chief Deputy Kang, said he had never seen a prosecutor play a joke like this on a public defender in his office. When asked whether he thought Murray was joking, he testified: "Maybe, in some measure, in Mr. Murray's mind, this was funny. I don't see it as a joke."

Similarly, when Officer Martinez was asked his opinion of Murray's actions, he testified: "I didn't think it was funny." He further testified that in his

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4. **[3]** Unlike the hearing judge, we see no reason to entertain a First Amendment free speech argument given that the criminal courts clearly found that Murray's actions prejudiced Palacios's constitutional right to counsel. (*Gentile v. State of Nev.* (1991) 501 U.S. 1030, 1075 [ability to restrict attorney participating as counsel in pending criminal case from speech that creates "substantial likelihood of material prejudice" to that proceeding or to parties' rights to fair trial is not violative of First Amendment].)

5. **[1d]** While Murray was not technically a party to the Palacios criminal case, his falsification of Palacios's statement was the basis of the public defender's motion to dismiss—which included briefing and an evidentiary hearing where Murray testified and presented his version of events, as did Hinman and Palacios. Moreover, Murray's office (the Kern County District Attorney's Office) opposed the motion to dismiss and defended Murray's conduct. For purposes of our analysis, we find that Murray was equivalent to a party, his misconduct bears a strong similarity to the charged disciplinary misconduct in this proceeding, and Judge Staley's decision to grant the motion to dismiss was based on substantial evidence. This situation is analogous to a sanction proceeding against an attorney who is involved in a case, but not a named participant in the caption. (See *In the Matter of Lais, supra,* 4 Cal. State Bar Ct. Rptr. at p. 117.)

experience as a law enforcement officer, he had never before seen or heard of a prosecutor doing something like this.

Like the criminal courts, these witnesses did not find Murray's actions to be a joke or even an appropriate subject to joke about. Nor do we—"a trial is not a game." (*In re Ferguson* (1971) 5 Cal.3d 525, 531.)

[2b] The duties Murray violated are profound and fundamental to our system of justice. He failed to live up to the standard imposed on him by virtue of his unique role in the administration of justice. Our independent review of the record gives us no reason to diverge from the prior criminal court findings, which come to us with prima facie validity. Accordingly, we find that Murray intentionally breached his ethical duties as a prosecutor by creating and transmitting falsified material in a criminal case.

B. Count Two: Section 6068, Subdivision (a) (Failure to Comply with Laws)[6]

[4] OCTC charged Murray with violating Palacios's Fourteenth Amendment right to due process and his Sixth Amendment right to counsel under the United States Constitution. The hearing judge dismissed this count as duplicative of Count One. OCTC does not challenge the dismissal, and we adopt it. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060 [little, if any, purpose is served by duplicate allegations of misconduct in State Bar Court proceedings].)

C. Count Three: Section 6068, Subdivision (a) (Failure to Comply with Laws)

[5a] OCTC also charged Murray with violating discovery statutes that require prosecutors to disclose, among other things, statements of all defendants and testifying witnesses within 30 days of trial. (Pen. Code, § 1054.1, subds. (b), (c), (e), and (f); Pen. Code, § 1054.7.) The hearing judge dismissed this count, finding Murray did not withhold any items subject to disclosure: "[T]he gravamen of the State Bar evidence . . . is that [Murray] provided improper information, rather than withheld evidence. Such alleged conduct does not violate the specific statutes cited in this count." (Underscoring in original.)

[5b] While we disagree with the hearing judge and conclude that Murray violated at least the spirit of the discovery statutes when he produced falsified material (see Pen. Code, § 1054 [discovery statutes enacted to save time, protect victims and witnesses, and "promote the ascertainment of truth in trials"]), we adopt the dismissal of Count Three, which OCTC does not challenge on appeal.

IV. SIGNIFICANT HARM OUTWEIGHS STRONG MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct requires OCTC to establish aggravating circumstances by clear and convincing evidence.[7] Standard 1.6 requires Murray to meet the same burden to prove mitigation. The hearing judge found five factors in mitigation (no prior discipline, cooperation, good character evidence, community service, and remorse) and only one factor in aggravation (significant harm). We adopt these findings, but on balance, assess less weight in mitigation and substantially more in aggravation based on the significant harm Murray caused to the public, the profession, and the overall administration of justice.

A. Aggravation

[6] *1. Significant Harm (Std. 1.5(j))*

We find Murray's misconduct is aggravated by the significant harm he caused. The underlying criminal case involved a 10-year-old girl who reported being repeatedly molested by Palacios, her mother's live-in boyfriend—a heinous scenario. Due

6. Section 6068, subdivision (a), provides: "It is the duty of an attorney to . . . support the Constitution and laws of the United States and of this state."

7. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

to Murray's intentional misconduct,[8] the victim did not get her day in court. Moreover, Murray's actions directly interfered with Palacios's attorney-client relationship, causing Palacios to lose trust in his attorney. Lastly, the administration of justice suffered and was fundamentally undermined when the charges against Palacios were dismissed without resolution on the merits. Such egregious misconduct by a prosecutor violates basic notions of ethics, integrity, and fairness upon which the legal profession is built, it erodes confidence in law enforcement and the criminal justice system, and it puts the public at risk. (See *In re Field* (2010) 5 Cal. State Bar Ct. Rptr. 171, 184 [abuse of prosecutorial power negatively impacts reputation of District Attorney's Office and public's trust in criminal justice system]; see also *Price v. State Bar* (1982) 30 Cal.3d 537, 551 (dis. opn. of Richardson, J.) ["It is self evident that a lawyer's presentation to . . . counsel of deliberately fabricated documentary evidence strikes directly at the very integrity of the judicial process."].)

B. Mitigation

1. No Prior Discipline (Std. 1.6(a))

Murray practiced law in California for just under 10 years with no prior record of any discipline. We agree with the hearing judge that this period of unblemished practice is deserving of significant weight in mitigation. (*In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80, 88 ["entitled to full credit" for 10 years of discipline-free practice]; *Hawes v. State Bar* (1990) 51 Cal. 3d 587, 596 [more than 10 years of discipline-free practice entitled to significant mitigation].)

When misconduct is serious, as it decidedly was here, a long record of no discipline is most relevant when the misconduct is aberrational. (*Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029.) Although the hearing judge did not make a specific finding in this regard, we assume that because he believed Murray's misconduct was a "joke," he did not think it was innate behavior that would likely recur. Based on the testimony of Murray and his character witnesses, we also believe this was an isolated act.

2. Cooperation and Candor (Std. 1.6(e))

Murray has been candid and cooperative throughout these proceedings and during the criminal proceedings. He waived his Fifth Amendment right, testified freely, and stipulated to facts. However, he did not stipulate to culpability. Such cooperation is entitled to mitigation credit, but, as both the hearing judge and OCTC point out, very limited credit. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [credit for stipulating to facts "very limited" where culpability is denied].)

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

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, is entitled to mitigation credit. Murray presented a wide range of character references from numerous individuals, including several prosecutors and criminal defense attorneys, a sitting Kern County superior court judge, and bar association leaders, who were fully aware of his misconduct. Many testified that Murray had their continued support and that they believed in his integrity. Most influential was the testimony of the current elected District Attorney, Lisa Green, who submitted a lengthy letter, stating in part:

> I know Rob Murray and as such I know beyond a shadow of a doubt that he never intended that the transcript be used against the defendant, either in court or for any purpose. His intent, as

8. [7] Because we find in our culpability analysis that Murray acted intentionally, we decline to give intentionality additional weight in aggravation as requested by OCTC. (*In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 68 [after determining factors giving rise to culpability for section 6106 moral turpitude violation, "[t]o again consider those factors in aggravation would improperly give them double weight"].)

> he repeatedly stated, was to engage in a practical joke at the expense of the deputy public defender. It was a bad joke and Mr. Murray used poor judgment, but it was not a malicious act. From the point of disclosure of the existence of the altered transcript, Mr. Murray has taken full responsibility for his actions. He was and continues to be extremely apologetic and extremely remorseful. [¶] As the elected District Attorney, I recognize how Mr. Murray's conduct can impact the public's perception of my office. I further understand that the public's confidence in this office can be undermined by an incident such as this. I would never write this letter if I felt that Rob Murray intentionally edited the transcript in order to strengthen a case and obtain a conviction. In fact, if I believed for a moment that he acted with malevolent intent, I would have pursued termination. The truth is Rob Murray is a man of character who made a mistake. I ask you to take that into consideration as you decide the appropriate punishment. I ask you to not let one mistake define a man's career.

We agree with the hearing judge that Murray is entitled to significant weight in mitigation based on this and similar testimony from members of the bench and bar, who have a "strong interest in maintaining the honest administration of justice." (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319.)

4. Community Service

We also agree with the hearing judge that Murray's community service work is entitled to considerable weight. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) He is a former recipient of the Eagle Scout award and has been active in local scouting activities. He is an elder in his church and active in church life. Finally, he helps victims of crime and their families deal with the aftermath of emotional problems, and he earned the "Prosecutor of the Year" award from the group Mothers Against Drunk Driving.

5. Remorse (Std. 1.6(g))

[8] The hearing judge gave Murray significant mitigation credit for recognizing his wrongdoing and expressing remorse. OCTC challenges this finding, claiming Murray did not engage in "prompt objective steps, demonstrating spontaneous remorse and recognition of the wrongdoing and timely atonement." We agree and assign limited weight. While there is no question Murray is remorseful now, his expression of regret, standing alone, is not deserving of significant weight. (*Hipolito v. State Bar* (1989) 48 Cal.3d 621, 627, fn. 2.) Murray had time and opportunity yet did nothing to set the record straight in the Palacios case until confronted by Hinman. He took no prompt, remedial action, and, as a result, significant damage was done to the public, the profession, and the administration of justice.

V. LEVEL OF 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 legal profession; and to maintain high professional standards for attorneys. (Std. 1.1.) Ultimately, we balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.)

Our analysis begins with the standards. While we recognize that they are not binding on us in every case, the Supreme Court has instructed that we should follow them "whenever possible" (*In re Young, supra,* 49 Cal.3d at p. 267, fn. 11), and they should be given great weight in order to promote "the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91.)

We consider standard 2.11 to be most apt as it addresses the presumptive discipline for acts of moral turpitude and provides that:

> Disbarment or actual suspension is the presumed sanction for an act of moral turpitude. . . . 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 member's practice of law.

[2c] As an officer of the court and representative of the People, Murray is subject to the highest standards of honesty, fidelity, and rectitude. (*Price v. State Bar, supra,* 30 Cal. 3d at p. 551.) Prosecutors must meet standards of candor and impartiality not demanded of other attorneys. They are held to an elevated standard of conduct because of their "unique function . . . in representing the interests, and in exercising the . . . power, of the state. [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

"The [prosecutor] is the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88.) Although our system of administering criminal justice is adversarial in nature, and prosecutors must be zealous advocates in prosecuting their cases, it cannot be at the cost of justice. (*United States v. Young* (1985) 470 U.S. 1, 7.) The "ultimate goal [of the criminal justice system] is the ascertainment of truth, and where furtherance of the adversary system comes in conflict with the ultimate goal, the adversary system must give way to reasonable restraints designed to further that goal." (*In re Ferguson, supra,* 5 Cal.3d at p. 531.) The court in *In re Ferguson* explained in very practical terms the special role of the prosecutor and the controls that must be in place to maintain that role:

> The duty of the district attorney is not merely that of an advocate. His duty is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial . . . . In the light of the great resources at the command of the district attorney and our commitment that justice be done to the individual, restraints are placed on him to assure that the power committed to his care is used to further the administration of justice in our courts and not to subvert our procedures in criminal trials designed to ascertain the truth.
>
> (*Ibid.*)[9]

[9a] We find that Murray lost sight of the significant and vital duties placed upon him as a prosecuting attorney when he intentionally altered Palacios's statement to add a false confession. His misconduct during the course and scope of his work as a district attorney substantially prejudiced Palacios's relationship with his counsel. In fact, it compromised the entire criminal matter, resulting in all charges against Palacios being dismissed. His actions caused immense harm to many others, too, including the 10-year-old victim and her mother, the public, the profession, and our system of justice.

Given the broad range of discipline in standard 2.11, we look to comparable case law to determine the appropriate level of discipline. (See, e.g., *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311). However, our research reveals very limited State Bar discipline case precedent for prosecutorial misconduct of this nature, with cases from our jurisdiction imposing discipline ranging from 30 days' to four years' actual suspension.[10]

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9. Our recognition of a higher standard of conduct for prosecutors is not only derived from case law. As a result of a prosecutor's unique position in the administration of justice, we note that the American Bar Association adopted a rule of professional conduct detailing the "Special Responsibilities of a Prosecutor." (See ABA Model Rules Prof. Conduct, rule 3.8.)

10. We also note the dearth of precedent nationally; historically, relatively few reported cases addressed the professional discipline of prosecutors, and most involved minor sanctions. However, at least one court observed a changing trend toward greater discipline. (See *State ex rel. Oklahoma Bar Ass'n. v. Miller* (2013) 309 P.3d 108, 120 [imposing 180-day suspension for prosecutorial misconduct, Oklahoma Supreme Court noted "[i]nstances of prosecutorial misconduct from previous decades, such as withholding evidence, were often met with nothing more than a reprimand or a short suspension . . . [but] such misconduct is punished more harshly when it occurs now"].)

In *Noland v. State Bar* (1965) 63 Cal.2d 298, a prosecutor committed an act of moral turpitude by attempting to delete the names of 65 pro-defense jurors from the jury list to gain an advantage at subsequent trials. The list was never used and no case was ever compromised. The prosecutor claimed he was acting out of an altruistic motive to "improve the jury system," and that no harm was intended or resulted. The Supreme Court imposed a 30-day actual suspension, finding that his misconduct was a "calculated thwarting of objective justice." (*Id.* at p. 302.) Murray's misconduct is substantially more serious than Noland's because it prejudicially affected a pending prosecution and caused actual harm to the victim, Palacios, and the administration of justice.

In *Price v. State Bar, supra,* 30 Cal.3d 537, a prosecutor altered evidence presented at a murder trial to obtain a conviction. His misconduct involved moral turpitude, and was aggravated when he attempted to conceal and minimize his acts by visiting the defendant in jail and offering to seek a more favorable sentence if the defendant agreed not to appeal the conviction. The prosecutor in *Price* presented significant evidence in mitigation, including no prior discipline, cooperation, remorse, good character evidence, and community service. Although the misconduct was extremely serious, the Supreme Court concluded that the weight of the mitigation militated against disbarment and imposed a two-year actual suspension. Unlike Price, Murray did not introduce altered evidence at trial, secure an actual conviction with altered evidence, or make any deals directly with Palacios.

In *In the Matter of Field, supra,* 5 Cal. State Bar Ct. Rptr. 171, a career prosecutor repeatedly, over a 10-year period, violated the due process rights of criminal defendants, violated court orders and directives, performed incompetently, did not respect the court, failed to obey the law, withheld evidence, misled a judge, and committed multiple acts of moral turpitude. Because of his compelling mitigation, including no prior record of discipline, he was spared disbarment, but was suspended for four years. Field's misconduct was exceptionally egregious and involved repeated and varied transgressions in many matters over many years.

[9b] Here, we agree with OCTC that a 30-day actual suspension is insufficient. A lengthier period of actual suspension is necessary to emphasize that Murray's misconduct is serious and cannot be countenanced. The superior court observed that it could not "tolerate such outrageous misconduct that results in the deprivation of basic fundamental constitutional rights that are designed to provide basic fairness . . . ." It took the extraordinary step of dismissing the criminal charges against Palacios. We believe that our decision should be equally forceful and clear as to the required professional standards. Accordingly, we recommend a one-year actual suspension from the practice of law.

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Robert Alan Murray be suspended from the practice of law for two years, that execution of that suspension be stayed, and that Murray be placed on probation for two years on the following conditions:

1. He must be suspended from the practice of law for the first year of his probation period.

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

4. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation deputy either in person or by telephone.

During the period of probation, he must promptly meet with the probation deputy as directed and upon request.

5. He must submit written quarterly reports to the Office of Probation on or before each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the tests given at the end of those sessions. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

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 period of probation, if he has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Murray be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of his actual suspension in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

VIII. RULE 9.20 COMPLIANCE

We further recommend that Murray be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

IX. COSTS

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

We concur:

STOVITZ, J.*
McELROY, J.**

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* Judge Pro Tem by appointment of the California Supreme Court.

** Hearing Judge of the State Bar Court, assigned by the Presiding Judge pursuant to rule 5.155(F) of the Rules of Procedure.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JANE L. SCHOOLER

A Member of the State Bar

[No. 12-O-11554]

Filed December 6, 2016

[As Modified on January 31, 2017]

SUMMARY

Respondent was disciplined for misconduct arising from her actions as trustee and executor of her parents' multi-million-dollar estate and trusts. The hearing judge found her culpable of acts of dishonesty constituting moral turpitude for violating her fiduciary duties, making misrepresentations to the probate court, and refusing to follow court orders and pay sanctions. The hearing judge also found respondent culpable of maintaining unjust actions by filing frivolous appeals. The hearing judge found three factors in aggravation and two in mitigation. Applying standard 2.11, the hearing judge recommended discipline including a two-year actual suspension continuing until respondent demonstrates her rehabilitation. The Office of the Chief Trial Counsel requested review, seeking additional aggravation, disbarment, and an order that respondent pay outstanding sanctions. (Hon. Donald F. Miles, Hearing Judge.)

The Review Department affirmed the hearing judge's factual, culpability, and aggravation and mitigation findings as supported by the record, and declined to find additional aggravation, but found that disbarment was the appropriate discipline given respondent's egregious misconduct and the substantial harm suffered by the beneficiaries of the trust as a result of her misconduct.

COUNSEL FOR PARTIES

For State Bar: Allen Blumenthal

For Respondent: Jane L. Schooler, in Pro. Per.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a, b] 130 **Procedure on Review (rules 5.150-5.160)**

Where respondent included facts that were not in the record in her brief on review, Review Department granted OCTC's motion to strike those portions of respondent's brief, under rule 5.156(A) of Rules of Procedure, providing that Review Department considers only evidence in Hearing Department record.

[2 a, b] 130 **Procedure on Review (rules 5.150-5.160)**

Where respondent requested that Review Department correct asserted factual errors by hearing judge, but did not require with rules 5.153(A) and 5.152(C) requiring her to specify disputed factual findings and support her position with record references, and where errors were merely facts or opinions from respondent's testimony that were contrary to or unsupported by the record, Review Department denied respondent's request.

[3 a, b] 106.30 **Procedural Issues—Issues re Pleadings—Duplicative charges**
213.10 **State Bar Act Violations—Section 6068(a) (support Constitution and laws)**
221.11 **State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)—Deliberate dishonesty/fraud—Found**

Where respondent misused her authority and discretion as trustee of her family's trust, intentionally violated numerous fiduciary duties set forth in the Probate Code by means infused with dishonesty and/or concealment, made repeated misrepresentations to the court and third parties in documents filed which falsely represented her as trustee after she had been removed, and intentionally violated court orders, respondent was culpable of multiple intentional acts of moral turpitude. Respondent was also culpable of violating section 6068(a), but Review Department assigned these violations no additional weight because they were duplicative of section 6106 violations.

[4] 191 **Miscellaneous General Issues—Effect of/Relationship to Other Proceedings**
213.30 **State Bar Act Violations—Section 6068(c) (counsel only legal actions/defenses)**

Where respondent filed multiple frivolous appeals that appellate court dismissed after finding respondent's arguments had no merit and resulted from subjective bad faith, and where appellate court's findings, which were entitled to great weight, were supported by clear and convincing evidence, respondent was culpable of violating section 6068(c).

[5] 162.20 **Standards of Proof/Standards of Review—Respondent's burden in disciplinary matters**
204.90 **Substantive Issues—Culpability—Other general substantive issues re culpability**

Reliance on advice of counsel is not a defense in a discipline case. Where respondent, while acting as fiduciary, disregarded advice of counsel regarding administration of trust, and committed acts of misconduct after counsel stopped representing her, respondent's misconduct was not excused by reliance on advice of counsel.

[6 a, b] **204.90 Substantive Issues—Culpability—Other general substantive issues re culpability**
430.00 Common Law/Other Statutory Violations—Breach of Fiduciary Duty
Even where an attorney is not practicing law, she is required to conform to ethical standards required of attorneys. An attorney who breaches fiduciary duties that would justify discipline if there were an attorney-client relationship may properly be disciplined for misconduct. Respondent's misconduct was not excused because she was acting as trustee for family estate, not as attorney.

[7] **148 Evidentiary Issues—Witnesses**
166 Standards of Proof/Standards of Review—Independent Review of Record
615 Aggravation—Lack of candor/cooperation with Bar (1.5(l))—Declined to find
Great weight is given to hearing judge's findings on candor because judge who hears and sees witness testify is best positioned to make this determination. Where hearing judge heard respondent testify over multiple days and did not find lack of candor despite OCTC's request, Review Department declined to find dishonest testimony as additional aggravating factor.

[8] **735.50 Mitigation—Candor and cooperation with Bar (1.6(e))—Declined to find**
Where respondent did not enter into stipulation until trial, stipulated to facts that were easy to prove, and did not admit culpability, hearing judge properly declined to assign respondent mitigation credit for cooperation.

[9a, b] **831.20 Application of Standards—Standard 2.11 (Moral Turpitude, Fraud, etc.)—Applied-Disbarment—Magnitude of misconduct great**
Where respondent engaged in serious misconduct for over seven years, including breach of her fiduciary duties by failing to distribute to her siblings almost any assets of estate for which she was trustee; where her conduct resulted in a substantial loss in the value of the trust corpuses; and where respondent made misrepresentations and filed frivolous appeals in attempt to retain control over trust assets, respondent's blatant disregard for her ethical duties and for court processes called for discipline at highest end of applicable range. Where record demonstrated respondent was at risk for committing future misconduct, disbarment was only discipline adequate to protect public, courts, and profession.

ADDITIONAL ANALYSIS

Culpability

Found

213.11 State Bar Act Violations—Section 6068(a) (support Constitution and laws)

213.31 State Bar Act Violations—Section 6068(c) (counsel only legal actions/defenses)

Aggravation

Found

521 Multiple acts of misconduct (1.5(b))

588.10 Harm to all of the above (or unspecified, or other) (1.5(j))

591 Indifference to rectification/atonement (1.5(k))

Mitigation

Found

710.10 Long practice with no prior discipline record (1.6(a))

Discipline

1010 Disbarment

2311 Involuntary Inactive Enrollment After Disbarment Recommendation—Imposed

OPINION

PURCELL, P.J.

This disciplinary proceeding arises from Jane L. Schooler's actions as trustee and executor of her parents' multi-million dollar estate and trusts. The Office of the Chief Trial Counsel of the State Bar (OCTC) charged her with violating her fiduciary duties, making misrepresentations to the probate court, refusing to follow court orders and pay sanctions, and maintaining an unjust action by filing frivolous appeals. The hearing judge found Schooler culpable and recommended discipline including a two-year actual suspension continuing until she demonstrates her rehabilitation.

OCTC appeals, seeking additional aggravation, disbarment, and an order that Schooler pay the outstanding sanctions. Schooler did not appeal and waived oral argument, but requests we correct mistakes she alleges the hearing judge made or remand the case for such corrections.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we affirm the hearing judge's factual and culpability findings, as supported by the record. Though we do not assign additional aggravation, we recommend disbarment given Schooler's egregious misconduct and the substantial harm she caused the beneficiaries, as detailed in the Factual Background. We do not recommend Schooler be ordered to pay sanctions in light of our disbarment recommendation and because the state courts have already ordered such payments.

I. PROCEDURAL BACKGROUND

A. Pretrial Filings

On August 13, 2013, OCTC filed a three-count Notice of Disciplinary Charges (NDC), alleging that Schooler: (1) repeatedly breached her fiduciary duties as trustee and personal representative of her parents' trusts and estate, acts that involved moral turpitude, dishonesty, or corruption, in violation of section 6106 of the Business and Professions Code;[1] (2) failed to fulfill her fiduciary duties as set forth in the Probate Code, in violation of section 6068, subdivision (a);[2] and (3) intentionally violated multiple court orders and made misrepresentations to the courts and third parties, acts that involved moral turpitude, dishonesty, or corruption, in violation of section 6106. On December 26, 2014, OCTC filed a First Amended NDC, which added a fourth count alleging that Schooler maintained unjust actions by filing frivolous appeals, in violation of section 6068, subdivision (c).[3] The parties filed stipulations to admit documents and facts, and a 10-day trial commenced in April 2015. Schooler testified for five days. The hearing judge issued his decision in October 2015, and amended it on November 4, 2015.

Since Schooler did not appeal, we focus our review on the primary issues OCTC raised in its appeal: (1) whether additional aggravation for dishonesty is merited; and (2) whether disbarment, rather than suspension, is the appropriate discipline. We decline to assign additional aggravation, but find that disbarment is the appropriate discipline.

B. Rulings on Motions in the Review Department

[1a] On June 22, 2016, OCTC filed a motion to strike portions of Schooler's brief on the grounds that she raised new issues, her statements were not admissible, and she failed to cite to the record in support of her requests. Schooler did not file a response to the motion. **[2a]** In her responsive brief on review, she requested that we correct factual errors by the hearing judge. On July 15, 2016, we issued an order informing the parties that we would rule on their respective requests in this opinion, after fully reviewing the case. We make those rulings below.

1. Further references to sections are to this source unless otherwise noted. Under section 6106, "[t]he commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise . . . constitutes a cause for disbarment or suspension."

2. Under section 6068, subdivision (a), a member has a duty "[t]o support the Constitution and laws of the United States and of this state."

3. Under section 6068, subdivision (c), a member has a duty "[t]o counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just . . . ."

[1b] First, we grant OCTC's motion to strike the portions of Schooler's brief that raise facts not in the record. (Rules Proc. of State Bar, rule 5.156(A) [Review Department considers only evidence admitted as part of Hearing Department record].)

[2b] Second, we deny Schooler's request to correct factual errors, which were merely facts and opinions from her testimony that were contrary to or unsupported by the record. Further, Schooler did not comply with the Rules of Procedure that *require* her to specify the disputed factual findings and include references to the record supporting her position. (Rules Proc. of State Bar, rules 5.153(A), 5.152(C).)

II. FACTUAL BACKGROUND[4]

Schooler was admitted to the practice of law in California on December 14, 1987, and has no prior record of discipline. She has been registered as inactive since January 31, 2014, and testified that she has not acted as an attorney for many years.

A. Schooler Was Responsible for Administering the Family Estate and Trusts

Schooler's parents designated her as trustee of her family's trusts and as personal representative of her mother's estate (Rowena Estate). Rowena Schooler (Rowena), Schooler's mother, died on October 27, 2004; Rowena's husband, Eugene B. Schooler, predeceased her on August 20, 1996. At the time of Rowena's death, she left two trusts: Trust B, which was created when her husband died; and another trust she created some time after her husband's death (Rowena Trust). She also left her will (Rowena Will).

Trust B contained 100 percent of the shares of Tierra Del Mar Corporation (TDM), a Nevada corporation. TDM owned a 25 percent interest in three parcels of property in Las Vegas, Nevada, parcels of property in Reno and Primm, Nevada, and a parcel of property in Riverside, California. Trust B also contained the remaining 75 percent interest in the three Las Vegas parcels owned by TDM, and another parcel in Reno.

The Rowena Trust contained a promissory note for just over $10,000, a 5 percent interest in a property in Escondido, California (Escondido Parcel), and proceeds from a life insurance policy.

The Rowena Estate contained the family residence located near the beach in Del Mar (Beach House), a promissory note for over $6,000, shares of stock (500) valued at approximately $100, personal belongings valued at approximately $3,000, and checking and savings accounts with a balance of approximately $320.

In 2007, the combined value of Trust B, the Rowena Trust, and the Rowena Estate was just over $7 million. Both Trust B and the Rowena Trust provided that, when the last surviving trustor died, the trust corpuses were to be divided into five equal shares and distributed to Schooler and her siblings: Katherine Schooler Kerns (Katherine); Eugene Andrew Schooler (Andrew); John Evan Schooler (John); and Louis V. Schooler (Louis).[5] The Rowena Will provided that any assets remaining in the Rowena Estate should be transferred to the Rowena Trust as if they had been in the trust on the date of Rowena's death.

B. Schooler Mismanaged the Beach House and Other Properties

When Schooler's parents originally created a family trust in 1989, it contained language designating the Beach House as a unique and special asset. It directed that the house should not be liquidated unless absolutely necessary, and should be made available for Schooler, Katherine, and Andrew to live in if they desired. The family trust also provided that any children living in the Beach House should pay the

4. The factual background is based on the parties' stipulations as to facts and admission of documents, 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) [factual findings entitled to great weight]; *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 [hearing judge best suited to resolve credibility questions].)

5. Andrew, John, and Louis are collectively referred to as the Schooler Brothers.

property taxes and a monthly rent not to exceed $2,500. When Rowena died, however, the special asset provision no longer applied because the Beach House was moved from the Rowena Trust to the Rowena Estate, which did not contain this specific provision.[6] Nevertheless, Schooler testified that she did not plan to sell the Beach House, and thus could comply with the restriction in the original family trust.

In 2004, when Rowena died, Schooler and her brother Andrew were living in the Beach House, and the lower level of the home was rented to tenants who were paying $2,200 per month. In early 2005, Schooler told Andrew he had to move out, and ordered the tenants to vacate the property. She told her brothers that she intended to paint and make repairs in order to sell the house by the end of 2005. But after Andrew and the tenants moved, Schooler did not put the Beach House on the market, re-rent it, or distribute it to her siblings by other means.[7] Instead, she continued to live in it and use income from the Rowena Trust and Trust B to repair and maintain it, spending a total of $106,779 on the Beach House from October 2005 to April 2007. She also changed the locks and installed a security gate, preventing the Schooler Brothers from accessing the property.

Schooler did not pay rent while she lived in the Beach House, although she represented in accountings that she paid $2,000 per month. Ultimately, she defaulted on the mortgage payments on the house, and Washington Mutual Bank recorded two notices of default and an election to sell against the property.

Schooler also did not pay taxes on the real property parcels in Las Vegas. As a result, the Office of the Clark County Treasurer issued three notices of intent to sell real property in December 2010. The notices stated that overdue taxes, penalties, and interest of $19,993, $20,004, and $19,900 were owed on the respective parcels, and the county had scheduled them to be sold at a public foreclosure auction.

Around April 25, 2011, Schooler filed a Chapter 11 bankruptcy petition on behalf of an entity called the "Schooler Trust" to avoid the sale of the parcels. On June 23, 2011, the petition was dismissed because the trust was ineligible to file for bankruptcy.

C. Schooler Failed to Distribute Assets of the Estate and Trusts

Between 2004 and 2011, Schooler did not distribute assets to the named beneficiaries as required by the trusts and the estate. By June 2011, the distributions Schooler made to herself and her siblings totaled $100,000 from the proceeds of the sale of one of the Las Vegas parcels and a 20 percent undivided interest in the Escondido Parcel (which equaled a 1 percent share of the entire parcel, worth $3,400 for each sibling). Schooler reported in an April 2006 letter that she paid herself trustee's fees of $25,000 to manage Trust B and $20,000 to manage the Rowena Trust, and a salary of $15,000 per year from TDM. Schooler did not distribute the assets despite repeated requests from the Schooler Brothers and their lawyer that she sell the Beach House and other real property and distribute the proceeds, along with the interests in TDM. Further, in 2007, Schooler declined to accept two offers to buy real estate parcels held by TDM or Trust B, one for $250,000 for each of two properties in Reno ($500,000 total), and a second for $2.25 million for three of the Las Vegas parcels.

D. Schooler Removed as Executor and Sanctioned by the Superior Court

In July 2007, the Schooler Brothers filed a petition to challenge Schooler's accounting related to the Rowena Estate and to surcharge and remove Schooler as executor, along with a related petition to ensure there had been no violation of the contest clause in the Rowena Will. Their challenges to the Rowena Estate, Trust B, and the Rowena Trust were combined and heard on June 23, 2011 in San Diego County Superior Court.

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6. This occurred in 2002 when Rowena borrowed $170,000, secured by a promissory note and deed of trust against the house.

7. During 2006, Schooler made offers to buy, or exchange real property parcels for, the Schooler Brothers' interest in the Beach House. The Schooler Brothers rejected these offers as unfair and unequal distribution proposals, which would result in Schooler and Katherine receiving more than their respective 20 percent shares of the trust and estate distributions.

Schooler was present at the hearing when Superior Court Judge Cline made an oral order removing her as trustee of the trusts and as executor of the Rowena Estate. The judge indicated his intent to fill those positions with an independent fiduciary, and ordered Schooler to produce documents on July 5, 2011 and to appear for a deposition on July 7, 2011. The judge also ordered the immediate transfer of the Beach House from the Rowena Estate to the Rowena Trust. On July 11, 2011, the judge issued a written order memorializing his oral ruling, and further ordered $2,280 in sanctions against Schooler.

On July 18, 2011, Judge Cline heard an ex parte motion regarding Schooler's failure to comply with his orders. The judge named Gloria Trumble as successor trustee and executor. He also found that Schooler had failed to comply with his previous order, and ordered her to pay those sanctions plus sanctions of $3,375 for non-compliance. In addition, he ordered Schooler to provide the original trust and estate documents to Trumble by August 2, 2011. Schooler did not produce these documents and instead appealed the superior court's orders, asserting that her appeal stayed the proceedings. At a hearing on August 10, 2011, Judge Cline informed Schooler that her appeal did not stay the proceedings, made additional findings to support appointment of a successor trustee, and clarified that Trumble was an interim trustee of the two trusts and a temporary executor of the estate.

Schooler appealed the rulings removing her as trustee and executor and appointing Trumble as her interim successor. In October 2012, the Court of Appeal filed a decision affirming Schooler's removal and Trumble's appointment, specifically rejecting Schooler's contentions that her appeal stayed the proceedings. On December 16, 2011, after a trial, Judge Cline issued a judgment and order and a statement of decision authorizing Trumble to sell the Beach House and the various real estate parcels, and directing her to increase the rent to $5,000 per month and commence eviction proceedings to remove Schooler from the Beach House.

E. Schooler Violated her Fiduciary Duties related to the Estate and Trusts

Judge Cline's statement of decision stated that Schooler "misused [her] discretion and authority" and "engaged in a course of conduct, the purpose of which was to obtain the sole and exclusive use and ownership of the [Beach House], to receive as much income from the assets of the two trusts and the estate as possible, to receive maximum distribution of the assets as possible, [and] to coerce her siblings into acceding to her demands and decisions." The decision also declared that Schooler's conduct resulted in the loss of substantial value of the various assets, that her intent was to personally enrich herself to the detriment of her siblings, and that her conduct caused harm to her siblings.

Judge Cline found that Schooler violated the following fiduciary duties, without limitation: (1) to carry out the terms of the trust, as found in Probate Code section 16000, by failing to make timely distributions; (2) to avoid a conflict of interest, as found in Probate Code section 16004, by taking a position contrary to those of other beneficiaries regarding assets; (3) of loyalty, as found in Probate Code section 16002, by taking steps to personally benefit herself to the detriment of other beneficiaries; (4) of impartiality, as found in Probate Code section 16003, by placing her interests ahead of all other beneficiaries; (5) to keep beneficiaries reasonably informed of the affairs of the trust, as found in Probate Code section 16060, by refusing to provide and concealing material information; (6) of care, as found in Probate Code section 16040, by acting in bad faith, making misrepresentations, and exercising discretionary power unreasonably; (7) of due care, by failing to list and sell property without justification and failing to accept cash offers for sale; (8) to preserve the trust property by failing to sell various properties, failing to pay taxes on the Las Vegas parcels, and failing to pay the mortgage on the Beach House; (9) acting in bad faith, as found in Probate Code section 16081; and (10) unlawfully misappropriating trust and estate assets for her own use and purposes.

The hearing judge in this disciplinary proceeding assigned great weight to Judge Cline's findings and adopted them as proof of the charges alleged in the First Amended NDC because they were supported by overwhelming, clear and convincing evidence.[8]

Pursuant to Judge Cline's December 2011 order, Trumble filed an unlawful detainer action against Schooler to evict her from the Beach House. Schooler responded on January 27, 2012, by filing a demurrer in which she falsely represented to the court that she was the personal representative of the Rowena Estate and the trustee of Trust B and the Rowena Trust. She made the same misrepresentations when Trumble sought a loan secured by the Beach House that the probate court authorized her to obtain. On February 29, 2012, Schooler executed and recorded a grant deed, conveying ownership of the Beach House to Katherine and herself. She executed the deed as "Executor" of the "Estate of Rowena L. Schooler" even though she had been removed by Judge Cline. On March 12, 2012, Schooler filed a motion to strike the unlawful detainer action, again falsely representing to the court that she was still the personal representative of the Rowena Estate and the trustee of Trust B and the Rowena Trust. Trumble testified that these actions impeded her ability to sell the Beach House, as ordered by the probate court. In May 2013, following trial on Trumble's petition for ownership and damages, Judge Julia Kelety ruled that Schooler wrongfully and in bad faith took property belonging to the Rowena Trust and that she was liable for $3.71 million in damages—twice the value of the Beach House at the time that Schooler conveyed ownership to herself and Katherine. Schooler has not paid this judgment.

F. Court of Appeal Sanctioned Schooler for Filing Frivolous Appeals

Schooler filed a series of appeals challenging the probate court's rulings and Trumble's actions, including Judge Cline's July 2011 order removing her as trustee and executor. She also appealed the judge's December 2011 order and judgment, which was dismissed when she failed to file an opening brief. In June 2012, she filed another appeal, raising many of the same issues contained in the dismissed appeal. In November 2013, the Court of Appeal dismissed this appeal as frivolous and taken for improper purposes, holding that Schooler and her counsel "made an unmistakable and bad faith effort to avoid the impact of [the court's] prior orders." The court ordered Schooler to pay sanctions of $10,725 to the Schooler Brothers and $8,760 to Trumble. Shortly thereafter, Schooler filed two additional appeals, later consolidated, challenging the probate court orders. Again, in October 2014, the Court of Appeal dismissed both appeals as meritless, finding that the "record more than amply supports a finding of subjective bad faith," and ordered additional sanctions of $10,260 to Trumble, and $8,500 to the court. Schooler has not paid any of the sanctions.

III. SCHOOLER IS CULPABLE OF ALL CHARGED MISCONDUCT

The hearing judge found Schooler culpable of each count of misconduct charged in the First Amended NDC. Neither party challenges these findings on review, and we adopt them as they are fully supported by the record.[9]

[3a] To begin, Schooler committed multiple acts of moral turpitude, in violation of section 6106, and failed to comply with the law, in violation of section 6068, subdivision (a), as follows. She misused her authority and discretion, and violated numerous fiduciary duties set forth in the Probate Code by intentional means that were frequently infused with dishonesty and/or concealment. She made repeated misrepre-

8. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

9. The First Amended NDC charged violations of: (1) section 6106 (moral turpitude—for breach of fiduciary duties as trustee and personal representative); (2) section 6068, subdivision (a) (failure to comply with laws—breach of fiduciary duties); (3) section 6106 (moral turpitude—intentional bad faith violation of court orders and misrepresentations); and (4) section 6068, subdivision (c) (maintaining unjust actions—filing frivolous appeals).

sentations to the court and third parties by filing documents falsely stating that she was a trustee and personal representative in an attempt to circumvent court orders. And she misrepresented her status when she executed a grant deed giving the Beach House to herself and Katherine, even though she knew that the court had ordered Trumble to evict her and sell the property. Finally, she intentionally violated court orders by failing to pay sanctions.[10]

[4] Schooler also maintained unjust actions, in violation of section 6068, subdivision (c), by filing several frivolous appeals that the appellate court dismissed after finding the arguments had no merit and were the result of subjective bad faith. These findings are entitled to great weight and are supported by clear and convincing evidence. (*In the Matter of Kinney* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 360, 365 [may rely on court of appeal opinion to which attorney was party as conclusive legal determination of civil matters bearing strong similarity to charged disciplinary conduct]; *In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 117-118 [court adopted frivolous appeal findings by court of appeal where respondent failed to produce any competing evidence].)

[5], [6a] Schooler claims that her misconduct should be excused because she was acting as a trustee for the family estate, not as an attorney, and because she relied on advice of counsel for her actions. First, relying on such advice from other counsel is not a defense in a discipline case. (*Sheffield v. State Bar* (1943) 22 Cal.2d 627, 632.) Second, Schooler disregarded her attorney's advice—he advised her by letter that the Beach House was not subject to the original trust provision designating it a special asset, and he told her she was free to distribute the assets after the Internal Revenue Service issued tax rulings in 2006. Moreover, it was *after* counsel represented Schooler that she executed the grant deed transferring the Beach House to her sister and herself, and falsely represented that she was still a trustee. **[6b]** The law is clear that even if Schooler was not practicing law, she was required to conform to the ethical standards required of attorneys. (*Crawford v. State Bar* (1960) 54 Cal.2d 659, 668 ["Attorneys must conform to professional standards in whatever capacity they are acting in a particular matter. [Citations.]"].) An attorney who breaches fiduciary duties that would justify discipline if there was an attorney-client relationship may be properly disciplined for the misconduct. (*In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, 373.)

IV. SUBSTANTIAL AGGRAVATION OUTWEIGHS MINIMAL MITIGATION[11]

A. Aggravation

The hearing judge found three factors in aggravation, which neither party challenges: multiple acts of misconduct over a period of years, including breach of fiduciary duties, misrepresentations to courts, and filing of frivolous appeals (std. 1.5(b)); significant harm to the beneficiaries of the trusts and estate for money spent on legal fees and substantial loss of the corpuses of the trusts (std. 1.5(j)); and indifference toward rectification or atonement for the consequences of her misconduct (std. 1.5(k)). Schooler blames others, including the courts, her brothers, and attorneys she claims advised her, for the problems caused by her misconduct. We agree with the hearing judge's findings and assign substantial weight to the overall aggravating evidence.

[7] We decline to assign the additional aggravation OCTC requested for dishonest testimony. (Std. 1.5(l).) The hearing judge heard Schooler testify over multiple days and did not make this finding, despite OCTC's request at trial. We give great weight to a judge's findings on candor because the judge who hears and sees the witness testify is best positioned to make this determination. (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 282 [hearing judge's findings on candor entitled to great weight].)

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10. [3b] We do not assign additional weight to Schooler's violations of section 6068, subdivision (a), because they are duplicative of the section 6106 violations. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403 [no additional weight given to duplicative charges].)

11. Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Schooler to meet the same burden to prove mitigation. All further references to standards are to this source.

Mitigation

The hearing judge correctly found that Schooler was entitled to mitigation for a 17-year period of discipline-free practice, moderated by the fact that she practiced law for only a short time. (Std. 1.6(a).)

[8] The judge also properly declined to assign mitigation credit for cooperation because Schooler's stipulation was to facts that were easy to prove, was entered into during the trial, and did not include any admission of culpability. (Std. 1.6(e); *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more mitigating weight accorded when culpability as well as facts admitted].)

V. DISBARMENT IS THE APPROPRIATE 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 standards for attorneys. (Std. 1.1.) Our disciplinary analysis begins with the standards which, although not binding, are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) The Supreme Court has instructed us to follow them whenever possible (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11), and to look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

Standard 2.11 is most applicable and provides that "[d]isbarment or actual suspension is the presumed sanction for an act of moral turpitude, . . . intentional or grossly negligent misrepresentation, or concealment of a material fact."[12] The standard also provides that "[t]he degree of sanction depends on the magnitude of the misconduct," including the extent of harm to the victim, the impact on the administration of justice, and the extent to which the misconduct related to the member's practice of law.

The hearing judge recognized that Schooler's misconduct was serious and deserved substantial discipline, but found that disbarment was neither necessary nor appropriate in view of case law. We disagree. As analyzed below, we find that Schooler's long-running, extremely harmful, and serious misconduct, along with the aggravating factors, supports disbarment.

[9a] Schooler had a fiduciary duty under the terms of the trusts to equitably distribute the Rowena Estate to the named beneficiaries. Unfortunately for them, she failed in performing these duties for seven years after her mother's death. In particular, she distributed almost none of the assets of the sizeable estate, and continued living in a major asset, the Beach House, after evicting her brother and rent-paying tenants. During the same time, she allowed the mortgage on the Beach House to go into default, failed to pay taxes on the Nevada properties, refused to accept offers to buy certain properties, and did not collect or pay any rent on the Beach House while she lived there. Her conduct contributed to a substantial loss in the value of the trust corpuses, which financially harmed her siblings who still have not received their full distribution of the estate. Moreover, after Schooler was removed as trustee, she filed a series of frivolous appeals and made misrepresentations to courts and others to try to retain control of the assets.

[9b] In sum, we find that Schooler's blatant disregard for her ethical duties and for the court's processes calls for discipline at the highest end of the range provided in standard 2.11—disbarment. This record well demonstrates that she is at risk for committing future misconduct given her varied wrongdoing and the aggravating factors, including her indifference. We conclude that our recommendation is supported by case law, and that the public, the courts, and the profession are best protected if Schooler is disbarred under standard 2.11.[13]

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12. Standard 1.7(a) provides that "[i]f a member commits two or more acts of misconduct and the [s]tandards specify different sanctions for each act, the most severe sanction must be imposed."

13. *Lebbos v. State Bar* (1991) 53 Cal.3d 37 (disbarment for multiple acts of moral turpitude and dishonesty, including pattern of abuse of judicial officers and court system); *Weber v. State Bar* (1988) 47 Cal.3d 492 (disbarment for violating court order to distribute estate assets, commingling and misappropriating estate funds, and engaging in moral turpitude and dishonesty); and *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179 (disbarment for 30-year attorney sanctioned for filing frivolous motions and appeals over 12 years who lacked insight and refused to change).

VI. RECOMMENDATION

We recommend that Jane L. Schooler be disbarred from the practice of law and that her name be stricken from the roll of attorneys admitted to practice in California.

We further recommend that Schooler must comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter.

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

VII. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

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

WE CONCUR:

McGILL, J.*
STOVITZ, J.**

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* Appointed to serve on the panel for this matter as a Hearing Judge of the State Bar Court, assigned by the Presiding Judge pursuant to rule 5.155(F) of the Rules of Procedure; as of November 1, 2016, serving as a Review Judge by appointment of the California Supreme Court.

**Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

STEVEN HOWARD UNGER

Petitioner for Reinstatement

[No. 16-R-46518]

Filed March 17, 2017

SUMMARY

A hearing judge dismissed a petition for reinstatement to the practice of law as untimely under rule 9.10(f) of the California Rules of Court. The petitioner filed his petition within three years after being notified that he had passed the Attorneys' Examination administered by the Committee of Bar Examiners, but more than three years after he actually took the examination. The hearing judge found that petitioner failed to take and pass the within three years prior to the filing of the petition for reinstatement, as required by the rule. (Hon. Donald F. Miles.)

Petitioner sought review. He argued that the three-year time limitation under rule 9.10(f) does not begin to accrue until a petitioner passes the examination, and thus, his petition for reinstatement was timely filed. The Review Department agreed, and therefore reversed the dismissal and remanded for further proceedings.

COUNSEL FOR PARTIES

For State Bar: Kevin B. Taylor

For Respondent: Kevin P. Gerry

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **130 Generally Applicable Procedural Issues—Procedure on Review (rules 5.150-5.160)**

169 Miscellaneous Issues re: Standard of Proof/Standard of Review

Where the Review Department conducts a summary review under rule 5.157 of the Rules of Procedure of the State Bar, the hearing judge's decision is final as to all material findings of fact, and the issues are limited to: (1) contentions that the facts support conclusions of law different from those reached by the hearing judge; (2) disagreement about the appropriate disposition or degree of discipline; or (3) other questions of law. Issues and contentions not raised are waived on summary review.

[2] **2505 Issues in Reinstatement Proceedings—Special Procedural Issues—Interpretation of Rules of Procedure, Div. 7, Ch. 3 (rules 5.440-5.447)**

2509 Issues in Reinstatement Proceedings—Special Procedural Issues—Other Procedural Issues

The requirement in rule 9.10(f) of the California Rules of Court, and rule 5.441 of the Rules of Procedure of the State Bar, that a petitioner for reinstatement must have taken and passed the Attorneys' Examination administered by the Committee of Bar Examiners, is a single pre-filing requirement that must be fully satisfied before a petitioner can file a petition for reinstatement. Thus, the three-year time limit within which a petitioner must file the petition begins to run on the date of the written notification of passage mailed to the petitioner, not when the petitioner takes the examination. Accordingly, where a petitioner filed a petition for reinstatement within three years after the date he passed the examination but more than three years after he sat for the examination, his application was timely filed.

ADDITIONAL ANALYSIS

None

OPINION

THE COURT*

In 2002, Steven Howard Unger resigned from the State Bar of California with disciplinary charges pending. In 2016, he filed a petition for reinstatement to the practice of law (petition) and attached evidence that he had taken and passed the Attorneys' Examination administered by the Committee of Bar Examiners (Attorney Exam). On July 27, 2016, a hearing judge dismissed the petition as untimely under rule 9.10(f) of the California Rules of Court (Rule 9.10(f)). Unger appeals, arguing that the hearing judge erroneously interpreted that rule, and requests that his petition proceed on the merits. The Office of the Chief Trial Counsel of the State Bar (OCTC) maintains that the hearing judge ruled correctly. Having reviewed the pleadings submitted in this matter, we reverse the dismissal and remand for further proceedings under rule 5.440 et seq. of the Rules of Procedure of the State Bar.

I. PROCEDURAL HISTORY ON REVIEW

On September 1, 2016, we granted Unger's unopposed request to designate this matter for summary review under rule 5.157 of the Rules of Procedure of the State Bar. Unger and OCTC then submitted briefing. On November 4, 2016, we granted Unger's unopposed request for judicial notice and ordered the record augmented to include a copy of a non-published Hearing Department order filed on August 3, 2016, in *In the Matter of Ellerman* (State Bar Court Case No. 16-R-13066) (*Ellerman*). (Rules Proc. of State Bar, rules 5.156(B), 5.157(D); Evid. Code, § 452, subd. (d).) Oral argument took place on January 25, 2017.

II. FACTS AND CONCLUSIONS OF LAW

[1] In summary review proceedings, the hearing judge's decision is final as to all material findings of fact, which are binding on the parties. (Rules Proc. of State Bar, rule 5.157(B).) On review, the issues "are limited to: [¶] (1) contentions that the facts support conclusions of law different from those reached by the hearing judge; [¶] (2) disagreement about the appropriate disposition or degree of discipline; or [¶] (3) other questions of law." (Rules Proc. of State Bar, rule 5.157(B).) If the parties do not raise an issue or contention, it is waived. (Rules Proc. of State Bar, rule 5.157(C).)

In this case, the sole question before us is whether Unger timely filed his petition. To answer this, we must determine what triggers the time limitation set forth in Rule 9.10(f). That rule states, in relevant part, that petitioners for reinstatement who resigned with charges pending "must establish present ability and learning in the general law by providing proof, at the time of filing the application for readmission or reinstatement, that they have taken and passed the [Attorney Exam] within three years prior to the filing of the application for readmission or reinstatement."[1]

A. Petition for Reinstatement

Unger sat for the Attorney Exam administered in February 2013. He received notification, dated May 17, 2013, that he had passed the exam. On May 16, 2016, Unger filed his petition and attached the passage notification as his evidence of compliance with Rule 9.10(f) and Rule 5.441.

On June 27, 2016, OCTC filed a motion to dismiss on the grounds that Unger "failed to have taken and passed" the Attorney Exam "within three years prior to the filing of the petition for reinstatement." OCTC argued that Unger had to have filed his petition no later than February 25, 2016, to be timely, three years after he *took* the Attorney Exam. In his opposition, Unger argued that the three-year limitation cannot accrue until the petitioner *passes* the exam.

*Before Purcell, P. J., Honn, J., and McGill, J.

1. Similarly, rule 5.441(B)(3)(a) of the Rules of Procedure of the State Bar (Rule 5.441) states that petitioners for reinstatement who resigned with charges pending "must establish that they have taken and passed the [Attorney Exam] within three years prior to the filing of the petition for reinstatement."

B. Dismissal Order

In ruling on OCTC's motion, the hearing judge stated that the "limitation on the time period during which the petitioner is required to take the examination is important to ensuring that the results of the examination, when favorable, are indicative of that individual's present ability and learning in the general law." (Underlining in original.) The judge reasoned that Unger's proposed interpretation would place "no time limitation on when the petitioner is required to take the examination but, instead, merely require the reinstatement petition to be filed within three years after the individual has been notified of the examination results." He concluded that Unger "failed to present proof that he successfully took the examination within three years prior to the filing of his petition, and the evidence presented by him showed that the examination he passed was outside the three-year window."

C. Arguments on Review

In his opening brief on review, Unger advances three arguments. First, he contends that the language of the rule supports multiple readings, so we should consider it in the context of its purpose—to ensure that the petitioner has shown competence—and that purpose is served by proof of passage of the exam, not proof of taking it. Second, Unger compares the rules governing reinstatement with the rule governing admission, which he asserts "specifically" sets forth the applicable time limitation for using California Bar Examination[2] results as "[n]o later than five years from the last day of administration of the California Bar Examination the applicant passes." (Rules of State Bar, rule 4.17(A).) He argues that "[h]ad the State Bar wanted to assert the last day of the [Attorney Exam] as the applicable accrual date, they could have and should have done so." Third, Unger urges that strong public policy favors trying cases on the merits.

OCTC counters that if the "intention was to measure the three[-]year time period from notification of passage, the rule would have stated *within three years after notice of passage of the attorney exam.*" (Italics in original.) Further, it contends that the word "passed" in Rule 9.10(f) only clarifies that a petitioner must be successful in taking the Attorney Exam to apply for reinstatement; the word itself has no impact on the time limitation. Additionally, OCTC argues that the date the petitioner is notified of passage is of little relevance in assessing his or her present ability and learning in the general law. OCTC did not address Unger's observation regarding the rule on admission or his policy argument favoring consideration of his disciplinary case on the merits.

D. Analysis

Neither the Supreme Court nor the State Bar Court has addressed in a published decision the event that triggers the start of the three-year limitation at issue here. We observe that a few days after the judge filed his order dismissing Unger's petition in this matter, a hearing judge in a different reinstatement matter, *Ellerman*, concluded, "As petitioners cannot file for reinstatement until they pass the examination, [OCTC's] proposed interpretation of rule 5.441(B)(3)(a) effectively and surreptitiously reduces the window of time to petition for reinstatement from three years to approximately thirty-three months. Such an interpretation is contrary to the clear reading of the rule, and, as pointed out by Petitioner, serves no purpose other than creating a trap for unwary petitioners. Moreover, there is a strong public policy favoring the resolution of matters on their merits." (*Ellerman*, *supra*, order filed Aug. 3, 2016.)[3]

[2] Looking at the plain language of Rule 9.10(f) and Rule 5.441, we read "have taken and passed the [Attorney Exam]" as a single prefiling requirement[4] that must be fully satisfied before a petitioner can file

2. Petitioners for reinstatement are required to take the Attorney Exam rather than the California Bar Examination, which individuals seeking admission must pass.

3. We take judicial notice of the fact that in *Ellerman*, OCTC has filed a petition for interlocutory review challenging the hearing judge's order, which is pending before this court. (Rules Proc. of State Bar, rules 5.156(B), 5.157(D); Evid. Code, § 452, subd. (d).)

4. A petitioner is also required to have submitted fingerprints to the California Department of Justice, to have paid all discipline costs and reimbursed any payments made by the Client Security Fund, and to include a $1,600 filing fee. (Rules Proc. of State Bar, rule 5.441(B)(1), (2) & (C).)

a petition for reinstatement. Taking the Attorney Exam does not satisfy the requirement; the petitioner fulfills the prefiling requirement only when he or she passes the exam. We conclude that the most reasonable reading of the rule is that passage of the exam triggers the start of the three-year limitation. Thus, a petitioner must file a petition for reinstatement within three years after the date he or she passed the Attorney Exam, which is the date of the written notification mailed by the Committee of Bar Examiners to the petitioner. In this case, the date of passage was May 17, 2013, and we find that Unger timely filed his petition within three years of that date on May 16, 2016.

We disagree with the hearing judge's reasoning that this reading of the rule would result in "no time limitation on when the petitioner is required to take the examination." Our general understanding is that the Committee of Bar Examiners notifies test takers of examination results in writing within three to four months after the administration of the Attorney Exam. Should a hearing judge confront a factual situation where a petitioner's notification is dated more than four months after the administration of the Attorney Exam, the judge retains the discretion to determine, based on the particular facts of the case, whether the petitioner has failed to timely file for reinstatement.

III. ORDER

For the reasons set forth above, we reverse the hearing judge's dismissal of Unger's petition for reinstatement to the practice of law, and remand this matter to the Hearing Department to allow for further proceedings under rule 5.440 et seq. of the Rules of Procedure of the State Bar.

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

LEO JOSEPH MORIARTY, JR.

A Member of the State Bar

[No. 15-O-10406]

Filed April 20, 2017

SUMMARY

In respondent's third disciplinary proceeding, a hearing judge found respondent culpable of moral turpitude in two client matters for failing to correct a misrepresentation made on his behalf to an administrative tribunal and intentionally making a false representation to an administrative tribunal. However, the hearing judge dismissed charges that respondent failed to obey orders of an administrative tribunal and failed to report related sanctions to the State Bar, concluding that the specific tribunal involved was not a "court" and that sanctions issued by its administrative law judges were not "judicial sanctions." The hearing judge also found one factor in mitigation and three factors in aggravation, including respondent's two prior records of discipline, but declined to recommend the presumptive discipline of disbarment, instead recommending an 18-month actual suspension. (Hon. Yvette D. Roland, Hearing Judge.)

The Office of Chief Trial Counsel of the State Bar appealed and sought disbarment. Respondent did not appeal, but sought dismissal. The Review Department affirmed the hearing judge's two moral turpitude culpability determinations, and found additional charged misconduct for seeking to mislead a judge, failing to obey court orders, and failing to report judicial sanctions to the State Bar. The Review Department also found one additional factor in aggravation, and recommended that respondent be disbarred.

COUNSEL FOR PARTIES

For State Bar of California: Allen Blumenthal, Esq.

For Respondent: Leo J. Moriarty, Jr., in pro per.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a-c] **204.20 Substantive Issues—Culpability—General—Intent requirement**
221.12 Substantive Issues—Culpability—State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)—Found—Gross negligence

Moral turpitude includes false or misleading statements to a court or tribunal. Actual intent to deceive is not necessary; gross negligence in creating a false impression is sufficient. Willful deceit violates section 6106. Where respondent took no steps to correct record despite notice that assistant made misrepresentation to administrative tribunal on respondent's behalf, on which tribunal had relied, respondent ratified assistant's misrepresentation, and thus was culpable of moral turpitude by gross negligence.

[2 a, b] **204.20 Substantive Issues—Culpability—General—Intent requirement**
213.40 Substantive Issues—Culpability—State Bar Act Violations—Section 6068(d) (do not mislead courts and judges)

Where respondent did not direct assistant to make misrepresentation to administrative tribunal on respondent's behalf, but took no steps to correct record after learning of misrepresentation, respondent was not culpable of violating section 6068(d), because he did not act with specific intent to deceive tribunal.

[3 a-f] **106.30 Procedural Issues—Issues re Pleadings—Duplicative charges**
204.20 Substantive Issues—Culpability—General—Intent requirement
213.40 Substantive Issues—Culpability—State Bar Act Violations—Section 6068(d) (do not mislead courts and judges)
221.11 Substantive Issues—Culpability—State Bar Act Violations—Section 6106 (moral turpitude, corruption, dishonesty)—Deliberate dishonesty/fraud —Found

Misrepresentation of fact to court for purpose of obtaining continuance violates attorney's duty not to mislead courts. For this purpose, administrative tribunal acting in quasi-judicial capacity is not distinct from court. Where respondent directed assistant to make material misrepresentation to administrative tribunal on respondent's behalf, and then took no steps to correct record despite notice that tribunal had relied on misrepresentation, respondent was culpable of intentional act of moral turpitude and of misleading tribunal, but violations were treated as single offense involving moral turpitude, and no additional weight was assigned to duplicative charge.

[4] **204.20 Substantive Issues—Culpability—General—Intent requirement**
220.00 Substantive Issues—Culpability—State Bar Act Violations—Section 6103, clause 1 (disobedience of court order)

To prove failure to obey court order, evidence must establish attorney knew what he or she was doing or not doing, and intended to act or abstain from acting. Where attorney was aware of orders requiring him to provide documentation and pay sanctions, and neither complied nor sought relief, attorney was culpable of disobeying court order.

[5] **204.90 Substantive Issues—Culpability—General—Other issues**
220.00 Substantive Issues—Culpability—State Bar Act Violations—Section 6103, clause 1 (disobedience of court order)

Where respondent represented clients before administrative tribunal, respondent's activity constituted practice of law because application of legal knowledge and technique was required.

[6 a-e] **204.90 Substantive Issues—Culpability—General—Other issues**
220.00 Substantive Issues—Culpability—State Bar Act Violations—Section 6103, clause 1 (disobedience of court order)

Scope of section 6103 is not limited to courts or constitutional administrative agencies; it enforces standards governing attorneys' conduct before all tribunals. Statutes specifying powers of Office of Administrative Hearings (OAH), and giving its administrative law judges (ALJs) authority to issue orders, contemplate that OAH should be treated as a court, and attorneys must obey its orders. Accordingly, where respondent willfully failed to comply with orders of an OAHALJ, respondent was culpable of violating section 6103.

[7 a-d] **162.20 Standards of Proof/Standards of Review—Quantum of Proof—Respondent's burden in disciplinary matters**
204.10 Substantive Issues—Culpability—General—Wilfulness requirement
220.00 Substantive Issues—Culpability—State Bar Act Violations—Section 6103, clause 1 (disobedience of court order)

Attorneys must obey a tribunal's orders unless they take steps to have them modified or vacated. Where respondent never sought relief from administrative tribunal's orders on basis of inability to comply or impossibility of compliance, Review Department rejected respondent's arguments that failure to comply was not willful, and that it would have been a waste of time to seek modification because his ability to comply was so uncertain. Fact that tribunal's orders were submitted to a board for final action also did not excuse respondent's noncompliance, where respondent never disputed finality or validity of orders, and did not seek stay of enforcement or appellate relief.

[8 a, b] **214.50 Substantive Issues—Culpability—State Bar Act Violations—Section 6068(o) (comply with reporting requirements)**

Statutory duty to report sanctions to State Bar applies to sanctions issued by all administrative agencies acting in a judicial or quasi-judicial capacity. Accordingly, where respondent failed to timely report sanctions imposed by Office of Administrative Hearings, respondent was culpable of violating section 6068(o)(3).

[9] **162.20 Standards of Proof/Standards of Review—Quantum of Proof—Respondent's burden in disciplinary matters**
204.10 Substantive Issues—Culpability—General—Wilfulness requirement
204.20 Substantive Issues—Culpability—General—Intent requirement
204.90 Substantive Issues—Culpability—General—Other general substantive issues re culpability
214.50 Substantive Issues—Culpability—State Bar Act Violations—Section 6068(o) (comply with reporting requirements)

Good faith, or even ignorance of the law, is no defense to a charged violation of statute requiring attorneys to report judicial sanctions to State Bar. Particularly where respondent did not establish that his failure to report sanctions imposed by administrative tribunal was attributable to his belief at the time that statute did not require reporting such sanctions, respondent was culpable of violating section 6068(o)(3).

[10] **523 Aggravation—Multiple acts of misconduct (1.5(b))—Found but discounted or not relied on**

Where respondent committed two acts of moral turpitude and also violated four orders issued by an administrative tribunal, and failed to report two judicial sanctions, respondent committed multiple acts of wrongdoing, a factor that was assigned moderate aggravating weight.

[11] **591 Aggravation—Indifference to rectification/atonement (1.5(k))—Found**

Where respondent contended there was no need to clarify record after he obtained continuances of hearings based on misrepresentations, and opined that statutory duty to report sanctions to State Bar was "low on the food chain with respect to reportability," respondent's failure to appreciate wrongfulness of his conduct, and his lack of insight, made him a danger to public and legal profession, and were assigned significant weight in aggravation.

[12 a-c] **801.45 Application of Standards—Deviation from standards—Found not to be justified**
801.47 Application of Standards—Deviation from Standards—Necessity to explain
806.10 Application of Standards—Standard 1.8 (Effect of Prior Discipline) —(b) Disbarment after two priors—Applied

Where (a) respondent had received brief actual suspensions in two prior disciplinary matters; (b) respondent's prior and current misconduct demonstrated his unwillingness or inability to conform to ethical norms; and (c) respondent's limited mitigation neither was compelling, nor predominated over significant aggravation, evidence presented no adequate reason to depart from standard making disbarment appropriate discipline after two priors involving actual suspension.

ADDITIONAL ANALYSIS

Culpability

Found

213.41 Section 6068(d) (do not mislead courts and judges)
214.51 Section 6068(o) (comply with reporting requirements)
220.01 Section 6103, clause 1 (disobedience of court order)

Not found

213.45 Section 6068(d) (do not mislead courts and judges)

Aggravation

Found

511 Prior record of discipline (1.5(a))
591 Indifference to rectification/atonement (1.5(k))

Found but discounted or not relied on

586.30 Harm to administration of justice (1.5(j))

Mitigation

Found but discounted or not relied on

735.30 Candor and cooperation with Bar (1.6(e))

Not found

725.59 Emotional/physical disability/illness (1.6(d))—Other reason
740.51 Good character references (1.6(f))—Insufficient number or range of references
765.51 Substantial pro bono work—Insufficient evidence

Discipline

1010 Disbarment
2311 Involuntary Inactive Enrollment After Disbarment Recommendation—Imposed

OPINION

HONN, J.

This is Leo Joseph Moriarty, Jr.'s, third disciplinary proceeding since his 1989 admission to the State Bar of California. In 2000, he received a 30-day actual suspension after stipulating to misconduct in two matters (*Moriarty I*). In 2010, he received a 45-day actual suspension after stipulating to misconduct in one matter (*Moriarty II*).

In the present case, Moriarty is charged with misconduct in two client matters. A hearing judge found him culpable of moral turpitude for: (1) failing to correct a misrepresentation made on his behalf to an administrative tribunal; and (2) intentionally making a false representation to an administrative tribunal. The judge dismissed charges, however, that Moriarty failed to obey orders of an administrative tribunal and failed to report related sanctions to the State Bar. The judge concluded that the specific tribunal involved was not a "court" and that sanctions issued by its administrative law judges (ALJs) were not "judicial sanctions."

After weighing factors in aggravation and mitigation, the judge considered standard 1.8(b),[1] which provides for disbarment when an attorney has two or more prior records of discipline, subject to certain exceptions. She did not recommend disbarment, though, because "the timing of [Moriarty's] misconduct" and "the nature and extent of [his] prior disciplines do not justify disbarment." Instead, she recommended discipline that included an 18-month actual suspension.

The Office of Chief Trial Counsel of the State Bar (OCTC) appeals. It argues that Moriarty is culpable on all counts, additional aggravation should be found, and he should be disbarred even if we affirm the dismissals. Moriarty does not appeal, but requests a dismissal. He contends that the judge correctly dismissed eight counts, but erred in finding him culpable of two counts of moral turpitude. Further, he asserts that even if he is culpable on those two counts, an 18-month actual suspension, not disbarment, is appropriate.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we affirm most of the judge's findings of fact, her two moral turpitude culpability determinations, and most of her aggravation and mitigation findings. We disagree, however, with dismissal of one of the other charged counts and with her decision not to recommend disbarment. Moriarty's culpability in the present matter is serious. Coupled with his prior misconduct, some of which mirrors his present wrongdoing, his behavior demonstrates that he is unwilling or unable to follow ethical rules. Further, he failed to prove compelling mitigation. As such, we do not find sufficient justification to depart from standard 1.8(b), and recommend disbarment as necessary to protect the public, the profession, and the administration of justice.

I. PROCEDURAL BACKGROUND

On October 13, 2015, OCTC filed a 10-count Notice of Disciplinary Charges (NDC), charging Moriarty with two counts of seeking to mislead a judge, two counts of moral turpitude through misrepresentation, four counts of failing to obey a court order, and two counts of failing to report judicial sanctions. The parties filed a Stipulation as to Facts and Admission of Documents on January 26, 2016, and a Supplemental Stipulation as to Facts on February 3, 2016. Trial was held on February 2 and 3, 2016, and posttrial briefing followed. On May 23, 2016, the hearing judge issued her decision.

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

II. FACTUAL BACKGROUND[2]

Teresa Jacobo and George Mirabal were ex-councilmembers for the City of Bell (City). At all relevant times, Moriarty represented Jacobo and Mirabal in separate matters before the Office of Administrative Hearings (OAH) involving their individual disputes with the City and the California Public Employees' Retirement System (CalPERS) concerning the reduction of their retirement benefits (Jacobo matter and Mirabal matter, respectively).

A. The Jacobo Matter

An OAH hearing was set in the Jacobo matter on September 12, 2014. Moriarty testified that he did not feel well the night before the hearing and, due to his prior medical history, believed he was having a heart attack. Having no medical insurance, he self-treated his symptoms with nitroglycerin and aspirin. That same evening, Moriarty's fiancée spoke to his assistant, Lazaro Machado,[3] and explained that Moriarty may be having a heart attack and may need to go to the hospital. Moriarty testified that he instructed Machado to seek a continuance of the next day's hearing. Moriarty emailed Machado, instructing him not to provide his cell phone number to opposing counsel. He also wrote, "Thus I might or might not go to the hospital (none of their business)."

On the morning of September 12, 2014, Machado called the City's and CalPERS's respective counsel and the OAH, and separately informed them that Moriarty was experiencing heart problems and could not attend the hearing. Machado told them that Moriarty was going, or had been taken, to the hospital. The OAH treated Machado's call as a request for a continuance, and filed an order that same day granting that request (September 12 Order). The order stated that "Machado reported that he was informed by Moriarty's wife that Moriarty was having heart issues and, therefore, would be unable to attend the hearing [that] morning, and that [Moriarty's] wife had taken [Moriarty] to the hospital." The OAH also ordered Moriarty to file with the OAH and serve on opposing counsel documentation substantiating the medical emergency that rendered him unavailable for the September 12, 2014 hearing. Moriarty received this order.

Moriarty was not hospitalized nor did he seek or obtain any professional medical treatment on September 11 or 12, 2014. He also did not file or serve any documentation, as ordered. Subsequently, the City and CalPERS filed separate motions for sanctions against Moriarty due to his failure to provide substantiating documentation. Each also filed a notice of hearing on its motion, notifying Moriarty that a hearing was set for October 17, 2014. Moriarty received these motions and notices.

Moriarty did not attend the October 17, 2014 sanctions hearing. A special appearance attorney appeared on his behalf and made an oral motion to continue the hearing on the grounds that Moriarty was suffering "health issues" and needed an additional 30 days to file and serve the medical documentation required by the September 12 Order. The OAH denied the oral motion.

On October 21, 2014, the OAH filed separate orders granting the City's and CalPERS's motions for sanctions against Moriarty. In each order, the OAH found that Moriarty's actions in requesting a continuance and subsequently failing to provide the required medical documentation constituted bad faith actions or tactics that were frivolous and solely intended to cause unnecessary delay. The OAH ordered him to pay monetary sanctions of $1,419.06 to the City and $2,966.75 to CalPERS within 30 days. Both orders were served on Moriarty, and he received them.

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2. The factual background is based on the parties' two written stipulations, 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).) Moriarty stipulated to most facts in this case, which are largely not in dispute. On review, the issues presented are primarily questions of law.

3. Machado is a former attorney and Moriarty's former law partner who resigned from the State Bar with disciplinary charges pending in November 2004. Those charges involved office mismanagement. He also had a prior discipline record involving misrepresentations to doctors and client trust account violations.

Moriarty failed to timely pay the sanctions. The City pursued a small claims action against him in superior court. On January 17, 2015, the court entered a judgment requiring Moriarty to pay the City $1,419.06 in principal and $91.86 in costs. On April 20, 2015, a notice of entry of judgment was served on Moriarty, which he received. Moriarty has not paid the full sanctions owed to the City,[4] and has not paid any sanctions to CalPERS. In addition, he has not reported to the State Bar, in writing or otherwise, either of the sanctions imposed by the OAH.

B. The Mirabal Matter

On September 23, 2014—just two weeks after the OAH filed the September 12 Order in the Jacobo matter—an OAH hearing was set in the Mirabal matter (September 23 hearing). Moriarty testified that he was again experiencing health problems prior to the hearing. His fiancée insisted that he should go to the hospital and contacted Machado to express her concern. Moriarty instructed Machado to seek a continuance of the hearing. Either Moriarty or his fiancée informed Machado that Moriarty was at the hospital receiving an angiogram and possibly another angioplasty for a new stent implant.

On September 22, 2014, Moriarty's office, on his behalf, filed a written motion requesting a continuance of the September 23 hearing because he could not attend due to health issues. The motion stated: "[Moriarty] is today at the hospital, receiving an Angiogram and possibly another Angioplaty [*sic*] for a new Stent implant." Machado provided Moriarty with a copy of the motion within two days after its filing.[5] In fact, Moriarty was not hospitalized on September 22 or 23, 2014, and he did not obtain any medical treatment at or around the time of the September 23 hearing.

On October 8, 2014, the OAH filed a written order granting Moriarty's continuance request (October 8 Order). The OAH ordered Moriarty to file with the OAH and serve on the City's and CalPERS's respective counsel documentation signed by a competent medical professional confirming his hospitalization on September 22, 2014, and his inability to proceed with the September 23 hearing. The OAH order was served on Moriarty, and he received it.

Moriarty did not file or serve any of the ordered documentation. On October 27, 2014, CalPERS filed and served a motion for sanctions against Moriarty due to his failure to do so. Moriarty received the motion.[6] A hearing on CalPERS's motion was set for November 10, 2014. Ultimately, on November 13, 2014, CalPERS withdrew its motion because Moriarty paid it the full amount requested.

III. MORIARTY IS CULPABLE OF MULTIPLE ACTS OF MISCONDUCT

A. Moriarty Committed Two Acts of Moral Turpitude

1. Count One: Seeking to Mislead Judge (Bus. & Prof. Code, § 6068, subd. (d))[7]

Count Two: Moral Turpitude (Misrepresentation) (§ 6106)[8]

OCTC charged Moriarty with violating section 6106 by stating, or causing to be stated, to the

4. On August 11, 2015, Moriarty entered into an agreement with the City to make monthly payments of $142.70, beginning on September 1, 2015. He made payments on September 25 and October 29, 2015, but failed to make any further payments. At trial, he testified that he has been financially unable to do so.

5. Moriarty testified that "at some point [he] must have seen" it, but does not recall when.

6. The City did not seek sanctions because it was able to inform its witnesses before they appeared and, therefore, no costs were incurred.

7. Further references to sections are to this source unless otherwise noted. Section 6068, subdivision (d), provides that an attorney has a duty "[t]o employ . . . those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."

8. Section 6106 states in relevant part: "The commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension."

OAH that he had been taken to the hospital and would be unable to attend the scheduled September 12, 2014 hearing in the Jacobo matter when he knew, or was grossly negligent in not knowing, that the statement was false, and took no steps to rectify the misrepresentation (Count Two). OCTC also charged Moriarty with violating section 6068, subdivision (d), based on the same facts (Count One). The hearing judge found Moriarty culpable as charged,[9] but dismissed Count One as duplicative of Count Two because the same misconduct underlies both violations. As detailed below, we find that Moriarty acted with gross negligence and committed an act of moral turpitude. But we dismiss Count One because he did not act with the requisite intent to establish a violation of section 6068, subdivision (d).

Section 6106 applies to misrepresentations and concealment of material facts. (See *In the Matter of Crane and Depew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 154-155.) "No distinction can . . . be drawn among concealment, half-truth, and false statement of fact. [Citation.]" (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315, quoted in *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 156.) **[1a]** It is well established that moral turpitude includes an attorney's false or misleading statements to a court or tribunal. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 786.) "The actual intent to deceive is not necessary; a finding of gross negligence in creating a false impression is sufficient for violation of section 6106. [Citations.]" (*Ibid.*)

The evidence here clearly and convincingly[10] demonstrates that Machado misrepresented to the OAH on September 12, 2014 that Moriarty went to the hospital for his heart problems. The OAH's September 12 Order shows that the misstatement was material and did mislead because the continuance grant was based on Moriarty's purported medical emergency. However, Moriarty was not hospitalized and did not obtain any medical treatment at that time. Indeed, in sanctioning Moriarty, the OAH concluded that "there was no medical emergency that made [Moriarty] unable to appear for the September 12, 2014 hearing, and the last-minute continuance request due to a medical emergency was without merit, frivolous and solely intended to cause unnecessary delay."

[1b] [2a] There is a lack of evidence that Moriarty directed Machado to make a misrepresentation. However, ample evidence shows that Moriarty had notice that Machado did make a misrepresentation on Moriarty's behalf and that the OAH relied upon that misrepresentation. Further, despite knowing that Machado was an attorney who had resigned with charges pending and who had a history of making misrepresentations, Moriarty assigned him the task of seeking a continuance from the OAH. Moriarty then took no steps to correct the record despite receiving the September 12 Order that showed the OAH had been misled. Moriarty had a duty to advise the OAH of the true state of affairs (*Williams v. Superior Court* (2007) 147 Cal.App.4th 36, 56 ["Attorneys have the duty to be forthright and honest with the court, and to be honest with each other"]),[11] yet he did nothing. As such, we find that Moriarty ratified Machado's misrepresentation. (See, e.g., *In the Matter of Conner* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 93, 101 [attorney's ratification of assistant's letter to client that amounted to extortion constituted moral turpitude where attorney did nothing to retract letter].) Doing so constitutes moral turpitude by gross negligence. (See, e.g., *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 90-91 [gross negligence in creating false impression sufficient for violation of § 6106].)

[2b] We do not, however, find sufficient evidence to establish that Moriarty intended to deceive the OAH. Thus, we dismiss Count One. (*In the*

9. Although it is not entirely clear, it seems that the judge found that Moriarty violated section 6106 through gross negligence.

10. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

11. Another administrative entity, the Workers' Compensation Appeals Board (WCAB), recently reminded attorneys appearing before it of "their continuing duty to timely advise the WCAB (i.e., both the Appeals Board and the [workers' compensation ALJs]) of any material change in circumstances that could substantially affect cases pending before of it." (*Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 [2014 WL 4975935, at *10, fn. 24] (Appeals Board en banc).)

Matter of Chesnut (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174 [attorney must act with intent to deceive to violate § 6068, subd. (d)].)

2. Count Eight: Seeking to Mislead Judge (§ 6068, subd. (d))

Count Nine: Moral Turpitude (Misrepresentation) (§ 6106)

[3a] We also affirm the hearing judge's finding that Moriarty is culpable of violating section 6106 in the Mirabal matter by causing to be stated in writing to the OAH on September 22, 2014, that "[Moriarty] is today at the hospital, receiving an Angiogram and possibly another Angioplaty [*sic*] for a new Stent implant," when he knew, or was grossly negligent in not knowing, that the statement was false, and thereafter took no steps to rectify the misrepresentation (Count Nine), and of violating section 6068, subdivision (d), based on the same facts (Count Eight). The judge found that Moriarty intentionally made a misrepresentation, but dismissed Count Eight as duplicative of Count Nine. As detailed below, we disagree with the dismissal of Count Eight.

[3b] Like the judge, we find that Machado misrepresented, in writing, that Moriarty went to the hospital and received an emergency medical procedure the day before the September 23 hearing. Although Moriarty and Machado both testified that Moriarty never directed Machado to mislead the OAH by stating that Moriarty went to the hospital, the judge found that neither Moriarty's nor Machado's testimony was credible. This credibility finding is entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A); *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 280; *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 [hearing judge best suited to resolve credibility questions].) The motion for a continuance—filed just two weeks after the OAH issued the September 12 Order in the Jacobo matter—was specific and included detailed information about Moriarty's condition as the basis for the request. Yet Moriarty was not hospitalized and did not obtain any medical treatment at or near the time of the September 23 hearing. As such, we find that Moriarty directed Machado to make the material misrepresentation.

[3c] Further, Moriarty again failed to rectify a misrepresentation made by Machado. Moriarty received a copy of the motion soon after it was filed, and received the OAH's order granting his continuance request based on his purported medical emergency. Nevertheless, Moriarty took no steps to correct the record, and thereby violated his ethical duty. (*Williams v. Superior Court*, *supra*, 147 Cal.App.4th at p. 56.) Given these facts, we find that Moriarty committed an intentional act of moral turpitude, and also violated section 6068, subdivision (d). (See *Grove v. State Bar*, *supra*, 63 Cal.2d at p. 315.)

[3d] We disagree with the dismissal of Count Eight. Given that the same intentional misconduct underlies the violations of sections 6106 and 6068, subdivision (d), however, we treat them as a single offense involving moral turpitude (*Bach v. State Bar* (1987) 43 Cal.3d 848, 855; *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 221), and assign "no additional weight to such duplication in determining the appropriate discipline." (*In the Matter of Katz* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 430. 435, fn. 4.)

3. Moriarty's Arguments Are Unavailing

Moriarty did not appeal, but claims on review that the hearing judge erred in finding him culpable of moral turpitude. OCTC contends that not only did Moriarty not appeal, but he also failed to cite to the record to support his contentions or factual claims, as required. (See Rules Proc. of State Bar, rules 5.152(C) ["appellant must specify the particular findings of fact that are in dispute and must include references to the record to establish all facts in support of the points raised by the appellant"], 5.153(A) [same formal requirements apply to appellee].) OCTC asserts that Moriarty's contentions should be rejected on that basis alone. It further argues that even if we consider Moriarty's contentions, the evidence shows he is culpable of making misrepresentations to an ALJ in two separate cases. Pursuant to our independent review authority, we reject Moriarty's arguments and summarize his key challenges below.

The evidence and our findings refute Moriarty's assertions that: (1) he never sought to mislead any-

body; (2) on both occasions, he "was indeed ill and suffering from what he reasonably believed . . . were minor heart attacks"; and (3) he did not need to make any misrepresentations to the OAH to obtain the continuances, and did not do so. As noted above, his failures to correct the record *did* mislead the OAH, and he produced no documentation to substantiate his illness claims. Further, his allegations are baseless as to how the OAH would have ruled had it been presented with accurate information.

[3e] We are also unpersuaded by Moriarty's contention that "[t]here was absolutely no tactical advantage gained by [him] and his clients by these continuances. . . ." He used misrepresentations to obtain trial continuances. A misrepresentation of a fact to a court for the purpose of obtaining a continuance has been found to be "a deliberate deceit" and "an intentional violation" of an attorney's duties, including a violation of section 6068, subdivision (d). (*Vaughn v. Municipal Court* (1967) 252 Cal.App.2d 348, 358.) **[1c]** And willful deceit violates section 6106. (*In the Matter of Chesnut, supra*, 4 Cal. State Bar Ct. Rptr. at pp. 174-175.)

In addition, the evidence and our findings disprove Moriarty's arguments that: (1) any misunderstanding based on what was communicated to the OAH by Machado was not at his direction and was not done by any intent to willfully deceive anybody; (2) his actions do not constitute a ratification of what was said or written/sent to the OAH; and (3) at all times, he acted with a good faith belief of what the law required in such circumstances.[12]

B. Moriarty Failed to Comply with Four OAH Orders

1. Counts Three, Four, Five, and Ten: Failure to Obey Court Order (§ 6103)[13]

OCTC charged Moriarty with three counts of violating section 6103 in the Jacobo matter by failing to comply with the OAH's orders to: (1) file and serve documentation to substantiate his September 12, 2014 medical emergency (Count Three); (2) pay $1,419.06 in sanctions to the City (Count Four); and (3) pay $2,966.75 in sanctions to CalPERS (Count Five). OCTC also charged Moriarty with violating section 6103 in the Mirabal matter by failing to comply with the OAH's order to file and serve documentation signed by a competent medical professional confirming his September 22, 2014 hospitalization and his inability to proceed with the September 23 hearing (Count Ten). The hearing judge did not find Moriarty culpable and dismissed these four counts because she concluded that the OAH is not a "court" within the meaning of section 6103. As analyzed below, we find that the hearing judge erred, and we conclude that Moriarty is culpable as charged.

2. Moriarty Knew He Was Failing to Obey Orders While Representing His Clients

[4] To prove failure to obey a court order under section 6103, at a minimum, it must be established that an attorney *knew* what he or she was doing or not doing and that he or she intended either to commit the act or to abstain from committing it. (*In the Matter of Maloney and Virsik, supra*, 4 Cal. State Bar Ct. Rptr. at p. 787, quoting *King v. State Bar* (1990) 52 Cal.3d 307, 314, italics added by *In the Matter of Maloney and Virsik*.) Moriarty was aware of all four OAH orders, as he stipulated that he received all of them. Yet he failed to file and serve required documentation, pay ordered sanctions, or appeal or seek other relief. **[5]** It is also equally clear that Moriarty's representation of his clients before the OAH constituted the "practice of law." "The cases uniformly hold that the character of the act, and not the place where it is performed, is the decisive element, and if the application of legal knowledge and technique is required, the activity constitutes the

12. **[3f]** As discussed below, given our rejection of the legal rationale that Moriarty contends "justified the dismissals" of the section 6103 and section 6068, subdivision (o)(3), counts in the NDC "on the basis of the lack of constitutional authority," we also reject his argument that such rationale requires the dismissal of the section 6068, subdivision (d), charges as well.

13. Section 6103 provides that an attorney's "willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension."

practice of law, *even if conducted before an administrative board or commission.* [Citation.]" (*Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 543, italics added.)

3. The OAH Is a Court Within the Meaning of Section 6103

[6a] Moriarty asserts that OCTC failed to prove that the OAH is a "court," a predicate to a finding of a violation of section 6103. We reject his contention, as analyzed below.

The OAH is a division of the Department of General Services, and is under the direction and control of a director appointed by the Governor. (Gov. Code, § 11370.2.) Established by the California Legislature, the OAH is a quasi-judicial tribunal that conducts adjudicatory hearings to resolve disputes involving state and local government agencies. The director appoints and maintains a staff of full-time ALJs, and may also appoint pro tempore part-time ALJs. (Gov. Code, §§ 11370.3, 11502, subd. (b).)[14] When the OAH conducts an evidentiary hearing or adjudicatory proceeding, the ALJs must issue a written decision stating the factual and legal basis for the decision. (Gov. Code, § 11425.50, subd. (a).) An ALJ's orders are enforceable in the same manner as money judgments or by contempt sanctions (Gov. Code, § 11455.30, subd. (b)), and are subject to judicial review (Gov. Code, §§ 11455.30, subd. (b), 11523). Also, an ALJ "may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay . . . ." (Gov. Code, § 11455.30, subd. (a); accord Cal. Code Regs., tit. 1, § 1040 [same].)

[6b] The statutes cited above specify the powers of the OAH, including the authority of its ALJs to issue orders. The language clearly contemplates that the OAH should be treated as a court and its orders as ones that attorneys must obey. (E.g., Gov. Code, §§ 11455.30, subd. (a), 11475.30.)

[6c] We also disagree with Moriarty's position that *In the Matter of Lantz* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 126 can be read to mean that the only administrative agencies that section 6103 applies to are constitutional administrative agencies, such as the WCAB. In *Lantz*, we found that an "order of [a] workers' compensation judge is an order of a court within the meaning of section 6103," and the attorney violated that section by disregarding such an order. (*Id.* at p. 134.) We did not make any finding that other, nonconstitutional administrative agencies fell outside section 6103's scope.

Moreover, there are many reasons to apply the same analysis that we used in *Lantz* to orders issued by the OAH. The Legislature's creation of workers' compensation tribunals (namely, the WCAB) and processes and procedures to resolve workers' compensation disputes (see *In the Matter of Lantz*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 134) parallels the purposes of the OAH, which is "a state entity, funded by the state, created to provide adjudicators to decide the fate of those faced with deprivations of property and liberty interests in administrative hearings." (*California Teachers Ass'n v. State of California* (1999) 20 Cal.4th 327, 336.) Both the OAH and the WCAB are tribunals that adjudicate parties' contentions and property rights, and both resolve issues of fact and law.

Further, final decisions of both the WCAB and other administrative agencies acting in a judicial or quasi-judicial capacity may each have res judicata and collateral estoppel effect. (*Hand Rehabilitation Center v. Workers' Comp. Appeals Board* (1995) 34 Cal.App.4th 1204, 1214 [discussing res judicata and collateral estoppel]; *Traub v. Board of Retirement* (1983) 34 Cal.3d 793, 798 [discussing collateral estoppel]); *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 324 [discussing res judicata and collateral estoppel]; *Pacific Coast Medical Enter-*

14. Government Code section 11475.30 defines the term "[c]ourt" as "the agency conducting an adjudicatory proceeding," and the term "[j]udge" as an "[ALJ] or other presiding officer."

prises v. Department of Benefit Payments (1983) 140 Cal.App.3d 197, 214 [discussing res judicata]; *Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 867 [discussing collateral estoppel]; *Basurto v. Imperial Irrigation District* (2012) 211 Cal.App.4th 866, 878 [discussing collateral estoppel].)[15] The OAH hearings in the Jacobo and Mirabal matters were undertaken in a quasi-judicial capacity, and the Supreme Court has noted that OAH ALJs, acting in the related area of employee termination rights, "serve a function and purpose analogous to those of judges in courts of record." (*California Teachers Ass'n v. State of California*, *supra*, 20 Cal.4th at p. 336; cf. *Taylor v. Mitzel* (1978) 82 Cal.App.3d 665, 670 [defendant was "immune from liability, both under the federal Civil Rights Act and in tort, since his acts were those of a quasi-judicial officer acting in his official capacity as a hearing examiner employed by the state through the [OAH]"].)

Finally, in comparing constitutional and nonconstitutional agencies, the distinctions between the two are not significant as to an attorney's ethical duties. The State Bar Act (§ 6000 et seq.), of which section 6103 is part, sets forth a comprehensive scheme for regulating the entire practice of law in California, including when attorneys appear before administrative agencies. (*Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, 68-69.) Further, "the standards governing an attorney's ethical duties do not vary according to the many areas of practice." (*In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 511.) Section 6103's requirement that attorneys obey court orders in connection with the practice of law is thus part of the State Bar Act's purpose to, inter alia, establish ethical standards, protect the courts and the public, and preserve confidence in the legal system and profession. (Cf. *Aulisio v. Bancroft* (2014) 230 Cal.App.4th 1516, 1519 [discussing purpose of State Bar Act and § 6125 (unauthorized practice of law)]; *Ames v. State Bar* (1973) 8 Cal.3d 910, 917 [discussing purpose of Rules of Professional Conduct]; § 6001.1 ["[p]rotection of the public shall be the highest priority for the State Bar"].)

[6d] "Obedience to court orders is intrinsic to the respect attorneys and their clients must accord the judicial system." (*In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 403.) As the Supreme Court has made clear, "[d]isobedience of a court order . . . demonstrates a lapse of character and a disrespect for the legal system that directly relate to an attorney's fitness to practice law . . . . [Citation.]" (*In re Kelley* (1990) 52 Cal.3d 487, 495.) Indeed, "[o]ther than outright deceit, it is difficult to imagine conduct in the course of legal representation more unbefitting an attorney [than willful violation of court orders]." (*Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.) Section 6103 thus plays an integral part in the statutory scheme, as it provides a mechanism to enforce the standards governing attorneys' conduct before tribunals. We find that this is true whether the tribunal is a court of record, a constitutional administrative agency, or another administrative agency. Therefore, we conclude that section 6103 governs the orders and sanctions of all administrative agencies acting in a judicial or quasi-judicial capacity.

[6e] For the above reasons, we find that an order of an OAH ALJ is an "order of the court" within the meaning of section 6103.

4. Moriarty's Violation of Section 6103 Was Willful

[7a] We reject Moriarty's argument that his failure to comply with the OAH's September 12 Order (Count Three) and October 8 Order (Count Ten) requiring him to provide substantiating medical documentation was not willful given that it was

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15. The Supreme Court has noted that: "Indicia of proceedings undertaken in a judicial capacity include a hearing before an impartial decision maker; testimony given under oath or affirmation; a party's ability to subpoena, call, examine, and cross-examine witnesses, to introduce documentary evidence, and to make oral and written argument; the taking of a record of the proceeding; and a written statement of reasons for the decision. [Citation.]" (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 944.)

"impossible" to do so because no such medical records existed. His purported inability to comply with the orders is not a defense because no evidence shows that he ever sought relief from the orders on the basis of inability to comply. (*In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 9 [attorney obligated to obey orders unless steps taken to have them modified or vacated]; see also *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 952 ["no plausible belief in the right to ignore final, unchallengeable orders one personally considers invalid"].) Moriarty chose to do nothing, and simply ignored the orders.

[7b] We also reject Moriarty's argument that his failure to comply with the OAH's two October 21, 2014 sanctions orders (Counts Four and Five) was not willful because it was impossible for him to do so "due to his lack of sufficient financial resources." Moriarty never established his inability to pay before the OAH, and his claim of financial hardship, even if true, is no defense to nonpayment of sanctions because he failed to seek relief. (*In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 868 [despite financial hardship, attorney culpable for failure to pay court-ordered sanctions when attorney fails to seek relief from order in civil courts because of inability to pay].)[16]

Accordingly, OCTC established that Moriarty is culpable as charged in Counts Three, Four, Five, and Ten.[17]

C. Moriarty Failed to Timely Report Two Sanctions Imposed by the OAH

Counts Six and Seven: Failure to Report Judicial Sanctions (§ 6068, subd. (o)(3))[18]

[8a] OCTC charged Moriarty with violating section 6068, subdivision (o)(3), by failing to timely report to the State Bar the sanctions of $1,419.06 (Count Six) and $2,966.75 (Count Seven) imposed by the OAH in the Jacobo matter. The hearing judge concluded that Moriarty was not required to report OAH sanctions, noting that the "OAH has no power to enforce monetary sanctions" and "there is a lack of precedent establishing that sanctions issued by an OAH [ALJ] are considered 'judicial sanctions' within the meaning of section 6068, subdivision (o)(3)." She thus found him not culpable and dismissed both counts. We disagree.

[8b] As we have previously held, "the purpose of section 6068, subdivision (o)(3) is to inform the State Bar promptly of events which *could* warrant disciplinary investigation. Depending on the facts, any such investigation might not even focus primarily on the sanction itself, but on the conduct preceding or surrounding a sanctions order." (*In the Matter of Respondent Y*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 866.) Since the practice of law includes litigating before administrative agencies adjudicating matters, it would be inconsistent with the purpose of section 6068, subdivision (o)(3), to exempt sanctions issued by such agencies from an attorney's reporting requirement. Moreover, that section identifies certain sanctions that need not be reported—i.e., discovery sanctions and sanctions of less than $1,000. No exemption exists for sanctions imposed by administrative agencies. As such, consistent with our above analysis regarding section 6103, we find that section 6068, subdivision (o)(3), applies to sanctions issued by all administrative agencies acting in a judicial or quasi-judicial capacity. We thus conclude that the sanctions imposed here by the OAH are "judicial

16. **[7c]** We also reject Moriarty's contention that seeking more time to pay would be a "useless waste of time for everybody" since his ability to pay the sanctions in full was so uncertain.

17. **[7d]** Moriarty contended at oral argument that decisions of an OAH ALJ are not "final" because they are submitted to a board (which includes nonattorneys) that can decide whether to adopt them. His argument is unavailing. We find that the orders here were final because there is no evidence that Moriarty ever disputed their finality or validity or sought to stay their enforcement or pursued appellate relief. (See *In the Matter of Klein*, *supra*, 3 Cal. State Bar. Ct. Rptr. at p. 9 [attorney required to obey court order unless attorney takes steps to have it modified or vacated, regardless of belief that order is invalid].)

18. Section 6068, subdivision (o)(3), requires an attorney "[t]o report to the [State Bar], in writing, within 30 days of the time the attorney has knowledge of . . . [¶] . . . [¶] . . . [t]he imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000)."

sanctions" within the meaning of section 6068, subdivision (o)(3), which must be reported to the State Bar.[19]

[9] We also reject Moriarty's purported good faith defense. Good faith, or even ignorance of the law, is not a defense to section 6068, subdivision (o)(3). (*In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 176.) Moreover, the record does not establish that his failure to report the sanctions was attributable to his belief *at the time* that the statute did not require him to report the OAH sanctions. We thus find him culpable as charged.

IV. SIGNIFICANT AGGRAVATION OUTWEIGHS LIMITED MITIGATION

OCTC must establish aggravating circumstances by clear and convincing evidence (std. 1.5), while Moriarty has the same burden to prove mitigation (std. 1.6).

A. Aggravation

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

Standard 1.5(a) provides that a prior record of discipline may be an aggravating factor. The hearing judge found that Moriarty's two prior discipline records are a significant aggravating factor. We agree.

Moriarty I.[20] On January 13, 2000, the Supreme Court ordered that Moriarty receive three years' probation with conditions, including a 30-day actual suspension, as the result of his stipulating to three ethical violations in two matters. In one matter, in 1996, Moriarty made false representations to the Los Angeles Municipal Court that a defendant was represented by counsel and that Moriarty was making special appearances for that counsel. However, the defendant was not represented by said counsel, and Moriarty knew or should have known that the court would be misled. He was culpable of seeking to mislead a judge and engaging in an act of moral turpitude. In a second matter, in 1997, Moriarty failed to communicate with his client and allowed the dismissal of his client's case with prejudice. He was culpable of improperly withdrawing from employment. In mitigation, he had no prior record of discipline and was candid and cooperative with the State Bar.[21] No aggravating factors were involved.

Moriarty II.[22] On January 22, 2010, the Supreme Court imposed one year of probation with conditions, including a 45-day actual suspension, on Moriarty as the result of his stipulating to three ethical violations in one client matter. In 2005, Moriarty failed to perform legal services with competence by failing to make court appearances on three occasions, permitting his client's case to be dismissed, and failing to take any action to reinstate his client's case after its dismissal. Moriarty was also culpable of failing to keep his client reasonably informed of significant developments and failing to promptly respond to his client's reasonable status inquiries. In mitigation, Moriarty displayed candor and cooperation with the State Bar and demonstrated good character. In aggravation, he had one prior record of discipline, caused significant client harm, and committed multiple acts of wrongdoing.

We observe that Moriarty has repeatedly attempted to mislead tribunals (first in 1996 in *Moriarty I* and again in 2014 in the present case) and abandoned his clients (first in 1997 in *Moriarty I* and again in 2005 in *Moriarty II*). We also note his recurring disregard of adherence to professional responsibilities: in *Moriarty I*, he engaged in an act involving moral turpitude; in *Moriarty II*, he committed multiple acts of wrongdoing and caused significant harm; and in this case, he again committed multiple acts of misconduct, including some involving moral turpitude.

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19. We also note that the City's sanction award was reduced to a superior court judgment on January 17, 2015. Moriarty was served with the notice of entry of judgment on April 20, 2015. He makes no argument that he was not required to report this judgment to the State Bar.

20. Supreme Court Case No. S083255; State Bar Court Case Nos. 96-O-04531; 98-O-00944.

21. The hearing department decision mistakenly stated that no mitigating factors were involved.

22. Supreme Court Case No. S178060; State Bar Court Case No. 07-O-14229.

(See *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619 [part of rationale for considering prior discipline as having aggravating impact is that it is indicative of recidivist attorney's inability to conform his conduct to ethical norms]; *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443-444 [similarities between prior and current misconduct render previous discipline more serious, as they indicate prior discipline did not rehabilitate].)

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

[10] Because we find misconduct that was dismissed by the hearing judge, we also find, unlike the judge, that Moriarty's misconduct is aggravated by multiple acts of wrongdoing. (Std. 1.5(b) [multiple acts of wrongdoing are aggravating circumstance].) In addition to the two acts of moral turpitude found by the judge, we find Moriarty violated four OAH orders and failed to report two judicial sanctions to the State Bar. We thus assign this factor moderate aggravating weight. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646-647 [three instances of misconduct considered multiple acts].)

3. Significant Harm (Std. 1.5(j))

We agree with the hearing judge that Moriarty's misconduct harmed the administration of justice. (Std. 1.5(j) [significant harm to client, public, or administration of justice is aggravating circumstance].) In its sanctions orders, the OAH determined that Moriarty did not experience a medical emergency that prevented him from appearing at the September 12, 2014 hearing. The OAH found that Moriarty's "last-minute continuance request due to a medical emergency was without merit, frivolous and solely intended to cause unnecessary delay." The OAH granted continuances that delayed the Jacobo and Mirabal matters in reliance on Moriarty's misrepresentations, one of which was intentional. Such actions undermine the ability of a tribunal to rely on an attorney's word. (*In the Matter of Reiss* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 206, 220.) The hearing judge found that this harm was a significant aggravating factor. We differ from the judge, however, and find that the harm to the administration of justice caused by these continuances is only a moderate aggravating factor.

4. Indifference (Std. 1.5(k))

[11] The hearing judge correctly found that Moriarty fails to appreciate the wrongfulness of his misconduct. Indeed, Moriarty stated multiple times during the trial below that there was no need to correct the record or clarify the actual circumstances surrounding his continuance requests since he had already obtained the continuances. His attitude reveals a lack of understanding of his ethical responsibilities as an attorney, as demonstrated by his testimony that he understood "that the reporting of judicial sanctions is something that's kind of low on the food chain with respect to reportability." Like the hearing judge, we assign significant weight to Moriarty's indifference because his lack of insight makes him an ongoing danger to the public and the legal profession. (*In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 380 [lack of insight causes concern attorney will repeat misconduct]; *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511 [law does not require false penitence but does require respondent to accept responsibility for acts and come to grips with culpability].)

B. Mitigation

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

We agree with the hearing judge that Moriarty is entitled to limited mitigating weight for his cooperation with the State Bar. (Std. 1.6(e) [mitigation credit permitted for spontaneous candor and cooperation displayed to State Bar].) Moriarty entered into an extensive pretrial factual stipulation, as well as a supplemental factual stipulation, which expedited the trial, although many of the facts were easily provable. (*In the Matter of Gadda*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 443 [factual stipulation merits some mitigation].)

2. No Other Mitigating Factors

The judge correctly found that Moriarty did not establish any other mitigating factors. First, Moriarty did not present clear and convincing evidence that his heart problems or *any* medical issues were directly responsible for his misconduct. (See std. 1.6(d) [mitigation credit permitted for extreme emotional difficulties or physical or mental disabilities suffered by member at time of misconduct under certain circumstances].) Second, he failed to establish any mitigation for good character because his one character witness, Lazaro Machado, did not constitute the requisite "wide range of references in the legal and general communities." (Std. 1.6(f).) Machado testified regarding Moriarty's generosity and pro bono work. (See *Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [pro bono work and community service are mitigating circumstances].) Specifically, he noted that Moriarty frequently helped clients without charging them, assisted other attorneys, and made loans to various individuals, often without expectation of repayment. Nevertheless, the testimony was provided in very general terms. Without a clear description of the type and extent of these acts, we do not have clear and convincing evidence of their nature and scope. Thus, we can afford them no mitigating credit.

V. DISBARMENT IS THE APPROPRIATE DISCIPLINE[23]

Our disciplinary analysis begins with the standards which, although not binding, are entitled to great weight (std. 1.1; *In re Silverton* (2005) 36 Cal.4th 81, 91-92), and should be followed whenever possible (std. 1.1; *In re Young* (1989) 49 Cal.3d 257, 267, fn. 11).

In analyzing the applicable standards, we first determine which standard specifies the most severe sanction for the at-issue misconduct. (Std. 1.7(a) [most severe sanction shall be imposed where multiple sanctions apply].) Here, both standard 2.11, which addresses an act of moral turpitude or intentional or grossly negligent misrepresentation, and standard 2.12(a), which addresses disobedience or violation of a court order related to a member's practice of law or the duties required of an attorney under section 6068, subdivision (d), provide that disbarment or actual suspension is the presumed sanction.[24]

[12a] Furthermore, given Moriarty's disciplinary history, we also look to standard 1.8(b), which states that disbarment is appropriate where an attorney has two or more prior records of discipline if: (1) an actual suspension was ordered in any prior disciplinary matter; (2) the prior and current disciplinary matters demonstrate a pattern of misconduct; or (3) the prior and current disciplinary matters demonstrate the attorney's unwillingness or inability to conform to ethical responsibilities. Moriarty's case meets two of these criteria: he previously received 30- and 45-day actual suspensions; and, like the hearing judge, we find that his prior and current misconduct establish his unwillingness or inability to conform to ethical norms. Moreover, the two specified exceptions to standard 1.8(b) do not apply here. Moriarty's present misconduct did not occur at the same time as his prior misconduct, and his limited mitigation for cooperation is neither compelling nor does it predominate over the significant aggravation for two prior discipline records, multiple acts of wrongdoing, significant harm, and his indifference.

[12b] We next consider whether any reason exists to depart from the discipline called for by standard 1.8(b). We acknowledge that disbarment is not mandatory as a third discipline. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-507 [disbarment is not mandatory in every case of two or more prior disciplines, even where no compelling mitigating circumstances clearly predominate (analysis under former std. 1.7(b))]; *In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136 [to fulfill "purposes of lawyer discipline, we must examine the nature and chronology of respondent's record of discipline"].) However, if we deviate from recommending disbarment, we must articulate clear reasons for doing so. (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons for departure from standards].)

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23. 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 standards for attorneys. (Std. 1.1.)

24. Standard 2.12(b), which provides that reproval is the presumed sanction for violation of duties required of an attorney under section 6068, subdivision (o), is also applicable.

[12c] Moriarty has not identified an adequate reason for us to depart from applying standard 1.8(b), and we cannot articulate any. Further, we reject the hearing judge's reasons for deviating from recommending disbarment—i.e., because "the timing of [Moriarty's] misconduct" and "the nature and extent of [his] prior disciplines do not justify disbarment." The record shows multiple instances of similar wrongdoing dating back to 1996, repeated abandonment of clients, blatant violation of applicable orders, and a troubling similarity between Moriarty's present misconduct and the misconduct underlying *Moriarty I*. We also note that his misconduct in *Moriarty II* occurred shortly after his *Moriarty I* probation ended, and his present misconduct occurred shortly after his *Moriarty II* probation ended. Moreover, we find that the metes and bounds of the misconduct here are greater than the judge found. The record depicts an attorney who, for much of the past two decades, was either committing repeated, serious misconduct or being monitored on probation.

We emphasize that attorneys are sworn officers of the courts, and "[i]t is, of course, an extremely serious breach of an attorney's duty to lie in statements made to the court." (*In re Aguilar* (2004) 34 Cal.4th 386, 394.) Practically speaking, courts simply cannot function unless they can trust that attorneys appearing before them are telling the truth. Honesty is absolutely fundamental in the practice of law; without it, "the profession is worse than valueless in the place it holds in the administration of justice." (*Tatlow v. State Bar* (1936) 5 Cal.2d 520, 524.)

The State Bar Court has been required to intervene three times to ensure that Moriarty adheres to the professional standards required of those who are licensed to practice law in California. We conclude that further probation and suspension would be inadequate to prevent him from committing future misconduct that would endanger the public and the profession. (*Barnum v. State Bar* (1990) 52 Cal.3d 104, 112-113 [disbarment imposed where attorney repeatedly failed to comply with probation conditions since further probation unlikely to prevent future misconduct].) The standards and decisional law support our conclusion that the public and the profession are best protected if Moriarty is disbarred.[25]

V. RECOMMENDATION

We recommend that Leo Joseph Moriarty, Jr., be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice in California.

We further recommend that Moriarty must comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter.

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

VI. ORDER OF INACTIVE ENROLLMENT

Pursuant to section 6007, subdivision (c)(4), and rule 5.111(D)(1) of the Rules of Procedure of the State Bar, Leo Joseph Moriarty, Jr., is ordered enrolled inactive. The order of inactive enrollment is effective three days after service of this opinion. (Rules Proc. of State Bar, rule 5.111(D)(1).)

WE CONCUR:

PURCELL, P. J.
STOVITZ, J.*

25. E.g., *In the Matter of Carver* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 427 (disbarment where attorney with two prior disciplines committed act of moral turpitude and significant aggravation outweighed limited mitigation); *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63 (disbarment where attorney with two prior disciplines was unable to conform conduct to ethical norms with multiple aggravating factors and no mitigation).

*Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

State Bar Court
Review Department

In the Matter of

TIMOTHY JOHN MACKENZIE

A Member of the State Bar

No. 16-R-17485

Filed November 6, 2017

SUMMARY

Petitioner resigned after charges of misappropriation had resulted in a recommendation that he be disbarred. The Client Security Fund then paid two claimants as a result of petitioner's misconduct. Petitioner filed a petition for reinstatement without providing proof that he had first reimbursed the Client Security Fund as required by statute and by the State Bar Rules of Procedure. A hearing judge dismissed the petition as a matter of discretion, and petitioner sought review.

The Review Department interpreted the applicable statutes and rules to require that a former attorney seeking reinstatement must fully reimburse the Client Security Fund before filing a petition for reinstatement. It also determined that due process does not require the State Bar Court to provide a reinstatement petitioner with an evidentiary hearing if the prefiling requirements for a reinstatement petition have not been met. Accordingly, it affirmed the dismissal of the petition, concluding that such dismissal was mandatory, not discretionary.

COUNSEL FOR PARTIES

For State Bar of California: Brandon Keith Tady, Esq.

For Petitioner: Timothy John MacKenzie

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1]

130 Procedure on Review (rules 5.150-5.160)
199 Miscellaneous General Issues—Other Miscellaneous General Issues
Where Supreme Court has not published decision interpreting State Bar Act provision or related provision of Rules of Procedure of State Bar, State Bar Court itself interprets statute and rule as written.

[2 a-c]

2504 Issues in Reinstatement Proceedings—Special Procedural Issues — Burden of Proof/Showing Required for Reinstatement
2590 Issues in Reinstatement Proceedings—Miscellaneous Issues in Reinstatement Proceedings
By statute, as a condition of reinstatement, disbarred attorneys must reimburse Client Security Fund (CSF) for moneys paid out as result of attorney's misconduct. Under this statute, former attorney must repay CSF in full prior to obtaining reinstatement. Even though Supreme Court has not foreclosed possibility that it could grant conditional reinstatement under some circumstances, State Bar Court lacks authority to recommend reinstatement where payment in full to CSF has not been made, and does not have discretion to grant relief from requirement of CSF reimbursement.

[3]

135.09 Amendments to Rules of Procedure—Other issues
135.87 Amendments to Rules of Procedure—Reinstatement after Disbarment
2504 Issues in Reinstatement Proceedings—Special Procedural Issues — Burden of Proof/Showing Required for Reinstatement
2590 Issues in Reinstatement Proceedings—Miscellaneous Issues in Reinstatement Proceedings
Rule 5.441(B)(2) of Rules of Procedure of State Bar establishes that reimbursement of Client Security Fund for moneys paid out as result of disbarred attorney's misconduct is a mandatory prefiling requirement for petitions for reinstatement. Where State Bar Act provision requires such payment, State Bar Board of Governors acted within its authority, and not in conflict with statute, in adopting rule regulating timing of payment by requiring that it be made before petition for reinstatement is filed. Interpreting rule to require prefiling payment supports policy goals of maintaining solvency of Client Security Fund, and preserving judicial resources by avoiding lengthy reinstatement proceedings when petitioner has no prospects for payment.

[4]

135.09 Amendments to Rules of Procedure—Other issues
146 Evidentiary Issues—Judicial Notice
In case involving interpretation of State Bar Rules of Procedure, Review Department took judicial notice of Board of Governors agenda item, State Bar Rules, and relevant state legislation.

[5] **119 Procedural Issues—Other Pretrial Matters**
192 Miscellaneous General Issues—Constitutional Issues–Due Process/ Procedural Rights
2504 Issues in Reinstatement Proceedings—Special Procedural Issues — Burden of Proof/Showing Required for Reinstatement
2590 Issues in Reinstatement Proceedings—Miscellaneous Issues in Reinstatement Proceedings

Due process does not require that petitioner for reinstatement be allowed to present evidence of rehabilitation at evidentiary hearing, where applicable provision of State Bar Rules of Procedure expressly provides for dismissal of petition for failure to comply with prefiling requirements, including reimbursement of Client Security Fund.

[6] **199 Miscellaneous General Issues—Other Miscellaneous General Issues**
2590 Issues in Reinstatement Proceedings—Miscellaneous Issues in Reinstatement Proceedings

State Bar Court's review of petition for reinstatement, resulting in determination that petition should be dismissed for failure to satisfy a prefiling requirement, constituted hearing of petition in first instance by State Bar Court, as required under California Rules of Court.

ADDITIONAL ANALYSIS

[None.]

OPINION

THE COURT.*

Rule 5.441(B)(2) of the Rules of Procedure of the State Bar [1] requires that a petitioner seeking reinstatement to membership of the State Bar reimburse, prior to filing a petition, the Client Security Fund (CSF) for payments it made as a result of the petitioner's misconduct. Timothy John MacKenzie filed a petition for reinstatement (petition) without complying with the rule, and a hearing judge exercised her discretion and dismissed the petition because she found MacKenzie had little or no prospect of reimbursing CSF before reinstatement.

MacKenzie appeals and argues that the rule conflicts with Business and Professions Code section 6140.5, subdivision (c),[2] which states that CSF reimbursement "shall be paid as a condition of reinstatement of membership." He contends the statute does not require reimbursement prior to filing a petition for reinstatement or even prior to reinstatement. Instead, he argues reimbursement may be made after reinstatement. He also argues the dismissal deprived him of his right to present all evidence related to his rehabilitation, moral qualification for reinstatement, and present ability and learning in the general law. He requests that the dismissal be set aside and that this matter be remanded for further reinstatement proceedings. The Office of Chief Trial Counsel of the State Bar (OCTC) does not appeal. It requests affirmance of the dismissal, but asks that we find the dismissal was mandatory rather than discretionary.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we affirm the dismissal. We clarify that, pursuant to section 6140.5, subdivision (c), and rule 5.441 (B)(2), CSF reimbursement is a mandatory prefiling requirement. Where, as here, a petitioner has not reimbursed CSF prior to filing a petition for reinstatement, dismissal is mandatory, not discretionary.

I. DISMISSAL OF PETITION REQUIRED

Rule 5.441(B)(2) requires that "[p]rior to filing" a petition for reinstatement after resignation, with or without charges pending, or after disbarment, a petitioner must have "reimbursed all payments made by [CSF] as a result of the petitioner's conduct, plus applicable interest and costs, under [section 6140.5, subdivision (c)]." Further, the rule also requires that a petitioner attach to the petition proof of compliance with this requirement.

The facts and procedural history are not in dispute on review. After the Hearing Department recommended that MacKenzie be disbarred due to his dishonest misappropriation of $162,400, he resigned with charges pending in 2000. By June 2009, CSF had paid $52,757.17 to two claimants as a result of MacKenzie's misconduct. On November 17, 2016, MacKenzie filed a petition for reinstatement without reimbursing CSF. As of December 2, 2016, the outstanding amount totaled $96,121.13, including principal, accrued interest, and processing costs.[3] OCTC moved to dismiss the petition on the grounds that, inter alia, MacKenzie failed to satisfy rule 5.441(B)(2). In opposition, MacKenzie asserted that at no time did he have the ability to reimburse CSF in a lump sum or to make meaningful payments. He also stated that his ability to reimburse CSF would be greatly enhanced by reinstatement and submitted a declaration from his current employer in support. On February 3, 2017, the hearing judge dismissed the petition because "while rule 5.441(B)(2) is not mandatory, it is within this court's discretion to dismiss the petition for failure to comply with this requirement when the petitioner has little or no prospect of satisfying an unpaid CSF obligation before reinstatement."

*Before Purcell, P. J., Honn, J., and McGill, J.

1. All further references to rules are to the Rules of Procedure of the State Bar unless noted.

2. All further references to sections are to the Business and Professions Code unless noted.

3. MacKenzie has not made any voluntary reimbursement payments to CSF. The sole payment received by CSF was $613 tendered to the State Bar by the Franchise Tax Board from an intercept of a tax refund owed to MacKenzie.

A. CSF Reimbursement Is a Mandatory Prefiling Requirement

MacKenzie does not contend that he complied with the rule. Instead, he maintains that section 6140.5, subdivision (c), allows him to be reinstated with the condition that he reimburse CSF after he returns to the practice of law and that he is "otherwise qualified to seek reinstatement." He argues that rule 5.441(B)(2) improperly conflicts with section 6140.5, subdivision (c), because the rule requires CSF reimbursement prior to filing a petition for reinstatement. We disagree.

[1] The Supreme Court has not published a decision interpreting section 6140.5, subdivision (c), or rule 5.441(B)(2). Absent this guidance, we interpret the statute and rule as written. (§§ 6086.5 ["The board of trustees shall establish a State Bar Court, to act in its place and stead in the determination of disciplinary and reinstatement proceedings . . . to the extent provided by rules adopted by the board of trustees pursuant to this chapter"], 6025, 6086, 6087; *Obrien v. Jones* (2000) 23 Cal.4th 40, 49–50 [Supreme Court has "chosen to utilize the assistance of the State Bar Court in deciding admission and discipline matters" and also has "prescribed . . . procedural rules for the State Bar Court itself"].)

[2a] Section 6140.5, subdivision (c), provides that "Any attorney whose actions have caused the payment of funds to a claimant from [CSF] shall reimburse the fund for all moneys paid out as a result of his or her conduct with interest . . . . For a member who resigns with disciplinary charges pending or a member who is suspended or disbarred, the reimbursed amount, plus applicable interest and costs, shall be paid as a condition of reinstatement of membership." We find that the statute establishes a requirement that a petitioner must reimburse CSF in full prior to reinstatement, and, under the statute, the State Bar Court lacks authority to recommend reinstatement where a petitioner has not reimbursed CSF in full. Our interpretation is consistent with *Hippard v. State Bar* (1989) 49 Cal.3d 1084 (*Hippard*). There, where a petitioner sought to be reinstated on the condition that he repay CSF within a two-year period after reinstatement, the Court held,

> While we need not and do not decide in this case that reinstatement may never be granted subject to appropriate conditions [citation], we do conclude that the condition suggested by petitioner is inconsistent with the basic purpose underlying reinstatement. An applicant seeking reinstatement must show rehabilitation. [Citation.] As noted earlier, the burden on the applicant is heavy. Where, as here, evidence of the efforts, if any, to make restitution to those seriously harmed by the applicant's previous misconduct is a central consideration, allowing restitution as a subsequent condition would negate the requisite showing and effectively undermine the well-established burden of proof. The applicant must establish his or her case before, not after, reinstatement. . . . Accordingly, we conclude that in this case it would be improper to grant reinstatement subject to petitioner thereafter making the requisite showing of restitution.

(*Id.* at p. 1098.)[4]

[3] We also find that, as worded, rule 5.441(B)(2) establishes that CSF reimbursement is a mandatory prefiling requirement. Contrary to MacKenzie's claim, this requirement does not conflict with section 6140.5, subdivision (c), or change its scope as worded by the Legislature. The statute, not the rule, establishes the basic condition that CSF must be reimbursed prior to reinstatement. The rule only clarifies the *timing* for compliance with the condition—i.e., *before* a petitioner files a petition for reinstatement. The Board of Governors (later renamed Board of Trustees) clearly had the authority to set the timing

4. **[2b]** The Supreme Court did not foreclose the possibility that, in an exercise of its inherent authority over admissions, it might grant conditional reinstatement under other circumstances. Such a conclusion, however, does not authorize this court to recommend reinstatement as MacKenzie requests.

for reimbursement because it has the authority to adopt rules to carry out the State Bar Act. (§ 6025 ["Subject to the laws of this State, the board may formulate and declare rules and regulations necessary or expedient for the carrying out of this chapter"].) Indeed, the Board expressly acted within that authority in adopting the predecessor rule to rule 5.441(B)[5] "to 'implement the statutory authority to enforce orders regarding disciplinary costs and CSF reimbursements as money judgments.' " (*In the Matter of MacKenzie* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 56, 63 (*MacKenzie I*), quoting Board of Governors Agenda Item 122, July 9, 2004, p. 3.)[6]

Several strong policy reasons support our analysis. CSF is a victim compensation fund supported by attorney membership fees, which allows clients who have suffered losses due to members' dishonest misconduct to be repaid. (§§ 6140.5, subd. (a), 6140.55 [board authorized to include amount to fund CSF and related administration costs as part of annual membership fees]; State Bar Rule 3.420 et seq.) Thus, it follows that requiring a petitioner to repay CSF prior to filing a petition for reinstatement aids in maintaining the fund's solvency. (See *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 558 [discussing CSF's origin and purpose; noting State Bar "sought legislative authorization for the CSF in order to create a remedy *in addition* to disciplinary measures and civil actions to reimburse clients for losses caused by the wrongful conduct of attorneys"].) Making CSF repayment a prefiling requirement also serves the rational goal of "preserv[ing] judicial resources by avoiding lengthy proceedings when a petitioner 'has no prospects for' " repaying CSF. (*MacKenzie I, supra*, 5 Cal. State Bar Ct. Rptr. at p. 65, quoting Board of Governors Agenda Item 122, *supra*, at p. 8.)[7]

Like *Hippard*, the other cases MacKenzie cites do not support his contentions. *In re Gaffney* (1946) 28 Cal.2d 761 and *Galardi v. State Bar* (1987) 43 Cal.3d 683 were both decided before section 6140.5, subdivision (c), was enacted and thus did not consider whether a petitioner could be reinstated conditioned on subsequent CSF reimbursement. We acknowledge that in *MacKenzie I* we held that the prefiling requirement that a petitioner repay disciplinary costs was directory, not mandatory. (*MacKenzie I, supra*, 5 Cal. State Bar Ct. Rptr. at p. 61.) But our holding was based on the State Bar Court's expressly delegated discretion to grant requests for relief from disciplinary costs. (*Ibid.*; see also §§ 6086.10, subd. (c), 6140.7; rule 5.130(B).) **[2c]** In contrast, the State Bar Court does not have discretion to grant relief from CSF obligations. (See § 6140.5; rule 5.136.) Finally, in *In the Matter of Jaurequi* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 56 (*Jaurequi*), we held that CSF reimbursement was not a "condition precedent" to the filing of a petition for reinstatement. But this case was decided *before* the Board adopted the rule making CSF reimbursement a prefiling requirement. (*Id.* at p. 59.)

B. No Due Process Violation

[5] We also reject MacKenzie's argument that due process requires that he be allowed to present all evidence of his rehabilitation at an evidentiary hearing. To the contrary, rule 5.441(E) expressly states that "[f]ailure to comply with any of the requirements of [rule 5.441] will be grounds to dismiss the petition." (See *MacKenzie, supra*, 5 Cal. State Bar Ct. Rptr. at p. 66 [hearing judge has discretion to dismiss reinstatement proceeding if petitioner fails to pay disciplinary costs prior to filing petition rather than undertake lengthy trial].)

5. Former rule 662(c) provided, in pertinent part, "No petition for reinstatement shall be filed unless and until the petitioner has provided satisfactory proof to the State Bar Court that he or she has paid . . . all reimbursement for payments made by the Client Security Fund as a result of the petitioner's conduct, plus applicable interest and costs, pursuant to Business and Professions Code section 6140.5(c)."

6. **[4]** On July 27, 2017, based on OCTC's unopposed request and pursuant to rule 5.156 and Evidence Code section 452, we took judicial notice of: (1) Board of Governors Agenda Item 122, July 9, 2004; (2) State Bar Rules, Title 3, Division 4, Chapter 1, Articles 1 through 5; and (3) Senate Bill No. 1498 (1987–1988 Reg. Sess.).

7. Notably, no statute or rule establishes a process whereby we could recommend that a membership be cancelled if a petitioner failed to fully reimburse CSF after reinstatement.

MacKenzie points to our holding in *Jaurequi* that a petitioner's "right to be reinstated can only be determined following a hearing," citing to rule 951(f) (renumbered 9.10(f)) of the California Rules of Court.[8] (See *Jaurequi, supra*, 4 Cal. State Bar Ct. Rptr. at p. 59.) Again, *Jaurequi* was decided before CSF reimbursement was made a prefiling requirement for reinstatement and a ground for dismissal when not satisfied.

[6] In light of the express language of rule 5.441, we find that a petitioner who has not reimbursed CSF does not have a right to a hearing or to otherwise present all evidence related to his or her rehabilitation in seeking reinstatement to the practice of law. We further find that in reviewing the petition and determining that MacKenzie failed to satisfy a prefiling requirement, the State Bar Court has "heard" the petition "in the first instance," as required by rule 9.10(f) of the California Rules of Court.

II. CONCLUSION

Because CSF reimbursement is a mandatory prefiling requirement, failure to satisfy the requirement must result in dismissal. We affirm the dismissal since MacKenzie did not reimburse CSF prior to filing the petition.

8. The rule provides that reinstatement petitions "must, in the first instance, be filed and heard by the State Bar Court."

State Bar Court
Review Department

In the Matter of

JORDAN TONYA LOUISE PETERS

A Member of the State Bar

No. 13-C-16396

Filed January 29, 2018

SUMMARY

While driving under the influence of prescription drugs, Peters caused a car accident that killed a passenger in the other car. She pleaded nolo contendere and was convicted of felony vehicular manslaughter while intoxicated, without gross negligence. A hearing judge found that the facts and circumstances surrounding the conviction involved moral turpitude, and recommended disbarment.

The Review Department affirmed the disbarment recommendation, holding that the facts of the conviction involved moral turpitude, and the mitigating circumstances were not compelling. Thus, there was no reason to deviate from the applicable disciplinary standard, under which disbarment is the presumed sanction for a felony conviction involving moral turpitude.

COUNSEL FOR PARTIES

For State Bar of California: Kevin B. Taylor, Esq.

For Respondent: Jordan T. Peters, Esq.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1a-c] **1511 Substantive Issues in Conviction Proceedings — Nature of Underlying Conviction — Driving Under the Influence**

1523 Substantive Issues in Conviction Proceedings — Moral Turpitude — Found Based on Facts and Circumstances

The test for whether an attorney's felony conviction involves moral turpitude is whether the facts and circumstances surrounding the attorney's criminal conduct show either a deficiency in any character trait necessary for the practice of law, or involve such a serious breach of duty to another or society, or such flagrant disrespect for law or societal norms, that knowledge of the attorney's conduct would likely undermine public confidence in and respect for the legal profession. Where respondent lacked candor and made disingenuous statements to law enforcement personnel, and her conduct in driving while impaired by abuse of prescription drugs showed lack of regard for her duty to society or concern for the law, the circumstances of her felony vehicular manslaughter conviction involved moral turpitude.

[2] **191 Miscellaneous General Issues — Effect of/Relationship to Other Proceedings**

1511 Substantive Issues in Conviction Proceedings — Nature of Underlying Conviction — Driving Under the Influence

1691 Miscellaneous Issues in Conviction Cases — Admissibility and/or Effect of Record in Criminal Proceeding

Respondent's conviction for felony vehicular manslaughter while intoxicated conclusively established that respondent drove while intoxicated and caused victim's death.

[3] **543.90 Aggravation — Intentional misconduct, bad faith, etc. (1.5 (d), (e), (f)) — Found but discounted or not relied on — Other reason**

Where respondent's concealment and false statements to law enforcement were relied upon in finding respondent's felony conviction involved moral turpitude, no additional aggravation was warranted for concealment, bad faith, or dishonesty.

[4a, b] **710.36 Mitigation — Long practice with no prior discipline — Found but discounted or not relied on — Present misconduct likely to recur**

Attorney's absence of prior discipline over many years of practice should not be assigned significant mitigating weight unless misconduct is not likely to recur. Where respondent had not shown that the substance abuse problems involved in her misconduct had been resolved, her 19 years of discipline-free practice deserved only some mitigating weight.

[5a-c] **725.36 Mitigation — Emotional/physical disability/illness — Found but discounted or not relied on — Inadequate showing of rehabilitation**

Where respondent's uncontradictory testimony established that misconduct was caused by long-standing depression and prescription drug abuse, respondent was entitled to some mitigation for emotional difficulties or physical or mental disabilities. However, where respondent had a years-long history of abuse, and had started but not completed rehabilitation, she did not show complete, sustained recovery and rehabilitation, and full mitigation was not warranted.

[6a, b] **130 Generally Applicable Procedural Issues — Procedure on Review**
159 Evidentiary Issues — Miscellaneous Evidentiary Issues
725.36 Mitigation — Emotional/physical disability/illness — Found but discounted or not relied on — Inadequate showing of rehabilitation
Where respondent's misconduct was related to prescription drug abuse, Review Department permitted respondent to augment record with evidence of rehabilitation occurring after trial in disciplinary proceedings. Evidence of post-trial rehabilitation was not entitled to full evidentiary weight, however, because it was not subject to cross-examination.

[7] **725.36 Mitigation — Emotional/physical disability/illness — Found but discounted or not relied on — Inadequate showing of rehabilitation**
Review Department assigns some mitigating weight to attorney's rehabilitation activities while on criminal probation, but gives far greater weight to activities after probation has ended.

[8a, b] **765.39 Mitigation — Substantial pro bono work — Found but discounted or not relied on — Insufficient evidence**
Respondents deserve mitigation credit for pro bono and community service activities, even if shown only by respondent's own testimony. Such work does not qualify for full mitigation credit, however, where respondent's testimony lacks specificity and is uncorroborated, so State Bar Court cannot evaluate full measure of respondent's dedication and zeal in such activities.

[9a-c] **1511 Substantive Issues in Conviction Proceedings — Nature of Underlying Conviction — Driving Under the Influence**
1523 Substantive Issues in Conviction Proceedings — Moral Turpitude — Found Based on Facts and Circumstances
1552.10 Application of Standards — Criminal Conviction — Standard 2.15(b) (felony conviction under circumstances involving moral turpitude) — Applied — Disbarment
Where respondent's felony vehicular manslaughter conviction, arising from driving while impaired by prescription drugs, involved moral turpitude; showed disregard for law and public safety; caused significant harm; and was accompanied by lack of candor in dealing with law enforcement, and respondent's mitigating factors were not compelling and fell far short of predominating, discipline less than presumed sanction of disbarment would fail to protect public and would undermine confidence in legal profession.

Additional Analysis

Aggravation

Found

584.10 Harm — To public

Mitigation

Found but discounted or not relied on

735.30 Candor and cooperation with Bar
740.31 Good character references
745.39 Remorse/restitution/atonement

Discipline

1610 Disbarment

Other

1541.10 Interim suspension after felony conviction — Ordered — California or federal felony

OPINION

McGill, J.

On April 30, 2013, Jordan Tonya Louise Peters was driving under the influence of prescription drugs when, without braking, she rear-ended a car stopped at a traffic light. The other driver was seriously injured and the other driver's passenger, her 69-year-old husband, died. On her plea of nolo contendere, Peters was convicted of felony vehicular manslaughter while intoxicated without gross negligence.

Disbarment is the presumed sanction for a felony conviction in which the surrounding facts and circumstances involve moral turpitude, unless the most compelling mitigating circumstances clearly predominate. A hearing judge found that the facts and circumstances surrounding Peters's conviction involved moral turpitude, and, not finding compelling mitigation, recommended disbarment.

Peters appeals. She argues that the facts and circumstances surrounding her crime did not involve moral turpitude and her mitigating circumstances are entitled to more credit. She contends that a two-year actual suspension would be sufficient to preserve the integrity of the profession and protect the public. The Office of Chief Trial Counsel of the State Bar (OCTC) requests that we affirm the disbarment recommendation.

Upon our independent review (Cal. Rules of Court, rule 9.12), we find the facts of the conviction involve moral turpitude, and the mitigating circumstances are not compelling. We can discern no reason from this record to deviate from the applicable disciplinary standard, and thus affirm the disbarment recommendation.

I. FACTUAL BACKGROUND[1]

A. PETERS ABUSED PRESCRIPTION DRUGS LEADING UP TO THE COLLISION

On and off for several years prior to the April 30, 2013 collision, Peters was taking Neurontin, a central nervous system depressant, for anxiety. Common side effects of the drug include sedation, dizziness, and lack of muscle coordination. Peters also suffered from chronic neck and back pain due to a preexisting medical condition. In September 2010, her primary care physician referred her to a pain management specialist, Dennis Hembd, M.D. Dr. Hembd, too, prescribed Neurontin for Peters, as well as Norco, an opioid medication with the same narcotic component as Vicodin (hydrocodone), and, later, a similar pain medication (Nucynta).

Dr. Hembd soon became concerned about Peters's escalating drug use, as reflected in reports of his visits with Peters from November 5, 2010, through May 13, 2011. Peters once told Dr. Hembd's physician's assistant that Neurontin caused her to feel sedated. She also increased her use of Norco, made frequent refill requests, and sought a stronger dosage. On November 8, 2010, Dr. Hembd wrote that he was "wary of her medication use." Two months later, on January 14, 2011, Dr. Hembd noted a discrepancy between Peters's stated and observed use of Norco and Nucynta. Dr. Hembd also noted that day that Peters admitted to him that she "ha[d] been unable to control the use of her medication," and she failed to participate in the physical therapy he recommended. After his final visit with Peters in May 2011, Dr. Hembd recorded that Peters had run out of Norco two weeks early. He testified at her disciplinary trial that "early refills would obviously be a sign of trouble."

1. The facts are based on the parties' pretrial written stipulation, 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).) All further references to rules are to the Rules of Procedure of the State Bar unless otherwise noted.

In August 2011, Dr. Hembd terminated his treatment of Peters by letter to her and to her primary care doctor. He based his decision on her treatment history and a report from MedCo, a pharmacy management and benefit corporation. He wrote in the letter that, as reported by MedCo, during the prior two months, Peters had filled Norco prescriptions from his office and two other providers using three different pharmacies, which suggested Norco abuse.[2] Dr. Hembd noted her inconsistent follow-up when she was asked to come in and review her prescription drug use. He cautioned her about the risk of overdose in combining Norco with her other prescribed drugs and recommended that she discontinue taking Norco and seek substance abuse treatment.

Peters did not see Dr. Hembd again or discuss his letter with him. Instead, she talked about her medication use with her primary care doctor, her psychiatrist, her marriage and family therapist, and, later, her new spinal doctor. She thought she "could manage" her prescription drug use and "just needed better willpower to deal with the issue." She did not seek substance abuse treatment at that time. Although she continued to use other prescription drugs,[3] she stopped taking Norco in 2012.

In March 2012, Peters closed her law practice due to mounting stress. She transferred or closed cases, and took steps to ensure that her clients were properly handled. She continued to teach at two universities, and later worked in human resources for a construction company.

At the disciplinary trial, Peters admitted she began to abuse Neurontin in 2012 and had not been following the prescribed dosage for about nine to 12 months before the April 30, 2013, collision. By 2013, her prescribed dose was one and one-half 600-milligram tablets taken three times per day for a total of four and one-half pills or 2,700 milligrams per day. Her actual daily dose varied as some days she took the prescribed amount, some days less, other days more. At the time, Peters thought she did not have an addiction problem and was in control of her Neurontin use. At trial, she admitted, "I thought I was in control. But I clearly wasn't."

B. PETERS CAUSED A FATAL AUTOMOBILE COLLISION WHILE IMPAIRED

On April 30, 2013, Peters picked up a Neurontin refill and then went to her office at the construction company at which she was employed at the time, worked on several projects and interacted with colleagues. At trial, she admitted that between 9:18 a.m. and 2:00 p.m., she took six or seven Neurontin pills—more than her full day's prescribed dose—in roughly five hours. She also had several other prescription drugs in her system, including tramadol,[4] another pain medication prescribed by her primary care doctor. She testified that she did not feel impaired and felt no different that day than any other day.

Unexpectedly, Peters was called around 3:15 p.m. to pick up her son and left work earlier than planned. Three eyewitnesses who observed her driving testified at trial. Making a left turn, on a Roseville, California street, Peters veered right across four lanes, and drove up and over a curb and sidewalk until all four tires were on a grassy area beyond the sidewalk. Peters recalled striking only the curb. Without stopping, she returned to the road and swerved left across three lanes toward the center median. She then swung back over to the right-hand curb, almost came to a stop, but did not. She continued to drive at varying speeds for

2. In July or August 2011, Peters fell, breaking her nose and cracking a tooth. An urgent care provider and a dentist each prescribed Vicodin to treat her resulting pain.

3. Peters's psychiatrist prescribed her Cymbalta and Wellbutrin for depression, Xanax and Neurontin for anxiety, and Restoril (temazepam) for sleep. Peters's primary care doctor prescribed her Topril and Lisinopril for high blood pressure.

4. As noted in a California Department of Justice Bureau of Forensic Services toxicology report included in the record, tramadol (Ultram) may induce side effects of dizziness, somnolence, and seizures.

another half-mile. Her driving was so erratic and worrisome that two drivers behind her turned on their emergency flashers to try to slow traffic and to warn others, and one of them called 911.

Around 3:40 p.m., Peters was traveling at approximately 50 to 60 miles per hour when, without braking, she rear-ended one of several cars stopped at a red light. Bonnie Weaver was the driver of that car and her husband of over 48 years, Robert Weaver, was the front seat passenger. The impact crushed the back half of the Weavers' car, leaving nothing behind the front seats. The couple suffered grave injuries and were transported to the hospital. Robert died hours later. Bonnie survived, but continues to suffer from her injuries, as discussed in detail below in aggravation. Peters's erratic driving also set off a chain of events that caused a separate collision involving three other cars, resulting in injuries to two other victims.

C. POLICE INTERVIEWED PETERS AT THE SCENE AND ARRESTED HER

Police Sergeant Jeffrey Beigh (Sergeant Beigh), who was a patrol officer and certified drug recognition expert at the time of the collision, arrived on the scene within 10 minutes and interviewed Peters. He observed that she seemed to be in shock. Peters told him that while driving, she looked down briefly to change the radio channel, and when she looked up, the Weavers' car was in front of her. She also told him she had a history of anxiety, depression, and high blood pressure for which she was taking Xanax, Neurontin, Cymbalta, Wellbutrin, Lisinopril, and Topril.

Sergeant Beigh completed a Driving Under the Influence Report (DUI report) that day, which documented his roadside interview of Peters and their discussion of her Neurontin and Xanax use. He testified that she told him she had taken two Neurontin pills, her prescribed dose, at approximately 1:30 p.m. Peters testified that she remembered telling him she had taken Xanax as directed, but does not recall stating she had taken Neurontin as directed. She also remembered being asked when she took her *last dose* of Neurontin. Notes on the DUI report corroborate her recollection.[5]

Observing Peters's red, watery eyes, droopy eyelids, and difficulty following instructions, Sergeant Beigh administered Standardized Field Sobriety Tests (SFSTs), which evidenced that she was impaired. In the DUI report, Sergeant Beigh noted that Peters was unsteady, she "missed the number 15 as she counted" (i.e., she said "12, 13, 14, 16"), and her "balance showed to be grossly impaired."

Peters agreed to submit to a preliminary alcohol screening test, which showed her blood alcohol level at 0.00 percent. She also voluntarily provided a blood sample for chemical testing, which ultimately revealed positive results for Neurontin and several other prescription drugs.[6]

Sergeant Beigh arrested Peters and took her to jail. There, he asked her to perform another round of SFSTs, and again she "performed extremely poor[ly]." At this time, she admitted she was taking Cymbalta, Xanax, Wellbutrin, Restoril, Neurontin, Topril, and Lisinopril. She did not mention she was also taking tramadol.

A police officer found a bottle of Neurontin and three loose Neurontin pills in Peters's purse. The officer counted 124 pills in total.[7] Since the pill bottle showed that the 135-

5. Specifically, the notes indicate that Sergeant Beigh asked Peters when she last used drugs, and what time was her first and last use of drugs. Peters replied, "TOOK MEDS THIS AM AT 0645, TOOK NEURONTIN [AT] 1330" and "0645/1330," respectively.

6. Two laboratories tested for Neurontin in her blood. Each reported a significantly different result. Neither of the testifying expert forensic toxicologists could conclusively determine the reason for the disparity or the actual number of pills Peters had taken.

7. The DUI report noted that Peters stated she spilled some Neurontin pills "into her purse." She testified that she "spilled them likely at work," she "didn't know where it had spilled during the day," and "[n]o one checked anywhere at [her] work."

pill prescription had just been filled that day, Sergeant Beigh concluded that 11 pills were missing. He noted in his DUI report that "Peters could only account for two of the missing Neurontin pills that she claimed to take at 1330 hours."

At trial, Sergeant Beigh said that he would have included in his report if Peters had told him she took six or seven Neurontin pills. Like the hearing judge, we find that Peters never told the police the total number of Neurontin pills she took the day of the collision.

D. PETERS WAS CONVICTED OF FELONY VEHICULAR MANSLAUGHTER WITHOUT GROSS NEGLIGENCE

Peters was charged with one felony count of vehicular manslaughter while intoxicated with gross negligence (Pen. Code, § 191.5, subd. (a)) as to Robert, and three felony counts of driving under the influence of drugs causing injury (Veh. Code, § 23153, subd. (a)) as to Bonnie and two victims in other cars. On January 26, 2015, Peters pled nolo contendere to, and was convicted of, one felony count of vehicular manslaughter while intoxicated, but without gross negligence (Pen. Code, § 191.5, subd. (b)). The other charges were dismissed.

In March 2015, during the presentencing phase, Peters filled out a probation application and met with a probation officer. She provided incomplete or inconsistent information at their interview and in writing. While she acknowledged prescription drugs were in her system at the time of the collision, she specified they were "at therapeutic limits." Further, despite having pled nolo contendere to vehicular manslaughter *while intoxicated*, the probation officer noted in his presentencing report that Peters claimed "she was not impaired in any way and that the collision was a horrible accident." In addition, she did not inform the probation officer she had been abusing Neurontin for months, or that she had been taking more than her prescribed dose. At trial, the probation officer confirmed that information would have been useful in drafting his presentencing report and recommendations. Peters testified that she was scared and nervous at the interview.

On March 24, 2015, Peters was sentenced to 364 days in jail, five years of formal probation, and attendance at a DUI class for 18 months. She was released on September 9, 2015, after serving 172 days in custody.

II. STATE BAR COURT PROCEEDINGS

After OCTC transmitted the felony conviction records to this court, we placed Peters on interim suspension from the practice of law effective July 7, 2015, pending final disposition of this proceeding. (Bus. & Prof. Code, §§ 6101, 6102; Cal. Rules of Court, rule 9.10; rules 5.341, 5.342.)[8] Once we received evidence of finality, we referred the matter to the Hearing Department to determine whether the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline. (§ 6102, subd. (e); rule 5.344.)

Following a trial and posttrial briefing,[9] the hearing judge issued her decision on April 21, 2017. She found that the facts and circumstances surrounding Peters's conviction involved moral turpitude. She recommended disbarment because Peters failed to establish compelling mitigating circumstances. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 2.15(b) [disbarment is presumed sanction for felony conviction in which facts and circumstances surrounding offense involve moral

8. All further references to sections are to the Business and Professions Code unless otherwise noted.

9. At Peters's request, the hearing judge ordered certain confidential portions of the record redacted and sealed. We do not refer to the protected information in this opinion except for that which Peters described or relied on during trial or in her briefs.

turpitude, unless most compelling mitigating circumstances clearly predominate].)[10]

III. PETERS'S CRIMINAL CONVICTION INVOLVED MORAL TURPITUDE

[1a] Peters argues that she should not be found culpable of moral turpitude, primarily because she did not know she was addicted to Neurontin nor did she feel impaired the day of the collision. However, her contention does not correctly reflect the test for moral turpitude. The test is whether the facts and circumstances surrounding her criminal conduct show either "a deficiency in any character trait necessary for the practice of law (such as trustworthiness, honesty, fairness, candor, and fidelity to fiduciary duties)" or involve "such a serious breach of a duty owed to another or to society, or such a flagrant disrespect for the law or for societal norms, that knowledge of the attorney's conduct would be likely to undermine public confidence in and respect for the legal profession. [Citations.]" (*In re Lesansky* (2001) 25 Cal.4th 11, 16.) We find that her conduct, as evidenced in the record, establishes moral turpitude under either condition of the test.

[1b] First, the facts and circumstances surrounding her conviction reveal deficiencies in Peters's honesty and candor. Peters argues that she is not culpable of moral turpitude because she did not make affirmative misstatements to either Sergeant Beigh or the probation officer. However, we find that she was not candid with Sergeant Beigh at the scene about the number of Neurontin pills she had taken. Even assuming a misunderstanding at the scene caused her to misstate the number of pills she had consumed, she never told the police she had taken six or seven—not two—Neurontin pills in the hours before the collision. Further, during the presentencing phase, she did not tell the probation officer about her overuse of Neurontin—information he testified would have been useful in preparing his report. She also disingenuously told the probation officer she had not been impaired, and the collision was a horrible accident resulting from a lack of caution.

[1c] Second, Peters's conduct represents a serious breach of her duty to society and demonstrates a flagrant disrespect for the law such that knowledge of her conduct would undermine public confidence in and respect for the profession. **[2]** Her felony criminal conviction is conclusive proof that she drove while intoxicated and caused Robert Weaver's death. (§ 6101, subds. (a) & (e); *In the Matter of Posthuma* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 813, 820.)[11] Peters had an admitted history of being unable to control her prescription drug use, which prompted one physician to cease treating her. Though she stopped using Norco in 2012, she took Neurontin contrary to direction for nine to 12 months prior to the collision. On the day of the crash, Peters knowingly took six or seven Neurontin pills—more than her full day's prescribed dose—in about five hours. Despite having previously felt sedated by the drug, she still chose to drive. For nearly a mile, she traversed widely across multiple lanes but did not stop, even after she ran all four tires of her car over the curb and onto the grass. Instead, she continued driving at approximately 50 to 60 miles per hour, and, without braking, rear-ended the Weavers' stopped car. She destroyed their car, killed Robert, gravely injured Bonnie, and injured others.

[1c] Peters argues she did not feel impaired the day of the collision. But, in fact, she was *significantly* impaired, as shown by her conviction for vehicular manslaughter while intoxicated, her Wildly erratic driving, her failure to apply the

10. All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

11. Penal Code section 191.5, subdivision (b), states: "Vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, but without gross negligence, or the proximate result of the commission of a lawful act that might produce death, in an unlawful manner, but without gross negligence."

brakes, and, after the collision, her physical appearance, lack of balance, difficulty following instructions, and inability to pass multiple SFSTs. Whether she perceived that she was impaired, she knew or should have known that it was unsafe and unlawful to drive after taking more than a full day's dose of Neurontin in five hours. She had been taking the drug for years, had felt sedated by it before, and knew or should have known about its common side effects of dizziness, sedation, and lack of muscle control. Peters should have stopped driving after she breached the curb, yet she did not. She acted without regard for her duty to society or concern for the law or public safety, and the resulting grave consequences to the Weavers are a prime measure of the results of that disregard. (See *In re Alkow* (1966) 64 Cal.2d 838, 840 (*Alkow*) [moral turpitude where attorney had history of driving while visually impaired and "reasonably must have known that injury to others was a possible if not a probable result of his driving"].)

IV. AGGRAVATION AND MITIGATION

OCTC must establish aggravating circumstances by clear and convincing evidence. (Std. 1.5.)[12] Peters has the same burden to prove mitigation. (Std. 1.6.)

A. AGGRAVATION

1. SIGNIFICANT AGGRAVATION FOR CAUSING SIGNIFICANT HARM

We find that Peters caused significant harm to the public, which warrants significant weight in aggravation. (Std. 1.5(j).) She caused Robert's death and deprived his family and friends of his love, companionship, and friendship. His wife, Bonnie, testified, "nothing will ever be the same." Peters also gravely injured Bonnie, who suffered a broken nose, orbital eye blowout, crushed sinuses, dislocated discs in her neck, a crushed foot, internal bleeding, and a broken shoulder that required surgery and placement of a plate held by nine bolts. Bonnie was in critical care for eight days and in therapy for six months. She still must have her discs and eyes checked, gets headaches, and cannot sleep lying down because her crushed sinus wall cannot be repaired so she is unable to breathe well. Two individuals involved in the second collision also suffered physical injuries: one, chest and leg pain, and the other, head and neck pain. Finally, Peters's actions resulted in the destruction of the Weavers' car and damage to at least two cars involved in the second collision.

2. NO OTHER AGGRAVATION WARRANTED

[3] The hearing judge found no additional aggravation for concealment (see std. 1.5(f)) or bad faith or dishonesty (see std. 1.5(d)) because she determined Peters's misconduct involved moral turpitude based on her concealment and false statements to the police and the probation officer. We affirm. (*In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 68 [where factual finding used for culpability, improper to consider them in aggravation].)

B. MITIGATION

1. SOME MITIGATION FOR NO PRIOR RECORD OF DISCIPLINE

[4a] Peters was admitted to the State Bar in 1994 and has no prior record of discipline. The "absence of any prior record of discipline over many years of practice coupled with present misconduct, which is not likely to recur" is a mitigating circumstance. (Std. 1.6(a).) The hearing judge assigned significant mitigating weight to

12. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

Peters's discipline-free career without considering whether the misconduct is "not likely to recur," as the standard requires.

[4b] We assign this factor only some mitigating weight. While Peters had 19 years of discipline-free practice, she has not shown that her substance abuse problems are resolved, as discussed below. Absent this evidence, we are unable to find that her misconduct is unlikely to recur. (See *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [long discipline-free practice is most relevant where misconduct is aberrational].)

2. SOME MITIGATION FOR EXTREME EMOTIONAL AND PHYSICAL DIFFICULTIES

Mitigation is available for "extreme emotional difficulties or physical or mental disabilities" if: (1) the member 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 member will commit future misconduct. (Std. 1.6(d).)

[5a] The hearing judge assigned this factor no weight in mitigation, but we find Peters is entitled to some mitigation. Her uncontradicted testimony establishes that her long-standing depression and prescription drug abuse led to the collision. (See *In the Matter of Deierling* (Review Dept. 1991) 1 Cal State Bar Ct. Rptr. 552, 560 [attorney's convincing, uncontradicted testimony about drug and alcohol abuse established causal connection to misconduct].) However, Peters has not shown the required proof of complete, sustained recovery and rehabilitation to warrant full mitigation. (*In re Lamb* (1989) 49 Cal.3d 239, 246; see also *Rosenthal v. State Bar* (1987) 43 Cal.3d 658, 664 [attorney must demonstrate "a meaningful and sustained period of successful rehabilitation"]; *Slavkin v. State Bar* (1989) 49 Cal.3d 894, 905 [attorney suffering from drug or alcohol dependence generally must establish that addiction is permanently under control]; std. 1.6(d).)

We date Peters's drug abuse to November 2010. However, she did not seek substance abuse treatment prior to the 2013 collision, disregarding the advice of her pain management specialist, Dr. Hembd, in 2011. Though she stopped using Norco in 2012, she began abusing Neurontin in the months prior to the collision.

Even the fatal collision did not prompt Peters to seek treatment. Nearly two years after the crash, she told the probation officer that she did not feel she had a drug or alcohol problem and did not wish to enter a rehabilitation program.

Only upon release from custody in September 2015 did Peters begin receiving *mandatory* drug abuse and addiction counseling as part of an 18-month DUI program, which she successfully completed in March 2017.[13] She has not violated her criminal probation or failed any of the required random drug tests, which do not include testing for Neurontin. Further, she testified that she no longer abuses drugs and is able to help support her family financially. **[7]** While we assign some weight to an attorney's activities while on criminal probation, we give "far greater weight" to activities after probation has ended. (*In the Matter of Bodell* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 459, 464; see also *Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 939 [inadequate that petitioner stayed out of trouble while being watched on probation]; *In re Giddens* (1981) 30 Cal.3d 110, 116 [proof of rehabilitation needed "during a period when petitioner is neither on parole . . . nor under supervision of the bar"].)

Peters recently sought treatment on her own initiative. In June 2017, she voluntarily entered an intensive outpatient program (IOP) that addresses the needs of those with addiction issues who are seeking long-term recovery. Peters was discharged from the IOP on August 31, 2017. Since then, she has begun individual therapy with a new marriage and family therapist, and individual drug treatment with a certified drug and alcohol counselor. Her attending psychiatrist at

13. **[6a]** On review, Peters filed two motions to augment the record. We granted her requests to augment the record with evidence of her rehabilitation since trial.

the IOP stated, "Peters is being treated for her dual diagnoses of depression and substance use disorder in full remission." He also wrote, "It is my opinion that Jordan Peters is not a danger to the public and does not have an impairment that would prevent her from practicing law." In her discharge summary, another doctor confirmed that Peters had been diagnosed with: (1) generalized anxiety disorder; (2) major depressive disorder; and (3) opiate use disorder, "in full sustained remission." **[6b]** We do not assign these items full evidentiary weight, however, because they were not subject to cross-examination by OCTC at trial.

[5c] We applaud Peters's rehabilitation efforts, both voluntary and mandatory. Yet, given her years-long history of abuse, her earlier resistance to seeking treatment, and that she only began her treatment just over two years ago, we find, for the purposes of attorney discipline, that Peters has started but not completed rehabilitation. (See *Rosenthal v. State Bar*, *supra*, 43 Cal.3d at p. 664 [18 months of sobriety not sufficiently meaningful and sustained period of successful rehabilitation]; cf. *Howard v. State Bar* (1990) 51 Cal.3d 215, 222–223 [attorney who abused cocaine and alcohol entitled to substantial reduction in discipline given extensive expert and lay testimony about her rehabilitation and evidence demonstrating two and a half years of sobriety]; *Waysman v. State Bar* (1986) 41 Cal.3d 452, 459 [over three years of sobriety and successful treatment of alcohol problem, coupled with other mitigating facts, justified discipline that included six-month stayed suspension and probation under rigorous conditions].)

3. LIMITED MITIGATION FOR COOPERATION

We agree with the hearing judge that Peters is entitled to limited mitigation credit for her cooperation with the State Bar by entering into a stipulation of facts, most of which were easily provable. (Std. 1.6(e) [mitigation credit permitted for spontaneous candor and cooperation displayed to State Bar]; *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443 [factual stipulation merits some mitigation].) However, we reject Peters's requests for additional mitigation for her candid testimony about her personal life, mental health struggles, and drug use, and for her offer to stipulate to additional facts. Her testimony largely went to her defense and is considered elsewhere in mitigation, and her offer does not warrant further credit.

4. MODERATE MITIGATION FOR GOOD CHARACTER

Peters is entitled to mitigation if she establishes 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 her misconduct. (Std. 1.6(f).) The hearing judge noted that Peters's good character evidence was from only five witnesses, and assigned it minimal weight because she did not offer evidence from a wide range of references in the legal and general communities. We accord Peters additional weight, however, as she actually presented six witnesses. Nonetheless, we agree she is not entitled to full mitigating credit as she did not provide any references from the legal community. (See *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [testimony from members of bench and bar entitled to serious consideration because judges and attorneys have "strong interest in maintaining the honest administration of justice"].)

Peters presented six witnesses who testified to her good character and honesty. Those witnesses included her former paralegal, her pastor, three other people from her church, and an executive assistant at her workplace at the time of trial. Her former paralegal had known her for about five years, while the other witnesses had known her for about one to three years. None knew Peters well. They had varying degrees of knowledge about the circumstances surrounding the collision, but all testified they knew that Peters caused a fatal collision while on prescription medication, was criminally convicted, and was extremely remorseful. Four visited her in jail.

While none of the witnesses were from the legal community or had a long-term relationship with Peters, we find the quantity and quality of their testimony more persuasive than the hearing judge did. We thus assign moderate mitigating weight to Peters's character evidence. (See *In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 476 [weight of character evidence reduced where wide range of references lacking]; cf. *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591–592 [significant mitigation for good character for three witnesses, two attorneys and a fire chief, who had long-standing familiarity with attorney and broad knowledge of good character, work habits, and professional skills].)

5. MODERATE MITIGATION FOR PRO BONO AND COMMUNITY SERVICE

[8a] Pro bono work and community service are mitigating circumstances. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) Peters testified to numerous pro bono and community service activities. The hearing judge did not assign mitigating credit for any uncorroborated activities, but did allot modest credit for those confirmed by others. We find Peters deserves mitigation for all her activities and also find the record reveals more evidence of pro bono and community service work that entitles her to moderate weight in mitigation overall.

Peters's pro bono and community service work spans many years. She testified that she provided pro bono legal services to several individuals and families prior to the collision. Her work included: representing a single mother with an autistic son to obtain paternal consent for the child to receive medical care; helping an immigrant family in a zoning matter and to defend against stop orders and keep its small business operational; and assisting another immigrant family to attain citizenship. Peters also provided services to the legal and general communities at large. She served for three years on the executive committee of a county bar association section, first as a member, then as vice-president, and then as president. She also served three years on the board of an organization that aided domestic violence survivors.

After the collision, no further evidence of Peters's pro bono work exists. Yet, while in custody, she taught other inmates to read, helped some prepare for the GED test, and served as a mentor. In 2014, Peters joined a church at which she has regularly volunteered on Sundays, except while incarcerated, assisting kitchen staff and "serv[ing] in areas [for which] there is little thanks." These post-collision activities were corroborated by multiple witnesses.

[8b] Peters's pro bono and community service work is commendable, but does not qualify for full mitigation credit because her testimony lacked specificity and, as to her pre-collision activities, was uncorroborated. We thus cannot evaluate the full measure of the dedication and zeal she brought to those activities. (See *Rose v. State Bar* (1989) 49 Cal.3d 646, 667 [mitigation for legal abilities, dedication, and zeal in pro bono work]; compare *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 840 [limited weight given for community service where evidence based solely on attorney's testimony and, thus, extent of service unclear] with *Schneider v. State Bar* (1987) 43 Cal.3d 784, 799 [considerable weight given for legal and community services where attorney, certified taxation specialist and adjunct law professor, served on several bar and law school committees, founded tax group and pension council, had attorneys, clients, and judge submit supporting letters, and received commendation from local council for "Decade of Friendship"].)

6. MODERATE MITIGATION FOR REMORSE AND RECOGNITION OF WRONGDOING

The hearing judge accorded Peters's remorsefulness some weight in mitigation though she never personally apologized to Bonnie Weaver. The judge found that Peters credibly testified that she has shared with friends, colleag-

ues, and church members that she often thinks about the collision, the Weavers, and the remorse she feels for having taken Robert Weaver's life as a result of her untreated prescription drug addiction. (Std. 1.6(g).)

We too find that Peters's remorse and recognition of wrongdoing warrant mitigation. We give great weight to the hearing judge's credibility findings (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032), note that several witnesses provided testimony corroborating that Peters was remorseful, and find that Peters expressed remorse to Bonnie and the entire Weaver family during her criminal sentencing hearing in March 2015. Further, we acknowledge Peters's concession that she deserves discipline, and recognize her efforts to accept responsibility and seek treatment, although she did not do so in some instances until years after the misconduct. Accordingly, we assign moderate weight to Peters's remorse and recognition of wrongdoing. (See *In the Matter of Romano* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 391, 399–400 [moderate weight assigned for remorse where attorney, at time of her hearing to show cause why she should not be sanctioned, apologized and explained she realized she could not justify her conduct merely because her intent was to help clients, and where attorney disgorged $18,500 in wrongfully obtained fees, though she did so pursuant to court-imposed sanctions order].)

V. DISBARMENT IS THE APPROPRIATE DISCIPLINE

Our role is not to punish Peters for her crime—the superior court has done so by sentencing her in the criminal proceeding—but to recommend professional discipline. (*In re Brown* (1995) 12 Cal.4th 205, 217 ["the aim of attorney discipline is not punishment or retribution; rather, attorney discipline is imposed to protect the public, to promote confidence in the legal system, and to maintain high professional standards"]; std. 1.1.) Peters seeks a two-year actual suspension, and OCTC asks that we affirm the disbarment recommendation.

We follow the standards whenever possible and balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis, to ensure that the discipline imposed is consistent with the purposes of discipline. (*In re Young* (1989) 49 Cal.3d 257, 266–267 & fn. 11.) **[9a]** Disbarment is the presumed sanction for a felony conviction in which the surrounding facts and circumstances involve moral turpitude, unless the most compelling mitigating circumstances clearly predominate, in which case at least a two-year actual suspension is appropriate. (Std. 2.15(b).)

In addition to the standards, we look to case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.) We find no published California case considering a felony vehicular manslaughter conviction. In a 1966, pre-standards case, the Supreme Court imposed a six-month suspension for misdemeanor vehicular manslaughter involving moral turpitude where the attorney had a history of driving while visually impaired and of violating his probation, and had received more than 20 traffic violations. (*Alkow*, *supra*, 64 Cal.2d 838.) Notably, *Alkow* did not involve intoxicated driving or a felony, and " 'discipline imposed in 1966, is no longer applicable, in light of current societal rejection of impaired driving, especially drunk driving, and the implementation of standards for attorney sanctions that were adopted in 1986.' [Citation.]" (*In the Matter of Guillory* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 402, 411 (*Guillory*).) Moreover, unlike this case, *Alkow* revealed no finding that the attorney had misled those investigating his crime or those evaluating his sentence.[14]

14. Recently, we recommended an actual suspension of two years to continue until proof of rehabilitation for four misdemeanor alcohol-related driving offenses involving moral turpitude. (*Guillory*, *supra*, 5 Cal. State Bar Ct. Rptr. at pp. 405, 411.) However, *Guillory* is distinguishable from the instant matter because disbarment is not the presumptive discipline, as it is in this case, for misdemeanor convictions.

[9b] Applying standard 2.15(b), we find Peters has failed to establish that the most compelling mitigating circumstances clearly predominate, given the nature of her crime and the attendant aggravation. (See *In re Strick* (1987) 43 Cal.3d 644, 656 [in conviction involving moral turpitude, level of discipline must correspond to reasonable degree with gravity of misconduct].) Peters showed disregard for the law and for public safety when she drove while impaired by Neurontin. This serious breach of her duty to society caused death and injury. The physical and emotional consequences to Bonnie Weaver are significant harms and cannot be overstated. We also emphasize that Peters lacked candor in dealing with the police in the aftermath of the collision and, in particular, the probation officer during the presentencing phase. Honesty and candor are critically important traits to the legal profession, and any deficiency is of serious concern.

[9c] While she had a 19-year discipline-free career before the collision, her rehabilitation is in its early phase, and we find she has not shown her misconduct is unlikely to recur. For the same reason, her crime is not fully mitigated by her physical and emotional problems. These mitigating factors, together with her moderate evidence of good character, pro bono and community service, and remorse, and her limited credit for cooperation do not constitute compelling mitigation. They fall far short of predominating, given her extremely serious misconduct and the profound harm she caused. Anything less than disbarment would fail to protect the public and undermine its confidence in the legal profession. Thus, before Peters is entitled to resume practicing law, she should be required to demonstrate in a reinstatement proceeding by clear and convincing evidence, her rehabilitation and exemplary conduct over an extended period of time.

VI. RECOMMENDATION

We recommend that Jordan Tonya Louise Peters be disbarred from the practice of law and that her name be stricken from the roll of attorneys admitted to practice in California.

We further recommend that Peters comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter.

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

VII. ORDER

The order that Jordan Tonya Louise Peters be involuntarily enrolled as an inactive member of the State Bar pursuant to section 6007, subdivision (c)(4), effective April 24, 2017, will continue, pending the consideration and decision of the Supreme Court on this recommendation.

State Bar Court
Review Department

In the Matter of

JOSEPH PATRICK COLLINS

A Member of the State Bar

No. 16-O-10339

Filed March 28, 2018

SUMMARY

The Office of the Chief Trial Counsel (OCTC) charged Collins with failing to obey five sanctions orders issued by a trial court in a civil case. Collins stipulated to the facts and to his culpability, but went to trial on aggravation, mitigation, and discipline. After the trial, the hearing judge dismissed the charges sua sponte on the ground that Collins had no obligation to comply with the sanctions orders because he was not personally named in the orders or the underlying motions. OCTC appealed.

The Review Department reversed, holding that Collins was bound by his factual admission in the parties' stipulation that he was aware of the sanctions orders issued against his law firm, and was personally subject to them. The orders could not be collaterally attacked for the first time in the disciplinary proceedings. Based on the trial record regarding degree of discipline, the Review Department found no basis upon which to deviate from the applicable disciplinary standard, and recommended a 30-day actual suspension.

COUNSEL FOR PARTIES

For State Bar of California: Brandon Keith Tady, Esq.

For Respondent: Joseph P. Collins, Esq.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1a-d] **162.19 Standards of Proof/Standards of Review — State Bar's burden — Other/general**
191 Miscellaneous General Issues — Effect of/Relationship to Other Proceedings
220.00 Culpability — State Bar Act Violations — Section 6103, clause 1 (disobedience of court order)

To prove a violation of Business and Professions Code section 6103 based on an attorney's failure to obey court orders, OCTC must establish the attorney knew the orders were final and binding, and intended his acts or omissions. Where respondent was aware of and joined in client's tactical decision not to participate in discovery; was timely served with motions for discovery sanctions but chose not to respond or appear; was served with orders granting monetary sanctions against his client and his firm jointly and severally; and stipulated he was individually responsible for resulting obligation, respondent was obligated either to comply with orders or make formal motion or appeal explaining why he could not do so, and could not simply disregard orders, even under client's instructions. Respondent was therefore culpable of violating section 6103.

[2a, b] **117 Generally Applicable Procedural Issues — Dismissal (rules 5.122-5.124)**
151 Evidentiary Issues — Evidentiary effect of Stipulations
204.90 Substantive Issues — Culpability — Other general substantive issues re culpability
220.00 Culpability — State Bar Act Violations — Section 6103, clause 1 (disobedience of court order)

Stipulated facts in disciplinary proceedings are binding on parties under State Bar rule 5.58(G). Where respondent stipulated that he was obligated to pay monetary sanctions awarded against his law firm; law firm name did not indicate it was a corporation or limited liability partnership, as would be required by State Bar Rules 3.152(B) and 3.174(B); and even if it were, respondent could not thereby escape personal liability for his own professional malfeasance and still would have been required to report sanctions award against him, record and law supported respondent's stipulation, and hearing judge erred in exonerating respondent and dismissing disciplinary proceeding based on conclusion that respondent was not individually responsible for paying sanctions.

[3a-c] **191 Miscellaneous General Issues — Effect of/Relationship to Other Proceedings**
151 Evidentiary Issues — Evidentiary effect of Stipulations
220.00 Culpability — State Bar Act Violations — Section 6103, clause 1 (disobedience of court order)

When attorney has actual notice of court order, and does not object, move for reconsideration, or seek appellate review, attorney forfeits right to challenge order based on inadequate notice, and is obligated to comply with order. For due process and notice purposes, discovery sanctions orders are not distinguishable from other types of sanctions orders. Where respondent stipulated he had actual notice of orders imposing monetary discovery sanctions, and did not comply with orders, hearing judge erred in finding respondent not culpable of violating orders because he was not personally named in underlying motions.

[4a-c] **101 Generally Applicable Procedural Issues — Jurisdiction**
191 Miscellaneous General Issues — Effect of/Relationship to Other Proceedings
220.00 Culpability — State Bar Act Violations — Section 6103, clause 1 (disobedience of court order)

For disciplinary purposes, superior court orders are final and binding once review in courts of record is waived or exhausted. Attorneys cannot wait until State Bar disciplinary proceedings commence to collaterally challenge legitimacy of superior court orders. State Bar Court does not have jurisdiction to determine validity of civil court orders.

[5] **117 Generally Applicable Procedural Issues — Dismissal (rules 5.122-5.124)**
130 Procedure on Review (rules 5.150-5.160)
166 Standards of Proof/Standards of Review — Independent Review of Record

Where hearing judge held full and fair trial on aggravation and mitigation but dismissed case without making any findings, and Review Department reversed dismissal, Review Department reviewed record and made its own findings and discipline recommendation.

[6a-d] **801.45 Application of Standards — General Issues — Deviation from standards — Found not to be justified**
802.64 Application of Standards — Standard 1.7 (Determination of Appropriate Sanctions) — Limits on effect of mitigating circumstances
921.21 Application of Standards — Standard 2.12(a) — Applied–actual suspension — Violation of court order
1093 Miscellaneous Substantive Issues re Discipline — Inadequacy of Discipline

Where respondent established substantial mitigation, and Office of Chief Trial Counsel sought only stayed suspension, Review Department nonetheless imposed 30-day actual suspension, because applicable Standard provided for actual suspension or disbarment; mitigation was not sufficient to justify deviation from Standard; respondent's misconduct in violating five separate court orders was serious, not minor; and respondent had not yet provided proof of payment of court-ordered monetary sanctions.

[7] **191 Miscellaneous General Issues — Effect of/Relationship to Other Proceedings**
171 Issues re Conditions Imposed as Part of Discipline — Restitution Requirements (rule 5.136; Standard 1.4(a))
220.00 Culpability — State Bar Act Violations — Section 6103, clause 1 (disobedience of court order)
802.50 Application of Standards — General Issues — Standard 1.4 (Conditions Attached to Sanctions)

Where respondent was culpable of disobeying court orders by failing to pay monetary sanctions, payment of the sanctions was imposed as condition of respondent's disciplinary probation.

ADDITIONAL ANALYSIS

Culpability

Found

220.01 Section 6103, clause 1 (disobedience of court order)

Aggravation

Found

521 Multiple acts of misconduct (1.5(b))

Mitigation

Found

710.10 No prior discipline (1.6(a))
730.10 Cooperation (1.6(e))

Discipline Imposed

1013.08 Stayed Suspension — Two years
1015.01 Actual Suspension — One month or less
1017.08 Probation — Two years

Probation Conditions

1021 Restitution
1024 Ethics exam/ethics school

OPINION

HONN, J.

This matter is before us on appeal by the Office of Chief Trial Counsel of the State Bar (OCTC). OCTC charged Joseph Patrick Collins with five counts of failing to obey civil court sanctions orders, and Collins stipulated to all of the predicate facts as well as culpability. However, following a one-day trial on aggravation, mitigation, and the level of discipline, a hearing judge sua sponte dismissed the case, finding the sanctions orders were void or voidable and Collins had no obligation to comply with them. OCTC asks that we reverse the judge's decision and find culpability. As to discipline, it seeks a one-year stayed suspension. Collins did not appeal, but asks that we affirm the dismissal.

We independently review the record (Cal. Rules of Court, rule 9.12) and reverse the hearing judge.

The parties stipulated that Collins was served with all five sanctions motions and orders, that he was named in the sanctions orders along with his client, and that he was jointly and severally responsible for the debt. The superior court records indicated that the motions named only Collins's client, while the resulting sanctions orders named Collins's client and his counsel, the Law Offices of Joseph P. Collins. The hearing judge disregarded the stipulation and found that the orders were void or voidable as to Collins since he was not named in the motions or personally named in the sanctions orders.

We enforce the factual admissions in the parties' stipulation, which demonstrate that Collins was aware of the sanctions orders, which he was subject to, and failed to comply or challenge them in the courts of record. We disagree with the hearing judge that the sanctions orders can be collaterally attacked for the first time in these proceedings. After considering and weighing aggravation and mitigation, we find no basis to deviate from the applicable disciplinary standard, which minimally calls for a period of actual suspension. We therefore recommend a 30-day actual suspension, which we note is at the lowest end of the standard's range but is sufficient to protect the public, the courts, and the profession.

I. FACTUAL[1] AND PROCEDURAL BACKGROUND

Collins was admitted to the practice of law in California on January 8, 1993. On September 21, 2016, OCTC filed a Notice of Disciplinary Charges against him alleging five separate violations of Business and Professions Code section 6103 for willfully disobeying civil court sanctions orders in a single client matter.[2]

A. The Parties' Joint Stipulation

On January 10, 2017, OCTC and Collins filed a joint stipulation as to facts, admission of documents, and conclusions of law (stipulation). In summary, the parties stipulated that Collins was culpable as charged of five counts of violating court orders, as supported by the following facts.

Collins represented the defendant, Martin Caverly, in a civil case involving breach of contract.[3] On March 25, May 6, June 24, July 1,

1. The factual background is based on the parties' joint stipulation, 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).) All further references to rules are to the Rules of Procedure of the State Bar unless otherwise noted.

2. All further references to sections are to the Business and Professions Code. Section 6103 provides that an attorney's "wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension."

3. *O'Connor Peabody Holdings, LLC, et al. v. Martin B. Caverly*, Los Angeles County Superior Court, Case No. SC122588.

and July 15, 2015, the superior court heard and granted five separate discovery motions brought by the plaintiff to compel Caverly's responses to various discovery requests (form interrogatories, special interrogatories, demand for production of documents [set one], demand for production of documents [set two], and his appearance for deposition). With each motion, the plaintiff also sought sanctions. In total, the court ordered monetary sanctions of $6,300 ($1,185 for each document-related discovery violation [$4,740] plus $1,560 for compelling Caverly's deposition) against Collins and Caverly, jointly and severally, payable to the plaintiff within a specified period of time (ranging from 20 to 30 days).

The plaintiff served notice of each ruling on Collins, which Collins received. The sanctions were not paid, nor were discovery responses provided as ordered. For this reason, on September 17, 2015, the court granted the plaintiff's motion for terminating sanctions and entered Caverly's default. The plaintiff served notice of this ruling on Collins, which he received. Judgment was entered against Caverly on November 4, 2016.[4] The amount of the judgment did not include the sanctions ordered against Collins and Caverly, and, as of the date of trial in this matter, none of the sanctions had been paid to the plaintiff.

B. The Trial Proceeding

Since the parties did not agree to the level of discipline for Collins's stipulated misconduct, a one-day trial on that issue was held on January 20, 2017. The parties had a full and fair opportunity to present evidence and testimony, opening and closing arguments, and posttrial briefing.

At the commencement of the trial, the hearing judge received the stipulation into evidence, along with other exhibits and Collins's declaration. Collins also testified on his own behalf and was the sole witness in the proceeding. In both his declaration and his trial testimony, Collins explained that the decision not to comply with the discovery requests was client-driven. He stated that Caverly wanted to keep litigation expenses to a minimum, and made the tactical decision to cease participation and let the case terminate by default. Thus, Caverly did not respond to discovery requests or attend his scheduled deposition, and neither Caverly nor Collins opposed the motions to compel and requests for sanctions, appeared at the hearings on those motions, sought reconsideration, or otherwise challenged or appealed the sanctions awards. Although Collins was served with and received copies of all pleadings and orders, he contends that he was simply following Caverly's instructions.

On January 27, 2017, the hearing judge took Collins's disciplinary matter under submission.[5] However, before issuing her decision, she held a telephonic status conference on March 3, 2017, during which she informed the parties of her concerns about whether the stipulated conclusions of law were adequately supported by the record. In particular, she had reviewed the underlying motions and orders in the civil case and questioned whether the sanctions orders against Collins were valid and enforceable. The judge also noted that the plaintiff's sanctions motions only sought recourse against Caverly, who, according to Collins, directed the litigation strategy. She further expressed doubts about whether Collins had adequate advance notice that

4. The 2016 date appears to be a typographical error, as the superior court records show that judgment was entered on November 4, 2015. For our purpose, this error is insubstantial and does not affect the culpability or disciplinary analysis. (*In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 19, 23, fn. 6 [modifications made by Review Department in referee's decisions did not affect recommended discipline and were deemed insubstantial].)

5. The judge gave the parties until January 27, 2017, to submit closing briefs. OCTC timely filed its brief, but Collins failed to file a conforming brief. He attached a copy of his brief to an email to the Hearing Department, but the clerk rejected it because it was not signed or accompanied by a proof of service. (State Bar Ct. Rules of Prac., rule 1112(a).)

he would be subject to sanctions along with his client because he was not named in the sanctions motions. The judge then asked the parties to file supplemental briefs addressing whether: (1) the sanctions orders were final and binding on Collins individually; and (2) payment of the sanctions was an act that Collins "ought in good faith to have done." Her verbal directives were also reflected in a March 6, 2017 order, and both parties filed the requested briefs on March 20, 2017.

C. The Hearing Judge's Decision

On April 27, 2017, the hearing judge issued her decision. She rejected the parties' five stipulated conclusions of law[6] and dismissed Collins's disciplinary case, finding that the sanctions orders against him were either void or voidable. While she stated that the parties remained bound by the stipulated facts under rule 5.58(G) (parties bound by stipulated facts even if conclusions of law are rejected), she nevertheless found that the superior court sanctions orders themselves did not name Collins individually, but instead named the Law Offices of Joseph P. Collins, and that, in any event, neither Collins nor his law firm was given prior notice of any sanctionable conduct on their part.

II. COLLINS IS CULPABLE OF FAILING TO OBEY COURT ORDERS (§ 6103)

[1a] To prove the section 6103 violations, OCTC must establish that Collins knew the sanctions orders against him were final and binding and that he intended his acts or omissions. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 787.)

[1b] We find that the parties' stipulated facts, the superior court records in evidence, and Collins's trial testimony and declaration clearly and convincingly[7] establish his culpability. Collins stipulated that he represented Caverly in the civil court action and testified that he was aware of and joined in Caverly's tactical decision not to participate in discovery. The court records show that Collins was timely served with copies of all five sanctions motions against Caverly, yet Collins chose not to file responsive pleadings or appear at the hearings so that the case could conclude by default. The court records also indicate that the sanctions orders were issued against Caverly and *his counsel*, the Law Offices of Joseph P. Collins, jointly and severally. Additionally, Collins stipulated that he was individually responsible for this obligation, that he was served with and received each of the sanctions orders, and that the sanctions had not been paid.

[1c] Under these circumstances, we find that Collins was aware of the orders and had ample time and opportunity to contest their validity in the courts of record. He failed to do so. Thus, he was obligated to comply with the orders, and "not simply disregard them" (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 47), even if he was following his client's instructions. As we stated in *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 403: "Obedience to court orders is intrinsic to the respect attorneys and their clients must accord the judicial system. As officers of the court, attorneys have duties to the judicial system which may override those owed to their clients. [Citations.] In the case of court-ordered sanctions, the attorney is expected to follow the order or proffer a formal explanation by motion or appeal as to why the order cannot be obeyed."

[1d] Given Collins's knowing and intentional disobedience of the five unchallenged sanctions orders, we find him culpable of five violations of section 6103.

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6. In his posttrial brief, Collins asked to withdraw his stipulated conclusions of law. The hearing judge denied the request as moot in her April 27, 2017 decision since she dismissed the case.

7. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

III. THE HEARING JUDGE SHOULD HAVE ABIDED BY THE PARTIES' STIPULATED FACTS AND THE UNCHALLENGED SANCTIONS ORDERS

We disagree with the hearing judge's attack in this disciplinary proceeding on the validity of the civil court sanctions orders. As discussed below: (1) the hearing judge failed to adhere to the parties' stipulated facts, which expressly resolved that Collins was individually obligated to pay the sanctions; (2) Collins forfeited his ability to contest the sanctions orders by not seeking relief in the courts of record; and (3) the unchallenged orders are now final and binding for attorney disciplinary purposes.

A. Collins Is Individually Liable For The Sanctions

[2a] Contrary to the parties' mutual understanding and agreement that Collins was obligated to pay the sanctions, the hearing judge concluded that Collins was not individually responsible for the debt because the sanctions orders named the Law Offices of Joseph P. Collins. We find the judge erred, and should have abided by the parties' stipulated facts, which, we note, are binding on the parties and amply supported by the record and the law. (Rule 5.58(G); *Inniss v. State Bar* (1978) 20 Cal.3d 552, 555 ["Ordinarily, . . . the stipulated *facts* may not be contradicted; otherwise, the stipulation procedure would serve little or no purpose, requiring a remand for further evidentiary hearings whenever the attorney deems it advisable to challenge the factual recitals"].)

[2b] There is no question that Collins represented Caverly in the civil action, and that as Caverly's counsel, Collins was, in part, the subject of the sanctions orders. Thus, the sanctions against the Law Offices of Joseph P. Collins constituted sanctions against Collins. The title, "Law Offices of Joseph P. Collins," includes no corporate or limited liability partnership indicia,[8] and there is no evidence in the record that establishes that the Law Offices of Joseph P. Collins is anything but Collins operating under that name as a solo practitioner. Nevertheless, even if Collins enjoyed corporate or limited liability status, he cannot escape personal liability for his own professional malfeasance. (See *T & R Foods, Inc. v. Rose* (1996) 47 Cal.App.4th Supp. 1, 8–9; see also § 6068, subd. (o)(8) [attorney's duty to notify State Bar of reportable sanctions includes sanctions against law firm or law corporation in which attorney was partner or shareholder at time of conduct complained of].)

B. Collins Had Notice Of The Sanctions Orders And Chose Not To Challenge Them

[3a] Relying on *In re Marriage of Fuller* (1985) 163 Cal.App.3d 1070 and *Blumenthal v. Superior Court* (1980) 103 Cal.App.3d 317, the hearing judge sua sponte determined that even if Collins were individually obligated to pay the sanctions, the orders are void or voidable because he was not named in the sanctions motions and was therefore not aware that his conduct could be the subject of possible sanctions. The judge, however, failed to recognize that Collins stipulated that he had actual notice that he had been sanctioned, and at that point, "he was obligated to obey the order[s] unless he took steps to have [them] modified or vacated, which he did not do. [Citations.]" (*In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar. Ct. Rptr. 1, 9; accord, *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 951–952 [technical arguments regarding validity of civil court orders waived if orders became final without appropriate challenge; "[t]here can be no plausible belief in the right to ignore final, unchallengeable orders one personally considers invalid"]; see also *Jansen Associates, Inc. v. Codercard, Inc.* (1990) 218 Cal.App.3d 1166 (*Jansen*).) Under facts similar to

8. See State Bar Rules 3.152(B) (corporate naming requirements) and 3.174(B) (limited liability partnership naming requirements).

Collins's case, the plaintiff in *Jansen* sought sanctions against Codercard, after the company and its attorney failed to attend mandatory arbitration proceedings. (*Jansen,* at p. 1168.)[9] When the trial court imposed monetary sanctions against the attorney only, the attorney did not object or seek reconsideration. (*Id.* at pp. 1168–1169.) The attorney later sought to invalidate the orders based on lack of notice, but the appellate court found he had forfeited that right: "In failing to raise the issue of inadequate notice during the hearing, failing to request a further hearing on the matter, and failing to file a motion to reconsider the issue, [the attorney] waived any objection he may have had upon that ground [Citations.]." (*Id.* at p. 1170.)

[3c] Likewise, Collins failed to object at the superior court level or seek appellate recourse. He has thus waived his right to challenge the orders.

C. The Sanctions Orders Are Now Final And Binding For Purposes Of Attorney Discipline

[4a] The sanctions orders against Collins are now final and binding for purposes of this disciplinary matter. The hearing judge's collateral attack on the orders and her finding that they are void or voidable during this proceeding were beyond her authority. Specifically, we disagree with the judge that *In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, establishes that the State Bar Court has the limited jurisdiction to determine the validity of civil court orders.

In *Respondent X*, *supra*, 3 Cal. State Bar Ct. Rptr. 592, an attorney deliberately violated the confidentiality provision of a court order enforcing a settlement agreement and he was subsequently convicted of civil and criminal contempt. The attorney sincerely believed he was acting in support of sound public policy in violating the order, but lost his appeals of both the underlying order and the contempt findings. In assessing culpability under section 6103, we held: "As to the validity of the court's confidentiality order, . . . we properly defer to the collective judgment of the courts of record which heard the contempt proceeding and which found respondent guilty and to the courts which considered respondent's subsequent appeal and requests for reconsideration and certiorari." (*Id.* at p. 605.) We emphasized that the attorney "had his opportunities to litigate *in the courts of record* his claims that the order he violated was void" and that there was "no valid reason to go behind the now-final order." (*Ibid.*, italics added.)

We read *Respondent X* in harmony with *In the Matter of Boyne*, *supra*, 2 Cal. State Bar Ct. Rptr. 389 and *In the Matter of Klein*, *supra*, 3 Cal. State Bar Ct. Rptr. 1—cases that also address an attorney's ethical duty to comply with civil court orders. **[4b]** Contrary to the hearing judge's position, the above-cited cases all stand for the same principle salient to the current matter—that superior court orders are final and binding for disciplinary purposes once review is waived or exhausted in the courts of record.

Where the cases differ is at what point *during a civil case* an attorney can challenge an order. In *Boyne* and *Klein*, we held that an attorney cannot sit back and await contempt proceedings before complying with, or explaining why he or she cannot obey, a court order. (*In the Matter of Boyne*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 404; *In the Matter of Klein*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 9.) However, we held in *Respondent X*, interpreting the then-recent Supreme Court case of *People v. Gonzalez* (1996) 12 Cal.4th 804, 818-819 (criminal case that

9. **[3b]** The plaintiff made this request pursuant to Code of Civil Procedure section 128.5, which authorizes a trial court to issue sanctions against "a party, the party's attorney, or both," for "[f]rivolous actions or delaying tactics." Collins attempts to distinguish these sanctions from the discovery sanctions imposed in his case. However, for purposes of due process and notice requirements, we see no tangible difference.

rejected collateral bar rule in California), that an attorney facing an injunctive order has one of two options: either obey the order while simultaneously challenging its validity or disobey the order, await contempt proceedings, and raise any jurisdictional contentions when punishment for such disobedience is sought to be imposed. (*In the Matter of Respondent X*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 604.) **[4c]** But with either of these two options, the remedy lies in the "courts of record," where the order originated. (*Id.* at p. 605.) We find no support for the hearing judge's finding that the concept of punishment extends beyond contempt proceedings in the superior court to attorney disciplinary proceedings. To the contrary, *Respondent X* and the related body of case precedent on this topic make clear that an attorney cannot wait until State Bar proceedings commence in order to collaterally challenge the legitimacy of a superior court order.

IV. AGGRAVATION AND MITIGATION

Standard 1.5[10] requires OCTC to establish aggravating circumstances by clear and convincing evidence; standard 1.6 requires Collins to do the same to prove mitigation. In their stipulation, OCTC and Collins stipulated to two factors in mitigation (no prior discipline and cooperation), and expressly "reserve[d] the right to argue to the court the weight that should be given to these factors." **[5]** In fact, the hearing judge gave both sides a full and fair trial and opportunity to present additional evidence of aggravation and mitigation, and to advocate orally and in writing their positions on the import of all of the factors. Collins did not present any additional evidence in mitigation. Since the hearing judge dismissed the case, she did not make any findings as to aggravation and mitigation in her decision. Nonetheless, we review the record and find the following.

A. Aggravation

Multiple Acts Of Wrongdoing

Collins violated five distinct superior court sanctions orders. We assign moderate aggravating weight to these multiple acts of wrongdoing. (Std. 1.5(b); *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646–647 [three instances of misconduct considered multiple acts]; *In the Matter of Moriarty* (Review Dept. 2017) 5 Cal. State Bar Ct. Rptr. 511, 526 [eight acts of misconduct, including violation of four court orders, assigned moderate aggravating weight].)

B. Mitigation

1. No Prior Discipline

Absence of a prior record of discipline over many years, coupled with present misconduct that is not likely to recur, is a mitigating circumstance. (Std. 1.6(a).) Collins has a 22-year legal career without discipline, which warrants significant weight in mitigation. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [more than 10 years of misconduct-free practice given significant weight in mitigation].) Moreover, his misconduct involved a single client matter where the sanctioned discovery abuses occurred over a relatively short period of time (March to July 2015). In light of these factors, we do not find that the misconduct is likely to recur. (*Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [long history of no discipline most relevant when misconduct is aberrational].)

2. Cooperation

Collins is entitled to significant mitigation for his cooperation with the State Bar. He stipulated to facts and culpability, which assisted

10. All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

OCTC's prosecution of the case and conserved time and resources. (Std. 1.6(e) [spontaneous candor and cooperation to State Bar is mitigating]; *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive mitigation given to those who willingly stipulated to facts and culpability].)

V. A 30-DAY ACTUAL SUSPENSION IS WARRANTED

Our analysis begins with the standards, which promote the uniform and consistent application of disciplinary measures, and are entitled to great weight. (Std. 1.1; *In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Although we are not strictly bound by the standards, the Supreme Court instructs us to follow them whenever possible. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) If we deviate, we must articulate clear reasons for doing so. (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.)

[6a] Here, standard 2.12(a) directly applies, providing that disbarment or actual suspension is the presumed sanction for disobedience of a court order. Section 6103 itself also states that violation of a court order is cause for disbarment or suspension, and Supreme Court precedent makes it clear that such misconduct is considered "unbefitting an attorney." (*Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.) OCTC, however, seeks a one-year *stayed* suspension, which represents a downward departure from the prescribed minimum sanction under standard 2.12(a). It argues that Collins's mitigation outweighs his aggravation.

[6b] In weighing aggravation and mitigation, standard 1.7(c) permits us to recommend a more lenient disciplinary sanction than is otherwise specified in a given standard if the net effect of the aggravating and mitigating circumstances demonstrates that a lesser measure fulfills the primary purposes of discipline. However, standard 1.7(c) also indicates that, on balance, this is only appropriate in "cases of minor misconduct, where there is little or no injury to a client, the public, the legal system, or the profession and where the record demonstrates that the member is willing and has the ability to conform to ethical responsibilities in the future."

[6c] While we acknowledge Collins's 22 years of discipline-free law practice and his extensive cooperation in this proceeding, his showing of mitigation is not enough to satisfy standard 1.7(c). His misconduct is serious, not minor, as he violated *five* separate court orders, and he has yet to provide proof of payment or resolution of the outstanding debt. (See *Barnum v. State Bar*, *supra*, 52 Cal.3d at p. 112 [violation of court order is considered serious misconduct].) Under these circumstances, he does not qualify for a reduction in the discipline under our standards.

[6d] Therefore, we find that a period of actual suspension, in accordance with standard 2.12(a), is appropriate and necessary discipline. **[7]** We recommend a 30-day actual suspension, with probation and conditions that include payment of the sanctions ordered by the superior court. (See *In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 869 [payment of outstanding sanctions is necessary component of discipline and ensures respondent's professional obligations under § 6103]; see also *In re Morse* (1995) 11 Cal.4th 184, 210–211 [payment of civil penalties ordered as explicit condition of probation despite any redundancies in civil enforcement action].)

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Joseph Patrick Collins be suspended from the practice of law for two years, that execution of that suspension be stayed, and that he be placed on probation for two years on the following conditions:

1. He must be suspended from the practice of law for the first 30 days of the period of his probation.

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within one year after the effective date of discipline, he must show proof of payment of the following sanctions as ordered by the Los Angeles County Superior Court on March 25, May 6, June 24, July 1, and July 15, 2015, in Case No. SC122588 (or reimburse the Client Security Fund, to the extent of any payment from the Fund to the payee(s), in accordance with Business and Professions Code section 6140.5), and furnish such proof to the State Bar Office of Probation in Los Angeles:

    a. $1,185 plus 10 percent interest per year from March 25, 2015;
    b. $1,185 plus 10 percent interest per year from May 6, 2015;
    c. $1,185 plus 10 percent interest per year from June 24, 2015;
    d. $1,185 plus 10 percent interest per year from July 1, 2015; and
    e. $1,560 plus 10 percent interest per year from July 15, 2015.

    Alternatively, he may show satisfactory proof of resolution of the five sanctions orders to the State Bar Office of Probation.

4. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

5. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation case specialist to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation case specialist either in person or by telephone. During the period of probation, he must promptly meet with the probation case specialist as directed and upon request.

6. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

7. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

8. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's 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 shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

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 period of probation, if he has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Joseph Patrick Collins be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the State Bar Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

VIII. COSTS

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

We concur:

PURCELL, P. J.

STOVITZ, J.*

* Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

State Bar Court
Review Department

In the Matter of

KLAYTON KHISHAVEH

A Member of the State Bar

No. 16-O-11205

Filed April 24, 2018

SUMMARY

While disciplinary charges were pending against respondent in a previous matter, respondent committed additional misconduct by ignoring a client's personal injury claim for two years, resulting in the loss of the client's cause of action. In this disciplinary proceeding, respondent stipulated to three counts of misconduct. The hearing judge recommended lesser discipline than had been imposed in the previous matter, and the Office of Chief Trial Counsel appealed. Even though respondent's misconduct in this matter was less serious than in the previous matter, the Review Department found no reason to depart from the standard calling for progressive discipline for subsequent misconduct, and increased the recommended discipline to a three-year actual suspension.

COUNSEL FOR PARTIES

For State Bar of California: Brandon Keith Tady, Esq.

For Respondent: David Alan Clare, Esq.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1a, b] 511 Aggravation – Prior record of discipline – Found

Where respondent's prior misconduct was serious, and was similar to some of respondent's present wrongdoing, commonalities rendered respondent's prior record particularly serious, and hearing judge correctly assigned it significant aggravating weight.

[2] 511 Aggravation – Prior record of discipline – Found
513.10 Aggravation – Prior record of discipline – Found but discounted – Contemporaneous with current misconduct
801.45 General Issues re Application of Standards – Deviation from standards – Found not to be justified

Where respondent committed most of current misconduct after commencement of disciplinary proceedings regarding respondent's prior misconduct, Review Department did not apply general principle that aggravating force of prior discipline is diminished if misconduct leading to prior discipline occurred during same time period as current misconduct.

[3] 106.90 Generally Applicable Procedural Issues – Issues re Pleadings – Other issues
521 Aggravation – Multiple acts of misconduct – Found

Where respondent was found culpable of three disciplinary violations, but committed at least 25 acts of wrongdoing over two-year period by repeatedly failing to respond to letters from insurer regarding client's claim, hearing judge erred in assigning only minimal aggravating weight to respondent's multiple acts of wrongdoing. Multiple acts of wrongdoing are not limited to the counts pled, and respondent's recurring ethical violations were assigned significant aggravating weight.

[4] 582.10 Aggravation – Harm to client — Found

Where respondent's misconduct deprived injured client of cause of action, causing client's loss of faith in legal community, continued physical pain, and difficulty in driving, hearing judge correctly found significant harm to client as aggravating circumstance.

[5] 120 Generally Applicable Procedural Issues – Conduct of Trial
162.19 Standards of Proof/Standards of Review – Quantum of Proof Required – State Bar's burden – Other/general
595.90 Aggravation – Indifference to rectification/atonement – Declined to find – Other reason

Where OCTC did not raise issue of indifference toward rectification or atonement at trial, thus depriving respondent of opportunity to provide rebuttal evidence, and record was unclear regarding relevant facts, Review Department declined to assign aggravation based on respondent's alleged failure to make amends to client by paying for medical treatment.

[6a, b] 735.10 Mitigation – Candor and cooperation with Bar – Found
745.52 Mitigation – Remorse/restitution/atonement – Declined to find – Inadequate showing generally

Respondent's comprehensive stipulation regarding facts and culpability, which assisted prosecution and conserved judicial time and resources, was entitled to significant mitigation credit for cooperation with the State Bar. However, where respondent did not stipulate until

shortly before trial, and record contained no evidence of prompt objective steps indicating remorse, respondent was not entitled to additional mitigation for remorse.

[7] **511 Aggravation – Prior record of discipline – Found**
801.45 General Issues re Application of Standards – Deviation from standards – Found not to be justified
802.61 Application of Standards – Most severe applicable sanction to be used
805.10 Application of Standards – Current discipline greater than prior – Applied
846.54 Application of Standards – Performance, communication, withdrawal violations – Limited in scope or time–suspension or reproval – Declined to apply–greater discipline – Other aggravating factors
Purpose of disciplinary standard calling for greater discipline in second case is to address recidivist misconduct. Nature of misconduct in second case need not be more serious than in prior case in order to warrant increased discipline. Where respondent's multiple acts of misconduct in second case significantly harmed client, and occurred when respondent should have been aware of ethical duties because prior disciplinary proceeding had been initiated when misconduct in second case occurred, nothing in record warranted departure from standard requiring greater discipline for subsequent misconduct, even though misconduct in second case was less serious.

ADDITIONAL ANALYSIS

Culpability

Found

214.31 Section 6068(m) (communicate with clients)
270.31 Incompetence (RPC 3-110(A))
277.21 Prejudicial withdrawal (RPC 3-700(A)(2))

Discipline Imposed

1013.10 Stayed suspension – Four years
1015.09 Actual suspension – Three years
1017.10 Probation – Four years

Probation Conditions

1024 Ethics exam/ethics school
1030 Standard 1.2(c)(1) Rehabilitation requirement

OPINION

PURCELL, P.J.

This is Klayton Khishaveh's second disciplinary case in less than three years. In 2015, he stipulated to serious misconduct and was ordered to serve a two-year actual suspension, continuing until he proves his rehabilitation. He remains suspended.

While Khishaveh negotiated the discipline in his first case, he committed the present misconduct. He ignored his client's personal injury claim for two years, the statute of limitations passed, and the cause of action was lost. He stipulated to facts and culpability for failing to perform competently, communicate significant developments, and avoid prejudice to his client upon withdrawal from representation. The hearing judge recommended a one-year actual suspension—a downward departure from the disciplinary standard that mandates progressive discipline.[1] The Office of Chief Trial Counsel of the State Bar (OCTC) appeals, seeking a three-year actual suspension. Khishaveh does not appeal, but requests a six-month actual suspension.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we affirm culpability, but find no reason to depart from the progressive discipline standard. We recommend a three-year actual suspension, continuing until Khishaveh proves his rehabilitation.

I. KHISHAVEH'S CURRENT MISCONDUCT (*KHISHAVEH II*)

A. Stipulated Facts

Khishaveh was admitted to practice law in California in June 2005. On May 8, 2013, Edyn Rodas retained him for his personal injury claim resulting from a car accident that day. Allstate Insurance Company (Allstate) insured the other motorist. Between June 6, 2013 and May 1, 2015, Khishaveh ignored 25 letters from Allstate that requested he submit a demand letter and "special package" to proceed with Rodas's claim.[2]

Khishaveh answered Allstate for the first time on May 5, 2015, two years after receiving the first letter. His response did not provide the bills and medical reports that Allstate requested to substantiate the settlement demand. Instead, it provided an "outline of client's treatment," listed two of Rodas's medical providers and their treatment costs, and made a settlement demand of $6,578. On May 12, Allstate confirmed receipt of Khishaveh's letter and again requested that he provide information regarding Rodas's claim, which Khishaveh again failed to do. On May 27, Allstate wrote to Khishaveh and requested evidence that he had filed a lawsuit to protect the statute of limitations on Rodas's claim. Khishaveh failed to respond. On June 10, 2015, Allstate sent him another letter asking that he contact the company within 10 days or it would close Rodas's matter. Again, Khishaveh failed to respond.

As a result of Khishaveh's failure to file a lawsuit or negotiate a settlement, Allstate closed the claim after the statute of limitations expired. Khishaveh did not inform Rodas of these events. On February 5, 2016, nearly three years after Rodas's accident, Allstate informed him that his claim had been closed and that Khishaveh had not provided medical information or filed a lawsuit to protect the statute of limitations. Rodas complained to the State Bar.

B. The Notice of Disciplinary Charges

On December 16, 2016, OCTC filed a three-count Notice of Disciplinary Charges (NDC), alleging that Khishaveh failed to: (1) per-

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

2. Allstate's 2013 letters were dated June 6, June 29, July 26, September 23, October 22, November 11, and December 19. Its 2014 letters were dated January 8, February 8, March 31, May 2, May 31, July 2, July 25, August 22, September 20, October 23, November 20, and December 16. And its 2015 letters were dated January 14, January 23, February 7, March 13, April 2, and May 1.

form legal services with competence, in violation of rule 3-110(A) of the Rules of Professional Conduct;[3] (2) keep his client reasonably informed of significant developments in his matter, in violation of Business and Professions Code section 6068, subdivision (m);[4] and (3) take reasonable steps to avoid reasonably foreseeable prejudice to his client before withdrawing from employment, in violation of rule 3-700(A)(2).[5]

C. The Disciplinary Trial

The trial was held on April 11, 2017. The parties did not call witnesses, but had previously filed a Stipulation as to Facts, Conclusions of Law, and Admission of Documents (Stipulation). Khishaveh stipulated to culpability on all counts. The judge approved the Stipulation and admitted other exhibits. OCTC gave opening and closing statements, and Khishaveh chose not to testify or to give any statements. The judge called for mitigation and aggravation evidence. In mitigation, Khishaveh offered his Stipulation (as cooperation). In aggravation, OCTC offered Khishaveh's prior discipline record, his multiple acts of misconduct, and Rodas's victim impact statement. The trial took less than one day. Both parties submitted posttrial briefs. The judge issued her decision on June 14, 2017, finding Khishaveh culpable on all three counts, as charged.

D. Stipulated Culpability

We affirm the hearing judge's culpability findings, as supported by the Stipulation and the evidence. We focus on mitigation, aggravation, and whether progressive discipline applies.

II. AGGRAVATION OUTWEIGHS MITIGATION

OCTC must establish aggravating circumstances by clear and convincing evidence[6] (std. 1.5), while Khishaveh has the same burden to prove mitigation (std. 1.6). We agree with the hearing judge that the aggravation far outweighs the mitigation, as detailed below.

A. Aggravation

1. Prior Record of Discipline—*Khishaveh I*

[1a] Standard 1.5(a) provides that a prior record of discipline may be an aggravating factor. The hearing judge found that Khishaveh's prior record was "serious" and afforded it "significant aggravating weight." We agree.

Khishaveh's misconduct began in 2011, about six years after his 2005 admission to the State Bar. On May 2, 2014, OCTC filed an NDC in *Khishaveh I* alleging he committed several acts of misconduct in three matters in case numbers 13-O-12709, 13-O-16445, and 13-O-16740. On February 11, 2015, Khishaveh signed a stipulation to facts, culpability, mitigation, aggravation, and discipline.

In the first matter, Khishaveh represented a client who was injured in a car accident. Khishaveh made false representations about the settlement to his client's medical provider, Dr. Suzanne Fratto, failed to maintain funds in his client trust account (CTA) for Dr. Fratto, misappropriated by gross negligence $2,789 that

3. Rule 3-110(A) provides that an attorney "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." All further references to rules are to the Rules of Professional Conduct unless otherwise noted.

4. Section 6068, subdivision (m), provides that it is the duty of an attorney "[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services." All further references to sections are to the Business and Professions Code.

5. Rule 3-700(A)(2) prohibits an attorney from withdrawing from employment until the attorney has taken reasonable steps to avoid reasonably foreseeable prejudice to the client's rights, including giving due notice to the client, allowing time for employment of other counsel, and complying with rule 3-700(D) (promptly returning client's papers and property and refunding unearned fees) and other applicable rules and laws.

6. *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552 (clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind).

Dr. Fratto was entitled to receive, and failed to properly communicate with or pay Dr. Fratto until the doctor filed a lawsuit.[7]

In the second matter, Khishaveh commingled funds and issued insufficient funds (NSF) checks from his CTA from 2011 to 2013. He made seven deposits of personal funds (totaling $35,200) into his CTA, and issued five NSF checks (totaling $6,926.82) from his CTA.[8]

In the third matter, Khishaveh failed to timely pay a $1,000 sanctions order issued by an administrative law judge on May 28, 2013. On October 1, 2013, he paid the sanctions but never reported them to the State Bar, as he is required to do.[9]

In aggravation, Khishaveh engaged in multiple acts of wrongdoing, caused significant harm to Dr. Fratto, committed trust violations, and lacked insight and remorse. In mitigation, he was credited for his cooperation (entering into a pretrial stipulation) and given nominal or "the lightest possible weight (if any)" for his five years of discipline-free practice.

On June 22, 2015, the Supreme Court adopted the stipulation recommendation for discipline and ordered Khishaveh suspended for three years, stayed, with four years' probation, subject to a two-year actual suspension, continuing until he proves his rehabilitation, fitness to practice, and learning and ability in the general law. (Supreme Court Case No. S225940.) The Supreme Court order became effective on July 22, 2015.

[1b] To determine the aggravating weight of Khishaveh's prior discipline, we consider that his past misconduct was serious, and that it is similar to some of his present wrongdoing. In particular, he failed to properly communicate with Dr. Fratto about monies due to her and, likewise in the present case, he never contacted Rodas, even after Rodas's cause of action was lost. Dr. Fratto and Rodas suffered significant harm. (See *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443–444 [similarities between prior and current misconduct render previous discipline more serious, as they indicate prior discipline did not rehabilitate].) These commonalities render Khishaveh's prior record particularly serious and deserving of the significant aggravating weight the hearing judge assigned. (See *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619 [part of rationale for considering prior discipline as having aggravating impact is that it is indicative of recidivist attorney's inability to conform his conduct to ethical norms].)[10]

2. Multiple Acts of Wrongdoing

[3] The hearing judge found aggravation for multiple acts of wrongdoing based on the three charges in the NDC. (Std. 1.5(b) [multiple acts of wrongdoing are aggravating].) The judge assigned minimal weight because the misconduct was "limited in scope and involved a single client." OCTC argues for increased aggravation because Khishaveh committed at least 25 acts of wrongdoing over a two-year period by repeatedly failing to respond to Allstate's letters. We agree. Multiple acts of wrongdoing are not limited to the counts pled. (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 279.) We assign significant aggravating weight to Khishaveh's recurring ethical violations.

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7. These acts violated section 6106 (moral turpitude by misrepresentation), rule 4-100(A) (failure to maintain funds), and section 6106 (moral turpitude by grossly negligent misappropriation).

8. These acts violated rule 4-100(A) (commingling) and section 6106 (moral turpitude by gross negligence).

9. These acts violated sections 6103 (disobeying court order) and 6068, subdivision (o)(3) (failure to report sanctions to State Bar within 30 days).

10. [2] The aggravating force of prior discipline is generally diminished if the misconduct occurred during the same time period as the current misconduct. (*In the Matter of Sklar*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 619.) This principle does not apply here because Khishaveh committed most of his current misconduct either after the NDC was filed or after he signed the stipulation in *Khishaveh I*.

3. Significant Harm

[4] The hearing judge correctly found that Khishaveh's misconduct significantly harmed his client. (Std. 1.5(j) [significant harm to client, public, or administration of justice is aggravating circumstance].) Khishaveh's incompetence cost Rodas his cause of action. Rodas's unchallenged victim impact statement describes the hardship of this experience. He "lost faith in the legal community," and continues to suffer physical pain because he did not receive necessary medical treatment. He also has difficulty driving, which affects his personal life. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646 [significant aggravation where attorney failed to pursue client's case, resulting in its dismissal and client's inability to obtain damages].)

4. No Aggravation for Indifference

[5] The hearing judge did not assign aggravation for indifference. (Std. 1.5(k) [indifference toward rectification or atonement for consequences of misconduct is aggravating].) For the first time on review, OCTC requests that we assign aggravation because Khishaveh did not make amends by paying for Rodas's medical treatment. We decline to do so. When the judge called for aggravation evidence at trial, OCTC did not raise this issue, which deprived Khishaveh of an opportunity to provide rebuttal evidence. Further, our independent review of the record does not clearly and convincingly establish if, when, or by whom Rodas's medical bills were paid.

B. Mitigation

1. Cooperation

[6a] The hearing judge assigned significant mitigation credit for Khishaveh's cooperation with the State Bar because he stipulated to facts and culpability. (Std. 1.6(e) [spontaneous candor and cooperation to State Bar is mitigating].) We agree. The comprehensive Stipulation assisted OCTC's prosecution and conserved judicial time and resources, resulting in less than a one-day trial. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive mitigation given to those who willingly stipulate to facts and culpability].)

2. No Mitigation for Remorse and Recognition of Wrongdoing

[6b] Khishaveh argues that he is entitled to additional mitigation for remorse for entering into the Stipulation. (Std. 1.6(g) [mitigation available for "prompt objective steps, demonstrating spontaneous remorse and recognition of the wrongdoing and timely atonement"].) We reject this argument. Khishaveh entered the Stipulation shortly before trial, which does not demonstrate *prompt* objective steps indicating remorse, as the standard requires. And there is no other evidence of remorse in the record as Khishaveh did not testify or call witnesses. Notably, we have already assigned significant mitigation credit for Khishaveh's Stipulation under standard 1.6(e) (cooperation).

III. PROGRESSIVE DISCIPLINE IS WARRANTED[11]

Our disciplinary analysis begins with the standards which, although not binding, are entitled to great weight (std. 1.1; *In re Silverton* (2005) 36 Cal.4th 81, 91–92), and should be followed whenever possible. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) If we deviate from the standards, we must clearly articulate compelling reasons for doing so. (*Aronin v. State Bar* (1990) 52 Cal.3d 276, 291; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.)

We first determine which standard applies to Khishaveh's misconduct. Standard 2.7(c) provides for suspension or reproval as the presumed sanction for "performance, communication, or withdrawal violations, which are limited in scope or time."[12] But given Khishaveh's disciplinary history, we also look to standard 1.8(a), which

11. 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 standards for attorneys. (Std. 1.1.)

12. The degree of sanction depends on the extent of the misconduct and the degree of the harm to the client or clients. (Std. 2.7(c).)

calls for increased discipline if the attorney has a prior record.[13] It provides: "If a member has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust."

[8a] The hearing judge analyzed standard 1.8(a) and found that it applied, but did not follow its directive for progressive discipline. The judge incorrectly reasoned that since Khishaveh's present misconduct was less extensive and serious than his past misconduct, imposing an additional three-year actual suspension would be manifestly unjust. Instead, the judge deviated from standard 1.8(a) and applied standard 2.7(c), and the attendant case law, to recommend a one-year actual suspension—less than the two-year actual suspension the Supreme Court ordered in *Khishaveh I*.

[8b] We disagree with this disposition. The language of standard 1.8(a) directs that we *must* impose greater discipline except for a narrow exception not applicable here. The hearing judge seemed to focus on comparing whether Khishaveh's present misconduct was more serious than his past misconduct to determine if it was "progressive." This comparison is not the test for progressive discipline.

[8c] Standard 1.8(a) mandates progressive discipline for a second case of misconduct—but progressively *serious* misconduct in the second case is not required. We acknowledge that Khishaveh's present misconduct is less serious than his past wrongdoing, but it is still significant. He committed multiple acts of misconduct over two years and significantly harmed Rodas. Khishaveh should have been, but was not, keenly aware of his ethical duty to avoid future misconduct because his first discipline case had been initiated when he committed the present misconduct. He failed to respond to at least 13 of 25 letters from Allstate after the May 2, 2014 NDC was filed in *Khishaveh I*. And later, after he signed his stipulation for a two-year actual suspension in *Khishaveh I*, he disregarded more letters from Allstate *before* the statute of limitations expired or his client was harmed. Since Khishaveh chose not to testify at trial, no evidence explains his inexcusable inaction. This misconduct, his recent serious discipline record, and the overall aggravation call for measured and progressive discipline under standard 1.8(a). We find nothing in the record that merits a departure from that standard.

Khishaveh argues on review that imposing progressive discipline would be a rigid application of standard 1.8(a), and would unfairly result in greater discipline than is warranted for his present misconduct. He urges that imposing an additional three-year actual suspension "on top" of the two-year actual suspension he has already served would be grossly excessive and, as the hearing judge found, "manifestly unjust." In support, he offers two cases where progressive discipline was not imposed for additional misconduct: *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83 and *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527.

Both cases are distinguishable. Most notably, *Wyrick* and *Friedman* were decided more than a decade before *In re Silverton*, *supra*, 36 Cal.4th 81—the Supreme Court's most recent approval of progressive discipline under former standard 1.7(a) (currently standard 1.8(a)). **[8d]** *Silverton*, a disbarment case, makes clear that the purpose of former standard 1.7(a) is to address recidivist misconduct by *requiring* greater discipline in a second case unless the specified exceptions set out in the standard are met. Contrary to Khishaveh's argument, the Supreme Court did not limit its analysis in *Silverton* to cases where an attorney's prior discipline was disbarment. As to *Wyrick*, the case involved a prior criminal conviction, which was different from the new misconduct, and there were no other aggravating circumstances. (*In the Matter of Wyrick*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 87–

13. The most severe sanction shall be imposed where multiple sanctions apply. (Std. 1.7(a).)

90.) *Friedman* involved the late filing of a California Rules of Court, former rule 955 (current rule 9.20) declaration, also different misconduct than in the prior case, and the attorney proved compelling mitigation, including that no clients were harmed. (*In the Matter of Friedman*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 530–532.) Unlike *Wyrick* and *Friedman*, Khishaveh's aggravation outweighs his mitigation, he committed similar acts of wrongdoing in his past and present cases, and he caused significant harm to Rodas.

[8e] We also reject Khishaveh's argument that an alternative "safeguard" to imposing progressive discipline already exists since he must prove his rehabilitation under standard 1.2(c)(1), as ordered in his prior discipline case. We disagree. That discipline case did not impress upon him the negative consequences of failing to perform his ethical duties, namely, that it can cause harm to others and can subject him to progressive discipline. The totality of the circumstances warrants progressive discipline as directed by standard 1.8(a), including a three-year actual suspension continuing until Khishaveh proves his rehabilitation, fitness to practice, and present learning and ability in the general law under standard 1.2(c)(1).

IV. RECOMMENDATION

For the foregoing reasons, we recommend that Klayton Khishaveh be suspended from the practice of law for four years, that execution of that suspension be stayed, and that he be placed on probation for four years on the following conditions:

1. He must be suspended from the practice of law for a minimum of the first three years of his probation and until he provides proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

4. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation case specialist to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation case specialist either in person or by telephone. During the period of probation, he must promptly meet with the probation case specialist as directed and upon request.

5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's 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 shall not receive MCLE credit for attending

Ethics School. (Rules Proc. of State Bar, rule 3201.)

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 period of probation, if he has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Klayton Khishaveh be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of his actual suspension in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

VI. RULE 9.20

We further recommend that Klayton Khishaveh be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

VII. COSTS

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

We concur:

HONN, J

MCGILL, J.

State Bar Court
Review Department

In the Matter of

STEPHEN RAWLIEGH GOLDEN

A Member of the State Bar

Nos. 14-O-06366, 16-O-10260 (Consolidated)

Filed May 30, 2018

SUMMARY

Respondent was found culpable of 25 counts of misconduct, in 11 client matters, for violating statutes regulating providers of home loan modification services. The Review Department rejected respondent's contention that he was not culpable of violating the statutes because his activities constituted foreclosure defense rather than loan modification. The Review Department also agreed with the hearing judge's recommended discipline of actual suspension for one year and until Golden makes restitution to his former clients of illegally collected advance fees, and added a requirement that respondent remain suspended until he proves his rehabilitation, fitness, and learning in the law.

COUNSEL FOR PARTIES

For State Bar of California: Brandon Keith Tady, Esq.

For Respondent: Stephen Rawliegh Golden, in pro. per.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1a, b] **194 Miscellaneous General Issues – Effect/Applicability of Statutes Outside State Bar Act**
204.90 Substantive Issues – Culpability – Other general substantive issues re culpability
222.20 Section 6106.3 (violation of Civil Code re mortgage loan modifications)
Where disciplinary statute defined violation of specified Civil Code sections as constituting attorney misconduct, and statute was amended to delete reference to one of such Civil Code sections, pre-amendment version of statute applied to misconduct that respondent committed prior to effective date of amendment.

[2a-h] **194 Miscellaneous General Issues – Effect/Applicability of Statutes Outside State Bar Act**
222.20 Section 6106.3 (violation of Civil Code re mortgage loan modifications)
Civil Code section 2944.7 prohibits any person engaged in loan modifications from collecting any advance fees in advance of completing all contracted loan modification services, and an attorney's violation of the statute constitutes a disciplinable offense under section 6106.3. Section 2944.7 is not ambiguous, and does not permit an exception for attorneys who attempt to obtain loan modifications, but plan to file litigation if a modification request is denied. Where respondent stipulated that clients retained his services to keep their homes and properties; he discussed loan modification with them as an available remedy, along with litigation if loan modification applications were denied; he submitted loan modification applications for them and negotiated with their lenders; and he collected fees from them before completing all loan modification services, respondent was culpable of violating section 6106.3, even if the purpose of his litigation services was not just to obtain loan modifications.

[3a, b] **194 Miscellaneous General Issues – Effect/Applicability of Statutes Outside State Bar Act**
222.20 Section 6106.3 (violation of Civil Code re mortgage loan modifications)
California's statutory Homeowner Bill of Rights, which provides remedies for home mortgage borrowers including recovery of attorney fees against lenders, does not conflict with statutes prohibiting attorneys in loan modification proceedings from collecting any advance attorney fees, and does not permit attorneys to collect otherwise prohibited advance fees in order to prepare to litigate against a lender as a means to leverage a loan modification.

[4a, b]

159 Evidentiary Issues – Miscellaneous Evidentiary Issues
169 Standards of Proof/Standards of Review – Miscellaneous Issues re Standard of Proof/Standard of Review
191 Miscellaneous General Issues – Effect of/Relationship to Other Proceedings
204.90 Substantive Issues – Culpability – General substantive issues re culpability – Other
2210.90 Issues in Section 6007(c) Involuntary Inactive Enrollment Proceedings – Special Procedural Issues in Section 6007(c)(2) Threat of Harm Cases – Other special procedural issues

Involuntary inactive enrollment proceedings are abbreviated proceedings in which the principal issue is whether OCTC can establish exigent circumstances sufficient to justify enrolling an attorney involuntarily inactive before a formal disciplinary proceeding. Any subsequent disciplinary proceedings are separate proceedings, and neither the involuntary inactive enrollment order itself nor any of the findings made in the underlying proceedings is binding or has any probative value in the formal disciplinary case. Such an order also is not a final decision on the merits, and thus does not fulfill the requirements of collateral estoppel. Accordingly, Review Department considering disciplinary proceedings declined to consider hearing judge's analysis of statute as set forth in order denying involuntary inactive enrollment.

[5]

146 Evidentiary Issues – Judicial Notice
191 Miscellaneous General Issues – Effect of/Relationship to Other Proceedings
2210.90 Issues in Section 6007(c) Involuntary Inactive Enrollment Proceedings – Special Procedural Issues in Section 6007(c)(2) Threat of Harm Cases – Other special procedural issues

Order denying OCTC's petition for involuntary inactive enrollment was judicially noticeable in subsequent disciplinary proceeding involving same respondent.

[6]

162.20 Standards of Proof/Standards of Review – Quantum of Proof Required – Respondent's burden in disciplinary matters
204.90 Substantive Issues – Culpability – Other general substantive issues re culpability

Neither employees of State Bar nor fellow attorneys can give an attorney permission to violate duties under statutes or ethics rules. Accordingly, it was not a valid defense to disciplinary charges that respondent relied on information in a State Bar flyer, and on advice from OCTC, in determining that his actions did not violate statute.

[7a-c] **106.40 Procedural Issues – Issues re Pleadings – Amendment of pleadings**
106.90 Procedural Issues – Issues re Pleadings – Other issues re pleadings
151 Evidentiary Issues – Evidentiary Effect of Stipulations
192 Miscellaneous General Issues – Constitutional Issues – Due Process/Procedural Rights
563.10 Aggravation – Uncharged violations – Found but discounted or not relied on – Procedural impropriety

Evidence of uncharged misconduct can be considered in aggravation if respondent's due process rights are not violated. Where OCTC was or should have been aware of uncharged misconduct before disciplinary charges were filed, misconduct should have been charged. Nonetheless, where respondent stipulated to conduct constituting uncharged misconduct; uncharged misconduct was elicited for relevant purpose and based on respondent's own representations; and hearing judge granted motion to conform charges to proof at trial, hearing judge correctly assigned nominal weight in aggravation for uncharged misconduct.

[8] **582.10 Aggravation – Harm – To client – Found**

Where respondent illegally charged advance fees to financially distressed clients, and gave clients advice that served to worsen their already bad financial situations, hearing judge properly found that respondent's misconduct significantly harmed his clients, despite respondent's contentions that he obtained good results in clients' cases.

[9] **591 Aggravation – Indifference to rectification/atonement – Found**

Where respondent continued to operate law firm in unlawful manner despite plain language of statute, disciplinary investigation, and disciplinary proceedings, and respondent's attitude revealed lack of understanding of attorneys' ethical responsibilities, his lack of insight made him an ongoing danger to public and legal profession, and hearing judge properly found respondent's indifference to rectification or atonement to be aggravating factor.

[10a, b] **710.36 Mitigation – Long practice with no prior discipline record – Found but discounted or not relied on – Present misconduct likely to recur**

Where respondent had 17 years of discipline-free practice, but respondent's misconduct involved 11 client matters over more than a five-year period, and respondent evinced indifference to rectification and persisted in operating his practice unlawfully, misconduct was not aberrational or unlikely to recur. Accordingly, respondent's record of discipline-free practice was entitled to only minimal mitigating weight.

[11a-c] **901.05 Application of Standards – Standards 2.18, 2.10 – Applied–suspension – Violation of Business & Professions Code**
901.10 Application of Standards – Standards 2.18, 2.10 – Applied–suspension – Gravity of offense severe
901.20 Application of Standards – Standards 2.18, 2.10 – Applied–suspension – Harm to victim great
901.40 Application of Standards – Standards 2.18, 2.10 – Applied–suspension – Other aggravating factors

Where most severe standard applicable to respondent's misconduct called for disbarment or actual suspension, and mitigation for lack of a prior disciplinary record and cooperation with State Bar was greatly outweighed by aggravation for multiple acts of wrongdoing, overreaching, uncharged misconduct, significant client harm, indifference, and failure to make restitution, respondent's request for discipline not involving actual suspension was unsupported, and hearing judge properly recommended actual suspension for one year and until respondent completed restitution to clients. In addition, Review Department recommended that respondent remain suspended until he proves rehabilitation, fitness, and learning in the law, allowing him to gain insight into his misconduct, and at the same time, protecting the public, the courts, and the legal profession.

ADDITIONAL ANALYSIS

Culpability

Found

222.21 Section 6106.3 (violation of Civil Code re mortgage loan modifications)
280.41 Maintain records of client funds

Not found

273.05 Improper transaction with client

Aggravation

Found

521 Multiple acts of misconduct
551 Overreaching
616.10 Failure to make restitution

Not found

535.90 Pattern of misconduct – Other reason

Mitigation

Found

735.10 Candor and cooperation with Bar

Discipline Imposed

1013.08 Stayed suspension – Two years
1015.06 Actual suspension – One year
1017.09 Probation – Three years

Probation Conditions

1021 Restitution
1024 Ethics exam/ethics school
1030 Standard 1.2(c)(1) Rehabilitation Requirement

OPINION

HONN, J.

Stephen Rawliegh Golden appeals a hearing judge's decision finding him culpable of 25 counts of misconduct related to home loan modification services in 11 client matters. Specifically, the judge found Golden culpable of multiple counts in each of three categories of misconduct: (1) charging pre-performance fees; (2) failing to provide separate statements, required by law, disclosing that a third-party representative was unnecessary for loan modifications; and (3) failing to render appropriate accountings. The judge found Golden's misconduct was mitigated by his 17 years of discipline-free practice and his cooperation in these proceedings (i.e., stipulating to many facts that established his culpability for the first two categories, and expressly stipulating to culpability for the third). She found aggravating significant client harm, multiple acts demonstrating a pattern of misconduct, indifference toward rectification, uncharged misconduct, failure to make restitution, and overreaching. The judge recommended a one-year actual suspension, continuing until Golden makes restitution of illegal fees charged to his clients, totaling more than $278,000.

Golden appeals. He challenges culpability, principally arguing that he provided foreclosure defense litigation rather than purely loan modification services, and, thus, was permitted to charge and collect advance fees. The Office of Chief Trial Counsel of the State Bar (OCTC) does not appeal and requests that we affirm the judge's findings and discipline recommendation.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we affirm the hearing judge's findings of fact and law with minor modifications. After reviewing the applicable disciplinary standards and relevant loan modification case law, we agree with the judge that Golden's misconduct warrants a one-year actual suspension to continue until he makes full restitution. We also recommend that he remain suspended until he proves his rehabilitation and fitness to practice law.

I. RELEVANT PROCEDURAL HISTORY

Golden was admitted to practice law in California on January 4, 1993, and has no prior record of discipline. On October 27, 2015, OCTC filed a 13-count Notice of Disciplinary Charges (NDC) in Case Nos. 14-O-06366 (15-O-10090; 15-O-10686; 15-O-11035; 15-O-11090; 15-O-11237) (NDC-1).

On July 14, 2016, OCTC initiated an expedited proceeding (Case No. 16-TE-14488) seeking Golden's involuntary inactive enrollment pursuant to Business and Professions Code section 6007, subdivision (c)(1)-(3).[1] A hearing judge denied OCTC's petition.

On September 7, 2016, OCTC filed an NDC in Case Nos. 16-O-10260 (16-O-10597; 16-O-10896; 16-O-11152; 16-O-11971) (NDC-2). NDC-1 and NDC-2 were consolidated on October 6, 2016. OCTC filed an amended 13-count NDC-2 (ANDC-2) on December 28, 2016.

On March 13, 2017, the parties filed an extensive "Stipulation to Facts and Conclusions of Law and Authentication of Exhibits" (Stipulation). A five-day trial was held in March 2017. OCTC presented 11 witnesses, including several of Golden's former clients. Golden testified and presented three witnesses. Prior to the end of trial, the hearing judge granted OCTC's motion to conform the charges to the proof at trial, including

1. All further references to sections are to the Business and Professions Code unless otherwise noted. Under section 6007, subdivision (c), an attorney may be involuntarily enrolled as inactive based on a finding that the "attorney's conduct poses a substantial threat of harm to the interests of the attorney's clients or to the public."

the facts in the Stipulation. Posttrial briefing followed, and the judge issued her decision on June 28, 2017.[2]

II. LEGISLATION REGULATING LOAN MODIFICATION SERVICES

In 2009, the Legislature amended the law to regulate an attorney's performance of home loan modification services. California Senate Bill No. 94 (SB 94),[3] which became effective on October 11, 2009, provided two safeguards for borrowers who employ someone to assist with a loan modification: (1) a requirement for a separate notice advising borrowers that it is not necessary to employ a third party to negotiate a loan modification (Civ. Code, § 2944.6, subd. (a)); [4] and (2) a proscription against charging pre-performance compensation, i.e., restricting the collection of fees until all contracted-for loan modification services are completed. (Civ. Code, § 2944.7, subd. (a)).[5] The intent was to "prevent persons from charging borrowers an up-front fee, providing limited services that fail to help the borrower, and leaving the borrower worse off than before he or she engaged the services of a loan modification consultant." (Sen. Com. on Banking, Finance, and Insurance, Analysis of Sen. Bill No. 94 (2009–2010 Reg. Sess.) as amended Mar. 23, 2009, pp. 5–6.) **[1a]** At all times relevant to this matter, a violation of either Civil Code provision constituted a misdemeanor (Civ. Code, §§ 2944.6, subd. (c), 2944.7, subd. (b)), which is cause for imposing attorney discipline. (§ 6106.3.)[6]

III. FACTUAL FINDINGS [7]

The hearing judge's factual findings are, for the most part, undisputed by the parties and supported by the record. We adopt these findings with minor modifications, as summarized below. Notably, the judge found that the testimony of Golden and his staff lacked credibility. The Judge

2. After trial was completed, the judge received and granted Golden's unopposed motion to withdraw Exhibit 1041. Inadvertently, Exhibit 1041 was not removed from the record.

3. SB 94 added sections 2944.6 and 2944.7 to the Civil Code and section 6106.3 to the Business and Professions Code (Stats. 2009, Ch. 630, § 10).

4. Civil Code section 2944.6, subdivision (a), requires that a person attempting to negotiate a loan modification must, before entering into a fee agreement, disclose to the borrower the following information in 14-point bold type font "as a separate statement":

> It is not necessary to pay a third party to arrange for a loan modification or other form of forbearance from your mortgage lender or servicer. You may call your lender directly to ask for a change in your loan terms. Nonprofit housing counseling agencies also offer these and other forms of borrower assistance free of charge. A list of nonprofit housing counseling agencies approved by the United States Department of Housing and Urban Development (HUD) is available from your local HUD office or by visiting www.hud.gov.

5. In relevant part, Civil Code section 2944.7, subdivision (a), provides that "it shall be unlawful for any person who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, to . . . [¶] . . . [c]laim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform."

6. **[1b]** Prior to January 1, 2017, section 6106.3 provided, "It shall constitute cause for the imposition of discipline of an attorney within the meaning of this chapter for an attorney to engage in any conduct in violation of section 2944.6 or 2944.7 of the Civil Code." Effective January 1, 2017, the statute was amended so that the reference to Civil Code section 2944.7 was removed. However, since all of the misconduct underlying this matter occurred before January 1, 2017, we find that the former version of section 6106.3 applies

7. The facts included in this opinion are based on the Stipulation, 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).)

based this conclusion "on, among other things, the fact that their testimony directly contradicted the overwhelming credible evidence before this court on various issues." We give great weight to the judge's credibility findings. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 [hearing judge best suited to resolve credibility questions].)

Golden stipulated that clients in 11 matters (collectively, the clients) sought his services to help them keep their homes or properties. Several of the clients contacted Golden after having been unsuccessful in obtaining loan modifications themselves. Golden discussed with the clients all available remedies, including a loan modification and litigation. He advised the clients that he anticipated filing litigation on their behalf in the event that their respective lenders denied their loan modification applications or for other reasons.

Each client signed a retainer agreement committing to pay Golden a monthly advance fee. While these agreements were largely similar, some differences existed, notably only six included the Civil Code section 2944.6 disclaimer language (§ 2944.6 disclaimer), and three stated that the monthly fee would be billed during the "loan mod/litigation process" while the others used different language. Golden submitted loan modification applications for all but one of the clients,[8] and negotiated with their various lenders.

Golden also stipulated that, after termination of his employment, he failed to render appropriate accountings to the clients for the fees they paid, in violation of rule 4-100(B)(3) of the Rules of Professional Conduct.[9]

In addition, with one exception detailed below, Golden failed to refund any advance fees he received from the clients.

A. McDonough Matter (Case No. 16-O-10260, ANDC-2, Counts One–Four)

On November 18, 2010, Joshua McDonough employed Golden and paid him an advance fee of $500. Their fee agreement did not contain the § 2944.6 disclaimer. On March 19, 2012, McDonough paid Golden another $2,500, and subsequently made monthly payments of $1,200.

Golden's firm sent several loan modification applications to McDonough's lender but was unsuccessful for approximately two years. On June 8, 2012, Golden filed a lawsuit on McDonough's behalf in Los Angeles County Superior Court. On August 8, the lawsuit was removed to federal court, and on November 21, Golden dismissed it. On April 11, 2013, Golden filed a second lawsuit for McDonough, but again later dismissed it.

In March 2014, Golden submitted another application for McDonough. In April 2014, Golden entered into another fee agreement with him that included the § 2944.6 disclaimer, and thereafter continued to try to obtain a loan modification.

Before terminating Golden's employment, McDonough paid fees totaling $35,117. After his termination, Golden failed to render an appropriate accounting to McDonough and failed to refund any advance fees received from him.

B. Mazziotti Matter (Case No. 16-O-10597, ANDC-2, Counts Five–Seven)

Tim Mazziotti and Suzanne Wells Schurman (the Mazziottis) employed Golden and paid him an advance fee of $1,500 on August 28, 2012.

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8. Golden began preparing an application for that one client, who paid him monthly fees.

9. All further references to rules are to the Rules of Professional Conduct unless otherwise noted. Under rule 4-100(B)(3), a member shall "[m]aintain complete records of all funds, securities, and other properties of a client . . . and render appropriate accounts to the client regarding them . . . ."

Their fee agreement did not contain the § 2944.6 disclaimer.

On February 2, 2013, Golden submitted a loan modification application for the Mazziottis. At their lender's request, Golden later submitted additional documents, but the application was denied on June 10, 2013.

On August 29, 2013, Golden filed a lawsuit and recorded a lis pendens on behalf of the Mazziottis. On March 14, 2014, he filed a First Amended Complaint, and on October 22, a Second Amended Complaint. The Mazziottis made monthly payments from August 2012 to June 2015, and ultimately paid Golden a total of $51,000.

On June 3, 2015, the Mazziottis decided to sell their home and asked Golden to represent them in the escrow, which he did. They discussed settling an outstanding cause of action with the lender for $2,500. On February 8, 2016, the Mazziottis called about that settlement. Golden's office accountant responded by email, "You had a balance due of $5,487.93 at the time that we received the settlement check. We applied the $2,500 balance and you still have a balance remaining for $2,987.93. We are actually owed money from you which is why we did not send any funds to you." After his termination, Golden failed to render an appropriate accounting to the Mazziottis and failed to refund any advance fees received from them.

C. Johnson Bennett Matter (Case No. 16-O-10896, ANDC-2, Counts Eight and Nine)

Doris Johnson Bennett employed Golden and paid him an advance fee of $1,650 on December 4, 2014. From February 2 to November 2015, Johnson Bennett made monthly payments to Golden and ultimately paid a total of $18,150.

On April 17, 2015, Golden submitted a loan modification application on Johnson Bennett's behalf. On June 15, 2015, Golden filed a lawsuit against her loan servicer in Los Angeles County Superior Court, which was removed to federal court in July and dismissed with prejudice in November. Golden appealed, but the appeal was dismissed on January 20, 2016, for failure to prosecute. After his termination, Golden failed to render an appropriate accounting to Johnson Bennett and failed to refund any advance fees received from her.

D. Bartlett Matter (Case No. 16-O-11152, ANDC-2, Counts Ten and Eleven)

Jonathan Bartlett employed Golden on September 6, 2013. Their fee agreement did not contain the § 2944.6 disclaimer.[10] Between September 6, 2013, and January 21, 2014, Bartlett paid Golden fees totaling $17,623.06. Golden submitted a loan modification application on Bartlett's behalf. After his termination, Golden failed to render an appropriate accounting to Bartlett and failed to refund any advance fees received from him.

E. Schneiders Matter (Case No. 16-O-11971, ANDC-2, Counts Twelve and Thirteen)

Raymond and Suzanne Schneiders (the Schneiderses) employed Golden on February 10, 2014, and paid him an advance fee of $1,500 on February 24. On July 15, 2015, Golden submitted a loan modification request, which was denied on July 23. Between February 2014 and November 2015, the Schneiderses paid Golden fees totaling $37,422.29. After his termination, Golden failed to render an appropriate accounting to the Schneiderses and failed to refund any advance fees received from them.

10. Although the parties stipulated to this fact, OCTC did not charge Golden with a violation of Civil Code section 2944.6, subdivision (a), in the Bartlett matter.

F. Arellano Matter (Case No. 14-O-06366, NDC-1, Counts One and Two)

Oscar Arellano employed Golden on August 22, 2012. Their fee agreement did not contain the § 2944.6 disclaimer.[11]

On February 13, 2013, Golden submitted a loan modification request to Arellano's lender and loan servicer. In July, he withdrew from Arellano's representation without informing Arellano, who continued to make monthly fee payments. In January 2014, Arellano visited Golden's office and was informed his case had been closed. In March 2015, Golden refunded $7,500 for the fees collected after Golden's withdrawal. Arellano paid Golden a total of $18,250[12] (after deducting the refund). After his termination, Golden did not render an appropriate accounting to Arellano and failed to refund any advance fees other than the $7,500.

G. McCarthy Matter (Case No. 15-O-10090, NDC-1, Counts Three and Four)

Bo and Grace McCarthy (the McCarthys) employed Golden on January 15, 2014. Between January and October 2014, they paid Golden fees totaling $13,500. On May 14, Golden submitted a loan modification request to the McCarthys' lender. Golden did not file litigation for the McCarthys. They terminated Golden's employment around December 2014. After his termination, Golden did not render an appropriate accounting and failed to refund any advance fees received from them.

H. Garcia Matter (Case No. 15-O-10686, NDC-1, Counts Five and Six)

Robert Garcia employed Golden on July 30, 2014, and paid him a $1,650 advance fee. By September 2014, he had paid Golden fees totaling $4,950. In August 2014, Golden started preparing a loan modification application for Garcia. Garcia terminated Golden's employment Effective October 16, 2014, but reinstated it on November 21. In February 2015, Garcia again terminated Golden's employment. Golden did not submit a loan modification request or file litigation for Garcia. After his termination, Golden did not render an appropriate accounting to Garcia and failed to refund any advance fees received from him.

I. Kessler Matter (Case No. 15-O-11035, NDC-1, Counts Seven and Eight)

Adrienne Kessler employed Golden on August 2, 2012. Their fee agreement did not contain the § 2944.6 disclaimer.[13] Between August 2012 and October 2014, Kessler paid Golden fees totaling $41,599.60. In November 2012, Golden submitted a loan modification request to Kessler's lender. Golden later submitted further documentation for the request, which was eventually denied.

In March 2014, Golden filed a civil complaint for Kessler, which was removed to federal court in December 2014 and thereafter dismissed by Golden. Kessler terminated Golden's representation in January 2015. After his termination, Golden did not render an appropriate accounting to Kessler and failed to refund any advance fees received from her.

J. Soule Matter (Case No. 15-O-11090, NDC-1, Counts Nine–Eleven)

Felice Soule employed Golden on September 21, 2012, and paid him an advance fee of $1,500 on September 30, 2012. Their fee agreement did not contain the § 2944.6 disclaimer. From November 2012 to October 2014, Soule

11. Although the parties stipulated to this fact, OCTC did not charge Golden with a violation of Civil Code section 2944.6, subdivision (a), in the Arellano matter.

12. In the Stipulation, this amount is listed as $19,500, which is inconsistent with the sum of monthly payments listed in the Stipulation and the record.

13. Although the parties stipulated to this fact, OCTC did not charge Golden with a violation of Civil Code section 2944.6, subdivision (a), in the Kessler matter.

made monthly payments to Golden. In total, Soule paid Golden $32,000.

On November 27, 2012, Golden submitted a loan modification request to Soule's lender. Golden later submitted further documentation in support of the loan modification request, which was denied.

Golden filed a civil complaint on Soule's behalf in Los Angeles Superior Court in December 2014. Soule terminated Golden's employment on February 2, 2015. After his termination, Golden did not render an appropriate accounting to Soule and failed to refund any advance fees received from her.

K. Adams Matter (Case No. 15-O-11237, NDC-1, Counts Twelve and Thirteen)

Cherie Adams employed Golden on March 4, 2014. From March to July 2014, Adams paid Golden fees totaling $6,250. On July 2, 2014, Golden submitted a loan modification request, which was denied on July 7. After his termination, Golden did not render an appropriate accounting to Adams and failed to refund any advance fees received from her.

IV. GOLDEN IS CULPABLE OF 25 COUNTS OF MISCONDUCT

A. Summary

OCTC charged Golden with 26 counts of misconduct in 11 client matters. The hearing judge found Golden culpable of 25 counts, including 14 violations of section 6106.3, subdivision (a). Specifically, the judge found 11 violations of Civil Code section 2944.7, subdivision (a)(1) (charging pre-performance fees), and three violations of Civil Code section 2944.6, subdivision (a) (failing to provide a separate statement disclosing that a third-party representative was unnecessary for loan modifications). In addition, and as stipulated to by Golden, the judge found him culpable of 11 counts of failing to render an appropriate accounting, in violation of rule 4-100(B)(3). However, the judge found that OCTC did not prove that Golden obtained an interest adverse to his client, McDonough, in violation of rule 3-300, and therefore dismissed one count (ANDC-2, count four) with prejudice. OCTC does not challenge this dismissal on review.

We agree with and affirm all of the hearing judge's culpability findings, and, thus, find that Golden is culpable of 25 counts of misconduct and is subject to discipline.[14]

B. Section 6106.3, Subdivision (a): Charging Fees Before Completing All Contracted-For Loan Modification Services (Civ. Code, § 2944.7, subd. (a)(1)) [NDC-1, Counts One, Three, Five, Seven, Nine and Twelve; ANDC-2, Counts One, Five, Eight, Ten, and Twelve]

[2a]OCTC charged Golden with 11 counts of violating section 6106.3 by charging and collecting fees for loan modifications before performing all contracted services, as prohibited by Civil Code section 2944.7. The hearing judge found him culpable of all 11 counts. We agree.

[2b] We first interpreted Civil Code section 2944.7 for purposes of attorney discipline in *In the Matter of Taylor* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 221 (*Taylor*). There, we concluded that the statute clearly prohibited collecting any fees in advance of completing all loan modification services. (*Id.* at p. 232.) Furthermore, we found that the *Taylor* loan modification agreements, which "unbundle[ed] services within loan modifications and charge[d] separately for them," ran afoul of the statutory provisions. (*Ibid.*)

14. Since the NDCs alleged similar misconduct in each client matter, we have grouped the counts by charged misconduct, rather than by client matter or numerical order, to assist the reader.

[2c] Our analysis in *Taylor* applies equally to these 11 client matters. These clients sought loan modifications and paid Golden monthly advance fees to obtain them. Golden stipulated that: the clients retained his services to keep their homes and properties; he discussed with them available remedies, including loan modifications and litigation; he advised them that he would file litigation on their behalf if their lenders denied their applications; he submitted loan modification applications for all of them, except Garcia; and he negotiated with their lenders.

[2d] Golden also stipulated to facts establishing that he collected fees in each client matter before completing all loan modification services. His admitted conduct violated Civil Code section 2944.7, and hence section 6106.3. Therefore, we find him culpable as charged.

C. Section 6106.3, Subdivision (a): Failing to Provide Required Separate Statement Containing Disclaimer Language (Civ. Code, § 2944.6, subd. (a)) [NDC-1, Count Eleven; ANDC-2, Counts Two and Six]

OCTC charged Golden with three counts of violating section 6106.3 by failing to provide a separate statement that a third-party negotiator was unnecessary. OCTC alleged those violations in the Soule matter (NDC-1, count eleven), McDonough matter (ANDC-2, count two), and Mazziotti matter (ANDC-2, count six). The hearing judge found Golden culpable as charged. We agree. Golden negotiated, arranged, and offered to perform a mortgage loan modification or other form of mortgage loan forbearance without providing his clients with the § 2944.6 disclaimer.

D. Rule 4-100(B)(3): Failing to Render Appropriate Accounting [NDC-1, Counts Two, Four, Six, Eight, Ten, and Thirteen; ANDC-2, Counts Three, Seven, Nine, Eleven, and Thirteen]

Golden stipulated that he failed to render an appropriate accounting to each of the clients regarding the fees he received from them, following their termination of his employment, in violation of rule 4-100(B)(3). As such, we find Golden culpable as charged in these 11 counts.

V. GOLDEN'S DEFENSES TO CULPABILITY ARE WITHOUT MERIT

On review, Golden asserts that we should consider several factors related to his culpability and appropriate discipline. We address his culpability arguments in this section, and those regarding a reduction in his discipline in mitigation.[15]

A. Litigation Rather than Loan Modification Services

[2e] We reject Golden's argument that he offered litigation services rather than loan modification services. His primary goal was to obtain loan modifications. Civil Code section 2944.7 bars up-front fees for loan modification services. No exception exists for attorneys who plan to file litigation if a loan modification request is denied.

[2f] We thus are unpersuaded by Golden's contentions that his fee agreements were for the "purposes of litigation and foreclosure defense," and litigation was not intended solely to secure a loan modification. Even if he offered services other than loan modifications (e.g., litigation, short sales, bankruptcy), as he contends on review, the services provided in all 11 client matters were solely or primarily to obtain loan modifications.

[2g] As we concluded in *Taylor*, *supra*, 5 Cal. State Bar Ct. Rptr. 221, "Civil Code section 2944.7, subdivision (a), plainly prohibits *any person* engaging in loan modifications from collecting *any fees* related to such modifications until *each and every* service contracted for has been completed. [Citation.]" (*Id.* at p. 232, italics

15. We have independently reviewed each of Golden's arguments. Those not specifically addressed herein have been considered as lacking in factual and/or legal support. We also reject Golden's request that we "do an electronic search of federal and state appellate courts and lower courts for [Golden's] foreclosure defense cases."

in original.) Even if the purpose of Golden's litigation services was not just to obtain a loan modification, his collection of fees before *each and every* service he contracted for was completed violated the statute. (*Id.* at pp. 231–232.) [16]

B. Allowance for Fees for Litigation as Means to Leverage Loan Modification

[3a] We also reject Golden's argument that Civil Code section 2944.7, subdivision (a), should not apply to litigation that attempts to obtain a loan modification. Golden contends that the Homeowner Bill of Rights (HBOR) (A.B. 278 (2011–2012 Reg. Sess.); S.B. 900 (2011–2012 Reg. Sess.)) should be read to "allow[] a lawyer to get paid for preparing to litigate and litigating against the client's lender as a means to leverage a loan modification." His argument is unpersuasive.

[3b] We find no conflict between Civil Code section 2944.7, subdivision (a), which prohibits an *attorney* from charging pre-performance advance fees for litigation related to a loan modification, and the HBOR, which provides that a borrower may receive attorney fees from a *lender*. The remedies provided under the HBOR include (a) injunctive relief potentially available for a borrower still in possession of the home; (b) treble actual damages or $50,000, whichever is greater, if the lender has already sold the home and if the servicer's violation was intentional, reckless, or resulted from willful misconduct; and (c) reasonable attorney fees and costs for a prevailing borrower. However, nothing in the HBOR permits an *attorney* to charge pre-performance fees for litigation related to a loan modification, and none of the HBOR remedies includes the advance fees Golden received or provides support for his argument that he was entitled to such fees.

C. Reliance on Hearing Department's Order Filed in Case No. 16-TE-14488

[4a] Golden contends that "the proper analysis of the main legal issue" in this matter is included in the Hearing Department's September 23, 2016 order in Case No. 16-TE-14488 denying OCTC's petition for Golden's involuntary inactive enrollment (TE case order). Further, Golden suggests that we consider the hearing judge's "common sense analysis" of SB 94 in that order.[17] We disagree and decline to do so.

[4b] Case No. 16-TE-14488 was an abbreviated proceeding in which the principal issue was whether OCTC established "exigent circumstances" sufficient to justify enrolling Golden involuntarily inactive before a formal disciplinary proceeding. As the Supreme Court made clear in *Conway v. State Bar* (1989) 47 Cal.3d 1107, 1119, "Any subsequent disciplinary proceedings are just that—subsequent, and separate, proceedings. *Neither the involuntary inactive enrollment order itself nor any of the findings made in those proceedings is binding or has any probative value in the formal disciplinary case.*" (Italics added, footnote omitted.) In addition, the TE case order does not fulfill the requirements of collateral estoppel; it was not a final decision on the merits. (See *Basurto v. Imperial Irrigation Dist.* (2012) 211 Cal.App.4th 866, 877, citing *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.)

D. Reliance on Information from State Bar

[6] Golden's arguments that he relied on information provided by the State Bar in a flyer regarding SB 94, and that OCTC purportedly

16. In response to Golden's request that we "provide a bright line rule for when foreclosure defense attorneys violate Senate Bill 94 considering all the policy factors involved," we note that we did so in *Taylor*, and since then, we have reiterated "what is permissible and what is not."

17. **[5]** OCTC argues that the TE case order, attached as an exhibit to Golden's opening brief, is not admissible. We disagree and take judicial notice of it. (See Rules Proc. of State Bar, rule 5.156; Evid. Code, § 452, subd. (d).) We further note that upon Golden's request during trial—to which OCTC did not object—the hearing judge stated that she would make the TE case order part of the record in this matter.

agreed in 2013 that his services did not violate SB 94, are also unavailing. Golden cannot rely on the opinion of another lawyer or of State Bar employees as a defense to a professional misconduct charge. The Supreme Court has held that "no employee of the State Bar can give an attorney permission to violate the Business and Professions Code or the Rules of Professional Conduct. An opinion of a fellow attorney is likewise no defense to wrongdoing . . . ." (*Sheffield v. State Bar* (1943) 22 Cal.2d 627, 632.) And, regardless, in 2013—*before* Golden committed much of his misconduct—this court issued *Taylor*, which made clear that Civil Code section 2944.7, subdivision (a), does not specifically exclude litigation services and defines "service" broadly to include "each and every service the person contracted to perform or represented that he or she would perform."

E. Ambiguity

[2h] On review, Golden argues that the language of Civil Code section 2944.7 is ambiguous and should be interpreted to allow attorneys to charge and receive fees for litigation services. We disagree. We have found that the statute "plainly prohibits *any person* engaging in loan modifications from collecting *any fees* related to such modifications until *each and every* service contracted for has been completed. [Citation.] We find nothing ambiguous about the statute's language . . . ." (*Taylor*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 232.)

VI. AGGRAVATION OUTWEIGHS MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct[18] requires OCTC to establish aggravating circumstances by clear and convincing evidence.[19] Golden has the same burden to prove mitigation. (Std. 1.6.)

A. Aggravation

1. Multiple Acts of Wrongdoing (Std. 1.5(b)); Pattern of Misconduct (Std. 1.5(c))

The hearing judge found that Golden committed multiple acts of misconduct that evidence a pattern of misconduct under standard 1.5(c). We need not reach the issue of whether his misconduct constituted a pattern but we find him culpable of 25 counts of misconduct in 11 client matters during a more than five-year period. We assign significant weight in aggravation under standard 1.5(b) to his recurring violations.

2. Overreaching (Std. 1.5(g))

The hearing judge correctly found that unilaterally taking his clients' $2,500 in settlement funds in the Mazziotti matter demonstrates Golden's overreaching and warrants significant consideration in aggravation. (Std. 1.5(g).) We find additional overreaching in Golden's withdrawal from Arellano's representation in July 2013 without informing Arellano—who continued to make monthly fee payments—until January 2014 that his case had been closed. Like the judge, we find that Golden's overreaching warrants significant consideration in aggravation.

3. Uncharged Misconduct (Std. 1.5(h))

[7a] "Although evidence of uncharged misconduct may not be used as an independent ground of discipline" (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35 (*Edwards*)), it may be considered in aggravation if the respondent's due process rights are not violated. (See *id.* at pp. 35–36.) As the hearing judge noted, this matter involves a different situation than in *Edwards*.

[7b] Golden *stipulated* to conduct constituting uncharged misconduct. This misconduct included using a fee agreement that did not include

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

19. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

the § 2944.6 disclaimer in three client matters (the Bartlett, Arellano, and Kessler matters). Like the hearing judge, we find that Golden's uncharged misconduct was elicited for a relevant purpose and was based on his own representations.[20] Further, as previously noted, the judge granted OCTC's motion to conform the charges to the proof at trial, including the facts in the Stipulation. We affirm the judge's assignment of nominal weight in aggravation for Golden's uncharged misconduct.

4. Significant Harm (Std. 1.5(j))

[8] The hearing judge properly found that Golden's misconduct significantly harmed his clients. (Std. 1.5(j) [significant harm to client, public, or administration of justice is aggravating circumstance].) Golden deprived his financially distressed clients of the funds they paid him in illegal advance fees. In addition, Golden and his employees advised some of his clients to stop making their mortgage payments, which served to worsen their already bad financial situations. We are unpersuaded by Golden's contentions on review that he obtained "good results, not just modifications, but also cash settlement in many of the cases." Like the judge, we find that the significant harm Golden caused his clients warrants substantial consideration in aggravation.

5. Indifference (Std. 1.5(k))

[9] The hearing judge found that Golden's actions demonstrate his indifference toward rectification or atonement for the consequences of his misconduct. (Std. 1.5(k).) We agree. Despite the Civil Code's plain language, the established case law, the State Bar's investigation, and the present proceedings, Golden continues to operate his law firm in a similar fashion. His attitude reveals a lack of understanding of his ethical responsibilities as an attorney. Like the judge, we find that his indifference warrants considerable weight in aggravation because his lack of insight makes him an ongoing danger to the public and the legal profession. (*In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 380 [lack of insight causes concern attorney will repeat misconduct]; *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511 [law does not require false penitence but does require respondent to accept responsibility for acts and come to grips with culpability].)

6. Failure to Make Restitution (Std. 1.5(m))

Golden's misconduct is also aggravated by his failure to make restitution. (Std. 1.5(m).) He collected over $283,000 in illegal advance fees in 11 client matters, and, to date, he has only refunded $7,500 of the fees he received from Arrellano. Golden still owes over $278,000 to his clients. We accord this factor significant weight in aggravation. (*In the Matter of DeClue* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 437, 445 (*DeClue*).)

B. Mitigation

1. No Prior Record (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. (Std. 1.6(a).) Golden was admitted to practice law in January 1993, and his misconduct began in November 2010. The hearing judge found that Golden's approximately 17 years of discipline-free practice warrants significant consideration in mitigation.[21] We disagree.

[10a] While over 17 years of discipline-free practice could warrant significant weight in mitigation (*Hawes v. State Bar* (1990) 51 Cal. 3d 587, 596 [more than 10 years of discipline-free practice is significant mitigation]), we do not assign such weight because Golden's misconduct

20. **[7c]** As noted by the hearing judge, OCTC should have charged this misconduct in an NDC, as OCTC was or should have been aware of these violations before filing the NDCs.

21. In light of our culpability findings above, we find unpersuasive Golden's assertion that he had "25 years . . . without any prior disciplinary action."

was not aberrational or unlikely to recur. (See *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [where misconduct is serious, long discipline-free practice is most relevant where misconduct is aberrational and unlikely to recur].) Given that he committed similar, serious misconduct in 11 client matters over more than a five-year period, we do not view his misconduct as aberrational. (*In the Matter of Wenzel* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 380, 386 [conduct not found aberrational where multiple acts were committed and attorney had time to reflect before each subsequent act].) Considering Golden's indifference toward rectification and that he continues to operate his firm in a similar fashion, we do not find that his misconduct is unlikely to recur.

[10b] We thus assign minimal mitigating weight to Golden's over 17 years of discipline-free practice. (See *In the Matter of Romano* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 391, 395, 398–399 [minimal weight afforded for 22 years of discipline-free practice where misconduct, which included filing 82 fraudulent bankruptcy petitions, "was most serious, involved intentional dishonesty, and continued over three and a half years," and was not proven aberrational].)

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

The hearing judge found that Golden entered into an extensive stipulation regarding facts, admissibility of evidence, and culpability, and that such cooperation with the State Bar preserved court time and resources, warranting significant mitigation credit. We agree and assign this factor significant weight. (Std. 1.6(e) [spontaneous candor and cooperation to State Bar is mitigating]; *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive weight in mitigation given to those who admit culpability and facts].)

VII. DISCIPLINE [22]

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

In analyzing the applicable standards, 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].) **[11a]** Here, standard 2.18 is the most severe, providing that disbarment or actual suspension is the presumed sanction for a violation of the Business and Professions Code not otherwise specified in another standard.[23]

The hearing judge considered the applicable standards and case law (namely, *Taylor*), balanced the aggravating and mitigating factors, and recommended discipline including a one-year actual suspension continuing until Golden pays restitution. At trial, Golden argued that his discipline should not include any period of actual suspension. On review, he contends that "upholding the [Hearing Department's] ruling would appear to render an extreme, unjust result." At trial, OCTC sought a one-year actual suspension to continue until Golden pays restitution and proves his rehabilitation, fitness to practice, and present learning and ability in the law. On review, OCTC requests that we affirm the judge's discipline recommendation.

22. 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.)

23. Standard 2.2(b), which provides that suspension or reproval is the presumed sanction for a violation of rule 4-100(B)(3), also applies.

As did the hearing judge, we look to *Taylor*. Taylor received a six-month actual suspension for charging pre-performance loan modification fees in eight client matters and failing to provide the required disclosures in one case. Multiple acts of wrongdoing, significant client harm, and lack of remorse aggravated his misconduct, and Taylor proved one mitigating circumstance—good character. Like Golden, Taylor failed to fully refund the illegally collected fees. We also find guidance in *DeClue*, *supra*, 5 Cal. State Bar Ct. Rptr. 437, in which we recommended a six-month actual suspension continuing until payment of restitution. DeClue illegally charged and collected advance fees for loan modifications in two client matters, and he proved no mitigation while his misconduct was aggravated by a prior record of discipline, significant harm to his clients, failure to pay restitution, and uncharged misconduct.

[11b] Golden's misconduct is more serious and extensive than was either Taylor's or DeClue's. Further, the amount of Golden's illegally collected advance fees dwarfs those involved in *Taylor* or *DeClue*. And, as in those cases, the mitigation we assigned for lack of a prior record and for cooperation is greatly outweighed by aggravation for multiple acts of wrongdoing, overreaching, uncharged misconduct, significant client harm, indifference, and failure to make restitution.

[11c] An appropriate sanction should fall within the range the applicable standard provides unless the net effect of the aggravating and mitigating circumstances demonstrates that a greater or lesser sanction is needed to fulfill the primary purposes of discipline. (Std. 1.7.) To deviate from the applicable standard, we must state clear reasons for doing so. (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons for departure from standards].) We find Golden's request for no actual suspension to be unsupported. Instead, we affirm the hearing judge's recommended one-year actual suspension continuing until Golden makes restitution of all the fees he collected illegally. In addition, we recommend that he remain suspended until he proves his rehabilitation, fitness, and learning in the law. This recommendation will allow Golden the opportunity to gain insight into—and show he is no longer indifferent to—his misconduct, and will, at the same time, protect the public, the courts, and the legal profession.

VIII. RECOMMENDATION

For the foregoing reasons, we recommend that Stephen Rawliegh Golden be suspended from the practice of law for two years, that execution of that suspension be stayed, and that he be placed on probation for three years on the following conditions:

1. He must be suspended from the practice of law for a minimum of the first year of his probation, and remain suspended until the following conditions are satisfied:

a. He makes restitution to the following payees (or reimburses the Client Security Fund, to the extent of any payment from the Fund to the payees, in accordance with Business and Professions Code section 6140.5) and furnishes satisfactory proof to the State Bar Office of Probation in Los Angeles:

(1) Joshua McDonough in the amount of $35,117 plus 10 percent interest per year from November 18, 2010;

(2) Tim Mazziotti and Suzanne Wells Schurman in the amount of $51,000 plus 10 percent interest per year from August 28, 2012;

(3) Tim Mazziotti and Suzanne Wells Schurman in the amount of $2,500 plus 10 percent interest per year from February 8, 2016;

(4) Doris Johnson Bennett in the amount of $18,150 plus 10 percent interest per year from December 4, 2014;

(5) Jonathan Bartlett in the amount of $17,623.06 plus 10 percent interest per year from September 6, 2013;

(6) Raymond and Suzanne Schneiders in the amount of $37,422.29 plus 10 percent interest per year from February 24, 2014;

(7) Oscar Arellano in the amount of $18,250 plus 10 percent interest per year from September 4, 2012;

(8) Bo and Grace McCarthy in the amount of $13,500 plus 10 percent interest per year from January 15, 2014;

(9) Robert Garcia in the amount of $4,950 plus 10 percent interest per year from July 30, 2014;

(10) Adrienne Kessler in the amount of $41,599.60 plus 10 percent interest per year from August 2, 2012;

(11) Felice Soule in the amount of $32,000 plus 10 percent interest per year from September 30, 2012; and

(12) Cherie Adams in the amount of $6,250 plus 10 percent interest per year from March 4, 2014.

b. He provides proof to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

4. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation case specialist to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation case specialist either in person or by telephone. During the period of probation, he must promptly meet with the probation case specialist as directed and upon request.

5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, as to whether he is complying or has complied with the conditions contained herein.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's 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 shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

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 period of probation, if he has complied with all conditions of probation, the

period of stayed suspension will be satisfied and that suspension will be terminated.

IX. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Stephen Rawliegh Golden be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter, or during the period of his actual suspension, whichever is longer, and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

X. RULE 9.20

We further recommend that Golden be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension

XI. COSTS

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

We concur:

PURCELL, P.J.

STOVITZ, J.*

* Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

State Bar Court
Review Department

In the Matter of

SANDRA LEE NASSAR

A Member of the State Bar

No. 14-O-00027

Filed August 23, 2018

[As Modified September 7, 2018]

SUMMARY

Nassar, a prosecutor, failed to provide certain discoverable evidence to a criminal defendant's counsel upon request, as required by law. The hearing judge found Nassar culpable of misconduct, and recommended a longer actual suspension than requested by the Office of the Chief Trial Counsel (OCTC). On review, Nassar argued that she was not culpable of misconduct. OCTC did not seek review.

The Review Department concluded that Nassar was culpable of the charged violations of Business and Professions code sections 6068(a) (failure to support laws) and 6106 (moral turpitude), and rule 5-220 of the California Rules of Professional Conduct (suppression of evidence). Upon its independent review of the hearing judge's aggravation and mitigation findings and discipline recommendation, the Review Department reduced the recommended discipline from the one-year actual suspension recommended by the hearing judge to a six-month actual suspension.

COUNSEL FOR PARTIES

For State Bar of California: Danielle A. Lee, Esq.

For Respondent: Blithe E. Cravens Esq, Brentford J. Ferreira Esq., and Stephen L. Cooley, Esq.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1a-d] **194 Miscellaneous General Issues — Effect/Applicability of Statutes Outside State Bar Act**
213.10 Culpability — State Bar Act — Section 6068(a) (support Constitution and laws)
Where respondent, as prosecutor in criminal case, failed to disclose discoverable evidence to defense counsel 30 days before trial, in violation of Penal Code section 1054.1, Review Department found respondent culpable of violating section 6068(a) (failure to support laws), concluding that whether evidence in question was exculpatory or material did not affect culpability, because statute required disclosure of all written witness statements. Trial continuances also did not affect culpability, because statute required disclosure 30 days before any trial date set by court, even if continuance of trial was expected and did in fact occur.

[2] **194 Miscellaneous General Issues — Effect/Applicability of Statutes Outside State Bar Act**
221.12 Culpability — State Bar Act — Section 6106 (moral turpitude) — Found — Gross negligence
Where respondent, as prosecutor in criminal case, was obligated to disclose evidence to defense counsel, but failed to disclose it based on unreasonable belief, contrary to clear language of applicable statute, that disclosure was not required, respondent was culpable of committing act of moral turpitude through gross negligence.

[3] **130 Procedure on Review**
165 Adequacy of Hearing Department Decision
166 Independent Review of Record
221.00 Culpability — State Bar Act — Section 6106 (moral turpitude)
Where hearing judge found that respondent, as prosecutor in criminal case, committed act of moral turpitude by improperly failing to disclose evidence to defense counsel in order to secure strategic trial advantage, Review Department deferred to hearing judge's determination that respondent's alternative explanation of her conduct lacked credibility.

[4a, b] **106.30 Procedural Issues — Pleadings — Duplicative charges**
204.90 Culpability — Other general substantive issues re culpability
Where respondent was culpable of committing act of moral turpitude and of violating rule of professional conduct based on same misconduct underlying respondent's culpability of violating Business and Professions Code section 6068(a), hearing judge was correct in giving other violations no additional weight in culpability.

[5] **325.00 Culpability — Rules of Professional Conduct — Suppression of Evidence**
Where respondent, as prosecutor in criminal case, was obligated by statute to disclose certain evidence to defense counsel, respondent violated rule 5-220 by withholding that evidence.

[6a, b] **586.11 Aggravation — Harm — To administration of justice — Inherent in nature of misconduct**
586.12 Aggravation — Harm — To administration of justice — Specific interference with justice
Where respondent, as prosecutor in criminal case, failed to disclose evidence to defense counsel as required by law, respondent's misconduct eroded confidence in law enforcement and the criminal justice system. Respondent's misconduct thus significantly harmed the administration of justice, and warranted substantial weight in aggravation.

[7a, b] **591 Aggravation — Indifference to rectification/atonement — Found**
Attorneys accused of misconduct have the right to defend themselves vigorously. However, where respondent adhered throughout disciplinary proceedings to erroneous belief that she did not commit misconduct, based on her unreasonable interpretation of clearly worded statutes, respondent's failure to fully acknowledge her wrongdoing constituted lack of insight and warranted moderate weight in aggravation.

[8] **710.36 Mitigation — Long practice with no prior discipline record — Found but discounted or not relied on – Present misconduct likely to recur**
Where respondent testified in disciplinary proceedings that she had fully complied with her legal and ethical duties and would act in the same manner again, respondent did not establish that her misconduct was unlikely to recur, thus reducing the mitigating weight of her lack of a prior disciplinary record.

[9] **735.30 Mitigation — Candor and cooperation with Bar — Found but discounted or not relied on**
Where respondent stipulated only to short set of easily provable facts, hearing judge correctly gave minimal consideration to respondent's cooperation as mitigating factor.

[10] **740.31 Mitigation — Good character references — Found but discounted or not relied on – Insufficient number or range of references**
Character evidence from attorneys and judges deserves great consideration because they have a strong interest in maintaining the honest administration of justice. However, for mitigation purposes in disciplinary proceedings, weight of this evidence is tempered by absence of wide range of references. Where respondent offered no character evidence from general community, Review Department assigned less than full mitigation weight to respondent's good character evidence.

[11] **715.50 Mitigation — Good faith — Declined to find**
Where respondent prosecutor believed that her conduct in delaying statutorily required disclosure of evidence to defense counsel was justified, but her belief was not objectively reasonable based on clear wording of applicable statute, respondent was not entitled to mitigating credit for acting in good faith.

[12a-b] 802.69 Application of Standards — Determination of Appropriate Sanctions — Generally/Other
Application of Standards — Standard 2.12(a) — Applied–actual suspension — Violation of Bus. & Prof. Code § 6068(a) through (h)
1092 Discipline — Miscellaneous Substantive Issues — Excessiveness of Discipline

Prosecutors have an elevated standard of candor and impartiality as compared to other attorneys. They must be zealous in their representation, but not at the cost of justice. Where respondent lost sight of her prosecutorial duty to shield against injustice, in failing to disclose evidence to defense counsel despite repeated requests, her misconduct was serious, and her actions fell substantially below the standards required of a prosecutor. Her conduct warranted more than the minimum 30-day suspension described in the applicable standard, but the hearing judge's recommendation of a one-year actual suspension with a proof of rehabilitation requirement was not necessary. A six-month actual suspension was sufficient to convey to respondent the gravity and consequences of her actions.

ADDITIONAL ANALYSIS

Culpability

Found

213.11 Section 6068(a) (support Constitution and laws)
221.10 Section 6106 (moral turpitude, corruption, dishonesty)
325.01 Suppression of evidence (rule 5-220)

Discipline Imposed

1013.08 Stayed Suspension — Two years
1015.04 Actual Suspension — Six months
1017.08 Probation — Two years

Probation Conditions

1024 Ethics exam/ethics school

OPINION

MCGILL, J.

Sandra Lee Nassar, a deputy district attorney in the Orange County District Attorney's Office, appeals a hearing judge's decision finding her culpable of three counts of misconduct for her failure to produce evidence in a felony criminal trial. While the Office of Chief Trial Counsel of the State Bar (OCTC) recommended that Nassar be actually suspended for six months, the judge recommended that Nassar be suspended for two years, that execution of that suspension be stayed, and that she be placed on probation for three years subject to an actual suspension of one year and until she provides proof to the State Bar Court of her rehabilitation, fitness to practice, and present learning and ability in the general law. Nassar asserts that discipline is not warranted as she acted appropriately. OCTC does not appeal and supports the judge's decision and discipline recommendation.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we reject Nassar's arguments, and affirm the hearing judge's culpability findings, but not her discipline recommendation. In light of the comparable case law, we recommend an actual suspension of six months to protect the public, the courts, and the legal profession.

I. PROCEDURAL BACKGROUND

On March 3, 2017, OCTC filed a Notice of Disciplinary Charges (NDC), charging Nassar with violating Business and Professions Code section 6068, subdivision (a) (failure to support laws),[1] section 6106 (moral turpitude—suppression of evidence), and rule 5-220 of the California Rules of Professional Conduct (suppression of evidence).[2] On June 28, 2017, the parties filed a Stipulation as to Facts and Admission of Documents (Stipulation). Trial was held on June 28 and 29 and July 21, 2017, and posttrial briefing followed. On October 10, 2017, the hearing judge issued her decision

II. FACTUAL BACKGROUND[3]

Nassar was admitted to practice law in California on December 9, 1998. In June 2011, Nassar filed criminal charges in *People v. Carmen Iacullo and Lori Pincus,* Orange County Superior Court Case No. 11NF1839 (*Iacullo*), alleging child abuse and torture of a five-year-old victim. *Iacullo* was in custody prior to the filing of these charges. Pincus, the victim's mother and Iacullo's codefendant, was arrested on June 11, 2011.

After Nassar filed *Iacullo*, she directed that a "mail cover" be imposed on Iacullo's and Pincus's mail while both were in custody.[4] Nassar received and reviewed copies of the intercepted mail before it was forwarded to the addressee. Iacullo, Pincus, and their attorneys were unaware of the mail cover.

Pursuant to a plea agreement Nassar negotiated with Pincus, Pincus pled guilty on July 10, 2012, to violations of Penal Code section 273a, subdivision (a) (child abuse), and Penal Code section 32 (accessory after the fact). As a part of her

1. All further references to sections are to the Business and Professions Code unless otherwise noted.

2. All further references to rules are to the California Rules of Professional Conduct unless otherwise noted

3. The factual background is based on the Stipulation, the trial testimony, documentary evidence, and factual findings by the hearing judge, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).)

4. Testimony at trial from both parties established that when a mail cover is in use, jail personnel intercept and copy all mail sent to and from the prisoner at the request of the prosecuting attorney. Attorney-client communications are excluded. Copies are held for the district attorney to review, and after the mail is copied, it is forwarded to the addressee. Nassar asked the jail to implement the mail cover. The decision to do so was entirely within her discretion.

plea, Pincus signed a factual basis statement [5] and a cooperation agreement that she would testify at Iacullo's trial. Pincus was released soon after her plea, thereby ending the mail cover on her correspondence. Iacullo's mail cover remained in place.

Between July 2011 and August 2012, Iacullo's attorney, Joe Dane, repeatedly requested discovery documents from Nassar. Iacullo's case was scheduled for jury trial five times during April 2012 to June 2013. Each time, the defense filed a motion to continue the trial shortly before the scheduled date. The superior court granted each motion on the first day of trial, except the first one, which was granted the week before trial was to start. [6]

In April 2013, Nassar was transferred out of the Family Protection Unit as part of the customary rotation practice in the district attorney's office. Deputy District Attorney Jennifer Duke took over the *Iacullo* prosecution, after which the next trial date was set for June 17, 2013.

When Nassar told Duke about the mail cover in the *Iacullo* case, Duke asked if any of the more than 1,000 pages of collected material had been produced. Nassar had not produced any of it, and replied, "Why would I?" Duke then spoke to her supervisor, Ted Burnett, who confirmed that the mail cover materials should have been provided to Dane in response to his earlier requests. On June 6, 2013, Duke produced all collected materials to Dane and canceled the mail cover.

On July 3, 2013, Dane filed a motion to dismiss or, in the alternative, to recuse the Orange County District Attorney's Office based on, among other issues, its withholding of the mail cover materials. On July 17 and 29, the superior court held a hearing on the motion, at which Nassar testified. She testified that she was familiar with her duty to produce exculpatory and mitigating information, even without a request from the defense. Nassar admitted that she received statements written by Pincus through the mail cover. She testified that she considered only one letter to be exculpatory,[7] but believed she did not have to produce it since it was sent to Iacullo, and was in his possession.[8]

At the hearing, Dane asked Nassar why she did not provide the mail cover materials when Pincus pled guilty. She answered that, at that time, she "had not finished turning over all of the discovery on the case." She then explained that she did not produce the mail cover materials because "[i]t relates to trial strategy."

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5. Pincus admitted in the statement that she "willfully and unlawfully harbored, concealed, and aided [Iacullo], knowing he had committed the crimes of child abuse and torture upon [her] son . . . with the intent that [Iacullo] might avoid and escape from arrest, trial, conviction, and punishment for the felony crimes he committed against [her] son."

6. Trial was initially set for June 20, 2012. On June 13, the trial date was moved to October 10. On that date, and on each successive scheduled trial date of January 16, 2013, March 20, April 17, and June 17, 2013, the trial was continued.

7. This letter from Pincus to Iacullo was dated October 23, 2011, and stated, in part, "I know you didn't do what they're saying. You couldn't have! I told them you hadn't been home for that last week other than to grab your tattoo equipment, but they accused me of lying to protect you." It was the only letter discussed in detail at the hearing.

8. Other letters written by Pincus were admitted into evidence at Nassar's disciplinary trial and were described in the hearing judge's decision. They were obtained through the mail cover on Pincus while she was incarcerated and included (1) a letter to "Alex" stating that she did not sign a statement from the district attorney because it was "bullshit" and wanted her to admit to "concealing a crime covering his ass"; (2) a letter to an unknown individual stating that Pincus did not sign a factual basis statement from the district attorney because it was "bullshit"; (3) a letter to "Teresa" stating that Pincus did not sign the factual basis statement because it points the finger at Iacullo and she was "not physically present when it happened"; and (4) a letter to "Andrew" stating that the factual basis statement was not right because Pincus was not there and could not say that she knows what happened.

The superior court found no due process violation and denied the motion to dismiss. However, the court determined that Nassar committed a "willful *Brady* violation," [9] and recused her from the case. The court found that Nassar did not produce "obviously exculpatory material," and her justification was not reasonable, adding that "It wasn't even close to a reasonable excuse." The judge noted that Dane could use the letter from Pincus to Iacullo to impeach Pincus's testimony at trial and that the defense could call Nassar as a witness. Neither side appealed the court's ruling.

In January 2014, Iacullo and Duke negotiated a plea agreement. Iacullo pled guilty to a violation of Penal Code section 273a, subdivision (a), with enhancements for great bodily injury and prior convictions. On January 24, 2014, Iacullo was sentenced to 12 years in state prison.[10]

III. NASSAR FAILED TO DISCLOSE DISCOVERABLE EVIDENCE

A. Count One: Section 6068, Subdivision (a) (Failure to Support Laws)[11]

In count one of the NDC, OCTC alleged that Nassar failed to comply with her "obligation under Penal Code sections 1054.1, et seq." when she did not produce discoverable evidence to Iacullo's defense counsel. Penal Code section 1054.1 requires, in relevant part, that a prosecuting attorney disclose to the defense statements of all defendants (subdivision (b)), any exculpatory evidence (subdivision (e)), and relevant written or recorded statements of witnesses (subdivision (f)). Penal Code section 1054.1 is "designed to promote truth in trials by requiring timely pretrial discovery." (*In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171, 181, fn. 10; see also *People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 570 [discussing purpose of discovery statutes under Pen. Code §§ 1054–1054.9].) Additionally, Penal Code section 1054.7 requires the prosecuting attorney to make disclosures under Penal Code section 1054.1 "at least 30 days prior to the trial, unless good cause[12] is shown why a disclosure should be denied, restricted, or deferred." Any decision to deny, restrict, or defer disclosures belongs to the court. (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1125 [trial court has broad discretion to deny, restrict, or defer disclosures under Pen. Code § 1054.7].)

The hearing judge found Nassar culpable because she willfully failed to disclose Pincus's statements obtained from the mail cover at least 30 days prior to trial, in violation of Penal Code sections 1054.1 and 1054.7, and that the October 23, 2011 letter was discoverable because it was exculpatory *and* a witness statement. (Pen. Code, § 1054.1, subds. (e) & (f).) Noting that Pincus had agreed to testify at trial and her letters contradicted the cooperation agreement that she signed, the judge also found that Nassar was required to disclose at least four additional letters from the mail cover that Pincus wrote to others because they constituted witness statements by her that pertained to the charges against Iacullo.[13]

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9. All references to "*Brady*" refer to the United States Supreme Court case *Brady v. Maryland* (1963) 373 U.S. 83. *Brady* held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." (*Id.* atp. 87.) The court emphasized that this decision was necessary to promote fairness in criminal trials and to comport with the standards of justice. (*Id.* at pp. 87–88.)

10. Under the complaint, Iacullo was facing a possible life sentence.

11. Under section 6068, subdivision (a), an attorney's duty is "[t]o support the Constitution and laws of the United States and of this state."

12. Penal Code section 1054.7 states, "'Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement," and a party may request to make its good cause showing in camera.

13. *Ante*, fn. 8.

Nassar appeals, arguing that her duty to disclose never arose while she was the prosecutor in *Iacullo*.[14] OCTC asserts that Nassar violated Penal Code sections 1054.1 and 1054.7 when she failed to turn over Pincus's statements from the mail cover 30 days before the trial dates scheduled for October 10, 2012; January 6, 2013; March 20, 2013; and April 17, 2013.

[1a] First, we need not determine if the October 23, 2011 letter was exculpatory under Penal Code section 1054.1, subdivision (e), since we find Nassar culpable for her failure to disclose Pincus's written statements under subdivision (f) of that section. Nassar did not timely produce the October 23, 2011 letter or Pincus's four other written statements that Nassar received under the mail cover, in violation of Penal Code section 1054.1, subdivision (f).

[1b] We also reject Nassar's argument that she did not have to produce the four additional letters because they were not "material." This argument is misplaced as the case law she cites interprets federal standards under *Brady*, not law dictating disclosure requirements under the Penal Code. As the hearing judge found, Pincus had agreed to testify and her letters were clearly written statements by a witness that were relevant and required to be disclosed under Penal Code section 1054.1, subdivision (f). We agree with the judge's conclusion that Nassar was obligated to provide those additional letters.

[1c] Nassar asserts that a duty to disclose evidence did not arise while she was the prosecutor because no "actual trial date" triggered the 30-day requirement under Penal Code section 1054.7. She attempts to distinguish the holding of *Field* by asserting that the superior court judge never set a discovery cutoff date nor had the parties announced that they were ready for trial and, therefore, no violation of Penal Code section 1054.7 occurred. However, *Field* did not hold that a discovery cutoff date had to be set to determine the trial date for Penal Code section 1054.7 purposes. Instead, the court relied on the plain language of that section and stated:

> Absent express language in section 1054.7 dictating otherwise, we do not presume the Legislature intended to allow parties in criminal proceedings to disregard discovery deadlines associated with trial dates merely because they think they can successfully predict that a trial date will be continued. [Citation.]

(*In the Matter of Field, supra*, 5 Cal. State Bar Ct. Rptr. at p. 182.) Similar to Nassar, Field argued that the set trial date was not "real" because it had been continued and an attorney must use his "predictive ability" to determine if a case is actually going to trial for the purpose of timely producing discovery. (*Ibid.*) We rejected Field's argument and found that he was culpable under section 6068, subdivision (a), when he did not make the required disclosures pursuant to Penal Code section 1054.7 at least 30 days prior to the first scheduled trial date without any showing of good cause for delay. (*Id.* at pp. 181–182.)

[1d] We see no reason to change our approach here.[15] The first trial date was scheduled for June 20, 2012. In May 2012, 30 days before

14. Under count one, Nassar also objects to the hearing judge's analysis under *Brady*. However, the judge correctly held that the issue was whether Nassar complied with the Penal Code, not whether there was a *Brady* violation. *Brady* has nothing to do with Nassar's culpability as alleged in the NDC, and Nassar's argument regarding *Brady* is without merit.

15. Nassar cites *People v. Superior Court (Lavi)* (1993) 4 Cal.4th 1164, which discusses the deadline for filing preemptory challenges under Code of Civil Procedure section 170.6. She argues that the trial date used to calculate the deadline under Penal Code section 1054.7 should be calculated similarly to the date under the master calendar rule. As discussed above, the plain language of Penal Code section 1054.7 does not support such an interpretation and neither does our holding in *Field*. Accordingly, we reject Nassar's argument.

the set trial date when she was required to disclose information, Nassar knew that the mail cover materials contained discoverable evidence because she admitted at trial that they included witness statements. Further, she stated that she planned to produce the materials once the mail cover was terminated. Finally, she made no showing of good cause for her failure to make the disclosures.[16] Accordingly, we find clear and convincing evidence[17] that Nassar is culpable under count one because she violated Penal Code sections 1054.1 and 1054.7 when she failed to timely produce witness statements to Iacullo's attorney.

B. Count Two: Section 6106 (Moral Turpitude—Suppression of Evidence)[18]

In count two of the NDC, OCTC alleged that Nassar committed an act of moral turpitude, dishonesty, or corruption when she knew, or was grossly negligent in not knowing, that she was required to provide the defense with discoverable evidence secured via a mail cover. OCTC charged that Nassar failed to produce that evidence "in order to secure a strategic trial advantage." The hearing judge stated that Nassar "adopted an unreasonably narrow view" of what should be disclosed and concluded that Nassar did not fulfill her obligations under the Penal Code. The judge held that Nassar's belief that she was not required to disclose the mail cover materials was unreasonable because it directly conflicted with the requirements of Penal Code sections 1054.1 and 1054.7. As such, the hearing judge found that Nassar violated section 6106 and committed an act of moral turpitude because Nassar was grossly negligent when she willfully failed to produce the discoverable mail cover evidence to the defense. (See *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, 807 [gross negligence may be basis for finding of moral turpitude].)

[2] Nassar again asserts that she did not fail to produce discoverable evidence as no duty arose while she was the prosecutor in *Iacullo* and, therefore, she did not commit an act of moral turpitude. As discussed above, Nassar had a duty to produce the mail cover materials to Dane 30 days before trial, which she did not do. OCTC supports the hearing judge's culpability finding. We agree with the judge's holding that Nassar was grossly negligent in her failure to produce discoverable evidence to the defense. Nassar's belief that she did not need to disclose the mail cover

16. A party must show good cause to defer a disclosure and can request that the court permit the showing of good cause in camera. (*Alvarado v. Superior Court*, *supra*, 23 Cal.4th at p. 1134.) Nassar claims that she delayed in producing the mail cover materials for two reasons. First, she asserts that a mail cover is an investigation and, as such, is privileged under Penal Code section 1054.6 and Evidence Code section 1040. However, she points to no authority, and we can find none, to support this broad assertion. Second, she argues that she needed to protect the victim. She stated that Pincus and Iacullo were attempting to locate the victim, but the only evidence supporting that claim is Nassar's own testimony. She cites *People v. Acevedo* (2012) 209 Cal.App.4th 1040 for the proposition that she could withhold the mail cover materials because "the need for confidentiality outweighs the necessity for disclosure." However, that decision is not hers to make; it belongs to the court under Penal Code section 1054.7. (*Alvarado v. Superior Court*, *supra*, 23 Cal. 4th at p. 1134; see also *People v. Acevedo*, *supra*, 209 Cal.App.4th at pp. 1052–1054.) Nassar cannot make her own good cause determination.

17. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

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

materials was unreasonable as it directly conflicted with her clear obligations under Penal Code sections 1054.1 and 1054.7.

[3] We also find that Nassar withheld the mail cover materials to secure a strategic trial advantage. At the hearing on the motion to dismiss, she admitted that she did so because "[i]t relates to trial strategy." The superior court judge found that Nassar's trial strategy was to not disclose the evidence, which was not a legitimate reason to withhold it. Nassar later testified at her disciplinary trial that when she used the term "trial strategy," she meant that her intent was to protect the victim. The hearing judge found that her credibility on this subject was diminished because Nassar never mentioned victim safety when she and Duke discussed the mail cover materials. Specifically, Nassar and Duke both testified that she replied, "Why would I?" when Duke asked if the mail cover materials had been produced. At that time, Nassar did not tell Duke that she was concerned about protecting the victim. We defer to the hearing judge's credibility findings because "[she] alone is able to observe the witnesses' demeanor and evaluate their veracity firsthand." (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032.)

[4a] The hearing judge gave no additional weight in culpability for this count as it is based on the same misconduct that constituted the violation in count one. We agree. (*See In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127 [no additional weight for same misconduct that forms basis of separate violation].)

C. Count Three: Rule 5-220 (Suppression of Evidence)

OCTC also charged Nassar with violating rule 5-220, which provides, "A member shall not suppress evidence that the member or the member's client has a legal obligation to reveal or produce."[19] The hearing judge found that Nassar violated this rule by failing to produce the discoverable mail cover evidence in her possession that she was obligated to produce to the defense under Penal Code sections 1054.1 and 1054.7.

Nassar maintains that she did not suppress evidence because she was "merely waiting for the case to reach the trial stage before taking down the mail cover and providing the mail cover materials to defense counsel." OCTC asserts that Nassar had an obligation under Penal Code sections 1054.1 and 1054.7 to produce those materials.

[5] As discussed above, Nassar was obligated under the Penal Code to disclose items contained within the mail cover 30 days before the first scheduled trial date of June 20, 2012. By withholding that evidence, she violated rule 5-220. **[4b]** As with count two, the hearing judge assigned no additional weight in culpability since the basis of misconduct for this count is the same as in count one. We agree with the judge's culpability finding and the weight assigned for this violation. (See *In the Matter of Sampson, supra,* 3 Cal. State Bar Ct. Rptr. at p. 127.)

IV. AGGRAVATION AND MITIGATION

Standard 1.5 [20] requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Nassar to meet the same burden to prove mitigation.

A. Aggravation

1. Significant Harm (Std. 1.5(j))

[6a]The hearing judge found that Nassar's "failure to turn over exculpatory and impeachment

19. Count three also contains the charge that Nassar committed a violation "in order to secure a strategic trial advantage." As discussed under count two, we find that Nassar's admission at the hearing on the motion to dismiss establishes that she violated this rule in order to secure a strategic trial advantage.

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

evidence, as required by law, significantly undermines the public's trust in the criminal justice system and warrants substantial consideration in aggravation." We agree.

The superior court judge stated that Nassar had no excuse for her actions and found that her conduct fell "painfully below the standard of care provided or required of a prosecutor in any case." Nassar's failure to produce required evidence in her role as a prosecutor "erodes confidence in law enforcement and the criminal justice system." (*In the Matter of Murray* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 479, 489; see also *In the Matter of Field, supra,* 5 Cal. State Bar Ct. Rptr. 171 [abuse of prosecutorial power negatively impacts reputation of district attorney's office and public's trust in criminal justice system].) Thus, we find that Nassar's actions significantly harmed the administration of justice and assign substantial weight in aggravation.

2. Lack of Insight (Std. 1.5(k))

The hearing judge found that Nassar demonstrated a lack of insight regarding her present misconduct because she testified that she did nothing wrong and would engage in the same conduct if a similar situation arose. The judge concluded that Nassar's attitude and unwillingness to acknowledge her own misconduct were reasons to believe that she might commit future misconduct. The judge assigned significant weight in aggravation.

Nassar argues that she was acting as a diligent prosecutor by obtaining the mail cover to protect the victim. She argues that she was aware of her duty to disclose the materials she obtained and planned to produce them. However, she believes that the disclosure deadline did not arise while she was the assigned prosecutor. She contends that her "honest belief in her innocence" demonstrates that she should not receive aggravation for lack of insight.

[7a] We agree with the hearing judge that Nassar lacks insight, but we assign less aggravating weight. Nassar was faced with two competing duties as prosecutor—to disclose certain evidence to the defense and to protect the safety of the victim. Nassar allowed her duty to the victim to overshadow her duty to the defendant. As a result, she took an unreasonable view of Penal Code sections 1054.1 and 1054.7, two clearly worded statutes, and she still firmly holds to this view. She testified at her trial that she would undertake the same actions again, and that she fully complied with her legal and ethical obligations. She is simply wrong.

[7b] Nassar, "like any attorney accused of misconduct, ha[s] the right to defend [herself] vigorously." (*In re Morse* (1995) 11 Cal.4th 184, 209.) However, her steadfast opposition in light of her clear legal and ethical duties as a prosecutor demonstrates that she has not fully acknowledged her wrongdoing. (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511 ["The law does not require false penitence . . . . But it does require that the respondent accept responsibility . . . and come to grips with . . . culpability"].) Accordingly, we assign moderate aggravation for lack of insight.

B. Mitigation

1. No Prior Discipline (Std. 1.6(a))

Absence of a prior record of discipline over many years, coupled with present misconduct that is not likely to recur, is a mitigating circumstance. The hearing judge credited Nassar with significant mitigation for her approximately 13 years of discipline-free practice. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [more than 10 years of misconduct-free practice given significant weight in mitigation].)

[8] We assign less than full mitigation credit, however, because Nassar did not establish that her misconduct is unlikely to recur. (*Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [where misconduct is serious, long discipline-free practice is most relevant where misconduct is aberrational and unlikely to recur].) As discussed above, Nassar testified that she did nothing wrong, that

she fully complied with her legal and ethical duties, and that she would do the same thing again. Her attitude reduces the weight of her lack of a prior disciplinary record.

2. Cooperation (Std. 1.6(e))

[9] Nassar stipulated to a short set of facts and did not stipulate to the admission of any exhibits nor culpability. The hearing judge correctly gave minimal consideration to Nassar's Stipulation because it contained easily provable facts. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive weight in mitigation accorded those who admit culpability as well as facts].) We agree.

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

Nassar 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." The hearing judge stated that Nassar's character evidence was diminished because her references were all from the legal community and did not represent a "wide range." (*In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 476 [weight of character evidence reduced where wide range of references lacking].) Despite this finding, the judge assigned significant weight in mitigation for Nassar's six witnesses and 28 character declarations.

On appeal, OCTC states that Nassar received the appropriate amount of mitigation. Nassar does not specifically argue for increased weight in mitigation, but asserts that her character references do represent a "wide range." She had numerous witnesses, consisting of judges, criminal defense attorneys, a law professor, and her fellow prosecutors and other employees of the Orange County District Attorney's Office. All were aware of Nassar's misconduct and had known Nassar for a long time (most ranging from 10 to 20 years). **[10]** The character evidence from the attorneys and judges is impressive and deserves great consideration because they have a "strong interest in maintaining the honest administration of justice." (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319.) However, for mitigation purposes in a disciplinary proceeding, the weight of this evidence is tempered when a "wide range of references is absent." (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50.) Since she offered no character evidence from the general community, we assign less than full mitigation weight for Nassar's good character evidence.

4. Good Faith (Std. 1.6(b))

[11] On appeal, Nassar argues that she should be given mitigation credit because "she acted in good faith in delaying discovery" based on case law and the Penal Code.[21] An attorney may be entitled to mitigation credit if he or she can establish a "good faith belief that is honestly held and objectively reasonable." (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653 [good faith established as mitigating circumstance when attorney proves belief was honestly held and reasonable].) However, her belief that she could wait to produce evidence until a "real" trial date was set was not objectively reasonable based on the clear wording of Penal Code section 1054.7. (*In the Matter of Field, supra,* 5 Cal. State Bar Ct. Rptr. at p. 182.) We find that Nassar does not deserve mitigating credit for good faith.

V. DISCIPLINE [22]

Our disciplinary analysis begins with the standards. While they are guidelines for discipline

21. Citing *People v. Salazar* (2005) 35 Cal.4th 1031, Nassar asserts that she was not required to turn over the October 23, 2011 letter because it was in the defense's possession. *Salazar* dealt with the materiality of evidence under *Brady* and has no bearing on whether Nassar was obligated to make certain disclosures under the Penal Code.

22. 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.)

and are not mandatory, we give them great weight to promote consistency. (*In re Silverton* (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.) We also look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.)

[12a] In analyzing the applicable standards, 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].) Here, standard 2.12(a) is the most severe and specific, providing that disbarment or actual suspension is the presumed sanction for a violation of section 6068, subdivision (a).[23]

The hearing judge considered standard 2.12(a) and also looked to the case law for guidance. Specifically, the judge looked to two recent cases involving prosecutorial misconduct: *In the Matter of Murray, supra,* 5 Cal. State Bar Ct. Rptr. 479 and *In the Matter of Field, supra,* 5 Cal. State Bar Ct. Rptr. 171.

In *Murray,* a district attorney added fabricated lines to the transcribed statement of a defendant that made it seem the defendant had confessed to having sexual intercourse with a child. Murray sent the false document to the public de-fender, failed to correct the record despite several opportunities to do so, and then ultimately claimed it was all a "joke." He was culpable of an act of moral turpitude under section 6106 for knowingly creating and transmitting a false confession to the public defender.[24] In aggravation, we found that Murray caused significant harm to the victim, the defendant, and the administration of justice. He received limited mitigation for his stipulation to facts and his delayed remorse and recognition of his wrongdoing. We assigned significant mitigation weight for Murray's lack of prior discipline, extraordinary character evidence, and community service, and recommended an actual suspension of one year.

The prosecutor in *Field* was culpable of misconduct in four criminal prosecutions over a 10-year period. His violations included failing to obey a court order, in violation of section 6103; moral turpitude violations under section 6106 for suppression of evidence, disrespect to the court, and an improper closing argument; and failing to comply with laws, in violation of section 6068, subdivision (a). Overall, we found compelling mitigation for Field's cooperation, extraordinary good character evidence, and community service. In aggravation, he committed multiple acts of misconduct and caused significant harm to the administration of justice. We did not find that Field displayed indifference toward rectification because he admitted he used poor judgment and should have produced certain evidence. Field stated that he would make changes to the way he handled discovery in the future. We recommended an actual suspension of four years.

We agree with the hearing judge's reliance on standard 2.12(a) along with *Murray* and *Field.* In comparing Nassar's misconduct to the two cases, she wrote, "[T]he misconduct in *Murray* was more outrageous and the misconduct in *Field* was more extensive." Nonetheless, Nassar's failure to timely produce discoverable evidence to the defense is extremely serious misconduct because she failed to fulfill her prosecutorial duty to promote justice. (See *In the Matter of Murray, supra,* 5 Cal. State Bar Ct. Rptr. at p. 488 [serious misconduct for prosecutor's failure to live up to standard imposed on him by virtue of his unique role in the administration of justice] and *In the Matter of Field, supra,* 5 Cal. State Bar Ct. Rptr. at pp.186–187 [prosecutors are held to elevated standard and have special duty to promote justice

23. The hearing judge noted that the same range of discipline would have applied for a violation of section 6106 under standard 2.11. Standard 2.19 applies to a violation of rule 5-220 and provides a less severe sanction than standard 2.12 (a).

24. Murray was also charged with a violation of section 6068, subdivision (a), based on the same facts, but that charge was dismissed as duplicative. (*In the Matter of Murray, supra,* 5 Cal. State Bar Ct. Rptr. at p. 488.)

and seek truth].) However, her misconduct is not as serious as that committed by the attorney in *Murray*. That prosecutor deliberately altered evidence and compromised the prosecution, resulting in the dismissal of charges. Also, Nassar's misconduct involved only one matter, unlike the misconduct in *Field*, which was prolonged and involved several violations. The discipline in *Murray* was an actual suspension of one year and it was four years in *Field*. We find that a discipline including less than one year of actual suspension is warranted here.[25]

[12b] As discussed in *Field* and *Murray,* prosecutors have an elevated standard of candor and impartiality as compared to other attorneys. *(In the Matter of Field, supra,* 5 Cal. State Bar Ct. Rptr. at p. 186; *In the Matter of Murray, supra,* 5 Cal. State Bar Ct. Rptr. at p. 491.) Prosecutors exercise the sovereign power of the state and must be zealous in their representation, but not at the cost of justice. (*United States v. Young* (1985) 470 U.S. 1, 7.) The "ultimate goal [of the criminal justice system] is the ascertainment of the truth, and where furtherance of the adversary system comes in conflict with the ultimate goal, the adversary system must give way to reasonable restraints designed to further that goal."(*In re Ferguson* (1971) 5 Cal.3d 525, 531.)

[12c] We find that Nassar lost sight of her prosecutorial duties when she failed to disclose the mail cover materials. She shifted her focus away from her duty to shield against injustice and concentrated on the adversarial nature of the job. She repeatedly failed to make the disclosures, despite Dane's repeated requests, before each of the scheduled trial dates, in violation of the Penal Code. Nassar admitted that she withheld discoverable evidence to obtain a strategic advantage at trial. Further, she did not avail herself of the remedy permitted under Penal Code section 1054.7. Instead of requesting the judge to look at the materials in camera to determine if good cause existed to defer producing the materials, Nassar improperly made that determination herself. Her misconduct was serious and her actions fell substantially below the standards required of a prosecutor.

In sum, we find that Nassar's failure to produce discoverable evidence to the defense warrants a term of actual suspension above the 30-day minimum described in standard 1.2(c) (1).[26] The aggravation and mitigation factors in this case are on balance and do not merit either a longer or shorter term of suspension.[27] We find that the comparable case law is most useful in determining the appropriate discipline recommendation. We believe that the purposes of attorney discipline and prosecutorial accountability will be met by recommending discipline that includes a six-month actual suspension. The hearing judge's recommendation of a one-year actual suspension and until Nassar provides proof of her rehabilitation, fitness to practice, and present learning and ability in the general law is not necessary as our recommendation should convey to Nassar the gravity and consequences of her actions.

25. The case precedent for circumstances similar to Nassar's is "limited." (*In the Matter of Field, supra,* 5 Cal. State Bar Ct. Rptr. at p. 186.) Apart from *Field* and *Murray*, discipline imposing actual suspension has ranged from 30 days to two years. (*Ibid.*) In *Noland v. State Bar* (1965) 63 Cal.2d 298, a prosecutor was given a 30-day actual suspension when he committed an act of moral turpitude by attempting to delete potential pro-defense jurors from the jury list to gain advantage at trials. In *Price v. State Bar* (1982) 30 Cal.3d 537, a prosecutor was given a two-year actual suspension for altering evidence at a murder trial to obtain a conviction. The prosecutor's misconduct involved moral turpitude. The Supreme Court concluded that the mitigation evidence presented weighed against the prosecutor's disbarment. We note that both *Noland* and *Price* are pre-standards cases.

26. Standard 1.2(c)(1) provides, "Actual suspension is generally for a period of 30 days, 60 days, 90 days, six months, one year, 18 months, two years, three years, or until specific conditions are met."

27. Under standard 1.7, the net effect of the aggravating and mitigating circumstances can determine if a greater or lesser sanction than that specified in a given standard should be imposed. Here, those circumstances do not meet the requirements under standard 1.7(b) or (c).

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Sandra Lee Nassar be suspended from the practice of law for two years, that execution of that suspension be stayed, and that she be placed on probation for two years with the following conditions:

1. Nassar must be suspended from the practice of law for the first six months of her probation.

2. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Nassar must (1) read the California 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 her compliance with this requirement, to the State Bar's Office of Probation in Los Angeles with her first quarterly report.

3. Nassar must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of her probation.

4. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Nassar must make certain that the State Bar Attorney Regulation and Consumer Resources Office (ARCR) has her current office address, email address, and telephone number. If she does not maintain an office, she must provide the mailing address, email address, and telephone number to be used for State Bar purposes. She 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.

5. Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Nassar must schedule a meeting with her assigned probation case specialist to discuss the terms and conditions of her 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, she may meet with the probation case specialist in person or by telephone. During the probation period, she 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.

6. During Nassar's probation period, the State Bar Court retains jurisdiction over her to address issues concerning compliance with probation conditions. During this period, she must appear before the State Bar Court as required by the court or by the Office of Probation after written notice mailed to her official membership address, as provided above. Subject to the assertion of applicable privileges, Nassar must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

a. Deadlines for Reports. Nassar 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, Nassar must submit a final report no earlier than ten days before the last day of the probation period and no later than the last day of the probation period.

b. Contents of Reports. Nassar must answer, under penalty of perjury, all inquiries contained in the quarterly report form provided by the Office of Probation, including stating whether she 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. Nassar is directed to maintain proof of her 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 her actual suspension has ended, whichever is longer. She is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

7. Within one year after the effective date of the Supreme Court order imposing discipline in this matter, Nassar 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 she will not receive MCLE credit for attending Ethics School. If she provides satisfactory evidence of completion of Ethics School after the date of this decision but before the effective date of the Supreme Court's order in this matter, she will nonetheless receive credit for such evidence toward her duty to comply with this condition.

8. For a minimum of one year after the effective date of discipline, Nassar is directed to maintain proof of her compliance with the Supreme Court's order that she comply with the requirements of California Rules of Court, rule 9.20(a) and (c). Such proof must include the names and addresses of all individuals and entities to which notification was sent pursuant to rule 9.20; copies of the notification letter sent to each such intended recipient; the original receipt and tracking information provided by the postal authority for each such notification; and the originals of all returned receipts and notifications of non-delivery. Nassar is required to present such proof upon request by OCTC, the Office of Probation, and/or the State Bar Court.

9. 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 Nassar has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Nassar be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) 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 Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).) If Nassar provides satisfactory evidence of taking and passage of the MPRE after the date of this opinion but before the effective date of the Supreme Court's order in this matter, Nassar will nonetheless receive credit for such evidence toward her duty to comply with this condition.

VIII. RULE 9.20

We further recommend that Nassar be ordered to comply with the requirements of California Rules of Court, rule 9.20, and to perform the

acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order imposing discipline in this matter. Failure to do so may result in disbarment or suspension.

IX. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against a member who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

We concur:

PURCELL, P.J.

HONN, J.

State Bar Court
Review Department

In the Matter of

CHANCE EDWARD GORDON

A Member of the State Bar

Nos. 12-O-15516; 12-O-15734 (Correlated)

Filed October 31, 2018

SUMMARY

Respondent entered into a partnership with a non-lawyer to manage an enterprise that used misleading advertising to attract loan modification clients nationwide, charged them illegal advance fees, employed non-lawyers to deliver legal services, and shared fees with non-lawyer personnel. Respondent persisted in this activity, despite cease and desist orders from several states, until his operation was shut down by a court order obtained by a federal consumer protection agency. During the State Bar's investigation, respondent repeatedly made threats of physical violence against State Bar personnel, resulting in the issuance of restraining orders against him. The hearing judge recommended that respondent be disbarred, and the Review Department agreed.

COUNSEL FOR PARTIES

For State Bar of California: Allen Blumenthal, Esq.

For Respondent: Chance Edward Gordon, in pro. per.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **141.10 Evidentiary Issues – Relevant and Reliable Evidence Admissible**
142.10 Evidentiary Issues – Hearsay – Admissibility
142.20 Evidentiary Issues – Hearsay – Insufficiency to Support Finding
192 Miscellaneous General Issues – Constitutional Issues – Due Process/Procedural Rights

Where culpability determinations were based on evidence introduced at trial without respondent's objection, respondent's due process rights were not violated by admission of such evidence, as any objection had been waived. Moreover, State Bar's rules permit admission of relevant, reliable hearsay evidence to supplement or explain other evidence, although hearsay admitted over timely objection is not sufficient in itself to support a finding.

[2] **103 Generally Applicable Procedural Issues – Disqualification/Bias of Judge**
120 Generally Applicable Procedural Issues – Conduct of Trial
162.20 Standards of Proof/Standards of Review – Respondent's burden in disciplinary matters
192 Miscellaneous General Issues – Constitutional Issues – Due Process/Procedural Rights

Where respondent failed to establish that hearing judge demonstrated bias or that respondent was specifically prejudiced, and where purpose of hearing judge's questions at trial was to clarify judge's own confusion about testimony, respondent failed to meet burden to show judicial bias, and failed to show he was deprived of due process.

[3a, b] **204.90 Substantive Issues in Disciplinary Matters – Other general substantive issues re culpability**
252.20 Culpability – Rules of Professional Conduct Violations – Law partnership with non-lawyer

Even when a service may be performed by non-lawyers, when such services are rendered by an attorney or in an attorney's office, they constitute the practice of law. Where customers of loan modification business jointly operated by respondent and non-lawyer were told they were receiving attorney services, business constituted practice of law. Accordingly, respondent was culpable of forming a partnership with a non-lawyer.

[4a, b] **252.20 Culpability – Rules of Professional Conduct Violations – Law partnership with non-lawyer**

A partnership is an association of two or more persons to carry on as co-owners of a business for profit, whether or not the persons intend to form a partnership. Where respondent entered into agreement with non-lawyer to conduct business selling loan modification services to clients; non-lawyer's efforts were critical part of operation; respondent and non-lawyer carried out business as common enterprise; and business

constituted practice of law, respondent was culpable of forming a partnership with a non-lawyer.

[5a, b] **252.30 Culpability – Rules of Professional Conduct Violations – Sharing fee with non-lawyer**

Where respondent shared revenue from advance attorney fees collected by loan modification services business with non-lawyer partner, and partner then paid sales representatives commissions out of partner's share of revenue, respondent was culpable of violating rule prohibiting sharing legal fees with a non-lawyer.

[6a, b] **253.10 Culpability – Rules of Professional Conduct Violations – False/misleading communication**

Where respondent changed the name and website of his loan modification services operation numerous times to mislead public; used same client testimonials on different websites; failed to identify himself as attorney responsible for communications or solicitations; and mailed solicitations implying falsely that operation was affiliated with government entities, respondent was culpable of violating rule prohibiting attorneys from sending false, deceptive, or misleading communications or solicitations.

[7] **191 Miscellaneous General Issues – Effect of/Relationship to Other Proceedings**
204.90 Substantive Issues – Culpability – Other general substantive issues re culpability
253.10 Culpability – Rules of Professional Conduct Violations – False/misleading communication

Business and Professions Code section allowing any person to file complaint with State Bar for false, misleading, or deceptive legal advertising, and allowing State Bar to require attorney to withdraw advertising on 72 hours' notice if such complaint is supported by substantial evidence, is completely separate from attorneys' duty under Rules of Professional Conduct not to use deceptive or misleading advertising. Accordingly, respondent who employed misleading advertising was properly found culpable of violating Rules of Professional Conduct even though no such complaint was filed, and State Bar did not give him 72 hours' notice to withdraw advertising.

[8] **194 Miscellaneous General Issues – Effect/Applicability of Statutes Outside State Bar Act**
204.90 Substantive Issues – Culpability – Other general substantive issues re culpability
222.20 Section 6106.3 (violation of Civil Code re mortgage loan modifications)

Where disciplinary statute defined violation of specified Civil Code sections as constituting attorney misconduct, and statute was amended to delete reference to one of such Civil Code sections, pre-amendment version of statute applied to misconduct that respondent committed prior to effective date of amendment.

[9] **106.10 Generally Applicable Procedural Issues – Issues re Pleadings – Sufficiency of pleadings to state grounds for action sought**
194 Miscellaneous General Issues – Effect/Applicability of Statutes Outside State Bar Act
204.90 Substantive Issues – Culpability – Other general substantive issues re culpability
Where disciplinary statute defined violation of specified Civil Code section as constituting attorney misconduct, attorney was properly found culpable of violating disciplinary statute even though notice of disciplinary charges charged violation of disciplinary statute only, and did not expressly charge violation of Civil Code section.

[10a, b] **294.90 Substantive Issues – Culpability – Other general substantive issues re culpability**
221.11 Culpability – Business and Professions Code Sections – Section 6106 (moral turpitude) – Found – Deliberate dishonesty/fraud
Where respondent's marketing materials and sales representatives indicated to potential clients that a lawyer would be working on their behalf, but respondent in fact delegated loan modification work to non-attorney employees, and respondent knew representations made to clients were false, respondent committed an act of moral turpitude despite his professed honest belief that what he was doing was legal.

[11] **221.11 Culpability – Business and Professions Code Sections – Section 6106 (moral turpitude) – Found – Deliberate dishonesty/fraud**
Respondent committed misconduct involving moral turpitude by engaging in operation to collect illegal advance attorney fees and exploit vulnerable homeowners by using an aggressive marketing scheme under which clients were falsely informed that they were hiring a lawyer to sue banks, and misled to believe operation was affiliated with government entities, while respondent changed name of operation and its websites several times to distance himself from past complaints, and failed to identify himself on some websites as attorney responsible for solicitations.

[12] **551 Aggravation – Overreaching – Found**
Respondent's procedures for dealing with complaining clients constituted overreaching, where respondent attempted to intimidate such clients by sending them draft civil complaints that accused them of extortion, claimed they were required to arbitrate, and alleged that respondent had completed necessary work to earn his fee.

[13a, b] **191 Miscellaneous General Issues – Effect of/Relationship to Other Proceedings**
591 Aggravation – Indifference to rectification/atonement – Found
Where respondent continued to collect advance fees for loan modification services despite cease and desist orders from several states; ceased his wrongdoing only after temporary restraining order was issued; and continued to insist his conduct was legal even after his operation was shut down by consumer protection agency, respondent's

indifference toward rectification and inability to recognize wrongfulness of his misconduct warranted substantial consideration in aggravation.

[14a-c] **191 Miscellaneous General Issues – Effect of/Relationship to Other Proceedings**
611 Aggravation – Lack of candor/cooperation with Bar – Found
Where respondent not only failed to cooperate with OCTC, but made repeated threats against OCTC employees, resulting in the issuance of restraining orders against him, respondent's behavior was reprehensible and constituted extremely serious aggravation.

[15] **582.10 Aggravation – Harm – To client – Found**
Where respondent exploited clients' financial desperation by illegally charging advance fees for loan modification, and pushed them to the brink of foreclosure by encouraging his employees to tell them to stop communicating with lenders and paying their mortgages, respondent's conduct warranted substantial weight in aggravation.

[16] **710.36 Mitigation – Found but discounted or not relied on – Present misconduct likely to recur**
Absence of a prior record of discipline over many years, coupled with present misconduct that is not likely to recur, is a mitigating circumstance. Where respondent completely lacked insight into his misconduct, it could not be viewed as unlikely to recur, so his 11 years of discipline-free practice was assigned only nominal mitigation credit.

[17a-c] **831.20 Application of Standards – Standard 2.11 (Moral Turpitude, Fraud, etc.) – Applied – Disbarment – Magnitude of misconduct great**
831.50 Application of Standards – Standard 2.11 (Moral Turpitude, Fraud, etc.) – Applied – Disbarment – Presence of other aggravation
1091 Discipline – Miscellaneous Substantive Issues re Discipline – Proportionality with Other Cases
Where charges against respondent did not involve individual client matters, but rather extensive, nationwide illegal scheme to sell attorney services while legal work was done by non-attorneys; respondent continued to mislead public even after state and federal agencies informed him his loan modification scheme was fraudulent; and respondent displayed extreme inability to recognize wrongfulness of his actions and threatened State Bar employees, respondent's conduct warranted discipline beyond that recommended in typical loan modification cases. Given these facts, respondent would not be deterred from future wrongdoing merely by suspension, and disbarment was necessary to protect public, courts, and legal profession.

Additional Analysis

Culpability

Found

State Bar Act

213.11 Section 6068(a) (support Constitution and laws)
222.21 Section 6106.3 (mortgage loan modifications)

Rules of Professional Conduct

252.21 Rule 1-310 (Law partnership with non-lawyer)
252.31 Rule 1-320(A) (Sharing fee with non-lawyer)
253.11 Rule 1-400(D)(2) (False/misleading communication)

Aggravation

Found

521 Multiple acts of misconduct

Discipline Imposed

1010 Disbarment
2311 Inactive Enrollment After Disbarment Recommendation – Imposed

OPINION

HONN, J.

This matter involves Chance Edward Gordon's unsuccessful attempt to avoid the statutory proscription against attorneys receiving advance fees for loan modification services prior to completion of the contracted-for work. Gordon, an attorney admitted only in California, marketed his services nationwide using misleading, false advertising. His operation was extensive, bringing in 11.4 million dollars in fees from more than 2,000 clients. To justify his advance fees, he characterized his work as "Pre-Litigation" activities and his loan modification work as "pro bono" services. In carrying out this ruse, he also violated other laws, and all of his misconduct was surrounded by serious aggravating circumstances. During the investigation of his misconduct, Gordon also engaged in outrageous behavior toward State Bar employees.

The hearing judge found Gordon culpable of six counts of misconduct: (1) moral turpitude; (2) forming a partnership with a non-lawyer; (3) sharing legal fees with a non-lawyer (two counts); (4) false advertising; and (5) failing to comply with laws. The judge also found five factors in aggravation and nominal mitigation. Ultimately, the judge recommended that Gordon be disbarred.

On review, Gordon requests that all six counts be dismissed with prejudice or, in the alternative, that we disqualify the hearing judge and order a new trial. The Office of Chief Trial Counsel of the State Bar (OCTC) urges that we uphold the hearing judge and recommend that Gordon be disbarred. Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we affirm the hearing judge's culpability and discipline determinations. Due to Gordon's serious aggravation and nominal mitigation, we recommend that he be disbarred.

I. PROCEDURAL BACKGROUND

On September 21, 2012, OCTC initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) in State Bar Case No. 10-O-05509 et al.[1] A second NDC was filed on December 20, 2012, in State Bar Case No. 12-O-14013 et al. The cases in this opinion (12-O-15516; 12-O-15734) were included in the second NDC. The first NDC and the second NDC were ordered consolidated in 2013, but were severed on November 30, 2017. The cases in the first NDC were abated, not dismissed, and remain abated. On December 28, 2017, all of the cases charged in the second NDC were dismissed without prejudice except for the titled case numbers of this opinion. Therefore, only counts 9 through 14 of the second NDC are at issue here. Unlike the typical loan modification case, these counts do not charge misconduct related to individual client matters. Instead, they deal with Gordon's overall loan modification scheme.

Trial was held on August 26, 29, 30, and 31, 2016, and the parties filed posttrial closing briefs. On November 22, 2016, the hearing judge issued her decision.

II. LEGISLATION REGULATING LOAN MODIFICATION SERVICES

In 2009, the Legislature amended the law to regulate an attorney's performance of home loan modification services. California Senate Bill No. 94 (SB 94),[2] which became effective on October 11, 2009, provided two safeguards for

1. As discussed below, the Consumer Financial Protection Bureau (CFPB) had filed a complaint for permanent injunction against Gordon in United States District Court for the Central District of California in July 2012. (*Consumer Financial Protection Bureau v. Gordon*, CV12-06147.)

2. SB 94 added sections 2944.6 and 2944.7 to the Civil Code and section 6106.3 to the Business and Professions Code. (Stats. 2009, Ch. 630, § 10.)

borrowers who employ someone to assist with a loan modification: (1) a requirement for a separate notice advising borrowers that it is not necessary to employ a third party to negotiate a loan modification (Civ. Code, § 2944.6, subd. (a)); [3] and (2) a proscription against charging pre-performance compensation, i.e., restricting the collection of fees until all contracted-for loan modification services are completed (Civ. Code, § 2944.7, subd. (a).) [4] The intent was to "prevent persons from charging borrowers an up-front fee, providing limited services that fail to help the borrower, and leaving the borrower worse off than before he or she engaged the services of a loan modification consultant." (Sen. Com. on Banking, Finance, and Insurance, Analysis of Sen. Bill No. 94 (2009–2010 Reg. Sess.) as amended Mar. 23, 2009, pp. 5–6.) At all times relevant to this matter, a violation of either Civil Code provision constituted a misdemeanor (Civ. Code, §§ 2944.6, subd. (c), 2944.7, subd. (b)), which is cause for imposing attorney discipline. (§ 6106.3.)

III. FACTUAL BACKGROUND [5]

Gordon was admitted to practice law in California on December 7, 1998. Between 2009 and 2012, he partnered with non-lawyer Abraham Michael Pessar to provide loan modification services. [6] Their operation consisted of a sales division, responsible for marketing and selling loan modification services, and a processing division that provided the actual services. The sales representatives were paid on commission and they sold loan modification services to homeowners at a cost of $2,500 to $4,500. Before the operation ended, approximately 20 non-attorney processors were doing the loan modification work and over 20 sales representatives marketed the services.

The operation took place in several suites in a Los Angeles office building where Gordon and Pessar shared office space. John Gearries acted as the office manager and reported to Gordon and Pessar. Gordon was the only attorney involved in the operation. He prepared, approved, and signed the fee agreements executed by most of the customers. He was also responsible for ensuring that the operation complied with the law. Pessar focused on marketing and managing the day-to-day sales and processing activities. Although Pessar oversaw these functions, Gordon retained final decision-making authority over marketing and provided guidance to the sales and processing departments. Pessar also supervised all banking-related duties. Gordon and Pessar agreed that they would share the revenue from the operation: one-third to Gordon and the remaining two-thirds to Pessar, which he would use to pay himself and to pay marketing and sales force commissions. By the time the operation ended, it had collected advance loan modification fees from approximately 2,300 clients in California and several other states. From January 2010 to July 2012, the operation collected 11.4 million dollars in revenue.

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3. Civil Code section 2944.6, subdivision (a), requires that a person attempting to negotiate a loan modification must, before entering into a fee agreement, disclose to the borrower the following information in 14-point bold type font "as a separate statement":

> It is not necessary to pay a third party to arrange for a loan modification or other form of forbearance from your mortgage lender or servicer. You may call your lender directly to ask for a change in your loan terms. Nonprofit housing counseling agencies also offer these and other forms of borrower assistance free of charge. A list of nonprofit housing counseling agencies approved by the United States Department of Housing and Urban Development (HUD) is available from your local HUD office or by visiting www.hud.gov.

4. In relevant part, Civil Code section 2944.7, subdivision (a), provides that "it shall be unlawful for any person who negotiates, attempts to negotiate, arranges, attempts to arrange, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower, to . . . [¶] . . . [c]laim, demand, charge, collect, or receive any compensation until after the person has fully performed each and every service the person contracted to perform or represented that he or she would perform."

5. The facts included in this opinion 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).)

6. In an email to Pessar, Gordon refers to the operation with Pessar as their "enterprise."

Gordon created his "Pre-Litigation Monetary Claims Program" (Program) in response to the passage of SB 94. In fact, he testified that the "whole point" of creating the Program was to avoid the application of SB 94. Under Gordon's Program, borrowers would sign a "pro bono" agreement for the operation's loan modification services in an attempt by Gordon to avoid the prohibition against collecting advance fees under Civil Code section 2944.7, subdivision (a). However, borrowers could only receive the "pro bono" services if they paid for the Program. Gordon compared the Program to a box of Cracker Jack: he said the loan modification was like the "free prize" you got at the bottom of the box.

In 2011, Gordon revised his attorney/client fee agreement to describe the scope of the attorney services provided. Under the agreement, he would provide clients with "custom legal products," which included a draft demand letter, a qualified written request, and a draft complaint. Gordon created templates for these documents, and the operation processors would fill in the relevant information. However, these documents were of little value to the clients and were not used to obtain loan modifications. These "custom legal products" were usually prepared, if at all, after an application for a loan modification was submitted.

The marketing and telephone scripts for the operation show that sales representatives were selling loan modifications services. The representatives were instructed to ask clients for their mortgage information and then to tell the clients that they could lower their interest rate to two percent or adjust their payments equal to 31 percent of their gross income. However, according to Pessar, clients "frequently complained that they did not receive the loan modifications or the terms that they were promised."

Marketing for the operation included numerous mail solicitations, internet advertising, and cold calling from the sales division. Gordon approved the marketing materials. When the operation began, they sent out 5,000 to 10,000 mailers per month, but by the time the operation was shut down, they were sending out 10,000 per week. None of the mail solicitations included Gordon's name. They listed a Washington, D.C. return address, which did not exist; stated in a large font, "NOTICE OF HUD RIGHTS"; and prominently displayed the logos of HUD and the Making Homes Affordable Programs. If consumers called the operation and asked if they were contacting HUD or a government agency, the sales representatives provided scripted responses that circumvented directly answering the questions. The representatives were directed to respond, "Under HUD (Housing and Urban Development) you have rights as a homeowner. During this conversation I would like to go over those rights with you." Sales representatives were also scripted to say, "The reason for the call is we have you on President Obama's Stimulus List."

Sales representatives marketed the services by telling potential clients that a law firm would represent them in their loan modification. The operation marketed the law firm services in order to gain the clients' confidence and justify the fees charged. Gordon did not actually perform the loan modification services. He rarely even talked to the clients and usually did so only after they had made complaints to the State Bar.

The sales representatives pressured callers by stating that they had only 72 hours to decide whether to purchase the operation's services. Sales scripts prompted the representatives to tell potential customers that the law firm stated they were "qualified under federal guidelines," which was "great news . . . because law firms in such a scrutinized industry will only take on cases they feel . . . 100 percent confident on." The representatives also told prospective clients that the "operation was a consumer advocate membership organization" to convince them that it was not another loan modification scam. Even if the potential clients did not qualify for loan modification services, Gordon encouraged sales representatives to sign them up anyway because "everyone qualifies" for "custom legal products."

Gordon repeatedly changed the name of the operation and its websites.[7] He testified that he did so because he "didn't want to be detected by the Better Business Bureau." He determined the content of each website, but did not identify himself as the State Bar member responsible for the solicitations. The different iterations of the websites contained identical content, including the same client testimonials. The websites advertised a "Pre-Litigation Research & Investigation Program" where the homeowner would be provided with "prepared, detailed legal documents of illegal conduct engaged in by their particular lender." The websites stated that an attorney would prepare the documents and "utilize them to construct a lawsuit against your lender" to leverage negotiations with the mortgage lender. The sales scripts reinforced these claims and prompted the representatives to state, "these lawyers are going to want to find weakness in your file and do a forensic investigation on your file." However, after paying for this program, clients were told that the services did not provide for a forensic audit. Further, the websites referenced"myhud.org," which was not a government website, but a website owned and operated by Gordon. At first, the operation marketed only in California, but by early 2010, it sent direct mailers to homeowners in several states.

On July 18, 2012, the CFPB filed a complaint in United States District Court for the Central District of California for permanent injunction against Gordon.[8] (*Consumer Financial Protection Bureau v. Gordon*, CV12-06147.) The CFPB alleged that Gordon was "engaged in an ongoing, unlawful mortgage relief scheme that preys on financially distressed homeowners nationwide by falsely promising a loan modification in exchange for an advance fee." On June 26, 2013, the court granted the CFPB's motion for summary judgment. The court entered the final judgment and permanent injunction on July 26, 2013. Gordon was prohibited from doing mortgage assistance relief or debt relief work for three years. The court entered a judgment for equitable monetary relief in favor of the CFPB against Gordon for $11,403,338.63. On April 14, 2016, the United States Court of Appeals for the Ninth Circuit upheld the district court's decision to grant summary judgment in favor of the CFPB (*Consumer Financial Protection Bureau v. Gordon* (2016) 819 F.3d 1179).[9] On May 4, 2018, we took judicial notice of the United States Supreme Court's order in *Consumer Financial Protection Bureau v. Gordon* that denied Gordon's petition for a writ of certiorari. ((2017) 137 S.Ct. 2291.)

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7. The operation's names included the Gordon Law Firm, Gordon and Associates, National Legal Source, Resource Law Center, Resource Law Group, and Resource Legal Group. The website names included resourcelawcenter.com, nationallegalsource.com,thereliefnetwork.org,resourcelegalgroup.com, and prelitlaw.com

8. The complaint was brought against Gordon as an individual and the business names that he had used: Gordon & Associates, The Law Offices of Chance E. Gordon, The Law Offices of C. Edward Gordon, The C.E.G. Law Firm, National Legal Source, Resource Law Center, Resource Law Group, and Resource Legal Group.

9. The Ninth Circuit remanded the monetary judgment against Gordon for further consideration, however, because the district court may have impermissibly entered the judgment for a time period prior to the effective date of the Consumer Financial Protection Act and Regulation O. Gordon's petition for rehearing en banc was denied by the Ninth Circuit on July 20, 2016.

IV. CULPABILITY[10]

[2] Gordon requests a new trial because he claims that the hearing judge exhibited bias towards him and engaged in judicial misconduct. He contends that the judge "abandoned her duty to remain impartial and instead embroiled herself in the trial." As such, Gordon argues that he was deprived of his fundamental right of due process. We reject these arguments because Gordon has failed to establish that the hearing judge demonstrated bias or that Gordon was specifically prejudiced. (*In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 592 [respondent has burden to clearly establish bias and to show how he was specifically prejudiced].) The hearing judge did not "embroil" herself in the trial. Any questions that she asked were to clarify her own confusion about the testimony. "A trial court has both the discretion and the duty to ask questions of witnesses, provided this is done in an effort to elicit material facts or to clarify confusing or unclear testimony." (*People v. Cook* (2006) 39 Cal.4th 566, 597.) We find through our independent review of the record that the hearing judge acted properly and that Gordon received a fair trial.

A. Rules of Professional Conduct, Rule 1-310:[11] Forming a Partnership with a Non-Lawyer [Count 10][12]

[3a] OCTC charged Gordon with violating rule 1-310 by operating a classic "common enterprise" with a non-attorney (Pessar); commingling finances; using common facilities; sharing employees; sharing physical resources; and acting with a common, singular purpose to unlawfully obtain advance attorney fees from clients for loan modification services. The hearing judge found Gordon culpable, and we agree.

As an overarching argument for why he is not culpable of any of the counts charged in this matter, Gordon asserts that he was not engaging in the practice of law when he provided loan modification assistance to homeowners as a part of the "custom products" he sold. First, he argues that his employees only performed ministerial tasks in preparing the Program documents and, therefore, were not engaged in the practice of law. Second, he insists that because non-attorneys can assist with a loan modification under California law, his actions could not constitute the practice of law.

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10. **[1]** The culpability determinations in this opinion are based solely on the direct evidence produced at the trial in this matter, including trial testimony and documents that were introduced and not objected to at trial. (Rules Proc. of State Bar, rule 5.104.) As such, we reject Gordon's arguments that his due process rights were violated when certain evidence was admitted at trial. He did not object to most of the exhibits that were admitted. "Where respondent did not object to the admission of evidence, it is well settled that any objection on that point has been waived." (*In the Matter of Regan* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 844, 857.) Further, our evidentiary rules state, "Any relevant evidence must be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions." (Rules Proc. of State Bar, rule 5.104(C).) Hearsay evidence must be admitted if it is relevant and reliable. However, it may only be "used for the purpose of supplementing or explaining other evidence, but over timely objection will not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Rules Proc. of State Bar, rule 5.104(D).)

11. All further references to rules are to the Rules of Professional Conduct, unless otherwise noted. Under rule 1-310, "A member shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership consist of the practice of law."

12. For clarity, we discuss count 9 after addressing counts 10 through 14.

Gordon also asserts that his and Pessar's business operations were "separate and distinct from one another." He argues that he did not pay sales representatives, but paid only Pessar for "providing him with the infrastructure necessary to run his business." He argues that neither providing infrastructure for the Program nor assisting homeowners with loan modifications is the practice of law.

[3b] Gordon's arguments lack merit. The customers were told that they were getting the services of an attorney and that an attorney would handle the loan modifications "pro bono." Gordon did not handle every loan modification nor did he closely supervise the processors' work on client matters. "The practice of law embraces a wide range of activities, such as giving legal advice and preparing documents to secure client rights [citation]." (*In the Matter of Huang* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 296, 304.) In *In the Matter of Huang*, Huang's clients contracted for legal services and case analysis by an attorney, but the work was performed by lay individuals. The work of these non-lawyers constituted the practice of law. (*Ibid.*) Although certain services (such as loan modifications) might be performed by lay people, "it does not follow that when they are rendered by an attorney, or in his office, they do not involve the practice of law." (*Crawford v. State Bar* (1960) 54 Cal.2d 659, 667–668 [even though services might have been performed by other lay individuals or title companies, insurance companies, and brokers, when rendered by attorney's office constitutes practice of law].) When people hire an attorney for services that might otherwise be done by lay people, they do so because they "expect and are entitled to legal counsel." (*Ibid.*) Accordingly, the operation that Gordon's clients contracted for constituted the practice of law.

[4a] Gordon asserts that he is not culpable under count 10 because a partnership means "an association of two or more lawyers to carry on as co-owners of a continuing business engaged in the practice of law with the sharing of profits and losses." Gordon's definition of partnership is incorrect as a partnership does not have to be between two lawyers. Under the Corporations Code, a partnership is defined as "an association of two or more persons to carry on as co-owners of a business for profit." (Corp. Code, § 16101, subd. (9).) It does not matter whether or not the persons intend to form a partnership. (Corp. Code, § 16202, subd. (a).) "Generally, a partnership connotes co-ownership in partnership property, with a sharing in the profits and losses of a continuing business. [Citation.]" (*Chambers v. Kay* (2002) 29 Cal.4th 142, 151.)

[4b]Gordon's agreement with Pessar to sell loan modification services to clients constituted a partnership. Pessar did not only "provide infrastructure." His efforts were a critical part of the operation and he and Gordon acted with a singular purpose—to obtain advance fees for loan modification services. They agreed to carry out this business as a common enterprise while they commingled finances, used common facilities, and shared employees and physical resources. Their business of providing loan modification services constituted the practice of law, which was by Gordon forming a partnership with a non-lawyer in violation of rule 1-310.

B. Rule 1-320(A): Sharing Legal Fees with a Non-Lawyer [Counts 11 and 12]

OCTC charged Gordon with two counts of violating rule 1-320(A) by (1) sharing advance attorney fees from clients for loan modifications with Pessar and (2) paying sales representatives commissions based on the amount of those advance attorney fees collected.

Under rule 1-320(A), a lawyer shall not "directly or indirectly share legal fees with a person who is not a lawyer," except under certain circumstances not applicable here. This rule addresses the risk posed by the possibility of control by a non-lawyer more interested in personal profit than the client's welfare. (See *In re Arnoff* (1978) 22 Cal.3d 740, 748, fn. 4; *Gassman v. State Bar* (1976) 18 Cal.3d 125, 132; *In the Matter of Bragg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 615, 624–625.)

Gordon asserts that the fees collected were for his custom legal products, which did not involve conduct constituting the practice of law. Alternatively, he argues that even if the fees were

for loan modification services, loan modification does not constitute the practice of law and those payments could be shared since they were not legal fees. Both arguments fail because, as discussed above, the operation consisted of the practice of law.

[5a] Gordon also submits that even if they were legal fees, he did not share them—he compensated Pessar and the sales representatives for the "infrastructure" they provided. This is not the case. Gordon formed a partnership with Pessar where they agreed to share the revenue from the operation: one-third to Gordon and two-thirds to Pessar to pay himself and to pay the sales commissions. The fees that Gordon received from the legal services the operation was marketing were shared with non-lawyers: two-thirds directly to Pessar and commissions indirectly to the sales representatives. This was the plan that Gordon and Pessar devised to share the money coming in from the operation.

[5b] We agree with the hearing judge that Gordon violated rule 1-320(A) by sharing advance attorney fees from clients for loan modifications with Pessar (count 11) and by paying sales representatives commissions based on the amount of the advance attorney fees collected (count 12). Accordingly, we find that Gordon is culpable under counts 11 and 12.

C. Rule 1-400(D)(2): False Advertising [Count 13]

[6a] OCTC charged Gordon with violating rule 1-400(D)(2) by sending a communication or solicitation that contains matter which is false, deceptive, or which tends to confuse, deceive, or mislead the public; by operating numerous websites with different business names; using the same client testimonial interchangeably on different websites; and failing to identify himself as the State Bar member responsible for the communication or solicitation on several websites. Rule 1-400(D)(2) provides that a communication or a solicitation shall not "[c]ontain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public." (See *In re Morse* (1995) 11 Cal.4th 184, 195 [rule 1-400(D)(2) proscribes misleading advertisements by attorneys].) The hearing judge concluded that Gordon was culpable of violating rule 1-400(D)(2), and we agree.

[6b] Gordon changed the name of the operation, and the websites attached to it, numerous times to mislead the public, often without identifying himself as the responsible attorney. He used the same client testimonials on several different websites. He also mailed solicitations that implied that the operation was affiliated with various government entities when it was not. Gordon's communications were misleading in multiple respects and, therefore, a violation of rule 1-400(D)(2).

Gordon argues that rule 1-400(D)(2) does not apply to his conduct because he was advertising for "purely non-legal services." As discussed above, Gordon was advertising for legal services and, therefore, this argument is without merit.[13]

13. **[7]** Alternatively, he maintains that even if his advertising was for legal services, the State Bar was required to give him 72 hours' notice to withdraw the advertisements under Business and Professions Code section 6158.4, subdivision (b)(2). Section 6158.4 allows any person to file a complaint with the State Bar for false, misleading, or deceptive legal advertising. Under subdivision (b)(2), if the State Bar determines that substantial evidence exists to support such a claim, the lawyer is given 72 hours to withdraw the advertising. No evidence was presented that such a complaint was filed with the State Bar necessitating notice and the opportunity to withdraw. Further, the civil enforcement action provided for under section 6158.4 is completely separate from Gordon's duty under the Rules of Professional Conduct not to use deceptive or misleading advertising.

D. Business and Professions Code Section 6068, Subdivision (a): [14] Failing to Comply with Laws [Count 14]

OCTC charged Gordon with a violation of section 6068, subdivision (a), for accepting advance attorney fees for residential mortgage loan modification services, in violation of section 6106.3 and the Mortgage Assistance Relief Services Rule (MARS Rule), 16 Code of Federal Regulations part 322 (recodified as 12 C.F.R. § 1015). Prior to January 1, 2017, section 6106.3 provided, "It shall constitute cause for the imposition of discipline of an attorney within the meaning of this chapter for an attorney to engage in any conduct in violation of sections 2944.6 or 2944.7 of the Civil Code."[15] The hearing judge found that Gordon violated section 2944.7 when he accepted advance attorney fees for loan modification services and, therefore, violated section 6106.3.[16]

[9] Gordon asserts that count 14 did not charge him with a violation of Civil Code section 2944.7, which the hearing judge found, and, therefore, he cannot be culpable. However, when this count was charged, section 6106.3 stated that a violation of Civil Code section 2944.7 shall constitute cause for the imposition of discipline. As such, Gordon's argument lacks merit. (See *In the Matter of Taylor* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 221, 231–232 [violation of § 6106.3 for charging advance fees for loan modification services in violation of Civ. Code, § 2944.7].)

When Gordon accepted advance attorney fees for loan modification services, he violated Civil Code section 2944.7 and, hence, section 6106.3. Therefore, we find him culpable under count 14.

E. Section 6106: Moral Turpitude [Count Nine]

OCTC charged Gordon with a violation of section 6106, alleging that he committed acts involving moral turpitude, dishonesty, or corruption by engaging in a nationwide loan modification operation with a non-attorney (Pessar); by falsely representing to potential clients that the offered services would be performed by licensed attorneys; and by engaging in an aggressive sales and marketing scheme for the purpose of collecting illegal advance attorney fees and exploiting vulnerable, desperate homeowners for personal gain. Section 6106 is violated when an attorney commits "any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise . . . ." A violation of section 6106 constitutes a cause for disbarment or suspension. "An attorney's practice of deceit involves moral turpitude. [Citations.]" (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 888; see also *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 936.)

[10a] The hearing judge found that Gordon's marketing materials and the sales representatives indicated to potential clients that a lawyer would be working on their behalf. However, Gordon delegated these tasks to the non-attorney processors. The judge found that these false representations constituted moral turpitude and dishonesty in willful violation of section 6106. We agree because it was Gordon's established practice to deceive clients and, therefore, his misconduct involved moral turpitude.

Gordon argues that no evidence proved that he approved any script directing sales repr-

14. All further references to sections are to the Business and Professions Code unless otherwise noted. Under section 6068, subdivision (a), it is the duty of an attorney to "support the Constitution and laws of the United States and of this state."

15. **[8]** Effective January 1, 2017, the statute was amended so that the reference to Civil Code section 2944.7 was removed. However, since all of the misconduct underlying this matter occurred before January 1, 2017, we find that the former version of section 6106.3 applies.

16. The hearing judge did not find Gordon culpable of a MARS Rule violation as charged in count 14 because the MARS Rule violation as alleged did not comply with rule 5.41(B)(1) of the Rules of Procedure of the State Bar. We agree.

esentatives to tell potential clients that they were hiring an attorney. This is not the case. Gearries and Pessar testified that Gordon had the final say as to the sales representatives' scripts, and the employees were instructed to tell clients that their cases were being handled by a law firm.

[10b] Gordon asserts that he operated under the honest belief that what he was doing was legal and, therefore, there can be no finding of moral turpitude. This contention is meritless. We find clear and convincing evidence[17] that Gordon is culpable under count nine because he represented to clients and potential clients that an attorney would handle their loan modification and other litigation services. He knew that these representations were false and, therefore, committed an act of moral turpitude in violation of section 6106.

[11] We also find that Gordon is culpable of committing moral turpitude under count nine by engaging in the operation with Pessar to collect illegal advance attorney fees to exploit vulnerable homeowners by using an aggressive marketing scheme. The sales representatives were instructed to inform clients that they were getting a lawyer who was not afraid to sue the banks, when, in fact, suing the banks was not included in the "Pre-Litigation" services. Gordon misled consumers to believe that the operation was affiliated with various government entities. He changed the names of the operation and the websites several times to distance himself from past complaints. Further, he failed to identify himself on several websites as the attorney responsible for the solicitations. He aggressively marketed his "custom legal products," when in fact he was offering loan modification services. Clients had to pay advance fees before any loan modification work was done, in violation of SB 94. These actions demonstrate that Gordon committed misconduct involving moral turpitude.

V. AGGRAVATION AND MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct [18] requires OCTC to establish aggravating circumstances by clear and convincing evidence. Gordon has the same burden to prove mitigation. (Std. 1.6.)

A. Aggravation

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

In aggravation, the hearing judge found that Gordon committed multiple acts of misconduct. We find him culpable of six counts of misconduct and assign substantial weight in aggravation. (*In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 13 [substantial weight in aggravation where over 300 clients were affected]; *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 555 [repeated and similar acts of misconduct warrant serious aggravation]; see also *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646–647 [three instances of misconduct considered multiple acts].)

2. Overreaching (Std. 1.5(g))

[12]The hearing judge correctly found that Gordon's procedures for dealing with complaining clients constituted overreaching. When clients complained to the State Bar, he directed the staff to send them a "Notice of Client's Right to Arbitrate" and draft civil complaints against the clients to intimidate them. The draft complaints alleged that clients were engaging in extortion, that they were required to arbitrate, and that Gordon had completed the necessary work to earn his fee. Those complaints were sent to several clients who complained about Gordon's loan modifications to the State Bar. "The essence of a

17. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

18. All further references to standards are to this source.

fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed . . . is in a superior position to exert unique influence over the dependent party." (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813.) Gordon exploited his position as an attorney and attempted to intimidate his clients. The Supreme Court has long recognized that the right to practice law "is not a license to mulct the unfortunate." (*Recht v. State Bar* (1933) 218 Cal. 352, 355.) Gordon attempted to do just that when he sought to keep his clients from complaining to the State Bar. We assign substantial weight for Gordon's overreaching.

3. Indifference toward Rectification/Atonement (Std. 1.5(k))

[13a]The hearing judge found indifference toward rectification or atonement because Gordon continued to collect advance fees for loan modifications services despite cease and desist orders from several states. We agree and find that Gordon stopped only when a temporary restraining order terminated his operation in July 2012.

[13b]The record shows that Gordon has not accepted responsibility for his misconduct. Even after his operation was shut down by the CFPB, he continued to insist that his conduct was legal. "The law does not require false penitence. [Citation.] But it does require that the respondent accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Gordon is unable to recognize the wrongfulness of his misconduct—he failed to even consider whether his actions were appropriate. While he has the right to defend himself vigorously, his arguments "went beyond tenacity to truculence." (*In re Morse*, *supra*, 11 Cal.4th at p. 209.) His indifference warrants substantial consideration in aggravation. (*In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 380 [ongoing failure to acknowledge wrongdoings instills concern that attorney may commit future misconduct].)

4. Lack of Cooperation (Std. 1.5(l))

[14a]The hearing judge found lack of cooperation for Gordon's failure not only to cooperate with OCTC, but also for his threats against OCTC employees. Below, we include excerpts from Gordon's correspondence with State Bar employees to demonstrate the severity of his actions.[19]

On November 4, 2012, Gordon sent an email to Craig von Freymann, an OCTC investigator, and Erin Joyce, an OCTC prosecutor, directing that if von Freymann wanted to further contact Gordon, he could do so "through three two minute rounds which will be officiated by a professional boxing referee." Two weeks later, Gordon sent another email to von Freymann, stating:

> Corrupt investigator…Corrupt prosecutor…a Kangaroo court...a Kangaroo court...what a joke. The funny thing is that you people think that you will "close the book" on me and never have to answer for what you have done and what you are doing to me. But your smarter than that, aren't you Craig? Hated enemies know each other better than best friends...and you know that I will pursue you and your agency until I get my "pound of flesh"...whether I am an inactive attorney, disbarred attorney, whatever...right Craig?

19. Any errors in the quoted excerpts are from the original correspondence.

On December 11, 2012, Gordon included von Freymann in an email where Gordon wrote:

> I want each and everyone [*sic*] of you to know beyond a reasonable doubt that you are going to answer for what you have done . . . . [¶] You will never "close the book" on me until justice is served. Trust me. As much as you are monitoring and tracking me, I am doing the same to all of you, and will continue to do so even if you leave your current position for the private sector. You're not the only ones that know how to make life hell. [¶] You have stained the name of my family whose male ancestors fought in the Revolutionary War. Justice will be served. Believe it.

On December 20, 2012, Gordon emailed Joyce and von Freymann, and welcomed them to forward his previous emails to "the corrupt, fat-ass Judge Platel if [they] so desire." He went on to say:

> Craig, you have until the end of the year to agree to a time and place for us to have our three round match. 8 ounce gloves. Three two minute rounds. Let's just get it over with Craig. You illegally destroyed my business and screwed up my life. You can't just think I'm going to let it go, are you? Once we are done with the bout, [then] I'm done with the issues I have with you. Let's just get it done. [¶] I will be refiling the lawsuit that was dismissed without prejudice. I will win this thing or at least make the cost of your victory so high that you will wish you had just left me alone.

Later that day, Gordon sent another email that included Joyce and von Freymann as recipients, stating (in all capital letters):

> HOW LONG DO YOU BELIEVE YOU CAN ENGAGE IN THIS ABUSIVE LAWLESSNESS BEFORE I BEGIN ENGAGING IN LAWLESSNESS TOO? IS THAT WHAT YOU [AND] YOUR AGENCIES WANT? ANARCHY? [¶] YOUR [sic] NOT FOLLOWING YOUR OWN RULES, YET YOU EXPECT ME TO DO SO. PACK UP YOUR MUTUAL CIRCUSES AND GO HOME OR THINGS ARE GOING TO GET REAL NASTY AFTER THE FIRST OF THE YEAR.

On January 14, 2013, Gordon included Joyce in an email that said, "Hell of a Job ladies! Good looking out for the public!" He also stated, "Don't blame me when all this garbage you have perpetuated pours out of the Courts, and into the streets." He then included a quote from Justice Brandeis:

> If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that the end justifies the means – to declare that the government may commit crimes – would bring terrible retribution.

He then ended the email, "It would appear that this is where we are headed!"

On January 24, 2013, he included Joyce in another email that stated:

> I just want you and every single one of the other arrogant assholes that are behind this bullshit crusade to wrongfully and illegally trample on my rights so that I can be unfairly removed from the profession, that I have dedicated the rest of my life to getting justice and avenging what has

> been wrongfully done to me by you, Von Freymann, and everyone else behind this campaign of terror. [¶] You idiots can stick your noses in the air all you want, but the worse you can do is have me disbarred...and once you do that, it will not be the end but rather the beginning of you and everyone else involved having to deal with the monumental unprecedented payback that will be enacted upon all of you and that will pale in comparison to what you have done to me. [¶] Count on it. Go adopt another cat to calm yourself if you need to. Watch it happen...because it will.

On February 20, 2013, Gordon again referenced getting his "pound of flesh" when he wrote an email to Joyce:

> Are you people really this stupid that you think that continuing to blatantly violate my rights and smack me across the face is going to resolve this? Do you think getting me disbarred will end this? Do you think getting my lawsuits dismissed will end this? [¶] You helped ransack and destroy my business...do you really think I'm going to let that go without getting my pound of flesh? [¶] Idiots.

On April 2, 2013, Gordon emailed Joyce:

> God, how on Earth does you or anyone in your agency involved in my case believe that they are going to avoid serious backlash from all this?! 42 years old does not make me an old man...I've got the rest of my life to get my revenge.:) [¶] Idiots.

On May 1, 2013, Gordon emailed Joyce:

> Who do I serve with my D.C. lawsuit and subsequent subpoenas? Starr Babcock ignored my last correspondence and the State Bar and its agents will evade service at the office. Would I just serve you at your home in the valley, Jayne Kim at her home in Marina Del Rey and Craig at his home in Huntington Beach? . . . [¶] . . . You guys need to start putting your heads together as to how you will try and reverse some of the harm you've done to me. I'm definitely not letting any of this go, and very soon I will be in a strong enough position economically to really focus on addressing it. A good starting point might be to stay your prosecution of me. However, if your office continues to be stoic on this point, than don't be shocked when face with the resulting consequences.

On May 9, 2013, Gordon ramped up his harassment of Joyce, writing an email to her stating:

> I want you to know one thing in no uncertain terms Erin...I will find out what is most sacred to you in this world...and I will destroy it...just like you have done to me...and I am going to do the same to every single person that is behind what has been done to me. [¶]

> You may think that what I am saying is just words...but it's not...what I'm telling you will be accomplished and fulfilled...no matter how long it takes, nor how hard it is for me to accomplish...I promise you...and I put that promise on the lives of my two children.

As the hearing judge found, Gordon's emails did not appear to be empty threats considering what he posted on Facebook. On his Facebook timeline, Gordon compared his situation to former police officer Christopher Dorner, who committed a series of murders in 2013, and wrote, "Transparency needs to be woven into all of these agencies. If this doesn't happen, no one should be surprised if blood is shed in the future." In addition, near the time the CFPB action was initiated, Gordon posted a picture of himself holding a gun captioned, "Troubled times lie ahead..."

[14b] Joyce and von Freymann took this information to the Los Angeles Superior Court. On May 17, 2013, the court issued a Temporary Restraining Order against Gordon limiting his access to OCTC offices and his contact with Joyce and her minor children. On June 6, 2013, the court issued a Workplace Violence Restraining Order After Hearing against Gordon, which extended the restraining order until June 6, 2016, and added von Freymann as a protected person under the restraining order. At the hearing in this matter, Gordon stated that he "probably" overreacted, but that Joyce instigated his reaction.

[14c]Gordon's behavior went beyond lack of cooperation into repeated threats and harassment. We agree with the hearing judge that Gordon's behavior toward these OCTC employees was reprehensible and constitutes extremely serious aggravation.

5. Significant Harm (Std. 1.5 (j))

[15]The hearing judge found that Gordon's actions significantly harmed his clients by "improperly depriving them of precious funds while they faced foreclosure." She stated that this financial harm warranted "some consideration" in aggravation. We agree that Gordon significantly harmed his clients, but we assign substantial weight in aggravation because he exploited his clients' financial desperation and deprived them of funds through illegal fees. In addition, Gordon encouraged his employees to tell clients to stop communicating with their lenders and stop paying their mortgage while they were paying Gordon's fees. This resulted in clients being pushed to the brink of foreclosure.

B. Mitigation

[16] The hearing judge found that Gordon did not offer any evidence in mitigation. However, the judge gave nominal weight for Gordon's 11 years of discipline-free practice. Absence of a prior record of discipline over many years, coupled with present misconduct that is not likely to recur, is a mitigating circumstance. (Std. 1.6(a).) Given Gordon's complete lack of insight into his misconduct, we cannot view his misconduct as unlikely to recur. We agree with the hearing judge and also assign only nominal mitigation credit. (*Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [where misconduct is serious, long discipline-free practice is most relevant where misconduct is aberrational and unlikely to recur].)

VI. DISCIPLINE [20]

Our disciplinary analysis begins with the standards, which, although not binding, are guiding and entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 91–92.) The Supreme Court has instructed us to follow them whenever possible. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) We also look to comparable

20. 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.)

case law to determine the proper discipline. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.)

In analyzing the applicable standards, 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].) Here, standard 2.11 is the most severe, providing that disbarment or actual suspension is the presumed sanction for an act of moral turpitude.[21]

The hearing judge considered the applicable standards and also relied on the case law for guidance. Specifically, the hearing judge looked to *In the Matter of Huang*, *supra*, 5 Cal. State Bar Ct. Rptr. 296. Huang supervised a high-volume loan modification practice, discovered accounting irregularities, and learned that employees were disregarding office procedures, preventing clients from meeting with Huang, and covering up client complaints. (*Id.* at p. 300.) He realized he had lost control of the law office and fired his entire staff. He received a two-year actual suspension, continuing until payment of restitution for violating loan modification laws, failing to supervise non-lawyers, and aiding and abetting the unauthorized practice of law, among other charges. He received aggravation for multiple acts of misconduct and causing significant client harm. In mitigation, he displayed remorse, cooperated with OCTC, demonstrated good character, and had no prior record of discipline.

Comparing Huang's actions to Gordon's, the hearing judge decided that disbarment was appropriate for Gordon. Huang had "blown the whistle" on his own operation and even reported it to the district attorney's office. Huang exhibited remorse and cooperated with OCTC. However, Gordon showed no such remorse while contending that his involvement with the operation did not involve the practice of law and that all charges against him should be dismissed. Combined with Gordon's threats to his clients and OCTC employees, the hearing judge held that his conduct was "completely unacceptable and clearly demonstrate[d] a high likelihood of recidivism and a considerable threat to the public." As such, she recommended Gordon's disbarment.

We find guidance in the *Huang* decision, but also look to other loan modification cases. In *In the Matter of Golden* (Review Dept., May 30, 2018, 14-O-06366 (15-O10090; 15-O-10686; 15-O-11035; 15-O-11090; 15-O-11237); 16-O-10260 (16-O-10597; 16-O-10896; 16-O-11152; 16-O-11971) Cons.) 5 Cal. State Bar Ct. Rptr. 574,[22] Golden was culpable of 25 counts of misconduct related to home loan modification services, including 14 violations of section 6106.3 for charging pre-performance fees, in violation of Civil Code section 2944.7, subdivision (a)(1) (11 counts) and failing to provide a separate statement disclosing that a third-party representative was unnecessary for loan modifications, in violation of Civil Code section 2944.6, subdivision (a) (3 counts). In addition, Golden stipulated to, and was found culpable of, 11 counts of failing to render an appropriate accounting. The court found several factors in aggravation: multiple acts of wrongdoing, overreaching, uncharged misconduct, significant harm to his clients, indifference for lack of understanding of his ethical duties, and failure to make restitution. Golden received minimal mitigating credit for his lack of a prior record and significant mitigating credit for cooperating by entering into an extensive stipulation regarding facts, admissibility of evidence, and culpability. Golden was actually suspended for one year and until he makes restitution and proves his rehabilitation and fitness to practice law.

We also look to *In the Matter of Taylor*, *supra*, 5 Cal. State Bar Ct. Rptr. 221. There, we first concluded that Civil Code section 2944.7 clearly prohibited collecting any fees in advance of completing all loan modification services. (*Id.*

21. Standard 2.12 also provides for disbarment or actual suspension for a violation of section 6068(a). Standard 2.8, which provides that actual suspension is the presumed sanction for sharing legal fees with a non-lawyer, also applies.

22. On July 6, 2018, the Review Department filed an order granting OCTC's request for publication in *Golden*. And on September 17, 2018, Golden sought review in the Supreme Court.

at p. 232.) Taylor received a six-month actual suspension and until he makes restitution for charging pre-performance loan modification fees in eight client matters and failing to provide the required disclosures in one case. Multiple acts of wrongdoing, significant client harm, and lack of remorse aggravated his misconduct, and Taylor proved one mitigating circumstance—good character. He also failed to fully refund the illegally collected fees.

In the Matter of DeClue (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 437 also provides guidance as it involves an attorney who illegally charged and collected advance fees for loan modifications in two client matters. DeClue received a six-month actual suspension and until payment of restitution. He proved no mitigation while his misconduct was aggravated by a prior record of discipline, significant harm to his clients, failure to pay restitution, and uncharged misconduct.

[17a] While the loan modification cases discussed above provide guidance, this case is unique. Due to the scope of Gordon's scheme and the egregious aggravation, our recommendation may go beyond the discipline recommended in a typical loan modification case. (See *In re Morse*, *supra*, 11 Cal.4th at p. 207 [scope of attorney's misconduct necessitated court go beyond recommendations in other false advertising disciplinary cases].)

[17b] First, the counts in this matter do not involve specific client matters like those mentioned above. We must consider Gordon's operation as a whole and the illegal scheme that he devised. The "practice and procedure" of the operation involved Gordon's employees selling the services of an attorney while the legal work was done by non-attorneys. (*Vaughn v. State Bar* (1972) 6 Cal.3d 847, 858 ["practice and procedure" of law firm may evidence attorney misconduct].) Second, Gordon's operation was extensive and nationwide. He had over 2,000 clients from several states and collected fees in excess of 11 million dollars. Further, he was notified by the attorneys general of North Carolina, Connecticut, and Florida that his loan modification scheme was fraudulent. The CFPB also filed an action against him. Yet, Gordon continued to mislead the public through his websites and marketing "pro bono" loan modification services. At several points, Gordon had the opportunity to consider whether his actions were appropriate. Instead of doing so, he displayed an extreme inability to recognize the wrongfulness of his actions. (*In re Morse*, *supra*, 11 Cal.4th at p. 209 [arguments cannot go beyond tenacity into truculence].) His hostility is further evidenced in his threatening correspondence with State Bar employees, which led them to seek a restraining order.

[17c] Looking to all of the relevant factors, it is clear that disbarment is appropriate and necessary to protect the public, the courts, and the profession. The aggravation here was egregious, especially due to Gordon's threats. Gordon is culpable of a loan modification scheme where he lied to clients that an attorney would provide services to them and he illegally charged advanced fees while he formed a partnership with a non-lawyer, shared fees with non-lawyers, and deceptively advertised. The underlying misconduct and his behavior in defending himself in this disciplinary proceeding requires disbarment as we do not believe that Gordon can be deterred from future wrongdoing merely by suspension. Like Morse, Gordon has refused to heed the several different authorities that identified his illegal scheme. His extensive operation and the practices he employed demonstrate the harm that he has caused. The facts here go beyond a typical loan modification case and we must distinguish it as such with our discipline recommendation. Although the greatest sanction that we have imposed in a somewhat comparable loan modification case has been two years of actual suspension, *Huang* and other loan modification cases are less instructive due to the nature of this matter and Gordon's actions. Accordingly, Gordon should be disbarred.

VII. RECOMMENDATION

For the foregoing reasons, we recommend that Chance Edward Gordon be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice in California.

We further recommend that Gordon comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter.

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

VIII. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

The order that Chance Edward Gordon be involuntarily enrolled as an inactive member of the State Bar pursuant to section 6007, subdivision (c)(4), effective November 25, 2016, will remain in effect pending consideration and decision of the Supreme Court on this recommendation.

We concur:

MCGILL, J.

STOVITZ, J*

*Retired Presiding Judge of the State Bar Court, Serving as Review Judge Pro Tem by appoint of the California Supreme Court.

State Bar Court
Review Department

In the Matter of

MANUEL ANGEL GONZALEZ

A Member of the State Bar

Nos. 12-N-16025; 12-O-12219 (Consolidated)

Filed November 8, 2018

SUMMARY

In his third disciplinary proceeding, respondent was found culpable of failing to comply with rule 9.20 of the California Rules of Court, failing to cooperate with State Bar investigations, unauthorized practice of law, acts of moral turpitude, and misconduct with respect to client fees. The hearing judge recommended actual suspension for two years and until respondent made restitution and proved his rehabilitation. The Review Department concluded that the hearing judge's recommended discipline was insufficient, given respondent's recidivist misconduct and lack of compelling mitigation, and recommended that respondent be disbarred.

COUNSEL FOR PARTIES

For State Bar of California: Brandon Keith Tady, Esq.

For Respondent: Manuel Angel Gonzalez, in pro. per.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1a, b] **511 Aggravation – Prior record of discipline – Found**

Where respondent committed most of the misconduct involved in his third disciplinary matter after signing a stipulation in his first disciplinary matter and after the filing of his second disciplinary matter (a motion to revoke his probation), it was inconceivable that respondent did not know his conduct in his third disciplinary matter was unethical. The similarity of respondent's past misconduct to the wrongdoing charged in his third disciplinary matter demonstrated that he was a recidivist offender. Accordingly, his prior record of discipline was entitled to significant weight in aggravation, and hearing judge erred in diminishing that weight somewhat.

[2] **618.10 Aggravation – High level of vulnerability of victim – Found**

Where the clients harmed by respondent's misconduct were an incarcerated criminal defendant and four immigrants subject to possible deportation, the clients were highly vulnerable victims, and the harm respondent caused to them warranted significant aggravation.

[3a, b] **213.90 Culpability – State Bar Act – Section 6068(i) (cooperate in disciplinary proceedings)**

735.10 Mitigation – Candor and cooperation with Bar – Found

Even though respondent was found culpable of failing to cooperate with the State Bar's pre-filing investigation of his misconduct, he was still entitled to significant mitigating credit for entering into a stipulation, after disciplinary charges were filed, which admitted to culpability on two counts and to several facts.

[4a-c] **725.11 Mitigation – Emotional/physical disability/illness – Found – With expert testimony**

725.32 Mitigation – Emotional/physical disability/illness – Found but discounted or not relied on – Lack of causal relation to misconduct

Where expert evidence failed to establish that respondent's mini-strokes were directly responsible for his misconduct, respondent was not entitled to any mitigation for physical or mental disabilities, except as to subsequent act of misconduct that occurred shortly after respondent suffered major stroke.

[5a-f] **801.45 Application of Standards – General Issues – Deviation from standards – Found not to be justified**
801.47 Application of Standards – General Issues – Deviation from standards – Necessity to explain
806.10 Application of Standards – Effect of Prior Discipline – Disbarment after two priors – Applied
1093 Miscellaneous Substantive Issues re Discipline – Inadequacy of Discipline
When a respondent has two or more prior records of discipline, and an actual suspension was ordered in any of them, or the prior and current matters demonstrate either a pattern of misconduct or an unwillingness or inability to conform to ethical norms, disbarment is appropriate. Deviation from the presumptive discipline of disbarment must be based on clearly articulate reasons. Discipline short of disbarment is appropriate only if the most compelling mitigating circumstances clearly predominate, or the misconduct underlying the prior discipline occurred during the same time period as the current misconduct. Where respondent had two prior actual suspensions; the misconduct in his third disciplinary matter was similar to that in his first, showing his unwillingness or inability to fulfill his ethical duties; respondent violated his probation; and he did not present compelling mitigation, further suspension and probation would not prevent him from committing future misconduct that would endanger the profession and the public. Thus, hearing judge erred in recommending only a two-year suspension; disbarment was the appropriate discipline.

[6] **162.11 Standards of Proof/Standards of Review – Quantum of Proof Required – State Bar's burden – Clear and convincing standard**
171 Issues re Conditions Imposed as Part of Discipline – Restitution Requirements
277.60 Culpability – Rules of Professional Conduct Violations – Failure to refund unearned fees
Where respondent spent 50-60 hours working on a client's case; OCTC did not prove by clear and convincing evidence that there were outstanding unearned fees that respondent failed to refund; and charge of failure to refund unearned fees in that case was dismissed with prejudice, Review Department did not recommend that respondent be required to make restitution to that client.

ADDITIONAL ANALYSIS

Culpability

Found

State Bar Act

213.11 Section 6068(a) (support Constitution and laws)
213.91 Section 6068(i) (cooperate in disciplinary proceedings)
214.31 Section 6068(m) (communicate with clients)
221.11 Section 6106 (moral turpitude) – Deliberate

Dishonesty/fraud

221.12 Section 6106 (moral turpitude) – Gross negligence
231.01 Section 6126 (unauthorized practice – misdemeanor)

Rules of Professional Conduct

270.31 Intentional, reckless, or repeated incompetence
277.21 Prejudicial withdrawal
277.61 Failure to refund unearned fees
280.41 Maintain records of client funds

Other

1915.10 Cal. Rules of Ct., Rule 9.20

Not Found

Rules of Professional Conduct

277.65 Failure to refund unearned fees

Aggravation

Found

521 Multiple acts of misconduct
582.10 Harm to client
616.10 Failure to make restitution

Discipline

1010 Disbarment
1021 Restitution
1921 Disbarment
2311 Inactive enrollment after disbarment recommendation

OPINION

PURCELL, P.J.:

This is Manuel Angel Gonzalez's third disciplinary proceeding since 2011, and the second time he has taken advantage of clients in immigration and criminal cases. A hearing judge found that Gonzalez (1) failed to comply with rule 9.20 of the California Rules of Court, (2) failed to cooperate with State Bar investigations, (3) engaged in the unauthorized practice of law (UPL), (4) committed acts of moral turpitude, and (5) collected fees while failing to perform, account, or refund fees in five client matters. Gonzalez was disciplined for committing similar client misconduct in 2011.

The hearing judge recommended discipline including a two-year actual suspension, continuing until Gonzalez refunds $14,400 to clients and proves his rehabilitation. The Office of Chief Trial Counsel of the State Bar (OCTC) appeals, seeking Gonzalez's disbarment since his two prior disciplines did not reform him. Gonzalez does not challenge the judge's findings or discipline recommendation, except the actual suspension continuing until he pays restitution.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we agree with most of the hearing judge's findings. We do not agree with her discipline recommendation because Gonzalez's recidivist misconduct calls for disbarment under our disciplinary standards.

I. PROCEDURAL HISTORY

OCTC filed the Notice of Disciplinary Charges (NDC) on October 18, 2012, charging 25 counts of misconduct. On November 14, 2012, Gonzalez filed his response, stating that he suffered a "massive stroke" on July 21, 2012, that resulted in serious medical problems. He alleged he experienced several "mini-strokes" that negatively affected his cognitive functions for two years before the stroke, which was during the time of his present misconduct. Given these health issues, the case was first abated in 2013, and ultimately unabated for trial in April 2017.

On September 29, 2017, the parties filed an extensive Stipulation as to Facts; Admission of Documents; and Telephonic Witness Testimony (Stipulation). Gonzalez admitted culpability for failing to timely file a California Rules of Court, rule 9.20 declaration and for not cooperating in three State Bar investigations. A two-day trial took place on October 3 and November 7, 2017. The hearing judge filed her decision on December 18, 2017, finding Gonzalez culpable of 21 counts of misconduct. The judge recommended a two-year suspension continuing until Gonzalez pays restitution and proves his rehabilitation, fitness to practice, and present learning and ability in the general law.

On April 6, 2018, OCTC filed its opening brief on review, requesting that Gonzalez be disbarred. On May 8, Gonzalez filed a two-page responsive brief in which he did not challenge the hearing judge's decision except to request that we reconsider continuing his suspension until he pays restitution; he stated he wants to "reimburse the parties now that [his] condition has been identified, treated, and [is] in full remission." On May 18, OCTC filed its rebuttal brief.

On review, neither party contests the hearing judge's findings of fact or conclusions of law. Though we disagree with the judge's discipline recommendation, we adopt most of her findings as they are supported by the evidence. We summarize those findings below.

II. FACTS[1] AND CULPABILITY

A. THE RULE 9.20 MATTER (CASE NO. 12-N-16025) [COUNT ONE]

Gonzalez stipulated to violating rule 9.20 of the California Rules of Court (count one). Due to his suspension or involuntary inactive enroll-

1. The facts are based largely on the Stipulation, though we also rely on 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).)

ment in two prior discipline cases, he was not entitled to practice law from May 27 to July 26, 2011 (*Gonzalez I*) and from February 6, 2012 (*Gonzalez II*).[2] The Supreme Court ordered in *Gonzalez II* that he comply with rule 9.20 of the California Rules of Court as follows: subdivision (a) no later than July 7, 2012 (notifications to clients and counsel) and subdivision (c) no later than July 17, 2012 (filing of affidavit showing compliance with subdivision (a)). Gonzalez failed to file his affidavit by the due date. Four days later, on July 21, 2012, he was incapacitated by the stroke. He filed a belated affidavit on November 15, 2012.

B. THE FIVE CLIENT MATTERS

1. The Rivera Matter (No. 12-O-12219) [Counts Two, Four, and Six] [3]

On February 6, 2011, Salvador Rivera employed Gonzalez to represent him in an immigration removal proceeding. Gonzalez agreed to perform all legal services, including investigation, analysis, document preparation, and appearances. Between February 6 and April 21, 2011, Gonzalez was paid $1,200 in installment payments. On May 27, 2011, he was suspended from practicing law for 60 days in *Gonzalez I*, but did not notify Rivera.

On May 28 and June 22, 2011, while on suspension, Gonzalez negotiated two checks from Rivera for $300 each without informing his client that he was suspended. Between February and December of 2011, Rivera repeatedly asked about the case status, but Gonzalez did not respond. On July 27, 2011, Gonzalez's suspension ended and his status was changed to active. From August to November 2011, he continued to collect legal fees from Rivera for a total of $6,015. Between February 2011 and February 2012, he did not file any documents on Rivera's behalf, but spent 50-60 hours working on the case. On February 2, 2012, Rivera terminated Gonzalez's services, and requested a refund of unearned fees. Gonzalez received the letter request, but did not respond, provide an accounting, or refund any fees.

Gonzalez committed three ethical violations: (1) he engaged in an act of moral turpitude, dishonesty, or corruption, in willful violation of Business and Professions Code section 6106,[4] by receiving advance fees from Rivera during his suspension, when he knew, or was grossly negligent in not knowing, that Rivera paid the fees reasonably believing that Gonzalez was entitled to practice law (count two); (2) he willfully violated section 6068, subdivision (m), by failing to respond to Rivera's status inquiries between February and December 2011 (count four); and (3) he willfully violated rule 4-100(B)(3) of the Rules of Professional Conduct [5] by failing to render accountings to Rivera (count six).

2. The Castillo Matter (No. 12-O-12507) [Counts Seven, Eight, 10, and 11]

On March 7, 2011, Concepcion Castillo employed Gonzalez to represent her in immigration proceedings to obtain legal residency status and permanent citizenship. Gonzalez agreed to perform all legal services, including investigation, analysis, document preparation, and appearances. Between March 7 and November 29, 2011, Castillo paid Gonzalez several installments totaling $6,000 in advance attorney fees. On May 27, 2011, Gonzalez was suspended from the practice of law for 60 days, but did not notify Castillo. He collected fees from her on May 28 and June 22, 2011, while he was suspended.

On July 27, 2011, Gonzalez's suspension ended, and his status was changed to active. Between March 7, 2011, and January 2012, he did not perform any services on Castillo's behalf. On

2. Hereafter, we refer to Gonzalez's inability to practice law as a suspension.

3. The hearing judge dismissed with prejudice counts three, five, nine, and 12.

4. All further references to sections are to this source.

5. All further references to rules are to this source unless otherwise noted.

January 17, 2012, Castillo terminated Gonzalez's services, and asked for a refund of unearned fees. On February 16, Gonzalez sent an email response to Castillo admitting he did not have the funds and asking her to consider using an immigration specialist he found who would perform the work for no additional cost. Ultimately, Gonzalez did not refund the fees or provide an accounting. Castillo filed a State Bar complaint on March 21, 2012.

Gonzalez committed four ethical violations: (1) he committed an act involving moral turpitude, dishonesty, or corruption, in willful violation of section 6106, by receiving fees from Castillo during his suspension when he knew, or was grossly negligent in not knowing, that she paid the fees reasonably believing that he was entitled to practice law (count seven); (2) he willfully violated rule 3-110(A) by failing to perform any services he had agreed to provide Castillo (count eight); (3) he willfully violated rule 4-100(B)(3) by failing to render appropriate accountings to Castillo (count 10); and (4) he willfully violated rule 3-700(D)(2) by failing to refund any of the unearned $6,000 attorney fees (count 11).

3. The Garcia Matter (Case No. 12-O-12759) [Counts 13 and 14]

On January 16, 2012, Robert Garcia consulted with Gonzalez about his incarcerated son, Michael Garcia. [6] Michael was represented by a public defender, had entered a plea, and was awaiting sentencing. [7] On January 30, the day of Michael's sentencing hearing, Robert hired Gonzalez and paid him $2,000 in legal fees to represent Michael. Gonzalez appeared at the hearing and informed the court that he was substituting in as Michael's attorney. Gonzalez requested a continuance, which was granted until February 16, 2012.

On February 6, 2012, Gonzalez was suspended and not entitled to practice law. He failed to inform Robert that he could not represent Michael. Robert discovered Gonzalez's status on his own, and on February 11, requested an accounting and refund of the advance fees. Gonzalez did not provide either to Robert, nor did he appear at Michael's February 16, 2012 hearing.

Gonzalez committed two ethical violations: (1) he willfully violated rule 4-100(B)(3) by failing to provide Robert with an accounting for the $2,000 fee (count 13); and (2) he willfully violated rule 3-700(D)(2) by failing to refund the unearned $2,000 advance fee (count 14).

4. The Jordan-Borceguin Matter (Case No. 12-O-12410) [Counts 15 through 19]

On September 27, 2010, Margarita Jordan-Borceguin employed Gonzalez to represent her in an immigration proceeding. Gonzalez agreed to perform all legal services related to the proceeding, including investigation, analysis, document preparation, and appearances. Between September 27, 2010, and May 9, 2011, Jordan-Borceguin paid Gonzalez several installments of advance attorney fees totaling $4,000.

Between September 27, 2010, and July 7, 2011, Gonzalez did not communicate with Jordan-Borceguin. On May 27, 2011, he was suspended from the practice of law for 60 days, but did not inform her.

On June 28, 2011, Gonzalez received a Notice of Hearing in Removal Proceedings (Notice of Hearing) from the immigration court informing him that Jordan-Borceguin's hearing would be held on February 27, 2012. On July 7, 2011, while Gonzalez was suspended, a letter issued from his law office to Jordan-Borceguin stating that the immigration court had changed her hearing date to February 27, 2012. This letter was from Gonzalez's assistant, but contained letterhead listing "Manuel A. Gonzalez, Law Group" and included an email address of attygonzalez@yahoo.com.

On July 14, 2011, Gonzalez received another Notice of Hearing from the immigration

6. We refer to Robert and Michael Garcia by their first names to avoid confusion.

7. Gonzalez met with Michael at the jail about the potential representation.

court, this time informing him that the hearing date was changed to February 6, 2012, the date Gonzalez would be suspended. Neither Gonzalez nor Jordan-Borceguin appeared in court on that date. As a result, Jordan-Borceguin's immigration proceedings were terminated and she was ordered for deportation, but hired new counsel. Between September 2010 and February 2012, Gonzalez did not perform any services of value, and did not provide an accounting or refund any advance fees. On March 3, 2012, Jordan-Borceguin filed a State Bar complaint.

Gonzalez committed five ethical violations: (1) he willfully violated rule 3-700(A)(2) by constructively withdrawing from employment without notice or avoiding reasonably foreseeable prejudice to his client and by failing to perform any services for Jordan-Borceguin over an 18-month period (count 15); (2) he committed an act involving moral turpitude, dishonesty, or corruption, in willful violation of section 6106, by not informing his client that he was not entitled to practice law at a time he purportedly represented her and provided legal services (count 16); [8] (3) he willfully violated section 6126 by not informing her of his suspension and by permitting his staff to correspond with her using letterhead indicating he was entitled to practice law, and thereby failed to support the laws of the State of California, in willful violation of section 6068, subdivision (a), by holding himself out as entitled to practice law when he was not an active member of the Bar (count 17); (4) he willfully violated rule 3-700(D)(2) by not refunding any of the unearned $4,000 fees he received (count 18); and (5) he willfully violated rule 4-100(B)(3) by failing to provide Jordan-Borceguin with an accounting of the $4,000 in advance fees (count 19).

5. The Sebastian Matter (Case No. 12-O-13128) [Counts 20 through 24]

On February 11, 2010, Catalina Aquino Sebastian employed Gonzalez to represent her in immigration proceedings to obtain legal residency in the United States. Gonzalez agreed to perform all legal services related to the immigration proceeding, including investigation, analysis, document preparation, and appearances. Between February 10 and June 17, 2010, Sebastian paid installments of advance attorney fees totaling $2,400.

On May 27, 2011, Gonzalez was suspended for 60 days, but did not notify Sebastian. Between February 2010 and November 2011, she telephoned Gonzalez repeatedly and asked about the status of her immigration matter. Gonzalez did not respond. When Sebastian called Gonzalez in November 2011, she learned that his telephone had been disconnected and he had moved out of his office. Gonzalez did not inform Sebastian that he was relocating, nor did he provide her with his new address or telephone number.

In December 2011, Sebastian discovered new contact information for Gonzalez. She called him, and they scheduled a meeting. Gonzalez did not appear at the appointed time and place, and did not communicate with her thereafter. In February 2012, Sebastian located Gonzalez's new office in San Diego. She went there to meet with him, but was told by staff that he was no longer eligible to practice law.

Between February 2010 and February 2012, Gonzalez did not perform any services for Sebastian. He did not earn any fees she advanced,

8. The NDC charged Gonzalez with moral turpitude for collecting fees while suspended and for not informing his client he was suspended when he purportedly performed legal services. The hearing judge found that Gonzalez collected fees while suspended but the Stipulation establishes that the client paid $4,000 in fees between September 27, 2010, and May 9, 2011; Gonzalez's 60-day suspension began after that period on May 27, 2011. We find Gonzalez culpable of moral turpitude for not informing his client he was suspended when he purportedly represented her, as alternatively charged in the NDC.

and did not provide an accounting or refund. On April 16, 2012, Sebastian filed a State Bar complaint.

Gonzalez committed five ethical violations: (1) he willfully violated rule 3-110(A) by failing to perform any of the services he had agreed to provide (count 20); (2) he willfully violated section 6068, subdivision (m), by failing to respond to his client's telephone calls seeking a status update (count 21); (3) he willfully violated rule 3-700(A)(2) by constructively withdrawing from employment, failing to perform any services over a two-year period, failing to provide her with status updates, moving his offices without notice, and not taking steps to avoid reasonably foreseeable prejudice to his client (count 22); (4) he willfully violated rule 4-100(B)(3) by failing to provide an accounting of the $2,400 advance fee and failing to render an appropriate accounting (count 23); and (5) he willfully violated rule 3-700(D)(2) by failing to refund any of the unearned $2,400 (count 24).

C. STATE BAR INVESTIGATION MATTER (CASE NOS. 12-O-12410; 12-O-12507; 12-O-13128 [COUNT 25]

Jordan-Borceguin, Castillo, and Sebastian filed State Bar complaints against Gonzalez on March 3, March 21, and April 16, 2012, respectively. Shortly thereafter, a State Bar investigator sent letters to Gonzalez requesting, among other things, his written response to the allegations of misconduct and an accounting of time spent on the cases. Gonzalez received the letters but did not reply. On June 1, the investigator sent three emails to Gonzalez, one for each complainant, repeating the requests. Gonzalez received the emails but did not respond.

Gonzalez stipulated to culpability for violating section 6068, subdivision (i), by not providing a written response to the investigator's letters and email, and by failing to otherwise cooperate in the State Bar investigation of the complaints. (*Bach v. State Bar* (1991) 52 Cal.3d 1201, 1208 [duty to cooperate breached where no response to two investigation letters].)

III. AGGRAVATION OUTWEIGHS MITIGATION

Standard 1.5 requires that OCTC must prove aggravating factors by clear and convincing evidence. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552 [evidence that leaves no substantial doubt and is sufficiently strong to command unhesitating assent of every reasonable mind].) Standard 1.6 requires Gonzalez to meet the same burden to prove mitigation.

A. AGGRAVATION

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

Gonzalez has two prior records of discipline.

Gonzalez I.[9] Beginning in 2005, three years after his April 29, 2002 admission to the California State Bar, Gonzalez was hired to perform work in five immigration and two criminal law matters, and was paid a total of $14,775. Over several years, he failed to perform competently, inform clients of significant developments, respond to client inquiries, provide accountings, return files upon request, and refund unearned fees to five clients.

On November 16, 2010, Gonzalez signed a stipulation as to facts, culpability, mitigation, aggravation, and discipline. Multiple acts of wrongdoing and harm to clients were aggravating factors. Candor and cooperation for the stipulation and remorse for his misconduct and statement that he intended to pay restitution as ordered were mitigating factors.

9. Supreme Court Case No. S190664; State Bar Case Nos. 07-O-13329 (07-O-13827; 08-O-13980; 09-O-12664; 09-O-17424; 09-O-18923; and 10-O-03257).

The parties agreed to two years' suspension, stayed, with two years' probation, including a 60-day actual suspension, and a payment plan of $110 per month to each of the five clients until the $14,775 was paid in full. The Hearing Department approved the stipulation, which was filed on December 7, 2010. On April 27, 2011, the Supreme Court ordered the stipulated discipline, which became effective on May 27, 2011.

Gonzalez II.[10] On November 15, 2011, the State Bar's Office of Probation (Probation) filed a motion to revoke probation in *Gonzalez I* because Gonzalez failed to pay restitution. On February 3, 2012, a hearing judge found that Gonzalez had not made any restitution payments to the five clients from July to October 2011. In aggravation, Gonzalez had a prior record of discipline, committed multiple acts of misconduct, and demonstrated indifference because he did not comply with his probation terms even after Probation sent him a reminder. There were no mitigating factors. The judge recommended that probation be revoked, and that Gonzalez serve the two-year stayed suspension, two years' probation, and an actual suspension of one year. The actual suspension would continue until Gonzalez (1) paid restitution according to the payment plan in *Gonzalez I*, and (2) proved his rehabilitation. On May 8, 2012, the Supreme Court ordered the recommended discipline and included that Gonzalez comply with rule 9.20 of the California Rules of Court. The order became effective on June 7, 2012.[11]

[1a]The hearing judge assigned significant weight to Gonzalez's overall prior record, but she diminished it "somewhat," finding that his misconduct in *Gonzalez II* "occurred after much of the present misconduct." The record does not support this finding.

[1b]Gonzalez committed most of his present misconduct in 2011 and 2012, when he knew of both prior discipline cases. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619 [weight of aggravation for prior discipline record depends on whether attorney had opportunity to heed import of prior proceeding before committing misconduct at issue].) The operative dates to mark his notice of his past wrongdoing are November 2010, when he signed the stipulation in *Gonzalez I,* and November 15, 2011, when Probation filed its motion to revoke probation in *Gonzalez II.*

To illustrate, the following misconduct in the present case, among other instances, occurred after November 2010 (*Gonzalez I*) and/or November 2011 (*Gonzalez II*): (1) in the Rivera matter, in early 2012, Gonzalez's services were terminated and a refund requested, but he provided none; (2) in the Castillo matter, when the client terminated his services in early 2012 and requested a refund, Gonzalez did not respond; (3) in the Garcia matter, Gonzalez was hired to represent Garcia's incarcerated son in January 2012, and failed to appear for the sentencing hearing in February 2012; (4) in the Jordan-Borceguin matter, in February 2012, Gonzalez did not appear for her immigration hearing; (5) in the Sebastian matter, from February 2010 to November 2011, Gonzalez did not respond to his client's calls after disconnecting his phone and moving his office, and did not appear for a scheduled meeting with his client in December 2011; and (6) from March through June 2012, Gonzalez failed to respond to the State Bar investigator about the Castillo, Jordan-Borceguin, and Sebastian complaints.

[1c]After Gonzalez was disciplined in *Gonzalez I,* we find it inconceivable that he did not know it was unethical to collect fees from clients, perform no work, and fail to communicate, provide accountings, or refund unearned fees. The similarity of Gonzalez's past misconduct to his present wrongdoing demonstrates that he is a recidivist offender. Accordingly, we assign full significant aggravation to his prior record of discipline. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443–444 [similarities between prior and current misconduct render previous discipline more serious as they indicate prior discipline did not rehabilitate]; *In the Matter of Shalant* (Review Dept. 2005) 4 Cal.

10. Supreme Court Case No. S190664; State Bar Case No. 11-PM-18515.

11. This record does not establish whether Gonzalez paid the restitution that was ordered in *Gonzalez II.*

State Bar Ct. Rptr. 829, 841 [great weight placed on common thread among attorney's past and present misconduct].)

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

The hearing judge assigned significant aggravating weight to 21 acts of wrongdoing. We agree. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646–647 [three instances of misconduct considered multiple acts].)

3. Significant Harm to Client / Public / Administration of Justice (Std. 1.5(j))

The hearing judge found that the harm Gonzalez caused his clients merited substantial consideration in aggravation. We agree. His misconduct delayed his clients' proceedings, and deprived them of money paid as advance fees for services Gonzalez did not provide.

4. Failure to Make Restitution (Std. 1.5(m))

The hearing judge assigned Gonzalez's failure to refund $14,400 in unearned fees significant consideration in aggravation. We agree. (*In the Matter of DeClue* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 437, 445 [failure to pay $10,000 in restitution is significantly aggravating].)

5. Highly Vulnerable Victims (Std. 1.5(n))

[2] Though the hearing judge did not find this factor, OCTC requests that we do so. We find that all five clients were highly vulnerable victims, and assign significant aggravation. Garcia, an incarcerated criminal defendant, was vulnerable per se because he was limited in his freedom to assist Gonzalez or stay apprised of his attorney's efforts. (*In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459, 462, 465, citing *Borré v. State Bar* (1991) 52 Cal.3d 1047, 1053.) The four immigration clients were highly vulnerable because such proceedings can result in deportation. (See *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 950 [immigration client status is precarious with potential for serious harm].)

B. MITIGATION

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

[3a]The hearing judge assigned significant mitigating credit for Gonzalez's extensive Stipulation wherein he admitted to culpability on two counts and to several facts. OCTC does not challenge this finding, and we agree with it.[12]

2. Physical or Mental Disabilities (Std. 1.6(d))

[4] Mitigation is available for physical or mental disabilities if: (1) an attorney suffered from them at the time of his misconduct; (2) they are established by expert testimony as being directly responsible for the misconduct; and (3) the difficulties no longer pose a risk of future misconduct. The hearing judge assigned substantial mitigating weight for Gonzalez's physical difficulties subsequent to his July 21, 2012 stroke; this mitigation applies only to his belated California Rules of Court, rule 9.20 filing. But the judge concluded that a nexus between any mini-strokes and Gonzalez's present misconduct that occurred before the stroke was "a little murkier." The judge assigned limited overall mitigating weight for physical difficulties *before* July 2012, reasoning that Gonzalez committed "remarkably similar" misconduct in *Gonzalez I* in 2006, 2007, and 2008 (before the mini-strokes) and was able to handle other high-level cognitive functions during the time of the present misconduct. Gonzalez does not challenge the hearing judge's finding. Nonetheless, we review the record under our independent duty to do so, and agree with the hearing judge.

12.**[3b]**Though Gonzalez was culpable for failure to cooperate with the State Bar pre-filing investigation (count 25), we do not diminish the mitigating credit we assign for his pretrial Stipulation. (See *In the Matter of Sampson* (1994) 3 Cal. State Bar Ct. Rptr. 119, 132–133.)

Gonzalez testified that mini-strokes preceded his July 21, 2012 stroke, and affected his executive functioning in that he could not think or perform properly. In support, he presented one expert, Dr. Dominick Addario, a neuropsychiatrist, who examined him for the first time on November 4, 2016, four years after his stroke. Dr. Addario testified that, within a reasonable medical probability (which is greater than 50%), Gonzalez (1) would have suffered impairment of neurocognitive functions from late 2009 until July 21, 2012, and (2) was now fit to resume the practice of law. [13] To reach this conclusion, Dr. Addario reviewed medical records, administered psychological tests, and conducted an interview and examination of Gonzalez, as detailed in his report.

Notably, Dr. Addario's report contains a summary from a report by Delia M. Silva, Psy.D., a neuropsychologist. Gonzalez consulted her months before he contacted Dr. Addario. Dr. Silva reported that Gonzalez sought to persuade her to report that mini-bleeds had likely caused cognitive deficits before his major stroke. Dr. Silva told him she could not objectively do so. She described Gonzalez as pleasant, but noted that he had poor boundaries, was impulsive, was not forthcoming with information, and was "perseverative" about his history of ischemic attacks and the importance of documenting their cognitive effects.

[4b] OCTC requests that no mitigation be afforded for physical or mental disabilities except as to Gonzalez's belated filing of the California Rules of Court, rule 9.20 declaration, which occurred after the stroke. We agree. Dr. Addario's testimony and opinion are not persuasive. To begin, they conflict with Dr. Silva's report. Moreover, as the hearing judge noted, Gonzalez was able to focus well enough to perform various tasks during 2010 to 2012 without signs of cognitive difficulties. For example, he successfully accepted thousands of dollars from five vulnerable clients, deposited numerous installment payments of advance fees, and appeared in court in the Garcia criminal matter. He also sent an email to Castillo in February 2012, admitting he did not have her funds and requesting that she consider an immigration specialist he had located to perform work for no additional cost.

[4c] Though Gonzalez suffered a serious medical condition beginning on July 21, 2012, he did not prove that mini-strokes that occurred during the two years before the stroke were "directly responsible for his misconduct," as the standard requires. (Std. 1.6(d); *In the Matter of Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160, 168 [no mitigation credit where attorney failed to establish causal nexus between emotional difficulties and misconduct].) Thus, other than his tardy filing of his California Rules of Court, rule 9.20 affidavit, Gonzalez's present misconduct is not mitigated by physical difficulties.

IV. DISBARMENT IS THE APPROPRIATE DISCIPLINE [14]

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

[5a] Standard 1.8(b) is most applicable here. (Std. 1.7 [most serious sanction applies].) It provides that disbarment is appropriate when a member has two or more prior records of discipline if (1) an actual suspension was ordered in any previous disciplinary matter, (2) the prior and current disciplinary matters demonstrate a pattern

13. The hearing judge accepted Dr. Addario's expert opinion on the medical issues only and not as to whether Gonzalez was fit to practice law.

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

of misconduct, *or* (3) the prior and current disciplinary matters reveal the attorney's unwillingness or inability to conform to ethical norms.

[5b] Gonzalez's case meets two of these criteria: an actual suspension was ordered in both *Gonzalez I* (60 days) and *Gonzalez II* (one year), and he failed to reform after being disciplined for similar misconduct in *Gonzalez I*, which shows his unwillingness or inability to fulfill his ethical duties.

[5c] We may depart from the prescribed discipline of disbarment under standard 1.8(b) where "the most compelling mitigating circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current misconduct." Gonzalez did not make this showing. His mitigation for the pretrial Stipulation and late-filed California Rules of Court, rule 9.20 declaration is not compelling. Nor does it predominate over his misconduct and five factors in aggravation (prior discipline, multiple acts, harm, failure to make restitution, and vulnerable victims). Further, he has engaged in escalating misconduct, committing acts of UPL and moral turpitude in the present case.

[5d] The hearing judge reasoned that a two-year suspension was warranted because standard 1.8(b) does not mandate disbarment and, according to case law, a significant suspension was appropriate. The judge relied on *In re Brockway*, *supra*, 4 Cal. State Bar Ct. Rptr. 944 to support her recommendation for a two-year actual suspension. *Brockway*, an authority not related to standard 1.8(b), is distinguishable. The attorney in *Brockway* received a two-year suspension for abandoning four immigration clients, but he had only one record of discipline for unrelated misconduct, and he paid restitution to his clients. In contrast, Gonzalez abandoned five clients and committed other misconduct, has two prior discipline records (one for similar misconduct), and owes $14,400 in restitution.

[5e] We find that standard 1.8(b), and not *In re Brockway*, guides our analysis. If, like the hearing judge, we were to deviate from the presumptive discipline of disbarment, we must clearly articulate reasons for doing so. (*Aronin v. State Bar* (1990) 52 Cal.3d 276, 291; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5; std. 1.1 [standards afforded great weight and should be followed whenever possible].) We find none, and Gonzalez failed to present any in his responsive brief.

[5f] Just years after his admission to the Bar in 2002, Gonzalez violated his ethical duties to clients and to the State Bar, and violated orders of the Supreme Court and the State Bar Court. He victimized vulnerable clients after being disciplined for doing so, and has already violated terms of a disciplinary probation. We find that further suspension and probation will not prevent him from committing future misconduct that would endanger the profession and, particularly, the public. (*In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 300 ["respondent should not be admitted to disciplinary probation where there is clear evidence that he or she will not comply with its conditions"].) [15] A full reinstatement proceeding after Gonzalez is disbarred is the only measure that will serve the goals of attorney discipline and ensure protection of the public, the profession, and the administration of justice. The relevant decisional law also supports our disbarment recommendation, [16] which makes moot Gonzalez's request on review that he not remain suspended

15. In two separate proceedings, State Bar Court hearing judges have determined that Gonzalez owes clients a total of over $29,000 in unearned fees, yet no evidence credibly establishes he has made restitution. We reject Gonzalez's argument that loss of his computer files prevented him from paying restitution to his clients in the present case.

16. Compare *Barnum v. State Bar* (1990) 52 Cal.3d 104, 113 (disbarment where three prior disciplines and depression was not" most compelling" mitigation when weighed against risk of recurrence of misconduct) and *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 80 (disbarment where two prior disciplines, attorney was unable to conform conduct to ethical norms, and no mitigation) with *In the Matter of Lawrence* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 239, 246–248 (three-year actual suspension where three prior disciplines, attorney suffered extreme physical disabilities that caused or contributed to misconduct for 30 years, and mitigation outweighed aggravation).

until he pays restitution.

V. RECOMMENDATION

We recommend that Manuel Angel Gonzalez be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted in California.

We further recommend that he comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter.

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

We further recommend that Gonzalez be required to make restitution to (1) Concepcion Castillo in the amount of $6,000 plus 10 percent interest per year from November 29, 2011, (2) Robert Garcia in the amount of $2,000 plus 10 percent interest per year from January 30, 2012, (3) Margarita Jordan-Borceguin in the amount of $4,000 plus 10 percent interest per year from May 9, 2011, and (4) Catalina Aquino Sebastian in the amount of $2,400 plus 10 percent interest per year from June 17, 2010.

[6] Like the hearing judge, we do not recommend restitution in the Rivera case. The record demonstrates that Gonzalez spent 50-60 hours working on the case, and OCTC did not prove by clear and convincing evidence that there were outstanding unearned fees that Gonzalez failed to refund. (Count five in Rivera's case, failure to refund unearned fees, was dismissed with prejudice.)

VI. ORDER OF INACTIVE ENROLLMENT

Pursuant to section 6007, subdivision (c)(4), and rule 5.111(D)(1) of the Rules of Procedure of the State Bar, Manuel Angel Gonzalez is ordered enrolled inactive. The order of inactive enrollment is effective three days after service of this opinion (Rules Proc. of State Bar, rule 5.111(D)(1).)

We concur:

MCGILL, J.

STOVITZ, J.*

* Retired Presiding Judge Of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

State Bar Court
Review Department

In the Matter of

LESLIE VICTOR AMPONSAH

A Member of the State Bar

Nos. 17-N-06871; 17-O-06931 (Consolidated)

Filed April 22, 2019

SUMMARY

Amponsah failed to comply with rule 9.20 of the California Rules of Court, and with two conditions of his probation from a prior disciplinary matter. At the time of his offenses, Amponsah was suffering from extreme emotional distress. He took action to inform his clients of his suspension, and made other efforts to comply with rule 9.20, but did not comply fully within the applicable deadlines. The hearing judge recommended a one-year actual suspension, and OCTC appealed, seeking disbarment. The Review Department concluded that in light of Amponsah's mitigating emotional difficulties and his attempts to comply with the rule, the recommended one-year actual suspension was sufficient.

COUNSEL FOR PARTIES

For State Bar of California: Brandon K. Tady, Esq.

For Respondent: Kerumi T. Maatafale, Esq.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1a-c] **595.90 Aggravation — Indifference to rectification/atonement – Declined to find — Other reason**

1913.29 Cal. Rules of Ct., Rule 9.20 Violation Proceedings — Special Substantive Issues — Delay in Compliance Generally

Where respondent's failure to comply with rule 9.20 of the California Rules of Court was considered in establishing his culpability, and he had made several failed attempts to file a compliance declaration and reasonably understood, based on communications from Probation Department, that further attempts would be futile, respondent's failure to file the compliance declaration did not demonstrate continuing misconduct or indifference toward rectification and atonement, and did not constitute an aggravating factor.

[2a, b] **204.90 Substantive Issues in Disciplinary Matters — Culpability – Other**

214.10 Culpability — Business and Professions Code — Section 6068(k) (comply with disciplinary probation)

1719 Issues in Probation Cases — Special Issues — Miscellaneous

Substantial compliance with disciplinary probation conditions is not a defense to probation violations. Where disciplined attorney did not timely schedule initial meeting with Probation Department, and did not timely submit first two required quarterly reports, attorney was culpable of violating probation, despite his belated compliance with both requirements.

[3] **511 Aggravation — Prior record of discipline — Found**

511.90 Aggravation — Prior record of discipline — Found but discounted — Other reason

Where respondent was culpable of violating his disciplinary probation, and his prior record of discipline involved one count of commingling that merited a 90-day suspension and was not similar to his present misconduct, hearing judge properly deemed respondent's prior record to be a serious, but not significant, aggravating factor.

[4] **523 Aggravation — Multiple acts of misconduct — Found but discounted or not relied on**

Where respondent failed to comply with Supreme Court order requiring him to give notice of his suspension under rule 9.20 of the California Rules of Court, and also violated two terms of his disciplinary probation, only modest aggravating weight was appropriate for respondent's multiple acts of misconduct.

[5a-c] **725.11 Mitigation — Emotional/physical disability/illness — Found — With expert testimony**

Mitigation may be assigned for extreme emotional difficulties or physical or mental disabilities if respondent suffered from them at time of misconduct, expert testimony establishes they were directly responsible for misconduct, and they no longer pose a risk that respondent will commit future misconduct. Where testimony of respondent and his therapist established that extreme emotional distress was directly responsible for respondent's misconduct, and that respondent had recovered, Review Department assigned substantial weight in mitigation, given persuasive quality of respondent's evidence.

[6a, b] **130 Procedural Issues — Procedure on Review**
165 Standards of Proof/Standards of Review — Adequacy of Hearing Department Decision
725.11 Mitigation — Emotional/physical disability/illness — Found — With expert testimony

Where hearing judge found that respondent and his therapist testified credibly regarding respondent's emotional difficulties at the time of his misconduct and his subsequent recovery, these findings were entitled to great weight. Where that testimony and other evidence established that respondent had recovered from his emotional difficulties, and respondent had repeatedly attempted to rectify part of his misconduct, respondent established that he had recovered, and his emotional difficulties were properly considered in mitigation.

[7a-f] **805.10 Application of Standards — Effect of Prior Discipline — Current discipline should be greater than prior — Applied**
1913.70 Cal. Rules of Ct., Rule 9.20 Violation Proceedings — Special Substantive Issues — Lesser Sanction than Disbarment for Violation

Under rule 9.20(d) of the California Rules of Court, an attorney may be suspended or disbarred for a willful failure to comply with the provisions of the rule. In general, a violation of rule 9.20 is a serious ethical breach for which disbarment may be appropriate. Nonetheless, each disciplinary case must be decided on its own facts, and discipline less than disbarment has been imposed in rule 9.20 cases where the attorney demonstrated attempts to comply with the rule, significant mitigation, or little aggravation. Where respondent's misconduct was diminished by extreme emotional difficulties; respondent made efforts to comply with his disciplinary obligations and eventually complied with his probation conditions; respondent arranged for all his clients to receive actual, albeit deficient, notice of his suspension; respondent participated in disciplinary proceedings, admitted facts establishing culpability, and proved he had recovered from emotional problems that led to misconduct; there was no evidence of client harm; and respondent's only prior discipline was a 90-day actual suspension, a one-year actual suspension rather than disbarment was appropriate.

ADDITIONAL ANALYSIS

Culpability

Found

214.11 Section 6068(k) (comply with disciplinary probation)
1915.10 Cal. Rules of Ct., Rule 920

Mitigation

Found

735.10 Candor and cooperation with Bar

Discipline Imposed

1923.08 Stayed Suspension — Two years
1924.06 Actual Suspension — One year
1925.08 Probation — Two years

OPINION

PURCELL, P.J.:

A hearing judge found Leslie Victor Amponsah culpable of failing to comply with California Rules of Court, rule 9.20,[1] and with two probation conditions in a prior disciplinary case. The judge recommended discipline that included a one-year actual suspension, noting that Amponsah made "attempted, albeit deficient, compliance efforts in the midst of extreme emotional distress," and he did not demonstrate indifference to the disciplinary system.

The Office of Chief Trial Counsel of the State Bar (OCTC) appeals, seeking disbarment. Amponsah did not appeal and supports the hearing judge's decision.

After independently reviewing the record under rule 9.12, we affirm the hearing judge's culpability determinations, aggravation findings, and discipline recommendation, but we increase the mitigation weight for Amponsah's emotional difficulties. A one-year actual suspension is appropriate given Amponsah's overall mitigation, his cooperation in these proceedings, and his repeated attempts to file his rule 9.20(c) declaration. The recommended discipline is a significant sanction that properly addresses Amponsah's misconduct in view of these circumstances.

I. PROCEDURAL BACKGROUND

OCTC filed a two-count Notice of Disciplinary Charges (NDC) against Amponsah on December 27, 2017, charging violations of rule 9.20 and of two disciplinary probation terms. On April 9, 2018, the parties filed a pretrial Stipulation as to Facts and Admission of Documents that established Amponsah's culpability. The hearing judge held the trial on April 17 and 30, and issued her decision on July 20, 2018. On review, Amponsah does not challenge the judge's factual or culpability findings, and we adopt them as supported by the record. The primary issue before us is to determine the appropriate level of discipline, which includes carefully evaluating the aggravating and mitigating factors, particularly Amponsah's emotional difficulties.

II. AMPONSAH'S RECORD OF DISCIPLINE

Amponsah was admitted to practice law in California in June 1993, and has one prior record of discipline. Amponsah stipulated that during 2016, he commingled personal and business funds in his client trust accounts (CTAs), and repeatedly used his CTAs to pay personal and business expenses, in violation of rule 4-100(A) of the Rules of Professional Conduct. In aggravation, he committed multiple acts of wrongdoing. In mitigation, he had practiced law for 22 years without discipline and cooperated by entering into the stipulation before disciplinary charges were filed. Amponsah agreed to a two-year stayed suspension, a 90-day actual suspension, and two years' probation with standard terms. The Hearing Department approved the stipulation and filed it on February 6, 2017.

On June 23, 2017, the Supreme Court issued its order imposing the stipulated discipline.[2] The order was properly served on Amponsah and became effective on July 23, 2017. It required Amponsah to comply with the notification provisions of rule 9.20(a) within 30 calendar days of the effective date,[3] and with the reporting requirements of rule 9.20(c) within 40 calendar

1. All further references to rules are to this source unless otherwise indicated.

2. Supreme Court No. S240903 (State Bar Court Nos. 16-O-14533 (16-O-16600; 16-O-16775)).

3. Rule 9.20(a)(1) and (4) require an attorney to do the following: (1) notify clients being represented in pending matters, along with any cocounsel, of a suspension and consequent disqualification to act as an attorney after the suspension's effective date; (2) notify clients to seek other legal advice if there is no cocounsel; (3) notify opposing counsel in pending litigation; (4) if no opposing counsel, notify adverse parties of the suspension and consequent disqualification to act as an attorney after the suspension's effective date; and (5) file a copy of the notice with the court, agency, or tribunal before which the litigation is pending.

days of the effective date.[4] The order warned that failure to comply "may result in disbarment or suspension." Rule 9.20(b) requires strict mailing guidelines for notification.[5]

III. FACTS SUPPORT CULPABILITY FINDINGS [6]

Count one of the NDC alleged that Amponsah failed to file a rule 9.20(c) compliance declaration by September 1, 2017, as ordered by the Supreme Court. Count two alleged that Amponsah failed to comply with his disciplinary probation, in violation of Business and Professions Code section 6068, subdivision (k),[7] because he did not (1) timely arrange an initial meeting with the Office of Probation (Probation), or (2) submit a quarterly report that was due on October 10, 2017.

A. UNCONTESTED RULE 9.20 VIOLATION

Amponsah willfully violated rule 9.20 by failing to file a declaration of compliance. He was required to complete the rule 9.20(a) notice requirements by August 24, and then include that information in his rule 9.20(c) compliance declaration that was due September 1, 2017.

Amponsah did not make notifications according to the specific requirements in rule 9.20, but he did take some action to inform his clients of his suspension. For example, he asked Keith Landrum, his law partner of 24 years, to take over his caseload before his suspension took effect. Landrum agreed and contacted each client; some stayed with Landrum and others left the practice. Amponsah also wrote letters to his clients informing them that he would be suspended for 90 days as of July 23, 2017, that their files were being "handled, worked on and overseen by Mr. Keith Landrum Esq," and that they should contact Landrum with questions. Six client letters were timely dated before the August 24, 2017 notification due date and six were late—dated August 31. But Amponsah admitted that he could not confirm the date he actually mailed them, nor did he send them by certified or registered mail, return receipt requested, as rule 9.20 requires. He further failed to notify opposing counsel, adverse parties, or the court (in his litigated matters). While Amponsah's clients received timely actual notice of his suspension through Landrum's efforts, Amponsah failed to comply with the specific notification requirements of rule 9.20(a).

As to rule 9.20(c), Amponsah did not file a proper compliance declaration. The probation deputy provided two reminder letters, on July 20 and August 24, 2017. When Amponsah did not file his declaration by September 1, the deputy sent a letter advising him that he had not filed a compliant rule 9.20 declaration, and that disciplinary charges could be filed. [8]

In early 2018, Landrum made three unsuccessful attempts to file the rule 9.20 compliance declaration on behalf of Amponsah. On January 31, Landrum submitted the first declaration to Probation, but did not file it with the State Bar Court, as instructed. On February 26, the probation deputy informed Landrum of the

4. Rule 9.20(c) requires an attorney to file an affidavit with the Clerk of the State Bar Court showing compliance with the provisions of the order entered under this rule within the time prescribed in the order after the effective date of the suspension.

5. All notices must be by registered or certified mail, return receipt requested, and must contain an address for the suspended attorney.

6. The facts are based on the stipulated facts, the trial evidence, and the hearing judge's factual findings, to which we give great weight. (Rules Proc. of State Bar, rule 5.155(A).)

7. All further references to sections are to this source.

8. Amponsah testified that he was unable to comply with his disciplinary obligations from July 2017 until January 2018, due to extreme emotional difficulties. Evidence establishing these difficulties is detailed in the mitigation section of this opinion.

error and suggested he properly file the declaration. Landrum filed a second declaration with the State Bar Court on February 28. On March 2, the supervising attorney in Probation informed Landrum by letter that this declaration was not compliant; it was incomplete and the attached supplemental declaration by Amponsah did not adequately demonstrate that he had timely complied with the notice requirements.

[1a] On April 2, 2018, Landrum filed a third declaration with the State Bar Court. On April 11, the supervising attorney informed Landrum by letter that this declaration also did not comply, noting that Amponsah admitted in his attached supplemental declaration that he was still in the process of notifying opposing counsel or adverse parties of his suspension—in other words, Amponsah had not completed the notification process that was due in August 2017. Both the April 11 and the March 2 letters to Landrum from the supervising attorney advised: "**Please note that it may not be possible to file a compliant [rule 9.20(c)] declaration because Respondent [Amponsah] did not complete all of the required tasks by the ordered deadlines.**" (Emphasis in original.) [9]

On August 1, after the hearing judge issued her July 20, 2018 decision, Amponsah's trial counsel filed a motion in the Review Department requesting an extension of time to file the rule 9.20 declaration. The motion asserted that because the belated rule 9.20 declarations have been repeatedly rejected as non-compliant, the additional time would permit Amponsah to "resend certified letters to his former clients so that he can file a compliant 9.20 Declaration." OCTC opposed the motion, and we denied it as untimely because the hearing decision and discipline recommendation had been filed. Though Amponsah made attempts to comply, he is culpable of failing to perform his rule 9.20(c) obligations, as charged in count one of the NDC. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187 [attorney is required to strictly comply with rule 9.20 obligations].)

B. UNCONTESTED PROBATION VIOLATIONS

[2a] Amponsah failed to timely comply with two probation terms. On July 20, 2017, the probation deputy provided a letter to Amponsah reminding him of his disciplinary obligations, which included scheduling an initial meeting with Probation by August 22, and filing his first quarterly report on October 10. The letter also contained several enclosures, including a blank rule 9.20 compliance form and a blank quarterly report form. Amponsah received the letter and left a voicemail message for the probation deputy on July 21, 2017, requesting a callback regarding the required meeting. On July 24, Amponsah made the same request by email. That day, the deputy emailed Amponsah and asked him to provide a date and time to meet. Amponsah did not respond due to his emotional difficulties.

[2b] Sometime after the NDC was filed in December 2017, Landrum began representing Amponsah and assisted him with his outstanding disciplinary obligations. On February 22, 2018, Landrum submitted Amponsah's quarterly reports that were due on October 10, 2017 and January 10, 2018. [10] On February 27, Landrum also scheduled

9. **[1b]** We note that this statement may be problematic for respondents. It could be interpreted to mean that any attempt to file a compliance declaration that is either itself late or states that notice of suspension was provided late is a futile endeavor because it will be deemed noncompliant. For this reason, as well as the attempts Landrum made to file Amponsah's declaration, we do not find Amponsah has demonstrated indifference or is continually refusing to comply with rule 9.20 by failing to file his compliance declaration—since his notifications will be late, it seems likely that his compliance declaration would be deemed noncompliant.

10. On February 26, 2018, the probation deputy emailed Landrum that the quarterly reports had been received, but were late and therefore were not compliant.

Amponsah's overdue initial probation meeting, which took place on March 5, 2018, by telephone. Despite his late compliance efforts, Amponsah is culpable for failing to timely comply with his probation terms, in willful violation of section 6068, subdivision (k), as charged in count two of the NDC. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536–537 [substantial compliance with probation conditions is not defense to probation violation].)

IV. AGGRAVATION AND MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct [11] requires OCTC to establish aggravating circumstances by clear and convincing evidence. [12] Amponsah has the same burden to prove mitigation. (Std. 1.6.) We agree with the hearing judge's aggravation and mitigation findings except that we assign increased weight in mitigation for Amponsah's emotional difficulties.

A. AGGRAVATION

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

[3]The hearing judge deemed Amponsah's 2016 prior record of discipline to be a serious aggravating factor. OCTC argues that this prior discipline presents significant aggravation because it would have created in Amponsah a heightened sense of professional responsibility, and no facts diminish its weight. We find that serious aggravating weight is sufficient. Amponsah's prior case involved one count of commingling that merited a 90-day suspension, and it is not similar to his present misconduct. (See *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443–444 [similarities between prior and current misconduct render previous discipline more serious, as they indicate prior discipline did not rehabilitate].)

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

[4] The hearing judge assigned modest aggravating weight to Amponsah's multiple acts of misconduct, reasoning that the present misconduct arises from failing to comply with one Supreme Court order. (*In the Matter of Carver* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 348, 355 [modest weight for violation of three terms of reproval order].) OCTC argues that more weight should be afforded because the violations involve a Supreme Court rule 9.20 order *and* certain probation terms that, together, demonstrate Amponsah's unwillingness or inability to conform to his ethical responsibilities. We reject this argument and find that modest aggravating weight is appropriate for Amponsah's three acts of wrongdoing charged in the NDC (two probation violations and a rule 9.20 violation).

3. Indifference (Std. 1.5(k))

[1c]The hearing judge found that Amponsah did not demonstrate indifference toward rectification and atonement as an aggravating factor. OCTC argues that Amponsah has shown indifference because he has yet to file his rule 9.20 compliance declaration. As noted, Landrum made several failed attempts to file a declaration on behalf of Amponsah. Moreover, Probation twice informed Landrum that Amponsah may never be able to file a compliant declaration since he did not make timely rule 9.20 notifications. A reasonable person would find this directive by Probation to reflect that further attempts would be futile, and we have already considered Amponsah's failure to comply with rule 9.20 to establish his culpability. We do not consider it again in aggravation to demonstrate indifference. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 133 [finding of aggravation inappropriate for conduct that formed basis for culpability].)

11. All further references to standards are to this source.

12. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

B. MITIGATION

1. Extreme Emotional Difficulties (Std. 1.6(d))

[5a] 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 found that Amponsah presented clear and convincing evidence that he suffered extreme emotional difficulties at the time of his misconduct due to child custody and financial issues, and assigned moderate mitigating weight. We agree that mitigation is warranted, but we afford it greater weight.

[6a] To begin, the hearing judge found that Amponsah and his therapist, Patricia Allen, Ph.D. testified credibly. These findings are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A) [great weight given to hearing judge's factual findings]; *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 [hearing judge best suited to resolve credibility questions "because [she] alone is able to observe the witnesses' demeanor and evaluate their veracity firsthand"].) On review, we are limited to examining a cold record and must rely on the hearing judge's assessment of the witnesses' demeanor and the nature and quality of their testimony. The hearing judge was in an appreciably better position than we are to conclude that Amponsah and Dr. Allen accurately and reliably recounted Amponsah's emotional condition. We find that the record is devoid of sufficient evidence for us to depart from the judge's well-reasoned conclusion given the quality and quantity of the testimony, as detailed below.

Amponsah testified that he suffered high levels of anxiety and was in a mental fog after he received the suspension order in July 2017. Having practiced law for 24 years, he felt ashamed to be suspended. With no income during a custody dispute over his six-year-old daughter, he worried that he would lose custody if he could not financially provide for her. He testified that he functioned by taking one thing at a time as he was "trying to focus on survival." He lost weight, experienced tremors, and became withdrawn, as witnessed by his friends and Landrum. Landrum testified seeing Amponsah sit in a dark office for hours—a marked change from the detailed and organized attorney who had been his partner for more than two decades.

Amponsah also presented the expert testimony of Patricia Allen, who holds a Ph.D. in psychology and has 47 years of experience as a marriage/family/child therapist. Dr. Allen has been Amponsah's treating therapist since 2006. She spoke of her long-term treatment of Amponsah and provided detailed facts about his emotional difficulties in the second half of 2017. Dr. Allen testified that Amponsah suffered from severe anxiety and post-traumatic stress disorder during the time of his misconduct (between July and December 2017) due to his custody battle and his extreme fear of losing custody of his daughter. Dr. Allen also confirmed that Amponsah's apprehension has since improved and his stress and anxiety levels have normalized. She stated that Amponsah "is a healthy man today . . . ."

[5b, 6b] OCTC argues that no mitigating credit should be assigned for emotional difficulties because Amponsah has not recovered from them and has yet to comply with his obligations under rule 9.20. We reject these arguments. First, Dr. Allen's testimony and other evidence are contrary to OCTC's assertion that Amponsah has not recovered. Second, Amponsah repeatedly, albeit unsuccessfully, attempted to file a compliant rule 9.20(c) declaration. Most recently, the supervising attorney in Probation informed him that he likely could not do so since he was already late on his notification requirements.

[5c] We conclude that Amponsah's testimony and that of his therapist established that his extreme emotional distress was directly responsible for his misconduct during the relevant times. The hearing judge assigned moderate mitigating weight to Amponsah's emotional difficulties. We assign substantial weight given the persuasive quality of the evidence. (*In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 912 [testimony of respondent

and marriage counselor established extreme emotional distress as mitigating factor].)

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

The hearing judge assigned significant mitigation credit for Amponsah's cooperation because he entered into a stipulation that admitted facts establishing his culpability, which conserved judicial time and resources. OCTC primarily argues that Amponsah is entitled to only limited credit because the stipulated facts were easy to prove and Amponsah minimized his failures to comply with rule 9.20. We do not agree. Whether facts are easy to prove is only one aspect to consider in assigning mitigating weight. Overall, Amponsah demonstrated cooperation through his stipulation. Such action merits substantial mitigation. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive weight in mitigation for those who admit culpability and facts].)

V. ONE-YEAR SUSPENSION IS APPROPRIATE PROGRESSIVE DISCIPLINE

[7a] OCTC contends Amponsah should be disbarred for failing to comply with rule 9.20. Amponsah argues that disbarment would be punitive since his misconduct was due to his emotional difficulties, for which he sought treatment and has now recovered. The hearing judge recommended discipline, including a one-year actual suspension, after considering the law and the standards, the seriousness of Amponsah's misconduct, his efforts to comply, his cooperation, and his lack of indifference. We agree with the hearing judge.

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 standards for attorneys. (Std. 1.1.) We begin our analysis with the guiding language of rule 9.20 and our disciplinary standards (*In re Silverton* (2005) 36 Cal.4th 81, 91–92 [standards entitled to great weight]; *In re Young* (1989) 49 Cal.3d 257, 267, fn. 11 [standards to be followed wherever possible].)

[7b] Rule 9.20 provides that a violation is cause for either disbarment *or* suspension,[13] and standard 2.14 instructs that actual suspension is appropriate for a violation of disciplinary probation. We acknowledge that Amponsah's violation of rule 9.20 presents circumstances that merit the more serious potential sanction.

[7c] In general, a rule 9.20 violation is deemed a serious ethical breach for which disbarment has been held to be appropriate. (See *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) The rule performs the "critical prophylactic function" of notifying clients, counsel, adverse parties, and the courts about an attorney's discipline. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187.) Nonetheless, the Supreme Court has made it clear that each disciplinary case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059.) And case law over the past several decades instructs that discipline less than disbarment has been imposed in rule 9.20 violation cases where the attorney demonstrated, for example, unsuccessful attempts to file a rule 9.20 declaration, significant mitigation, or little aggravation.[14] The hearing

13. Rule 9.20(d) provides that a "suspended member's willful failure to comply with the provisions of this rule is a cause for disbarment or suspension and for revocation of any pending probation."

14. *Shapiro v. State Bar* (1990) 51 Cal.3d 251 (one-year actual suspension for "totality of the circumstances," including timely notification but five-month late-filed affidavit after unsuccessful attempt; 16 years of discipline-free practice; physical and emotional problems; and good character); *In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192 (nine-month actual suspension for failing to timely file declaration of compliance after unsuccessful attempts to file it two weeks late; two prior disciplines and multiple acts were aggravating and recognition of wrongdoing, pro bono activities, and lack of harm were mitigating).

judge's findings in Amponsah's case reflect that these factors are present and justify suspension rather than disbarment.

[7d]Most notably, the hearing judge found that the seriousness of Amponsah's misconduct was diminished by his extreme emotional difficulties and his attempts and efforts to comply with his disciplinary obligations. Even before his suspension took effect, he asked Landrum to help him. Landrum notified all of Amponsah's clients of the suspension, made three unsuccessful attempts to file Amponsah's rule 9.20 declaration, and eventually filed the late quarterly probation report and assisted Amponsah to meet with his probation deputy. For Amponsah's part, he fully participated in these proceedings, admitted to facts establishing culpability, and proved that he has recovered from his emotional problems that led to his misconduct. Landstrum's early contact with the clients, though deficient under rule 9.20's strict notification requirements, provided actual notice of Amponsah's suspension. Thus, the record contains no evidence of client harm. Under these circumstances, we agree with the hearing judge that "suspension rather than disbarment is appropriate because [Amponsah's] misconduct is not indicative of his ability to conform to ethical norms."

OCTC cites cases that it asserts support disbarment. But a review of these cases reveal that they are not comparable because they involve significant aggravating circumstances that are absent in Amponsah's case. In *Bercovich v. State Bar* (1990) 50 Cal.3d 116, the attorney made no attempts to comply and had a prior discipline for misappropriating more than $100,000 and a probation revocation that had resulted in a two-year actual suspension and a five-year actual suspension, respectively. In *Dahlman v. State Bar* (1990) 50 Cal.3d 1088, the attorney had a prior discipline that had resulted in a three-year actual suspension and did not appear for the hearing to determine culpability for failing to comply with former rule 955 (now rule 9.20). In *In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, the attorney's failure to file a former rule 955 compliance declaration was significantly aggravated by dishonesty to the courts, client harm, and the unlicensed practice of law. And in *In the Matter of Esau* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr 131, the attorney had three prior records of discipline that included repeated failures to comply with basic terms of probation.

[7e] Unlike these cases, Amponsah appeared for the proceedings, was not dishonest, has one prior record of discipline that resulted in a 90-day actual suspension, proved his emotional difficulties were directly responsible for his misconduct, and established by expert testimony that he has recovered. This is not a case where Amponsah ignored his disciplinary obligations, as in *Dahlman v. State Bar*, *supra*, 50 Cal.3d at p. 1096, where the attorney was disbarred for ignoring efforts of the State Bar and the Supreme Court to obtain his compliance with rule 9.20 and "evidenced an indifference to the disciplinary system." Nor is Amponsah's case similar to *In the Matter of Pierce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 382, 388, where we recommended disbarment for an attorney with two prior disciplines who demonstrated "ostrich-like behavior" in failing to timely file the rule 9.20 compliance declaration.

The hearing judge considered all the factors and relied on comparable case law to support her suspension recommendation. In particular, the judge relied on *Shapiro v. State Bar*, *supra*, 51 Cal.3d 251, 259–260, where the Supreme Court imposed discipline including a one-year actual suspension for willful violation of former rule 955 and client abandonment. The *Shapiro* court found that the attorney made an unsuccessful, but diligent, attempt to comply with rule 9.20, resulting in a five-month delay. Like Amponsah, Shapiro presented substantial mitigation about the physical and psychological difficulties he experienced during the time of his misconduct, as well as evidence that he had recovered from his problems. In considering this mitigation, the *Shapiro* court emphasized the "overriding principle that the purpose of these proceedings is not to punish an attorney but to inquire into the moral fitness of an officer of the court to continue in that capacity and to afford protection to the public, the courts, and the legal profession." (*Id.* at p. 260, citing *Clancy v. State Bar* (1969) 71 Cal.2d 140, 151.)

[7f] Guided by the cases, the standards, and the language of rule 9.20 itself, we find that an actual suspension is appropriate discipline for Amponsah's rule 9.20 violation and his two probation violations. To determine the appropriate period of suspension, we consider the principle of progressive discipline.[15] Since Amponsah served a 90-day actual suspension in his prior case, a one-year actual suspension is significantly progressive and appropriate to his misconduct to accomplish the goals of attorney discipline without being punitive. (See std. 1.2(c)(1) ["Actual suspension is generally for a period of thirty days, sixty days, ninety days, six months, one year, eighteen months, two years, three years, or until specific conditions are met"].) As the hearing judge aptly summarized, "In consideration of the totality of the circumstances, including the relevant mitigating and aggravating factors, and the range of discipline suggested by rule [9.20], the standards, and the case law, the court recommends that one year's actual suspension will adequately protect the public."

VI. RECOMMENDATION[16]

For the foregoing reasons, we recommend that Leslie Victor Amponsah be suspended from the practice of law for two years, that execution of that suspension be stayed, and that he be placed on probation for two years with the following conditions:

1. Amponsah must be suspended from the practice of law for the first year of his probation.

2. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Amponsah must (1) read the California Rules of Professional Conduct, Business and Professions Code sections 6067, 6068, and 6103 through 6126, and rule 9.20, 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 with his first quarterly report.

3. Amponsah must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

4. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Amponsah 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. He 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.

5. Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Amponsah must schedule a meeting with his assigned probation case specialist 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, he may meet with the probation case specialist in person or by telephone. During the probation period, he 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.

6. During Amponsah's probation period, the State Bar Court retains jurisdiction over him to address issues concerning compliance with probation conditions. During this period, he must

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15. Standard 1.8(a) provides, "If a member has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust."

16. We do not recommend that Amponsah take and pass the State Bar's Ethics School or the Multistate Professional Responsibility Examination because he was previously ordered to do so in Supreme Court No. S240903.

appear before the State Bar Court as required by the court or by the Office of Probation after written notice mailed to his official membership address, as provided above. Subject to the assertion of applicable privileges, Amponsah must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

a. Deadlines for Reports. Amponsah 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, Amponsah must submit a final report no earlier than ten days before the last day of the probation period and no later than the last day of the probation period.

b. Contents of Reports. Amponsah 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. Amponsah is directed to maintain proof of his 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 his actual suspension has ended, whichever is longer. He is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

7. For a minimum of one year after the effective date of discipline, Amponsah is directed to maintain proof of his compliance with the Supreme Court's order that he comply with the requirements of California Rules of Court, rule 9.20(a) and (c). Such proof must include the names and addresses of all individuals and entities to which notification was sent pursuant to rule 9.20; copies of the notification letter sent to each such intended recipient; the original receipt and tracking information provided by the postal authority for each such notification; and the originals of all returned receipts and notifications of non-delivery. Amponsah is required to present such proof upon request by OCTC, the Office of Probation, and/or the State Bar Court.

8. 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 Amponsah has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VII. RULE 9.20

We further recommend that Amponsah be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

VIII. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against a member who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

We concur:

HONN, J.

McGILL, J.

State Bar Court
Review Department

In the Matter of

RITA MAE LINGWOOD

A Member of the State Bar

No. 16-O-17302

Filed August 27, 2019

SUMMARY

Lingwood borrowed funds from a trust of which she was the sole trustee. The terms of the trust permitted Lingwood to borrow the money; she secured the loan with a deed of trust on real property she owned; and she repaid the loan in full, with interest, within a year. However, in making the loan, Lingwood failed to provide the trust's beneficiaries with a writing describing the terms of the loan; failed to inform them they could seek the advice of independent counsel; and failed to obtain their consent in writing. By these omissions, Lingwood admittedly violated rule 3-300 of the Rules of Professional Conduct, as well as her fiduciary duties under the Probate Code.

The hearing judge found Lingwood had committed two additional acts of misconduct: misappropriating the funds she borrowed, and making untrue statements in a letter to the attorney for one of the trust beneficiaries. Concluding that both of these acts of misconduct involved moral turpitude, the hearing judge recommended that Lingwood be disbarred.

On Lingwood's request for review, the Review Department reversed the trial judge's findings that Lingwood had committed misappropriation and made untrue statements. The Review Department also rejected several of the hearing judge's findings in aggravation. Accordingly, the Review Department reduced the recommended discipline from disbarment to a 60-day actual suspension, with a stayed one-year suspension and two years of probation.

COUNSEL FOR PARTIES

For State Bar of California: Manuel Jimenez, Esq.

For Respondent: Rita Mae Lingwood, in pro. per.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **204.90 Substantive Issues – Culpability – Other general substantive issues re culpability**
273.00 Culpability – Rules of Professional Conduct – Rule 3-300
Attorney who is trustee of trust must comply with Rules of Professional Conduct as well as directives of trust instrument. Attorney entering into business transaction arising from attorney's duties as trustee must comply with rule 3-300.

[2] **194 Miscellaneous General Issues – Effect/Applicability of Statutes Outside State Bar Act**
204.90 Substantive Issues – Culpability – Other general substantive issues re culpability
430.00 Culpability – Common Law/Other Statutory Violations – Breach of Fiduciary Duty
When attorney is trustee of trust, trust's beneficiaries are not attorney's clients, but attorney may nevertheless be disciplined as if beneficiaries were clients, because of attorney's fiduciary relationship with beneficiaries.

[3a-c] **194 Miscellaneous General Issues – Effect/Applicability of Statutes Outside State Bar Act**
273.00 Culpability – Rules of Professional Conduct – Rule 3-300
Trustee of revocable trust owes fiduciary duty to settlor of trust. When settlor has become incompetent, trustee's fiduciary duty is to beneficiaries, and if trustee is an attorney, she is required to treat beneficiaries as clients for purposes of rule 3-300. Where respondent, as trustee, borrowed funds from trust whose settlor was incompetent, respondent violated rule 3-300 by failing to provide beneficiaries with written description of loan terms; failing to tell them they could seek advice of independent attorney; and failing to obtain their written consent to loan terms. Given these failures to comply with rule 3-300, respondent was culpable even if terms of loan were fair and reasonable.

[4a, b] **194 Miscellaneous General Issues – Effect/Applicability of Statutes Outside State Bar Act**
213.10 Culpability – State Bar Act – Section 6068(a) (support Constitution and laws)
As fiduciary, trustee has duty to act with utmost good faith, to administer trust according to its terms, and to act with reasonable care, skill and caution as prudent person in similar circumstances. Under Probate Code, trustees must administer trusts solely in interest of beneficiaries, and must not use trust property for trustee's own profit or purpose unconnected with trust. However, these obligations do not override provisions of trust itself. Where terms of trust gave respondent, as trustee, broad management powers,

including ability to enter into transactions such as self-dealing that would otherwise violate trustee's statutory duties, respondent was not culpable of violating section 6068(a), through Probate Code violations, by lending money to herself from trust, where loan was secured by respondent's real property and provided for five percent interest rate, and respondent paid off loan in full after request by beneficiary.

[5a, b]

194 Miscellaneous General Issues – Effect/Applicability of Statutes Outside State Bar Act

213.10 Culpability – State Bar Act – Section 6068(a) (support Constitution and laws)

273.00 Culpability – Rules of Professional Conduct – Rule 3-300

430.00 Culpability – Common Law/Other Statutory Violations – Breach of Fiduciary Duty

Probate Code section 16004 applies to fiduciary relationship between attorney and client, and is statutory complement to rule 3-300. Probate Code establishes rebuttable presumption that trustee has violated fiduciary duties when trustee obtains advantage from beneficiary in transaction between them. When attorney trustee enters into transaction with trust, transaction will be set aside unless attorney can show that beneficiaries had full knowledge of facts connected with transaction and fully understood its effect. Where respondent, as trustee, obtained loan from trust which benefited her, and did not fully inform beneficiaries of terms or risks of loan transaction, respondent violated her duties under Probate Code, and thereby violated section 6068(a).

[6]

106.30 Procedural Issues — Issues re Pleadings – Duplicative Charges

165 Standards of Proof/Standards of Review – Adequacy of Hearing Department Decision

213.10 Culpability – State Bar Act – Section 6068(a) (support Constitution and laws)

273.00 Culpability – Rules of Professional Conduct – Rule 3-300

Where same acts of misconduct by respondent violated both section 6068(a) and rule 3-300, hearing judge erred by dismissing section 6068(a) charge with prejudice. Better approach was to find both violations, but assign duplicative violation no additional weight in determining discipline.

[7a-d]

221.00 Culpability – State Bar Act – Section 6106 (moral turpitude, corruption, dishonesty)

420.00 Culpability – Common Law/Other Statutory Violations – Misappropriation

Where respondent correctly believed that trust of which she was trustee gave her authority to lend trust money to herself; respondent informed trust beneficiary of her intent to make loan and received no response; and respondent secured loan with deed of trust on respondent's property, respondent's actions were consistent with her belief she had authority to make loan, and inconsistent with intention to act with moral turpitude, dishonesty, or a correct motive. Finding that respondent intended to enter into loan transaction was incompatible with finding that respondent planned to misappropriate

funds. Accordingly, facts did not show respondent misappropriated funds in such a way as to violate section 6106, and Review Department reversed finding of culpability and dismissed charge with prejudice.

[8] **148 Evidentiary Issues – Witnesses**
165 Standards of Proof/Standards of Review – Adequacy of Hearing Department Decision

Where hearing judge did not explain reason for finding respondent's testimony not credible, and evidence corroborated respondent's testimony, Review Department did not adopt hearing judge's finding that respondent's testimony was not credible.

[9a-e] **162.11 Standards of Proof/Standards of Review – State Bar's burden – Clear and convincing standard**
221.00 Culpability – State Bar Act – Section 6106 (moral turpitude, corruption, dishonesty)
221.50 Culpability – State Bar Act – Section 6106 (moral turpitude, corruption, dishonesty) – Not Found

Section 6106 applies to misrepresentations and concealment of material facts. Mere negligence in making a representation does not violate section 6106. Where respondent trustee's representations to counsel for trust beneficiary were consistent with respondent's own honestly held beliefs and understanding, and respondent did not attempt to conceal her actions or to mislead beneficiary's counsel, OCTC did not prove by clear and convincing evidence that respondent made misrepresentations, and Review Department therefore dismissed section 6106 charge with prejudice.

[10a, b] **710.10 Mitigation – Long practice with no prior discipline record (1.6(a)) – Found**
801.11 Application of Standards – General Issues – Effective date/retroactive application of interim Standards

Current version of standard 1.6(a) provides that absence of prior record of discipline over many years of practice, coupled with present misconduct not likely to recur, is a mitigating factor. Unlike prior version of standard, current version does not include analysis of seriousness of misconduct. Under current version of standard, where respondent's misconduct was limited to single incident for which respondent apologized, and no facts suggested misconduct would be repeated, hearing judge erred in relying on former version of standard and giving respondent only minimal mitigation credit for 15 years of discipline-free practice based on seriousness of misconduct and lack of insight. Respondent was entitled to substantial weight in mitigation.

[11] **119 Generally Applicable Procedural Issues – Other Pretrial Matters**
730.10 Mitigation – Candor and cooperation with Bar (1.6(e)) – Found

Where respondent stated in pretrial statement that she had committed all acts of misconduct of which Review Department found her culpable, as well as stipulating to certain facts, respondent was entitled to considerable weight in mitigation under standard 1.6(e) for cooperation with State Bar.

[12a, b] **740.10 Mitigation – Good character references (1.6(f)) – Found**
Where Review Department found respondent borrowed money from client's trust rather than misappropriating it, Review Department did not discredit testimony of respondent's character witnesses for agreeing with respondent that funds were a loan. Where respondent's character witnesses included wide range of people who had known respondent for a long time; each witness had basic understanding of charges against respondent; and witnesses believed respondent had strong moral character, respondent was entitled to substantial weight for good character evidence under standard 1.6(f).

[13] **757.51 Mitigation – Restitution made without threat or force of proceedings (1.6(j)) – Declined to find – Coerced or belated restitution**
Under standard 1.6(j), restitution is a mitigating circumstance where made without threat of legal proceedings. Where respondent did not make full restitution until after complaint was filed with State Bar, respondent was not entitled to mitigation for restitution.

[14] **715.50 Mitigation – Good faith (1.6(b)) – Declined to find**
Although respondent, as trustee of trust that permitted self-dealing, correctly believed she had authority to borrow from trust, respondent was not entitled to mitigation for good faith because in making loan, respondent did not follow duties under Rules of Professional Conduct and Probate Code.

[15a, b] **802.63 Application of Standards – Standard 1.7 – Effect of mitigation on appropriate sanction**
881.10 Application of Standards – Standard 2.4 – Applied–suspension
921.23 Application of Standards – Standard 2.12(a) – Applied–actual suspension – Violation of §6068(a)-(h)
921.24 Application of Standards – Standard 2.12(a) – Applied–actual suspension – Mitigating factors
Where respondent, as trustee, borrowed money from client's trust; loan was authorized by trust but respondent did not comply with rule 3-300 and breached fiduciary duty under Probate Code; respondent's misconduct was serious but aberrational, involving only one client matter; mitigation was considerable, and Review Department found no aggravation or moral turpitude, respondent's misconduct warranted actual suspension, but not disbarment.

[16a-c] **179.90 Issues re Conditions Imposed as Part of Discipline – Other Issues – Other**
199 Miscellaneous General Issues in State Bar Court Proceedings – Other
2311 Inactive Enrollment After Disbarment Recommendation (section 6007(c)(4)) – Imposed
2319 Inactive Enrollment After Disbarment Recommendation (section 6007(c)(4)) – Miscellaneous Issues
Where respondent was placed on involuntary inactive enrollment under section 6007(c)(4) following hearing judge's disbarment recommendation, but Review Department reduced discipline to 60-day actual suspension, Review Department ordered

involuntary inactive enrollment terminated, and recommended that respondent be given credit for inactive enrollment period toward period of actual suspension. Because inactive enrollment period had lasted longer than 60 days, there would be no prospective period of actual suspension.

ADDITIONAL ANALYSIS

Culpability

Found

213.11 Section 6068(a)
273.01 Rule 3-300

Not Found

221.50 Section 6106
420.55 Misappropriation – Valid claim of right to funds

Aggravation

Not Found

525 Multiple Acts (Std. 1.5(b))
545 Concealment (Std. 1.5(f))
582.50 Harm to Client (Std. 1.5(j))
595.10 Indifference (Std. 1.5(k)) – Belated restitution efforts
595.10 Indifference (Std. 1.5(k)) – Other reason
618.50 Vulnerable Victim (Std. 1.5(n))

Mitigation

Found

765.10 Community Service

Not Found

725.59 Extreme Emotional Difficulties (Std. 1.6(d)) – Other reason

Discipline

1015.02 Actual suspension – 60 days
1013.06 Stayed suspension – One year
1017.08 Probation – Two years
1024 Ethics exam/ethics school

OPINION

HONN, J.

Rita Mae Lingwood borrowed funds from a trust while serving as its trustee pursuant to a clause in the trust that permitted such transactions. The Office of Chief Trial Counsel of the State Bar (OCTC) alleged that the $60,000 loan was an improper business transaction with a client and also a misappropriation of trust funds. OCTC also charged Lingwood with failing to comply with the Probate Code and making misrepresentations regarding the transaction.

The hearing judge found that Lingwood both misappropriated the $60,000 and improperly entered into a loan transaction for the same $60,000. The judge also found that Lingwood made misrepresentations about the loan, but dismissed the charge that she failed to comply with the Probate Code as duplicative of the improper loan charge. The judge recommended that Lingwood be disbarred.

Lingwood appeals, asserting that the evidence does not support misappropriation and misrepresentation. In her pretrial statement, Lingwood acknowledged that the manner in which she borrowed the funds violated rule 3-300 of the Rules of Professional Conduct[1] (count three: business transaction with a client) and that she failed to comply with Probate Code section 16002 (count two: failure to comply with laws)—two of the four counts of charged misconduct. She also challenges the aggravation and mitigation findings. Lingwood argues that disbarment is not appropriate discipline here. OCTC does not appeal and supports the disbarment recommendation.

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we find that Lingwood had the authority to borrow the funds under the terms of the trust agreement, but she is culpable of two charged counts of misconduct: violating rule 3-300 (count three) in the manner in which she borrowed the funds and violating her fiduciary duties under the Probate Code (count two).[2] We do not find that she misappropriated funds from the trust, in violation of Business and Professions Code section 6106,[3] nor do we find that she is culpable of making any misrepresentations. We recommend an actual suspension of 60 days to protect the public, the courts, and the legal profession.

I. PROCEDURAL BACKGROUND

On December 28, 2017, OCTC filed a Notice of Disciplinary Charges (NDC), charging Lingwood with five counts of misconduct. Count five was dismissed on OCTC's motion at the beginning of trial. The remaining counts included: (1) misappropriation of $60,000, in violation of section 6106; (2) improper withdrawal of money from a trust, in violation of section 6068, subdivision (a); (3) improper business transaction with a client, in violation of rule 3-300; and (4) misrepresentation, in violation of section 6106.

On April 11, 2018, Lingwood filed her pretrial statement in which she stated that she did not provide a written communication as required by rule 3-300 (count three) and that she failed to comply with Probate Code section 16002 (count two). While the parties entered into a Stipulation as to Facts and Admission of Documents (Stipulation) on June 12, the Stipulation did not include the specific admissions of culpability Lingwood had included in her pretrial statement.

1. All further references to rules are to the Rules of Professional Conduct that were in effect from September 14, 1992, to October 31, 2018, unless otherwise noted.

2. As discussed further below, we find that Lingwood admitted to a rule 3-300 violation (count three) in her pretrial statement. However, that admission does not accurately describe the scope of the violation under the Probate Code (count two).

3. All further references to sections are to the Business and Professions Code unless otherwise noted.

Trial was held on June 12, 13, 14, and 15, and posttrial briefing followed. On August 17, 2018, the hearing judge issued her decision.

II. FACTUAL BACKGROUND[4]

Lingwood prepared a trust agreement for her neighbors, Joan and Bob Doyle, which they executed on February 26, 2012 (the Trust). Joan and Bob[5] were designated co-trustees and Lingwood was designated the successor trustee. Subsequently, Lingwood prepared an amendment to the Trust, which was executed on June 27, 2015. At this time, Joan had been diagnosed with cancer and Bob began displaying signs of dementia; later, he would be diagnosed with Alzheimer's disease. Also on June 27, Bob executed the Durable Power of Attorney (DPOA) that Lingwood drafted. The DPOA appointed Lingwood and Joan's daughter, Belinda Draugelis, as Bob's attorneys-in-fact.[6] On July 8, Lingwood and Joan, as co-trustees, opened a checking account for the Trust (Trust bank account).

Belinda, who lived in Virginia at the time, traveled to California to be with her mother in late 2015. Lingwood met Belinda during her stay in California. Bob was placed in a memory care facility in December 2015 after Lingwood and Belinda first visited the facility. After Joan's death on February 4, 2016, Lingwood was the sole trustee of the Trust, which was intended to fund Bob's care, and the beneficiaries were Belinda and Gerald Drozdowski, Joan's son. On February 11, 2016, Belinda resigned as Bob's attorney-in-fact under the DPOA for the purpose of handling the Trust bank account, making Lingwood the sole attorney-in-fact.

Lingwood believed that some of the investments in the Trust were losing money, so she sought the advice of a financial advisor. In an initial meeting, the financial advisor suggested to Lingwood that he could manage the Trust portfolio in a way that would make it more diversified. Lingwood did not use the financial advisor's services. Instead, she determined that she would make a loan from the Trust to herself, secured by her real property, which would guarantee a certain rate of return for the Trust.

On March 5, 2016, Lingwood emailed Belinda about her idea for a loan and borrowing from "Bob's investment account." She stated: "I checked on the legality of this type of loan to a Trustee and per the Trust . . . a loan can be made and there is no breach of fiduciary duty as long as you would agree this to be a prudent investment." Lingwood testified at trial that at the time she wrote the email, she believed she had the authority to make the loan to herself. Lingwood was not asking Belinda for authority to make the loan, but for her agreement that the loan would be a prudent investment. Lingwood noted in her email that she believed the investment account had been experiencing a "loss" over the past few years. She stated that the proposed loan would guarantee a return on investment of 4.25 percent. Lingwood specified that she would execute a promissory note for $60,000, secured by a deed of trust on her condominium.

On April 1, 2016, Lingwood executed a $60,000 promissory note (the note) payable to the Trust with interest at five percent per annum, which was higher than the initially proposed rate. The same day, Lingwood wrote a check from the Trust bank account to herself for $30,000, which she deposited into her own account.[7] On April 26, she wrote a second check to herself for $30,000 from the Trust bank account to complete the $60,000 loan. On April 27, Lingwood secured the note by executing a deed of trust, which she sent to the Sacramento County Recorder's Office.

4. The factual background is based on the Stipulation, trial testimony, documentary evidence, and factual findings by the hearing judge, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).)

5. We refer to the family members by their first names for purposes of clarity and not out of disrespect. Nancy Joan Doyle went by her middle name, which we also adopt in this opinion.

6. The DPOA referred to the attorneys-in-fact as "agents."

7. Lingwood deposited the money into the bank account of the "Rita M. Lingwood Trust," of which she was the trustee.

Lingwood did not inform Bob, Belinda, or Gerald that she had borrowed the $60,000.

On May 2, 2016, Lingwood made a $600 payment to the Trust as required under the note. On that same day, two months after Lingwood's March 5 email, Belinda emailed Lingwood, expressly refusing to agree to Lingwood's loan proposal. Belinda stated, "I do not agree to authorize a personal loan, or any loan, to you from the trust." Lingwood replied to Belinda's email, but did not discuss the loan or the fact that she had already borrowed the $60,000. Lingwood explained at trial that she did not discuss the loan with Belinda at that time because she wanted to provide all of the documentation, including the recorded deed of trust, when she told Belinda that she had withdrawn the funds. She testified that when she received Belinda's email, she had already sent the deed of trust to the recorder's office, but had not yet received the conformed copy. The deed of trust was recorded on May 4, 2016.

Belinda's attorney, Susan Hill, wrote Lingwood a letter on May 26, 2016, inquiring whether Lingwood had "personally" borrowed the $60,000 as proposed in the March 5 email to Belinda. Hill also requested that Lingwood resign as Trustee. Lingwood replied to Hill by letter on June 1, declaring that she never proposed a "personal loan." She stated that she made a "real estate investment loan" from the Trust to herself, executed a note, and recorded a deed of trust securing the loan with her condominium. Lingwood enclosed a copy of the note and the deed of trust with the June 1 letter.

On June 10, 2016, Hill wrote to Lingwood, demanding immediate repayment of the $60,000. Lingwood replied that she was unable to do so at that time, but would refinance her condominium to repay it. Lingwood resigned as Trustee and as Bob's attorney-in-fact on June 15.

Between April 2 and June 30, 2016, Lingwood spent $58,584.99 of the $60,000 on personal expenditures. Besides the $600 payment on the note on May 2, Lingwood made $600 payments to the Trust on May 31, July 7, August 3, September 3, and October 6, 2016. On October 24, Belinda filed a complaint against Lingwood with the State Bar of CaliforniaState Bar of California. Lingwood made additional $600 payments on November 3 and December 4, 2016, and January 5 and February 8, 2017, while she attempted to refinance her condominium.

On December 4, 2016, Lingwood emailed Hill stating that she had preliminary approval on the refinancing and expected to close the deal within three weeks. She stated that the mortgage company would contact Belinda for a payoff demand and that Belinda should respond as soon as possible so the loan could close within the time the loan rate was locked. Hill wrote to Lingwood on December 19 that Belinda would sign and mail the requested documents as long as Lingwood agreed to pay approximately $8,000 for Hill's attorney fees. Lingwood responded that she could not pay the $8,000 and could not add it to the loan because the loan was already close to the maximum amount permitted by the lender. The loan lock rate expired on December 23, when Belinda did not provide the requested documentation on the advice of Hill. Lingwood then continued with her efforts to refinance and repay the loan. Belinda finally signed the payoff demand on February 9, 2017, and the refinance transaction closed. On March 10, 2017, less than a year after Lingwood had made the loan, she repaid the balance in full from the proceeds of refinancing her condominium with five percent interest as required by the note.

III. CULPABILITY

A. Count Three: Business Transaction with Client(Rule 3-300)[8]

Rule 3-300 prohibits attorneys from entering into a business transaction with a client unless (1) the terms of the transaction are fair and

8. We begin our culpability analysis with this count for the sake of clarity; our findings here affect our analysis under count two and explain the analysis for count one. We note that Lingwood admitted that she failed to comply with rule 3-300. However, as we are not dealing with a typical "client" under rule 3-300, it is important to describe the nature of her noncompliance.

reasonable, fully disclosed, and transmitted in writing to the client so that he or she can understand the terms; (2) the client is advised in writing that he or she may seek the advice of an independent attorney and given a reasonable opportunity to do so; and (3) the client consents in writing to the terms of the transaction.

In count three, OCTC alleged that Lingwood entered into a business transaction with persons to whom she owed a fiduciary duty, specifically Bob, Belinda, and Gerald,[9] when she "took a $60,000 loan" from the Trust. The NDC alleged that the terms of the transaction were not fair and reasonable to Bob, Belinda, and Gerald because (1) when executed, the loan was not secured; (2) Lingwood did not advise them in writing that they could seek the advice of an independent attorney of their choice, and did not give them a reasonable opportunity to do so; and (3) Bob, Belinda, and Gerald did not consent in writing to the terms of the transaction.[10] The hearing judge found Lingwood culpable as charged.

1. Attorneys acting as trustees must follow rule 3-300

[1] While a trustee must follow the directives contained in the trust instrument (*Copley v. Copley* (1981) 126 Cal.App.3d 248, 279), the Rules of Professional Conduct impose independent requirements on trustees when they are attorneys. (*Schneider v. State Bar* (1987) 43 Cal.3d 784, 796.) Even though a non-attorney can serve as a trustee, an attorney trustee who is also performing legal services in a dual capacity must conform all of the services performed to the Rules of Professional Conduct. (*Layton v. State Bar* (1990) 50 Cal.3d 889, 904.) An attorney entering into a business transaction arising from his or her duties as trustee is not exempted from rule 3-300. (*Schneider v. State Bar*, *supra*, 43 Cal.3d at p. 796 [applying former rule 5-101].)

2. Belinda and Gerald were Lingwood's "clients" for rule 3-300 purposes

[2] Beneficiaries of a trust are not "clients" of an attorney trustee, but the attorney trustee may nevertheless be disciplined as if they were her clients because of the attorney's fiduciary relationship with the beneficiaries. (See *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 979 [non-client treated as client for purposes of discipline where attorney was constructive trustee to non-client constructive beneficiary with respect to funds held in client trust account]; *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297, 307 [attorney trustee had fiduciary duties to non-client beneficiaries of trust for disciplinary purposes under rule 3-300].)

[3a]Under Probate Code section 15800, subdivision (b), the trustee of a revocable trust owes a fiduciary duty to the person holding the power to revoke—the settlor. Further, a competent settlor holds the power to consent when required, not the beneficiaries. (Prob. Code, § 15801, subd. (a).) Here, Bob was the named settlor of the Trust. However, he was diagnosed with Alzheimer's disease, resided in a memory care facility, and was unable to consent. When a settlor lacks capacity, the trustee owes a duty to provide information to the beneficiaries. (Rest. 3d Trusts, § 74, com. (e); *Lonely Maiden Productions, LLC v. Golden Tree Asset Management, LP* (2011) 201 Cal.App.4th 368, 379 [we may look to Restatement Third of Trusts for guidance].) Additionally, when a settlor becomes incompetent, the trust becomes irrevocable and beneficiaries are entitled to exercise rights under the trust that they

9. The NDC refers to Bob, Belinda, and Gerald as the "trust beneficiaries." However, Bob was the Trust settlor and Belinda and Gerald were beneficiaries.

10. We note that OCTC appeared to confuse the specific elements when charging the rule 3-300 violation in the NDC by framing the violation as not "fair and reasonable" when "fair and reasonable" terms are only an aspect of one element of a rule 3-300 violation. We analyze Lingwood's conduct under the elements as specifically stated in rule 3-300.

normally would not be able to exercise when their interest was only contingent. (Rest. 3d Trusts, § 74, com. (a)(2).) Because Bob was incompetent, Belinda and Gerald had exercisable rights under the Trust as beneficiaries, and Lingwood owed a fiduciary duty to them, consistent with the Trust's terms. Accordingly, for disciplinary purposes, she was required to treat them as her "clients" under rule 3-300.

3. Lingwood violated rule 3-300

[3b] Lingwood agreed at trial that she did not provide a writing to the beneficiaries describing the terms, as required under rule 3-300. Further, she did not tell the beneficiaries that they could seek the advice of an independent attorney, nor did they consent in writing to the terms of the loan. Accordingly, we find Lingwood culpable under count three.[11]

B. Count Two: Failure to Comply with Laws (§ 6068, subd. (a))[12]

In count two, OCTC alleged that Lingwood violated the laws of California, including but not limited to Probate Code sections 16002 and 16004, when she withdrew $60,000 from the Trust bank account without permission from Bob, Belinda, or Gerald and deposited it into her own account without informing them and contrary to their interests.[13] The hearing judge found that Lingwood violated section 6068, subdivision (a), because she was self-dealing as the trustee. The judge dismissed count two with prejudice as duplicative of count three. We find culpability under count two, disagree with the judge's reasoning, and decline to dismiss this count.

[4a] Probate Code sections 16002 and 16004 pertain to trust administration and the duties of trustees. As a fiduciary, a trustee has a duty "to act with the utmost good faith." (*Hearst v. Ganzi* (2006) 145 Cal.App.4th 1195, 1208.) Trustees are required to administer the trust according to the terms of the trust, and with reasonable care, skill, and caution as would a prudent person acting in similar circumstances. (Prob. Code, §§ 16000, 16040, subd. (a).) Under Probate Code section 16002, subdivision (a), trustees must "administer the trust solely in the interest of the beneficiaries." Probate Code section 16004, subdivision (a), provides that a trustee will not "use or deal with trust property for the trustee's own profit or for any other purpose unconnected with the trust . . . ." Notably, Probate Code sections 16002 and 16004 do not override the provisions of the trust instrument itself. These sections must be read in conjunction with Probate Code section 16000, which provides that, "the trustee has a duty to administer the trust according to the trust instrument and, *except to the extent the trust instrument provides otherwise*, according to this division." (Italics added.)

1. The Trust permitted "self-dealing" by the trustee

[4b] The Trust contained a "self-dealing"

11. **[3c]** On review, Lingwood acknowledged her violation of rule 3-300, but she contends that the hearing judge misrepresented the evidence because the terms of the loan were fair and reasonable. No clear and convincing evidence was produced at trial to establish whether the loan's terms were fair and reasonable. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552 [clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command unhesitating assent of every reasonable mind].) But regardless of our ruling as to its fairness or reasonableness, Lingwood would still be culpable of a rule 3-300 violation for failing to comply with the other elements of the rule, as stated above.

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

13. The NDC also alleged in count two that Lingwood violated Probate Code section 16060. However, at trial, OCTC disregarded any reference to Probate Code section 16060 in the NDC.

clause giving the trustee the power "[i]n buying and selling assets, in lending and borrowing money, and in all other transactions, irrespective of the occupancy by the same person of dual positions, to deal with itself in its separate, or any fiduciary capacity." The Trust also provided that the trustee could invest any part of the Trust estate in any property, whether secured or unsecured, or any real estate, whether or not productive at the time of investment, "without being limited by any statute or rule of law concerning investments by fiduciaries." Further, the Trust conferred upon the trustee the broadest management powers, providing in part that the trustee could "exercise all powers in the management of the Trust Estate which any individual could exercise in his or her own right, upon such terms and conditions as it may reasonably deem best . . . ." As such, under the terms of the Trust, the trustee had the ability to do business with the Trust as long as she did not act in bad faith or in disregard of the purposes of the Trust. Lingwood loaned money to herself from the Trust, but she secured the loan with her property and provided for a five percent interest rate. Lingwood made the payments with interest and paid the loan off in its entirety after she was asked to do so by Belinda. As such, we reject the hearing judge's culpability analysis because there is no clear and convincing evidence showing improper self-dealing by Lingwood in light of the Trust's explicit self-dealing clause and Lingwood's handling of the loan.

2. Lingwood's fiduciary duties included complying with rule 3-300

[5a] Probate Code section 16004 applies to the fiduciary relationship between attorney and client and is a "statutory complement to rule 3-300."[14] (*Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1152.) Probate Code section 16004, subdivision (c), provides a rebuttable presumption that a trustee has violated her fiduciary duties when a transaction occurs between the trustee and a beneficiary and the trustee obtains an advantage from the beneficiary. When an attorney trustee enters into a transaction with a trust, the transaction will be scrutinized by the courts due to the fiduciary relationship between the attorney trustee and the beneficiaries. (*Fair v. Bakhtiari*, *supra*, 195 Cal.App.4th at p. 1152.) Such a transaction will be set aside unless the attorney can show that the beneficiaries had full knowledge of the facts connected with the transaction and fully understood its effect. (*Id.* at p. 1155 [attorney must show that client was fully advised and transaction was fair to rebut presumption of undue influence under Probate Code § 16004].)

3. Lingwood violated her fiduciary duties under Probate Code

[5b] Lingwood gained an advantage from the transaction in that she obtained a loan of $60,000, improving her financial position and allowing her to make personal expenditures. Further, she did not fully inform the beneficiaries of the terms or the risks of the transaction, as demonstrated by her failure to satisfy the requirements of rule 3-300. Accordingly, the loan was made in violation of Lingwood's duties under Probate Code section 16004. (See *BGJ Associates v. Wilson* (2003) 113 Cal.App.4th 1217, 1229 [attorney violated Prob. Code § 16004 when he did not advise clients of all terms and perils associated with transaction with attorney].) Lingwood's breach of her fiduciary duties by failing to provide notice and full information to the beneficiaries regarding the loan establishes her culpability under count two.

[6] We find that the misconduct underlying Lingwood's violation under count two is the same as under count three for the rule 3-300 violation. However, we do not dismiss count two with prejudice, as the hearing judge did when she determined the counts were duplicative. We agree with OCTC that the better approach is to find both violations, but assign no additional weight for discipline purposes. (See *In the Matter of Moriarty* (Review Dept. 2017) 5 Cal. State Bar Ct.

14. We note that Lingwood stated in her pretrial statement that she "failed to comply with Probate Code section 16002." However, Lingwood did not describe the facts that led her to believe she violated this section. Our analysis of her culpability under count two stems from her violation of her fiduciary duties as an attorney to the beneficiaries.

Rptr. 511 [no dismissal of § 6068, subd. (d), charge where same misconduct proved culpability for violation of § 6106].) Lingwood is not prejudiced since we do not consider the duplicative section 6068, subdivision (a), violation as additional weight in determining discipline.

C. Count One: Moral Turpitude — Misappropriation (§ 6106)

[7a] In count one, OCTC alleged that Lingwood violated section 6106 when she withdrew $60,000 from the Trust bank account without the permission of Bob, Belinda, and Gerald. The NDC alleged that Lingwood deposited the $60,000 into her own account for her own use and benefit. Section 6106 states, "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." The hearing judge found Lingwood culpable of the misconduct alleged in count one. The judge reasoned that Lingwood misappropriated the $60,000 because she knew she was required to seek permission to withdraw it, knew she did not have authorization to do so, and used the money for personal expenses. We disagree.

[7b] Lingwood correctly thought that the Trust gave her the authority to make the loan. She testified that she thought she had authority to take the $60,000 as a loan even though she did not have consent from anyone to do so.[15] And in her March 2016 email to Belinda, she stated that she "checked on the legality of this type of loan to a Trustee and per the Trust . . . a loan can be made and there is no breach of fiduciary duty as long as you would agree this to be a prudent investment." After receiving no response from Belinda, on April 1, Lingwood executed a $60,000 note payable to the Trust. She secured the note through a deed of trust on her condominium in late April—all before receiving the May 2 email from Belinda disagreeing with her loan proposal. The Sacramento County Clerk recorded the deed on May 4. Lingwood withdrew the $60,000 from the Trust bank account in two installments on April 1 and April 26.

[7c] Lingwood's actions are consistent with her belief that she had the authority to take the loan and inconsistent with the notion that she intended to act with moral turpitude, dishonesty, or a corrupt motive. Further, a finding that she planned to misappropriate the funds is incompatible with our finding that she intended to enter into a loan transaction.

[7d] No facts show that Lingwood misappropriated the money in such a way as to violate section 6106. Therefore, we dismiss count one with prejudice. (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 839 [dismissal of charges for want of proof after trial on merits is with prejudice].)

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

[9a] Count four of the NDC alleged that Lingwood made four representations in a letter to Belinda's attorney that were false and misleading,

15. **[8]** The hearing judge found that Lingwood was not credible when she testified that she believed she had authority as the trustee to make the loan to herself. The judge did not explain the reason for this credibility finding. We do not adopt her credibility finding as the evidence corroborates Lingwood's understanding that she could self-deal as the trustee. (*In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 748 [while factual and credibility findings by finder of fact are to be accorded great weight, on independent review of record, Review Department may decline to adopt hearing judge's findings if insufficient evidence exists in record to support them].)

constituting violations of section 6106. The statements alleged in the NDC as misrepresentations are as follows:[16]

(1) "The loan request was never for a personal loan."

(2) ". . . I did not make a loan from any of [Bob's] personal assets."

(3) ". . . I did make a real estate investment loan from [the Trust] to my trust, executed a note and recorded a deed of trust securing the loan with my personal residence."

The hearing judge found that these statements were intentionally false and misleading and that Lingwood was therefore culpable of violating section 6106. We disagree.

[9b] Section 6106 applies to misrepresentations and concealment of material facts. (*In the Matter of Crane and Depew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 154–155.) "No distinction can . . . be drawn among concealment, half-truth, and false statement of fact. [Citation.]" (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315, quoted in *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 156.) Mere negligence in making a representation does not constitute a violation of section 6106. (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 353.)

[9c] As to the first statement, Lingwood testified at trial that she considered a "personal" loan to be any loan that was unsecured, and a loan secured by a deed of trust on real property to be a "real estate investment" loan. Therefore, she asserts that her statement to Hill that it was not a personal loan, but a real estate investment loan, was not a misrepresentation. We agree. Her statement that it was not a personal loan only indicated that it was a secured loan, and, in her mind, a "business loan." This was not a misrepresentation in violation of section 6106

[9d] As to the second statement that Lingwood did not make a loan from Bob's personal assets, it was not false because the loan was drawn from the Trust bank account and she stated so in her letter to Hill. OCTC argues that Lingwood's statement was a misrepresentation because she had written a $25,147.85 check from Bob's personal account and deposited it into the Trust bank account on March 30, before she wrote a check on April 1 from the Trust bank account for $30,000. Lingwood had the authority to manage Bob's assets under the DPOA. OCTC has not provided clear and convincing evidence that her statement was either meant to mislead Hill or made with gross negligence. In fact, Lingwood provided accountings to Hill for Bob's estate and the Trust. She never hid that she had moved Bob's money from one account to another and was attempting to make investments that would generate more money for the Trust.[17] We find that this statement was not a misrepresentation in violation of section 6106.

16. The NDC also alleged in count four that Lingwood made the following misrepresentation: "The Golden 1 Credit Union requirement of only one signature for [DPOA] is why I am the only signer on [Bob's] personal account. [Belinda] was at the Golden 1 Credit Union and her signature was notarized by a Golden 1 Credit Union employee . . . [who] explained their requirement and [Belinda] agreed and signed the Resignation of Agent Under [DPOA]." The hearing judge found that OCTC did not establish by clear and convincing evidence that this statement was a misrepresentation. OCTC did not appeal this finding. We agree with the judge.

17. According to the Trust accounting, the Trust was valued at over $400,000 in June 2016 and Bob's estate had assets over $100,000.

[9e] As to the third statement that Lingwood made a real estate loan, we find it represents her honestly held beliefs about the loan at the time. She never attempted to conceal the fact that she had taken the loan. In fact, she provided Hill with a copy of the note and the deed of trust. There was no misrepresentation or concealment of material facts since Lingwood correctly told Hill that she had made a secured "real estate investment loan." Accordingly, OCTC failed to present clear and convincing evidence that Lingwood's statements charged in the NDC were misrepresentations, and we therefore dismiss count four with prejudice.

IV. AGGRAVATION AND MITIGATION

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

A. Aggravation

1. Multiple Acts (Std. 1.5(b))

The hearing judge found that Lingwood "committed two separate acts of moral turpitude and engaged in self-dealing." The judge assigned moderate weight in aggravation. We find no acts of moral turpitude and no self-dealing. The only culpability we find is for Lingwood's failure to comply with rule 3-300 before entering into the loan and for duplicative allegations under section 6068, subdivision (a). As such, we assign no aggravation for multiple acts.

2. Concealment (Std. 1.5(f))

The hearing judge found that Lingwood's misconduct was "surrounded by concealment" and that she "tried to conceal her misappropriation of $60,000 by characterizing it as a real estate investment loan." Since we find that Lingwood disclosed the loan to Hill and provided her with a copy of the note and the deed of trust, we assign no aggravation for concealment.

3. Significant Harm to the Client (Std. 1.5(j))

The hearing judge found that Lingwood caused significant harm to the Trust because Trust money had to be used to hire an attorney to restore the funds Lingwood misappropriated. We disagree. No clear and convincing evidence was produced showing that Belinda's hiring of an attorney constituted significant harm. Lingwood did not misappropriate any money and the loan did not harm the Trust as it was secured and repaid with interest. Even though Lingwood failed to follow her fiduciary duties to the beneficiaries, we find no evidence that they were significantly harmed. Accordingly, we assign no aggravation under standard 1.5(j).

4. Indifference (Std. 1.5(k))

Standard 1.5(k) provides that an aggravating circumstance may include "indifference toward rectification or atonement for the consequences of the misconduct." An attorney who fails to accept responsibility for her 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 significant aggravation for Lingwood's failure to appreciate the wrongfulness of her misconduct. Lingwood admitted before trial that she failed to comply with the Probate Code and rule 3-300, and therefore was culpable under counts two and three—the only counts for which we find culpability. She also apologized at trial for these violations. Additionally, before trial, she repaid the loan with interest. There is no clear and convincing evidence that Lingwood displayed indifference.

5. High Level of Victim Vulnerability (Std. 1.5(n))

The hearing judge found that Bob was a vulnerable victim because he was elderly and had Alzheimer's disease. The judge determined that Lingwood breached her fiduciary duty to Bob by misappropriating funds that were for his benefit

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

and by engaging in self-dealing. We do not find that Lingwood misappropriated funds or engaged in improper self-dealing. Lingwood's culpability here is based on her failure to properly notify and obtain permission from Belinda and Gerald to enter into the loan. Bob suffered no damage as a vulnerable victim here and we assign no aggravation under standard 1.5(n).

B. Mitigation

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

[10a] The hearing judge gave only minimal mitigation credit to Lingwood for her 15 years of discipline-free practice because her conduct was serious and she displayed a lack of insight. The judge cited *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029, and relied on a former version of standard 1.6(a) that included an analysis of the seriousness of an attorney's misconduct. Current standard 1.6(a) offers mitigation where there is an "absence of any prior record of discipline over many years of practice coupled with present misconduct which is not likely to recur."

[10b] We do not find that Lingwood lacked insight. Her misconduct was limited to a single incident in which she failed to take all of the proper steps before entering into a loan. She apologized for her actions and no other facts suggest that she is likely to repeat her present misconduct. Therefore, we conclude that Lingwood is entitled to substantial weight in mitigation for her 15 years of discipline-free practice. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [substantial mitigation where attorney practiced over 10 years before first act of misconduct and misconduct not likely to recur].)

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

[11] Spontaneous cooperation with the State Bar is a mitigating circumstance. (Std. 1.6(e).) The hearing judge assigned limited mitigation for Lingwood's cooperation by entering into the Stipulation because she stipulated to facts that were easily proven. Lingwood stated in her pretrial statement that she failed to comply with the Probate Code and rule 3-300 under counts two and three. Again, counts two and three are the only counts for which we find culpability. Lingwood admitted culpability and facts; therefore, we assign considerable weight in mitigation. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive weight in mitigation accorded those who admit culpability as well as facts].)

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

[12a] Lingwood 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 assign any mitigation for good character because "at least three of the witnesses received entrusted funds" that Lingwood misappropriated from the Trust. As previously stated, we do not find that she committed misappropriation. The judge also found that the witnesses "parroted" Lingwood's belief that the funds were a loan. We find that the transaction was a loan, albeit in violation of rule 3-300, and do not discredit her witnesses for calling it as such, especially when the NDC referred to it as a loan. Further, the hearing judge found that the witnesses did not represent a wide range of references in the legal and general communities. We disagree as discussed below.

[12b] We give greater weight to Lingwood's good character evidence. Each of the witnesses had a basic understanding of the charges against her. (*In re Brown* (1995) 12 Cal.4th 205, 223 [mitigation considered for attorney's good character when witnesses aware of misconduct].) Nine character witnesses testified on Lingwood's behalf at trial, including professional colleagues, personal friends, and a client. Four additional declarants submitted good character statements. One witness, an attorney who has known Lingwood for over 25 years, stated that Lingwood was always honest and had high integrity. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration given to attorneys' testimony due to their "strong interest in maintaining the honest administration of justice"].) The other witnesses expressed the same sentiments, believed Lingwood had strong moral

character, and would continue to recommend her as an attorney. Lingwood's character witnesses included a wide range of references from people who had known her for a long time. Accordingly, substantial mitigating weight is deserved. (See *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591–592 [significant mitigation for testimony on issue of good character where witness observed attorney's "daily conduct and mode of living"].)

4. Community Service

Community service is a mitigating circumstance. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) The hearing judge afforded Lingwood moderate mitigation for her community service endeavors. We agree. Since 2013, Lingwood has served on the advisory board for the Sunrise Recreation and Park District and on the board for her homeowners' association. In 2004 and 2005, Lingwood provided estate planning classes for the Coalition of Concerned Legal Professionals.

5. Restitution (Std. 1.6(j))

[13] Restitution is a mitigating circumstance if it is "made without the threat or force of administrative, disciplinary, civil or criminal proceedings." (Std. 1.6(j).) The hearing judge did not assign mitigation for restitution and we agree. While Lingwood did make several payments before the threat of disciplinary proceedings, she was doing so under the loan terms, not as restitution. Lingwood did not pay off the balance of the loan until after a State Bar complaint was filed. (*Hitchcock v. State Bar* (1989) 48 Cal.3d 690, 709 [restitution paid under threat or force of disciplinary proceedings does not have any mitigating effect].)

6. Good Faith (Std. 1.6(b))

[14] An attorney may be entitled to mitigation credit if she can establish a "good faith belief that is honestly held and objectively reasonable." (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653 [good faith established as mitigating circumstance when attorney proves belief was honestly held and reasonable].) Lingwood contends that she should be given mitigation credit for her belief that she had authority to make a loan to herself under the Trust due to the self-dealing clause. Even though she had authority to self-deal under the Trust, she was required to follow her duties under the Rules of Professional Conduct and the Probate Code. Lingwood did not do so. Accordingly, we do not give mitigating credit for good faith.

7. Extreme Emotional Difficulties or Physical and Mental Disabilities (Std. 1.6(d))

Lingwood requests that we consider her mental state at the time of the misconduct. She claimed that she was experiencing depression, stress, and other hardships when she took the loan from the Trust. Mitigation is available for extreme emotional difficulties if: (1) Lingwood suffered from them at the time of her misconduct; (2) expert testimony establishes they were directly responsible for the misconduct; and (3) the difficulties no longer pose a risk that she will commit future misconduct. No clear and convincing evidence was presented at trial establishing that Lingwood suffered from a condition that was directly responsible for her misconduct. Therefore, we assign no mitigation credit for emotional difficulties.

V. 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 Silverton* (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.) We also look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.)

In analyzing the applicable standards, we first determine which standard specifies the most severe sanction for the at-issue misconduct. (Std. 1.7(a) [most severe sanction must be im-

posed where multiple sanctions apply].) Here, disbarment or actual suspension are the appropriate sanctions under standards 2.4 and 2.12(a).

On review, Lingwood asserts that disbarment is not warranted by her misconduct. We agree. Similar cases involving failure to comply with rule 3-300 have resulted in actual suspensions of 30 to 60 days.

For instance, *Schneider v. State Bar*, *supra*, 43 Cal.3d 784 involved an attorney acting as a trustee, who made loans to entities in which he had an interest pursuant to clauses in the trusts that allowed such transactions. However, the court found that the loans were adequately secured or were not at risk. Schneider also made an intentional misrepresentation to the trustor regarding the status of the loan proceeds. The loans were repaid with interest before the notice to show cause in the disciplinary case was filed. Mitigation included 13 years of discipline-free practice, community service, and admission of wrongdoing. He was actually suspended for 30 days.

We find *In the Matter of Hultman*, *supra*, 3 Cal. State Bar Ct. Rptr. 297 most instructive. *Hultman* involved an attorney acting as a trustee who made two loans to himself without complying with rule 3-300. One of the loans was unsecured and both loans provided for payment of interest only, with no due date for payment of the principal. Hultman did not provide full disclosure, advise the beneficiaries that they could seek independent counsel, or obtain consent from them or the court to take the loans. His misconduct was deemed serious as it involved repeated self-dealing by a trustee where he was grossly negligent in filing an inaccurate trust accounting, which amounted to a moral turpitude violation. Hultman was actually suspended for 60 days.

We find that Lingwood believed she had the authority to make a loan from the Trust. She asked Belinda in an email to "agree," but only to her characterization of the loan as a prudent investment. That is, Lingwood asked Belinda if the loan was in the best interest of the Trust estate, not whether Lingwood had the authority to self-deal under the Trust agreement. Lingwood told Belinda about the loan and took action when she did not receive a response. She borrowed $60,000 from the Trust, but before Belinda had responded.

[15a] Lingwood always considered what she did to be a loan and she acted accordingly. She executed a note secured by a deed of trust on her condominium. She was forthcoming with Belinda's attorney about what she had done and provided her with a copy of the note and the deed of trust. Lingwood's misconduct was serious, but it was aberrational, involving only one client matter. She never intended to permanently take the Trust's money. She intended to pay the loan back, which she did. She has no prior record of discipline and we are impressed with her good character evidence and her community service.

[15b] In sum, Lingwood's breach of her fiduciary duties warrants a term of actual suspension as guided by the case law and consistent with the standards. We do not find any moral turpitude violations as the hearing judge did and we reject the judge's disbarment recommendation. Finally, as the mitigation is considerable and no aggravation has been found, discipline at the lower end of the spectrum is appropriate. (Std. 1.7(c).) We believe that an actual suspension of 60 days is appropriate to protect the public, the courts, and the legal profession. **[16a]** Accordingly, we: (1) order that Lingwood's involuntary inactive enrollment under section 6007, subdivision (c)(4), ordered by the hearing judge, effective on August 20, 2018, be terminated and (2) recommend that Lingwood be given credit for the period of her inactive enrollment under section 6007, subdivision (c)(4), toward the 60-day period of actual suspension that we recommend be imposed on her. (See *In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 143.)

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Rita Mae Lingwood, State Bar No. 214145, be suspended from the practice of law for one year, that execution of that suspension be stayed, and that she be placed on probation for two years with the following conditions:

1. **[16b]** Lingwood must be suspended from the practice of law for the first 60 days of her probation. However, we recommend that she be given credit for the period of her inactive enrollment under Business and Professions Code section 6007, subdivision (c)(4), toward the recommended 60-day period of actual suspension. Since Lingwood will have already served more than 60 days on inactive enrollment as of the date of this opinion, there would be no prospective period of actual suspension in this matter.

2. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Lingwood 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 her compliance with this requirement, to the State Bar's Office of Probation in Los Angeles (Office of Probation) with her first quarterly report.

3. Lingwood must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of her probation.

4. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Lingwood must make certain that the State Bar Attorney Regulation and Consumer Resources Office (ARCR) has her current office address, email address, and telephone number. If she does not maintain an office, she must provide the mailing address, email address, and telephone number to be used for State Bar purposes. Lingwood 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.

5. Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Lingwood must schedule a meeting with her assigned probation case specialist to discuss the terms and conditions of her 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, she may meet with the probation case specialist in person or by telephone. During the probation period, Lingwood 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.

6. During Lingwood's probation period, the State Bar Court retains jurisdiction over her to address issues concerning compliance with probation conditions. During this period, she must appear before the State Bar Court as required by the court or by the Office of Probation after written notice mailed to her official membership address, as provided above. Subject to the assertion of applicable privileges, she must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

7. Quarterly and Final Reports

a. Deadlines for Reports. Lingwood 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, Lingwood 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. Lingwood must answer, under penalty of perjury, all inquiries contained in the quarterly report form provided by the Office of Probation, including stating whether she 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. Lingwood is directed to maintain proof of her 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 her actual suspension has ended, whichever is longer. She is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

8. Within one year after the effective date of the Supreme Court order imposing discipline in this matter, Lingwood 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 Lingwood will not receive MCLE credit for attending this session. If she 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, Lingwood will nonetheless receive credit for such evidence toward her duty to comply with this condition.

9. 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 Lingwood has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

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

VIII. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10,[19] costs assessed against an attorney who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

19. We note that subdivision (c) of section 6086.10 further provides that an attorney may be granted relief, in whole or in part, from an order assessing costs under this section, in the discretion of the State Bar Court, for good cause shown. (See also Rules Proc. of State Bar, rule 5.130; *In the Matter of Respondent J* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 273; *In the Matter of Langfus* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 161, 168.)

IX. ORDER

[16c] Finally, because we reject the hearing judge's disbarment recommendation, we order that Rita Mae Lingwood's inactive enrollment under Business and Professions Code section 6007, subdivision (c)(4), be vacated immediately. This order does not affect Lingwood's ineligibility to practice law that has resulted or that may hereafter result from any other cause.

We concur:

PURCELL, P.J.

McGILL, J.

State Bar Court
Review Department

In the Matter of

BOB BABAK KHAKSHOOY

A Member of the State Bar

No. 16-O-17807

Filed October 11, 2019, modified November 22, 2019

SUMMARY

Respondent represented a client who had been injured in an auto accident while driving for work. Respondent sued the other driver, and the client's employer's workers' compensation administrator notified respondent of a lien on the client's recovery, based on the workers' compensation administrator's statutory subrogation rights.

In the action against the other driver, respondent failed to respond to discovery, and failed to inform the client about the discovery requests. Opposing counsel obtained an order compelling discovery, but respondent did not notify the client of the order, and did not comply with it. Opposing counsel then filed a motion for terminating sanctions. Respondent again failed to notify the client.

Shortly thereafter, the driver's insurer offered to settle, and the client accepted the offer and executed a release. Respondent did not notify the workers' compensation administrator of the settlement until over a year later. Meanwhile, the insurer issued a check for the settlement amount, but respondent could not deposit the check because the workers' compensation administrator was named as a payee. For over two years, the client repeatedly requested disbursement of the settlement money. Ultimately, respondent provided the client with a disbursement sheet and paid the client from respondent's general account. After the client complained to the State Bar, the workers' compensation administrator agreed to reduce its lien and gave respondent permission to deposit the check from the driver's insurer.

Respondent was charged with nine counts of misconduct arising from this matter. The hearing judge found respondent culpable on four of the counts, and recommended a 30-day actual suspension. Both parties sought review. The Review Department found culpability on two counts the hearing judge had dismissed, and increased the recommended actual suspension to 90 days.

COUNSEL FOR PARTIES

For State Bar of California: Manuel Jiminez, Esq.
Kimberly Gay Anderson, Esq.

For Respondent: Keven Patrick Gerry, Esq.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1a-c] **280.00 Culpability – Rules of Prof. Conduct – Trust account/commingling (RPC 4-100(A))**
280.50 Culpability – Rules of Prof. Conduct – Pay client funds on request (RPC 4-100(B)(4))
An attorney is required in all circumstances to properly handle a client's settlement. Where respondent received settlement check made out jointly to respondent, client, and statutory lienholder, and respondent did not deposit check for three years due to respondent's failure to obtain authorization from lienholder, and did not pay client's share of settlement to client for over two years, respondent was culpable of violating rule 4-100(A), requiring lawyers to deposit funds received for benefit of clients into client trust account, and rule 4-100(B)(4), requiring lawyers to promptly pay funds client is entitled to receive.

[2a, b] **280.40 Culpability – Rules of Prof. Conduct – Maintain records of client funds (RPC 4-100(B)(3))**
Rule 4-100(B)(3) requires lawyers to maintain complete records of client funds in their possession and provide clients with proper accounting of funds, including date, amount, payee, and purpose of each disbursement. Respondent's disbursement sheet, which listed amount of settlement funds owed to each category of payee but contained no other information, was not an adequate accounting under this rule. Respondent was obligated to provide client with proper accounting whether or not client requested further information.

[3] **162.11 Standards of Proof/Standards of Review – Quantum of Proof – State Bar's burden – Clear and convincing standard**
214.30 Culpability – State Bar Act – Section 6068(m) (communicate with clients)
Where evidence did not establish clearly and convincingly that respondent failed to communicate with client, in that client could not recall specific dates he called respondent's office, and OCTC did not present any documentary evidence of client's unsuccessful efforts to contact respondent, hearing judge correctly dismissed charge that respondent violated section 6068(m) based on failure to respond to client's telephone calls.

[4a b] **162.11 Standards of Proof/Standards of Review – Quantum of Proof – State Bar's burden – Clear and convincing standard**
214.30 Culpability – State Bar Act – Section 6068(m) (communicate with clients)
221.00 Culpability – State Bar Act – Section 6106 (moral turpitude)
Where clear and convincing evidence showed respondent failed to keep client informed of discovery requests, and of court orders stemming from respondent's failure to respond to discovery, respondent was culpable of failing to keep client reasonably informed of significant developments, in violation of section 6068(m). However, where OCTC did not present clear and convincing evidence that respondent's motivation for lack of

communication was to cover up respondent's failure to perform competently, respondent was not culpable of act of moral turpitude in violation of section 6106.

[5a, b] **191 Miscellaneous General Issues – Effect of/Relationship to Other Proceedings**
220.00 Culpability – State Bar Act – Section 6103, clause 1 (disobedience of court order)

An attorney violates section 6103 when, despite being aware of a final, binding court order, the attorney knowingly takes no action in response to the order or chooses to violate it. Where respondent was aware of motion for discovery sanctions, did not oppose it, and received notice of ruling from opposing counsel, fact that sanctions order was not formally served on respondent did not excuse his failure to comply.

[6] **191 Miscellaneous General Issues – Effect of/Relationship to Other Proceedings**
220.00 Culpability – State Bar Act – Section 6103, clause 1 (disobedience of court order)

Superior court orders are final and binding for disciplinary purposes once review is waived or exhausted in courts of record. Where respondent never sought to stay, vacate, modify, or challenge discovery sanctions order, fact that order was not immediately appealable, and opposing party ultimately agreed to waive discovery sanctions, did not absolve respondent of culpability of failing to obey court order under section 6103.

[7a-c] **115 Procedural Issues – Continuances (rule 5.49)**
162.11 Standards of Proof/Standards of Review – Quantum of Proof – State Bar's burden – Clear and convincing standard
191 Miscellaneous General Issues – Constitutional Issues-Due Process/Procedural rights
545 Aggravation – Intentional misconduct, bad faith (1.5(d), (e), (f)) – Declined to find

Where OCTC argued for first time in closing trial brief that respondent engaged in dishonesty and bad faith in seeking continuance of disciplinary trial, Review Department declined to assign bad faith as aggravating factor, because respondent did not have opportunity to respond to OCTC's bad faith allegation, and OCTC did not establish by clear and convincing evidence that respondent deliberately attempted to mislead court.

[8] **710.36 Mitigation – Long practice with no prior discipline (1.6(a)) – Found but discounted or not relied on – Present misconduct likely to recur**

Where respondent failed to give adequate attention to client's case for almost two years, did not pay client until two years after case settled, and did not pay lienholder until even later, fact that misconduct occurred over significant period of time gave rise to concern that misconduct could recur, so respondent's 10-year record of discipline-free practice warranted only moderate mitigation credit.

[9a, b] **130 Procedural Issues – Procedure on Review**
802.61 Application of Standards – Standard 1.7 (Determination of Appropriate Sanctions) – Most severe applicable sanction to be used
824.10 Application of Standards – Standard 2.2(a) – Commingling/Trust Account Violation – Applied
1093 Miscellaneous Substantive Issues re Discipline – Inadequacy of Discipline
In analyzing applicable standards, State Bar Court first determines which standard specifies most severe sanction for misconduct. Where respondent was charged with two counts of mishandling client funds, and hearing judge found respondent not culpable on those counts but Review Department reversed that finding, Review Department applied most severe standard applicable to those charges, which provided for greater minimum actual suspension than recommended by hearing judge.

[10] **801.45 Application of Standards – General Issues – Deviation from standards – Found not to be justified**
811.10 Application of Standards – Part B – Introductory paragraph
824.10 Application of Standards – Standard 2.2(a) – Commingling/Trust Account Violation – Applied
Where presumed sanction applicable to respondent's mishandling of client funds was three months actual suspension, and mitigating circumstances did not sufficiently outweigh aggravating circumstance to justify deviation from standard, Review Department recommended 90-day actual suspension.

ADDITIONAL ANALYSIS

Culpability

Found

214.31 Section 6068(m)
220.01 Section 6103, clause 1
270.31 Rule 3-110(A)
280.01 Rule 4-100(A)
280.41 Rule 4-100(B)(3)
280.51 Rule 4-100(B)(4)

Not Found

214.35 Section 6068(m)
221.50 Section 6106

Aggravation

Found

521 Multiple acts of misconduct (1.5(b))

Not Found

582.50 Significant harm to client (1.5(j))
586.50 Significant harm to administration of justice (1.5(j))

Mitigation

Found but discounted

735.30 Candor and cooperation with State Bar (1.6(e))

Discipline Imposed

1013.06 Stayed suspension – One year
1015.03 Actual Suspension – Three months
1017.08 Probation – Two years

Probation Conditions

1024 Ethics exam/ethics school

OPINION

McGILL, J:

Respondent Bob Babak Khakshooy is charged with multiple counts of professional misconduct in one client matter, in which Khakshooy sued a driver that rear-ended his client's vehicle and injured him while working. The hearing judge found Khakshooy culpable on four of the nine counts that were charged. The judge recommended discipline, including that Khakshooy be actually suspended for 30 days.

Both Khakshooy and the Office of Chief Trial Counsel of the State Bar (OCTC) appeal. Khakshooy argues that the hearing judge's culpability findings are not supported by the evidence and should be reversed. OCTC argues that Khakshooy should be found culpable of three additional acts of misconduct not found by the judge. Additionally, OCTC asserts, whether or not those dismissals are overturned, the recommended 30-day actual suspension is inadequate and should be increased to six months.

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we adopt the hearing judge's findings of culpability, and we also find culpability on two of the dismissed counts. Due to the additional culpability found, we recommend an actual suspension of 90 days as the appropriate discipline in this case.

I. PROCEDURAL BACKGROUND

On May 1, 2018, OCTC filed the original Notice of Disciplinary Charges (NDC) in this matter. The NDC was subsequently amended on May 29, 2018 (FANDC), and charged Khakshooy with nine counts of misconduct relating to one client matter: (1) rule 3-110(A) of the Rules of Professional Conduct[1] (failure to perform with competence); (2) rule 4-100(A) (failure to deposit client funds in trust account); (3) rule 4-100(B)(4) (failure to pay client funds promptly); (4) rule 4-100(B)(3) (failure to render accounts of client funds); (5) Business and Professions Code section 6068, subdivision (m)[2] (failure to respond to client inquiries); (6) section 6106 (moral turpitude—misrepresentation/concealment) (7) section 6068, subdivision (m) (failure to inform client of significant developments); (8) section 6103 (failure to obey court order); and (9) section 6106 (moral turpitude—conversion).

Trial occurred on August 20, 21, 22, and 23, 2018. Khakshooy did not appear for trial on the first day,[3] at which time his attorney filed a motion to continue the trial based on his doctors' recommendations that Khakshooy "stay off work" for two weeks due to stress and a cold. The hearing judge denied the motion and proceeded to trial without Khakshooy as he was represented by counsel. Khakshooy appeared for the other three days of trial.[4] A Partial Stipulation as to Facts and Admission of Documents (Stipulation) was filed on August 22, 2018. The parties filed closing briefs on September 7, 2018. The judge issued her decision on November 21, 2018, which included granting OCTC's oral motion at trial to dismiss count nine of the FANDC.

II. FACTUAL BACKGROUND[5]

On January 16, 2013, Grean Anderson sustained minor injuries after he was rear-ended in

1. All further references to rules are to the Rules of Professional Conduct that were in effect from September 14, 1992, to October 31, 2018, unless otherwise noted.

2. All further references to sections are to the Business and Professions Code unless otherwise noted.

3. On July 9, 2018, OCTC served a notice in lieu of subpoena on Khakshooy's attorney, requesting that Khakshooy appear at trial.

4. At the end of the third day of trial while discussing the following day's trial schedule, Khakshooy stated that he had a conflict because he had a deposition already scheduled for that day. The hearing judge inquired if Khakshooy was ignoring his doctors' advice to stay off work, and he admitted that he was because he had planned on attending the deposition.

5. The facts included in this opinion are based on the Stipulation, 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).)

an auto accident while driving for his employer, Time Warner Cable. Anderson filed a workers' compensation claim without the assistance of an attorney. His claim was administered by ESIS, the third-party administrator of workers' compensation benefits for Time Warner Cable.

Anderson testified he needed to obtain help outside the workers' compensation system in order "to be protected." After seeing a television commercial, he hired Khakshooy to represent him on January 18, 2013, at which time he signed a contingency fee agreement. Khakshooy hired a contract attorney, Greg Goodheart, to assist him in filing a lawsuit on behalf of Anderson. Goodheart contacted Anderson and explained to him that Khakshooy's law firm would draft a complaint and file a civil lawsuit against the driver who had hit him. On October 3, 2013, Khakshooy filed the lawsuit in Los Angeles County Superior Court. Notwithstanding his discussion with Goodheart, Anderson did not understand that a lawsuit would be filed. He testified that he thought some type of administrative complaint would be filed against Mercury Insurance, which insured the driver.

On October 4, 2013, Recovery Services International (RSI) wrote Khakshooy and informed him that it was the agent for ESIS's lien rights. Specifically, RSI informed Khakshooy that, as a lienholder, ESIS had a statutory subrogation right, pursuant to Labor Code section 3852, to recover all compensation paid to Anderson in any action brought by him against the driver who hit him. For Anderson's workers' compensation claim, RSI stated that ESIS had paid out $5,504.95 in lost wages and medical expenses.

Mercury Insurance retained attorney David Hillier to represent the driver who hit Anderson. On November 13, 2013, Khakshooy was served with Form Interrogatories and a Demand for Inspection and Production of Documents. He did not respond to these discovery demands, nor did he notify Anderson or send him a copy. On December 27, Hillier sent Khakshooy a "meet and confer" letter, notifying Khakshooy that he would file a motion to compel if he did not receive the requested discovery responses within 10 days. Khakshooy still did not respond. On February 6, 2014, Hillier filed a motion to compel discovery and for monetary sanctions. Khakshooy received the motion but did not notify Anderson or send him a copy. Hillier also properly noticed a deposition of Anderson for February 13, 2014. Khakshooy and Anderson did not appear. Khakshooy had not told Anderson that his deposition had been scheduled.

On April 1, 2014, the superior court granted the motion to compel discovery and ordered Khakshooy and/or Anderson to pay $645 in sanctions and to serve written discovery responses on opposing counsel within 15 days. On April 7, Hillier served Khakshooy with a notice of ruling that detailed the court's order. Khakshooy failed to serve the discovery responses by the April 27 deadline and pay the sanctions.

On May 14, 2014, Hillier filed a motion for an order imposing terminating sanctions, requesting that Anderson's lawsuit be dismissed. Khakshooy received the motion but did not notify Anderson of this development. In June 2014, Khakshooy informed Anderson that a settlement offer of $8,000 had been made by Mercury Insurance. Khakshooy advised Anderson that proceeding with litigation would be expensive and that he should accept the settlement offer. Anderson agreed to accept the offer on June 10. However, Khakshooy did not notify RSI about the settlement, even though ESIS was entitled to satisfy its lien from the settlement funds, less his reasonable attorney fees and costs. Khakshooy's office did not contact RSI until July 2015, more than one year later.

On June 11, 2014, Mercury Insurance issued the $8,000 settlement check, made payable to Khakshooy, Anderson, and RSI. Khakshooy could not deposit the check into his client trust account (CTA) because RSI was a named payee. Khakshooy did not promptly contact RSI to negotiate the amount of money RSI required to satisfy its lien. On June 26, Anderson executed a release of all claims and Khakshooy filed a request for dismissal on June 30. As part of the settlement, Hillier agreed that Mercury Insurance would not require Khakshooy or Anderson to pay the $645 in sanctions. Mercury Insurance re-issued the settlement check three additional times after the June 11 check had gone stale. The additional

checks were issued on May 28, 2015; April 7, 2016; and November 30, 2016.

From 2014 through 2016, Anderson communicated with Khakshooy's office, inquiring about his settlement money and how it would be disbursed. In November 2016, Anderson went to Khakshooy's office where he was provided a disbursement sheet with the following information:

Total Settlement	$8,000.00
Medical Payment	$2,863.95
Attorney Fees	$3,600.00
Costs	$ 495.00
Client's Share	$1,041.05

Anderson was not satisfied with his portion, and Khakshooy agreed to increase it to $1,500. He did this by waiving the costs he incurred. In December 2016, Khakshooy paid Anderson the $1,500 from his general account.

Anderson filed a State Bar complaint because he had several unanswered questions about his case. On January 3, 2017, OCTC sent Khakshooy a letter, which he received, advising him of Anderson's complaint. In May 2017, ESIS agreed to reduce its lien to $1,200 and RSI authorized Khakshooy to deposit the check from Mercury Insurance. On May 23, 2017, Khakshooy deposited the November 30, 2016 check into his CTA.

III. CULPABILITY

A. Count One: Failure to Perform with Competence (Rule 3-110(A))

In count one, OCTC alleged that Khakshooy failed to perform with competence when he (1) filed a civil case without Anderson's knowledge or consent; (2) failed to provide Anderson with the form interrogatories and the demand for production of documents that were served on November 13, 2013; (3) failed to serve written discovery responses by the December 18, 2013 deadline; (4) failed to comply with the superior court's April 1, 2014 order requiring him to provide written discovery responses within 15 days, which resulted in the opposing party filing a motion for terminating sanctions; and (5) failed to promptly negotiate and pay the workers' compensation lien to ESIS and medical liens between June 2014 and April 2017. Rule 3-110(A) provides that a lawyer "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." The hearing judge found that Khakshooy violated rule 3-110(A) as charged in count one, except for the first allegation that he filed the case without Anderson's consent since Goodheart had explained the lawsuit to Anderson.

On review, Khakshooy disputes the finding of culpability under count one. He argues that Anderson was unwilling to participate in the discovery process, and therefore he was prevented from responding to the discovery requests. He also argues that he did not fail to perform with competence regarding the third-party liens. He asserts that he was able to significantly reduce the amount of the liens and that he advised Anderson about the lien negotiation process.

We reject Khakshooy's arguments as they fail to address the hearing judge's findings that are the basis for the culpability determination that Khakshooy failed to perform with competence. To begin, Khakshooy did not provide Anderson with the discovery requests[6] and did not serve written discovery responses. His inaction led Hillier to file a motion to compel and a request for monetary sanctions, which the superior court granted. When ordered to provide the responses, Khakshooy failed to comply with or challenge the order, which resulted in Hillier seeking a terminating sanction. Regarding the third-party liens, Khakshooy did not promptly negotiate and pay the ESIS lien; he did not notify RSI about the

6. At trial, Khakshooy's employee, Maria Romero, testified that Anderson was not cooperative in assisting with discovery. The hearing judge found that Romero was not credible because she spoke in generalities and was evasive and non-responsive. Additionally, no phone records or any other documentation were produced to corroborate Romero's testimony. We rely on the hearing judge's credibility determination. (*In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 241 [great weight given to hearing judge's credibility findings]; *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 [hearing judge best suited to resolve credibility questions, having observed and assessed witnesses' demeanor and veracity firsthand].)

settlement until over a year after he had received the initial settlement check from Mercury Insurance; and he did not pay ESIS until three years after the matter settled. His inaction and delay clearly establish culpability under rule 3-110(A) as the hearing judge found. (*In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 556 [delay in taking action and settling personal injury case and failure to handle case diligently violated rule 3-110(A)].)

B. Count Two: Failure to Deposit Client Funds in Trust Account (Rule 4-100(A))

Count Three: Failure to Pay Client Funds Promptly (Rule 4-100(B)(4))

Count two charges Khakshooy with a violation of rule 4-100(A) for failing to deposit in a trust account the $8,000 settlement check from Mercury Insurance he received in June 2014. Count three alleges that Khakshooy did not promptly pay Anderson his portion of the settlement, thus violating rule 4-100(B)(4).[7] The hearing judge dismissed both counts with prejudice because RSI was a named payee on the check and Khakshooy was unable to obtain its authorization until May 2017, at which time he paid RSI, and he had already paid Anderson from his own funds in December 2016. We disagree with the judge and find Khakshooy culpable on both counts.

[1a] Rule 4-100(A) requires lawyers to deposit funds received for the benefit of a client into a bank account labeled as a CTA. Rule 4-100(B)(4) requires lawyers to "[p]romptly pay or deliver, as requested by the client, any funds . . . in the possession of the [lawyer] which the client is entitled to receive."

OCTC asserts that Khakshooy's failure to promptly contact RSI to negotiate and settle its lien when he received the first settlement check establishes a violation of rule 4-100(A). To support its argument, OCTC cites *In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468, 479, where we held that an attorney violated rule 4-100(A) when he did not properly handle a client's settlement. The attorney in that case did not ensure that the settlement check was made out to himself so that he could deposit it into his CTA; in fact, he never knew the settlement check had been issued. Instead, the check was issued to the client and a different attorney because of his staff's actions and thus was not deposited into the proper account.

Citing *Rubens*, OCTC asserts that Khakshooy "had a duty to ensure the proper handling of the funds, to include obtaining, or at least seeking to obtain, proper authorization to ensure the funds were deposited in the [CTA], as required." Khakshooy argues that the *Rubens* case is inapplicable because culpability was based on Rubens's failure to supervise his staff, which led to the settlement check being improperly issued.

[1b] While Khakshooy's point is factually correct, he misses the broader point in *Rubens* that an attorney is required in all circumstances to properly handle a client's settlement. We agree with OCTC's reliance on *Rubens*. The violation of rule 4-100(A) is even more clear here because the delay in contacting RSI can only be attributed to Khakshooy's misconduct. He did not attempt to negotiate with RSI before he settled the matter in June 2014, and, once he received the first settlement check the following month, he did not have direct contact with RSI about the settlement until July 2015. As a result of his failure to undertake those duties, the check was not deposited until May 2017, almost three years after it was first issued. Accordingly, we find Khakshooy culpable of violating rule 4-100(A).

[1c] OCTC also asserts that Khakshooy violated rule 4-100(B)(4) because he possessed the funds and failed to promptly pay Anderson. We agree. Anderson began to request his share of the settlement funds from Khakshooy in July 2014, shortly after he signed the release of claims.

7. Khakshooy notes correctly that the FANDC incorrectly alleges in both counts two and three that he received the first settlement check on June 11, 2014. Counsel for Mercury Insurance did not forward the first settlement check to him until July 29.

Khakshooy did not communicate with RSI until a year later in July 2015. Further, when Anderson came to Khakshooy's office, 16 additional months later in November 2016, Khakshooy had not deposited any of the checks from Mercury Insurance because he had yet to obtain RSI's prerequisite authority. Instead, in December 2016, he paid Anderson from his general account. Khakshooy's unreasonable delay in contacting and negotiating with RSI prevented him from paying Anderson sooner than he did. (See *In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, 521–522 [attorney's unreasonable delay in endorsing settlement check prevented client from promptly receiving funds and violated rule 4-100(B)(4)].) We reject Khakshooy's argument that *Kaplan* does not apply because the attorney in *Kaplan* did not have physical possession of the check (a successor attorney did) and refused to sign it when it was presented to him. Accordingly, Khakshooy is also culpable of violating rule 4-100(B)(4).

C. Count Four: Failure to Render Accounts of Client Funds (Rule 4-100(B)(3))

[2a] In count four, OCTC alleged that Anderson requested an accounting on November 15, 2016, and Khakshooy thereafter failed to provide Anderson with an appropriate accounting. Rule 4-100(B)(3) requires lawyers to maintain complete records of client funds in his or her possession and to "render appropriate accounts to the client regarding them." The required records include "the date, amount, payee and purpose of each disbursement" made on behalf of a client. (See rule 4-100(C) and adopted standards.) The hearing judge found that, while Khakshooy gave Anderson a disbursement sheet that indicated a "broad overview of how much came in and how much went out," he did not provide "the specific details that one would expect to see in an accounting." The judge further noted that the disbursement sheet set forth a $2,863.95 medical payment without identifying which lienholder was paid and also included $495 for costs, but it failed to indicate how they were incurred. Finally, the disbursement sheet increased Anderson's settlement share by $458.95 without disclosing the source of those additional proceeds. As such, the hearing judge found Khakshooy culpable under count four.

Khakshooy asserts on review that he did not fail to render an appropriate accounting in November 2016, as alleged in the FANDC. He argues that an accounting could not have been provided at that time because the settlement funds had not been received—an up-to-date check was not issued until November 30—and he did not receive authorization to deposit the funds until May 2017. He states that he paid Anderson out of his own funds, before the settlement funds were received, and that an accounting at that time would consist only of a "copy of the same check that [Anderson] was about to receive." Khakshooy maintains that the disbursement sheet was only a proposed settlement breakdown and was accurate when it was made. He also asserts that Anderson never sought more information after he received the disbursement sheet. Thus, he contends that he should not be culpable for failing to provide a more detailed accounting in November 2016 because the information on the disbursement sheet was all he had at the time.

[2b] Khakshooy's arguments are without merit. Rule 4-100(B)(3) requires attorneys to "render appropriate accounts to the client." Khakshooy admitted that he never gave Anderson any accounting beyond the disbursement sheet. The disbursement sheet was not an adequate accounting under rule 4-100(B)(3) because it failed to provide complete information, including the specific amount paid to each medical provider, as the hearing judge noted. Also, Anderson need not request further information, as Khakshooy argues. Under the rule, Khakshooy is obligated to provide an accounting. (*In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 952 [obligation under rule 4-100(B)(3) does not require as predicate that client demand accounting].) Anderson was entitled to receive an accounting clearly identifying how the settlement money was disbursed and he did not receive it. Therefore, we uphold the judge's conclusion that Khakshooy violated rule 4-100(B)(3).

D. Count Five: Failure to Respond to Client Inquiries (§ 6068, subd. (m))

[3] Count five charges that Khakshooy failed to respond to over 15 telephonic inquiries made by Anderson between April 2015 and November 2016. Section 6068, subdivision (m), provides that an attorney is required to "respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services." The hearing judge found that OCTC did not establish by clear and convincing evidence[8] that Khakshooy violated section 6068, subdivision (m). The judge found that Anderson did have some communication with Khakshooy's office, but not as much as he hoped or expected. The judge described the evidence offered by OCTC as "murky." For example, Anderson could not recall specific dates on which he called Khakshooy's office, no documentary evidence supported the claim that Anderson left numerous voicemails, and Anderson did not write letters or emails to Khakshooy. The judge dismissed count five with prejudice. OCTC does not challenge the dismissal on review. We agree with the judge's reasoning and conclusion, and therefore affirm the 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].)

E. Count Seven: Failure to Inform Client of Significant Developments (§ 6068, subd. (m))

Count Six: Moral Turpitude—Misrepresentation/Concealment (§ 6106)

We discuss counts seven and six together as they allege the same facts under alternative theories of culpability. Count seven alleges that Khakshooy failed to keep Anderson reasonably informed of significant developments, in violation of section 6068, subdivision (m),[9] by failing to inform Anderson that (1) he filed a civil case on Anderson's behalf; (2) a notice of Anderson's deposition had been served on Khakshooy; (3) discovery requests were served on Khakshooy for Anderson's response; (4) the superior court sanctioned Khakshooy and/or Anderson $645 for failing to comply with those discovery requests; and (5) a motion for terminating sanctions was filed against Anderson. The hearing judge found that Khakshooy failed to keep Anderson informed as charged, with the exception of the filing of a civil case on Anderson's behalf.

[4a] Khakshooy asserts that he discussed the discovery requests with Anderson, who was unresponsive. We reject his argument based on the record and find that clear and convincing evidence establishes that Khakshooy did not inform Anderson about the February 2014 deposition, the discovery requests, the sanctions order, or the motion for terminating sanctions. Anderson testified that Khakshooy did not update him on these developments. The hearing judge found that Anderson's testimony was credible that he did not receive the letters Khakshooy presented at trial purportedly showing that he informed Anderson of specific developments.[10] We agree with the judge's culpability determination under count seven. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 643 [failure to contact client and inform of imminent critical development violates § 6068, subd. (m)].)

Regarding count six, OCTC alleges that Khakshooy, under the same facts as pleaded in count seven, also violated section 6106.[11] The hearing judge dismissed this charge with prejudice

8. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

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

10. We note the hearing judge found that letters to Anderson by Khakshooy, regarding the discovery requests, the sanctions order, and the motion for terminating sanctions, were "suspect and unreliable." We see no reason to alter her conclusions.

11. Section 6106 provides, "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise . . . constitutes a cause for disbarment or suspension."

by concluding that OCTC did not establish Khakshooy's culpability with clear and convincing evidence.

OCTC has the burden of proving culpability by clear and convincing evidence. (Rules Proc. of State Bar, rule 5.103.) On review, OCTC asserts the evidence establishes that Khakshooy knowingly, or with gross negligence, withheld facts that were material, relevant, and required to be disclosed. Specifically, OCTC argues that Khakshooy acted with moral turpitude because he failed in his fiduciary duty to Anderson by telling him that the expense of pursuing further litigation was too great, and he did this to hide from Anderson his failures to perform. He then led Anderson to settle on unfavorable terms, and thus committed an act of moral turpitude.

[4b] We decline to adopt OCTC's reasoning for at least two reasons. First, based on the record we have, we see insufficient evidence to conclude that the settlement terms were unfavorable to Anderson. Additionally, we are unable to see from our review of the evidence how OCTC's assertions can be supported to conclude that Khakshooy's failures to inform Anderson were done to cover up his mistakes, either intentionally or through gross negligence, and OCTC has failed to cite in its briefs where in the record such evidence exists. Thus, we agree with the hearing judge that OCTC has not established by clear and convincing evidence that Khakshooy committed an act of moral turpitude as charged in count six, and affirm the dismissal with prejudice. (*In the Matter of Kroff, supra*, 3 Cal. State Bar Ct. Rptr. at p. 84.)

F. Count Eight: Failure to Obey Court Order (§ 6103)

[5a] In count eight, OCTC alleges that Khakshooy failed to comply with the superior court's April 1, 2014 order compelling him to pay $645 in sanctions within 15 days, in violation of section 6103.[12] To discipline an attorney under section 6103, OCTC must prove two elements by clear and convincing evidence: (1) the attorney willfully disobeyed a court's order, and (2) the court order required the attorney to do or forbear an act in connection with or in the course of the attorney's profession which he ought in good faith to have done or not done. (*In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 603.) An attorney willfully violates section 6103 when, despite being aware of a final, binding court order, he or she knowingly takes no action in response to the order or chooses to violate it. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 787.)

[5b] The hearing judge found Khakshooy culpable under count eight as charged. Khakshooy argues on review that the evidence does not support his culpability under count eight because he was never served with a copy of the sanctions order or the corresponding minute order.[13] He states that the notice of ruling that Hillier served on him did not include a copy of the sanctions order or the minute order. We find these points to be unpersuasive in light of the evidence in the record. Khakshooy testified that he had known that Hillier intended to file a motion to compel, subsequently received that motion, and did not oppose it. Khakshooy had no basis for an opposition and did not appear in court, but rather testified that he "submitted on the tentative." He also testified that he knew the court would issue the order compelling discovery and he knew that a sanctions order would be entered. Further, he received the notice of ruling from Hillier, which clearly stated that the superior court had issued an order for $645 in sanctions that he and his client were required to pay within 15 days. If he had any doubts about the order or its particulars, he could

12. Section 6103 provides that, "A wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension."

13. We note that Khakshooy produced a letter at trial that he purportedly sent to Anderson. The letter is dated April 15, 2014, and provides, in pertinent part, "Please enclosed find the Court's Order pertaining the outstanding discovery responses that we must furnish Defendant in this matter, along with the Court's Sanction Order in the amount of $645.00."

have obtained a copy of it so that he would know exactly what it said. (See *Call v. State Bar* (1955) 45 Cal.2d 104, 110 [willful inattention to duty is grounds for discipline].)

Khakshooy also argues that OCTC did not establish that he knew that the sanctions order was a final and binding order. Citing the *Maloney and Virsik* case, he asserts that an attorney must know that the court order is final and binding in order to violate section 6103. Specifically, Khakshooy argues that, because his sanctions order was not appealable prior to final judgment pursuant to Code of Civil Procedure section 904.1, subdivision (b),[14] and, because he obtained from the opposing party a waiver of the sanction costs before any final judgment occurred, he is not culpable of violating section 6103.

We reject this argument as Khakshooy's reliance on the opposing party's waiver of the sanctions costs is misplaced. **[6]** Superior court orders are final and binding for disciplinary purposes once review is waived or exhausted in the courts of record. (*In the Matter of Collins* (Review Dept. 2018) 5 Cal. State Bar Ct. Rptr. 551, 559.) Khakshooy never sought to stay, vacate, modify, or challenge the April 1, 2014 discovery and sanctions order, and thus it remained in effect notwithstanding any agreement between the parties. (See *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 403 [obedience to court's order intrinsic to respect attorney must accord judicial system; attorney must follow court order or proffer formal explanation by motion or appeal as to why order cannot be obeyed].) Khakshooy's failure to take any action regarding the order rendered the order final and binding for attorney discipline purposes. Accordingly, we find him culpable under count eight.

IV. AGGRAVATION AND MITIGATION

Standard 1.5[15] requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Khakshooy to meet the same burden to prove mitigation.

A. Aggravation

1. Multiple Acts (Std. 1.5(b))

The hearing judge found Khakshooy's multiple violations to be an aggravating factor. We agree and assign moderate weight. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646–647 [three instances of misconduct considered multiple acts].)

2. Intentional Misconduct, Bad Faith, Dishonesty (Std. 1.5(d))

[7a] Standard 1.5(d) provides that aggravating circumstances may include intentional misconduct, bad faith, or dishonesty. The hearing judge agreed with OCTC's argument in its closing trial brief that Khakshooy engaged in additional acts of dishonesty and bad faith when he attempted to deceive the court and avoid trial by filing a motion to continue with doctors' notes recommending that he be off work for two weeks. At trial, Khakshooy admitted that he was planning on doing other legal work during those two weeks, even though he had argued that he was not well enough to participate in the disciplinary trial. The judge found that Khakshooy's conduct demonstrated bad faith, especially because he argued that he could not participate in trial only after his motion to abate was denied.

[7b] Khakshooy asserts that the evidence does not support a finding of bad faith

14. Code of Civil Procedure section 904.1, subdivision (b), states, "Sanction orders or judgments of five thousand dollars ($5,000) or less against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ."

15. Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. All further references to standards are to this source. The standards were revised effective January 25 and May 17, 2019. Because this request for review was submitted for ruling after these effective dates, we apply the revised version of the standards.

under standard 1.5(d). He argues that aggravating circumstances cannot be used as a sanction for trial conduct where the attorney does not have the opportunity to prepare a defense or otherwise respond to the allegation. We agree. The circumstances surrounding Khakshooy's conduct were not delved into at trial, and OCTC did not make a bad faith allegation until its closing trial brief, depriving Khakshooy of the chance to respond.

[7c] We find that Khakshooy's actions do not amount to bad faith because clear and convincing evidence has not established that he deliberately attempted to mislead the court. None of his actions interrupted the proceedings—the first day of trial proceeded without him and he attended on the other days. He presented doctors' notes along with the motion to continue and was candid in stating that he had taken some time off work due to illness, but still planned on attending a previously scheduled deposition. From these facts, the record is not clear that Khakshooy was attempting to evade culpability. Therefore, we do not assign aggravation for bad faith. (See *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 14 [no aggravation where insufficient evidence of bad faith].)

3. Significant Harm to Client and Administration of Justice (Std. 1.5 (j))

OCTC asserts that we should also find that Khakshooy's recommendation to Anderson to settle the matter—without disclosing material facts about his own misconduct—significantly harmed Anderson and the administration of justice. OCTC argues that Khakshooy did not tell Anderson prior to settlement about the motion for terminating sanctions and the impending hearing on the matter in order to hide his errors and misconduct for his own benefit. The hearing judge did not find aggravation for significant harm, and we agree. OCTC has not presented clear and convincing evidence that Anderson or the administration of justice was significantly harmed by Khakshooy's failure to inform Anderson of certain facts. Therefore, we do not assign aggravation under standard 1.5(j).

B. Mitigation

1. No Prior Record (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. (Std. 1.6(a).) The hearing judge gave significant mitigation credit for Khakshooy's 10 years of discipline-free practice. (*Hawes v. State Bar* (1990) 51 Cal. 3d 587, 596 [more than 10 years of discipline-free practice is significant mitigation].) Khakshooy was admitted to practice law in January 2003 and his misconduct began in late 2013.

[8] Khakshooy failed to give adequate attention to the Anderson matter from his failure to respond to discovery in November 2013 through July 2015 when he contacted RSI. Further, he did not pay Anderson his portion of the settlement funds until December 2016, two years after the case had settled, and did not pay RSI until May 2017 because of his delay in contacting RSI. While Khakshooy's misconduct dealt with a single client matter, this misconduct occurred over a significant period of time. Thus, we assign only moderate mitigation credit under standard 1.6(a) because his overall period of misconduct gives us concern that Khakshooy's misconduct may recur. (*Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [discipline-free record is most relevant where misconduct is aberrational and unlikely to recur].)

2. Candor and Cooperation with State Bar (Std. 1.6(e))

Khakshooy's Stipulation is a mitigating circumstance. (Std. 1.6(e) [spontaneous candor and cooperation with State Bar is mitigating].) The hearing judge assigned nominal weight because she determined that his motion to continue the trial was "misleading." As discussed above, we do not find enough evidence to conclude that his motion was misleading so we believe more than nominal weight should be assigned. However, Khakshooy did not admit culpability, and "more extensive weight in mitigation is accorded

those who, where appropriate, willingly admit their culpability as well as the facts." (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190.) Further, the Stipulation was not extensive and contained easy-to-prove facts. (*In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 318 [limited weight for non-extensive stipulation to easily proved facts].) Therefore, we assign limited weight in mitigation for this circumstance.

V. 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 Silverton* (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.)

[9a] In analyzing the applicable standards, 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].) Here, standard 2.2(a) is the most severe and applicable, providing for actual suspension of three months for failure to deposit client funds in a CTA and failure to pay client funds promptly. The hearing judge did not apply this standard because she did not find culpability, as we do, for failure to deposit client funds in a CTA (count two) or for failure to pay client funds promptly (count three).[16]

[10] Applying standard 2.2(a), the presumed sanction for Khakshooy's culpability under counts two and three is three months of actual suspension. We must also consider the net effect of the aggravating and mitigating circumstances to determine if a greater or lesser sanction than the one recommended in standard 2.2(a) is necessary to fulfill the primary purposes of discipline. (Std. 1.7.) The two mitigating circumstances here do not sufficiently outweigh the one aggravating circumstance in order to deviate from the three-month actual suspension recommended under standard 2.2(a). (See *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [clear reasons required for departure from standards].) Therefore, we conclude that a 90-day actual suspension is the appropriate discipline to protect the public, the courts, and the legal profession.

VI. RECOMMENDATION

We recommend that Bob Babak Khakshooy, State Bar No. 224044, be suspended from the practice of law for one year, that execution of that suspension be stayed, and that he be placed on probation for two years with the following conditions:

1. Khakshooy must be suspended from the practice of law for the first 90 days of his probation.

2. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Khakshooy 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

16. **[9b]** The hearing judge applied standard 2.12(a), which is also applicable, providing that disbarment or actual suspension is the presumed sanction for disobedience or violation of a court order related to an attorney's practice of law. While we agree with the judge's analysis under standard 2.12(a) and the relevant case law calling for an actual suspension of 30 days, we must analyze this matter under standard 2.2(a) as this standard provides for a minimum period greater than 30 days. We also note that standard 2.7(c) is applicable for performance violations based on the facts of Khakshooy's misconduct and provides for suspension or reproval.

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 his first quarterly report.

3. Khakshooy must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of his probation.

4. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Khakshooy 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. Khakshooy 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.

5. Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Khakshooy must schedule a meeting with his assigned probation case specialist 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, he may meet with the probation case specialist in person or by telephone. During the probation period, Khakshooy 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.

6. During Khakshooy's probation period, the State Bar Court retains jurisdiction over him to address issues concerning compliance with probation conditions. During this period, he 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 membership address, as provided above. Subject to the assertion of applicable privileges, he must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

7. Quarterly and Final Reports

a. Deadlines for Reports. Khakshooy 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, Khakshooy 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. Khakshooy 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. Khakshooy is directed to maintain proof of his 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 his actual suspension has ended, whichever is longer. He is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

8. Within one year after the effective date of the Supreme Court order imposing discipline in this matter, Khakshooy 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 Khakshooy 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, Khakshooy will nonetheless receive credit for such evidence toward his duty to comply with this condition.

9. 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 Khakshooy has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VII. MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Bob Babak Khakshooy be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) 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 Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).) If Khakshooy provides satisfactory evidence of the taking and passage of the MPRE 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 condition.

VIII. CALIFORNIA RULES OF COURT, RULE 9.20

We further recommend that Khakshooy be ordered to comply with the requirements of California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order imposing discipline in this matter.[17] Failure to do so may result in disbarment or suspension.

IX. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against a member who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

We concur:

PURCELL, P.J.
HONN, J.

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17. For purposes of compliance with rule 9.20(a), the operative date for identification of "clients being represented in pending matters" and others to be notified is the filing date of the Supreme Court order, not any later "effective" date of the order. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45.) Further, Respondent is required to file a rule 9.20(c) affidavit even if Respondent has no clients to notify on the date the Supreme Court filed 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).)

State Bar Court
Review Department

In the Matter of

PETER MILES HOFFMAN

Nos. 17-O-00833 (17-O-02657; 17-O-03006)

Filed April 8, 2020, modified June 19, 2020

SUMMARY

Respondent had two prior records of discipline, one of which was for practicing law while suspended by representing a party in an arbitration proceeding. In one of the earlier proceedings, respondent stipulated that this conduct constituted the unauthorized practice of law, and that he was unreasonable in believing otherwise. In this proceeding, respondent stipulated that he again represented a party in an arbitration while suspended, but argued this did not constitute the unauthorized practice of law.

The Review Department rejected this argument, holding that although civil statutes permit non-attorneys to represent parties in arbitration proceedings, that does not transform these actions into non-legal activities. Because respondent had stipulated in a prior disciplinary proceeding that it was not reasonable for him to believe representing a party in an arbitration did not constitute holding himself out as entitled to practice law, the Review Department concluded respondent was precluded from arguing to the contrary in the present matter. Because respondent was aware of his suspension, and had previously stipulated that the same conduct was grounds for discipline, respondent's unauthorized practice of law in this matter constituted intentional acts of moral turpitude, warranting respondent's disbarment.

COUNSEL FOR PARTIES

For State Bar of California: Alex James Hackert

For Respondent: Peter Miles Hoffman, in pro. per.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1a-d] **204.90 Substantive Issues in Disciplinary Matters Generally – Culpability – Other general substantive issues**
230.00 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6125
231.00 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6126

The definition of law practice is largely derived from case law, and includes representation of others in court proceedings, legal advice and counsel, and preparation of legal instruments and contracts by which legal rights are secured, regardless of whether a court proceeding is pending. Even when services may be performed by non-lawyers, they are not non-legal activities if a lawyer performs them. Moreover, lawyers acting in any capacity must conform to professional standards, including the prohibition against practicing law while suspended. Where respondent, while suspended from practice, made legal demands on opposing parties' counsel in arbitration proceedings, and briefed and advocated numerous legal issues, respondent was unquestionably engaged in law practice.

[2a, b] **194 Miscellaneous General Issues in State Bar Court Proceedings – Effect/ Applicability of Statutes Outside State Bar Act**
230.00 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6125
231.00 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6126

Code of Civil Procedure sections permitting persons not otherwise entitled to practice law in California to represent parties to certain types of arbitrations did not authorize suspended California attorney to practice law by representing party to arbitration. Statute permitting out-of-state attorneys in good standing to represent parties in arbitrations could not be construed to permit suspended California attorneys to practice law in violation of section 6126.

[3a-c] **151 Evidentiary Issues – Evidentiary Effect of Stipulations**

Where respondent stipulated in prior disciplinary proceeding that he was unreasonable in believing that representing party to arbitration did not constitute holding himself out as entitled to practice law, respondent was precluded from arguing in subsequent proceeding that such belief was reasonable. While Supreme Court has relieved attorneys of stipulations as to conclusions of law, and principles of res judicata and collateral estoppel did not require Review Department to give binding effect to stipulated conclusions of law in prior proceeding, respondent was bound by his factual stipulation that his belief was unreasonable.

[4] **159 Evidentiary Issues – Miscellaneous**
191 Miscellaneous General Issues – Effect of/Relationship to Other Proceedings
204.90 Substantive Issues in Disciplinary Matters Generally – Culpability – Other general substantive issues
510 Aggravation – Prior Record of Discipline
Prior discipline is considered in most cases only as aggravating circumstance in determining discipline in a later proceeding, but prior discipline may also be considered if it tends to prove a fact in issue in determining culpability.

[5] **151 Evidentiary Issues – Evidentiary Effect of Stipulations**
191 Miscellaneous General Issues – Effect of/Relationship to Other Proceedings
204.90 Substantive Issues in Disciplinary Matters Generally – Culpability – Other general substantive issues
Where respondent failed to withdraw from stipulation in prior disciplinary proceeding, or to timely request correction or modification of stipulation, and permitted stipulation's approval by State Bar Court and Supreme Court, respondent waived right to argue for first time in subsequent disciplinary proceeding that stipulation did not accurately reflect his agreement.

[6a-d] **192 Miscellaneous General Issues – Constitutional Issues – Due Process/ Procedural Rights**
221.19 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6106 – Found – Other factual basis
Where respondent had stipulated in earlier disciplinary proceeding that he was unreasonable in believing he could represent party in arbitration while suspended, respondent's subsequent practice of law in three arbitration matters while on notice of his suspension was an intentional act of moral turpitude, not merely grossly negligent. Finding of moral turpitude did not violate respondent's due process rights, because earlier stipulation put respondent on notice that continuing to appear for parties in arbitration while suspended could involve moral turpitude.

[7a, b] **510 Aggravation – Prior Record of Discipline**
Where respondent's prior record of discipline included stipulation admitting misconduct, and after stipulation was filed, respondent committed same type of misconduct in current matter, record showed respondent committed repeated acts in defiance of duty to comply with requirements of law license while suspended. Respondent's prior record of discipline thus had substantial weight in aggravation.

[8] **590 Aggravation – Indifference to Rectification/Atonement**
620 Aggravation – Lack of remorse/failure to appreciate seriousness
Where respondent continued to engage in UPL in multiple matters after stipulating to those offenses in prior disciplinary proceeding, and in current disciplinary proceeding, respondent denied culpability of that misconduct in his prior

proceeding despite his clear, written contrary admissions, respondent's lack of insight into wrongdoing constituted serious aggravating circumstance.

[9a-e] **801.45 – Application of Standards – General Issues – Deviation from standards – Found not to be justified**
806.10 Application of Standards – Part A (General Standards) – Standard 1.8(b) Disbarment After Two Priors – Applied
831.40 Application of Standards – Standard 2.11 (Moral Turpitude) – Applied- Disbarment – Coupled with other misconduct
831.50 Application of Standards – Standard 2.11 (Moral Turpitude) – Applied- Disbarment – Presence of other aggravation
911.10 Application of Standards – Standard 2.10 (Unauthorized Practice of Law) – (a) Practice while on disciplinary suspension – Applied – disbarment
Where respondent repeatedly practiced law while suspended, despite having stipulated to suspension for the same misconduct in earlier disciplinary proceeding, respondent's prior and current misconduct established respondent's unwillingness or inability to conform to ethical norms, and disbarment was necessary to prevent future misconduct. Where disbarment or actual suspension was presumed sanction for respondent's current misconduct (act of moral turpitude and practicing while suspended), and respondent had two or more prior records of discipline including actual suspension, record disclosed no reason to deviate from Standards calling for respondent's disbarment.

ADDITIONAL ANALYSIS

Culpability
Found
213.11 Section 6068(a)
230.01 Section 6125
231.01 Section 6126

Aggravation
Found
521 Multiple acts of misconduct

Mitigation
Found
735.10 Candor and cooperation with Bar

Discipline
1010 – Disbarment
2310 – Inactive Enrollment After Disbarment Recommendation

OPINION

STOVITZ, J.*

This is Peter Miles Hoffman's third disciplinary proceeding since 2011. The hearing judge found Hoffman culpable of identical ethical violations in 2017 in each of three legal matters—for the unauthorized practice of law (UPL) while suspended and for acts of moral turpitude arising from that UPL. Considering that Hoffman had been reproved in 2011 and suspended for six months in 2017, and determining that serious aggravating circumstances outweigh the one mitigating factor, the judge recommended disbarment as necessary to protect the public.

While stipulating to the facts of the three matters, Hoffman seeks review contending that he was entitled to practice law because California civil procedure allowed him to, and that his acts did not constitute moral turpitude. The Office of Chief Trial Counsel of the State Bar (OCTC) disagrees and supports the hearing judge's findings and disbarment recommendation.

On our independent review of the record, we uphold the hearing judge's overall decision and her recommendation. Before Hoffman committed any of the misconduct revealed by this record, he had stipulated in 2017, in his second disciplinary proceeding, that, inter alia, he did not have a reasonable belief that California civil procedure allowed him to represent parties in arbitrations while suspended from practice. Yet, in this proceeding, he contends that he did not so stipulate, contrary to the written record. Moreover, Hoffman's 2017 stipulation correctly reflects the ethical law governing attorneys. In order to protect the public, the courts, and the legal profession, we also recommend disbarment.

I. THE FACTUAL FINDINGS ARE UNDISPUTED

Shortly before the March 7, 2019 trial in this matter, Hoffman and OCTC stipulated to the basic facts of Hoffman's acts in each of the three UPL matters at issue. Hoffman's testimony, and the exhibits he agreed could be admitted in evidence, established that he had sent the electronic mail messages or taken the legal positions represented by those exhibits in the three separate matters, and that he had done so while suspended from the practice of law.

The stipulated facts and undisputed evidence led the hearing judge to make the following factual findings, which we summarize below. On our independent review of the record (Cal. Rules of Ct., rule 9.12), we adopt the hearing judge's findings. We start by noting that, during all key times in this record when Hoffman was found culpable of practicing law, he was indisputably under suspension from practice.[1]

A. The Paradise Film Arbitration

Hoffman was a vice-president of two film companies, collectively referred to in the record as MGN. They are affiliates of Paradise Film Company (Paradise), a corporation organized in the Russian Federation. In early 2017, a dispute was arbitrated in California between Paradise and IMF Sales Company (IMF Sales), a licensor of film distribution rights.

In the arbitration, Paradise was represented by counsel, Alexandra Krakovsky, licensed to practice law in California, and her acts are not before us in this proceeding. Hoffman acted as a non-attorney advisor for Paradise. Hoffman informed the arbitration tribunal and counsel for IMF Sales of his interim suspension.

* Retired Presiding Judge of the State Bar Court, serving as review judge pro tem by appointment of the California Supreme Court.

1. We suspended Hoffman interimly, effective September 28, 2015, after OCTC filed a certified copy of his conviction of federal felony crimes. (Bus. & Prof. Code, § 6102, subd. (a); Cal. Rules of Ct., rule 9.10(a).) Although Hoffman's conviction has not yet become final, his interim suspension has remained in effect since we imposed it. Effective July 23, 2017, in his second prior discipline case, the Supreme Court suspended Hoffman from practice for six months as final discipline for misconduct we discuss *post*.

Between February 17 and 28, 2017, Hoffman sent counsel for IMF Sales, Jeremiah Reynolds, a total of four email messages.[2] Collectively, these messages addressed Paradise's legal objections to discovery, the state of the evidence supporting an issue in the arbitration, that the hearing would be based on mixed questions of law and fact, the effect of applicable California law, issues of document production, the contract terms underlying the dispute, Paradise's position on a continuance of the arbitration, and the adequacy of IMF Sales's discovery responses.

B. The Comerica Bank Post-Arbitration Matter

Prior to April 2017, MGN had a film rights dispute with Comerica Bank or its affiliate or assignee. The matter was arbitrated and a final award was entered against MGN.

In February 2017, MGN filed a petition in Los Angeles County Superior Court to vacate the arbitration award. In April 2017, the opposing party filed a separate petition in Los Angeles County Superior Court to confirm the award.

Hoffman did not appear as an MGN representative before the arbitration tribunal or the Superior Court. At all times MGN was represented by counsel Krakovsky, who had represented Paradise in the Paradise Film arbitration.

However, between April 13 and 14, 2017, after each side to this Comerica Bank arbitration had filed post-arbitration Superior Court petitions referred to *ante*, Hoffman wrote two emails to opposing counsel, Gary Gans. Hoffman's April 13 email informed Gans that Hoffman: considered Gans's conduct sanctionable under California law for relying on the incorrect legal authority, considered Gans's conduct frivolous as it violated the "first to file" California rule, and made a demand to Gans to withdraw the petition to confirm the award.

The next day, Gans repeated to Hoffman an earlier, unanswered question about whether Hoffman was licensed to practice law in order to determine whether Gans could communicate with him. Hoffman replied the same day that he was an "authorized non-attorney agent" as he claimed that he had repeatedly told Gans. Hoffman then repeated his legal position on the dispute and the respective liability of the parties. He reiterated his position that Gans's petition to confirm the arbitration award was frivolous and that counsel Krakovsky would serve a motion for sanctions on Gans's client in due course.

Gans's reply to this email was that he assumed that Hoffman was not currently licensed to practice law in California and, therefore, communicating with opposing counsel about substantive legal matters constituted practicing law. Hoffman replied, characterizing Gans as an "idiot."

C. The United Care Network Arbitration

At all key times, Hoffman was an officer of United Care Network (UCN). Prior to his suspension in 2015, Kelly Bascom, a nurse practitioner engaged by UCN, had claimed that UCN violated state law by failing to pay her required overtime compensation and compensation for missed meal periods.

While in good standing in September 2015, Hoffman represented UCN by filing a Los Angeles County Superior Court action to compel arbitration. In May 2015, the Superior Court ordered arbitration of Bascom's claims and retained jurisdiction over the matter.

Hoffman continued to appear in the arbitration in 2015 and discussed substantive legal matters with opposing counsel before and after he was suspended from practice on September 28, 2015. As will be discussed *post*, Hoffman's 2015-

2. Hoffman's February 17, 2017 email was addressed jointly to opposing counsel Reynolds and to Krakovsky, who represented Paradise.

2016 post-suspension acts formed part of the basis for his second imposition of discipline and were founded on his 2017 written stipulation that he had, inter alia, held himself out as entitled to practice law while suspended and also committed acts of moral turpitude.[3]

Between May and November 2017, while suspended from practice, Hoffman resumed his active representation of UCN in the Bascom arbitration as a non-attorney representative. His acts found in the current matter included his May 9, 2017 email to opposing counsel and to a staff member of the arbitration organization. This message provided Hoffman's legal opinion of the arbitrator's jurisdiction and the merit of UCN's and opposing counsel's legal positions.

On September 22, 2017,[4] Hoffman submitted a pre-hearing memorandum to the arbitration tribunal. This discussed legal standards and principles applicable to the arbitration cited case law, provided other legal discussion, and argued the merits of UCN's case.

Three days later, Hoffman appeared at the arbitration hearing as an officer of UCN and as its non-attorney representative. During the hearing, Hoffman examined and cross-examined witnesses, objected repeatedly to evidence admissibility, cited to statutes and court decisions, and provided legal analysis, opinion, and argument on the issues before the arbitrator, including the doctrine of judicial notice and the reason a cross-claim should be precluded.

On about November 16, 2017, Hoffman filed a post-hearing memorandum in the arbitration. This document addressed the applicable legal standard, discussed legal doctrine, cited relevant court decisions, and argued the merits of UCN's case.

II. THE RECORD AND LAW SUPPORT THE HEARING JUDGE'S CONCLUSIONS THAT HOFFMAN PRACTICED LAW WHILE SUSPENDED AND COMMITTED ACTS OF MORAL TURPITUDE

A. The Procedural History of This Proceeding

On August 16, 2018, OCTC filed a Notice of Disciplinary Charges (NDC) alleging Hoffman's misconduct in each of the three matters discussed *ante*, and charging him with violating Business and Professions Code, section 6068 subdivision (a),[5] by his violations of the particular statutes prohibiting UPL. (*Id.*, §§ 6125-6126.) This NDC also charged Hoffman in each of those three matters with committing an act of moral turpitude, dishonesty, or corruption. (*Id.*, at § 6106.)

After trial, the hearing judge concluded that Hoffman was culpable of all the charged violations. Reviewing applicable statutory and decisional law, she determined that in each of the three matters, Hoffman's acts constituted UPL, notwithstanding that non-lawyers could represent parties to arbitrations; and he violated section 6126 by engaging in the practice of law while suspended. She also concluded that in each of the matters, Hoffman engaged in moral turpitude, either by intentional acts or by gross negligence.

On review, Hoffman disputes the hearing judge's culpability conclusions, essentially repeating the same arguments he made below. While not spe-

3. As we discuss *post*, Hoffman's 2015-2016 UPL and moral turpitude acts, which he admitted and which led to his 2017 discipline, were of the same type as his undisputed acts here and in the Paradise Film arbitration. The only procedural difference between the 2017 prior discipline record and this one is that, in the present matter, Hoffman has not stipulated to his culpability of violations of the State Bar Act for holding himself out as entitled to practice law while suspended and engaging in moral turpitude, as he had done in his 2017 disciplinary proceeding.

4. At this time and through the remainder of his activities in the UCN arbitration, Hoffman was under our 2015 interim suspension, as well as the six-month actual suspension ordered by the Supreme Court.

5. Unless noted otherwise, all references to sections are to those of the Business and Professions Code.

cifically disputing that the individual acts he performed involved the practice of law, he makes two essential claims as to the hearing judge's legal conclusions. First, citing Code of Civil Procedure, sections 1282.4, subdivision (h), and 1297.351,[6] he claims that he was immunized from lawyer discipline by validly acting as a non-attorney representative of a party in each of the arbitration matters at issue here. He distinguishes key authorities cited by the hearing judge in finding him culpable. Finally, he argues the evidence that he committed acts of moral turpitude was not clear and convincing; that he had a good faith belief that he could act as a non-lawyer representative in these arbitration matters; and the conclusion of moral turpitude deprived him of due process.

OCTC opposes Hoffman's claims, supporting the hearing judge's conclusions of law. It also claims that Hoffman's 2017 stipulated disposition has res judicata effect as to the UPL charges in the present proceeding, since Hoffman stipulated in 2017 that he committed the same form of UPL that he was later charged with in this proceeding.

On our independent review, we agree with the hearing judge's conclusions, except we find that Hoffman's acts of moral turpitude were willful. We address the hearing judge's conclusions, starting with the applicable law.

B. Hoffman's Acts in All Three Matters Constituted UPL and He Could Not Seek to Immunize his Practice of Law, While Suspended, by Designating Himself as a Non-Attorney Representative

Review of Hoffman's claims about the law show, collectively, that he is misinformed both as to the ethical duties of attorneys in this state and as to the facts not subject to dispute.

[1a] Although the Legislature has formulated the State Bar Act and limited exceptions to it as to the practice of law, the definition of law practice over time has been largely judicial. (E.g., *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 128–131; *People v. Merchants Protective Corp.* (1922) 189 Cal. 531, 535.) As pertinent here, that definition of law practice includes both representation of others in court proceedings as well as "legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured" without regard to whether a court proceeding is pending. (*Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 542–543.)

[1b] Hoffman unquestionably was engaged in law practice in each of the three matters, which are the subject of this proceeding, while he was suspended from practice. Collectively, he made legal demands on the opposing parties' counsel on behalf of his corporations; and he briefed and advocated a wide variety of legal issues, such as judicial notice, discovery and admissibility of evidence questions, procedures for pursuing relief from alleged frivolous litigation, the preclusion of cross-claims, and the legal effect of contract terms. He has never disputed that he had so acted.

[1c] Hoffman could not have transformed himself in 2017—or now—into a person never licensed to practice law merely based on his claim that the Legislature enacted laws allowing non-attorneys to represent persons in certain arbitrations. The Supreme Court has recognized that even if services may be performed by non-lawyers, if a lawyer performs them, they are not transformed into non-legal activities. (*Crawford v. State Bar* (1960) 54 Cal.2d 659, 668 [disbarred attorney's actions constituted law practice when conferring directly with clients, on his own, as to preparation

6. Code of Civil Procedure section 1282.4, subdivision (h), states that in arbitration arising under collective bargaining agreements governed by state or federal law, notwithstanding any law, including section 6125, a party may be represented in the proceedings regardless of whether that person is licensed to practice law. Code of Civil Procedure section 1297.351 provides that, in international arbitrations, a person may be represented by any person of their choice, who need not be licensed to practice law in California.

of deeds, probate matters, escrows, real estate ventures, mining claims, and dissolution of partnership while working as tax consultant in son's law office]; *In the Matter of Huang* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 296, 304 [in residential loan modification practice, attorney enabled non-lawyer staff to practice law by directly advising clients and negotiating loan modification terms and settlements with opposing lenders without attorney supervision].)

[1d] Moreover, Hoffman "must conform to the professional standards in whatever capacity he may be acting in a particular matter." (*Baron v. City of Los Angeles, supra,* 2 Cal.3d at p. 542, quoting *Libarian v. State Bar* (1943) 21 Cal.2d 862, 865.) One of those duties is the one charged in this proceeding, compliance with section 6126, subdivision (b), which prohibits practicing law or holding out as entitled to practice law, while, inter alia, suspended from law practice.

[2a] Neither of the civil procedure statutes which Hoffman relies on exempts suspended attorneys from compliance with section 6126. Code of Civil Procedure, section 1282.4, does allow arbitration parties to be represented by out-of-state attorneys, but imposes a number of prerequisites on them, including that any out-of-state attorney who seeks to represent a party in an arbitration must be in good standing in each jurisdiction admitted and may not be suspended or disbarred in any jurisdiction in which admitted. (Code Civ. Proc. § 1282.4, subd. (c)(4)-(5).)[7]

[2b] Hoffman's argument that he could represent parties to arbitrations while suspended, under statutes that disallow that representation by out-of-state suspended attorneys, would lead to the highly dubious, if not absurd, result that California's legislature intended to afford greater protection to parties in this state represented by out-of-state attorneys, than those represented by California-licensed attorneys. Hoffman provided no legislative intent evidence to support his view of the law, and we avoid a construction of these statutes that would lead to such a result. (E.g., *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616–617, quoting *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165–166.)

We hold that a key authority relied on by the hearing judge, *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, is persuasive as to Hoffman's status as a suspended attorney. Benninghoff was an attorney who resigned while charges were pending against him. He contended that, after resigning from State Bar membership, the State Bar could not assume jurisdiction over his law practice under section 6180, because he was not practicing law when representing parties in state administrative proceedings. The court decided that, whether or not non-lawyers could represent persons in California administrative procedures, Benninghoff could not do so, as he was subject to the consequences of section 6126, subdivision (b), as a resigned attorney. As noted *ante*, this section also applies, inter alia, to Hoffman, as a suspended licensee. Applying the authorities defining the practice of law, which we have cited *ante*, the court concluded that Benninghoff did practice law while resigned from law licensure. *(Benninghoff v. Superior Court, supra,* 136 Cal.App.4th at pp. 68–70.)

Hoffman seeks to distinguish *Benninghoff* on several grounds, but they are unavailing, either because section 6126, subdivision (b), does apply to suspended as well as resigned or disbarred attorneys, or the type of activities which Hoffman engaged in are clearly the practice of law, whether or not Hoffman acted as counsel of record. In that

7. Effective January 1, 2019, the same essential requirements were imposed on out-of-state attorneys seeking to represent parties in international arbitrations. (Id., § 1297.185, subd. (c).)

vein, we note that Hoffman's actions in the Comerica Bank matter occurred after the arbitration had concluded, and while the matter was pending in Superior Court.

C. Hoffman's 2017 Factual Stipulation, That He Had an Unreasonable Belief That He Was Exempted from the Reach of Section 6126, Subdivision (b), in UPL, Is Binding on Him in This Proceeding Concerning Later, but Similar Misconduct

[3a] Beyond the UPL authorities discussed *ante*, we have concluded that Hoffman's factual stipulation in his 2017 prior disciplinary proceeding should preclude his claim that he had a reasonable belief that he could practice law in arbitrations, although suspended.

[4] In most cases, an attorney's prior discipline is considered only as an aggravating circumstance to the degree of discipline to consider in a later proceeding (*see post*). But it may also be considered if it tends to prove a fact in issue in determining culpability. (Rules Proc. of State Bar, rule 5.106(D).) This is such a case.

[3b] In Hoffman's 2017 proceeding, he entered into a comprehensive stipulation to facts and conclusions of law, and an agreement to be suspended for six months. That document was introduced in evidence in the present record as Exhibit 1002, after the hearing judge tentatively determined that Hoffman was culpable. His 2017 stipulation admitted that between November 13, 2015 and March 1, 2016, in the same UCN arbitration matter involved in this proceeding, and while suspended from practice, Hoffman, inter alia, represented a party to the arbitration, communicated with opposing counsel and the arbitration tribunal regarding substantive legal matters in that arbitration, and submitted an Opposition of Claimant to the arbitration tribunal.

We set forth the salient factual portion of this 2017 Stipulation, found in the Attachment to the pre-printed State Bar Court form for this stipulated disposition:

> "FACTS:
> ***
> 4. At the time he was suspended, [Hoffman] was representing a party in *United Care Network LLC v. Baskom* [*sic*] . . ." [Hoffman] was of the unreasonable belief that his representation did not constitute holding himself out as entitled to practice law, as Code of Civil Procedure section 1282.4(h) allows non-attorneys to represent a party in such matters as does [American Arbitration Association] Rule 26. [Hoffman] now admits he held himself out to practice law when he was not entitled to do so, after his suspension took effect, by the following conduct:
>
> (a) Between November 4, 2015 and November 12, 2015, [Hoffman] communicated with opposing counsel via email regarding substantive legal matters in [the UCN matter].
>
> (b) Between November 4, 2015 and March 1, 2016, [Hoffman] communicated with the [American Arbitration Association] tribunal regarding substantive legal matters in [the UCN matter].
>
> On November 20, 2015, [Hoffman] submitted an Opposition of Claimant to [Hoffman's] Motion for Judgment on the Pleadings to the [American Arbitration Association] tribunal in [the UCN matter] while under suspension."
> ***

[3c] The Supreme Court has bound attorneys to their factual stipulations as part of an agreed stipulated set of facts, conclusions, and disposition, even if the Court is considering imposing greater discipline. However, in that situation, the Supreme Court will only relieve an attorney of the admitted conclusions of law. (*Giovanazzi v. State Bar* (1980) 28 Cal.3d 466, 470–471; *Inniss v. State Bar* (1978) 20 Cal.3d 552, 555.) Applying this doctrine, we are fully justified in holding Hoffman to his *factual* stipulation in 2017 that he was of the unreasonable belief that civil procedure statutes allowing non-lawyers to represent parties to arbitration immunized him from discipline. However, we deem it unwarranted to also follow OCTC's position that principles of res judicata and collateral

estoppel compel us to give binding effect in this proceeding to the 2017 stipulated *conclusions of law* that Hoffman had practiced law while suspended and had engaged in acts of moral turpitude.

Rather than be governed or guided in this proceeding by his 2017 factual stipulation in his prior proceeding, Hoffman has advanced two points on review: first, that the reach of this stipulation did not extend to UPL merely by representing a party to an arbitration; rather, the stipulation was focused on his failure to comply with his duties under rule 9.20, California Rules of Court; and second, that the actual language of the stipulation did not contain his agreed-upon language expressed during the settlement negotiation process in his prior proceeding. Neither of Hoffman's points has merit.

As to Hoffman's first point, his 2017 stipulation concerning the UCN arbitration acts in 2015 and 2016 expressly and without limitation admits on its face that he had an unreasonable belief that he could represent a party to an arbitration while suspended.

[5] As to his second point, Hoffman had an opportunity to timely request the correction or modification of the 2017 stipulation, or withdraw from it and proceed to trial, if he deemed it an inaccurate reflection of agreement in order to dispose of the matter. (Rules Proc. of State Bar, rule 5.58(F).) He presented no evidence that he had timely done so. Rather, he let the stipulation which bore his signature be approved both by a State Bar Court hearing judge and by the Supreme Court in 2017 when imposing the agreed discipline. Only at trial of *this* matter, did he raise this argument for the first time. Under these circumstances, Hoffman has waived any of the timely opportunities he had to remedy any disagreement he had with the form of the stipulation. (See *In the Matter of Freydl* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 349, 357 [accused attorney's failure to timely raise and seek resolution of a procedural issue waived that issue].)

D. Hoffman's Practice of Law While under Suspension also Involved Intentional Acts of Moral Turpitude

The hearing judge had two reasons for determining that Hoffman committed acts of moral turpitude. First, Hoffman was aware of this court's order of his interim suspension from law practice when it became effective in September 2015, and of the Supreme Court's order of a six-month disciplinary suspension, effective July 23, 2017. Second, by Hoffman resolving his second disciplinary proceeding via a stipulated disposition, he admitted that he had improperly practiced law and engaged in acts of moral turpitude in the pre-2017 arbitration phase of the UCN arbitration.

[6a] Hoffman claims that the record lacks sufficient evidence of moral turpitude acts on his part. He asserts that his acts of good faith in a disputed legal area as to accepted lay representation of parties to certain arbitrations should overcome the hearing judge's conclusions of moral turpitude. OCTC disagrees, pointing out the hearing judge's findings that Hoffman stipulated in his 2017 second disciplinary proceeding in which he agreed to be disciplined for the same type of misconduct in the UCN arbitration. We agree with OCTC and uphold the hearing judge's moral turpitude conclusion, but find that Hoffman's conduct shows intentional acts of moral turpitude, rather than, as the hearing judge concluded, moral turpitude acts made *either* intentionally or through gross neglect.

[6b] As we discussed *ante*, Hoffman's 2017 stipulation shows he had an "unreasonable belief" that he could practice law as a non-attorney representative of UCN. In that stipulation, he agreed that he willfully violated section 6068, subdivision (a), by violating sections 6125 and 6126, and that he committed moral turpitude barred by section 6106.

[6c] Thus, by his own admissions in a recent prior disciplinary proceeding, Hoffman was clearly

on notice that his further acts of this same type of misconduct were disciplinable and contrary to the good faith belief that he urges in the present proceeding. On occasion, we have found that a suspended attorney who violated sections 6125 and 6126 also committed acts of moral turpitude. (*In the Matter of Burke* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 448, 459 [suspended attorney appeared at deposition after learning of his suspension]; *In the Matter of Mason* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 639, 641–642 [attorney appeared in court knowing of his suspension; willful misconduct found].) Hoffman had prior knowledge not only of his 2015 interim suspension, but in February 2017, that his conduct of appearing for parties in arbitration while suspended was grounds for discipline. Thus, we are justified in concluding that his acts of moral turpitude in the three matters before us were intentional.

[6d] Hoffman's due process claims that he was not fairly on notice from 2017 that his conduct could involve moral turpitude and that his 2017 prior discipline was effectively reopened to now find him culpable of moral turpitude, are without merit. They are incorrect factually and belied by his 2017 voluntary stipulation.

III. SIGNIFICANT AGGRAVATION OUTWEIGHS MITIGATION

A. Mitigating Circumstances

At trial, Hoffman presented evidence of only one mitigating circumstance. He showed cooperation with the State Bar by stipulating with OCTC before trial as to all of the essential facts and the admissibility of documentary evidence. (Std. 1.6(e).)[8] We agree with the hearing judge's assessment that Hoffman's cooperation is worthy of moderate weight in mitigation.

B. Aggravating Circumstances

OCTC presented evidence of three aggravating circumstances, each found by the hearing judge. **[7a]** We agree with the judge's view that Hoffman's prior record of discipline is entitled to significant weight in aggravation. (Std. 1.5(a).)

Hoffman was privately reproved in 2011. In 2017, he was suspended from practice for one year, stayed, on conditions of one year of probation and an actual suspension of six months. Both priors arose from dispositions agreed to by Hoffman's stipulation as to his culpability.

Hoffman's private reproval was based on four litigation steps he took in 2006 and 2007, in California and federal courts, after receiving a judgment arising from an arbitration award. Hoffman stipulated that he willfully violated section 6068, subdivision (c) [maintaining actions or proceedings not legal or just], by filing a new state action after the first had been removed to federal court; by seeking remand of an action that had been removed to federal court;[9] by filing a third state court action against the same defendant earlier sued, alleging deceit;[10] and, finally, by appealing the third action after the sustained demurrer.[11] Hoffman stipulated in aggravation that his misconduct significantly harmed the administration of justice. In mitigation, Hoffman had no prior discipline, was candid and cooperative during the disciplinary proceedings, and established good character.

Hoffman's 2017 suspension was based on his stipulated acts between October and November 2015. He admitted that, in two matters, he failed to notify all required of his suspension as required by rule 9.20(a), California Rules of Court. He agreed that in the two matters, he committed moral turpitude by being grossly negligent in not knowing

8. All references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

9. In denying the motion to remand, the federal court concluded that Hoffman's state court complaint was frivolous and intended to harass the defendants.

10. The California Superior Court sustained the opposing party's demurrer to Hoffman's third action without leave to amend, based on binding, previous determination of the issue.

11. The Court of Appeal affirmed the ultimate dismissal of the third action, finding it frivolous.

that his rule 9.20(a) compliance document falsely stated his compliance with rule 9.20.

[7b] We find, as we discussed *ante*, that Hoffman's prior suspension was also based on his admitted UPL violations and moral turpitude in the same UCN arbitration matter underlying the current matter, but arising between late November 2015, and March 2016, more than a year before he engaged in the acts found in the current proceeding. Further, our analysis of the record of Hoffman's prior discipline shows that he and OCTC had filed their stipulated disposition with the State Bar Court on February 6, 2017, prior to any misconduct in any of the three current matters in this third proceeding.

[7c] We agree with the hearing judge that Hoffman's priors have substantial weight in aggravation, especially because they showed Hoffman's repeated acts in defiance of his duty to comply with the requirements of his law license while suspended.

We also agree with the hearing judge's assessment of significant aggravation by Hoffman's engaging in multiple acts of UPL and moral turpitude in each of three matters in the current proceeding. (Std. 1.5(b); *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646–647 [three instances of misconduct considered multiple acts].)

[8] Finally, we uphold the hearing judge's conclusion that Hoffman lacks insight into his wrongdoing. (Std. 1.5(k).) Not only did he continue to engage in UPL in multiple matters in this record after stipulating to those offenses in his second disciplinary proceeding, but he has also taken the position at trial, and before us, that he was not culpable of that misconduct in his prior proceeding, despite his clear, written admissions to the contrary.[12] This serious aggravating circumstance portends poorly for Hoffman's adherence to professional standards in the future.

IV. DISBARMENT IS THE APPROPRIATE DISCIPLINE

Our purpose in recommending attorney discipline is not punishment, but rather protection of the public, the courts, and the legal profession; preservation of public confidence in the profession; and maintenance of high professional standards for attorneys. (Std. 1.1.) Our disciplinary analysis begins with these standards. While they are guidelines for discipline and are not mandatory, we give them great weight to promote consistency. (*In re Silverton* (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.) We also look to comparable case law for guidance. (*See Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.)

In considering the applicable standards, we first determine which standard specifies the most severe sanction for the at-issue misconduct. (Std. 1.7(a) [most severe sanction shall be imposed where multiple sanctions apply].) **[9a]** Here, both standard 2.11, which addresses an act of moral turpitude, and standard 2.10(a), which addresses UPL while on suspension from practice, provide that disbarment or actual suspension is the presumed sanction.

[9b] Given Hoffman's disciplinary history, we also look to standard 1.8(b), which states that disbarment is appropriate where an attorney has two or more prior records of discipline if: (1) an actual suspension was ordered in any prior disciplinary matter; (2) the prior and current disciplinary matters demonstrate a pattern of misconduct; or (3) the prior and current disciplinary matters demonstrate the attorney's unwillingness or inability to conform to ethical responsibilities. Hoffman's case meets the first and third requirements: he previously received a private reproval and a six-month actual suspension; and, like the hearing judge, we find that Hoffman repea-

12. Although the hearing judge did not expressly quantify the weight of this aggravating circumstance, it is apparent from her discussion of it that she considered it seriously aggravating, as do we.

tedly failed to comply with his ethical obligations despite having stipulated to suspension in his second disciplinary proceeding for the very type of misconduct which he later committed in the same legal matter—engaging in law practice while suspended. As such, his prior and current misconduct establish his unwillingness or inability to conform to ethical norms. Moreover, the two specified exceptions to standard 1.8(b) do not apply here. Hoffman's present misconduct did not occur at the same time as his prior misconduct,[13] and his limited mitigation for cooperating in the third disciplinary proceeding is neither compelling nor does it predominate over the significant aggravation for two prior discipline records, multiple acts of wrongdoing, and his utter lack of insight into his wrongdoing.

[9c] We next consider whether any reason exists to depart from the discipline called for by standard 1.8(b). We acknowledge that disbarment is not mandatory as a third discipline. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506–507 [disbarment is not mandatory in every case of two or more prior disciplines].) However, if we deviate from recommending disbarment, we must articulate clear reasons for doing so. (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons for departure from standards].) Hoffman has not offered a cogent reason for us to depart from applying standard 1.8(b), and we cannot articulate any.

[9d] Hoffman's two prior disciplines, taken with the present record, show that he has been unable or unwilling to adhere to a variety of duties surrounding his law license: from avoiding frivolous and burdensome litigation tactics, for which he was reproved, to failing to comply properly with the duties of a suspended attorney. Having stipulated in his second disciplinary proceeding that he had engaged in UPL while suspended, he repeated that misconduct in the very same matter by later acts. He also repeated it in two other legal matters. Before both the hearing judge and on review, he has failed to acknowledge that he had, in 2017, stipulated to his UPL practice misconduct and that it constituted moral turpitude.

[9e] We must conclude from this record that further probation and suspension would be inadequate to prevent Hoffman from committing future misconduct that would endanger the public, clients, and courts. (*Barnum v. State Bar* (1990) 52 Cal.3d 104, 112–113 [disbarment imposed where attorney repeatedly failed to comply with probation conditions since further probation unlikely to prevent future misconduct].) The standards and decisional law support our conclusion that the public and the courts are best protected if Hoffman is disbarred.[14]

V. RECOMMENDATION

We therefore recommend that Peter Miles Hoffman be disbarred and that his name be stricken from the roll of attorneys licensed to practice in this state.

We also recommend that he comply with the provisions of rule 9.20 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court's order in this matter.

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

13. All of his present misconduct occurred after he and OCTC had stipulated to being suspended for the very same type of misconduct he later committed in the present record. (See *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602 [rationale for considering aggravating impact of prior discipline includes recidivist attorney's inability to conform conduct to ethical norms, so appropriate to consider whether current misconduct is contemporaneous with misconduct in prior case].)

14. E.g., *In the Matter of Carver* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 427 [disbarment where attorney with two prior disciplines committed act of moral turpitude and significant aggravation outweighed limited mitigation]; *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63 [disbarment where attorney with two prior disciplines was unable to conform conduct to ethical norms with multiple aggravating factors and no mitigation].

VI. ORDER OF INACTIVE ENROLLMENT

Because the hearing judge recommended disbarment, she properly ordered Hoffman to be involuntarily enrolled as an inactive member of the State Bar, as required by section 6007, subdivision (c)(4). The hearing judge's order became effective on June 8, 2019, and Hoffman has been on involuntary inactive enrollment since that time. He will remain on involuntary inactive enrollment pending the final disposition of this proceeding.

We concur:

PURCELL, P.J.
MCGILL, J.

State Bar Court
Review Department

In the Matter of

DEAN EDWARD SMART

No. 17-C-03687

Filed April 10, 2020, modified May 22, 2020

SUMMARY

Respondent had a history of assaultive behavior and alcohol dependence. While staying at his brother's home, respondent called a massage service while he was severely intoxicated. When the woman from the massage service arrived, she went upstairs to dance for respondent while her bodyguard remained outside. Respondent pinned the woman to the bed with his naked body and would not let her leave, so she screamed for her bodyguard. A violent fight ensued between respondent and the bodyguard. After the bodyguard got free, respondent fired his brother's gun, supposedly to frighten the woman and her bodyguard. The bullet went through a neighbor's garage door and lodged in the garage. Respondent pleaded guilty to felony charges of assault with force likely to produce great bodily injury and discharging a firearm with gross negligence. A hearing judge found that the facts and circumstances surrounding the conviction involved moral turpitude, and recommended disbarment.

The Review Department affirmed the disbarment recommendation, holding that the facts and circumstances surrounding the convictions involved moral turpitude, and the mitigating circumstances were not compelling. Thus, there was no reason to deviate from the applicable former disciplinary standard, under which disbarment was the presumed sanction for felony convictions involving moral turpitude.

COUNSEL FOR PARTIES

For State Bar of California: Kimberly Gay Anderson

For Respondent: Ashod Mooradian

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1a-d] **1513.10 Substantive Issues in Conviction Proceedings – Nature of Underlying Conviction – Violent Crimes – Homicide, Assault, Battery, and Related Crimes**
1519 Substantive Issues in Conviction Proceedings – Nature of Underlying Conviction – Other Crimes
1523 Substantive Issues in Conviction Proceedings – Moral Turpitude – Found Based on Facts and Circumstances
1528 Substantive Issues in Conviction Proceedings – Moral Turpitude – Definition

Moral turpitude consists of deficiency in any character trait necessary for law practice, such that knowledge of attorney's conduct would likely undermine public confidence in profession. Where respondent frightened woman from massage service by pinning her to bed while naked on top of her and refusing to let her leave; got into violent altercation with woman's bodyguard; and gratuitously fired gun in residential neighborhood when he could not honestly have believed victims posed imminent danger, respondent exhibited contempt for law and disregard of safety of others. Accordingly, facts and circumstances surrounding respondent's felony convictions of assault with force likely to produce great bodily injury and discharging firearm with gross negligence demonstrated moral turpitude.

[2a, b] **148 Evidentiary Issues – Witnesses**
165 Standards of Proof/Standards of Review – Adequacy of Hearing Department Decision
1691 Miscellaneous Issues in Conviction Cases – Admissibility and/or Effect of Record in Criminal Proceeding
1699 Miscellaneous Issues in Conviction Cases – Other Miscellaneous Issues in Conviction Cases

Hearing judge is in better position to assess nature and quality of testimony. Hearing judge's findings that respondent's testimony lacked credibility, and that victim's statements to police were credible, was entitled to great weight. Review Department would not contradict hearing judge's credibility conclusions where record lacked sufficient evidence to do so.

[3] **142.10 Evidentiary Issues – Hearsay – Admissibility (rule 5.104(d))**
142.20 Evidentiary Issues – Hearsay – Insufficiency to Support Finding
1691 Miscellaneous Issues in Conviction Cases – Admissibility and/or Effect of Record in Criminal Proceeding

Hearsay evidence is admissible in State Bar Court proceedings, but is not sufficient in itself to support finding if admitted over timely objection made on grounds valid in civil actions. Where police reports containing victim's hearsay statements were admitted into evidence by stipulation, without objection or limitation by respondent, hearing judge properly relied on victim's statements. Although hearing judge sustained respondent's counsel's

objections at trial to questions that would have elicited victim's hearsay statements from investigator, those objections did not preclude reliance on victim's statements in police report admitted without objection.

[4a, b] **191 Miscellaneous General Issues – Effect of/Relationship to Other Proceedings**
1513.10 Substantive Issues in Conviction Proceedings – Nature of Underlying Conviction – Violent Crimes – Homicide, Assault, Battery, and Related Crimes
1691 Miscellaneous Issues in Conviction Cases – Admissibility and/or Effect of Record in Criminal Proceeding

Where respondent pled guilty in criminal proceeding to willfully and unlawfully committing assault, Review Department declined to consider respondent's belated self-defense claim because it would negate elements of crime to which he pled guilty, and factual basis for plea supported hearing judge's finding that respondent's self-defense claim lacked credibility.

[5a-c] **162.11 Standards of Proof/Standards of Review – Quantum of Proof – State Bar's Burden – Clear and convincing standard**
164 Standards of Proof/Standards of Review – Proof of Intent
1527 Substantive Issues in Conviction Proceedings – Moral Turpitude – No Moral Turpitude

Where respondent made statements to brother, 911 operator, and deputy sheriff while intoxicated and with head injury, and generally vague statements were made while in heat of moment and while engaged in mutual combat where both parties received injuries, even if statements were not wholly accurate, without clear evidence of an intent to mislead, evidence did not establish that respondent made deliberate misrepresentations so as to satisfy finding of moral turpitude by clear and convincing standard of proof.

[6a, b] **595.90 Aggravation – Indifference to rectification/atonement – Declined to find – Other reason**
625.20 Aggravation – Lack of remorse – Declined to find – Failure of proof

Attorneys who fail to accept responsibility for their actions and instead seek to shift responsibility to others demonstrate indifference to misconduct and lack of remorse. However, where respondent's testimony at disciplinary trial unequivocally acknowledged his wrongdoing and took full responsibility, admitted his alcoholism, and showed he had taken concrete steps toward recovery, Review Department declined to find indifference to rectification based on respondent's initial refusal, years earlier, to pay for repair of property damage caused by misconduct.

[7a, b] **710.35 Mitigation – Long practice with no prior discipline record – Found but discounted or not relied on – Present misconduct too serious**

710.36 Mitigation – Long practice with no prior discipline record – Found but discounted or not relied on – Present misconduct likely to recur

Where misconduct is serious, prior record of discipline-free practice is most relevant for mitigation when misconduct was aberrational. Where respondent had decades-long history of alcohol abuse and multiple assaults, and had not shown that alcohol abuse problem underlying his assault conviction was resolved, Review Department was unable to find that misconduct was unlikely to recur, and gave only some weight to respondent's 27-year record of discipline-free practice.

[8a, b] **725.56 Mitigation – Emotional/physical disability/illness – Declined to find – Inadequate showing of rehabilitation**

Extreme emotional difficulties or physical or mental disabilities may be mitigating factor under Standard 1.6(d) if (1) attorney suffered from them at time of misconduct, (2) expert testimony establishes that they were directly responsible for misconduct, and (3) they no longer pose risk that attorney will commit future misconduct. Where respondent had continuously abused alcohol for more than 30 years and had only maintained sobriety for six-month period before trial, record did not clearly establish that respondent's alcoholism and other disorders no longer posed risk of future misconduct, despite expert testimony that respondent's emotional condition was directly responsible for violent behavior and that respondent no longer posed risk of future misconduct unless sobriety not maintained. Accordingly, respondent was not entitled to mitigation for extreme emotional difficulties.

[9] **735.10 Mitigation – Candor and cooperation with Bar - Found**

Where respondent cooperated with State Bar by waiving finality of criminal conviction and stipulating to facts and admission of documents, several of which were evidentiary basis of moral turpitude finding, respondent was entitled to substantial mitigation for cooperation with State Bar under Standard 1.6(e).

[10a-c] **801.45 General Issues re Application of Standards – Deviation from standards – Found not to be justified**

1552.10 Application of Standards to Discipline Based on Criminal Conviction – Standard 2.15(b) – Applied – Disbarment

Prior to July 1, 2019, under former standard 2.15(b), disbarment was presumed sanction for felony conviction in which surrounding facts and circumstances involved moral turpitude, unless most compelling mitigating circumstances clearly predominated. Where respondent was convicted of felony assault and grossly negligent discharge of firearm, and moral turpitude was found, disbarment was warranted despite respondent's showing of good character, cooperation with State Bar, and discipline-free career, as those factors were not most compelling in light of seriousness of criminal misconduct. Moreover, respondent's rehabilitation from alcoholism was in early phase, and respondent had not presented persuasive evidence of being on path to full sobriety and full understanding of

extent of alcohol problem. Accordingly, discipline less than disbarment would fail to protect public and courts, and would undermine confidence in the legal profession.

[11] **801.13 General Issues re Application of Standards – Effective date/retroactive application of 2019 Standards**
1552.10 Application of Standards to Discipline Based on Criminal Conviction – Standard 2.15(b) – Applied – Disbarment
1699 Miscellaneous Issues in Conviction Cases – Other Miscellaneous Issues in Conviction Cases
Where disciplinary standard in effect at time of respondent's misconduct made disbarment presumed discipline for felony convictions involving moral turpitude in surrounding facts and circumstances, that version of standard applied to respondent's case, rather than later version adopted to reflect non-retroactive statutory change requiring summary disbarment.

ADDITIONAL ANALYSIS

Mitigation

Found

740.10 Good character references

Discipline

1610 Disbarment
2310 Inactive Enrollment After Disbarment Recommendation

Other

1541.10 Interim suspension after felony convictions – Ordered – California or federal felony

OPINION

MCGILL, J.

On November 29, 2017, Dean Edward Smart pled guilty in Orange County Superior Court to felony violations of Penal Code section 245, subdivision (a)(4) (assault with force likely to produce great bodily injury), and Penal Code section 246.3, subdivision (a) (discharging firearm with gross negligence). After his convictions were transmitted to us, we placed him on interim suspension[1] and referred the case to the Hearing Department to determine if the facts and circumstances surrounding the convictions involved moral turpitude or other misconduct warranting discipline.

The hearing judge determined that the facts and circumstances surrounding Smart's convictions involved moral turpitude and, finding no compelling mitigation, recommended disbarment. Smart appeals. He argues that the facts and circumstances surrounding his crimes did not involve moral turpitude and his mitigating circumstances are compelling. He also requests that we reverse the judge's findings that he lacks insight into his conduct and that his testimony was not credible, along with her reliance on hearsay statements contained in police reports that were admitted into evidence. He contends that an 18-month actual suspension would be sufficient. The Office of Chief Trial Counsel of the State Bar (OCTC) requests that we affirm the disbarment recommendation.

Upon our independent review (Cal. Rules of Court, rule 9.12), we agree with the hearing judge that the circumstances surrounding Smart's convictions involve moral turpitude. While we reach different conclusions than the judge did on some of her aggravation and mitigation findings, we see no reason to disturb her credibility findings or her reliance on the hearsay statements contained in the admitted police reports. Smart has failed to establish that his actions did not amount to moral turpitude or that his mitigating circumstances are compelling, and we can discern no reason from this record to deviate from the presumptive discipline of disbarment under standard 2.15.[2] Accordingly, we affirm the disbarment recommendation.

I. FACTUAL BACKGROUND[3]

Smart was admitted to the practice of law in California on December 14, 1987, and he has been continuously licensed to practice since that time. In 2013, he moved from California to Texas. Although a Texas resident, he maintained a law office in Mission Viejo, California. From 2013 to 2015, when traveling to California to practice law, he stayed with his brother, John Smart,[4] at his brother's home in Lake Forest, California.

A. Smart's Ongoing Problems with Alcoholism Leading up to Incident

For several years prior to the events that led directly to this disciplinary proceeding, Smart suffered from alcoholism and had engaged in multiple assaults.[5] His psychotherapist, Mel Glass, Ph.D., testified that Smart has an alcohol dependence and had been drinking heavily since 1987. He has been a patient of Dr. Glass since 2012 as a result of court-ordered psychotherapy after the 2011 assault charge. Dr. Glass diagnosed Smart with major depressive disorder, post-

1. Smart's interim suspension began on February 26, 2018, ended on March 15, and then began again on May 1. The suspension was lifted from March 16 to April 30 to allow Smart to try a case that had previously been set for trial.

2. All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

3. The facts are based on the parties' pretrial written stipulation, trial testimony, documentary evidence, and the hearing judge's factual findings, which are entitled to great weight. (Rules of Procedure of the State Bar, rule 5.155(A).) All further references to rules are to the Rules of Procedure of the State Bar unless otherwise noted.)

4. Further references to John Smart are to his first name only to differentiate him from his brother; no disrespect is intended.

5. Smart's medical records establish that he was charged with assault with a deadly weapon after he threatened to kill a man who rang his doorbell on Christmas Eve in 2011; he "groped" a woman on her buttocks in 2012; and a SWAT team was called to Smart's residence after he drew a gun on a tow-truck operator in 2013.

traumatic stress disorder, generalized anxiety, and an alcohol use disorder. Dr. Glass further testified that Smart initially underwent therapy on a weekly basis, which increased to twice a week beginning eight months prior to Smart's disciplinary trial. At the disciplinary trial, Smart admitted that he is an alcoholic and that, while being under the influence of alcohol, he has "made the worst judgments I've ever made in my life."

B. Smart Commits Assault and Discharges Firearm with Gross Negligence While Impaired

In January 2015, Smart traveled to California to try a case and stayed with John. On the night of January 16, he drank approximately 14-21 glasses of wine (around four bottles) between 5:30 p.m. and midnight. At some point after 11:00 p.m., he called a massage service that he used about every two to three weeks. That night, he secured the services of Sherri Kench.

Upon arriving at the Lake Forest residence with her driver and security guard, Joshua Reagan,[6] Kench was greeted at the front door by Smart, whom she later described to police as not sober. Smart advised Kench to be quiet since John was sleeping. She was concerned about Smart's inebriated state and the fact that an unknown third person was in the residence, but she followed him to an upstairs bedroom where he handed her $220 in cash. Kench then took the money downstairs and gave it to Reagan who was waiting outside by the front door. She deliberately left the front door unlocked before returning upstairs to Smart's bedroom where she intended to dance for him.

What happened next is sharply disputed. According to Kench's and Reagan's statements to the police, Smart undressed and wanted sex. She refused and explained that she was there only to dance for him. Smart then grabbed her, threw her on the bed, and got on top of her. Fearing sexual assault, she screamed out to Reagan for help. Hearing her screams, Reagan began pounding on the front door. When Kench continued to scream, Reagan pounded on the front door again. Smart then ran downstairs naked, opened the front door, and attacked Reagan, yelling that he was going to kill him. A violent fight ensued.

At trial, Smart denied that he asked for sex or touched Kench. According to Smart, he said something like, "You're not the lady in the picture" to Kench, which he says offended her. She then told Smart that she wanted to leave. He replied, "Fine, but give me my money back." Kench then told him she would text her driver saying that he was assaulting her. Smart claims that he then feared someone would break into the house in response to her text, so he ran down the stairs toward the front door. When Smart was about six feet from the door, Reagan came charging in, spraying him with pepper spray, and running toward the bottom of the stairs. According to Smart, he tackled Reagan because he believed that he and his brother were in danger.

Kench viewed the fight from the upstairs landing where she was joined by John, who had been awakened by Smart's yelling that Kench and Reagan were going to rob him. Kench told John they were not there to rob anyone, Reagan was her security, and they wanted to leave. She described John's look as dumbfounded. During the altercation, Smart, a third-degree black belt in martial arts, placed Reagan in a "body-triangle," immobilizing him. He also held Reagan in a chokehold that caused him to go in and out of consciousness. While Reagan was struggling to breathe, Smart attempted to gouge out one of Reagan's eyes. Smart told John, "This guy is going to kill me," and instructed him to get his gun and call 911, which John did. Meanwhile, Kench descended the stairs, climbed over the two combatants, exited out the front door, and also called 911.

6. Neither Reagan nor Kench testified during the disciplinary trial. However, as noted by the hearing judge, both Reagan's and Kench's recollection of the events were detailed in the Orange County Sheriff Department's crime reports—which were admitted into evidence at the disciplinary trial without objection or limitation.

At trial, OCTC proffered the recordings of both John's and Kench's 911 calls, which the hearing judge admitted into evidence without limitation or hearsay objection. While John called 911, Reagan was struggling to escape from Smart's chokehold. On John's 911 recording, Smart can be heard angrily screaming, "we're being attacked in our home;" "we need help;" "I'm being f---ing attacked;" and "get your f---ing gun." Several times during that call, the 911 operator asked questions, which John would repeat to Smart. John would then relay Smart's answer to the operator. During this three-way question and answer session, Reagan was able to pepper spray Smart, escape the chokehold, and run out the front door to his car and Kench. Once Reagan got away, Smart took the phone from John and spoke directly with the operator. When asked how Reagan got into the house, Smart responded that "he broke into my house."

During her 911 call, Kench told the operator that Smart called her because he "wanted companionship" and that she was there "to hang out." She stated that Smart had "completely hurt her friend" and "choked him out." She also asserted that Smart "literally tried to force himself on me" and "tried to take advantage of me upstairs." At one point, she informed the operator that Smart was getting a gun. A review of Kench's 911 call clearly reveals that she was upset and frightened about the situation.

When Kench and Reagan ran from the house, Smart followed and fired the gun once from the front yard. When the police arrived, they were met by John and Smart standing in the front yard. Smart was completely naked, had a bloody face, was covered with pepper spray, and was moaning in pain. Upon being questioned, John told the officers that the gun was in his garage. Both brothers acknowledged that Smart had fired it, and Smart reported to the investigating officer that he had fired the weapon into the ground. He later claimed that he shot the gun to "scare" Reagan and Kench and to teach them that "something bad could have happened" to them. An extensive police search of the front lawn failed to reveal where the weapon had actually been discharged.

Smart later passed out and was taken to the hospital. He was interviewed there by a deputy sheriff who believed that Smart was a victim of a home-invasion robbery based on information he and John had given to the 911 operator. Smart asked the deputy, "Did you see who beat me up and sprayed my balls [with pepper spray]?" When asked by the deputy if he wanted to prosecute the matter, Smart replied, "Of course." In response to a request for a description of the assailant suspects, Smart replied, "I don't talk to you motherf---ers. You can talk to my lawyer." When the deputy explained that the department could only assist him as a victim if he provided a detailed statement, he displayed his middle finger and said, "F--- you."

A police investigator who also interviewed Smart testified that he was defiant, angry, and uncooperative. The investigator further testified that he interviewed Kench and Reagan separately twice. He found Kench to be fairly credible, though she did not tell the whole truth during her initial interview, and he found Reagan to be forthcoming and his story consistent.[7]

On the afternoon following the incident, the police were summoned to the home of one of John's neighbors, who discovered a bullet hole in his garage door. The police determined the bullet was fired from John's gun, went through the neigh-

7. The investigator also determined that Kench and Reagan had not been truthful about photos they claimed were taken shortly after their encounter with Smart to document their injuries. According to a forensic investigation conducted on both Kench's and Regan's phones, the photos were taken many days later.

bor's garage door, and lodged in a piece of wood inside the garage. The neighbor testified to Smart's rude reaction to his request that Smart repair the garage door. Smart visited the neighbor's house on June 9, 2015, to see the bullet hole damage. He initially offered to pay $50, then $100. When the neighbor rejected the offers, Smart suddenly became enraged, raised his voice, and aggressively denied any responsibility for the damage. On two later occasions, Smart would call out "How are you, asshole?" when he saw the neighbor. Ultimately, the neighbor was reimbursed $600 in restitution from the sheriff's department.

C. Smart Pled Guilty to and Was Convicted of Two Felonies

On December 7, 2015, the Orange County District Attorney's Office filed a six-count complaint against Smart charging him with one felony count for violating Penal Code section 245, subdivision (a)(4) (assault with force likely to produce great bodily injury); two felony counts for violating Penal Code section 245, subdivision (a)(2) (assault with a firearm); one felony count for violating Penal Code section 422, subdivision (a) (criminal threats); one felony count for violating Penal Code section 246 (shooting at inhabited dwelling house); and one felony count for violating Penal Code section 246.3, subdivision (a) (discharging firearm with gross negligence). In addition, two enhancements were charged: (1) Penal Code section 12022.7, subdivision (a) (personally inflicting great bodily injury on another during the commission of a crime) and (2) Penal Code section 12022.5, subdivision (a) (personal use of a firearm in the commission of a crime).

Smart initially pleaded not guilty to all six felony counts, but later he pleaded guilty to two of them: assault likely to produce great bodily injury and discharging a firearm with gross negligence. The remaining four counts and the two enhancements were dismissed. Smart was sentenced to three years of probation and 10 days in county jail with credit for five days served and five days' good conduct.

II. STATE BAR COURT PROCEEDINGS

After OCTC transmitted the felony conviction records to this court, we placed Smart on interim suspension from the practice of law effective February 26, 2018, ending on March 15, and beginning again on May 1 and continuing until the final disposition of this proceeding. (Bus. & Prof. Code §§ 6101, 6102;[8] Cal. Rules of Court, rule 9.10; rules 5.341 & 5.342.) Smart waived evidence of finality, and we referred the matter to the Hearing Department to determine whether the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline. (§ 6102, subd. (e); rule 5.344.)

On January 28, 2019, the parties filed a stipulation as to facts and admission of documents. Following a trial and posttrial briefing, the hearing judge issued her decision on May 9, 2019. She found that several of the facts and circumstances surrounding Smart's felony convictions revealed moral turpitude: Smart not allowing Kench to leave when she asked; his use of excessive force against Reagan; his gratuitous firing of a handgun; and his deliberate misrepresentations to John and the police regarding the events on January 17, 2015, and that he was "of course" going to prosecute Kench and Reagan. Because Smart failed to establish compelling mitigating circumstances, the judge recommended disbarment. (Std. 2.15(b) [disbarment is presumed sanction for felony conviction in which facts and circumstances surrounding offense involve moral turpitude, unless most compelling mitigation circumstances clearly predominate].)[9]

III. SMART'S CRIMINAL CONVICTIONS INVOLVED MORAL TURPITUDE

[1a] The issue before us is whether the facts and circumstances surrounding Smart's criminal convictions, which were not committed in the practice of law, constitute moral turpitude. We are guided by the Supreme Court's definition of moral turpitude: "a deficiency in any character trait necessary for the practice of law (such as trustworthiness, honesty, fairness, candor, and fide-

8. All further references to sections are to the Business and Professions Code unless otherwise noted.

9. The hearing judge erroneously cited standard 2.5 when she meant standard 2.15, as evident by her analysis. Her analysis was properly conducted under a version of standard 2.15 that existed at the time of the disciplinary trial.

lity to fiduciary duties) or if it involves such a serious breach of a duty owed to another or to society, or such a flagrant disrespect for the law or for societal norms, that knowledge of the attorney's conduct would be likely to undermine public confidence in and respect for the legal profession." (*In re Lesansky* (2001) 25 Cal.4th 11, 16.) We find that the facts and circumstances surrounding Smart's two felony offenses meet this definition of moral turpitude, as discussed below.

A. Smart's Conduct Was Violent, Excessive, and Lacked Respect for the Law

Smart argues that he should not be found culpable of moral turpitude and contends that he never threatened nor physically restrained Kench from leaving John's house. However, as noted previously, the facts are disputed. Kench's statements in the police report claim that he pinned her on the bed and that he was on top of her while naked. She stated that she was scared and screamed to Reagan because Smart would not let her leave. Her 911 call reflects similar statements and her real fear about what transpired. **[2a]** The hearing judge found Kench's statements to the police credible and Smart's testimony not credible in determining that his acts against Kench involved moral turpitude.

[3] Smart asserts that the hearing judge improperly relied on Kench's hearsay statements as evidence to support her findings. We reject Smart's argument. Under rule 5.104(D), "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection will not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." In this case, the police reports were admitted into evidence through the stipulation without any objection or limitation by Smart. While his counsel may have objected at trial to the questions asked of the investigator, which would have elicited Kench's hearsay statements, sustaining of those objections by the trial judge has no effect on the admitted police reports and Kench's statements therein. (*In the Matter of Regan* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 844, 857 [where attorney did not object to admission of evidence, it is well settled that any objection on that point is waived]; see also *In the Matter of Pierce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 382, 388, fn. 5 [declarations admitted into evidence without limitation in lieu of live testimony for all purposes, including for truth of matter asserted].)

[2b] Moreover, the hearing judge is in a better position to assess the nature and quality of a witness's testimony. Here, the judge reasoned that Smart lacked credibility due to his demeanor while testifying, the character of his testimony, and his capacity to perceive and recollect events. These findings are entitled to great weight. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 [hearing judge best suited to resolve credibility questions "because [she] alone is able to observe the witnesses' demeanor and evaluate their veracity firsthand"].) We find that the record lacks sufficient evidence for us to contradict either of the judge's credibility conclusions.

[4a] Smart also asserts that the physical altercation with Reagan did not involve moral turpitude because it was instinctive and that he "reacted for survival." Smart maintains that he urged John to get his gun because he was seriously injured during the altercation with Reagan and had to defend his brother and himself. The hearing judge rejected his claims of self-defense as lacking credibility. Even assuming that Smart feared for his safety after being pepper sprayed by Reagan, we do not consider Smart's belated self-defense claim because it would negate the elements of the assault to which he pled guilty. (*In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 588 [court may not reach conclusions inconsistent with conclusive effect of attorney's convictions].)[10]

10. **[4b]** Further, we find that the judge's adverse credibility determination is supported by the factual basis Smart proffered with his guilty plea: "In Orange County, California, on 1/17/15 I willfully and unlawfully committed an assault upon John Doe by means of force likely to produce great bodily injury."

[1b] The hearing judge found that Smart's refusal to let Kench leave after she expressed her wish to do so was an act of moral turpitude. We agree, but also find that his act of pinning her to the bed while he was naked and giving her cause for fear also equates to moral turpitude. (*In re Craig* (1938) 12 Cal.2d 93, 97 [moral turpitude is act of baseness, vileness, or depravity in duties owed to others or society in general and is contrary to accepted and customary rule of right and duty between people].)

[1c] Next, Smart argues that his gratuitous firing of John's gun did not involve moral turpitude. He relies on *In the Matter of Burns* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 406 to argue that, unlike the attorney in *Burns* who shot a firearm into an occupied moving vehicle, Smart did not shoot in Kench's or Reagan's direction. In *Burns*, we noted that the attorney's actions did not involve moral turpitude, but involved other misconduct warranting discipline. Central to that conclusion was that the attorney's actions were done in good faith because he fired his weapon "as safely as he could, and that he honestly believed he was in imminent danger of being shot at again." (*Id.*, at p. 410.)

[1d] Here, Smart did not act in good faith when discharging his brother's gun, which distinguishes *Burns* and renders it unnecessary to apply its conclusion to the facts in this matter. We find that Smart's gratuitous firing of the gun was excessive, dangerous, and disproportional to any plausible threat. Smart concedes that Kench and Reagan were out of his sight when he shot the gun, proving that he could not have honestly believed he was in imminent danger to justify firing the handgun. We find that Smart's firing of the weapon in the front yard of a residential neighborhood ostensibly to scare Kench and Reagan was reckless and extremely dangerous not only to them, but to others in the neighborhood as well. The fact that the stray bullet traveled through a neighbor's garage door into the garage is evidence of how dangerous Smart's action was; it could have caused serious injury or worse had the piece of wood not stopped the bullet. Thus, we find that Smart's behavior exhibited contempt for the law and disregard of the safety of others, which demonstrates moral turpitude. (See *In re Gross* (1983) 33 Cal.3d 561, 566 [misconduct, not conviction, warrants discipline]; see also *In the Matter of Miller* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 110, 115 ["wide ambit of facts surrounding the commission of a crime is appropriate to consider in a conviction referral proceeding"].)[11]

B. Smart Was Not Deceitful with His Brother, the 911 Operator, or the Police

[5a] The hearing judge found that Smart deliberately lied or told half-truths to his brother when he stated that Kench and Reagan were trying to rob him and that Reagan was going to kill him. She also found that Smart made misrepresentations to the 911 operator or the deputy sheriff four times: (1) when he said Reagan had broken into John's house; (2) when he said Kench and Reagan were in John's home to rob him; (3) when he led them to believe that he and John were victims of a home-invasion robbery; and (4) when he answered the deputy sheriff's question of whether he wanted to prosecute Kench and Reagan with "Of course." We do not find clear and convincing evidence to support the hearing judge's findings.[12]

[5b] During the physical altercation with Reagan, Smart told John to call the police. From John's 911 call, Smart can be heard instructing John

11. Smart also points to two other assault-related cases, where moral turpitude was not found, to support his position that his acts do not amount to moral turpitude: *In re Otto* (1989) 48 Cal.3d 970 and *In re Larkin* (1989) 48 Cal.3d 236. Similar to our discussion regarding Smart's assault on Kench and his reckless and extremely dangerous act in using a gun, we find *Otto* (infliction of corporal punishment) and *Larkin* (use of flashlight to strike victim's chin, causing minor injury) unpersuasive as well.

12. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

to "get the f---ing gun," and, when Smart got on the phone with the 911 operator, he stated, "He [Reagan] broke into my house." Based on the record, the evidence is insufficient to support the finding that Smart intended to mislead his brother or the 911 operator when he made these statements. Smart and Reagan were engaged in mutual combat where both sustained injuries; therefore, it was reasonable for Smart to be fearful of what would ensue and to instruct his brother to call 911. Additionally, we did not find sufficient evidence in the record to clearly establish that Smart told his brother that Kench and Reagan were trying to rob him, and OCTC has failed to cite in its brief where in the record such evidence exists.

[5c] As for Smart's additional statements to the 911 operator and the deputy sheriff, our review of the record indicates that the statements are generally vague, made in the heat of the moment of combat, and insufficient to support a conclusion that Smart deliberately misled the 911 operator or the deputy sheriff. OCTC argues that, when Smart indicated that he wanted to prosecute the matter, he deliberately misled the deputy into believing that he and John were victims of a home-invasion robbery. The police reports include inferences that the officers were responding to what they believed to be a home-invasion robbery. Beyond that, the reports contain no specific details or direct evidence to establish that Smart falsely asserted that a home-invasion robbery actually occurred. We also note that Smart was highly intoxicated and suffering from a head injury at the time. Therefore, even if his statements were not wholly accurate, we are unable from our review of the record, without clear evidence of an intention to mislead, to establish that Smart made deliberate misrepresentations to satisfy the clear and convincing standard of proof. (See *Ballard v. State Bar* (1983) 35 Cal.3d 274, 291 [all reasonable doubts resolved in favor of attorney].) Thus, we do not find that Smart's statements involved moral turpitude.

IV. AGGRAVATION AND MITIGATION

OCTC must establish aggravating circumstances by clear and convincing evidence. (Std. 1.5.) Smart has the same burden to prove mitigation. (Std. 1.6.)

A. Aggravation

No Aggravation for Indifference (Lack of Insight) (Std. 1.5(k))

[6a] Smart requests that we reject the hearing judge's finding that he exhibited a lack of insight into his misconduct by his refusal to pay John's neighbor for the damage to his garage from the stray bullet, thus showing Smart's failure to accept responsibility for his actions. We agree, as we fail to see how this conduct three and a half years before his disciplinary trial began negates his assertions at trial that he is remorseful.

[6b] 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.) Unlike the attorney in *Wolff*, Smart testified that he regrets his actions and takes full responsibility for everything that he did wrong. Further, he is an admitted alcoholic and stated that he should not have called Kench for services that night, especially given his significant impairment from his 0.232 percent blood-alcohol content level. He also admitted that he started the fight with Reagan. He has joined the State Bar's Lawyer Assistance Program (LAP) as a step to beginning his recovery and not as a matter of expediency as the judge believed. Finally, as the judge herself observed, Smart was in "extreme agony" when hearing Dr. Glass's testimony about him. We find that Smart's testimony during his disciplinary trial was an unequivocal acknowledgment of his wrongdoing and acceptance of responsibility, and, thus, we decline to assign indifference.

B. Mitigation

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

[7a] Smart was admitted to practice law in 1987 and has no prior record of discipline. The "absence of any prior record of discipline over many years of practice coupled with present misconduct, which is not likely to recur" is a mitigating circumstance. (Std. 1.6(a).) The hearing

judge assigned extensive mitigating weight to Smart's discipline-free career, but she concluded that it was not compelling because of the absence of a showing that his misconduct is "not likely to recur." We agree with OCTC that this circumstance should only be given some weight.

[7b] While Smart had 27 years of discipline-free practice, a significant period, he has not shown that his alcohol abuse problems are resolved. When misconduct is serious, as the Supreme Court explained in *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029, a prior record of discipline-free practice is most relevant for mitigation where the misconduct is aberrational, which is clearly not the case here. While we applaud Smart's efforts by voluntarily joining LAP, we find that he has not completed rehabilitation, after considering his decades-long history of abuse coupled with multiple assaults. (*Rosenthal v. State Bar* (1987) 43 Cal.3d 658, 664 [attorney must demonstrate "a meaningful and sustained period of successful rehabilitation"].) Absent this evidence, we are unable to find that his misconduct is unlikely to recur.

2. *Extreme Emotional Difficulties or Physical or Mental Disabilities (Std. 1.6(d))*

[8a] 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 did not afford Smart any mitigating credit for his emotional problems because she found that the record does not clearly establish that his difficulties or disabilities no longer pose a risk of future misconduct. We agree.

[8b] At trial, Dr. Glass testified about Smart's alcoholism and other disorders. He further testified that Smart has continuously abused alcohol for more than 30 years and has only recently maintained sobriety for a six-month period prior to the disciplinary trial. According to Dr. Glass, Smart's altercation with Reagan triggered an extreme emotional reaction which, combined with his intoxication, caused him to have an irrational fear for his life. He opined that Smart's emotional condition was directly responsible for his violent behavior on the night of the incident and that he no longer poses a risk of future misconduct. However, he testified that Smart could commit misconduct again if he fails to maintain his sobriety. We agree with the hearing judge in finding that Dr. Glass's testimony does not clearly and convincingly satisfy this mitigation standard given Smart's brief period of sobriety. (*Slavkin v. State Bar* (1989) 49 Cal.3d 894, 905 [attorney suffering from drug or alcohol dependence generally must establish that addiction is permanently under control].)

3. *Cooperation (Std. 1.6(e))*

[9] Smart asserts that he is entitled to mitigation credit for his cooperation with the State Bar by entering into a stipulation of facts and admission of documents. (Std. 1.6(e) [mitigation credit permitted for spontaneous candor and cooperation displayed to State Bar].) We agree. Overall, he demonstrated cooperation through his waiver of finality and stipulation to facts and admission of documents—with several of the documents being the evidentiary basis of the moral turpitude finding. Such action merits substantial mitigation. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive mitigation for admission of culpability and facts].)

4. *Good Character (Std. 1.6(f))*

Smart is entitled to mitigation if he establishes 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 his misconduct. (Std. 1.6(f).) The hearing judge noted that Smart established good character evidence through eight witnesses, including three attorneys, who were aware of the full extent of his misconduct. The judge gave extensive mitigating weight to the declarations, which OCTC does not challenge. We agree and assign substantial weight. (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591–592 [significant mitigation for good character for three witnesses, two attorneys, and fire chief, who had long-standing familiarity with attorney and broad knowledge of good character, work habits, and professional skills].)

V. DISBARMENT IS THE APPROPRIATE DISCIPLINE

Our role is not to punish Smart for his felonious crimes—the superior court has already done so—but to recommend professional discipline. (*In re Brown* (1995) 12 Cal.4th 205, 217 ["aim of attorney discipline is not punishment or retribution; rather, attorney discipline is imposed to protect the public, to promote confidence in the legal system, and to maintain high professional standards"]; std. 1.1.) We do so by following the standards whenever possible and balancing all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266, 267, fn. 11.) **[10a]** At the time of the misconduct and the hearing judge's decision, disbarment was the presumed sanction for a felony conviction in which the surrounding facts and circumstances involve moral turpitude, unless the "most compelling mitigating circumstances clearly predominate." (Std. 2.15(b).)[13]

We agree with the hearing judge and OCTC that no case law exists that is substantially comparable to this case. Smart asks us to consider the *Burns*, *Otto*, and *Larkin* cases, discussed previously, in formulating our discipline recommendation. We decline to do so, as the discipline in each of those three cases, unlike this one, rested on the conclusion that no moral turpitude was found. Smart also recommends a fourth case, *In re Mostman* (1989) 47 Cal.3d 725, in which moral turpitude was found, where Mostman was convicted of assault by means of force likely to produce great bodily injury, and where he had attempted to take revenge against an acquaintance who had threatened both his family and him by asking a client to kill that acquaintance. The Supreme Court imposed a two-year actual suspension, relying on the standard's requirement that "the most compelling mitigating circumstances [that] clearly predominate."

Our reading of *Mostman* leads us to conclude that since it was an extraordinary case of mitigating circumstances, it does not guide us to the same disciplinary conclusion here. The Supreme Court found more extensive mitigation for Mostman than is warranted for Smart, particularly the great emotional stress of the acquaintance's threats against himself and his family, along with the illness and death of other close family members and a bitter custody battle with his ex-wife over their son. The Supreme Court also found as mitigating evidence the fact that the acquaintance had, early in their relationship, asked Mostman to engage in unethical conduct on more than one occasion, but Mostman had refused. Finally, the Supreme Court also found a "strong suggestion in the record" that the client and the acquaintance had acted together in a plan to compromise Mostman, suggesting that the acquaintance was never in danger of harm from Mostman's expressed intent.

[10b] Applying former standard 2.15(b), we find that Smart has failed to establish that the most compelling mitigating circumstances clearly predominate, especially considering the nature of his misconduct. (See *In re Strick* (1987) 43 Cal.3d 644, 656 [in conviction involving moral turpitude, level of discipline must correspond to reasonable degree with gravity of misconduct].) Smart's actions toward Kench were deplorable, and he showed a flagrant disregard for the law and for public safety when he unlawfully fired a gun from the front yard as Kench and Regan ran from the house.

13. **[11]** This version of the applicable standard applied at the time of the hearing judge's decision. The standards were revised on July 1, 2019, to provide that summary disbarment is the sanction for a final felony conviction in which, inter alia, the facts and circumstances of the offense involved moral turpitude. Because the revised standard is based on revisions made to section 6102, subdivision (c), effective in 2019 and is not retroactive, we apply the standard that existed at the time the misconduct occurred (See *In the Matter of Jebbia* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 51, 55 [changes to § 6102 may not be applied retroactively to attorney's criminal conviction that predated those changes].)

[10c] While Smart established much mitigation for good character, cooperation, and several years of a discipline-free career prior to his convictions, without aggravation, those factors fail to constitute the most compelling, as required by former standard 2.15(b), in light of the seriousness of his criminal misconduct. Notably, we find that Smart's rehabilitation is in its early phase; he has not presented persuasive evidence that he is truly on the path to full sobriety and that he fully understands the extent of his alcohol problem. For the same reason, Smart's misconduct is not mitigated by his mental disabilities and emotional problems. Based on the facts of this case, we conclude that anything less than disbarment would fail to protect the public and the courts, and would undermine the confidence in the legal profession that our high standards are meant to maintain. Accordingly, Smart should be required to demonstrate by clear and convincing evidence in a reinstatement proceeding that he is fully rehabilitated over an extended period of time before he is entitled to resume practicing law.

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Dean Edward Smart be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice law in California.

We further recommend that Smart comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter.

We further recommend that costs be awarded to the State Bar in accordance with section 6086.10, such costs being enforceable as provided in section 6140.7 and as a money judgment. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against a member who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

VII. ORDER

The order by the hearing judge that Dean Edward Smart be involuntarily enrolled as an inactive member of the State Bar pursuant to section 6007, subdivision (c)(4), effective May 12, 2019, will remain in effect pending consideration and decision of the Supreme Court on this recommendation.

We concur:

PURCELL, P.J.
HONN, J.

State Bar Court
Review Department

In the Matter of

BRET MERRICK SAXON

No. 17-O-01259

Filed June 26, 2020

SUMMARY

In 2009, respondent diverted funds invested by the complaining witness in a movie production. Respondent had agreed to hold the funds in trust pending the completion of the production. In 2010, the complaining witness successfully sued respondent in Tennessee state court for breach of contract and fraud. In 2013, the complaining witness obtained a sister-state judgment in California based on the Tennessee judgment, but respondent then filed for bankruptcy. The movie was released in 2014. In 2016, a bankruptcy court ruled that the complaining witness's judgments against respondent were not dischargeable in bankruptcy.

In late 2018, OCTC charged respondent with one count of moral turpitude based on respondent's misappropriation of the entrusted funds. Finding that the disciplinary case was filed beyond the five-year rule of limitations, a hearing judge dismissed the matter with prejudice. OCTC requested review.

The Review Department held that the rule of limitations is tolled during the time an attorney acts in a fiduciary relationship, even if it is other than an attorney-client relationship. It also held that respondent remained in a fiduciary relationship with the complaining witness until the movie production was completed in 2014. Accordingly, the Review Department held that the charge of moral turpitude by misappropriation was timely filed in 2018, and the matter should not have been dismissed with prejudice. It therefore remanded the case to the Hearing Department for further proceedings.

COUNSEL FOR PARTIES

For State Bar of California: Alex James Hackert

For Respondent: Ronald Neil Richards

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1]

106.10 Generally Applicable Procedural Issues – Issues re Pleadings – Sufficiency of pleading to state grounds for action sought
117 Generally Applicable Procedural Issues – Dismissal
130 Procedure on Review
169 Standards of Proof/Standards of Review – Miscellaneous Issues re Standard of Proof/Standard of Review

In reviewing an order dismissing a disciplinary proceeding, Review Department looks to operative notice of disciplinary charges (NDC), deems all allegations in that NDC to be true, and may also rely on any judicially noticed facts to assess the sufficiency of the operative NDC.

[2a-h]

102.20 Generally Applicable Procedural Issues – Improper Prosecutorial Conduct – Delay in prosecution
106.10 Generally Applicable Procedural Issues – Issues re Pleadings – Sufficiency of pleading to state grounds for action sought
117 Generally Applicable Procedural Issues – Dismissal
204.90 Substantive Issues in Disciplinary Matters Generally – Culpability– Other general substantive issues
430.00 Substantive Issues in Disciplinary Matters Generally – Culpability – Common Law/Other Statutory Violations—Breach of Fiduciary Duty

If disciplinary proceeding is based solely on complainant's allegations of violation of State Bar Act or Rules of Professional Conduct, rule of limitations (Rules Proc. of State Bar, rule 5.21) provides that proceeding must begin within five years from date of violation. Normally, a statute or rule is violated when every element of violation has occurred. However, rule of limitations is tolled during period that attorney acts in fiduciary relationship with complainant or related party, even if it is other than an attorney-client relationship. Moreover, if disciplinary charge is based on continuing violation of duty, violation is deemed committed at termination of entire course of conduct. Where respondent allegedly breached fiduciary duty to investor under movie financing agreement requiring respondent to hold funds in escrow until close of movie production, rule of limitations was tolled as long as fiduciary relationship continued, and respondent's alleged diversion of funds created continuing violation lasting until completion of purpose of fiduciary duty. Accordingly, where initial notice of disciplinary charges was filed within five years after completion of movie production, misappropriation charge was timely even though diversion of funds occurred more than five years earlier.

[3a, b] **102.20 Generally Applicable Procedural Issues – Improper Prosecutorial Conduct – Delay in prosecution**
117 Generally Applicable Procedural Issues – Dismissal
191 Miscellaneous General Issues in State Bar Court Proceedings – Effect of/Relationship to Other Proceedings

Under rule 5.21(C)(3) of Rules of Procedure of State Bar, rule of limitations for disciplinary charges is tolled during pendency of government investigations or proceedings based on same acts or circumstances as violation. Where Tennessee civil proceeding found that respondent had defrauded investor and was liable for damages, rule of limitations was tolled for disciplinary charges based on same acts or circumstances. However, subsequent sister state collection proceedings, and bankruptcy proceeding to determine dischargeability of debt under Tennessee judgment, were not based on same acts or circumstances, and thus did not toll rule of limitations.

[4] **204.90 Substantive Issues in Disciplinary Matters Generally – Culpability– Other general substantive issues**
221.11 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6106 – Found – Deliberate dishonesty/fraud
430.00 Substantive Issues in Disciplinary Matters Generally – Culpability – Common Law/Other Statutory Violations—Breach of Fiduciary Duty

Attorney's commission of any act involving moral turpitude, dishonesty, or corruption is cause for disbarment whether the act is committed in the course of his relations as an attorney or otherwise. Attorney who accepts responsibility of a fiduciary nature is held to high standards of legal profession whether or not acting in capacity of attorney.

[5] **119 Generally Applicable Procedural Issues – Other Pretrial Matters**
130 Generally Applicable Procedural Issues – Procedure on Review
146 Evidentiary Issues – Judicial Notice

Pretrial statement filed in Hearing Department was part of record in Review Department and could be judicially noticed by Hearing Department on remand.

[6] **102.20 Generally Applicable Procedural Issues – Improper Prosecutorial Conduct – Delay in prosecution**
106.20 Standards of Proof/Standards of Review – Respondent's burden in disciplinary matters

Respondent seeking to dismiss disciplinary charges on basis of rule of limitation has burden of proving facts showing rule of limitation applies.

[7a, b] **130 Generally Applicable Procedural Issues – Procedure on Review**
165 Standards of Proof/Standards of Review – Adequacy of Hearing Department Decision
166 Standards of Proof/Standards of Review – Independent Review of Record
199 Miscellaneous General Issues in State Bar Court Proceedings – Other Miscellaneous General Issues

Regardless of whether issue was fully developed at Hearing Department, Review Department is required to independently review record and make any findings, conclusions, or decision or recommendation different from those of hearing judge. Review Department may also address an issue not raised in request for review, provided parties have opportunity to brief issue. Where hearing judge dismissed disciplinary proceeding based on rule of limitations, and OCTC argued in pretrial statement and on review that rule of limitations was tolled based on respondent's alleged fiduciary relationship with complaining witness, Review Department could reach issue of tolling based on fiduciary relationship after giving parties opportunity to brief issue.

[8] **102.20 Generally Applicable Procedural Issues – Improper Prosecutorial Conduct – Delay in prosecution**
106.40 Generally Applicable Procedural Issues – Issues re Pleadings – Amendment of pleadings
117 Generally Applicable Procedural Issues – Dismissal

Limitations period is calculated from date of filing of original notice of disciplinary charges (NDC). Where original NDC was filed within five years after termination of fiduciary duty that respondent was alleged to have violated, original NDC was timely filed, and amended NDC based on same misconduct related back to filing of original NDC.

ADDITIONAL ANALYSIS

[None.]

OPINION

HONN, J.

A hearing judge dismissed this matter with prejudice, finding that the Notice of Disciplinary Charges (NDC) was filed beyond the five-year rule of limitations. (Rules Proc. of State Bar, rule 5.21(A).)[1] The Office of Chief Trial Counsel of the State Bar (OCTC) appealed, contending that the hearing judge erred in finding the limitations period had expired because it should be tolled (1) while the complaining witness pursued civil remedies against Bret Saxon and (2) during Saxon's continued breach of his fiduciary duties.

[1] In reviewing this order of dismissal, we look only to the operative NDC and we deem all allegations in the NDC and the Amended NDC (ANDC) to be true. (*In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, 377–378; *In the Matter of Tady* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 121, 124.) We also may rely on any judicially noticed facts for the limited purpose of assessing the sufficiency of the operative NDC. (See Code Civ. Proc., § 430.30, subd. (a) [ground of objection "appears on the face [of the complaint], or from any matter of which the court is required to or may take judicial notice"]; see also 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 948, pp. 362-364.) Further, we independently review the entire record de novo. (Rules Proc. of State Bar, rule 5.155.)

[2a] We disagree with the hearing judge's ultimate dismissal with prejudice. The ANDC and documents judicially noticed satisfactorily plead that the single charge of moral turpitude by misappropriation occurred within five years of the filing of the original NDC, as tolled by the continuing fiduciary duty Saxon owed his client. We emphasize that the rule of limitations is tolled during the period of time that the attorney acts in a fiduciary relationship, even if it is other than an attorney-client relationship. Accordingly, we remand this case to the Hearing Department for further proceedings consistent with this opinion and order.

I. PROCEDURAL BACKGROUND

On December 19, 2018, OCTC filed the NDC in this matter. On January 30, 2019, Saxon filed a motion to dismiss on the grounds that the alleged misconduct (moral turpitude—misappropriation) occurred more than five years prior to the NDC's filing, and was therefore barred by rule 5.21. OCTC opposed the motion. On April 3, the hearing judge granted the motion and filed an order dismissing the case without prejudice.

On May 30, 2019, OCTC filed the ANDC, which alleged more facts regarding the relationship between the complaining witness, Jon Yarborough, and Saxon. On June 12, Saxon filed a second motion to dismiss on the same grounds, adding argument to address issues raised in OCTC's opposition to the first motion. On July 2, OCTC filed a request for judicial notice of many documents from a Tennessee civil proceeding.[2] The Tennessee Action was brought by Yarborough against Saxon, alleging, among other things, that Saxon committed fraud in his use of funds Yarborough provided to him in trust. Yarborough prevailed and was awarded $2.25 million in damages. OCTC requested judicial notice of a related sister-state proceeding in California,[3] and an adversary proceeding in bankruptcy court in the Central District of California.[4] Also, on July 2, OCTC filed its opposition to the second motion referencing the

1. All further references to rule(s) are to this source, unless otherwise noted.

2. *Yarborough Production Company LLC v. Bret Saxon et al.*, February 9, 2010, Chancery Court of Tennessee, case no. 37602 (the Tennessee Action).

3. *Yarborough Production Company LLC v. Bret Saxon, et al.*, November 9, 2012, Los Angeles County Superior Court, case no. BS140169 (the California Action).

4. *Yarborough Production Company LLC v. Bret Merrick Saxon,* United States Bankruptcy Court for the Central District of California, November 30, 2013, case no. 2:13-ap-02141-SK (the Bankruptcy Action).

dates of the above proceedings, arguing that, together, they tolled the rule of limitations in sufficient time to render the filing of the initial NDC timely. On July 17, 2019, the hearing judge again granted the motion to dismiss without prejudice.

The hearing judge conducted a status conference on July 17, 2019.[5] Thereafter, the hearing judge filed another order on July 31, 2019, granting Saxon's motion to dismiss, this time *with* prejudice. She found that the alleged misappropriation would have been complete when the money was taken, and absent tolling, the five-year period would begin immediately. As to tolling, she found that the five-year period elapsed despite being tolled during the Tennessee Action. She did not find OCTC's arguments persuasive that the period should be tolled during the pendency of the California Action and the Bankruptcy Action. She also found that Saxon's conduct was not a continuing violation under rule 5.21(B). The hearing judge did not address Saxon's fiduciary duty.

On August 20, 2019, OCTC filed its request for review. On November 12, OCTC filed its opening brief in this appeal. Saxon filed his responsive brief on January 15, 2020, and OCTC filed its rebuttal brief on January 30. At the close of oral arguments, the Review Department offered the parties an opportunity to brief certain issues regarding the rule of limitations, and the parties agreed to do so. The Review Department issued an order on March 13, 2020, specifying the issues to be addressed, and OCTC and Saxon filed supplemental briefs on April 15 and 17, 2020, respectively (Supplemental Brief(s)).

II. RELEVANT ALLEGATIONS IN THE ANDC

Recognizing that we are limited to the "four corners" of the ANDC, plus any judicially noticed documents, we now look to the ANDC to determine the facts that are alleged to show a misappropriation. The following is a summary of the relevant allegations:

Saxon is a movie producer who sought investments to fund a movie called "Fandango." One investor was Jon Yarborough, a resident of Tennessee. On or about October 6, 2009, Saxon and Yarborough entered into a Financing Agreement, whereby Yarborough and Saxon would invest $1.5 million and $3.5 million, respectively (the Combined Financing). The Financing Agreement also stated that all funds would be placed in a certain account defined as the "Picture Account," or another account approved by Yarborough and Saxon. The funds were to be segregated and used only for production costs, and the Financing Agreement provided that "[a]ny funds advanced to the Picture Account shall be held in trust." Under the Financing Agreement, Saxon was required to maintain the funds in the Picture Account until receipt of 100 percent of the Combined Financing. He could not withdraw money from the account until it was fully funded with the Combined Financing.

Yarborough wired $1.5 million to the Picture Account on October 21, 2009. Saxon never contributed his $3.5 million share. Instead, it is alleged that the day that Yarborough's funds were wired to the Picture Account, Saxon transferred the entire $1.5 million to a different account, not approved by the parties.

Yarborough filed a complaint on February 9, 2010, in the Tennessee Action for, among other things, Saxon's fraudulent misuse of the funds. That lawsuit continued to judgment on October 27, 2010. Saxon was found liable for breach of contract and fraud, and Yarborough was awarded $2.25 million in damages.

Yarborough sought to collect these damages by filing the California Action, a sister-state proceeding in California, on November 9, 2012. On June 28, 2013, he was successful in obtaining a California judgment against Saxon of over $2 million.

On September 5, 2013, Saxon filed a Chapter 7 bankruptcy petition. Yarborough filed the Bankruptcy Action, an adversary proceeding,

5. The record is unclear as to whether the July 17, 2019 status conference was conducted before or after the order of the same date granting the motion to dismiss.

claiming that the judgments obtained were not dischargeable by the bankruptcy. The bankruptcy court determined that Saxon defalcated the $1.5 million when he fraudulently transferred the funds from the Picture Account without having first deposited his own $3.5 million in that account. The Bankruptcy Action terminated on December 5, 2016. Finally, it is alleged that, as a result of the above, Saxon willfully and intentionally misappropriated $1.5 million, thereby committing an act involving moral turpitude, dishonesty, or corruption, in willful violation of Business and Professions Code, section 6106. [6]

III. DISCUSSION

A. The Rule of Limitations

[2b] Rule 5.21(A) states: "If a disciplinary proceeding is based solely on a complainant's allegations of a violation of the State Bar Act or Rules of Professional Conduct, the proceeding must begin within five years from the date of the violation." The parties do not dispute that this proceeding was based solely on a complainant's allegation of a violation. A statute or rule is violated "when every element of a violation has occurred. But if the violation is a continuing offense, the violation occurs when the offensive conduct ends." (Rules Proc. of State Bar, rule 5.21(B).)

[2c] The rule of limitations provides for various situations where the five-year limit is tolled, including: "[W]hile the attorney represents the complainant, the complainant's family member, or the complainant's business or employer" (Rules Proc. of State Bar, rule 5.21(C)(1)), and **[3a]** "while civil, criminal, or administrative investigations or proceedings based on the same acts or circumstances as the violation are pending with any governmental agency, court, or tribunal." (Rules Proc. of State Bar, rule 5.21(C)(3).)

B. The Five-Year Period Did Not Commence Until the Conclusion of Saxon's Fiduciary Obligations

Under the Financing Agreement, as alleged in the ANDC, Saxon agreed to hold Yarborough's funds in a segregated account and use them only to "fund production costs." The money was to be held in trust, and Saxon was required to maintain the funds in the Picture Account until receipt of all of the Combined Financing. According to the allegations, Saxon did not comply with these terms, but rather removed the funds without placing them in another account approved by the parties.

[4] Under section 6106, the Legislature made an attorney's commission of any act involving moral turpitude, dishonesty, or corruption a cause for disbarment "whether the act is committed in the course of his relations as an attorney or *otherwise*." (Italics added.) "'An attorney who accepts the responsibility of a fiduciary nature is held to the high standards of the legal profession whether or not he acts in his capacity of an attorney.'" (*In the Matter of McCarthy, supra,* 4 Cal. State Bar Ct. Rptr. at p. 373, quoting *Worth v. State Bar* (1976) 17 Cal.3d 337, 341.)

[2d] As noted above, rule 5.21(C)(1) tolls the five-year limit "while the attorney *represents* the complainant, the complainant's family member, or the complainant's business or employer." (Italics added.) Appellate courts have used the word "represents" to describe the limited agency of an escrow relationship, stating that the agent "only *represents* his principal insofar as he carries out the escrow instructions." (*Hannon v. Western Title Insurance Co.* (1989) 211 Cal.App.3d 1122, 1127 (italics added); see *Lee v. Escrow Consultants, Inc.* (1989) 210 Cal.App.3d 915, 920–921, citing *Kirby v. Palos Verdes Escrow Co.* (1986) 183 Cal.App.3d 57, 64.) Further, rule 5.4(15) defines "complainant" as "a person who alleges misconduct by a State Bar attorney" and does not require that the complainant be a client or former client. Thus, neither the Rules

6. All further references to sections are to this source, unless otherwise noted.

of Procedure of the State Bar nor case law requires us to limit the tolling provision in rule 5.21 to attorney-client relationships. To do so would subvert long-established Supreme Court and legislative authority regarding the regulation of attorneys who commit misconduct while acting as fiduciaries.

[2e] Based on the facts as alleged, we find that Saxon was acting as a fiduciary by holding funds in escrow, having been given precise instructions by the Financing Agreement. He remained in the capacity of a fiduciary with an obligation to hold the escrowed funds "in trust" until the Fandango production was completed and the purpose of the escrow fulfilled. As such, contrary to Saxon's argument, the extension of the period of limitations was not endless—it ended when its purpose ended, and its purpose was the production. The ANDC states that the film was released in 2014, which would indicate that Saxon's escrow responsibilities would be terminated at that time.[7]

C. The Rule of Limitations Was Not Sufficiently Tolled as a Result of the Pending Civil or Administrative Actions

[3b] As noted above, rule 5.21(C)(3) requires that pending civil, criminal, or administrative investigations or proceedings must be "based on the same acts or circumstances as the violation" in order to toll the running of the five-year limitations period. The Tennessee Action met this criterion since it directly found that Yarborough had been defrauded by Saxon and was entitled to damages. But the California Action and the Bankruptcy Action were derivative actions to the Tennessee Action—only filed to collect an outstanding debt (the Tennessee judgment). As such, they were not based on the same acts or circumstances as the violation. While it is true that the court in the Bankruptcy Action found that "Saxon defalcated the $1.5 million when he fraudulently transferred the funds," it did so only to determine if the debt was dischargeable in bankruptcy. Therefore, we agree with the hearing judge's finding that the rule of limitations was only tolled during the Tennessee Action and that period of time was insufficient to avoid the bar of the rule.

D. Saxon's Arguments in his Supplemental Brief Lack Merit

Though Saxon did not seek review, he raised several arguments in his Supplemental Brief filed on April 17, 2020. We find that none has merit. We summarize his arguments below.[8]

1. *Rule 5.21(C)(1) tolling does not apply and this issue was not raised by the parties*

[2f] **[7a]** As discussed above, a complainant need not be a client, and an attorney can commit acts of moral turpitude under section 6106 whether the misconduct occurred in the course of his relations as an attorney "*or otherwise*." Further, if an attorney accepts a relationship of trust, he or she is held to the high standards of a fiduciary. Common usage of the term *represents* additionally contemplates relationships other than those of attorney and client, including receiving funds as an escrow holder.

7. The ANDC does not state the date the "production" ended, but rather the date that the film was "released" which, by logical reasoning, would be after the date production ceased. But, for purposes of determining whether the ANDC states a cause of action within the period of limitations, this is sufficient to allege that the production was completed in 2014. **[5]** However, we note that Saxon's Pretrial Statement filed in the Hearing Department on March 26, 2019, clarifies at page five that ". . . the movie cost $3,000,000.00 to produce, *and was produced in 2014*." (Italics added.) This document is part of the record on appeal and can be judicially noticed by the Hearing Department. **[6]** It would be Saxon's burden on remand to prove the facts to show a rule of limitation applies. (Evid. Code, § 500; *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 8–9; see also *Guardian North Bay, Inc. v. Superior Court* (2001) 94 Cal.App.4th 963, 971–972 [in demurrer based on statute of limitations, defect must clearly and affirmatively appear on face of complaint; not enough that complaint shows that action *may* be barred].)

8. Arguments raised and addressed earlier in this opinion will not be discussed again. Other arguments that Saxon has raised, and we have not specifically discussed, have been considered and rejected as without merit.

[7b] The claim that the arguments regarding rule 5.21(C)(1) were not raised by the parties is both factually and legally incorrect. OCTC did raise Saxon's fiduciary relationship in its pretrial statement in the Hearing Department (citing *In the Matter of McCarthy*, *supra*, 4 Cal. State Bar Ct. Rptr. 364) and in both its opening and rebuttal briefs on review. Regardless of whether the issue was fully developed at the Hearing Department, the Review Department is required to "independently review the record and may make any findings, conclusions, or a decision or recommendation different from those of the hearing judge." (Rules Proc. of State Bar, rule 5.155(A).) Further, the Review Department may take action on an issue not raised in the request for review, provided the parties have an opportunity to brief that matter, which they did in their post-oral argument briefs. (Rules Proc. of State Bar, rule 5.155(C).)

2. *No fiduciary relationship exists between lender and borrower and Saxon was not a party to the Financing Agreement*

Saxon argues that no fiduciary relationship exists between a lender and a borrower. But the ANDC does not allege a relationship of lender and borrower. In fact, the ANDC refers to the payments contemplated by Saxon and Yarborough as "equity investments." Discussing a relationship of lender and borrower goes beyond the factual allegations in the ANDC, something we are not permitted to do in this procedural setting. The same reasoning applies to Saxon's argument that he was not a party to the Financing Agreement. This fact was not alleged in the ANDC.

3. *The fiduciary relationship between Saxon and Yarborough terminated upon misappropriation of the funds*

[2g] The ANDC alleges that Saxon was required to hold Yarborough's funds in trust. OCTC correctly points out that this fiduciary relationship would terminate, but only upon the completion of its purpose. As such, the misappropriation of the $1.5 million was an ongoing violation through the completion and production of the movie in 2014, the objective of the agreement between Yarborough and Saxon. (See, e.g., *In the Matter of Dyson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 280, 286 [attorney had ongoing fiduciary duty to client to hold in trust settlement funds subject to medical liens; attorney's duty to clients lasted until debt paid].)

[2h] Saxon refers to *In the Matter of McCarthy, supra*, 4 Cal. State Bar Ct. Rptr. at pp. 377-378, for the proposition that the rule of limitations started to run when every element of the alleged violation occurred. He failed to note the language of the opinion immediately surrounding his reference. While the general rule is usually applied, the court noted that it does not apply where the violation is a "continuing offense, in which case the violation is deemed to have been committed at the termination of the entire course of conduct." (*Ibid.*) Similarly, the court found that where the charge is based on a fiduciary relationship, the breach is "not only from his initial failure [to maintain the funds], but from his ultimate failure to distribute" them. (*Ibid.*) Here, it is alleged that Saxon breached his fiduciary duty under the Financing Agreement to hold the funds in escrow until the close of production, which created a continuing violation beyond the time when he withdrew Yarborough's money from the escrow account.

4. *The ANDC cannot be cured by amendment*

Saxon further asserts that the allegations of the ANDC cannot be amended to cure the defect. But it is not clear that there is a defect in the pleading that needs a cure. While not a model of draftsmanship, the ANDC alleged sufficient facts to provide notice to Saxon of the charges against him and to overcome a motion to dismiss.

IV. THE ANDC RELATED BACK TO THE FILING DATE OF THE ORIGINAL NDC, SO THE ANDC WAS TIMELY FILED

[8] As the ANDC alleges and the record shows, the movie was produced in 2014, which marked the date the escrow ended. Therefore, the purpose of the Financing Agreement under which Saxon had a fiduciary duty to hold Yarborough's funds in trust also ceased to exist in 2014. When Saxon no longer *represented* Yarborough within the meaning of rule 5.21(C)(1), the five-year limit was no longer tolled, and began to run. But since we calculate the limitations period from the date of

the filing of the original NDC, which was December 19, 2018, we find it was timely filed within five years from the 2014 completion of the escrow arrangement alleged in the ANDC. (See 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1188, pp. 619–620 [despite amended complaint, time of filing original complaint is date of commencement of action for purposes of statute of limitations].)

V. ORDER

This case is remanded to the Hearing Department for further proceedings consistent with this opinion.

We concur:

PURCELL, P.J.
MCGILL, J.

State Bar Court
Review Department

In the Matter of

DENNIS EARL BRAUN

Nos. 18-N-16608; 18-O-17277 (Consolidated)

Filed September 18, 2020

SUMMARY

Respondent, who had three prior records of discipline, failed to comply with rule 9.20(c) of the California Rules of Court, and with three conditions of his probation from a prior disciplinary matter. The hearing judge recommended discipline of 18 months' actual suspension and probation, giving significant weight to respondent's evidence of having suffered from depression which he had since overcome. The Review Department held that respondent had not shown by expert testimony that his depression was the cause of his misconduct, or that he had adequately recovered, especially given his failure to file a responsive brief on review. Accordingly, respondent's mitigation evidence did not overcome the significant weight of the aggravating circumstances, and there was no reason to deviate from the presumed discipline of disbarment applicable to an attorney who has two or more prior records of discipline and has previously received an actual suspension. The Review Department therefore recommended respondent's disbarment.

COUNSEL FOR PARTIES

For State Bar of California: Alex James Hackert

For Respondent: Dennis Earl Braun, in pro. per.

HEADNOTES

[1] **106.50 Generally Applicable Procedural Issues – Issues re Pleadings – Answer to initial pleading**
151 Evidentiary Issues – Evidentiary Effect of Stipulations
1913.11 Cal. Rules of Ct., Rule 9.20 Violation Proceedings – Special Substantive Issues – Wilfulness – Definition
1913.24 Cal. Rules of Ct., Rule 9.20 Violation Proceedings – Special Substantive Issues – Delay in Compliance – Delay in Filing Affidavit of Compliance

Willful violation of rule 9.20(c) requires neither bad faith nor even actual knowledge of rule provision violated. Where respondent conceded in answer to charges, and in stipulation of facts, that respondent failed to timely file rule 9.20(c) declaration and that State Bar sent email notices informing respondent of rule 9.20(c) filing duties, one that was received and another that was not returned, respondent was culpable of willfully violating rule 9.20(c).

[2a-d] **163 Standards of Proof/Standards of Review – Proof of Wilfulness**
214.10 State Bar Act Violations – Section 6068(k)
1712 Issues in Probation Cases – Special Issues – Wilfulness
1713 Issues in Probation Cases – Special Issues – Standard of Proof

Probation matters do not require proof that respondent actually knew specifics of probation delinquencies, as long as respondent had notice of probation duties. Where respondent failed to schedule and attend meeting with assigned probation deputy and did not submit first quarterly report to Probation until six months after due date, despite email communications from Probation regarding probation duties, respondent willfully failed to comply with three probation conditions in violation of Business and Professions Code section 6068, subdivision (k).

[3a, b] **521 Aggravation – multiple acts of misconduct – Found**
1719 Issues in Probation Cases – Miscellaneous Special Issues
1913.90 Cal. Rules of Ct., Rule 9.20 Violation Proceedings – Special Substantive Issues – Other Substantive Issues

Even though respondent's rule 9.20(c) and probation violations all arose from failing to comply with one Supreme Court order, respondent's violations of three separate probation duties and separate duty to comply with rule 9.20(c) were still multiple acts and entitled to substantial aggravating weight.

[4a, b] **740.32 Mitigation – Good character references – found but discounted or not relied on – References unfamiliar with misconduct**

Where respondent's good character and diligent representation of clients were attested to by five trial witnesses and 18 declarations, but most witnesses did not demonstrate general understanding of charges against respondent, respondent's character evidence was entitled to only moderate mitigating weight.

[5] **106.50 Generally Applicable Procedural Issues – Issues re Pleadings – Answer to initial pleading**

151 Evidentiary Issues – Evidentiary Effect of Stipulations

735.10 Mitigation – Candor and cooperation with Bar – Found

Where respondent's answer to disciplinary charges and subsequent stipulation admitted his culpability of willful violation of rule 9.20(c); respondent admitted facts of uncharged misconduct; and respondent did not dispute culpability of violating statutory duty even though stipulation was technically limited to facts of offenses, respondent was entitled to significant mitigating credit for cooperation with State Bar, even though facts in probation and rule 9.20 matters are generally easily provable and stipulations do not save significant time.

[6] **745.59 Mitigation – Remorse/restitution/atonement – Declined to find – Other reason**

Prompt objective steps, demonstrating spontaneous remorse and recognition of wrongdoing and timely atonement, qualify as mitigation. Where respondent claimed remorse and recognition of wrongdoing based on belated filings of rule 9.20(c) declaration, proof of Ethics School compliance, and delinquent quarterly probation report, but these steps were not taken spontaneously because respondent was aware Probation enforcement proceedings were underway, respondent was not entitled to mitigation.

[7a-h] **725.51 Mitigation – Emotional/physical disability/illness – Declined to find – Lack of expert testimony**

725.56 Mitigation – Emotional/physical disability/illness – Declined to find – Inadequate showing of rehabilitation

725.59 Mitigation – Emotional/physical disability/illness – Declined to find – Other reason

Standard 1.6(d) provides that mitigation may be assigned for extreme emotional difficulties if (1) respondent suffered from them at time of misconduct; (2) expert testimony established them as directly responsible for respondent's misconduct; and (3) emotional difficulties no longer pose risk that respondent will commit future misconduct. Where psychologists who opined on respondent's depressive symptoms at time of misconduct did not do so as experts and gave limited information of respondent's condition and treatment; expert evidence did not establish that, and hearing judge did not focus on whether, extreme

emotional difficulties were directly responsible for respondent's misconduct; and respondent's record of incomplete participation in disciplinary proceedings cast doubt on hearing judge's summary conclusion that respondent had adequately recovered, Review Department could not give any mitigating weight to respondent's emotional difficulties.

[8a-f] **165 Standards of Proof/Standards of Review – Adequacy of Hearing Department Decision**
801.45 Application of Standards – General Issues – Deviation from standards – Found not to be justified
801.47 Application of Standards – General Issues – Deviation from standards – Necessity to explain
806.10 Application of Standards – Part A (General Standards) – Standard 1.8(b) Disbarment After Two Priors – Applied
1913.70 Cal. Rules of Ct., Rule 9.20 (formerly Rule 955) Violation Proceedings – Special Substantive Issues – Lesser Sanction than Disbarment for Violation

Willful violation of rule 9.20 is considered serious ethical offense for which disbarment is generally appropriate. Standard 1.8(b) provides that disbarment is appropriate where respondent has two or more prior records of discipline if: (1) actual suspension was ordered in any prior disciplinary matter; (2) prior and current disciplinary matters demonstrate a pattern of misconduct; or (3) prior and current disciplinary matters demonstrate respondent's unwillingness or inability to conform to ethical responsibilities. Where respondent who violated rule 9.20 had three prior records of discipline, including one-year actual suspension, and had repeatedly failed to comply with disciplinary probation conditions, and exceptions to standard 1.8(b) were not applicable, hearing judge erred in failing to analyze applicability of standard 1.8(b). Where no reasons existed to depart from discipline called for by standard 1.8(b), Review Department recommended disbarment to adequately ensure public protection.

[9] **135.09 Generally Applicable Procedural Issues – Amendments to Rules of Procedure – Other issues re amendments to Rules of Procedure generally**
135.60 Generally Applicable Procedural Issues – Amendments to Rules of Procedure – Dispositions and Costs
179.90 Issues re Conditions Imposed as Part of Discipline – Other Issues re Conditions Imposed as Part of Discipline – Other issues
180.11 Monetary Sanctions – General Issues – Effective date/retroactivity of authorizing statute and rule
194 Miscellaneous General Issues – Other Miscellaneous General Issues

Rules of statutory construction apply when State Bar Court interprets Rules of Procedure of State Bar. Absent express retroactivity provision or clear evidence of intended retroactive application, statutes should not be construed to apply retroactively to offenses committed prior to effective date. Where all of respondent's misconduct occurred prior to

effective date of new State Bar Rule of Procedure implementing statute authorizing monetary sanctions, Review Department did not recommend imposition of monetary sanctions on respondent.

ADDITIONAL ANALYSIS

Culpability

Found

214.11 Section 6068(k)
1915.10 Cal. Rules of Ct., Rule 9.20

Aggravation

Found

511 Prior record of discipline

Discipline

180.35 Monetary Sanctions – Imposition – Not recommended
1810 Disbarment
1921 Disbarment
2311 Inactive Enrollment After Disbarment Recommendation – Imposed

OPINION

STOVITZ, J.*

Before trial of this consolidated disciplinary proceeding, Dennis Earl Braun stipulated to all of the facts that support the two charges against him: that he willfully violated rule 9.20(c), California Rules of Court[1], by filing over five months late, his required proof of compliance ordered by the Supreme Court in Braun's third prior discipline; and that he willfully violated Business and Professions Code, section 6068, subdivision (k)[2], by failing to timely comply with three of his Supreme Court-ordered disciplinary probation conditions.

In determining the proper level of discipline, the State Bar Court hearing judge weighed heavily evidence that Braun had suffered extreme emotional difficulties in late 2017 and 2018, but had recovered by May 2019. She recommended Braun's actual suspension for 18 months and probation. The State Bar's Office of Chief Trial Counsel (OCTC) seeks review arguing that disbarment is the appropriate discipline, considering several serious aggravating circumstances, including that Braun has been disciplined three times previously. Braun has not sought review nor filed a brief in opposition to that of OCTC.

We review this proceeding independently. (Cal. Rules of Court, rule 9.12; *In re Morse* (1995) 11 Cal.4th 184, 207.) As we discuss *post*, while we accord some mitigation to Braun's evidence, overall, it cannot overcome the significant weight of the aggravating circumstances of this record. Those include that he has twice been found to have violated multiple probation duties in both his last disciplinary proceeding and the present one. As well, a willful violation of rule 9.20 has typically resulted in disbarment. Although disbarment is not mandatory for a California attorney with three prior disciplines, we are unable to reach any reasonable conclusion that would justify us deviating from disbarment in this case. For the protection of the public, the courts, and the legal profession, we have concluded that we must recommend disbarment.

I. PERTINENT PROCEDURAL HISTORY

Braun was admitted to practice law in California in June 1991.

The current proceeding we now review started as a separate rule 9.20 enforcement proceeding filed by OCTC on November 29, 2018, and a separate original disciplinary proceeding filed by OCTC on January 3, 2019, alleging Braun's breach of three of his probation duties. Those duties were: his failure to timely schedule a meeting with his assigned State Bar Office of Probation (Probation) deputy, his failure to meet with that deputy, and his failure to timely submit his first quarterly written probation report due by October 10, 2018.

Initially, Braun did not reply to the Notice of Disciplinary Charges (NDC) alleging his rule 9.20 violation and OCTC sought to enter his default. However, Braun ultimately filed an answer to this charge and the probation violation charge.

In April 2019, the hearing judge ordered these proceedings consolidated for trial (Rules Proc. of State Bar, rule 5.47.)

In May 2019, the parties entered into a comprehensive stipulation as to facts, conclusions of law (Stipulation), and the admission of exhibits into evidence. This removed the need to present evidence establishing Braun's probation and rule 9.20 violations.

This case was tried on issues of degree of discipline, in May and July 2019. The hearing judge filed her decision in late October 2019, reco-

* Retired Presiding Judge of the State Bar Court, serving as review judge pro tem by appointment of the California Supreme Court.

1. Further references to rules are to this source, unless otherwise noted.

2. Further references to sections are to this source, unless otherwise noted.

mmending an 18-month actual suspension as part of a larger stayed suspension and probation.

OCTC sought our review in November, 2019, urging that Braun be disbarred, or, at the least, that he receive an enhanced suspension. Braun failed to file a reply to OCTC's opening brief and, per procedural rules, we directed that he could not participate in oral argument. (Rules Proc. of State Bar, rule 5.153(A)(2).)

II. THE UNDISPUTED FACTS AND OUR CONCLUSIONS FROM THEM SHOW BRAUN'S WILLFUL VIOLATIONS OF RULE 9.20 AND OF THREE PROBATION CONDITIONS

In his answer to the charges, Braun admitted that he willfully breached his probation conditions—to arrange to meet with his assigned probation deputy, to meet with that deputy, and to timely file his first probation report. He also admitted his failure to file a timely rule 9.20(c) compliance declaration with this court, as required by Supreme Court order.

His pretrial Stipulation of facts with OCTC also admitted these facts as well as facts not charged—that Braun failed to timely file his second probation report, and that he did not notify Probation that he had completed the State Bar's Ethics School program as required.

The hearing judge made findings and concluded from them that Braun had willfully violated rule 9.20 and the three charged conditions of his probation. We shall adopt them as summarized below.

A. Rule 9.20 Violation

Effective July 13, 2018, the Supreme Court suspended Braun from the practice of law for one year as a revocation of probation it imposed on him in 2016. He was required to comply with the provisions of rule 9.20. As we find *post*, the Supreme Court also imposed a new set of probation conditions on Braun.

Under the actual suspension order, *ante*, Braun had until August 22, 2018, to file with our court a declaration that he had complied with rule 9.20. (See California Rules of Court, rule 9.20(c).) He did not file it until February 11, 2019, over five months after it was due.

However, Probation had notified Braun about five weeks before his compliance date of his duty to comply with rule 9.20. It did this by sending an email to the email address he maintained on State Bar records since December 1, 2009, advising him that it had placed on his private profile on the State Bar's website a letter containing detailed information about his rule 9.20 requirements. Braun received this emailed letter.

On August 28, 2018, about a week after the due date for Braun's rule 9.20 compliance had passed, Probation mailed a letter to Braun at his street address of State Bar record, notifying him that he had not complied with rule 9.20. That letter was returned by the United States Postal Service to Probation, marked undeliverable. However, that same day, Probation sent the same information to Braun at his email address of record and this email was not returned.

[1] Although the hearing judge found that Braun was grossly negligent in failing to timely retrieve notices mailed to his official State Bar record address, she concluded correctly that Braun willfully failed to comply with rule 9.20(c). In his Answer to the charges and in the Stipulation, Braun conceded his culpability of this willful violation and his concession is amply supported by case law. Willfulness of a rule 9.20(c) violation requires neither bad faith nor even actual knowledge of the rule provision violated. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1185–1186 [predecessor rule 955].) In his written Stipulation, Braun conceded that he failed to timely file the required declaration, that the State Bar sent notices to him informing him of his rule 9.20(c) filing duties, and that he received one by electronic mail and another sent by electronic mail was not returned. We adopt the hearing judge's conclusion of Braun's willful violation of rule 9.20(c).

B. Probation Condition Violations

[2a] Under the actual suspension order, *ante*, as relevant here, Braun was required by August 12, 2018, to schedule a meeting with his assigned probation deputy. He did not do so. Nor did he meet with the probation deputy, as also required.

[2b] He was required to submit a quarterly report to Probation commencing on October 10, 2018, as to his compliance with probation conditions. He did not submit his first report until April 9, 2019, six months late.

[2c] Probation notified Braun of his probation duties in the same communications we found, *ante*, it used to notify Braun of his rule 9.20 compliance duties. As we found and as Braun stipulated, although Probation's letter sent via United States Postal Service on August 28, 2018, was not delivered, the earlier email communication of July 12 was received by him. And the August 28 letter was also sent to him via email and was not returned.

[2d] From these undisputed facts, the hearing judge concluded that Braun willfully failed to comply with his statutory duty to adhere to three of his probation conditions. (Bus. & Prof. Code, § 6068, subd. (k).) We adopt this conclusion. Just as in rule 9.20 matters discussed *ante*, probation violation matters do not require proof that Braun actually knew the specifics of his probation delinquencies, so long as he received notice of his probation duties. (*In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 309.) The undisputed facts so show.

III. STRONG AGGRAVATING CIRCUMSTANCES OUTWEIGH LIMITED MITIGATING ONES

In advocating the degree of discipline it deems warranted, OCTC must establish aggravating circumstances by clear and convincing evidence as required by standard 1.5.[3] Braun has the same burden to establish mitigating circumstances. (Std. 1.6.)

A. Aggravating Circumstances

1. *Three Prior Records of Discipline (Std. 1.5(a))*

We adopt the hearing judge's finding that Braun's record of three prior disciplines was a significant aggravating circumstance. OCTC does not dispute the weight accorded by the judge to this aggravating factor, and contends that it supports OCTC's advocacy of disbarment.

a. 2003 private reproval
(State Bar Court No. 01-O-03607)

This disciplinary matter was resolved by agreed disposition between Braun and OCTC for a private reproval with some rehabilitative conditions.

Braun represented a client in a personal injury matter. A $15,000 settlement was achieved. Braun held $9,000 in trust for the client's medical providers, per lien agreements. However, he willfully failed to perform legal services competently, as required by former rule 3-110 of the Rules of Professional Conduct,[4] by not taking appropriate steps to distribute the funds he held in trust to the client, or to the trustee after the client started bankruptcy proceedings.

The parties agreed in mitigation that Braun had no prior discipline record, and had suffered from extreme difficulties in his family or personal life. There were no aggravating circumstances present.

b. 2016 stayed suspension
(S236449, State Bar Court No. 14-O-06193)

Effective November 18, 2016, the Supreme Court suspended Braun for one year, stayed, with standard probation conditions lasting two years.

This arose from a contested State Bar Court proceeding in which Braun admitted to certain facts before trial and certain conclusions near the end of trial. It concerned Braun's representation of a client in civil litigation starting in 2011 and continuing into 2015, arising from family law matters.

The State Bar Court hearing judge concluded that Braun improperly withdrew from representation of his client after August 2014, in willful violation of former rule 3-700(A)(2) of the Rules of Professional Conduct. Although the hearing judge also found Braun culpable of failing to act competently toward his client in repeated instances (Rules Prof. Conduct, former rule 3-110(A)), the judge did not assess added discipline for that violation, as OCTC had conceded that it was dupli-

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

4. All further references to rules are to the former California Rules of Professional Conduct that were in effect until November 1, 2018, unless otherwise noted.

cative of the former rule 3-700(A)(2) violation. Finally, the hearing judge concluded that Braun willfully violated section 6068, subdivision (m), by failing to notify his client of discovery requests from opposing counsel and of the client's need to provide Braun with responses to them.

In aggravation, the hearing judge considered Braun's prior private reproval, the multiple acts of misconduct found in the second proceeding, and the harm caused by his misconduct. In mitigation, the judge gave limited weight to Braun's cooperation with State Bar Court proceedings but substantial weight to his impressive character evidence, attested to by 15 witnesses.

c. 2018 one-year actual suspension as revocation of 2016 probation (S236449, State Bar Court No. 18-PM-10810)

Braun did not comply with three conditions of his 2016 disciplinary probation and, in January 2018, OCTC moved our Hearing Department to revoke his probation. Braun did not participate in these proceedings, and the assigned hearing judge deemed his failure to reply to OCTC's default motion as an admission of its allegations. (Rules Proc. of State Bar, rule 5.314.) As we stated, *ante*, effective July 2018, the Supreme Court revoked Braun's probation, suspended him for one year, with credit for inactive enrollment, and required him to comply with terms of a newly-imposed set of probation conditions lasting for two years.[5]

The hearing judge found that Braun failed to schedule a required meeting with a Probation Deputy as required, by December 18, 2016. He did not schedule this meeting until nearly two months later, and only after Probation had contacted him about his delinquency.

Braun was required to file his first quarterly probation report by January 10, 2017. Instead, he filed it on February 21, 2017, over a month late, and after Probation informed Braun about his delinquency. Moreover, the hearing judge found that he failed to file his quarterly probation report due January 10, 2018.

Additionally, Braun failed to attend and prove passage of the State Bar Ethics School, within the required one-year period.

In aggravation, the hearing judge considered Braun's two prior disciplines as a significant factor. Also considered a substantial aggravating factor was his multiple violations of his probation duties. Finally, the hearing judge deemed that Braun's failure to participate in the probation revocation proceedings established his failure both to appreciate the seriousness of the charges against him and to understand the import of his duties as an attorney to participate in such proceedings.

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

[3a] The hearing judge found that Braun engaged in multiple acts of misconduct involving his duties ordered by the Supreme Court, but assigned only modest weight to this factor, since, in her view, all of Braun's violations arose from his failure to comply with one Supreme Court order. Although OCTC did not dispute the weight to be accorded this finding, we cannot accept the hearing judge's weight assigned it, as it does not accord with our review of the record.

[3b] First, the admitted facts show that Braun violated three duties of his probation and the separate duty to report compliance with rule 9.20(c). Moreover, when the hearing judge in Braun's third disciplinary proceeding was confronted with his similar series of probation violations (without a rule 9.20 violation, as that rule was not imposed upon him), he found that Braun's multiple probation violations were entitled to substantial aggravating weight. We do as well. (See *In the Matter of Esau* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 131, 135–136.)

5. In its definition of a "prior record of discipline," standard 1.2(g) includes discipline imposed for a violation of probation.

B. Mitigating Circumstances

1. *Evidence of Good Character (Std. 1.6(f))*

[4a] Braun presented the testimony of five witnesses and the declarations of 18 others to attest to his good character and faithful, diligent representation of clients in highly contested and protracted family law matters up to 2017. Standard 1.6(f) allows mitigating evidence of "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" to be considered.

[4b] The hearing judge noted the strength of this evidence as to the first two elements, but also noted its limitation as to the third element that most of the witnesses did not demonstrate a general understanding of the charges Braun was facing. (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 280.) Overall, the hearing judge considered this evidence worthy of moderate mitigating weight. We agree with the judge's weight of this factor.

2. *Candor and Cooperation to Victims and State Bar (Std. 1.6(e))*

[5] The hearing judge gave Braun significant mitigating credit for his Stipulation with OCTC as to facts and conclusions prior to the trial. In probation and rule 9.20 matters, the facts are generally easily provable and stipulations do not save significant time. (See *In the Matter of Bouyer* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 888, 891 [easily provable facts surrounding misdemeanor state tax conviction].) Yet, here, we agree with the hearing judge's weight accorded this factor. First, Braun admitted to facts beyond the charges of the NDC.[6] Moreover, in submitting his answer to the charges well before his Stipulation, he admitted his culpability of a willful violation of rule 9.20(c). Finally, Braun did not dispute his culpability of a willful violation of probation duties under section 6068, subdivision (k), although his Stipulation technically appeared to be limited to the facts of his probation offenses.

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

[6] We uphold the hearing judge's decision to deny mitigating weight to Braun's claim of it for his belated filings of his rule 9.20(c) declaration, proof of Ethics School compliance, and a delinquent quarterly probation report. To qualify for mitigating weight, these steps would have to be taken spontaneously. (Std. 1.6(b) [mitigation for "prompt objective steps, demonstrating spontaneous remorse and recognition of wrongdoing and timely atonement"].) Here, because of Braun's delinquencies, he was aware that Probation enforcement proceedings were underway.

4. *Evidence of Extreme Emotional Difficulties (Std. 1.6(d))*

[7a] The hearing judge accorded Braun significant mitigation credit for the evidence he submitted that he was suffering from notable depression at the end of 2017 and into 2018, was improving from it sometime in 2018, and had no evidence of impairment by April 2019, just before the time of trial. OCTC disputes this weight given to Braun's evidence, raising concerns about whether it was established by expert evidence, and whether it was established as the cause of Braun's probation and rule 9.20(c) violations. From our independent record review, we agree with OCTC's position, and have decided to accord no weight to this factor.

[7b] As we observed in a case last year, where evidence of extreme emotional difficulties was presented as to violations similar to the present

6. We adopted the hearing judge's culpability conclusions and we note that they were limited to the charged conduct. Thus, the issue of uncharged misconduct is not present in this case other than to the extent that it bolsters the breadth of Braun's cooperation. (See *Edwards v. State Bar* (1990) 52 Cal.3d 28, 35–36.)

case, standard 1.6(d) provides that mitigation may be assigned for extreme emotional difficulties if (1) the attorney suffered from them at the time of misconduct, (2) expert testimony established them as directly responsible for the attorney's misconduct, and (3) "they no longer pose a risk that the attorney will commit future misconduct." (*In the Matter of Amponsah* (Review Dept. 2019) 5 Cal. State Bar Ct. Rptr. 646, 654.)

[7c] We discuss the requirements of this mitigating standard, starting with whether expert testimony established them. The only mental health professional who testified at trial, Dr. Lynne Meyer, a practicing psychologist for 27 years, had known Braun for 13 years. However, as the hearing judge noted at trial, Meyer did not testify as an expert witness. Rather, Braun called her as a character witness. Meyer did not treat Braun as a clinician because she had previously had an attorney-client relationship with him. Instead, she suggested that he see another psychologist for treatment. Her conversations with Braun, while frequent over many years, appeared unrelated to his emotional issues.

In this context, Meyer testified that, starting in late 2017 and during parts of 2018, Braun's conversations with her showed his deep depression, anxiety, and shame at not being able to serve his clients, because of his disciplinary probation. In learning about Braun's situation with the State Bar, Meyer relied on his explanation and did not refer to the charges filed against him.

Braun did see psychologist Kathy MacLeay, Ph.D., who had known him for 30 years. MacLeay submitted her declaration, also as a character witness. Braun spoke to her in late 2017 and MacLeay described his mental state as "depressed, deflated, and immobilized" and unable to function on some days. She considered Braun to be suffering from a debilitating depression. To help Braun rebuild his mental, emotional strength and confidence, MacLeay saw him a couple of times a week in person and on the phone, but did not state in what portion of 2017 or 2018 those meetings occurred, or specify what treatment she provided. She did state her observation that during 2018, Braun had rebounded, transitioning from immobility to taking constructive, corrective action. MacLeay saw Braun return to being the strong, positive professional she had known for many years.

[7d] Thus, it is clear that the two psychologists who opined on Braun's depressive symptoms did not do so as experts and they gave limited information of his condition; and, as to Dr. MacLeay, what treatment she provided. This contrasts with *In the Matter of Amponsah*, *supra*, 5 Cal. State Bar Ct. Rptr at p. 654, where Amponsah's treating clinician testified as an expert with adequate details as to that attorney's condition and where character witness testimony was consistent with and complemented the expert's testimony.

[7e] We also find that the evidence is not clear and convincing that Braun's depressive condition reported by Drs. Meyer and MacLeay was directly responsible for his misconduct. Dr. Meyer gave no testimony showing that Braun's condition prevented his compliance with rule 9.20 or his several probation conditions. Moreover, neither Drs. Meyer nor MacLeay, who had each known Braun for many years, reported him depressive prior to late 2017. Yet the record before us shows without dispute that Braun's probation violations that led to his third disciplinary case started in late 2016 and were repeated in early 2017—during times that he was apparently functioning well as an attorney, as described by Dr. Meyer and found in character declarations of several other clients.

[7f] The record contains written evidence that, in April 2019, Braun consulted with Dr. Meyer and clinical psychologist Dr. Jeffrey Arden and they reported that psychological testing of him showed that he no longer suffered from his depressive condition. However, the record of his participation in the present matter gives us pause in weighing that evidence as heavily as did the hearing judge. Braun originally defaulted in answering the

charges in the rule 9.20 enforcement case. After reinstating his pretrial participation and participating in the trial and after OCTC sought our review to seek disbarment, Braun failed to file a responsive brief on review, resulting in the denial of the opportunity to present oral argument before us. Thus, even if, *arguendo*, Braun had created a nexus between his depression and his non-compliance with his licensure duties, he has not shown adequate recovery from that condition.

[7g] In the decision, the hearing judge's discussion of Braun's evidence of extreme emotional difficulty was limited. While concluding that Braun had established a "compelling mitigating factor" worth significant weight, the judge did not focus on the required nexus element. Similarly, the judge summarily concluded that Braun had adequately recovered from his condition.

[7h] Given the lack of evidence and based on our independent view of this record, as to what must be shown to sustain Braun's burden to accord mitigating weight to his claim of serious emotional difficulties, we cannot give it any weight. Braun did not establish any of the three requirements of the standard.

IV. THE BALANCE OF AGGRAVATING EVIDENCE OVER MITIGATION CALLS FOR DISBARMENT TO ADEQUATELY PROTECT THE PUBLIC

Indisputably, the purposes of attorney discipline are the protection of the public, the courts, and the legal profession, the maintenance of high professional standards, and the preservation of public confidence in the legal profession. (Std. 1.1; *Borré v. State Bar* (1991) 52 Cal.3d 1047, 1053; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

[8a] A willful violation of rule 9.20 is considered a serious ethical offense for which disbarment is generally considered the appropriate discipline. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.)[7] In selecting the apt degree of discipline, each case should be decided on its own facts, after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059.) However, *Bercovich v. State Bar*, *supra*, 50 Cal. 3d 116 at p. 131, notes that disbarment is the most consistently imposed sanction in recent post-standards cases under rule 9.20, and that greater consistency in imposing discipline was a key reason for the adoption of the standards.

On occasion, lesser discipline than disbarment has been imposed where the late filing of a compliance affidavit was the only rule 9.20 issue *and* the attorney demonstrated good faith, significant mitigation, and little or no aggravation.[8] For example, an actual suspension is appropriate where an attorney makes an unsuccessful attempt to timely comply, and presents substantial mitigation, including recovery from extreme emotional difficulties. (*Shapiro v. State Bar*, *supra*, 51 Cal.3d at pp. 255–260; *In the Matter of Amponsah*, *supra*, 5 Cal. State Bar Ct. Rptr. at pp. 656–657.)

[8b] Since Braun has three prior impositions of discipline, when applying the standards to this case, we must also give serious consideration to standard 1.8(b). Although the hearing judge cited the standard in the decision, its applicability to this case was not analyzed at all. The complete lack of a standard 1.8(b) analysis is a serious concern, given the standard's elements and the nature of Braun's most recent prior discipline, compared to this proceeding. Standard 1.8(b) provides that disbarment is appropriate where an attorney has two or more prior records of discipline

7. As rule 9.20(d) provides, "A suspended [attorney's] willful failure to comply with the provisions of this rule is a cause for disbarment or suspension and for revocation of any pending probation."

8. See *Shapiro v. State Bar* (1990) 51 Cal.3d 251; *Durbin v. State Bar* (1979) 23 Cal.3d 461; *In the Matter of Amponsah*, *supra*, 5 Cal. State Bar Ct. Rptr. at pp. 655–656; *In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192; *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527.

if: (1) an actual suspension was ordered in any prior disciplinary matter; (2) the prior and current disciplinary matters demonstrate a pattern of misconduct; or (3) the prior and current disciplinary matters demonstrate the attorney's unwillingness or inability to conform to ethical responsibilities. Braun's case meets the first and third of these requirements: he previously received a one-year actual suspension; and, as advocated by OCTC and shown by this record, Braun repeatedly failed to comply with his disciplinary probation conditions in two consecutive proceedings, following his 2016 stayed suspension. This factor of repetitive discipline for similar misconduct has been properly recognized as an especially serious aggravating circumstance, since Braun's prior probation revocation discipline did not serve to rehabilitate him and prevent repetition of the same type of misconduct we now review. (See *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443–444.) As such, his prior and current misconduct establish his unwillingness or inability to conform to the duties imposed on law licensees.

[8c] Moreover, the two specified exceptions to standard 1.8(b) do not apply here. Braun's present misconduct did not occur at the same time as his prior misconduct, and his limited mitigation is neither compelling nor does it predominate over the significant aggravation for three prior discipline records, and multiple acts of wrongdoing.

[8d] We next consider whether any reason exists to depart from the discipline called for by standard 1.8(b). We acknowledge that disbarment is not mandatory as a third discipline. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506–507 [disbarment is not mandatory in every case of two or more prior disciplines].) However, if we deviate from recommending disbarment, we must articulate clear reasons for doing so. (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons for departure from standards].) Upon careful consideration of this record and the goal of public protection, and maintenance of high professional standards, there are no reasons for deviating from disbarment.

The hearing judge compared Braun's rule 9.20 situation to the facts in *Matter of Amponsah*, *supra*, 5 Cal. State Bar Ct. Rptr. at pp. 651–653. In our view, *Amponsah* was a fundamentally different case than this one. Amponsah had only one prior imposition of discipline, rather than three as in this case. Amponsah's case was his first failure to comply with rule 9.20 and two of his probation conditions, rather than Braun's two consecutive proceedings showing his failures to comply with probation duties. The *Amponsah* record showed that, unlike here, Amponsah had made several attempts, albeit unsuccessful, to comply timely with rule 9.20. Amponsah offered convincing evidence of serious emotional difficulty, supported by expert testimony, with strong evidence of his recovery from that difficulty, and the hiring of counsel to assist him in complying with probationary duties going forward, in contrast to Braun's unconvincing evidence of mitigation.

In contrast, we see this case as far more akin to *In the Matter of Esau* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 131. In that case, Esau was privately reproved by our court, following discipline by another state, for wrongful retention of a client's advanced fees. As part of our court's reproval, Esau was required to comply with certain duties. He failed to comply with several of them, and his period of required compliance was extended for an additional year. Thereafter, he failed to comply with the duties in three areas, and was placed on a stayed suspension, with a new set of probation conditions. Esau failed to submit four probation reports on time and failed to perfect his address change timely. As discipline for these failures, Esau was actually suspended for six months and required to comply with probation conditions and rule 9.20. In the proceeding that led us to recommend disbarment, ordered by the Supreme Court, we found that Esau's sole violation was his willful failure to comply with rule 9.20(c) by filing his required declaration 103 days late. We noted the very limited evidence of good character which Esau introduced and that there was no expert evidence supporting his claims of extreme emotional difficulties.

Although Esau had one more instance of prior discipline than does Braun, for failure to comply with duties attached to earlier discipline, Braun, like Esau, failed repeatedly to comply with probationary-type duties. We are now confronted with Braun's second instance of multiple failures to comply with court-ordered duties.

[8e] The concern we expressed in *Matter of Esau, supra*, 5 Cal. State Bar Ct. Rptr. at p. 140 is equally applicable here: "[a]ttorneys who engage in this extended practice of inattention to official actions . . . should not be allowed to create the risk that it will extend to clients resulting in inevitable and grievous harm to them. (*In the Matter of Pierce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 382, 388.)"

[8f] To adequately ensure public protection, we recommend Braun's disbarment.

V. RECOMMENDATION

We recommend that Dennis Earl Braun be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice in California.

We further recommend that Braun be ordered to comply with the requirements of California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that within 30 and 40 days, respectively, after the effective date of the Supreme Court order imposing discipline in this matter.[9]

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

VI. MONETARY SANCTIONS

[9] The court does not recommend the imposition of monetary sanctions as all the misconduct in this proceeding/matter occurred prior to April 1, 2020, the effective date of Rules of Procedure of the State Bar, rule 5.137, which implements Business and Professions Code section 6086.13. (See *In the Matter of Wu* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 263, 267 [rules of statutory construction apply when interpreting Rules of Procedure of State Bar]; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208–1209 [absent express retroactivity provision in statute or clear extrinsic sources of intended retroactive application, statute should not be retroactively applied]; *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841 [where retroactive application of statute is ambiguous, statute should be construed to apply prospectively]; *Fox v. Alexis* (1985) 38 Cal.3d 621, 630–631 [date of offense controls issue of retroactivity].)

9. For purposes of compliance with rule 9.20(a), the operative date for identification of "clients being represented in pending matters" and others to be notified is the filing date of the Supreme Court order, not any later "effective" date of the order. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45.) Further, the attorney is required to file a rule 9.20(c) affidavit even if he or she has no clients to notify on the date the Supreme Court filed 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).)

VII. ORDER OF INACTIVE ENROLLMENT

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

We concur:

PURCELL, P.J.
VALENZUELA, J.**

** Currently serving as a hearing judge of the State Bar Court, appointed by the California Supreme Court, and designated to serve as a review judge in this matter by the Presiding Judge of the State Bar Court, pursuant to rule 5.155(F) of the Rules of Procedure of the State Bar. Review Judges Honn and McGill took no part in the consideration or decision of this review proceeding.

State Bar Court
Review Department

In the Matter of

JOSEPH EARL MARTIN

No. 16-O-17714

Filed September 30, 2020

SUMMARY

Respondent was found culpable of willfully violating former rule 4-100(A) of the Rules of Professional Conduct by depositing personal funds into, and paying personal expenses from, his client trust account on multiple occasions. The hearing judge recommended a 90-day actual suspension, finding that respondent failed to demonstrate that a lesser sanction was warranted under the applicable standard. On review, respondent contended that (1) he was not culpable because he had a good faith belief that his actions did not violate any ethical rule since the trust account never held any client funds, and (2) he was not afforded due process because the State Bar did not provide him notice, before filing charges, that his use of a trust account to hold only personal funds violated former rule 4-100(A). Although the Review Department rejected respondent's arguments on culpability, it concluded that mitigation clearly outweighed aggravation, and that the record supported a downward departure from the presumed discipline under the standards. It therefore imposed a public reproval with specified conditions.

COUNSEL FOR PARTIES

For State Bar of California: Rachel Simone Grunberg

For Respondent: Joseph Earl Martin

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1a, b]

163 Standards of Proof/Standards of Review – Proof of Wilfulness

280.00 Substantive Issues in Disciplinary Matters Generally – Culpability – Rules of Professional Conduct Violations – Trust account/commingling

Former rule 4-100(A) absolutely bars use of trust account for personal purposes, even if client funds are not on deposit. Where respondent deposited personal funds in, and paid personal expenses from, client trust account, respondent was culpable of willful violations of former rule 4-100(A), even though no client funds were in trust account.

[2]

102.30 Generally Applicable Procedural Issues – Improper Prosecutorial Conduct – Investigative and/or pretrial misconduct

106.20 Generally Applicable Procedural Issues – Issues re Pleadings – Adequate notice of charges

192 Miscellaneous General Issues in State Bar Court Proceedings – Constitutional Issues—Due Process/Procedural Rights

Fundamental requirement of due process is opportunity to be heard at meaningful time and in meaningful manner. In California disciplinary proceedings, adequate notice requires only that attorney be fairly apprised of precise nature of charges before proceedings commence. Where Notice of Disciplinary Charges pled specific facts comprising violation and specific rule violated, respondent received due process, and Review Department rejected respondent's contention that due process required that respondent be given notice during investigation that conduct violated specific rule before State Bar could charge respondent with violation.

[3]

162.20 Standards of Proof/Standards of Review – Respondent's burden in disciplinary matters

163 Standards of Proof/Standards of Review – Proof of Wilfulness

192 Miscellaneous General Issues in State Bar Court Proceedings – Constitutional Issues-Due Process/Procedural Rights

280.00 Substantive Issues in Disciplinary Matters Generally – Culpability – Rules of Professional Conduct Violations – Trust account/commingling

Language of former rule 4-100(A) is explicit that personal funds cannot be deposited into client trust account. Where respondent interpreted language of rule to permit respondent to deposit personal funds in client trust account that held no client funds; interpretation was unreasonable given entire language of rule; and respondent did not research case law after receiving letters from State Bar regarding NSF checks and containing copy of former rule 4-100, Review Department rejected respondent's argument that language of rule and case law failed to give adequate notice that using client trust account to hold and disburse personal funds was improper even though account never held client funds.

[4] **162.20 Standards of Proof/Standards of Review – Respondent's burden in disciplinary matters**
163 Standards of Proof/Standards of Review – Proof of Wilfulness
280.00 Substantive Issues in Disciplinary Matters Generally – Culpability – Rules of Professional Conduct Violations – Trust account/commingling

Good faith is not defense to commingling charge. Even if respondent had good faith belief that respondent was not violating rule 4-100(A) in depositing personal funds in, and paying personal expenses from, client trust account that held no client funds, good faith belief does not excuse culpability.

[5] **106.90 Generally Applicable Procedural Issues – Issues re Pleadings – Other issues re pleadings**
523 Aggravation – Multiple acts of misconduct – Found but discounted or not relied on

Whether an attorney engaged in multiple acts of misconduct in aggravation is not limited to counts pleaded. Where respondent's culpability of two counts of violating former rule 4-100(A) encompassed 168 separate acts of misconduct, respondent committed multiple acts of misconduct. However, where misconduct lasted only 10 months, respondent's multiple acts did not warrant substantial aggravation.

[6a, b] **165 Standards of Proof/Standards of Review – Adequacy of Hearing Department Decision**
192 Miscellaneous General Issues in State Bar Court Proceedings – Constitutional Issues – Due Process/Procedural Rights
565 Aggravation – Uncharged violations – Declined to find

Aggravating circumstances may include uncharged violations of Business and Professions Code or Rules of Professional Conduct. However, hearing judge erred in finding significant aggravation based on uncharged violation of former rule 4-100(A) based on erroneous factual conclusion from respondent's testimony, where State Bar never raised uncharged misconduct during trial or in posttrial closing brief, and respondent consequently did not have opportunity to defend during trial against uncharged violation.

[7a, b] **710.10 Mitigation – Long practice with no prior discipline record - Found**

No prior record of discipline over many years of practice, coupled with present misconduct that is not likely to recur, is a mitigating circumstance. Where record reflected 15 years of discipline-free practice; hearing judge's finding of shorter period was based on erroneous factual conclusion; and record reflected that respondent's misconduct was aberrational and unlikely to recur, respondent's 15 years of discipline-free practice were entitled to substantial weight in mitigation.

[8] **720.10 Mitigation – Lack of harm to client/public/justice - Found**
Mitigation can be given where lack of harm to clients, public, or administration of justice is established. Where record demonstrated that respondent's use of client trust account as personal checking account did not cause any harm to clients or otherwise, and State Bar's argument that it had potential for harm was speculative, lack of harm was entitled to substantial weight.

[9a, b] **715.50 Mitigation – Good faith – Declined to find**
An attorney may be entitled to mitigation credit if the attorney establishes a good faith belief that is honestly held and objectively reasonable. Where respondent acknowledged receiving copy of relevant ethics rule with State Bar investigative letter, and reviewed rule after receiving it, even if respondent honestly believed his conduct did not violate rule, it was objectively unreasonable for respondent to continue to violate clear language of rule for over six months after receipt of investigative letter, and Review Department assigned no mitigating credit for good faith.

[10a-c] **740.33 Mitigation – Good character references – Found but discounted or not relied on – Inadequate showing generally**
Attorneys are entitled to mitigation if extraordinary good character is attested to by wide range of references in legal and general communities who are aware of full extent of misconduct. Where respondent's three character witnesses, including his young adult son and two attorneys, were all fully aware of charges against respondent and praised respondent's excellent reputation as criminal defense attorney, hearing judge erred in discounting witnesses' testimony based on bias due to connections with respondent, and assigning only minimal mitigating weight. Witnesses' potential bias was not disqualifying but warranted consideration in weighing evidence. Nonetheless, given youth of respondent's son and attorney witnesses' having only known respondent for 10 years and five years, respondent was entitled to moderate mitigation for good character.

[11] **735.30 Mitigation – Candor and cooperation with Bar – Found but discounted or not relied on**
Mitigation may be assigned for cooperation with State Bar. Where respondent stipulated only to facts and admission of documents, and not to culpability, however, hearing judge erred in affording significant mitigation, and Review Department only gave moderate weight to respondent's cooperation.

[12] **745.52 Mitigation – Remorse/restitution/atonement – Declined to find – Inadequate showing generally**
755.51 Mitigation – Prejudicial delay in proceedings – Declined to find – Delay not sufficiently lengthy
755.52 Mitigation – Prejudicial delay in proceedings – Declined to find – Inadequate showing of prejudice
795 Mitigation – Other mitigating factors – Declined to find

Where respondent sought additional mitigation for (1) prompt action that rectified ethical issues; (2) State Bar's more than one-year delay in bringing charges; and (3) respondent's voluntary cessation of misconduct before charges were brought, clear and convincing evidence did not support additional mitigation. Respondent's rectifying actions were not prompt where respondent continued to commit misconduct months after contact from State Bar; respondent showed neither delay nor prejudice from State Bar's 17-month delay in filing disciplinary charges; and respondent's having ceased misconduct before charges were filed did not qualify as mitigating circumstance under applicable standard.

[13a-d] **801.41 Application of Standards – General Issues – Deviation from standards – Found to be justified**
802.63 Application of Standards – Part A – Standard 1.7 – Effect of mitigation on appropriate sanction
824.54 Application of Standards – Part B – Standard 2.2(a) – Declined to apply – lesser sanction imposed – Compelling mitigation

Where applicable standard provided for presumed discipline of three-month actual suspension for commingling, but respondent's misconduct was minor and aberrational; there were multiple mitigating circumstances, including 15-year discipline-free record, no client harm or risk of harm, good character, and cooperation, candor, and honesty; mitigating circumstances clearly outweighed one aggravating circumstance of multiple acts; and respondent demonstrated ability to conform to ethical responsibilities in future, public reproval with conditions of State Bar Ethics School and Client Trust Accounting School was appropriate discipline under standard providing for lesser discipline under such circumstances.

ADDITIONAL ANALYSIS

Culpability

Found

280.01 Trust account/commingling (1989 RPC 4-100(A))

Discipline

1024 Ethics exam/ethics school
1028 Client trust accounting school
1041 Public reproval – With conditions

OPINION

MCGILL J.

In his first disciplinary matter, Joseph Earl Martin was charged with two counts of misconduct, both based on violations of former rule 4-100(A) of the California Rules of Professional Conduct.[1] Specifically, the Notice of Disciplinary Charges (NDC) alleges Martin deposited personal funds into, and paid personal expenses from, his client trust account (CTA) on multiple occasions, and thus improperly commingled those funds. The hearing judge found Martin culpable of both counts. In recommending a 90-day actual suspension, the judge determined that Martin failed to demonstrate that a lesser sanction under standard 2.2(a)[2] was warranted.

Martin appeals. He argues that he did not commingle his personal funds in the CTA because no client money was ever deposited into it. Further, he asserts he had a good faith belief that his actions did not violate any ethical rule and that, because the State Bar never provided him notice that he was violating rule 4-100(A) before charges were filed, he was not afforded due process and thus should not be found culpable for violating the rule. Finally, Martin also asserts he has sufficient mitigation to warrant less discipline and seeks a private reproval. The Office of Chief Trial Counsel of the State Bar (OCTC) does not appeal the hearing judge's findings and requests that we uphold her recommendation.

Based on our independent review of the record (Cal. Rules of Court, rule 9.12), we affirm the hearing judge's culpability findings because commingling within the meaning of rule 4-100(A) occurs when an attorney maintains personal funds in a CTA even if no client funds are in the account. (*Doyle v. State Bar* (1982) 32 Cal.3d 12, 22–23.) We do, however, find aggravation for only one of the two aggravating circumstances found by the judge and give more weight to Martin's mitigating circumstances. Overall, the mitigation clearly outweighs the aggravation and, therefore, we conclude the record supports a downward departure under the standards. We order Martin be publicly reproved with conditions, which will, under the circumstances established here, be sufficient to protect the public, the courts, and the legal profession.

I. PROCEDURAL BACKGROUND

OCTC filed a NDC on December 6, 2018, alleging two counts of misconduct against Martin, both charging violations of rule 4-100(A). A one-day trial took place on April 5, 2019. Before the trial, on April 4, the parties filed a pretrial Stipulation as to Facts and Admission of Documents (Stipulation).[3] The hearing judge issued her decision on July 15, 2019, following a period for posttrial briefing.

II. FACTUAL BACKGROUND[4]

Martin was admitted to practice law in California on August 27, 1997. At some point in 2004, he opened a CTA at JP Morgan Chase Bank

1. All further references to rules are to the Rules of Professional Conduct that were in effect from September 14, 1992, to October 31, 2018, unless otherwise noted.

2. Standard 2.2(a) of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, provides that "Actual suspension of three months is the presumed sanction for . . . commingling . . . ." Further references to standards are to this source.

3. At the beginning of the trial, the hearing judge granted Martin's request to withdraw from stipulating to the admission of bank records as exhibits, based on his argument that his stipulation of facts rendered those records unnecessary. A review of the transcript shows many exhibits were only partially admitted, with OCTC agreeing that some records that had been contained in the Stipulation did not need to be admitted.

4. The facts included in this opinion are based on the Stipulation, 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).)

(Chase Bank), which he never used to accept, hold, or disburse client funds. OCTC and Martin stipulated that, between October 1, 2016, and July 26, 2017, Martin made several deposits into, and multiple withdrawals from, his CTA, totaling $52,188.63 in deposits and $46,869.39 in withdrawals.[5] All deposit and withdrawal activities were personal in nature.

Between October 2016 and July 2017, OCTC received copies of six non-sufficient fund (NSF) notices sent to Martin from Chase Bank pertaining to his CTA. OCTC's receipt of these notices prompted it to contact Martin. Specifically, OCTC sent Martin investigative letters seeking information about at least two NSF checks (check nos. 1161 and 1307). In three of these letters, one each sent on December 13, 2016, May 19, 2017, and July 11, 2017, the following warning was included: **"FAILURE TO PROVIDE THE DOCUMENTS REQUESTED [. . .] WHICH [YOU ARE] REQUIRED TO MAINTAIN PURSUANT TO RULE 4-100(C) [...] MAY BE CONSIDERED A VIOLATION OF RULE 4-100(B)(3)."** A complete copy of rule 4-100 was enclosed with each letter.[6]

Martin testified he reviewed the letters from OCTC as he received them, along with the enclosures that set forth rule 4-100 in its entirety. His understanding of the warnings in the letters was that OCTC was seeking records from him to prove he did not have client money in his CTA, which he was using for personal funds. His assessment of OCTC's letters comported with his belief at the time that a violation under rule 4-100 would occur only if he was combining his personal money with client money in the CTA. His belief was based on subsection (A)'s phrase "or otherwise commingled," which he interpreted to mean that all the language of subsection (A)'s prohibition applied only where mixing of client money and personal money occurred in the CTA. Because he never had client funds in his CTA, he concluded the rule's prohibition did not apply to him.

Martin obtained counsel, who answered questions from the OCTC investigator and provided CTA records on February 7, 2017, after receiving an extension. On March 10, his counsel sent an email to OCTC stating Martin told him that he had opened a regular checking account and planned to close his CTA once OCTC's investigation concluded. Martin's attorney also attached additional financial records from the CTA. The email pointed out that, as a criminal defense attorney, Martin did not receive, administer, or disburse client funds. At trial, Martin testified he intended to open a regular checking account at the time his counsel wrote the email. However, on March 17, he started a serious child molestation case in Sacramento that ended a few days before he suffered a heart attack on April 5. He continued to use the CTA for personal purposes until July 26, 2017.

III. MARTIN IS CULPABLE ON BOTH COUNTS

[1a] Count one of the NDC alleges that between October 1, 2016, and July 26, 2017, Martin deposited or commingled funds belonging

5. As established by the Stipulation, Martin made the following deposits into his CTA: 20 deposits from Legal Management Quickbooks (paychecks), six deposits from Spaulding Campri LLC (payments for his work as an independent contractor), and two cash deposits. Martin made the following payments from his CTA: 68 checks to K. Martin (his ex-wife), 49 cash withdrawals, 11 payments to Target, seven payments to V. Paul (his landlord), three checks to the Department of Motor Vehicles, and two payments to Kaiser Pharmacy.

6. Rule 4-100 provides, in relevant part, that, "(A) All funds received or held for the benefit of clients by a member . . . shall be deposited in a [CTA] . . . . No funds belonging to the member . . . shall be deposited [into the CTA] or otherwise commingled . . . . (B) A member shall . . . (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the member . . . .(C) The Board of [Trustees] . . . shall have the authority to formulate and adopt standards as to what 'records' shall be maintained by members . . . in accordance with subparagraph (B)(3). The standards formulated and adopted by the Board . . . shall be effective and binding on all members."

to him in his CTA, in willful violation of rule 4-100(A). In count two, the NDC alleges that Martin issued checks and made electronic withdrawals from his CTA to pay personal expenses during the same time period, in willful violation of the same rule. The hearing judge found that, by placing $52,188.63 of personal funds in his CTA (count one) and paying $46,869.39 in personal expenses from his CTA (count two), Martin was culpable as charged. We agree.

[2] On review, Martin first argues due process requires he be given notice during any investigation that his conduct violates a specific rule before OCTC can charge him with a violation. He is mistaken. Generally, "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner. [Citations.]'" (*Matthews v. Eldridge* (1976) 424 U.S. 319, 333.) In California disciplinary proceedings, "adequate notice requires only that the attorney be fairly apprised of the precise nature of the charges before the proceedings commence." (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 929.) In the NDC filed in this case, notice of the specific facts comprising the violation and the specific rule violated were pleaded for both counts as required under rule 5.41(B) of the Rules of Procedure of the State Bar; thus, on the issue of notice, Martin received due process.

[3] As for Martin's second argument, that the language of rule 4-100(A) and case law failed to give him adequate notice his acts of depositing only his personal funds in his CTA and payment of his personal expenses from it were improper, this argument also fails. Contrary to his assertion, rule 4-100(A) is explicit in that personal funds cannot be placed into a CTA: "No funds belonging to the member or the law firm shall be deposited [into the CTA] or otherwise commingled . . . ." Martin's testimony that the phrase "or otherwise commingled" led him to believe he was not violating rule 4-100(A), when only his personal funds were deposited into the CTA, is simply an unreasonable interpretation of the rule, given the language before that phrase clearly prohibits such an action. To his point that case law did not provide him adequate notice, we first note his testimony at trial was quite clear that he did not do any case research on the issue when the State Bar contacted him about his NSF checks. **[1b]** Nonetheless, the Supreme Court has interpreted rule 4-100(A) as a bright-line rule that "absolutely bars use of the trust account for personal purposes, even if client funds are not on deposit." (*Doyle v. State Bar*, *supra*, 32 Cal.3d at pp. 22–23.) Martin's argument that the Doyle case is inapplicable because the attorney had client funds in the CTA at some point that he later misappropriated, simply ignores the salient point the Supreme Court was making concerning the rule. Thus, by depositing personal funds into a CTA and paying personal expenses from it, Martin willfully violated the express language of rule 4-100(A) and the Supreme Court's clear declaration of how the rule applies.[7] Accordingly, his misuse of his CTA establishes culpability under counts one and two.[8]

7. The State Bar's Handbook on Client Trust Accounting also describes the prohibition against using a CTA for personal use: "You *can't* make payments out of your client trust bank account to cover your own expenses, personal or business, or for any other purpose that isn't directly related to carrying out your duties to an individual client." (The State Bar of Cal., Handbook on Client Trust Accounting for California Attorneys (2018) ("Handbook"), § VI, p. 17.) The Handbook is available online at the following website: http://www.calbar.ca.gov/Portals/0/documents/ethics/Publications/CTA-Handbook.pdf.

8. **[4]** Additionally, Martin briefly argues he had a good faith belief that he was not violating rule 4-100(A). Even if true, his good faith belief does not excuse his culpability. (*Heavey v. State Bar* (1976) 17 Cal.3d 553, 558 [good faith is not defense to commingling charge].)

IV. MITIGATION OUTWEIGHS AGGRAVATION [9]

Standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence.[10] Standard 1.6 requires Martin to meet the same burden to prove mitigation.

A. Aggravation

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

The hearing judge found Martin's multiple commingling violations over an eight-month period[11] to be an aggravating circumstance under standard 1.5(b) and assigned moderate weight because these acts did not occur over a lengthy period. Martin challenges this finding by arguing that his multiple improper CTA transactions constitute only one continuous act in the course of conduct. While not appealing, OCTC nonetheless urges us to assign significant weight in aggravation for this factor because Martin improperly used his CTA on at least 168 occasions.

We agree with the hearing judge's approach and reject both Martin's and OCTC's arguments. **[5]** We have held that "multiple acts of misconduct as aggravation are not limited to the counts pleaded. [Citation.]" (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 279.) Here, Martin's culpability is for two counts of misconduct that encompass 168 separate acts as established by the Stipulation. However, based on case law, we do not find that his conduct warrants substantial aggravation for multiple acts because his misconduct occurred over only 10 months. (See *In the Matter of Song*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 279 [significant aggravation for 65 improper CTA violations involving client harm over three-year period]; see also *In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 317 [significant weight in aggravation for 24 counts of misconduct involving harm to multiple clients over four-year period].)

2. *Uncharged Misconduct (Std. 1.5(h))*

[6a] Under standard 1.5(h), aggravating circumstances may include "uncharged violations of the Business and Professions Code or the Rules of Professional Conduct." The hearing judge found significant aggravation based on an uncharged violation of rule 4–100(A) in concluding that Martin's testimony revealed he had been commingling since 2004, not just from October 2016 through July 2017 as charged in the NDC.

[6b] Martin objects to this finding, arguing that the hearing judge's conclusion is based upon an erroneous factual conclusion drawn from his testimony. While Martin acknowledged at trial that he opened his CTA in 2004, he further testified he did not use it at all until 2012 when setting up direct deposit for his Legal Management Quickbooks paychecks. Despite this testimony, OCTC never raised uncharged misconduct during trial or in its post-trial closing brief. Consequently, Martin did not have an opportunity to defend himself during trial against this uncharged violati-

9. Martin requests "a de novo reconsideration of aggravating and mitigating factors." For all issues in this proceeding, including aggravating and mitigating factors, we "independently review the record and may make findings, conclusions, or a decision or recommendation different from those of the hearing judge." (Rules Proc. of State Bar, rule 5.155(A).)

10. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

11. The hearing judge incorrectly stated that Martin's misconduct occurred over an eight-month period. The Stipulation states that Martin's commingling violations happened over a 10-month period from October 1, 2016, through July 26, 2017.

on. Accordingly, we decline to find additional aggravation. (See *In the Matter of Lenard* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 250, 260 [no aggravation for uncharged misconduct where attorney did not have sufficient notice or opportunity to defend after OCTC became aware of relevant facts].)

B. Mitigation

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

[7a] Mitigation is available under standard 1.6(a) where no prior record of discipline exists over many years of practice, coupled with present misconduct that is not likely to recur. The hearing judge determined Martin's misconduct began in 2004, finding only seven years of discipline-free practice and affording him minimal mitigation. Martin requests that significant weight be given; OCTC agrees with the judge's assignment of minimal weight.

[7b] While we do not adopt the hearing judge's finding of uncharged misconduct in aggravation, our independent review of the record reveals that Martin's misconduct began in 2012, which equates to 15 years of discipline-free practice.[12] The record also reflects that Martin's misconduct was aberrational. (*Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [prior record of discipline-free practice is most relevant where misconduct is aberrational and unlikely to recur].) He testified he understands now that personal funds can never be deposited into a CTA and that personal expenses cannot be paid from a CTA. Further, he asserts that, if he were required to maintain client funds in the future, he would associate with an attorney who would be fully responsible for managing the CTA. Thus, Martin's 15 years of discipline-free practice are entitled to substantial weight in mitigation. (*In the Matter of Yee* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 330, 335 [significant weight in mitigation for 10 and one-half years of discipline-free practice]; *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [significant weight in mitigation for over 10 years of discipline-free practice].)

2. *No Client Harm (Std. 1.6(c))*

[8] Standard 1.6(c) provides for mitigation where lack of harm to clients, the public, or the administration of justice can be established. The hearing judge found Martin's use of his CTA as a personal checking account did not cause any client harm and afforded moderate weight. Martin requests that a greater weight be given to this circumstance. OCTC does not object to the finding of moderate weight, but it argues that greater weight should not be given because "[t]here is always the potential for harm." OCTC's argument is, at best, speculative. We find substantial weight should be given because no evidence in the record demonstrates any harm was caused to clients, the public, or the administration of justice.

3. *Good Faith (Std. 1.6(b))*

[9a] An attorney may be entitled to mitigation credit if he can establish a "good faith belief that is honestly held and objectively reasonable." (Std. 1.6(b); see also *In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653.) The hearing judge found Martin was not entitled to mitigation for his good faith belief that he was not violating any trust accounting rule by using his CTA as a personal account where the account did not hold client funds. Martin contends he honestly believed his CTA activities were proper and not an ethical violation. He also argues

12. The hearing judge erroneously concluded that Martin began using his CTA for personal deposits in 2004, when in fact, based on his unrebutted testimony, he opened the CTA in 2004 and began to use it in 2012.

that his interactions with OCTC during its investigation made his reliance on his beliefs objectively reasonable. OCTC argues that Martin is not entitled to any good faith mitigation because his ignorance of rule 4-100 is objectively unreasonable, particularly since he was provided with copies of the rule on multiple occasions.

[9b] Martin acknowledged receiving a copy of the complete text of rule 4-100 when OCTC mailed its first investigative letter to him in December 2016; Martin also testified that he reviewed the rule after receiving it. Even if he honestly believed his CTA usage did not run afoul of rule 4-100(A), it was objectively unreasonable for him to continue to use his CTA for personal matters until July 2017 in light of the clear language of the rule. We therefore assign no mitigation credit for good faith. (*Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 331 [attorney's honest belief not mitigating because belief was unreasonable].)

4. *Extraordinary Good Character (Std. 1.6(f))*

[10a] Martin is entitled to mitigation if he establishes "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).) Three witnesses, including his son and two attorneys, testified at trial regarding Martin's good character. The hearing judge reduced the weight accorded to two of his character references based upon a finding of "obvious bias" and assigned minimal weight to this mitigating circumstance; OCTC agrees with the judge's determination. We disagree with the judge's approach and assign moderate weight.

[10b] All three witnesses were fully aware of the charges against Martin and praised his excellent reputation as a criminal defense attorney. In fact, one of the attorney witnesses represented Martin during the OCTC investigation and trial in this matter. The other attorney witness had previously worked with Martin and attested to his strong work ethic and commitment to serve others. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration given to attorneys' testimony due to their "strong interest in maintaining the honest administration of justice"].)

[10c] Although some of Martin's good character testimony was offered by a family member and his former counsel, any bias they might have due to their connections should not be disqualifying, but considered in weighing the evidence. (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 592 [testimony of acquaintances, neighbors, friends, associates, employers, and family members, who had broad knowledge of attorney's good character, work habits, and professional skills, entitled to great weight].) However, Martin's son was only 20 years old when he testified, one attorney witness had known Martin for 10 years, and the other had only known him for five years, which is factually different than the three witnesses in *Davis*, who each had been acquainted with that attorney for 10 years or more. Therefore, we find Martin is entitled to moderate weight for establishing good character.

5. *Cooperation (Std. 1.6(e))*

[11] Mitigation may be assigned under standard 1.6(e) for cooperation with the State Bar. The hearing judge afforded significant mitigation for this circumstance, which Martin agrees is appropriate. OCTC requests we reduce the weight for this circumstance because Martin did not stipulate to culpability. Before trial, Martin stipulated to facts central to establishing the two charged counts, as well as the admission of documents. However, he did not admit culpability and "more extensive weight in mitigation is accorded those who, where appropriate, willingly admit their culpability as well as the facts." (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190.) Since Martin stipulated only to facts, and not to culpability, we reduce the weight given here to moderate for his cooperation.

6. Martin's Requests for Additional Mitigation (Stds. 1.6(g), (h), (i), and (j))

[12] Martin seeks additional mitigation, arguing that he took prompt action to rectify ethical issues and that the State Bar delayed for over a year in bringing charges. He also argues he should receive mitigation because he voluntarily closed his CTA before charges were brought. We do not find clear and convincing evidence supporting the additional mitigation Martin requests. His actions were not prompt because he continued to use his CTA improperly until July 2017, even though the State Bar contacted him months earlier. Further, Martin showed no delay, and no prejudice, by OCTC waiting 17 months to file the NDC. Finally, we fail to see how the fact that Martin closed the CTA before charges were filed qualifies under any standard 1.6 mitigating circumstances.

V. PUBLIC REPROVAL IS APPROPRIATE 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 standards for attorneys. (Std. 1.1.) Our analysis begins with the standards, which, although not binding, are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.) If we depart from the standards, we must articulate clear reasons for doing so. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.) In determining the appropriate discipline, we also look to case law for guidance (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311) and observe, "The well-settled rule is that the degree of professional discipline is not derived from a fixed formula but from a balanced consideration of all factors." (*In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 605.)

[13a] Standard 2.2(a) is the applicable standard as it specifies, "Actual suspension of three months is the presumed sanction for . . . commingling . . ." The hearing judge recommended a 90-day actual suspension, which reflects the presumed sanction, and OCTC urges us to affirm the judge's recommendation. Martin asks that we impose a private reproval, arguing his misconduct does not fall squarely within standard 2.2(a) but is more adequately addressed by standard 2.2(b)[13] regarding "other trust account violations." Since we found Martin culpable of commingling, we reject this argument.

[13b] Martin also argues standard 1.7(c)[14] applies here to justify a downward departure from the presumed discipline under standard 2.2(a). He argues the record demonstrates that he meets the criteria of the standard and, therefore, a reproval is warranted. While OCTC does not specifically respond to Martin's argument that standard 1.7(c) applies in this case, OCTC points to the case relied

13. Standard 2.2(b) provides that "Suspension or reproval is the presumed sanction for any other violation of [rule 4-100]."

14. Standard 1.7(c) provides, "If mitigating circumstances are found, they should be considered alone and in balance with any aggravating circumstances, and if the net effect demonstrates that a lesser sanction is needed to fulfill the primary purposes of discipline, it is appropriate to impose or recommend a lesser sanction than what is otherwise specified in a given Standard. On balance, a lesser sanction is appropriate in cases of minor misconduct, where there is little or no injury to a client, the public, the legal system, or the profession and where the record demonstrates that the member is willing and has the ability to conform to ethical responsibilities in the future."

upon by the hearing judge, along with other cases, to support its conclusion that the judge's recommendation of a 90-day actual suspension should be upheld.

The hearing judge considered *In the Matter of Bleecker* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113 to be the most applicable. In *Bleecker*, an attorney received a 60-day actual suspension for commingling and two counts of moral turpitude for his grossly negligent misappropriation of $270 and misusing his CTA to conceal assets from levy by the Internal Revenue Service. The judge determined that, while not as serious as the misconduct in *Bleecker*, Martin's misconduct nonetheless warranted greater discipline than the discipline recommended in *Bleecker* as that attorney had "a far greater amount of mitigation [and] an absence of any aggravation."[15] Further, the judge found the attorney's misconduct in *Bleecker* "took place over a limited time period" (five months), as opposed to Martin's misconduct (10 months).

First, we find that a five-month difference in length of misconduct between these two cases does not merit the distinction the hearing judge found. Additionally, because we only find one aggravating circumstance instead of two as the judge found, and provide more weight overall to Martin's mitigating circumstances, we do not agree with the judge that for these reasons Martin's discipline should be greater than in *Bleecker*. Further, the focus of the disciplinary analysis in *Bleecker* was on that attorney's misappropriation and concealment of his assets, and not commingling, which led to the 60-day actual suspension recommendation.[16] For these reasons, we decline to apply *Bleecker* to Martin's relatively limited misconduct of commingling.

OCTC also urges us to consider three additional cases: *In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420,[17] *In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47,[18] and *In the Matter of Doran* (Review Dept. 1998) 3 Cal. State

15. The opinion provides that the attorney in *Bleecker* established five mitigating circumstances: financial pressures leading to a cash shortage; the attorney hired a business consultant to remedy his business practices; no client was harmed; the attorney admitted misuse of his CTA; and five years had passed since the misconduct had occurred.

16. In *Bleecker*, because of multiple culpability findings, the disciplinary standard applied was the "most severe" pursuant to former standard 1.6(a), which was determined to be former standard 2.2(a). That standard provided for disbarment for misappropriation of entrusted funds unless the amount of funds misappropriated was insignificantly small or the most compelling mitigating circumstances clearly predominated, in which case a minimum of a one-year actual suspension should be imposed. We decided to also apply former standard 1.6(b)(2), which is substantially similar to standard 1.7(c), to go below former standard 2.2(a)'s one-year minimum because of the attorney's mitigation and that he was "not a venal person and his misconduct was aberrational." (*In the Matter of Bleecker*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 127.)

17. In *McKiernan*, we recommended a 90-day actual suspension for an attorney culpable of commingling and moral turpitude by gross negligence for issuing two NSF checks to a business when he knew insufficient funds were in the CTA to cover payment. The attorney took over three years to finally pay the amount owed to the business, and only after it had filed a complaint with the State Bar, for which moral turpitude was also found. The attorney's misconduct was aggravated by indifference for failing to repay at least part of the money, for a pattern of misconduct given he repeatedly misused his CTA over a prolonged period of time, and multiple acts, but mitigated by candor and cooperation, remorse and recognition of wrongdoing, 21 years of discipline-free practice (reduced because for 18 years he never managed his CTA), and limited weight for good character evidence.

18. In *Heiser*, we recommended that the attorney be actually suspended for six months. He was found culpable for commingling and for moral turpitude by writing NSF checks from his personal account and his closed CTA. His multiple aggravating circumstances outweighed his one mitigating circumstance. Further, the attorney did not pay two of his NSF checks, and the other two were not paid until the police were involved and legal proceedings commenced, thus causing those two people added expense to obtain their funds. Finally, the attorney in *Heiser* did not cooperate with the State Bar investigators and also did not appear for his disciplinary trial.

Bar Ct. Rptr. 871.[19] In considering *McKiernan*, in which we recommended the same discipline of 90 days' actual suspension as OCTC argues is appropriate here, we do not find that case sufficiently analogous due to the more extensive misconduct found beyond commingling, and the mitigating circumstances not clearly outweighing the aggravating circumstances as they do for Martin. For the same reasons, we find even less guidance from *Heiser* or *Doran*, where, in each case, the misconduct was more extensive and the aggravation outweighed the mitigation, resulting in a recommendation of six months' actual suspension.

[13c] Most notably, in all three cases cited by OCTC, clients were harmed; in Martin's case, no client was harmed or in danger of being harmed because Martin's unrebutted testimony is that he had always understood his personal funds could not be in the CTA if client money was there. Therefore, contrary to the hearing judge's conclusion, Martin was not "wholly oblivious to his ethical obligations in handling his CTA;" Martin honestly[20] but unreasonably misunderstood that rule 4-100(A) did not permit him to have personal funds in the CTA at any time, except under two strict conditions not involved here. His misunderstanding resulted in his misconduct continuing after receiving multiple investigative letters from the State Bar for his NSF charges, and OCTC argues this point repeatedly in asserting its position that Martin's misconduct deserves an actual suspension of 90 days. However, if OCTC had simply and clearly pointed out early in the investigative phase how Martin's actions ran afoul of rule 4-100(A), he might have made the necessary changes earlier than he did.[21]

[13d] We agree with Martin that the requirements of standard 1.7(c) have been met, and the overall record supports a downward departure from the 90-day actual suspension as the presumed sanction under standard 2.2(a). His multiple mitigating circumstances, including a 15-year discipline-free record, no client harm, character witnesses who credibly testified to his reputation for integrity, and his cooperation, candor, and honesty during the investigation and disciplinary trial, clearly outweigh his one aggravating circumstance of multiple acts. The net effect demonstrates that a lesser discipline is warranted to fulfill the primary purposes of discipline. Further, Martin's rule violations are minor misconduct as no client was harmed, and his actions were honest and aberrational, demonstrating that he has the ability to conform to ethical responsibilities in the future. Given these findings, a public reproval with the conditions that Martin attend and successfully complete the State Bar's Ethics School and Client Trust Accounting School is appropriate discipline to protect the public, the courts, and the legal profession.[22]

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19. In *Doran*, we also recommended that the attorney be actually suspended for six months. The attorney commingled for a period of almost three years and engaged in acts of moral turpitude by gross negligence when he issued 17 NSF checks. He testified he had no understanding of the purpose of a trust account, nor did he understand the concept of commingling. He also was found culpable for acting incompetently when he abandoned a client in one matter and took a position against a client in order to avoid being sanctioned in another uncharged matter. His multiple aggravating circumstances outweighed his one mitigating circumstance. Central to the recommended discipline was our observation from the entire record that the attorney demonstrated he was "totally oblivious" to his obligations as a lawyer, and we had great concern his lack of understanding of his obligations as an attorney posed a risk to the public. (*In the Matter of Doran*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 881.)

20. During its questioning of Martin during trial, OCTC failed to establish he was placing his personal money into the CTA for a dishonest motive, including that he was hiding his money from lien collection efforts or from his ex-wife.

21. The record shows that, as early as February 7, 2017, his then-counsel wrote the OCTC investigator and disclosed Martin was depositing his paychecks into the CTA and paying personal expenses from it.

22. Rule 5.127(B) of the Rules of Procedure of the State Bar provides: "A public reproval is part of the attorney's official State Bar attorney records, is disclosed in response to public inquiries, and is reported as a record of public discipline on the State Bar's web page. The record of the proceeding in which the public reproval was imposed is also public."

VI. ORDER

Joseph Earl Martin is ordered publicly reproved, to be effective 15 days after service of this opinion and order. (Rules Proc. of State Bar, rule 5.127(A).) He must comply with the specified conditions attached to the public reproval. (Rules Proc. of State Bar, rule 5.128.) Failure to comply with this condition may constitute cause for a separate proceeding for willful breach of rule 8.1.1 of the Rules of Professional Conduct that are currently in effect.

Martin is ordered to comply with the following conditions: Within one year of the effective date of this public reproval, he must submit to the Office of Probation satisfactory evidence of completion of Ethics School and passage of the test given at the end of that session. Within one year of the effective date of this public reproval, he must also submit to the Office of Probation satisfactory evidence of completion of Client Trust Accounting School and passage of the test given at the end of that session. Both requirements are separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending either Ethics School or Client Trust Accounting School. (Rules Proc. of State Bar, rule 3201.)

VII. COSTS

Costs are 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.

We concur:

PURCELL, P.J.
HONN, J.

State Bar Court
Review Department

In the Matter of

NICHOLAS JAMES CAPLIN

No. 17-C-05405

Filed November 13, 2020, modified December 30, 2020

SUMMARY

Respondent, while under the influence of an excessive amount of alcohol, was involved in a vehicular accident with a parked car resulting in property damage. At the scene of the accident, respondent falsely claimed to two police officers and others that a fictitious friend had been driving the vehicle and had fled the scene on foot. Respondent was subsequently convicted of one misdemeanor count of driving under the influence of alcohol with an enhancement for an excessive blood alcohol concentration greater than 0.15 percent. The hearing judge determined that the facts and circumstances surrounding respondent's conviction did not involve moral turpitude but did involve other misconduct warranting discipline, and recommended two years of stayed suspension and probation.

OCTC requested review, contending that the crime involved moral turpitude and warranted a 60-day actual suspension. The Review Department concluded that the facts and circumstances surrounding respondent's conviction involved moral turpitude, particularly given his repeated misrepresentations to police to perpetuate his fictitious driver narrative. Accordingly, the Review Department recommended a 30-day actual suspension as well as a one-year stayed suspension and one year of probation.

COUNSEL FOR PARTIES

For State Bar of California: Kimberly Gay Anderson, Mary Oushana

For Respondent: Kalab Andrew Honey

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1a, b]

191 Miscellaneous General Issues – Effect of/Relationship to Other Proceedings
1511 Substantive Issues in Conviction Proceedings – Nature of Underlying Conviction – Driving Under the Influence
1523 Substantive Issues in Conviction Proceedings – Moral Turpitude – Found Based on Facts and Circumstances
1691 Miscellaneous Issues in Conviction Cases – Admissibility and/or Effect of Record in Criminal Proceeding

For purposes of attorney discipline, respondent's criminal conviction of driving under the influence of alcohol with an enhancement for an excessive blood alcohol concentration was conclusive proof that respondent committed all elements of that crime. However, it is an attorney's misconduct, not their conviction, that warrants discipline, and facts and circumstances surrounding conviction may be considered in determining whether moral turpitude was involved.

[2a-d]

1511 Substantive Issues in Conviction Proceedings – Nature of Underlying Conviction – Driving Under the Influence
1523 Substantive Issues in Conviction Proceedings – Moral Turpitude – Found Based on Facts and Circumstances
1528 Substantive Issues in Conviction Proceedings – Moral Turpitude – Definition

Moral turpitude consists of deficiency in any character traits necessary for law practice (such as honesty and candor) or serious breach of duty owed to another or society, or flagrant disrespect for law or societal norms that knowledge of conduct would likely undermine public confidence in and respect for legal profession. Where respondent drove under influence of excessive alcohol, which exhibited contempt for law and public safety and reflected poorly on respondent's judgment and on legal profession, and respondent lied to police and fabricated complex, detailed narrative attempting to shift blame for accident to fictitious driver whom police attempted to locate, thereby wasting law enforcement resources, facts and circumstances surrounding respondent's conviction established moral turpitude, and hearing judge erred in concluding otherwise.

[3a, b]

162.10 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters – State Bar's burden
164 Standards of Proof/Standards of Review – Proof of Intent
1511 Substantive Issues in Conviction Proceedings – Nature of Underlying Conviction – Driving Under the Influence
1523 Substantive Issues in Conviction Proceedings – Moral Turpitude – Found Based on Facts and Circumstances

Where totality of evidence supported conclusion that after automobile accident, respondent consciously and persistently fabricated complex narrative involving phony driver in order to avoid arrest, respondent could not avoid culpability for acting with moral turpitude by claiming he made "drunken misrepresentations" and did not intend to lie to police officers or recall doing so.

[4a, b] **584.30 Aggravation – Harm – To Public – Found but discounted or not relied on**
Where respondent was involved in vehicular accident while under influence of excessive alcohol which caused some harm to owners of destroyed or damaged property, and caused city to expend emergency response resources, but respondent repaid costs and damages promptly, hearing judge erred in finding significant harm as aggravating circumstance.

[5] **148 Evidentiary Issues – Witnesses**
162 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters – State Bar's burden – Clear and convincing standard
169 Standards of Proof/Standards of Review – Miscellaneous Issues re Standard of Proof/Standard of Review
615 Aggravation – Lack of candor/cooperation with Bar – Declined to find
Aggravation for lack of candor in disciplinary proceedings must be supported by express finding that testimony lacked candor or was dishonest. Where record contained some incongruities in witnesses' testimony, but Office of Chief Trial Counsel had not presented clear and convincing evidence to establish respondent's testimony lacked candor, Review Department adopted hearing judge's finding that respondent testified credibly and declined to find aggravation for lack of candor.

[6a, b] **740.32 Mitigation – Good character references – Found but discounted or not relied on – References unfamiliar with misconduct**
Where six character references and testimony of two witnesses from broad spectrum of community established respondent's good character, but not all character references demonstrated full awareness of extent of respondent's misconduct, Review Department adopted hearing judge's conclusion that good character entitled to only moderate weight in mitigation.

[7] **735.10 Mitigation – Candor and cooperation with Bar – Found**
Where respondent stipulated to certain facts and circumstances related to conviction that were not easily provable and which formed basis of moral turpitude finding, substantial mitigation was warranted for cooperation with State Bar.

[8] **745.10 Mitigation – Remorse/restitution/atonement – Found**
Respondents are entitled to mitigation credit for prompt objective steps, demonstrating spontaneous remorse and recognition of wrongdoing and timely atonement. Where respondent acknowledged regret for actions that caused harm and inconvenience; notified insurance company of fault; and paid damages to property owner for damage not covered by insurance company before any threat of State Bar disciplinary proceeding, substantial mitigation was afforded for respondent's remorse.

[9] **757.10 Mitigation – Restitution without threat or force – Found**

Restitution is mitigating circumstance if made without threat or force of administrative, disciplinary, civil or criminal proceedings. Where respondent, upon learning of amount owed, promptly reimbursed city and property owner for damages resulting from vehicular accident caused by respondent while under influence of excessive alcohol, respondent was entitled to moderate weight in mitigation.

[10a-c] **1511 Substantive Issues in Conviction Proceedings – Nature of Underlying Conviction – Driving Under the Influence**

1523 Substantive Issues in Conviction Proceedings – Moral Turpitude – Found Based on Facts and Circumstances

1553.81 Application of Standards to Discipline Based on Criminal Conviction – Standard 2.15(b) – Applied – actual suspension – compelling mitigating circumstances

Standard 2.15(b) provides that actual suspension or disbarment is appropriate for misdemeanor convictions involving moral turpitude. Where facts and circumstances surrounding respondent's first misdemeanor conviction of driving under influence of alcohol with enhancement for excessive blood alcohol concentration involved moral turpitude, but no one was physically injured by respondent's actions; respondent exhibited exemplary behavior after conviction including full compliance with criminal probation terms and restitution; no aggravating factors were found; and respondent was entitled to mitigation for cooperation, good character, remorse, and restitution, discipline at lowest end of range for actual suspensions was warranted, appropriate discipline was 30 days of actual suspension coupled with one year of stayed suspension and probation.

[11] **135.09 Generally Applicable Procedural Issues – Amendments to Rules of Procedure – Other issues re amendments to Rules of Procedure generally**

135.60 Generally Applicable Procedural Issues – Amendments to Rules of Procedure – Dispositions and Costs

179.90 Issues re Conditions Imposed as Part of Discipline – Other Issues re Conditions Imposed as Part of Discipline – Other issues

180.11 Monetary Sanctions – General Issues – Effective date/retroactivity of authorizing statute and rule

194 Miscellaneous General Issues – Other Miscellaneous General Issues

Rules of statutory construction apply when State Bar Court interprets Rules of Procedure of State Bar. Absent express retroactivity provision or clear evidence of intended retroactive application, statutes should not be construed to apply retroactively to offenses committed prior to effective date. Where all of respondent's misconduct occurred prior to effective date of new State Bar Rule of Procedure implementing statute authorizing monetary sanctions, Review Department did not recommend imposition of monetary sanctions on respondent.

ADDITIONAL ANALYSIS

Mitigation

Declined to Find

710.53 Long Practice with no prior discipline record – Not in practice long enough – Prior to commission of misconduct

Discipline

180.35 Monetary Sanctions – Imposition – Not recommended
1024 Ethics exam/ethics school
1613.06 Stayed Suspension - One year
1615.01 Actual Suspension – One month or less
1617.06 Probation – One year

OPINION

HONN, J.

On February 23, 2018, Nicholas James Caplin pleaded guilty in the North County Division of the San Diego County Superior Court to one misdemeanor count of violating Vehicle Code section 23152, subdivision (a) (driving under the influence of alcohol (DUI)), with an enhancement for Vehicle Code section 23578 (excessive blood alcohol concentration (BAC) greater than 0.15 percent or refusal to take a test). After his conviction was transmitted to us, we referred the case to the Hearing Department to det-mine if the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline.

The hearing judge determined that the facts and circumstances did not include moral turpitude but did involve other misconduct warranting discipline. The judge recommended that Caplin be suspended for two years with the execution of that suspension stayed and that he be placed on probation for two years. The Office of Chief Trial Counsel (OCTC) appeals, arguing that the facts and circumstances surrounding Caplin's crime involve moral turpitude, and requests that we impose a 60-day actual suspension. Caplin does not appeal and requests that we affirm the hearing judge's decision.

Upon our independent review (Cal. Rules of Court, rule 9.12), we find that the facts surrounding Caplin's conviction constitute moral turpitude. Our disciplinary standards and the comparable case law guide us to recommend discipline that includes a 30-day actual suspension to protect the public and to maintain high professional standards.

I. FACTUAL BACKGROUND[1]

Caplin was admitted to practice law in California on November 26, 2016 and has no prior disciplinary record. This case arises from a traffic collision resulting from Caplin driving under the influence of alcohol with a BAC nearly twice the legal limit.

A. Caplin Drives While Intoxicated and Causes Extensive Property Damage

On August 19, 2017, the Carlsbad Police Department (CBPD) was notified of a traffic collision between a silver Audi A5 and a parked BMW vehicle in the area of 7300 El Fuerte Street. Prior to CBPD's arrival, Caplin was walking around the Audi and had declared to several neighbors that a friend, Michael Fisher,[2] had been driving the vehicle and then had fled the scene on foot. Officer Friedrich was the first to arrive and contact Caplin. Caplin reported to Officer Friedrich that Fisher had been driving and left the scene of the accident. He described Fisher as a white male wearing a white buttoned-up shirt. Shortly thereafter, Officer Byrne arrived on the scene and searched the vicinity but was unable to locate anyone matching Fisher's description. A neighbor who reported the accident to CBPD, disclosed to the officers that she had told dispatch

1.The facts are based on the parties' pretrial written stipulation, trial testimony, documentary evidence, and the hearing judge's factual findings, which are entitled to great weight. (Rules of Procedure of the State Bar, rule 5.155(A).) All further references to rules are to the Rules of Procedure of the State Bar unless otherwise noted.

2. Caplin later admitted he was the driver and he did not know anyone by that name. Upon being released from custody, Caplin called his insurance company and acknowledged fault as the driver.

that a male left the scene of the accident only because that is what Caplin told her. She acknowledged that she did not witness anyone leaving the scene.

Upon inspecting the Audi A5, Officer Byrne learned that it was registered to Caplin. He also noticed that only the driver's side airbag had deployed, and the vehicle's keys were on the passenger seat. Officer Byrne asked Caplin who had been driving and Caplin named his friend, Fisher. The officer then asked Caplin to call and ask Fisher to return to the scene but Caplin claimed he didn't have his friend's telephone number. However, he had also indicated at some point that he had contacted Fisher and asked to be picked up. When Officer Byrne confronted him about these inconsistencies, Caplin conceded that he did have Fisher's number, but it was not a saved contact. He refused to allow the officer to look through his cell phone.

The police report reveals that Officer Byrne smelled alcohol on Caplin's breath and observed his eyes to be bloodshot, watery, droopy, red, and glassy. It also asserts that Caplin informed the officer that he had a couple of alcoholic beverages that evening and was feeling their effects. Officer Byrne administered four field sobriety tests (FSTs) on Caplin, who interrupted one test to insist that he was not the driver. Caplin failed each test. Around 15 minutes later, Officer Byrne administered two breathalyzer tests at 11:49 p.m. and 11:53 p.m., and the results were 0.171 percent and 0.165 percent, respectively.

Based on the damage to the vehicle, its registration, Caplin being the only person on the scene, and the failed FSTs, Officer Byrne determined that Caplin had been the driver at the time of the collision and placed him under arrest. The officer then explained that Caplin would have to submit either a blood or another breath test under the implied consent law.[3] Caplin refused and requested an attorney. Officer Byrne sought a search warrant for Caplin's blood to test his BAC. Caplin's blood was drawn at 1:50 a.m. and showed a BAC of 0.150 percent as he was transported to Vista Detention Facility where he was booked.

The San Diego County Sheriff's Crime Laboratory's report, dated August 31, 2019, showed Caplin's BAC to have been 0.150 percent plus or minus 0.006. The traffic accident report stated that Caplin damaged two light poles, an exterior wall, a light fixture, an irrigation system, and a mailbox. The report roughly estimated the cost of repairs to be $12,000.

B. Caplin Pleaded Guilty to and Was Convicted of Misdemeanor DUI

On September 6, 2017, the San Diego County District Attorney's Office filed a two-count complaint against Caplin, charging him with one misdemeanor count for violating Vehicle Code section 23152, subdivision (a) (DUI), and one misdemeanor count for violating Vehicle Code section 23152, subdivision (b) (driving with 0.08 percent or more BAC). In addition, an enhancement was charged under Vehicle Code section 23578 (excessive BAC greater than 0.15 percent or refusal to take a test). On February 23, 2018, the section 23152, subdivision (b) count was dismissed in the interests of justice.

On February 23, 2018, Caplin pleaded guilty to the DUI and the excessive BAC enhancement. His sentence included five years of probation, a court fine of $2,283, restitution for the damage caused (over which the court retained jurisdiction), six days of participation in a public service program, standard alcohol conditions, participation in a Mothers Against Drunk Driving program, and an order to report to Court Collections. Caplin is complying with the terms of his sentence, including probation, payment of the court fine, payment of $5,000 restitution to the

3.The California implied consent law states that a driver lawfully arrested for a DUI offense is deemed to have given his consent to chemical testing of his blood or breath for the purpose of determining the alcoholic content of his blood. (Vehicle Code section 23612, subdivision (a)(1)(A).)

City of Carlsbad, attendance at Alcoholics Anonymous meetings, and completion of a DUI program.

In addition, Caplin personally paid $2,260 in restitution, prior to his criminal restitution hearing, to the owner of the damaged mailbox. He also paid $1,565.30 in emergency response costs, four months prior to his guilty plea, to the City of Carlsbad pursuant to a demand made under Government Code, section 53150.

II. STATE BAR COURT PROCEEDINGS

On April 18, 2018, OCTC transmitted Caplin's misdemeanor conviction records to this court. Upon finality of the conviction, we referred the matter to the Hearing Department on February 6, 2019, to determine whether the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline. (Rules of Proc. of State Bar, rule 5.344.) On May 9, the parties filed a stipulation as to facts and admission of documents (Stipulation). A one-day trial took place on September 4. Following the disciplinary trial and posttrial briefing, the hearing judge issued her decision on November 19. She found that the facts and circumstances surrounding Caplin's conviction, which included seven misrepresentations he made to police officers, did not involve moral turpitude but demonstrated misconduct warranting discipline. OCTC challenges the judge's finding, arguing that Caplin repeatedly lied to the police to impede investigation and arrest, which constitutes moral turpitude.

III. FACTS AND CIRCUMSTANCES INVOLVE MORAL TURPITUDE

[1a] For the purposes of attorney discipline, Caplin's conviction is conclusive proof of the elements of his crime. (See Bus. & Prof. Code, § 6101, subds. (a) & (e).) Thus, his misdemeanor conviction establishes that he drove under the influence of alcohol (Veh. Code § 23152, subd. (a)) and with a BAC of at least 0.15 percent (Veh. Code § 23578). The issue before us is whether the facts and circumstances surrounding his criminal conviction, which was not committed in the practice of law, demonstrate moral turpitude. **[2a]** We are guided by the Supreme Court's definition of moral turpitude: "a deficiency in any character trait necessary for the practice of law (such as trustworthiness, honesty, fairness, candor, and fidelity to fiduciary duties) *or* if it involves such a serious breach of a duty owed to another or to society, or such a flagrant disrespect for the law or for societal norms, that knowledge of the attorney's conduct would be likely to undermine public confidence in and respect for the legal profession." (*In re Lesansky* (2001) 25 Cal.4th 11, 16) (italics added). The hearing judge found that Caplin's overall misconduct involved seven misrepresentations to police officers; however, the judge concluded, without further analysis, that the facts and circumstances surrounding Caplin's offense did not involve moral turpitude. We disagree, as discussed below.

Caplin argues that the principle of stare decisis compels a finding that moral turpitude cannot be found in this case based on *In re Kelley* (1990) 52 Cal.3d 487 and *In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208. He is mistaken. **[1b]** We emphasize that it is the misconduct, not the conviction, that warrants discipline. (*In re Gross* (1983) 33 Cal.3d 561, 566.) Although Caplin's misdemeanor DUI conviction does not involve moral turpitude per se, the facts and circumstances surrounding it may be considered in determining moral turpitude. (*In the Matter of Miller* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 110, 115 ["wide ambit of facts surrounding the commission of a crime is appropriate to consider in a conviction referral proceeding"].)

[2b] In both *Kelley* and *Anderson*, the attorneys' misconduct warranted discipline but did not involve moral turpitude. Although Kelley, with a prior DUI conviction, lied to police about not having consumed alcohol when being arrested (*In re Kelley*, *supra*, 52 Cal.3d at p. 494), *In re Kelley* is distinguished because the attorney's lies were generic and limited to not being intoxicated. Here, Caplin's lies were far more elaborate and numerous, and had the potential for great harm since he shifted blame to a fictitious driver, whom the police attempted to locate, thereby wasting valuable law enforcement resources. Our moral turpitude finding is also not constrained by our

holding in In the *Matter of Anderson*. Although Anderson was uncooperative by attempting to leave the scene, struggling with officers, and resisting arrest in connection with his DUI conviction, he did not make any misrepresentations to police.

[2c] We find that Caplin's conviction, taken together with all the surrounding facts and circumstances, establishes moral turpitude. (See *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 935 [moral turpitude analysis is not restricted to examining elements of crime but must look at whole course of misconduct].) When questioned by Officer Friedrich at the accident scene, Caplin falsely identified a Michael Fisher as the driver of the vehicle, when in fact Caplin does not know anyone by that name. He repeated the lie to Officer Byrne. Caplin continued to conceal that he was the driver and made five additional statements promoting the false Michael Fisher narrative. Specifically, Caplin was deceitful with Officer Friedrich and Officer Byrne during the following seven interactions, to which he stipulated:

(1) Caplin informed Officer Friedrich that his friend Michael Fisher had been driving the vehicle;

(2) Caplin described Fisher as a white man wearing a buttoned-up shirt;

(3) Caplin told Officer Byrne that his friend Fisher had been driving;

(4) Caplin denied having Fisher's telephone number when Officer Byrne asked Caplin to call Fisher to return to the scene;

(5) Caplin advised Officer Byrne that he contacted Fisher and asked him to pick up Caplin;

(6) When confronted with his inconsistent statements about not having Fisher's phone number, Caplin conceded that he did have the number, but it was not a saved contact; and

(7) Caplin interrupted Officer Byrne during the FSTs instructions to explain that he was not the driver of the vehicle.

Such deceit involves moral turpitude. (*Cutler v. State Bar* (1969) 71 Cal.2d 241, 253 ["An attorney's practice of deceit involves moral turpitude"]; *In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 120 [attorney who deceived sheriffs about child custody order engaged in act of moral turpitude].)

[3a] Caplin argues his conduct does not involve moral turpitude under either prong of *In re Lesansky*—that he was dishonest or that he breached his duty to society. He asserts he was not intentionally deceitful but rather made "drunken misrepresentations" while interacting with the police. OCTC challenges this claim and argues that Caplin's lies were detailed and precise, which shows they were calculated to avoid criminal and civil responsibility for DUI. We find that the record supports OCTC's position with clear and convincing evidence.

[3b] At the disciplinary trial, Officer Byrne testified that although Caplin was intoxicated, he appeared alert and sober enough to answer questions. Caplin's grandfather, Alan Turner, testified that, when he picked Caplin up from jail the morning after the accident, Caplin confessed to him he had lied to the police and told them he was not the driver. Although Caplin testified that he accepts the police report as an accurate account of the events on the night of the accident, he also testified he does not recall lying to police officers. Caplin cannot have it both ways. The totality of the evidence leads us to conclude that he consciously and persistently fabricated a complex narrative involving a phony driver to thwart arrest and place himself above the law. (*See In re Rohan* (1978) 21 Cal.3d 195, 203 [conscious decision to not file income tax returns "evinces an attitude on the part of the attorney of placing himself above the law"].)

[2d] Not only did Caplin's conviction involve dishonesty but his driving while intoxicated and causing property damage reveal a lack of respect for the law and public safety. Caplin drove while he was significantly impaired, as established by his BAC of nearly twice the legal limit and his failure to pass four FSTs. This behavior exhibits contempt for the law and public safety and reflects poorly on Caplin's judgment and the legal profes-

sion. (*In the Matter of Burns* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 406, 416 [discipline system is responsible for preserving integrity of legal profession as well as protection of public].) Accordingly, we find clear and convincing evidence[4] that the facts and circumstances surrounding Caplin's conviction involve moral turpitude.

IV. AGGRAVATION AND MITIGATION

OCTC must establish aggravating circumstances by clear and convincing evidence. (Std. 1.5.) Caplin has the same burden to prove mitigation. (Std. 1.6.)

A. Aggravation

1. No Significant Harm to Clients, Public, or Administration of Justice (Std. 1.5(j))

[4a] The hearing judge found that Caplin's misconduct caused significant harm to the public by damaging both private and public property and assigned significant weight. (Std. 1.5(j) [significant harm to client, public, or administration of justice is aggravating circumstance].) Neither OCTC nor Caplin challenges this finding. We disagree that Caplin significantly harmed his clients, the public, or the administration of justice.

[4b] Caplin's misconduct undoubtedly caused some harm to the owner of the destroyed mailbox who incurred over $2,260 in property damage. Caplin also caused harm to the City of Carlsbad by damaging two light poles, an exterior wall, a light fixture, and an irrigation system, resulting in a $5,000 restitution payment. He further harmed the City of Carlsbad by causing it to expend $1,565.30 in emergency response resources. However, Caplin promptly repaid all of these costs shortly after he learned of the extent of the damage. As such, we do not find that his conduct resulted in *significant* harm.

2. No Aggravation for Lack of Candor (Std. 1.5(l))

[5] On review, OCTC argues that aggravation should be assigned for Caplin's lack of candor in these proceedings. The hearing judge did not analyze this issue in her decision, and made no adverse credibility finding against Caplin. We give great weight to the judge's findings based on credibility evaluations. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 [hearing judge best suited to resolve credibility questions "because [the judge] alone is able to observe the witnesses' demeanor and evaluate their veracity firsthand"].) A lack of candor finding must be supported by an express finding that the testimony lacked candor or was dishonest. (*In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 67.) OCTC claims that Caplin's trial testimony was dishonest because he stated he did not specifically recall making false statements to the police. However, Turner and Khoi Nguyen, Caplin's friend, both testified he admitted to them shortly after the accident that he had lied. While the record does indicate some incongruities, OCTC has not presented clear and convincing evidence to establish that Caplin's testimony lacked candor. (See *Ballard v. State Bar* (1983) 35 Cal.3d 274, 291 [all reasonable doubts resolved in favor of attorney].) Thus, we adopt the hearing judge's finding that Caplin testified credibly and decline to find aggravation for lack of candor.

B. Mitigation

1. No Prior Record of Discipline (1.6(a))

Standard 1.6(a) offers mitigation where there is an "absence of any prior record of discipline over many years of practice coupled with present misconduct, which is not likely to recur." The hearing judge did not afford Caplin any mitigation for discipline-free practice. We agree. Since

4. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

Caplin was admitted to practice in November 2016, he had been practicing for less than one year before the accident in August 2017. Therefore, we conclude that he is not entitled to any mitigation credit. (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 473 [no mitigation where attorney had practiced only four years prior to misconduct].)

2. *Extraordinary Good Character (Std. 1.6(f))*

[6a] Caplin is entitled to mitigation if he establishes "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 found that Caplin established good character and afforded moderate mitigating weight. We agree.

[6b] Six character references—including attorneys, his employer, and friends—presented letters attesting to Caplin's exceptional character. Also, two friends and a family member testified on his behalf. These references, representing a broad spectrum of the community, described him as trustworthy, supportive, responsible, and professional. The attorney witnesses affirmed Caplin's exemplary moral character and integrity. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration given to attorneys' testimony due to their "strong interest in maintaining the honest administration of justice"].) However, as the hearing judge found, we note that all the character references do not demonstrate full awareness of the extent of Caplin's misconduct, as the standard requires. (*In re Aquino* (1989) 49 Cal.3d 1122, 1131 [testimony of witnesses unfamiliar with details of misconduct not given significant weight in mitigation].) Like the hearing judge, we find that the mitigating weight afforded Caplin's good character evidence is somewhat diminished. We therefore assign moderate weight to this factor.

3. *Cooperation (Std. 1.6(e))*

[7] Under standard 1.6(e), Caplin is entitled to mitigation for cooperation by entering into the Stipulation as well as the admission of documents. Before trial, Caplin stipulated to certain facts and circumstances related to his conviction that were not easily provable and formed the basis of the moral turpitude finding. We agree with the hearing judge that such action merits substantial mitigation. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive mitigation for admission of culpability and facts].)

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

[8] Caplin requests mitigation for remorse in acknowledging his misconduct. Standard 1.6(g) provides mitigation credit where an attorney takes "prompt objective steps, demonstrating spontaneous remorse and recognition of the wrongdoing and timely atonement." OCTC challenges this factor, arguing that Caplin has not shown remorse. Caplin testified that he feels "extremely regretful" that his actions caused harm and inconvenience. He stated that the accident has formed a "lasting impression" on his views on alcohol. Shortly after the accident, Caplin notified his insurance company that he was at fault. He also paid the owner of the mailbox—prior to any threat of State Bar disciplinary action—for damage not covered by the insurance company. We conclude that the record supports substantial mitigation for Caplin's remorse. (Cf. *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 519 [greatly reduced mitigating weight for attorney's confession of misdeeds to client one year later, as not "an objective step 'promptly taken' spontaneously demonstrating remorse and recognition of the wrongdoing"].)

5. *Restitution (Std. 1.6(j))*

[9] Restitution is a mitigating circumstance if it is "made without the threat or force of administrative, disciplinary, civil or criminal proceedings." (Std. 1.6(j); see *Hitchcock v. State Bar* (1989) 48 Cal.3d 690, 709.) The hearing judge did not assign mitigation for restitution. We conclude that Caplin is entitled to mitigation of moderate weight. Upon learning of the amount owed, and prior to his conviction and criminal restitution hearing, Caplin promptly reimbursed the City of Carlsbad and the owner of the damaged mailbox.

V. THIRTY DAYS' ACTUAL SUSPENSION IS THE APPROPRIATE DISCIPLINE

We begin our disciplinary analysis by acknowledging that our role is not to punish Caplin for his criminal conduct, but to recommend professional discipline. (*In re Brown* (1995) 12 Cal.4th 205, 217 [aim of attorney discipline is not punishment or retribution; it is imposed to protect the public, to promote confidence in legal system, and to maintain high professional standards; std. 1.1.) We do so by following the standards whenever possible and balancing all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266, 267, fn. 11.)

[10a] Standard 2.15(b) provides for a wide range of discipline for Caplin's misconduct. It instructs that disbarment or actual suspension is appropriate for misdemeanor convictions involving moral turpitude. OCTC submits that a 60-day actual suspension should be imposed. Caplin requests that the hearing judge's discipline recommendation of a two-year stayed suspension be upheld.

In addition to the standards, we look to case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.) Beyond the standards, myriad cases deal with DUI convictions, but none involving similar facts as presented here. In recommending a one-year stayed suspension, the hearing judge mainly relied on *In re Kelley*, *supra*, 52 Cal.3d 487. *Kelley* involved an attorney with a second DUI misdemeanor conviction where the facts and circumstances surrounding her crime were not found to involve moral turpitude. Her lack of respect for the legal system, her misrepresentation regarding the amount of alcohol she drank, and her alcohol dependency problem warranted a public reproval with conditions. **[10b]** Unlike the hearing judge, we find that Caplin's misconduct—particularly the seven misrepresentations that he made to the police to perpetuate his false Michael Fisher narrative—constitutes moral turpitude because it demonstrates his dishonesty and his attempt to thwart arrest. "[D]ishonest conduct is inimical to both the high ethical standards of honesty and integrity required of members of the legal profession and to promoting confidence in the trustworthiness of members of the profession. [Citations.]" (*Stanley v. State Bar* (1990) 50 Cal.3d 555, 567.)

In support of its request for a 60-day actual suspension, OCTC cites to *In the Matter of Guillory* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 402 and *In the Matter of Peters* (Review Dept. 2018) 5 Cal. State Bar Ct. Rptr. 536. Guillory, who had three prior DUI convictions, received a two-year actual suspension when the facts and circumstances surrounding his fourth DUI misdemeanor conviction were found to involve moral turpitude. Guillory lied to the arresting officers by saying that he was permitted to drive to and from work with a suspended license. Further, he tried to avoid arrest by engaging in "badging," i.e., he sought to exploit his insider status as a deputy district attorney. (*In the Matter of Guillory*, *supra*, 5 Cal. State Bar Ct. Rptr. at pp. 406, 408.) In *Peters*, the attorney was disbarred, and the facts and circumstances surrounding her felony conviction of vehicular manslaughter while intoxicated also involved moral turpitude. She failed to accurately tell a police officer the quantity of pills she had taken when she drove erratically, struck a car, and caused grave injury and death. Two years later, she told a probation officer that she was not impaired when the collision occurred and failed to disclose that she had been abusing prescription drugs for months.

The facts and circumstances in the present matter are far less serious than those in *Guillory* or *Peters*. Caplin has not been convicted of multiple DUI offenses, like Guillory, nor was he convicted of a felony. His misdemeanor DUI did not cause death or great bodily injury, like Peters. But we do find guidance from Guillory, particularly in the attempt to avoid criminal liability by engaging in "badging." Like Guillory, Caplin also attempted to avoid arrest by creating a false narrative with Michael Fisher as the driver of the vehicle.

[10c] We recognize, however, that this is Caplin's first DUI, his crime was a misdemeanor, and no one was physically injured as a result of his recklessness. He exhibited exemplary behavior

after his conviction, including full compliance with the terms of his probation and restitution. He has no aggravation and has received mitigation for cooperation, good character, remorse, and restitution. This warrants a level of discipline at the lowest end of the range for actual suspensions. (Std. 1.2(c)(1) [actual suspension generally for 30 days, 60 days, 90 days, six months, one year, 18 months, two years, or three years].) Given these findings, a 30-day actual suspension is appropriate discipline to protect the public, the courts, and the legal profession.

VI. RECOMMENDATION

We hereby recommend that Nicolas James Caplin, State Bar No. 312343, be suspended from the practice of law for one year, that execution of that suspension be stayed, and that he be placed on probation for one year with the following conditions:

1. Actual Suspension. Caplin must be suspended from the practice of law for the first 30 days of his probation.

2. Review Rules of Professional Conduct. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Caplin 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 Office of Probation in Los Angeles (Office of Probation) with his first quarterly report.

3. Comply with State Bar Act, Rules of Professional Conduct, and Probation Conditions. Caplin must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of his probation.

4. 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, Caplin 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. Caplin 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.

5. Meet and Cooperate with Office of Probation. Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Caplin must schedule a meeting with his assigned probation case specialist 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, he may meet with the probation case specialist in person or by telephone. During the probation period, Caplin 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.

6. State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court. During Caplin's probation period, the State Bar Court retains jurisdiction over him to address issues concerning compliance with probation conditions. During this period, Caplin must appear before the State Bar Court as required by the court or by the Office of Probation after written notice mailed to his State Bar record address, as provided above. Subject to the assertion of applicable privileges, Caplin must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

7. Quarterly and Final Reports

(a) Deadlines for Reports. Caplin 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, Caplin 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. Caplin 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. Caplin is directed to maintain proof of his 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 his actual suspension has ended, whichever is longer. He is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

8. State Bar Ethics School. Within one year after the effective date of the Supreme Court order imposing discipline in this matter, Caplin 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, Caplin will nonetheless receive credit for such evidence toward his duty to comply with this condition.

9. 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 Caplin has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

10. Abstinence. Caplin must abstain from using alcoholic beverages and must not use or possess any illegal drugs or illegal drug paraphernalia. In each quarterly and final report submitted to the Office of Probation, he must report compliance with this condition.

11. Criminal Probation. Caplin must comply with all probation conditions imposed in the underlying criminal matter and must report such compliance under penalty of perjury in all quarterly and final reports submitted to the Office of Probation covering any portion of the period of the criminal probation. In each quarterly and final report, if Caplin has an assigned criminal probation officer, he must provide the name and current contact information for that criminal probation officer. If the criminal probation was successfully completed during the period covered by a quarterly or final report, that fact must be reported by Caplin in such report and satisfactory evidence of such fact must be provided with it. If, at any time before or during the period of probation, Caplin's criminal probation is revoked, he is sanctioned by the criminal court, or his status is otherwise changed due to any alleged violation of the criminal probation conditions by him, Caplin must submit the criminal court records regarding any such action with his next quarterly or final report.

VII. MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Caplin 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 Caplin 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.

VIII. 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 reinstatement or return to active status.

IX. MONETARY SANCTIONS

[11] The court does not recommend the imposition of monetary sanctions as all the misconduct in this matter occurred prior to April 1, 2020, the effective date of rule 5.137, which implements Business and Professions Code section 6086.13 (See *In the Matter of Wu* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 263, 267 [rules of statutory construction apply when interpreting Rules Proc. of State Bar]; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208–1209 [absent express retroactivity provision in statute or clear extrinsic sources of intended retroactive application, statute should not be retroactively applied]; *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841 [where retroactive application of statute is ambiguous, statute should be construed to apply prospectively]; *Fox v. Alexis* (1985) 38 Cal.3d 621, 630–631 [date of offense controls issue of retroactivity].)

We concur:

PURCELL, P.J.
MCGILL, J.

State Bar Court
Review Department

In the Matter of

FERNANDO FABELA CHAVEZ

A Member of the State Bar

No. 19-O-30131

Filed February 23, 2021, modified April 16, 2021

SUMMARY

Supreme Court ordered respondent to comply with California Rules of Court, rule 9.20 in connection with a one-year disciplinary suspension. However, even before the Supreme Court had issued its order, respondent began transferring responsibility for his cases to other attorneys. He also engaged an attorney experienced in discipline matters to assist him with his rule 9.20 obligations. At the time the Supreme Court filed its order requiring respondent to comply with rule 9.20, he was still the attorney of record in four cases. Respondent failed to comply with rule 9.20 by failing to file notices of his suspension with the courts in those four matters as required by rule 9.20(a)(4) and made grossly negligent misrepresentations amounting to moral turpitude in his rule 9.20(c) compliance declaration. In aggravation, the Review Department gave substantial weight to respondent's prior record of discipline. In mitigation, substantial weight was given to respondent's evidence of good character and his cooperation with the State Bar by entering into a detailed stipulation. Due to respondent's attempt to comply with rule 9.20 and his mitigation, the Review Department concluded that disbarment would be unduly punitive. However, to impress on respondent the seriousness of his misconduct and the consequences for failing to follow his ethical duties as an attorney, the Review Department determined the appropriate progressive discipline was two years' actual suspension continuing until respondent provided proof of rehabilitation and fitness to practice law pursuant to standard 1.2(c)(1).

COUNSEL FOR PARTIES

For State Bar of California: Rachel Simone Grunberg

For Petitioner: Lance Harrison Swanner

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1a-d] **151 Evidentiary Issues – Evidentiary Effect of Stipulations**
1913.90 Cal. Rules of Ct., Rule 9.20 (formerly Rule 955) Violation Proceedings – Special Substantive Issues – Other Substantive Issues

California Rules of Court, rule 9.20(a)(1) and (4) require attorneys to (1) notify clients being represented in pending matters, along with any co-counsel, of their disciplinary suspension and consequent disqualification to act as attorney after suspension's effective date; (2) notify clients to seek other legal advice if there is no co-counsel; (3) notify opposing counsel in pending litigation; (4) if no opposing counsel, notify adverse parties of suspension and consequent disqualification to act as attorney after suspension's effective date; and (5) file copy of notice with court, agency, or tribunal before which litigation is pending. Where respondent stipulated he was attorney of record in four cases at time Supreme Court order requiring compliance with rule 9.20 was filed, and respondent did not file the required notices of suspension with those courts and still had not done so by time of trial over two and one-half years later, respondent failed to comply with rule 9.20. Review Department rejected respondent's argument that respondent was not obligated to file court notices as respondent filed substitutions of attorney in three cases and informed clients that respondent would be suspended prior to rule 9.20 order's issuance, as respondent did not notify clients of suspension by registered or certified mail, return receipt requested, as required by rule 9.20(b); filed substitutions of attorney in pending cases after Supreme Court rule 9.20 order was filed but before effective date of order; and continued to work on one case that was settled, but not dismissed, after filing of Supreme Court rule 9.20 order.

[2] **147 Evidentiary Issues – Presumptions**
162.20 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters – Respondent's burden in disciplinary matters – Other/general
1913.12 Cal. Rules of Ct., Rule 9.20 (formerly Rule 955) Violation Proceedings – Special Substantive Issues – Wilfulness – Lack of Notice of Underlying Order

Under Evidence Code section 664, it is acknowledged that official duty has been regularly performed; thus, there is presumption that Supreme Court Clerk properly performed official duty in serving respondent and respondent's attorney with discipline order as provided in California Rules of Court, rule 9.18(b). Where respondent began transferring cases due to impending suspension prior to issuance of Supreme Court's rule 9.20 order; Review Department had recommended two-year suspension in respondent's prior disciplinary matter several months earlier; and respondent's attorney referenced Supreme Court's rule 9.20 order in email to respondent, argument that respondent did not receive notice of rule 9.20 order from either Supreme Court or respondent's attorney was not credible, and respondent did not rebut presumption of Evidence Code section 664.

[3a-b] **221.12 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6106 – Found – Gross negligence**

Where respondent, who had not filed notices of suspension with courts and had not provided appropriate certified notices of suspension to opposing counsel or unrepresented parties in pending cases as required by California Rules of Court, rule 9.20, represented in rule 9.20 compliance declaration that respondent had notified all opposing counsel of suspension by certified or registered mail, return receipt requested, filed copy of suspension notice with courts where cases pending, and provided notice of suspension to clients by certified or registered mail, respondent's statements in rule 9.20 compliance declaration were grossly negligent misrepresentations amounting to moral turpitude. Respondent had duty to review compliance declaration pre-filled-out by his attorney for accuracy before signing it under penalty of perjury but failed to do so.

[4] **164 Standards of Proof/Standards of Review – Proof of Intent**
213.40 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6068(d)

Attorney must act with intent to deceive to violate Business and Professions Code section 6068(d). Where no evidence established that respondent's careless review of California Rules of Court, rule 9.20 compliance declaration his attorney prepared amounted to intentional deception absent other evidence, Review Department adopted hearing judge's dismissal of section 6068(d) charge.

[5] **164 Standards of Proof/Standards of Review – Proof of Intent**
1913.11 Cal. Rules of Ct., Rule 9.20 (formerly Rule 955) Violation Proceedings – Special Substantive Issues – Wilfulness – Definition
1913.90 Cal. Rules of Ct., Rule 9.20 (formerly Rule 955) Violation Proceedings – Special Substantive Issues – Other Substantive Issues

Level of intent required to prove California Rules of Court, rule 9.20 violation is general intent, not specific intent or bad faith. Where respondent failed to file court notices of suspension required by rule 9.20, such conduct constituted willful violation of rule 9.20, and Review Department rejected respondent's argument that respondent did not have requisite level of intent to be found culpable of violating rule 9.20 as respondent did not do so willfully and acted in good faith.

[6] **1913.90 Cal. Rules of Ct., Rule 9.20 (formerly Rule 955) Violation Proceedings – Special Substantive Issues – Other Substantive Issues**

Reliance on attorney's advice is not defense to California Rules of Court, rule 9.20 violation but may be considered in mitigation. Similarly, reliance on employee's assistance in preparing list of cases in which respondent was counsel of record is also not defense to rule 9.20 violation. Sole responsibility to ensure identification of all cases pending on date Supreme Court's rule 9.20 order filed lies with respondent.

[7] **511 Aggravation – Prior record of discipline – Found**

Where respondent committed moral turpitude offense in both his prior disciplinary matter and present case, and respondent committed same misconduct in both cases by failing to

obey court orders, substantial aggravating weight given to respondent's prior record of discipline.

[8a-b] **740.10 Mitigation – Good character references – Found**
Where six witnesses and one declarant had known respondent from 20 to 40 years, spoke highly of respondent's character – describing respondent as honest, trustworthy, person with "one-in-a-million type of character" and had served as mentor to other attorneys and had deep commitment to community, Review Department held that even though many witnesses did not have detailed knowledge of respondent's misconduct, totality of impressive good character evidence merited substantial weight in mitigation.

[9] **735.10 Mitigation – Candor and cooperation with Bar – Found**
Although facts were easy to prove, where respondent entered into detailed stipulation which conserved judicial time and resources, and respondent stipulated to facts that formed basis of culpability findings in one count, substantial mitigation was assigned for respondent's cooperation for entering into detailed Stipulation.

[10] **795 Mitigation – Other mitigating factors – Declined to find**
Where respondent did not prove by clear and convincing evidence that respondent reasonably relied on unclear statements from attorney who sought to assist respondent with California Rules of Court, rule 9.20 obligations, and who followed up conversation with respondent with email that provided instructions for rule 9.20 compliance, including pre-populated forms to file after respondent provided appropriate notices, Review Department declined to assign mitigation credit for reliance on attorney.

[11a-e] **801.45 Application of Standards – General Issues – Deviation from standards – Found not to be justified**
805.10 Application of Standards – Part A (General Standards) Standard 1.8 – (a) Current discipline should be greater than prior – Applied
1913.70 Cal. Rules of Ct., Rule 9.20 (formerly Rule 955) Violation Proceedings – Special Substantive Issues – Lesser Sanction than Disbarment for Violation
California Rules of Court, rule 9.20 provides that willful violation is cause for disbarment or suspension. Discipline less than disbarment has typically been imposed for rule 9.20 violations where attorney demonstrated good faith, made unsuccessful attempts to file compliance declaration, proved significant mitigation with little aggravation, or presented other extenuating circumstances. Where respondent failed to comply with notice requirements of rule 9.20; respondent's rule 9.20 compliance declaration contained false statements; respondent violated court orders in both his past and present disciplinary cases; and there was lack of compelling mitigation, respondent's attempt to comply with rule 9.20 and mitigation for extraordinary good character and cooperation made disbarment unduly punitive, and Review Department concluded appropriate progressive discipline was two years' actual suspension continuing until respondent provided proof of rehabilitation and fitness to practice law pursuant to standard 1.2(c)(1) to impress on respondent the seriousness of misconduct and consequences for failing to follow ethical duties as attorney.

ADDITIONAL ANALYSIS

Culpability

Found

1915.10 Cal. Rules of Ct., Rule 9.20

Discipline

180.35 Imposition of Monetary Sanctions – Not recommended
1923.09 Stayed Suspension – Three years
1924.08 Actual Suspension – Two years
1925.09 Probation – Three years
1926 Standard 1.2(c)(1) Rehabilitation Requirement

OPINION

PURCELL, P.J.

A hearing judge found Fernando Fabela Chavez culpable of failing to comply with California Rules of Court, rule 9.20,[1] as ordered in his prior disciplinary case, and of making grossly negligent misrepresentations in his rule 9.20 compliance declaration. For lack of proof, the judge dismissed a third charge of seeking to mislead a judge. The hearing judge recommended discipline including a two-year actual suspension, continuing until Chavez proves rehabilitation and fitness to practice law.

Chavez appeals, arguing he is not culpable. Alternatively, he seeks a 30-day actual suspension if we find culpability. The Office of Chief Trial Counsel of the State Bar (OCTC) did not appeal but requests more aggravation and less mitigation.

After independently reviewing the record under rule 9.12, we affirm the hearing judge's findings and discipline recommendation. Chavez committed serious misconduct but proved extensive mitigation and that he did not act in bad faith. Having served a one-year actual suspension in his prior discipline case, the recommended two-year actual suspension is appropriate progressive discipline for Chavez's misconduct.

I. PROCEDURAL BACKGROUND

OCTC filed a three-count Notice of Disciplinary Charges (NDC) on March 20, 2019, alleging that Chavez (1) failed to obey rule 9.20, (2) sought to mislead a judge, and (3) engaged in an act of moral turpitude by making misrepresentations in his rule 9.20 compliance declaration filed with the State Bar Court. OCTC filed an amended NDC on June 27 (ANDC), charging the same violations with additional supporting facts. Chavez filed timely responses to the NDC and the ANDC. On December 2, the parties filed a detailed pretrial Stipulation as to Facts and Admission of Documents (Stipulation). The hearing judge held trial on December 17, 2019 and issued her decision on March 16, 2020.

II. CHAVEZ' PRIOR DISCIPLINE CASE

Chavez was admitted to practice law in California in June 1979, and he has one prior record of discipline. In a November 15, 2016 Review Department opinion, we found him culpable of several ethical violations stemming from his grossly negligent supervision of his office manager. Chavez's misconduct led to mishandling $750,000 in settlement funds and culpability for: (1) failing to maintain a total of $133,500 in client funds in his client trust account (CTA), in violation of former rule 4-100(A)) of the Rules of Professional Conduct; [2] (2) commingling, in violation of former rule 4-100(A); (3) grossly negligent misappropriation of over $65,000 from one client and $10,000 from another client, in violation of Business and Professions Code section 6106; [3] and (4) failing to obey a superior court's order to establish a blocked account to hold a $10,000 minor's compromise settlement for his client, in violation of section 6103. Aggravation was assigned for multiple acts of misconduct and significant client harm, and mitigation was credited for 31 years of discipline-free practice, extraordinary good character, pro bono work, and community service. We recommended discipline including a two-year stayed suspension, three years' probation, and a one-year actual suspension.

On March 10, 2017, the Supreme Court issued its order adopting the recommended discipline.[4] The Supreme Court order became effective on April 9, 2017. It required Chavez to comply with the notification provisions of rule 9.20(a) within 30 calendar days of the effective

1. All further references to rules are to this source unless otherwise indicated.

2. All further references to former rules are to the former California Rules of Professional Conduct that were in effect until November 1, 2018, unless otherwise noted.

3. All further references to sections are to this source.

4. Supreme Court Case No. S239147; State Bar Case No. 13-O-12150.

date[5] and with the reporting requirements of rule 9.20(c) within 40 calendar days of the effective date.[6] The order warned that failure to comply "may result in disbarment or suspension."[7]

III. FACTS[8] AND CULPABILITY

A. Count One: Failure to Obey Rule 9.20

Chavez began transferring responsibility for cases to other attorneys in January 2017, even before the Supreme Court order was issued on March 10. He engaged an attorney experienced in discipline matters to assist him with his rule 9.20 obligations. In early May 2017, Chavez and his attorney discussed the suspension order and rule 9.20 compliance. Chavez testified that the attorney asked him if he still had any outstanding cases. Chavez responded that "there might be a couple of cases, or one, where I'm on the complaint, but I'm not actively handling the case." Following the discussion, the attorney sent an email to Chavez on May 4, 2017, stating "I understand that, on the date that the Supreme Court of California issued its suspension order, you were still attorney of record in a least of couple of cases . . . [and] you were ordered to comply with rule 9.20 of the California Rules of Court." The attorney informed Chavez that "[t]hese things must be done no later than next Monday, May 8, 2017, which is the 30th day from the effective date of your suspension." The attorney also provided sample language for the client letters and notice to the courts along with a partially completed rule 9.20 compliance declaration.

[1a] Count one of the ANDC charges Chavez with violating rule 9.20(a)(4) by failing to file the notices of his suspension in court cases where he was counsel of record on the date the Supreme Court filed its order—March 10, 2017. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45 [for compliance with rule 9.20(a), operative date for identification of "clients being represented in pending matters" and others to be notified is filing date of Supreme Court order and not any later "effective" date of order].) Chavez stipulated that he was attorney of record in four cases on March 10, 2017, and he did not file notices of suspension with those courts. The cases were: (1) *Atenco-Moreno v. Solorio*, Monterey County Superior Court, case no. M123023; (2) *Ramirez v. McCreary*, Santa Clara County Superior Court, case no. 16CV290284, (3) *Loya-Pacheco v. Jimenez*, Santa Clara County Superior Court, case no. 16CV300393, (4) *Cantu vs. Hawkins,* Santa Clara County Superior Court, case no. 2015-1-CV287074.

[2] Chavez argues he is not culpable of failing to file notices with the court because he did not receive the March 10, 2017 order from the Supreme Court nor did his attorney provide it to him. By law, Chavez is presumed to have been served with the order. Under Evidence Code section 664, it is acknowledged that an official duty has been regularly performed; we therefore find a presumption that the Supreme Court Clerk properly performed his or her official duty in serving Chavez and his attorney as provided in rule 9.18(b).[9]

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5. Rule 9.20(a)(1) and (4) require an attorney to do the following: (1) notify clients being represented in pending matters, along with any cocounsel, of the suspension and consequent disqualification to act as an attorney after the suspension's effective date; (2) notify clients to seek other legal advice if there is no cocounsel; (3) notify opposing counsel in pending litigation; (4) if no opposing counsel, notify adverse parties of the suspension and consequent disqualification to act as an attorney after the suspension's effective date; and (5) file a copy of the notice with the court, agency, or tribunal before which the litigation is pending.

6. Rule 9.20(c) requires an attorney to file an affidavit with the Clerk of the State Bar Court showing compliance with the provisions of the order entered under this rule within the time prescribed in the order after the effective date of the suspension.

7. Rule 9.20(b) specifies strict mailing guidelines for notification. All notices must be by registered or certified mail, return receipt requested, and must contain an address for the suspended attorney.

8. The facts are based on the stipulated facts, the trial evidence, and the hearing judge's factual and credibility findings, to which we give great weight. (Rules Proc. of State Bar, rule 5.155(A); *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032].)

9. Rule 9.18(b) provided that the Supreme Court Clerk shall "mail notice of [the filing of a discipline order] to the member and his or her attorney of record, if any, at their respective addresses . . . ."

Chavez failed to rebut this presumption—the hearing judge found his testimony that he did not receive the order was not credible. The judge reasoned that since Chavez began transferring cases in January 2017 due to the impending suspension, it was not believable that he would fail to anticipate receipt of the suspension order from the Supreme Court or to request it from his attorney. (Rules Proc. of State Bar, rule 5.155(A [findings of fact are entitled to great weight].) We agree considering that the Review Department opinion recommended a two-year suspension in November 15, 2016 and Chavez's attorney referenced the Supreme Court Order in his May 4, 2017 email. We give great weight to the judge's credibility finding and adopt it. (*McKnight v. State Bar*, *supra*, 53 Cal.3d at p. 1032 [hearing judge's credibility findings entitled to great weight]; *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 121 [where factual finding rests on testimonial evidence, administrative committee who heard evidence is in better position to evaluate conflicting statements after observing demeanor of witnesses and character of testimony].)

[1b] Chavez also argues he is not culpable because he was not obligated to file court notices since he had removed himself from the cases at issue. He filed substitutions of attorney in *Ramirez* on March 30, in *Cantu* on March 31, and in *Loya-Pacheco* on April 17, and informed his clients in January and February 2017 that he would be suspended. We reject this argument for two reasons. First, Chavez did not notify his clients by registered or certified mail, return receipt requested, as required by rule 9.20. Second, filing substitutions of attorney in pending cases after the Supreme Court order is filed but before the effective date of the order does not fulfill rule 9.20 compliance obligations. (*In the Matter of Eldridge* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 413, 416–417.)

[1c] As to the *Atenco-Moreno* case, Chavez argues he was not required to report it because the case was settled in January 2017. Though settled, the case had not been dismissed and remained pending at the time of the Supreme Court order on March 10, 2017. In fact, Chavez continued to work on the case after this date. He filed a petition to approve a compromise on April 5, 2017, including a declaration stating he was attorney of record for plaintiff, and he received settlement checks in exchange for a dismissal and release on May 3, 2017.

[1d] We find that OCTC proved by clear and convincing evidence that Chavez is culpable for failing to comply with rule 9.20 in all four cases, as charged in count one.[10] Chavez's arguments are contrary to the Stipulation that states he did not file court notices in all four cases that were pending on March 10, 2017. Notably, Chavez had still not filed the appropriate court notices by the time of trial, in December 2019.

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

[3a] Count three of the ANDC charges Chavez with misrepresenting in his rule 9.20 compliance declaration that he made the proper notifications to counsel and the courts. His counsel provided him with a pre-filled-out rule 9.20 compliance declaration with pertinent instructions. The checked boxes indicated that Chavez had notified all opposing counsel of his suspension by certified or registered mail, return receipt requested, filed a copy of the notice with courts where cases were pending, and provided notice to his clients by certified or registered mail. Chavez testified he reviewed the declaration on May 5 and filed it on May 11, 2017. In fact, he had not performed the tasks when he signed and filed declaration.

[3b] Chavez's statements were grossly negligent misrepresentations amounting to moral turpitude. Although he testified he reviewed the document, he was clearly careless in doing so as it was entirely inaccurate—he had not filed notices with the courts and had not provided appropriate certified notices to opposing counsel or unrepresented parties in cases pending on March 10, 2017. (See *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 90–91 [omitting not being entitled to practice law

10. *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552 (clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind).

in application to become arbitrator amounts to moral turpitude by gross negligence]; *In the Matter of Yee* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 330, 334 [filing inaccurate MCLE compliance declaration by affirmation without verifying contents amounts to moral turpitude by gross negligence].)11 Chavez had a duty to review the compliance declaration for accuracy before he signed it under penalty of perjury and failed to do so. Compliance with rule 9.20 is critically important because it ensures that all concerned parties learn of an attorney's discipline and allows the Supreme Court to monitor compliance with conditions of suspension. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187; *Durbin v. State Bar* (1979) 23 Cal.3d 461, 467–468.) Chavez is culpable as charged.12

IV. CHAVEZ'S FURTHER DEFENSES DO NOT REFUTE CULPABILITY

A. Chavez's Contention that Specific Intent or Bad Faith is Required to Prove Violation of Rule 9.20 is Unavailing

[5] Chavez argues that he did not have the requisite level of intent to be found culpable of violating rule 9.20 because he did not do so willfully, and he acted in good faith. We reject his argument. The level of intent required to prove a rule 9.20 violation is general intent and not a measure of good or bad faith. (See *Phillips v. State Bar* (1989) 49 Cal.3d 944, 952 [wilfulness under rule 9.20 does not require bad faith or intent to violate law or to injure another]; *Lydon v. State Bar*, *supra*, 45 Cal.3d at p. 1186 [culpability under Cal. Rules of Court, former rule 955, now rule 9.20, does not require bad faith or actual notice of provision violated].) Chavez's failure to file the required notices constitutes a willful violation of rule 9.20.

B. Chavez's Reliance on his Attorney's Advice or Employee's Assistance Does Not Excuse Compliance with Rule 9.20

[6] Chavez contends that he should not be found culpable because he relied on the advice of his attorney, who did not make it clear that he had to file notifications in all matters pending on the date the Supreme Court order was filed. Reliance on one's attorney is not a defense, but it may be considered in mitigation. (*Sheffield v. State Bar* (1943) 22 Cal.2d 627, 632.) Also, Chavez's request to his employee to list cases in which he was counsel of record is not a defense for his rule 9.20 violation. When Chavez made the request in May 2017, no evidence proves that the list comprehensively reflected cases pending as of March 10, 2017, the date of the Supreme Court order. Chavez had the sole responsibility to ensure that he identified all cases pending on that date to properly comply with rule 9.20. He failed to do so and is therefore culpable.

V. AGGRAVATION AND MITIGATION[13]

A. Aggravation

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

[7] The hearing judge assigned substantial aggravating weight to Chavez's 2017 prior record of discipline discussed above. We agree. Chavez committed moral turpitude offenses in both cases—misappropriations in his past case and misrepresentations in his present case. Moreover, he committed the same misconduct in both cases by

11.**[4]** The hearing judge dismissed count two that Chavez sought to mislead a judge when he filed his false rule 9.20 declaration, in violation of section 6068, subdivision (d). OCTC did not appeal this dismissal and we adopt it. No evidence established that Chavez's careless review of the document his attorney prepared amounts to intentional deception absent other evidence (*In the Matter of Chesnut* (Review. Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174 [attorney must act with intent to deceive to violate § 6068, subd. (d)]), though it may constitute moral turpitude by gross negligence, as discussed above.

12. Any argument by Chavez that he is not culpable because he did not receive the Supreme Court order is inapplicable here. In this count, he is charged with misrepresenting to the court in his compliance declaration that he provided appropriate notices. Whether he received the Supreme Court order has nothing to do with his affirmative act of submitting an erroneous rule 9.20 compliance declaration.

13. Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct requires OCTC to establish aggravating circumstances by clear and convincing evidence. Chavez has the same burden to prove mitigation. (Std. 1.6.)

failing to obey court orders. In the prior case, he violated a superior court order to create and fund a minor's account and in the present case, he violated a Supreme Court order for compliance with rule 9.20. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443–444 [similarities between previous and current misconduct render previous discipline more serious, as they indicate prior discipline did not rehabilitate].)

B. Mitigation

1. *Good Character (Std. 1.6(f))*

[8a] Mitigation is available 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 assigned moderate weight. Based on the quality and quantity of the testimony, we increase the weight to substantial.

[8b] Chavez presented five witnesses who testified and one witness declaration. The live witnesses included an attorney, Chavez's secretary of 30 years, a client, a longtime friend, and a former California assemblyman and senator. The declarant was an associate in Chavez's office. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration given to attorneys' testimony due to their "strong interest in maintaining the honest administration of justice"].) The witnesses spoke highly of Chavez's character, describing him as honest and trustworthy. Most had known him for a long time—from 20 to 40 years. He was described as a person with a "one-in-a-million type of character," and who had served as a mentor to other attorneys. The former senator testified about Chavez's good character, considered him as family, and confirmed his deep commitment to the community. Though many witnesses did not have detailed knowledge of Chavez's misconduct, the totality of this impressive evidence of good character merits substantial weight in mitigation.

2. *Cooperation with State Bar (Std. 1.6(e))*

[9] The hearing judge assigned substantial mitigation for Chavez's cooperation for entering into a detailed Stipulation. We agree. (Std. 1.6(e) [spontaneous candor and cooperation displayed to victims of misconduct or to State Bar are mitigating].) We reject OCTC's request that we assign less weight because the stipulated facts were easy to prove and Chavez disputed culpability. Whether facts are easy to prove is just one aspect to consider in assigning mitigating weight to the Stipulation. Chavez's cooperation conserved judicial time and resources and he stipulated to facts that formed the basis of our culpability findings in count one. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive weight in mitigation for those who admit culpability and facts].)

3. *No Mitigation for Reliance on Attorney*

[10] Chavez's attorney was experienced in California discipline matters and sought to assist him with his 9.20 obligations. The hearing judge found a "lack of clarity in the information provided by counsel" to Chavez and assigned substantial mitigation for reliance on the attorney. (*Sheffield v. State Bar*, supra, 22 Cal.2d at p. 632 [reliance on counsel in disciplinary matter may be considered in mitigation].) We decline to assign mitigation credit. Chavez did not prove by clear and convincing evidence that he reasonably relied on unclear statements from his attorney. In fact, his attorney followed up on a conversation they had with a May 4, 2017 email that provided instructions for rule 9.20 compliance, including pre-populated forms to file after Chavez provided the appropriate notices. Chavez had adequate notice to comply with rule 9.20 because he received the Supreme Court order as well as an explanatory email from his attorney.[14]

14. We decline OCTC's request for aggravation for multiple acts of misconduct (std. 1.5(b)) and indifference (std. 1.5(k)); these factors have not been established by clear and convincing evidence.

VI. TWO-YEAR SUSPENSION IS PROPER PROGRESSIVE DISCIPLINE[15]

[11a] Our disciplinary analysis begins with rule 9.20 itself—it provides in relevant part that a willful violation is cause for disbarment or suspension. (See also *Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131 [Supreme Court has established that rule 9.20 violation is serious ethical breach for which disbarment is generally considered appropriate discipline].) We also look to the standards (*In re Silverton* (2005) 36 Cal.4th 81, 91) and comparable case law (*Snyder v. State Bar* (1990) 49 Cal.3d. 1302, 1310–1311), noting that each case must be decided on its own facts after a balanced consideration of relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059.) Discipline less than disbarment has typically been imposed for rule 9.20 violations where the attorney demonstrated good faith, made unsuccessful attempts to file the compliance declaration, proved significant mitigation with little aggravation, or presented other extenuating circumstances.16 The facts of this case justify discipline less than disbarment but greater than the one-year actual suspension ordered in Chavez's previous discipline case. (Std. 1.8(a) [sanction must be greater than that imposed in prior discipline unless remote in time and earlier misconduct not serious].)

[11b] The hearing judge found guidance in *Shapiro v. State Bar* (1990) 51 Cal.3d 251. In *Shapiro*, the Supreme Court imposed discipline including a one-year actual suspension for violation of California Rules of Court, former rule 955(c). The attorney late-filed a compliance declaration partially due to inadequate advice from the Bar's probation monitor, orally notified clients and others of his suspension, and made prompt efforts to correct his declaration once he learned it was insufficient. (*Id.* at p. 260.)

[11c] We agree with the hearing judge that Chavez's misconduct was significantly more serious than in *Shapiro*—his compliance declaration contained false statements and there is no evidence he has filed corrected declarations. In addition, he violated court orders in both his past and present disciplinary cases. However, Chavez's case is less serious than other rule 9.20 matters where disbarment has been ordered.17

[11d] We reject Chavez's request for a 30-day suspension, based on *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527. In *Friedman*, the attorney complied with the notice provisions of California Rules of Court, former rule 9.55 (precursor to rule 9.20) but failed to timely file a compliance declaration. The court recommended a 30-day actual suspension, finding the attorney substantially complied, filed an accurate declaration 14 days late after discovering his error, cooperated in the discipline proceedings, and acknowledged his misconduct. A 30-day suspension would represent a departure from the requirement of progressive discipline (Std. 1.8(a)), and we decline to make such an exception given Chavez's misconduct, its similarity to a past serious discipline case, and the lack of compelling mitigation.

[11e] We affirm the hearing judge's recommended two-year actual suspension continuing until Chavez provides proof of rehabilitation and fitness to practice pursuant to standard 1.2(c)(1). We agree with the hearing judge that Chavez's mitigation and attempt to comply with rule 9.20 makes disbarment unduly punitive. However, the circumstances here support a lengthy

15. 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.)

16. See, e.g., *Durbin v. State Bar*, *supra*, 23 Cal.3d 461 (6-month actual suspension for partial compliance and mix-up in communication regarding requirements); *In the Matter of Rose* (1994) 3 Cal. State Bar Ct. Rptr. 192 (9-month actual suspension concurrent with probation violation for attempt to file; no harm and recognition of wrongdoing but one prior discipline).

17. See, e.g., *Bercovich v. State Bar*, *supra*, 50 Cal.3d 116 (attorney did not comply with rule 9.20 and had two records of discipline); *Dahlman v. State Bar* (1990) 50 Cal.3d 1088 (attorney did not comply with rule 9.20, demonstrated indifference to disciplinary system, and did not appear at hearing); *Phillips v. State Bar*, *supra*, 49 Cal.3d 944 (attorney failed to file one rule 9.20 form and the second one was two years late; five prior discipline cases; and aggravation for habitual disregard of clients).

actual suspension at the upper range as appropriate progressive discipline. (Std. 1.2(c)(1) ["Actual suspension is generally for a period of thirty days, sixty days, ninety days, six months, one year, eighteen months, two years, three years, or until specific conditions are met"].) An 18-month actual suspension is not adequately progressive given Chavez's recent 2017 past discipline and his violations of court orders in both cases. A more significant suspension is required to impress on Chavez the seriousness of his misconduct and the consequences that occur when he fails to follow his ethical duties as an attorney. Our recommendation balances Chavez's misconduct and his prior record of discipline with his mitigation for cooperation and extraordinary good character.

VII. RECOMMENDATION[18]

It is recommended that Fernando Fabela Chavez, State Bar Number 86902, 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. Chavez must be suspended from the practice of law for a minimum of the first two years of his probation and until he 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. Review Rules of Professional Conduct. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Chavez 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 Chavez's first quarterly report.

3. Comply with State Bar Act, Rules of Professional Conduct, and Probation Conditions. Chavez must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of probation.

4. 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, Chavez 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. Chavez 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.

5. Meet and Cooperate with Office of Probation. Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Chavez must schedule a meeting with his assigned probation case specialist 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, Chavez may meet with the probation case specialist in person or by telephone. During the probation period, Chavez must promptly meet with representatives of the Office of Probation as requested and, subject to the assertion of applicable privileges, must fully, promptly, and truthfully answer any inquiries and provide any other information requested.

6. State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court. During Chavez's probation period, the State Bar Court retains jurisdiction over him to address issues concerning compliance with probation conditions. During this period, Chavez

18. We do not recommend that Chavez take and pass the State Bar's Ethics School or the Multistate Professional Responsibility Examination because he was previously ordered to do so in Supreme Court No. S239147.

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, Chavez must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

7. Quarterly and Final Reports.

(a) Deadlines for Reports. Chavez 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, Chavez 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. Chavez 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. Chavez 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. Chavez is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

8. 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 Chavez has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

9. Proof of Compliance with Rule 9.20 Obligation. Chavez 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, subdivisions (a) and (c). Such proof must include: the names and addresses of all individuals and entities to whom Chavez 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.

VIII. CALIFORNIA RULES OF COURT, RULE 9.20

It is further recommended that Chavez be ordered to comply with the requirements of California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order imposing

discipline in this matter.[19] Failure to do so may result in disbarment or suspension.

IX. MONETARY SANCTIONS

The court does not recommend the imposition of monetary sanctions as all the misconduct in this proceeding/matter occurred prior to April 1, 2020, the effective date of rule 5.137 which implements Business and Professions Code section 6086.13. (See *In the Matter of Wu* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 263, 267 [rules of statutory construction apply when interpreting Rules Proc. of State Bar]; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208–1209 [absent express retroactivity provision in statute or clear extrinsic sources of intended retroactive application, statute should not be retroactively applied]; *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841 [where retroactive application of statute is ambiguous, it should be construed to apply prospectively]; *Fox v. Alexis* (1985) 38 Cal.3d 621, 630–631 [date of offense controls issue of retroactivity].)

X. COSTS

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

We concur:

HONN, J.
McGILL, J.

19. For purposes of compliance with rule 9.20(a), the operative date for identification of "clients being represented in pending matters" and others to be notified is the filing date of the Supreme Court order, not any later "effective" date of the order. (*Athearn v. State Bar*, *supra*, 32 Cal.3d at p. 45.) Further, Chavez is required to file a rule 9.20(c) affidavit even if he had no clients to notify on the date the Supreme Court filed its order. (*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).)

State Bar Court
Review Department

In the Matter of

MICHAEL PHILIP RUBIN

A Member of the State Bar

No. 17-O-01810; SBC-19-O-30352 (Consolidated)

March 4, 2021, modified April 16, 2021

SUMMARY

Respondent was found culpable of eight counts of misconduct in three separate matters, including failing to obey a court order to pay sanctions, failing to report judicial sanctions of $2,335, threatening to report suspected immigration status of opposing party, failing to maintain client funds in trust account, failing to pay client funds promptly, representing clients with potential conflicting interests without complying with requirements of rule 3-310(C)(1), and two counts of commingling. In aggravation, significant weight was given to respondent's two prior records of discipline, substantial weight for multiple acts of misconduct and indifference, and limited weight for significant client harm. In mitigation, limited weight was given to respondent's evidence of extraordinary good character. In recommending discipline, Review Department concluded standard 1.8(b) applied and recommended disbarment

COUNSEL FOR PARTIES

For State Bar of California: Kimberly Gay Anderson

For Respondent: Michael Philip Rubin, in pro. per.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1a-c] **163 Standards of Proof/Standards of Review – Proof of Wilfulness**
204.10 Substantive Issues in Disciplinary Matters Generally – Culpability – General substantive issues re culpability – Wilfulness requirement
220.00 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6103

Willful disobedience or violation of court order requiring attorney to do or forbear act connected with or in course of attorney's profession, which attorney ought in good faith to do or forbear, constitutes cause for suspension or disbarment. Attorney acts willfully if attorney intends to commit the act or to abstain from committing it. Where attorney failed to pay court ordered sanctions and then appealed order's validity and lost, Review Department upheld hearing judge's culpability determination that respondent violated Business and Professions Code section 6103, as respondent had actual notice of order and requirement to pay sanctions; order was final and binding for disciplinary purposes as respondent's challenge of order was exhausted; sanctions order remained in effect even though entire case was appealed; and failing to pay sanctions until over a year and a half after knowledge of obligation was unreasonable and a violation of order.

[2a-d] **214.50 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6068(o)**

Good faith, or even ignorance of the law, is not a defense to violation of Business and Profession Code section 6068(o)(3). No requirement that Office of Chief Trial Counsel prove bad faith or that respondent have actual knowledge of violating section 6068(o)(3). Where court ordered respondent sanctioned $2,335 for being unsuccessful in opposing motion for protective order, not for failing to *make* discovery, and respondent knew of court's sanctions order but failed to report sanctions to State Bar, respondent willfully violated section 6068(o)(3).

[3a-d] **163 Standards of Proof/Standards of Review – Proof of Wilfulness**
204.10 Substantive Issues in Disciplinary Matters Generally _Culpability – General substantive issues re culpability – Wilfulness requirement
212.00 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6067
220.50 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6103.7

Mistake of law made in good faith may be defense to Business and Professions Code section 6067 charge, as attorneys are not infallible and cannot be expected to know all law. But section 6103.7 charge is different, as it does not pertain to attorney performance and knowledge of law. Prohibition from threatening immigration status in section 6103.7 establishes a clear ethical standard for conduct that attorneys must uphold. Only willful breach is required for discipline, not knowledge of rule or intent to violate it. Where respondent mentioned illegal immigration status of opposing party in letters and telephone calls to opposing counsel and in civil case management statement, those constituted threats in violation of Business and Professions Code section 6103.7, and respondent's purported ignorance of section 6103.7 was not a defense.

[4] **194 Effect/Applicability of Statutes Outside State Bar Act**

Litigation privilege in Civil Code section 47 does not apply to disciplinary proceedings. Where respondent argued hearing judge improperly relied on civil case management statement as it was privileged communication under Civil Code section 47, Review Department rejected respondent's argument.

[5a-b] **204.90 Substantive Issues in Disciplinary Matters Generally – Culpability – General substantive issues re culpability – Other general substantive issues re culpability**

214.50 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6068(o)

220.00 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6103

220.20 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6103.5

220.30 Substantive Issues in Disciplinary Matters Generally –Culpability – State Bar Act Violations – Section 6104

220.40 Substantive Issues in Disciplinary Matters Generally –Culpability – State Bar Act Violations – Section 6105

222.90 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6106.9

Knowledge of the violated provision is not required for violation of clear-cut professional responsibilities in Business and Professions Code (e.g., sections 6068(o)(3) [duty to report to State Bar imposition of judicial sanctions], 6103 [duty to obey court orders], 6103.5 [requirement that attorney communicate settlement offer], 6104 [attorney cannot appear without authority], 6105 [lending name to person who is not attorney], and 6106.9 [sexual relations between attorney and client].)

[6a-b] **221.50 Substantive Issues in Disciplinary Matters Generally –Culpability – State Bar Act Violations – Section 6106 – Not Found**

420.12 Common Law/Other Statutory Violations – Misappropriation – Found – Gross negligence

420.52 Common Law/Other Statutory Violations – Misappropriation – Not Found – Excusable negligence/technical violation

420.54 Common Law/Other Statutory Violations – Misappropriation – Not Found – Overall failure of proof

When trust account balance drops below amount attorney is required to hold for client, presumption of misappropriation arises. Burden then shifts to attorney to show misappropriation did not occur and attorney entitled to withdraw funds. Moral turpitude can be found when attorney's actions constitute gross carelessness and negligence violating fiduciary duty to client. Where balance in respondent's trust account fell below amount respondent required to hold for client on two occasions over three day period, which respondent explained was due to careless bookkeeping, and after realizing discrepancy, respondent deposited personal funds to cover discrepancy, misconduct did not rise to level of misappropriation by gross negligence as it was isolated, aberrational occurrence and respondent quickly restored funds.

[7] **130 Procedure on Review**
199 Miscellaneous General Issues in State Bar Court Proceedings –Other Miscellaneous General Issues

Where Office of Chief Trial Counsel (OCTC) did not appeal hearing judge's finding of no clear and convincing evidence of misappropriation, but instead attempted to argue misappropriation by gross negligence in its responsive brief on appeal, although some facts suggested respondent's actions may have been grossly negligent or construed as other misconduct, Review Department concluded that respondent did not have opportunity to fully address gross negligence issue on review and it would be unfair for Review Department to overturn hearing judge's finding that respondent was not culpable.

[8a-b] **280.00 Rules of Professional Conduct (RPC) Violations – Trust account/commingling (RPC 1.15(a), (c); 1989 RPC 4-100(A); 1975 RPC 8-101(A))**

Former Rule 4-100(A) of Rules of Professional Conduct provides, in part, that client funds held by attorney must be deposited in client trust account and maintained until amount owed to client is settled. Where respondent's client trust account dipped $4,098.97 below amount respondent was to hold in trust for client, respondent violated former rule 4-100(A) by failing to maintain $37,617.09 in client trust account on behalf of client.

[9a-b] **280.50 Rules of Professional Conduct (RPC) Violations – Pay client funds on request (RPC 1.15(d)(7); 1989 RPC 4-100(B)(4); 1975 RPC 8-101(B)(4))**

Former rule 4-100(B)(4) of Rules of Professional Conduct requires attorneys to promptly pay or deliver, as requested by client, any funds in attorney's possession which client is entitled to receive. Where client made several requests for funds, but respondent did not disburse funds for almost three months, respondent culpable of violating rule 4-100(B)(4).

[10a-b] **273.30 Rules of Professional Conduct (RPC) Violations – Conflicts of interest (RPC 1.7 (except 1.7(c)(2)) & 1.9; 1989 RPC 3-310; 1975 RPC 4-101 & 5-102)**

Former rule 3-310(C)(1) of Rules of Professional Conduct provides that attorney shall not, without informed written consent of each client, accept representation of more than one client in matter in which interests of clients potentially conflict. Where respondent represented two defendants in same lawsuit where damages were sought against both clients, respondent should have anticipated possible indemnity issues; thus, respondent's failure to inform clients about any potential conflicts and failure to obtain clients' informed written consent to representation was violation of former rule 3-310(C)(1).

[11] **163 Standards of proof/standards of Review – Proof of Wilfulness**
280.00 Rules of Professional Conduct (RPC) Violations – Trust account/commingling (RPC 1.15(a), (c); 1989 RPC 4-100(A1975 RPC 8-101(A))

Former rule 4-100(A) of Rules of Professional Conduct prohibits attorneys from commingling personal funds with client funds held in trust account. Ignorance of rules governing client trust accounts is no defense to commingling charge. Where personal loan funds were wired directly into respondent's client trust account, and respondent repaid loan with check from client trust account, respondent was culpable of willful violation of former rule 4-100(A), even if respondent believed at time that payment could be made from client trust account.

[12a-b] **280.00 Rules of Professional Conduct (RPC) Violations – Trust account/commingling (RPC 1.15(a), (c); 1989 RPC 4-100(A); 1975 RPC 8-101(A))**

An improper reason for depositing non-client funds in client trust account is not required to establish culpability for commingling. Where respondent deposited four checks from his business venture into his client trust account, respondent commingled non-client funds in his client trust account in violation of former rule 4-100(A) of the Rules of Professional Conduct.

[13a-c] **511 Aggravation – Prior record of discipline - Found**

Where attorney had two prior records of discipline and second disciplinary matter involved misconduct similar to that in present matter, including failure to promptly pay client funds and disobedience of court order, and probation condition in second disciplinary matter required respondent to have accountant certify that respondent properly maintained client funds records and client trust account, prior disciplines did not rehabilitate respondent causing concern about further misconduct, and therefore substantial aggravating weight given for respondent's two prior records of discipline.

[14] **582.32 Aggravation – Harm – To client – Found but discounted or not relied on – Harm otherwise slight**

582.39 Aggravation – Harm – To client – Found but discounted or not relied on – Other reason

Where respondent's misconduct, which deprived client of funds for approximately three months and burdened client with fear of not complying with fiduciary duties as trustee of trust, caused client significant harm due to mental suffering, but client's worry was for relatively short time period and no additional facts suggested severe monetary injury, limited weight in aggravation given for significant harm to client.

[15] **584.50 Aggravation – Harm – To Public – Declined to find**

586.50 Aggravation – Harm – To administration of justice – Declined to find

Where respondent's misconduct merely created additional work for superior court, as opposing counsel sought protective order resulting in sanctions against respondent, Review Department did not conclude that respondent's actions significantly harmed public or administration of justice.

[16a-b] **591 Aggravation – Indifference to rectification/atonement – Found**

Attorney who does not accept responsibility for actions and instead seeks to shift it to others demonstrates indifference and lack of remorse. Law does not require false penitence but does require that attorney accept responsibility for wrongful acts and come to grips with culpability. Where respondent exhibited insight as to some behavior but continued to describe violations as technicalities or made other excuses, and continued to insist conduct did not amount to threatening to report suspected immigration status by arguing never made direct threats and failed to acknowledge wrongfulness of conduct without considering import of comments on phone, in letters, and in court filings, respondent's actions continued to display indifference and Review Department assigned substantial consideration to this in aggravation.

[17] **615 Aggravation – Lack of candor/cooperation with Bar – Declined to find**

Where trial was hard-fought and at times somewhat contentious and judge reprimanded respondent regarding respondent's volume and tone, but judge was able to adequately manage trial so as to avoid any extreme behavioral issues, Review Department did not

conclude that respondent's actions rose to level warranting aggravation for lack of candor and cooperation to State Bar.

[18a-e] **740.32 Mitigation – Good character references – Found but discounted or not relied on - References unfamiliar with misconduct**
740.33 Mitigation – Good character references – Found but discounted or not relied on – Inadequate showing generally
740.39 Mitigation – Good character references – Found but discounted or not relied on – Other reason
Where character witnesses consisting of former employees, clients, attorneys, friend, and respondent's daughter testified on respondent's behalf, these established wide range of references, but several issues diminished strength of testimony including that other than respondent's daughter, only two character witnesses had known respondent for significant amount of time; no detailed testimony regarding respondent's daily conduct and mode of living; witnesses' testimony did not make clear they were aware of full extent of misconduct; and while three attorneys testified, one was respondent's daughter and other two had only known respondent a few years, Review Department assigned limited weight in mitigation to evidence of extraordinary good character.

[19] **735.50 Mitigation – Candor and cooperation with Bar – Declined to find**
Cooperation in communicating with State Bar investigator does not merit mitigation on its own since attorneys are required to do so. Where respondent failed to show actions were spontaneous or otherwise displayed cooperation, Review Department assigned no mitigation under standard 1.6(e).

[20a-e] **806.10 Application of Standards – Part A (General Standards) – Standard 1.8 – (b) Disbarment after two priors - Applied**
Standard 1.8(b) provides disbarment is appropriate where attorney has two or more prior records of discipline if (1) actual suspension was ordered in any prior disciplinary matter, (2) prior and current disciplinary matters demonstrate pattern of misconduct, or (3) prior and current disciplinary matters demonstrate attorney's unwillingness or inability to conform to ethical responsibilities. Where respondent was actually suspended for one year in second disciplinary matter, and similarity of misconduct in respondent's second prior discipline and current matter demonstrated respondent's unwillingness or inability to conform to ethical responsibilities, two criteria of standard 1.8(b) were met. However, standard 1.8(b) does not apply if most compelling mitigating circumstances clearly predominate or misconduct underlying prior discipline occurred during same time period as current misconduct. Where respondent had only limited mitigation for good character which did not clearly predominate over five serious aggravating circumstances, and misconduct in present matter occurred many years after previous misconduct, exceptions to standard 1.8 did not apply. However, disbarment is not mandatory in third disciplinary matter, even where compelling mitigating circumstances do not clearly predominate, as standard 1.8(b) is not applied reflexively, but with eye to nature and extent of prior record. Where respondent's past discipline occurred in 1993 and 1997, but respondent continued to commit misconduct in present case that was similar to past wrongdoing, committed multiple serious violations, was put on notice in second discipline of importance of handling client trust account with care but the failed to follow client trust account rules, and demonstrated indifference and failed to acknowledge wrongfulness of misconduct, given nature and chronology of respondent's violations, Review Department found no

reason to depart from presumptive discipline of disbarment under standard 1.8(b) and concluded public, courts, and legal profession best protected if respondent disbarred.

[21] **805 Application of Standards – Part A (General Standards) – Standard 1.8 – (a) Current discipline should be greater than prior**
806.10 Application of Standards – Part A (General Standards) – Standard 1.8 – (b) Disbarment after two priors - Applied
Standard 1.8(b) does not consider the remoteness of any prior discipline. Remoteness is only considered under standard 1.8(a) where there is single prior record of discipline.

[22] **135.09 Generally Applicable Procedural Issues – Amendments to Rules of Procedure – Other issues re amendments to Rules of Procedure generally**
135.60 Generally Applicable Procedural Issues – Amendments to Rules of Procedure – Dispositions and Costs
179.90 Issues re Conditions Imposed as Part of Discipline – Other Issues re Conditions Imposed as Part of Discipline – Other issues
180.11 Monetary Sanctions – General Issues – Effective date/retroactivity of authorizing statute and rule
194 Miscellaneous General Issues – Other Miscellaneous General Issues
Rules of statutory construction apply when State Bar Court interprets Rules of Procedure of State Bar. Absent express retroactivity provision or clear evidence of intended retroactive application, statute should not be construed to apply retroactively to offense committed prior to effective date. Where matter was submitted for decision prior to March 1, 2021, effective date of amended rule 5.137(H) of Rules of Procedure of State Bar, and all misconduct occurred prior to April 1, 2020, effective date of former rule 5.137 of Rules of Procedure of State Bar, Review Department did not recommend imposition of monetary sanctions on respondent

ADDITIONAL ANALYSIS

Culpability

Found

214.51	Section 6068(o)(3)
220.01	Section 6013
220.51	Section 6103.7
273.31	Conflicts of interest (RPC 1.7 (except 1.7(c)(2)) & 1.9;1989 RPC 3-310; 1975 RPC 4-101 & 5-102)
280.01	Trust account/commingling (RPC 1.15(a), (c); 1989 RPC 4-100(A); 1975 RPC 8-101(A))
280.51	Pay client funds on request (RPC 1.15(d)(7); 1989 RPC 4-100(B)(4); 1975 RPC 8-101(B)(4)

Not Found

280.45	Maintain records of client funds (RPC 1.15(d)(3)-(d)(6); 1989 RPC 4-100(B)(3); 1975 RPC 8-101(B)(3))

Aggravation

Found

521	Multiple acts of misconduct

Declined to find

615	Lack of candor/cooperation with Bar

Discipline

180.35	Imposition of Monetary Sanctions – Not recommended
1010	Disbarment
2311	Inactive Enrollment After Disbarment Recommendation -Imposed

OPINION

HONN, J.

This is Michael Philip Rubin's third discipline case. He was charged with 11 counts of misconduct in three separate matters, including a threat to report immigration status, misappropriation, and improper handling of his client trust account (CTA). The hearing judge found him culpable of eight counts and recommended disbarment.

Rubin appeals, arguing that disbarment is not warranted because the evidence did not show "willfulness, moral turpitude, or culpability." However, he "acknowledges" that he violated several provisions of the Business and Professions Code and the former California Rules of Professional Conduct. The Office of Chief Trial Counsel of the State Bar (OCTC) does not appeal and supports the judge's decision. Upon independent review of the record (Cal. Rules of Court, rule 9.12), we affirm the culpability determinations and the mitigation credit. Although we assign less aggravation, we affirm the discipline recommendation. Rubin committed several acts of serious misconduct and did not prove compelling mitigation. Disbarment is therefore appropriate under our disciplinary standards to protect the public, the courts, and the legal profession. text here.

I. PROCEDURAL BACKGROUND

On December 18, 2018, OCTC filed a three-count Notice of Disciplinary Charges (NDC) in case number 17-O-01810. The NDC was amended on April 3, 2019. The case was abated on May 22, pending the filing of additional charges. On July 19, OCTC filed an eight-count NDC in case number SBC-19-O-30352. The abatement in case number 17-O-01810 was terminated on July 22, and the two disciplinary matters were consolidated.

Trial was held on November 18-19, 21-22, and 25, and December 6, 2019. Posttrial closing briefs followed. The hearing judge issued her decision on March 5, 2020.

II. UVAS MATTER (17-O-01810)

A. Factual Background[1]

Rubin represented Thresiamma Mathew, the employer in a wage-and-hour labor dispute in *Rommel Uvas v. Thresiamma Mathew et al.*, Los Angeles County Superior Court, case no. BC639954 (hereafter *Uvas v. Mathew*). Attorney Nina Baumler represented the plaintiff, Rommel Uvas.

In a letter dated October 20, 2016, Rubin wrote to Baumler:

> I am informed that both your client and his brother, Renato Uvas, entered the U.S. on false passports and other false information. For your client to be entitled to any benefits under the California Employee Protection laws, he must prove that he is a U.S. citizen. We therefore need proof of your client's U.S. citizenship. In the U.S., it is well-settled that "reporting an illegal alien to the INS is generally encouraged conduct because it is consistent with the labor and immigration policies established by the IRCA." *Singh v. Jutla & C.D. & R's Oil, Inc.* (N.D. Cal. 2002) 214 F.Supp.2d 1056, 1059.
>
> With that being said, we respectfully instructed our client to decline your request until we see . . . proof of your client's citizenship.

1. The factual background for both disciplinary matters in this opinion is based on trial testimony, documentary evidence, and factual findings by the hearing judge, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).)

Rubin misstated the holding in *Singh* by omitting the entire quote,[2] which actually states:

> Though reporting an illegal alien to the INS is generally encouraged conduct because it is consistent with the labor and immigration policies established by the IRCA, the court in *Contreras [v. Corinthian Vigor Ins. Brokers, Inc.* (N.D. Cal. 1998) 25 F.Supp.2d 1053] concluded that reporting an illegal alien *with* a retaliatory motive was prohibited conduct under [title 29 United States Code] § 215(a)(3).

(*Singh v. Jutla & C.D. & R's Oil, Inc.*, *supra*, 214 F.Supp.2d at p. 1059.)

Baumler testified that during a March 16, 2017 phone call, Rubin told her, "You know, we're doing everything in our power to get your client and his brother deported."[3] Baumler replied, "Excuse me?" Rubin repeated his statement, adding "Your client's here illegally, isn't he?" Rubin further asserted that Uvas had committed fraud by entering the country and would be deported under the current administration.

On March 27, 2017, Rubin filed a case management statement in superior court, referring to Uvas as an "illegal alien." Rubin stated that Uvas came to the United States on a forged passport and, "[b]ased on policies of the current administration, [it is] unknown whether Plaintiff will be deported, and therefore unable to prosecute this case."

During litigation, Rubin insisted that he take Uvas's deposition in person at his office. In response, Baumler filed a motion for a protective order and requested that Uvas's deposition be taken by web or video conference. On February 20, 2018, the superior court held a hearing on the motion. Rubin did not appear at the hearing; instead, he hired contract attorney S. Martin Keleti to appear. The judge indicated at the hearing that she intended to grant the motion. Keleti immediately notified Rubin of the tentative ruling.

On February 20, 2018, the court granted the motion for a protective order and ordered Rubin and the defendants to pay $2,335 in sanctions, jointly and severally, as requested by Baumler, for costs and expenses in making the motion. On the same date, the court also signed the protective order, which mandated that the sanctions be paid within 10 days. On February 23, Rubin emailed Baumler regarding the February 20 hearing, threatening to make a complaint to the State Bar because Baumler did not provide him with the name of the court reporter at the hearing.[4]

Keleti received the minute order and emailed it to Rubin on March 6. On April 4, Baumler wrote to Rubin and requested payment of the sanctions. On April 19, Rubin filed a petition for writ of mandate, appealing the protective order and sanctions. The Second District Court of Appeal denied the petition on June 14. (*Mathew v. Superior Court of Los Angeles County*, Second Appellate District, case no. B289495.)

Rubin did not report the sanctions order to the State Bar until November 20, 2018. On November 22, 2019, during the disciplinary trial, Rubin paid Uvas $2,335.

Gary Mastin, an attorney who represented Uvas's brother, Renato, also testified about his interactions with Rubin in a separate wage-and-hour case.[5] Mastin testified that Rubin told him during a phone call that Renato did not have legal immigration status and that Rubin "was going to do something about that." On March 22, 2016, Mastin wrote to the Department of Fair Employment and Housing (DFEH) regarding Rubin's intention to report Renato's immigration status. He attached a

2. The hearing judge found that Rubin knowingly misstated the holding in Singh.

3. The hearing judge found that Baumler's testimony was credible.

4. On March 1, 2018, Rubin filed a formal complaint with the State Bar, which was deemed unmeritorious.

5. The hearing judge found that Mastin's testimony was credible.

letter from Rubin dated January 7, 2016, stating that Renato was not in the United States legally. Mastin believed Rubin made these statements as a threat and to retaliate for Renato's DFEH complaint. Then, in February 2017, in a civil case where Renato was the plaintiff, Rubin requested discovery including Renato's passport. Mastin thought this request was also a threat that Rubin intended to report Renato's immigration status.

B. Culpability[6]

1. Count One: Failure to Obey a Court Order (Bus. & Prof. Code, § 6103)[7]

[1a] Count one charges that Rubin failed to comply with the February 20, 2018 order to pay sanctions in *Uvas v. Mathew*. Section 6103 provides, in pertinent part, that willful disobedience or violation of a court order requiring an attorney to do or forbear an act connected with or in the course of the attorney's profession, which the attorney ought in good faith to do or forbear, constitutes cause for suspension or disbarment. An attorney acts willfully if he intends to commit the act or to abstain from committing it. (See *Durbin v. State Bar* (1979) 23 Cal.3d 461, 467 [no intent to violate law required]; see also *Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186 [willfulness does not require bad faith or knowledge of provision violated].) The hearing judge found culpability as charged since Rubin did not pay the sanctions until November 2019 during the disciplinary trial in this matter.

[1b] On review, Rubin argues that he did not violate the order because (1) there was no deadline for payment of the sanctions and (2) the order is not final as the underlying case is currently on appeal. He also argues that the order was never binding on him because it was not properly served, and he had a good faith belief that he did not need to comply due to the defective service. Further, he asserts that the order did not involve an act "in the course of his profession," and it pertained to a discovery dispute.[8]

[1c] As explained below, Rubin's arguments are without merit. OCTC proved by clear and convincing evidence that: (1) Rubin willfully disobeyed the court's order and (2) the court order required Rubin to do an act in the course of his profession which he ought in good faith to have done. (*In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 603 [elements of § 6103 violation]; *In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 868 [frivolous to claim that actions in representing client in civil case not connected with employment].) Rubin was aware on February 20, 2018, that the court intended to impose sanctions on him. By March 6, he had received a copy of the minute order. There is no question that he had actual notice of the order and the requirement that he pay the sanctions; the service argument is unavailing. (See *In the Matter of Khakshooy* (Review Dept. 2019) 5 Cal. State Bar Ct. Rptr. 681, 692–693 [attorney with actual notice of sanctions order culpable of § 6103 violation despite argument that he was not served with copy of order].) Rubin failed to pay the sanctions, then challenged the order's validity, and lost. Therefore, the sanctions order was final and binding for disciplinary purposes as Rubin's challenge of the order was exhausted. (*In the Matter of Collins* (Review Dept. 2018) 5 Cal. State Bar Ct. Rptr. 551, 559 ["superior court orders are final and binding for disciplinary purposes once review is waived or exhausted in the courts of record"].) The sanctions order remained in effect, even if the case as a whole was being appealed. There is "no valid reason to go behind the now-final order." (*In the Matter of Respondent X*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 605.) Rubin's argument that there was no deadline to pay is also without merit. He did not pay the sanctions until over a year and a half after he knew about the obligation, which was unreasonable and constituted a violation of the order. (See *In the Matter of Burke*

6. All culpability 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 is sufficiently strong to command unhesitating assent of every reasonable mind].)

7. All further references to sections are to the Business and Professions Code, unless otherwise noted.

8. At oral argument, Rubin acknowledged that the exception for discovery sanctions under section 6068, subdivision (o)(3), did not apply.

(Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 448, 457 [failure to pay sanctions for nearly 11 months was not reasonable and established culpability for § 6103]; *In the Matter of Respondent Y*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 867–868 [failure to pay sanctions was § 6103 violation when attorney had over year to pay].) Accordingly, we affirm the hearing judge's culpability determination.

2. Count Two: Failure to Report Judicial Sanctions (§ 6068, subd. (o)(3))

[2a] Count two charges that Rubin failed to timely report to the State Bar the superior court's February 20, 2018 order imposing $2,335 in sanctions against him. Section 6068, subdivision (o)(3), requires attorneys to report to the State Bar, in writing, within 30 days of knowledge of "[t]he imposition of judicial sanctions against the attorney, except for sanctions for failure to *make* discovery or monetary sanctions of less than one thousand dollars ($1,000)." (Italics added.) The hearing judge found culpability as charged.

[2b] Rubin acknowledges that he "technically" violated section 6068, subdivision (o)(3), but contends that the violation was not "willful" because he "believed, in good faith, that only a sanctions order involving moral turpitude, and not an order in connection with a discovery motion needed to be reported." He argues that the State Bar Court has held that ignorance of the law is not a cause for discipline.

[2c] Rubin's arguments are without merit. First, the sanctions were not imposed for failure to *make* discovery, but rather because Rubin was unsuccessful in opposing the protective order.[9] (Code Civ. Proc., § 2025.420, subd. (h).) Second, "[g]ood faith, or even ignorance of the law, is not a defense to section 6068, subdivision (o)(3). [Citation.]" (*In the Matter of Moriarty* (Review Dept. 2017) 5 Cal. State Bar Ct. Rptr. 511, 525; see also *In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420, 427 [inappropriate to reward attorney for ignorance of ethical responsibilities].)

[2d] Rubin knew of the sanctions order and failed to report it, even though he had an independent duty to do so. (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 47–48.) There is no requirement that OCTC must prove bad faith or that Rubin had actual knowledge of violating section 6068, subdivision (o)(3). (*In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 176.) Rubin's actions constituted a willful violation of section 6068, subdivision (o)(3), and we affirm the hearing judge's culpability determination.

3. Count Three: Threatening to Report Suspected Immigration Status (§ 6103.7)

[3a] Count three charges that Rubin threatened to report the suspected immigration status of Rommel Uvas on or about March 16, 2017. Section 6103.7 states, "It is cause for suspension, disbarment, or other discipline for any licensee of the State Bar to . . . threaten to report suspected immigration status of a witness or party to a civil or administrative action . . . to a federal, state, or local agency because the witness or party exercises or has exercised a right related to his or her employment . . . ." The hearing judge found that Rubin had made such threats on multiple occasions and was therefore culpable under count three.

Rubin disputes the hearing judge's credibility findings regarding the testimony of Baumler and Mastin and asserts that they were extremely biased against him. We reject these arguments. We adopt the judge's credibility findings as they were specific and reasoned. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 [hearing judge best suited to resolve credibility having observed and assessed witnesses' demeanor and veracity firsthand].)

[3b] Rubin also challenges the hearing judge's factual findings. He acknowledges that he

9. The judicial sanctions imposed here were not for a failure to *make* discovery. To the contrary, Rubin was the one propounding the discovery.

brought up the opposing parties' immigration status, but he argues that he never made "direct" threats that he would actually report anyone to the authorities. The judge found clear and convincing evidence that Rubin made threats, in violation of section 6103.7. We agree. Rubin threatened Baumler in a phone conversation, declaring that he was doing everything in his power to get Uvas and his brother deported. He made similar threats to Mastin. Rubin also referenced the immigration status of Uvas and his brother in letters to Baumler and Mastin. And he wrote in a case management statement that Uvas was an illegal alien. We adopt the judge's factual findings as they were supported by the record.[10] (Rules Proc. of State Bar, rule 5.155(A) [hearing judge's factual findings entitled to great weight].) Based on this evidence, we affirm the hearing judge's culpability finding.

[3c] We reject Rubin's assertion that his purported ignorance of section 6103.7 was a "complete defense." Rubin's reliance on *Call v. State Bar* (1955) 45 Cal.2d 104 is misplaced. That case dealt with a charge that an attorney had violated his oath to discharge his duties as an attorney to the best of his knowledge and ability under section 6067. A mistake of law made in good faith may be a defense to a section 6067 charge (*Call v. State Bar*, *supra*, 45 Cal.2d at pp. 110–111) because "attorneys are not infallible and cannot at their peril be expected to know all of the law." (*Zitny v. State Bar* (1966) 64 Cal.2d 787, 793.) **[3d]** However, a section 6103.7 charge is different as it does not pertain to attorney performance and knowledge of the law. (See *In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 631 [mistake of law is defense to violation of broad attorney duties under §§ 6067 & 6068, subd. (a)].) Instead, section 6103.7 establishes a clear ethical standard for conduct that attorneys must uphold. (See *In the Matter of McKiernan*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 427 [attorney's belief about ethical standard irrelevant].) **[5a]** Violations for other clear-cut professional responsibilities in the Business and Professions Code do not require knowledge of the violated provision. (See, e.g., *In the Matter of Blum*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 176 [ignorance of § 6068, subd. (o)(3), is not defense]; *In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 787 [elements of § 6103 violation do not include knowledge of provision].)[11]

[3e] The prohibition from threatening immigration status in section 6103.7 is a bright-line rule akin to those found in the Rules of Professional Conduct. Only a willful breach is required to be subject to discipline, not knowledge of the rule or intent to violate it. (See § 6077; *Gassman v. State Bar* (1976) 18 Cal.3d 125, 131 [knowledge of Rules of Professional Conduct not element of offense]; *Abeles v. State Bar* (1973) 9 Cal.3d 603, 610–611 [ignorance of Rules of Professional Conduct does not excuse violation].) Therefore, Rubin's purported ignorance of section 6103.7 is not a defense.

III. RAICEVIC MATTER (SBC-19-O-30352)

A. Factual Background

Rubin signed a retainer agreement with Vanessa Raicevic on April 3, 2018, to represent her in three matters—probate, elder abuse, and attorney fees. Vanessa's domestic partner, Douglas Maas, died in 2017, and she was appointed the trustee of the Douglas Maas Revocable Trust (Maas Trust). The attorney fees matter involved Vanessa's previous attorney, Valerie Horn, who sued both Vanessa and her brother, Rade Raicevic. (*Horn v. Raicevic*, Los Angeles County Superior Court, case no. SC128673.) Vanessa paid Rubin $95,000 for advance fees and costs.

10. Rubin argued the hearing judge improperly relied on his letter to Baumler and that when Rubin cited *Singh*, he believed he was citing "good law." There are no grounds for this argument. **[4]** Rubin also argued that the judge improperly relied on the case management statement because it was a privileged communication under Civil Code section 47. This argument is also rejected because the litigation privilege in Civil Code section 47 does not apply to disciplinary proceedings.

11. **[5b]** Other Business and Professions Code sections provide clear rules regarding attorney ethical conduct and do not require knowledge of the provision to violate it. (E.g., § 6103.5 [requirement that attorney communicate settlement offer]; § 6104 [attorney cannot appear without authority]; § 6105 [lending name to person who is not attorney]; § 6106.9 [sexual relations between attorney and client].)

1. Stevenson Refund and CTA Balance

Attorney Todd Stevenson previously represented Vanessa in the probate matter and the elder abuse case.[12] Rubin requested that Stevenson send him the unused portion of the advance fees Vanessa had paid. Stevenson sent Rubin a check for $37,617.09 as Vanessa's refund. Rubin deposited the check into his CTA on April 17, 2018. A few days after he received it, Vanessa and Rade asked Rubin for the money so that it could be deposited in the Maas Trust account. They made several verbal requests for the return of the funds over the following three months.

On May 17, 2018, Rade emailed Rubin regarding a meeting scheduled for the next day. Rade told him that Vanessa expected Rubin to return the $37,617.09 at the meeting. Rade informed Rubin that Vanessa wanted to deposit the money in the Maas Trust account pursuant to her duties as the trustee. At the May 18 meeting, Vanessa and Rade again asked for the refund, but Rubin did not provide it.[13] On July 6, Rubin paid Vanessa the $37,617.09.

During the time Rubin was required to hold the $37,617.09 in his CTA, its balance fell below that amount. On May 11, 2018, the CTA balance was $36,018.12. On May 14, it dropped to $33,518.12, which was $4,098.97 less than the required amount. Rubin then deposited personal funds, and, on May 16, the balance of the CTA was $40,018.12.

2. No Informed Written Consent for Representing Both Vanessa and Rade

While representing Vanessa, Rubin also represented Rade in the Horn fees matter. Among other claims, Horn contended that Vanessa breached her contract and was seeking recovery of attorney fees. Alleging that Rade interfered with the contract between her and Vanessa, Horn sought damages against Vanessa and Rade, jointly and individually. Horn's attorney testified that Horn would seek damages from whomever she could get money, Vanessa or Rade, and an indemnification suit might proceed. As Vanessa and Rade were both defendants in the matter, their interests potentially conflicted. Rubin did not inform them of the possible conflict and did not obtain informed written consent to the representation.

3. Verification Forms

During discovery in *Horn v. Raicevic*, Rubin's office was required to send Rade's responses to interrogatories with attached verifications signed by him. On May 29, 2018, a secretary in Rubin's office, Jaxcel Archiga, emailed Rade asking for permission for Rubin to sign a verification on Rade's behalf. Rade responded that he authorized Rubin to sign documents on his behalf. When the responses were sent to the opposing attorney, a verification form dated May 29, 2018, with Rade's purported signature was attached. Rade testified that he did not sign the document. Archiga testified that Rade came into the office to sign the verification.[14]

4. Billing Statements

Monthly billing statements were sent to Vanessa and Rade and included a description of services performed, costs incurred, payments and adjustments, and the remaining balance and/or credit. Vanessa and Rade terminated Rubin's employment in early August 2018. Rubin's office sent them a billing statement at the end of August.

12. Vanessa hired Stevenson in November 2017. In February 2018, Vanessa hired Rubin in place of Stevenson. However, a few days later, she informed Rubin that she had decided to remain with Stevenson. Vanessa subsequently terminated Stevenson in March 2018 and then rehired Rubin.

13. Rubin testified that Vanessa and Rade told him at the meeting to continue to hold the refund. The hearing judge found Rubin's testimony not credible.

14. Archiga also testified that after she sent the email to Rade seeking authorization to sign on his behalf, Rubin told her that doing so was not allowed. Another secretary, Vanessa Ramirez, testified that it was not office procedure to sign for clients on discovery verifications.

B. Culpability

1. Count One: Misappropriation (§ 6106)[15]

[6a] Count one charges that Rubin misappropriated $4,098.97 of the $37,617.09 held in his CTA on behalf of Vanessa, in violation of section 6106. When a trust account balance drops below the amount the attorney is required to hold for a client, a presumption of misappropriation arises. The burden then shifts to the attorney to show that misappropriation did not occur and that he was entitled to withdraw the funds. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 37; *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618.) Moral turpitude can be found when an "attorney's actions constitute gross carelessness and negligence violating the fiduciary duty to a client." (*Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020 [moral turpitude finding proper for gross carelessness in failing to maintain trust account]; see also *In the Matter of Blum*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 410 [§ 6106 violation can be supported by finding of gross negligence in handling trust account duties].)

[6b] Rubin admits that the CTA balance fell to $36,018.12 on May 11, 2018, and then to $33,518.12 on May 14. He explained that the drop was due to careless bookkeeping. After realizing the discrepancy, he deposited personal funds and the balance rose to $40,018.12 on May 16. The hearing judge found that Rubin was wrong in not properly maintaining his books, but his misconduct did not rise to the level of misappropriation by gross negligence because it was an isolated, aberrational occurrence and Rubin quickly restored the funds. Therefore, the judge did not find culpability for misappropriation. We affirm the hearing judge's decision and dismiss count one 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].)[16]

2. Count Two: Failure to Maintain Client Funds in Trust Account (Rule 4-100(A))[17]

[8a] Count two charges that Rubin failed to maintain a CTA balance of $37,617.09 for Vanessa, in violation of rule 4-100(A). Rule 4-100(A) provides, in part, that client funds held by an attorney must be deposited in a CTA and maintained until the amount owed to the client is settled. (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 277–278.)

[8b] The hearing judge found that the $4,098.97 dip in Rubin's CTA rendered him culpable under count two for failure to maintain the required balance. We affirm the judge's finding that Rubin violated rule 4-100(A) by failing to maintain $37,617.09 in his CTA on behalf of Vanessa. We reject Rubin's argument that he did not "willfully" violate rule 4-100(A). (See *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 504 [allowing balance in trust account to drop below level owed to client is willful violation of rule 4-100(A)].)

3. Count Three: Failure to Pay Client Funds Promptly (Rule 4-100(B)(4))

[9a] The NDC alleges that Rubin received $37,617.09 from Stevenson on or about April 17, 2018, on behalf of Vanessa. She was entitled to that

15. Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

16. [7] OCTC did not appeal the hearing judge's culpability decision, but instead attempted to argue misappropriation by gross negligence in its responsive brief. Some facts suggest that Rubin's actions may have been grossly negligent or construed as other misconduct. He testified that he does not keep written journals or client ledgers or perform monthly reconciliations for his CTA. He admitted that his "bookkeeping was rather sloppy" and that he relied on a secretary to handle "a lot" of the CTA work. Also, his explanation of the dip was incomplete. He accounted for only $2,500 of the $4,098.97, attributing the missing funds to an overpayment in another client matter. The hearing judge did not find clear and convincing evidence of misappropriation and OCTC did not appeal that decision. As a result, we find that, in this instance, Rubin did not have an opportunity to fully address the gross negligence issue on review. Accordingly, it would be unfair for us to overturn the judge's finding that Rubin is not culpable of this count.

17. All further references to rules are to the former California Rules of Professional Conduct that were in effect until November 1, 2018, unless otherwise noted.

amount as a refund of unearned attorney fees. On multiple occasions Vanessa and her brother verbally requested that Rubin return the $37,617.09. Vanessa's brother also sent Rubin an email on May 17, 2018, notifying him that Vanessa wanted to pick up the money the next day. Rubin did not return the funds until July 6, 2018. Count three charges that Rubin violated rule 4-100(B)(4) by failing to promptly return the $37,617.09. Rule 4-100(B)(4) requires attorneys to "[p]romptly pay or deliver, as requested by the client, any funds . . . in the possession of the member which the client is entitled to receive." The hearing judge found Rubin culpable as charged.

[9b] On review, Rubin contends that he offered to return the $37,617.09 at the May 18, 2018 meeting with Vanessa and her brother, but they told him to hold the money in the CTA, and they never made an "unambiguous demand" for return of the money after that date. He asserts that Vanessa and Rade were not credible witnesses and that we should accept his version of events. The hearing judge found that Vanessa and Rade made multiple requests for the repayment of the funds and chose to credit Vanessa's version of the events over Rubin's. As stated above, such a determination merits great weight, and the record does not justify disturbing it. Vanessa's funds should have been promptly paid when she requested them after Rubin received the funds in April. Despite several requests, Rubin did not disburse the $37,617.09 until July. Accordingly, we find Rubin culpable of violating rule 4-100(B)(4).

4. Count Four: Failure to Render Accounts of Client Funds (Rule 4-100(B)(3))

The NDC alleges that Vanessa asked for an accounting in August 2018 for the $95,000 she paid Rubin in advance fees. Count four charges that Rubin violated rule 4-100(B)(3) by failing to render an appropriate accounting. Rule 4-100(B)(3) requires an attorney to maintain complete records of all client funds in the attorney's possession and to "render appropriate accounts to the client regarding them." The hearing judge found that Rubin sent monthly statements to Vanessa and there was no clear and convincing evidence that he violated rule 4-100(B)(3). We agree. Rubin provided a statement to Vanessa, after his employment was terminated, that detailed the previous balance, the work that was done, the amount charged, and the remaining balance. Therefore, we dismiss count four with prejudice.[18] (*In the Matter of Kroff, supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

5. Count Seven: Representing Clients with Potential Conflict (Rule 3-310(C)(1))

[10a] The NDC alleges that Rubin represented both Vanessa and Rade when they were defendants in *Horn v. Raicevic* and had potential conflicts with one another. Count seven charges that Rubin violated rule 3-310(C)(1) by failing to inform Vanessa and Rade of the potential conflicts and failing to obtain their written consent before accepting representation. Rule 3-310(C)(1) provides that an attorney shall not, without informed written consent of each client, "[a]ccept representation of more than one client in a matter in which the interests of the clients potentially conflict." The hearing judge found that as Vanessa and Rade were defendants in the same lawsuit, they had a potential conflict with one another. Because Rubin did not obtain informed written consent from Vanessa and Rade prior to accepting representation, the judge determined that Rubin was culpable as charged under count seven. We agree. Because Horn sued both Vanessa and Rade, and sought damages against them, possible indemnity issues should have been anticipated.

[10b] Rubin acknowledges there was a "technical violation" of rule 3-310(C)(1), but attempts to minimize his misconduct by insisting that no client harm resulted and that he believed there was no conflict at the time of the representation. But Rubin failed to inform Vanessa and Rade about any potential conflicts and failed to obtain their informed written consent to the representation. Therefore, he violated rule 3-310(C)(1).

18. OCTC does not challenge the dismissal on review.

6. Count Eight: Misrepresentation (§ 6106)

Count eight charged Rubin with making misrepresentations related to interrogatories in *Horn v. Raicevic*, alleging that Rubin knew, or was grossly negligent in not knowing, that Rade had not actually signed the verification forms. Due to conflicting testimony regarding whether Rade signed the verification forms, the hearing judge found a lack of clear and convincing evidence. Therefore, the judge did not find any misrepresentation as charged under count eight. We agree and dismiss count eight with prejudice.[19] (*In the Matter of Kroff, supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

IV. CTA COMMINGLING (SBC-19-O-30352)

A. Factual Background

Rubin is a partner with Brian Nomi and Jack Moses in Pullman Properties LLC (PPL), a business entity engaged in real estate development. Neither PPL nor Nomi is Rubin's client in the present matter.[20] In October 2017, Nomi made a personal loan of $100,000 to Rubin, secured by two of Rubin's shares in PPL. Upon Rubin's instructions, Nomi wired the money directly into Rubin's CTA. On April 18, 2018, Rubin repaid the loan with interest by issuing a $105,000 check payable to Nomi, also from his CTA.

Between April 17 and September 14, 2018, Rubin deposited four checks from PPL into his CTA: (1) $24,171.09, dated April 17, 2018; (2) $15,000, dated June 19, 2018; (3) $2,223.97, dated August 14, 2018; and (4) $5,000, dated September 18, 2018. The total deposited was $46,395.06.

B. Culpability[21]

1. Count Five: Commingling (Rule 4-100(A))

[11] Count five charges that Rubin violated rule 4-100(A) by issuing a check for $105,000 from his CTA for payment of his personal expenses. Rule 4-100(A) prohibits attorneys from commingling personal funds with client funds held in a trust account. The hearing judge found that by repaying a $105,000 personal loan to Nomi with a CTA check, Rubin commingled his personal expenses with client funds, and was culpable under count five. On review, Rubin admits that he erred in repaying the loan from his CTA. He argues that he should not be held culpable for a willful violation, however, because he believed at the time he could make the payment as he did. This argument is without merit. Ignorance of the rules governing client trust accounts is no defense to a commingling charge. (*Silver v. State Bar* (1974) 13 Cal.3d 134, 145.) We affirm the hearing judge's culpability determination.

2. Count Six: Commingling (Rule 4-100(A))

[12a] Count six charges that Rubin commingled funds between April 17 and September 14, 2018, in violation of rule 4-100(A), when he deposited four checks payable to PPL in his CTA. The hearing judge found that Rubin deposited $46,395.06 from his business venture into his CTA and found him culpable as charged.

[12b] On review, Rubin attempts to explain why he deposited those funds in his CTA, arguing that he did so because he was unsure how much money belonged to him as a member of PPL and how much belonged to the other members. He said that he had acted as an attorney for PPL and the deposited funds "could have" represented fees or other money belonging to the members of PPL. Rubin argues that no improper reason for his deposit of those funds in his CTA was established at trial. These arguments are without merit. An

19. OCTC does not challenge the dismissal on review.

20. Rubin formed and represented PPL in various matters unrelated to those described below.

21. We reject Rubin's argument that the hearing judge disregarded facts that would mitigate the commingling charges. Rubin asserts that he lost $135,000 for a client, Ralph Hitchcock, when he received fraudulent wire instructions. Therefore, he arranged for the loan and for Nomi to wire $100,000 into his CTA. These facts might explain his need for the $100,000, but they are not a defense for commingling personal funds in his CTA.

improper reason is not required to establish culpability for commingling. Rubin commingled non-client funds in his CTA when he deposited the four checks, in violation of rule 4-100(A). Therefore, we affirm culpability under count six.

V. AGGRAVATION AND MITIGATION

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

A. Aggravation

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

[13a] Rubin has two prior records of discipline. In 1993, the State Bar Court issued a private reproval of Rubin. (State Bar Court No. 92-C-18577.) Rubin stipulated that in 1992, he brought a loaded gun into the Van Nuys Superior Courthouse in his briefcase. Rubin pleaded guilty to a violation of Penal Code section 12025, subdivision (b) (carrying a concealed firearm). He received mitigation for his lack of a prior record of discipline in 14 years of practice; there were no aggravating circumstances.

[13b] On July 16, 1997, Rubin received a one-year actual suspension and three years' probation. (State Bar Court Nos. 92-O-18013; 93-O-18057; 93-O-18854; 93-O-20185; 94-O-14783; 95-C-17226 (Consolidated); Supreme Court No. S061291.) In three client matters, Rubin violated: (1) rule 4-100(B)(4) (failure to promptly pay client funds), two counts; (2) rule 3-110(A) (failure to perform competently), two counts; (3) section 6068, subdivision (b) (failure to maintain respect to the courts); (4) section 6103 (disobedience of a court order); (5) section 6068, subdivision (i) (failure to cooperate in disciplinary investigation); (6) rule 3-700(D)(1) (failure to return file); (7) rule 4-200 (unconscionable fee); and (8) section 6106 (misrepresentation). Rubin was also found to have committed misconduct warranting discipline for his conviction pursuant to his violating Penal Code sections 242 and 243, subdivision (d) (battery on a person with serious bodily injury). Rubin received aggravation for his prior record of discipline, multiple acts of misconduct, uncharged misconduct, and significant harm. No mitigation was found. The hearing judge stated, "The Court is concerned about [Rubin's] inability to fully appreciate the seriousness of his professional obligations and of the conduct befitting an attorney. In truth, [Rubin] did not acknowledge any wrongdoing but adamantly insisted that everything he did was for the good of his clients and that he had no criminal intent as to [the victim of his battery]."

[13c] The hearing judge assigned significant aggravation for Rubin's two prior records of discipline. We conclude that they merit substantial aggravating weight.[22] Rubin's second disciplinary matter involved misconduct similar to that in the present matter, including failure to promptly pay client funds and disobedience of a court order. A condition of probation in the second discipline required him to have an accountant certify that he properly maintained client funds records and a CTA. This indicates that his prior disciplines did not rehabilitate him, causing concern about future misconduct. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443–444.)

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

The hearing judge assigned aggravation for Rubin's multiple acts of misconduct, including failing to pay and report judicial sanctions, threatening to report suspected immigration status, failing to maintain client funds, failing to promptly pay client funds, commingling, and failing to avoid adverse interests. We agree and assign substantial aggravation. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646–647 [three instances of misconduct considered multiple acts].)

22. Rubin argues that his prior records should not be considered as aggravation because a lengthy amount of time has passed since the previous disciplines. We reject this argument; such remoteness does not bar us from considering prior misconduct. We reiterate that the prior record here is especially relevant given the similarity of misconduct in the second discipline to the present case and the fact that his past interactions with the State Bar Court did not rehabilitate Rubin and prevent the current misconduct.

3. Significant Harm to Client, Public, or Administration of Justice (Std. 1.5(j))

[14] The hearing judge found significant harm under standard 1.5(j). Rubin deprived Vanessa of her funds for approximately three months, which burdened her with the fear of not complying with her fiduciary duties for the Maas Trust. We agree that this caused Vanessa significant harm due to her mental suffering. However, Vanessa's worry over the money was for a relatively short period of time and no additional facts suggest a severe monetary injury (no harm to the Maas trust and no loss of use of the money) or that Rubin possessed a wrongful intent in failing to promptly disburse the money. Therefore, we assign only limited weight in aggravation. (Cf. *In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 993 [aggravation for significant harm when client deprived of funds at time of desperate need].)

[15] The judge also found that Rubin's threats to report suspected immigration status required Baumler to seek a protective order, which wasted judicial time and resources. While Rubin's misconduct created additional work for the superior court, resulting in sanctions against Rubin, we do not find that his actions significantly harmed the public or the administration of justice. (See *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 75, 79–80 [harm to administration of justice where attorney "wasted considerable time" due to attorney's failure to conduct affairs properly and as directed].)

4. Indifference (Std. 1.5(k))

[16a] Indifference toward rectification or atonement for the consequences of misconduct is an aggravating circumstance. The hearing judge found that Rubin was insincere in his "limited expression of remorse." She also found that he "evidences no recognition of the serious consequences of his misbehavior." Instead, she found that Rubin failed to accept responsibility for his actions and attempted to blame others. An attorney who does not accept responsibility for his actions and instead seeks to shift it to others demonstrates indifference and lack of remorse. (*In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 14.) Accordingly, the judge assigned aggravation under standard 1.5(k).

[16b] We agree that Rubin is unable to recognize the wrongfulness of his misconduct. While the law does not require false penitence, it does require that an attorney accept responsibility for wrongful acts and come to grips with culpability. (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) On review and at oral argument, Rubin expressed some remorse and conceded that he had violated ethical duties. However, he continued to describe the violations as technicalities or make other excuses, such as arguing that he did not have to obey a court order when he was not served with it, even though he had actual notice of the order. Particularly troubling is his continued insistence that his actions in the Uvas matter did not amount to threatening to report suspected immigration status. He argues that he never made any "direct" threats and fails to acknowledge the wrongfulness of his conduct without considering the import of his comments on the phone, in letters, and in court filings. Even though he has exhibited insight as to some of his behavior, his actions continue to display indifference. Therefore, we assign substantial consideration in aggravation. (*In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 380 [ongoing failure to acknowledge wrongdoing instills concern that attorney may commit future misconduct].)[23]

5. Lack of Candor and Cooperation to the State Bar of California (Std. 1.5(l))

[17] The hearing judge found that Rubin was uncooperative during the disciplinary proceedings, requiring the judge's admonishments

23. In finding indifference, the hearing judge noted Rubin's approach to questioning particular witnesses at trial. We find Rubin's conduct more akin to mounting a vigorous defense. (See *In re Morse* (1995) 11 Cal.4th 184, 209 [attorney has right to defend himself vigorously].) Therefore, we do not include these actions in our indifference finding.

during trial.[24] She characterized Rubin's conduct as "unrestrained abuse" and "disruptive." In reviewing the record, we note that the judge reprimanded Rubin regarding his volume and tone. However, the judge was able to adequately manage the trial so as to avoid any extreme behavioral issues that would deserve aggravation under standard 1.5(l). The trial was hard-fought and somewhat contentious at times, but we do not find that Rubin's actions rose to a level warranting aggravation. Therefore, we do not find standard 1.5(l) aggravation here.

B .Mitigation

1. Extraordinary Good Character (Std. 1.6(f))

[18a] Rubin 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 assigned limited weight in mitigation, finding that the witnesses did not constitute a wide range of references. Rubin argues on review that the hearing judge improperly disregarded the character witnesses' testimony.[25] He asserts that the witnesses represented a broad range of the community and attested to his honesty. He requests that we give great weight in mitigation under standard 1.6(f).

[18b] We agree with the assignment of limited weight, but for a different reason than the hearing judge. Rubin presented character evidence from several clients, including Navdeep Mundi, Ben Alter, Ralph Hitchcock, Thresiamma Mathew,[26] and Candido Gonzalez. They testified that Rubin is trustworthy, competent, honest, and ethical. They also stated that they refer clients to him and would hire him again if they had further legal problems. Alter also testified as Rubin's friend, whom he has known for 25 years.

[18c] Three attorneys also testified on Rubin's behalf. Keleti, the contract attorney in the Uvas case, testified that Rubin is a knowledgeable, honest, and ethical attorney. Jared Xu, an attorney who previously worked for Rubin, testified that Rubin was an experienced and honest attorney who enthusiastically advocated for his clients. Xu was hired in 2018, around the time that Rubin took on the Raicevic matters. Xu now works at a different law firm, but views Rubin as a mentor. Lisa Rubin, Rubin's daughter and a third-year associate attorney at a law firm, testified that her father is an honest, knowledgeable, and ethical attorney. Testimony from attorneys is entitled to serious consideration. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration given to attorneys' testimony due to their "strong interest in maintaining the honest administration of justice"].)

[18d] Mercy Cudney, a paralegal who has known Rubin for over 20 years, testified that he is an honest and ethical attorney and that she often refers clients to him. In addition, two of Rubin's past secretaries, Vanessa Ramirez and Jaxcel Archiga, testified that Rubin is an honest person who worked hard for his clients.

[18e] This group of character witnesses consisting of former employees, clients, attorneys, a friend, and Rubin's daughter establishes a wide range of references. However, several issues diminish the strength of their testimony. First, besides Rubin's daughter, only two character witnesses have known Rubin for a significant amount of time—Alter and Cudney. And there was no detailed testimony regarding Rubin's daily conduct and mode of living. (See *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 592 [testimony of acquaintances,

24. The judge also stated that Rubin's testimony lacked candor. However, she only made specific findings about Rubin's *credibility* in the decision. We do not find that the record supports a lack of candor finding, and therefore, we do not assign aggravation on that basis.

25. In Rubin's opening brief on review, he requests that we find that the hearing judge erred by failing to judicially notice the testimony of Judge William D. Stewart of the Los Angeles County Superior Court. Rubin previously raised this issue in his request filed on October 5, 2020, which we denied by order dated October 23, 2020. We decline to revisit this request as the document is not a part of the record.

26. Rubin represents Mathew in the Uvas cases discussed in this opinion.

neighbors, friends, associates, employers, and family members on issue of good character, with reference to their observation of attorney's daily conduct and mode of living, entitled to great weight].) Second, the testimony does not make it clear that the witnesses were aware of the full extent of the misconduct. (*In re Brown* (1995) 12 Cal.4th 205, 223 [mitigation considered for attorney's good character when witnesses aware of misconduct].) This was Rubin's burden to prove and he failed to do so. Third, while three attorneys testified on his behalf, Xu had only known Rubin for a few years, Keleti for only two years, and Lisa is Rubin's daughter. In reviewing the record and weighing the evidence, we find that Rubin is entitled to only limited weight in mitigation under standard 1.6(f).

2. Spontaneous Candor and Cooperation with State Bar (Std. 1.6(e))

[19] Rubin argues that he should receive mitigation credit for being fully cooperative in the State Bar investigation. His cooperation in communicating with a State Bar investigator does not merit mitigation on its own since attorneys are required to do so. (§ 6068, subd. (i).) He has failed to show that his actions were spontaneous or otherwise display cooperation. Therefore, we assign no mitigation under standard 1.6(e).

VI. DISBARMENT IS THE APPROPRIATE 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 Silverton* (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.) We also look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.)

[20a] In analyzing the applicable standards, we first determine which standard specifies the most severe sanction for the at-issue misconduct. (Std. 1.7(a) [most severe sanction shall be imposed where multiple sanctions apply].) Considering Rubin's record of two prior disciplinary matters, we look to standard 1.8(b),[27] which states that disbarment is appropriate where an attorney has two or more prior records of discipline if (1) an actual suspension was ordered in any prior disciplinary matter, (2) the prior and current disciplinary matters demonstrate a pattern of misconduct, or (3) the prior and current disciplinary matters demonstrate the attorney's unwillingness or inability to conform to ethical responsibilities. Rubin's case meets two of these criteria. First, he was actually suspended for one year in his second disciplinary matter. Second, we find that the similarity of his misconduct in the second prior discipline and the current matter demonstrates his unwillingness or inability to conform to his ethical responsibilities.

[20b] Standard 1.8(b) does not apply if (1) the most compelling mitigating circumstances clearly predominate or (2) the misconduct underlying the prior discipline occurred during the same time period as the current misconduct. These exceptions do not apply here. Rubin has only limited mitigation for good character and it does not clearly predominate over the five serious aggravating circumstances. And the misconduct in the present matter occurred over 20 years after his previous misconduct, and not during the same time period.

[20c] We next consider whether any reason exists to depart from the discipline called for by standard 1.8(b). We acknowledge that disbarment

27. Standards 2.2(a) and (b), 2.5(c), 2.12(a) and (b), and 2.18 are also applicable. Standard 2.2(a) provides for actual suspension of three months for commingling or for failure to promptly pay out entrusted funds; standard 2.2(b) provides for suspension or reproval for other violations involving client funds. Standard 2.5(c) provides for suspension or reproval for conflicts of interest. Standard 2.12(a) provides for disbarment or actual suspension for a violation of a court order; standard 2.12(b) provides for reproval for a violation of section 6068, subdivision (o). Standard 2.18 provides for disbarment or actual suspension for a violation of a provision of Article 6 of the Business and Professions Code not otherwise specified.

is not mandatory in a third disciplinary matter, even where compelling mitigating circumstances do not clearly predominate. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506–507 [analysis under former std. 1.7(b)]; *In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136 [to fulfill purposes of attorney discipline, "nature and chronology" of prior record must be examined].) Standard 1.8(b) is not applied reflexively, but "with an eye to the nature and extent of the prior record. [Citations.]" (*In the Matter of Jensen* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 283, 292.) Deviating from standard 1.8(b) requires the court to articulate clear reasons for doing so. (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.)

[20d] Rubin has not identified an adequate reason for us to depart from applying standard 1.8(b), and we cannot discern any. We acknowledge that his past discipline was issued in 1993 and 1997, but of critical concern is the nature of the second prior discipline. Rubin has continued to commit misconduct in the present case that is similar to his past wrongdoing. Therefore, standard 1.8(b) is appropriately applied here. His current misconduct does not overlap with his prior violations, demonstrating that he failed to adhere to his professional duties after being disciplined twice.[28] Rubin cites to several cases, arguing that other attorneys were not disbarred for similar violations. However, those cases do not deal with a third discipline and do not involve multiple acts of misconduct as is the case here.

[20e] For the third time, Rubin is before this court because he has failed to meet his professional obligations. He has committed multiple serious violations in different client matters. He was put on notice in his second discipline of the importance of handling a CTA with care, but then failed to follow CTA rules. His indifference and failure to acknowledge the wrongfulness of his misconduct are troubling. This concern has not changed since Rubin's second discipline where the hearing judge found that Rubin was unable to fully appreciate his professional obligations. He continues to make excuses for "technical" violations rather than accept responsibility for his misconduct. Given the nature and chronology of Rubin's violations, we find no reason to depart from the presumptive discipline of disbarment under standard 1.8(b). We conclude that further probation and suspension would be insufficient to prevent him from committing future misconduct that would endanger the public and the profession. Accordingly, the public, the courts, and the legal profession are best protected if Rubin is disbarred.

VII. RECOMMENDATIONS

It is recommended that Michael Philip Rubin, State Bar Number 86732, be disbarred from the practice of law in California and that his name be stricken from the roll of attorneys.

CALIFORNIA RULES OF COURT, RULE 9.20

It is further recommended that Rubin be ordered to comply with the requirements of California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order imposing discipline in this matter.[29]

COSTS

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

28. **[21]** We note that standard 1.8(b) is the controlling standard here and does not consider the remoteness of any prior discipline. Remoteness is only considered under standard 1.8(a) where there is a single prior record of discipline.

[29] For purposes of compliance with rule 9.20(a), the operative date for identification of "clients being represented in pending matters" and others to be notified is the filing date of the Supreme Court order, not any later "effective" date of the order. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45.) Further, Rubin is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court filed 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).)

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 reinstatement or return to active status.

MONETARY SANCTIONS

[22] The court does not recommend the imposition of monetary sanctions in this matter, as this matter was submitted for decision prior to March 1, 2021, the effective date of amended rule 5.137(H) of the Rules of Procedure of the State Bar, and all the misconduct in this matter occurred prior to April 1, 2020, the effective date of former rule 5.137 of the Rules of Procedure of the State Bar. (See *In the Matter of Wu* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 263, 267 [the rules of statutory construction apply when interpreting the Rules of Procedure of the State Bar]; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208–1209 [absent an express retroactivity provision in the statute or clear extrinsic sources of intended retroactive application, a statute should not be retroactively applied]; *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841 [where retroactive application of a statute is ambiguous, the statute should be construed to apply prospectively]; *Fox v. Alexis* (1985) 38 Cal.3d 621, 630-631 [the date of the offense controls the issue of retroactivity].)

VIII. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

The order that Michael Philip Rubin be involuntarily enrolled as an inactive attorney of the State Bar pursuant to section 6007, subdivision (c)(4), effective March 8, 2020, will remain in effect pending consideration and decision of the Supreme Court on this recommendation.

WE CONCUR:

PURCELL, P. J.
McGILL, J.

State Bar Court
Review Department

In the Matter of

EMIL WALTER HERICH

A Member of the State Bar

No. SBC-19-C-30587

Filed May 19, 2021, modified on July 2, 2021

SUMMARY

Respondent, while driving under the influence of an excessive amount of alcohol, was involved in an accident with another vehicle resulting in property damage and injuries to the other vehicle's occupants. At the scene, respondent (1) repeatedly falsely denied to police that he had consumed any alcohol and was not feeling its effects; (2) falsely claimed that he was driving directly home from his office, rather than from a bar; and (3) refused to complete a series of field sobriety tests. Following his nolo contendere plea, respondent was convicted of one misdemeanor count of driving with a blood alcohol level of 0.08 percent or more and admitted a prior conviction for driving under the influence of alcohol nearly seven years earlier. The hearing judge determined that the facts and circumstances surrounding the conviction did not involve moral turpitude but constituted other misconduct warranting discipline and imposed a public reproval. The Office of Chief Trial Counsel of the State Bar (OCTC) sought reconsideration of the hearing judge's decision, contending the hearing judge erred by not finding moral turpitude and by failing to include a probation condition that respondent attend abstinence-based group meetings. The hearing judge denied OCTC's motion for reconsideration, finding that respondent's misrepresentations to the police officers did not rise to the level of moral turpitude but did constitute other misconduct warranting discipline. The hearing judge also found there was no clear and convincing evidence that respondent's two DUI incidents reflected a substance abuse problem or that, as a condition attached to his public reproval, treatment for problems related to alcohol abuse was required to protect the public.

Respondent requested review, contending that his case should be dismissed because discipline was neither required to protect the public nor authorized by applicable law or, in the alternative, he should receive only an admonition or a private reproval. The Review Department concluded that respondent's false statements to the police amounted to other misconduct warranting discipline, and the circumstances surrounding respondent's convictions were indications of an alcohol abuse problem with a nexus to the practice of law which, although respondent presented evidence that his legal work had not suffered from his alcohol consumption, warranted discipline due to the potential for future harm and to convey to respondent the seriousness of his actions. Noting that Respondent's mitigation outweighed aggravation

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

and respondent's compliance with criminal probation terms, the Review Department concluded that a public reproval with conditions, including that respondent attend an abstinence-based self-help group, was the appropriate discipline.

COUNSEL FOR PARTIES

For State Bar of California: Rachel Simone Grunberg, Esq.

For Petitioner: Emil Walter Herich, Esq., in pro. per.

HEADNOTES

[1a-c]

191 Miscellaneous General Issues – Effect of/Relationship to Other Proceedings
1511 Substantive Issues in Conviction Proceedings – Nature of Underlying Conviction – Driving Under the Influence
1531 Substantive Issues in Conviction Proceedings – Other Misconduct Warranting Discipline – Found
1691 Miscellaneous Issues in Conviction Cases – Admissibility and/or Effect of Record in Criminal Proceeding

Respondent's conviction conclusively proved elements of his crime. Thus, respondent's 2019 misdemeanor conviction established he drove under influence of alcohol and had prior DUI conviction. Drunk driving convictions do not establish per se moral turpitude, but moral turpitude can be established based on circumstances surrounding convictions. Where respondent repeatedly falsely denied to police officer consumption of alcohol and not feeling its effects, and falsely claimed driving directly home from office, Review Department concluded (1) respondent's actions did not establish moral turpitude but did amount to other misconduct warranting discipline; and (2) circumstances surrounding DUI convictions were indications of alcohol abuse problem, as respondent was again arrested for drunk driving only two years after criminal probation for first DUI ended; second drunk driving violation resulted in collision that injured two victims and caused property damage; and respondent admitted does not drive anymore so as not to risk driving under influence, which clearly implied respondent did not trust himself to make decision not to drive while impaired from drinking.

[2]

1511 Substantive Issues in Conviction Proceedings – Nature of Underlying Conviction – Driving Under the Influence
1531 Substantive Issues in Conviction Proceedings – Other Misconduct Warranting Discipline – Found
1699 Miscellaneous Issues in Conviction Cases – Other Miscellaneous Issues in Conviction Cases

Nexus between conduct resulting in DUI convictions and practice of law established if there were indications of alcohol abuse problem connected to multiple convictions. Where

respondent presented evidence that legal work had not suffered from alcohol consumption, but actions resulted in repeated criminal conduct, increasing in severity, which affected respondent's private life, respondent's problems with alcohol were enough to warrant discipline due to potential for future harm. Review Department concluded there was evidence of substance abuse problem with nexus to practice of law and discipline was appropriate to protect public from potential harm related to respondent's practice of law and to convey to respondent's seriousness of his actions.

[3a, b] **710.36 Mitigation – Long practice with no prior discipline record – Found but discounted or not relied on – Present misconduct likely to recur (1.6(a.))**

Mitigating circumstances may include absence of prior disciplinary record over many years of practice when coupled with present misconduct not likely to recur. Where, despite respondent's acknowledgement of wrongdoing, his awareness of dangers of driving under influence of alcohol, and compliance with criminal court obligations, respondent testified drinking and driving was problem for him, professed need for considerable behavioral change by declaring he did not plan to drive anymore, prior DUI did not serve to rehabilitate him, he diminished seriousness of his actions by downplaying their consequences, and had not identified other measures he planned to take to address alcohol problem, Review Department was not fully assured respondent's misconduct was unlikely to recur and assigned only moderate mitigating weight to respondent's 26 years of discipline-free practice.

[4a, b] **735.30 Mitigation – Candor and cooperation with Bar – Found but discounted or not relied on**

Respondent entitled to mitigation for cooperation with State Bar for entering into stipulation to facts and admission of documents, as respondent admitted facts beyond plea and stipulations saved judicial time and resources. But Review Department concluded respondent was not entitled to full mitigation and assigned only moderate weight for cooperation, as respondent did not admit culpability (i.e., that actions amounted to other misconduct warranting discipline).

[5a-d] **740.32 Mitigation – Good character references – Found but discounted or not relied on – References unfamiliar with misconduct**

Where good character evidence was presented from wide range of references, including from attorneys, friends, and clients, but most witnesses were unaware of full extent of respondent's misconduct, as declarants did not state awareness this was respondent's second DUI, Review Department assigned only moderate weight in mitigation.

[6a,b] **765.32 Mitigation – Substantial pro bono work – Found but discounted or not relied on – Pro bono work not substantial**

765.39 Mitigation – Substantial pro bono work – Found but discounted or not relied on – Other reason

Where respondent provided legal representation to two friends without payment, and respondent's testimony regarding recent pro bono case in which he devoted hundreds of work hours was corroborated by declaration from another attorney, Review Department assigned moderate mitigating weight to pro bono efforts, as respondent had not shown a prolonged dedication to pro bono work which would merit substantial mitigating weight.

[7a-b] **745.32 Mitigation – Remorse/restitution/atonement – Found but discounted or not relied on – Inadequate showing generally**

Where respondent expressed remorse; quickly admitted fault in civil matter resulting from accident caused by driving under influence of alcohol; and cooperated in disciplinary matter but made no other assurances or plans to address alcohol problem beyond abstaining from driving, which demonstrated failure to fully recognize wrongdoing, only some mitigating credit was deserved for prompt objective steps taken demonstrating spontaneous remorse and recognition of wrongdoing and timely atonement.

[8a-c] **172.30 Issues re Conditions Imposed as Part of Discipline – Monitoring, Treatment and Testing Requirements – Alcohol Testing/Treatment (Standard 1.4(c)**

1531 Substantive Issues in Conviction Proceedings – Other Misconduct Warranting Discipline – Found

1554.33 Application of Standards to Discipline Based on Criminal Conviction – Standard 2.16(b) – Applied – Reproval

Standard 2.16(b) provides for discipline ranging from reproval to suspension for misdemeanor convictions not involving moral turpitude but encompassing other misconduct warranting discipline. Where respondent had two DUI convictions; second DUI was committed only two years after respondent completed probation in first DUI matter and involved serious injuries to two victims and property damage; second DUI involved false statements to police; repeated criminal conduct, increasing in severity, evidenced alcohol abuse problems, but respondent's assertion regarding abstaining from driving did not solve alcohol problem or assure court future misconduct would not recur, Review Department concluded respondent's actions did not involve moral turpitude but did constitute other misconduct warranting discipline. As mitigating circumstances outweighed sole aggravating circumstance, and due to respondent's compliance with criminal probation terms, Review Department concluded appropriate discipline was public reproval with conditions, including attendance at abstinence-based self-help group, as court concluded respondent had alcohol problem. Although record did not establish respondent's law practice was affected by his alcohol abuse problem, court imposed discipline to prevent future harm to public and to impress upon respondent seriousness of actions, as respondent did not fully understand significance of alcohol problem and how it related to practice of law.

ADDITIONAL ANALYSIS

Aggravation

Found

584.10 Harm – To public

Discipline

1024 Ethics exam/ethics school
1641 Public Reproval – With Conditions

OPINION

McGILL, J.

On January 22, 2019, Emil Walter Herich pleaded nolo contendere to violating Vehicle Code section 23152, subdivision (b) (driving with a blood alcohol level of 0.08 percent or more); he also admitted a prior conviction for violating Vehicle Code section 23152, subdivision (a) (driving under the influence of alcohol (DUI)). After his conviction was transmitted to us, we referred the case to the Hearing Department to determine if the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline.

The hearing judge determined the facts and circumstances did not include moral turpitude but did constitute other misconduct warranting discipline. The judge ordered Herich to be publicly reproved based on his two misdemeanor DUI convictions. Herich appeals, arguing his case should be dismissed because discipline is neither required to protect the public nor authorized by applicable law. In the alternative, Herich argues he should receive only an admonition or a private reproval. The Office of Chief Trial Counsel of the State Bar (OCTC) does not appeal and requests we affirm the judge's decision.

Upon our independent review (Cal. Rules of Court, rule 9.12), we find the facts and circumstances surrounding Herich's conviction involve other misconduct warranting discipline. We affirm the hearing judge's order for a public reproval.

I. FACTUAL BACKGROUND[1]

Herich was admitted to practice law in California on December 4, 1984, and has no prior disciplinary record. He has been convicted of DUI violations for incidents in 2010 and 2018.

A. First DUI Conviction

Shortly after midnight on December 11, 2010, Herich was driving while under the influence of alcohol. Two Burbank police officers pulled him over and conducted a DUI investigation. Herich was arrested and charged in two counts: (1) DUI, in violation of Vehicle Code section 23152, subdivision (a), and (2) driving with a blood alcohol level of 0.08 percent or more, in violation of Vehicle Code section 23152, subdivision (b). (*People v. Herich* (Super. Ct. L.A. County, No. 0BR03572).) In March 2012, a jury found Herich guilty of both counts.

The trial judge sentenced him in October 2012. Herich was given 36 months of probation and ordered to complete an alcohol education and counseling program. As required by Vehicle Code section 23593, the judge advised Herich that (1) being under the influence of alcohol impairs the ability to operate a motor vehicle and is extremely dangerous to human life and (2) if Herich drove while under the influence of alcohol, resulting in someone being killed, then he could be charged with murder.[2] Herich unsuccessfully appealed. On December 10, 2013, Herich completed the alcohol education and counseling program and his criminal probation ended in July 2016.

On August 15, 2013, OCTC sent Herich a letter, which he received, notifying him that it was aware of his conviction for two misdemeanor DUI counts and expressing concern regarding potential substance abuse. OCTC informed him of the Lawyer Assistance Program and indicated it was closing its investigation related to the conviction.

B. Second DUI Conviction

On October 5, 2018, shortly after 10 p.m., Herich again drove under the influence of alcohol, causing a collision with another vehicle when he crossed over into opposing traffic on Coldwater Canyon Avenue in Los Angeles. The driver of the other vehicle (aged 63) and her husband (aged 87)

1. The facts are based on the parties' pretrial written stipulations, 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).)

2. This admonition derives from *People v. Watson* (1981) 30 Cal.3d 290, 300–301 (*Watson* admonition).

were injured.[3] Both vehicles sustained damage: Herich's 1998 Jaguar was totaled and the other car required over $7,000 to repair. Paramedics and police officers responded to the scene.

Herich told the paramedics he had no injuries and declined to go to the hospital. He denied that he had consumed any alcohol. At trial, Herich admitted he had been drinking at a bar in Beverly Hills, then left to drive home to Burbank via Coldwater Canyon. However, he told the police that he was driving directly home from his office. Herich also claimed that the accident occurred because he saw a shape and crossed the line to avoid hitting it.

During the police interview, the officer smelled alcohol on Herich's breath. The officer also observed Herich's eyes were bloodshot and watery, he was speaking slowly and slurring his speech, and he was stumbling and could not keep his balance. The officer began to administer a series of field sobriety tests, with her partner observing, but Herich refused to complete the tests. He repeatedly denied that he had been drinking and feeling the effects of alcohol.[4] He said the officers would just "use it against [him]" and that they had already decided he had been drinking. The officers suspected intoxication and arrested Herich for DUI. At the police station, Herich agreed to provide breath samples, and his blood alcohol levels were 0.182 and 0.169 at 11:48 p.m. and 11:51 p.m., respectively.

On October 29, 2018, Herich was charged with two counts of violating Vehicle Code section 23152, subdivisions (a) (count one) and (b) (count two). (*People v. Herich* (Super. Ct. L.A. County, No. 8VV04197).) The complaint also alleged his prior 2012 DUI conviction. On January 22, 2019, Herich pleaded nolo contendere to count two and admitted the 2012 prior conviction.[5]

II. STATE BAR COURT PROCEEDINGS

On October 24, 2019, OCTC transmitted Herich's misdemeanor conviction record to this court. We referred the matter to the Hearing Department on November 15 to determine whether the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline. (Rules of Proc. of State Bar, rule 5.344.) On March 2, 2020, the parties filed a stipulation as to facts and admission of documents. On March 11, they filed an amended stipulation and a one-day trial took place on March 13. Following the disciplinary trial and posttrial briefing, the hearing judge issued his decision on May 18. The judge did not find moral turpitude but found Herich's actions amounted to misconduct warranting discipline.

After the decision, OCTC filed a motion for reconsideration, arguing the hearing judge erred by not finding moral turpitude and by failing to include a condition that Herich attend abstinence-based group meetings. On June 26, the judge denied the motion for reconsideration, finding Herich's misrepresentations to the officers did not rise to moral turpitude, but constituted other misconduct warranting discipline. The judge also stated, "there is no clear and convincing evidence that [Herich's] two DUI incidents in 2010 and 2018 reflect a

3. The victims were transported to the hospital for treatment. Both underwent physical therapy after the accident, and one was evaluated by a neurologist for ongoing symptoms.

4. The officer asked whether Herich had anything to drink that night. He responded, "no." The officer asked again, "No alcoholic beverages?" Herich again replied in the negative. The officer then asked, "You sure about that?" He said that he was. The officer pointed out that she could smell alcohol emanating from Herich's person. He replied, "Do you? Now?" After asking him if he was in pain, the officer again asked what Herich had been drinking that day. He responded, "nothing." She asked again whether he had consumed any alcoholic beverages or drugs, and Herich said he had not. He admitted to the officer that he had previously been convicted of a DUI.

5. Count one of the complaint was dismissed. Herich was sentenced to 48 months of probation, with 96 hours in jail, for which he was credited as time served. He was also ordered to pay fines and restitution, perform 10 days of community labor, attend 26 Alcoholics Anonymous (AA) meetings, and enroll in an 18-month alcohol educational program. He was again provided a *Watson* admonition by the court. At the time of the disciplinary trial, Herich had complied with the terms of his probation, completed the community service, and attended 25 AA meetings and the first 12 months of the 18-month alcohol education program.

substance abuse problem or that treatment for problems related to alcohol abuse, as a condition attached to his reproval, is required to protect the public."

III. FACTS AND CIRCUMSTANCES SURROUNDING THE CONVICTION INVOLVE MISCONDUCT WARRANTING DISCIPLINE

[1a] For the purposes of attorney discipline, Herich's conviction is conclusive proof of the elements of his crime. (Bus. & Prof. Code, § 6101, subds. (a) & (e).) Thus, his misdemeanor conviction in 2019 establishes that he drove under the influence of alcohol (Veh. Code § 23152, subd. (b)) and had a prior DUI conviction in 2012. The issue before us is whether the facts and circumstances surrounding Herich's conviction involve moral turpitude or other misconduct warranting discipline. Drunk driving convictions do not establish per se moral turpitude. However, moral turpitude can be established based on the particular circumstances surrounding such convictions. (*In re Kelley* (1990) 52 Cal.3d 487, 493.)

[1b] The hearing judge did not find sufficient evidence of moral turpitude, but found other misconduct warranting discipline, which OCTC does not contest in this appeal proceeding. The judge found Herich lied to the officers when he repeatedly denied that he had been drinking alcohol and was not feeling its effects. Therefore, the judge found Herich's actions justified discipline.

[1c] We agree with the hearing judge's reasoning that Herich's lying to the police warrants discipline. However, we also find the circumstances surrounding Herich's DUI convictions are indications of an alcohol abuse problem because (1) he was again arrested for drunk driving only two years after his criminal probation for his first DUI ended and (2) his second drunk driving violation resulted in a collision that injured two victims and caused property damage. These facts evidence an alcohol problem and are more serious due to the collision and the injuries, facts not present in *Kelley*.[6] We affirm the finding that Herich's actions did not establish moral turpitude but did amount to other misconduct warranting discipline.

[2] We reject Herich's argument that no nexus exists between his actions and his law practice. The Supreme Court has stated a nexus can be established if there are indications of an alcohol abuse problem connected to multiple convictions. (*In re Kelley*, *supra*, 52 Cal.3d at p. 495 [circumstances surrounding two DUI convictions established alcohol abuse problem warranting professional discipline].) We find the circumstances surrounding Herich's conviction are similar to those in *Kelley* and thus establish a nexus between his misconduct and the practice of law.[7] While Herich presented evidence that his work has not suffered from his alcohol consumption, his actions have resulted in repeated criminal conduct, increasing in severity, which has affected his private life. Herich's problems with alcohol are enough to warrant discipline due to the potential for future harm. (*In re Kelley*, *supra*, 52 Cal.3d at p. 496 [lack of harm does not prohibit discipline aimed at ensuring potentially harmful misconduct does not recur].) We will not "sit back and wait" until Herich's alcohol problems affect his law practice. (*Id.* at p. 495.) Therefore, discipline is appropriate here to protect the public from the

[1d] 6. We disagree with the hearing judge's determination that no clear and convincing evidence of an alcohol abuse problem exists here. Herich admitted he does not drive anymore so as not to risk driving under the influence. This admission provides additional evidence that Herich has a problem with alcohol. It clearly implies he does not trust himself to make the decision not to drive while impaired from drinking. It would be inconsistent to hold that Herich believes he has to abstain from driving all of the time in order to avoid driving while impaired without also holding that he has an alcohol problem.

[1e] 7. We also reject Herich's argument that he cannot be disciplined because he, unlike Kelley, was not on probation at the time of his second arrest, and, therefore, did not show disrespect to the legal system. While we acknowledge Kelley's disobedience of a court order was found to establish a nexus to the practice of law and similar facts are not established here, the Supreme Court explicitly stated in *Kelley* that the nexus was found in two different ways. (*In re Kelley*, *supra*, 52 Cal.3d at p. 495.) Therefore, while Herich did not disobey a court order, his alcohol abuse problem is sufficient in itself to warrant discipline under *Kelley*.

potential harm related to his practice and to convey to Herich the seriousness of his actions.[8]

On review, Herich argues discipline cannot be imposed on him unless his criminal conduct has a "logical relationship" to the practice of law. He relies on *In re Lesansky* (2001) 25 Cal.4th 11 to support this argument, but Herich misapplies *Lesansky* to the facts of his case. *Lesansky* dealt with defining moral turpitude under Business and Professions Code section 6102, subdivision (c), which provided for summary disbarment if an attorney was convicted of a felony offense and "an element of the offense . . . involved moral turpitude." The Supreme Court stated in *Lesansky* that "discipline may be imposed only for criminal conduct having a logical relationship to an attorney's fitness to practice, and that the term 'moral turpitude' must be defined accordingly." (*In re Lesansky*, *supra*, 25 Cal.4th at p. 14.) Because *Lesansky* involved determining if that attorney's criminal conduct met the definition of moral turpitude for summary disbarment under Business and Professions Code section 6102, subdivision (c), the relevance of *Lesansky* to this case is limited. *Lesansky* addressed the definition of moral turpitude and its relation to attorney discipline, not whether an attorney can be disciplined for other misconduct not involving moral turpitude, as allowed under *Kelley*. As stated above, we find a nexus between the practice of law and Herich's alcohol problem.

In his rebuttal brief, Herich argues his case should be dismissed based on *In the Matter of Carr* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 756. While at his girlfriend's residence, Carr took a Valium pill because he was upset and later took two to four Excedrin PM pills for a headache. The girlfriend then asked Carr to leave and he attempted to drive home. The police found Carr asleep in his car and he was arrested. He was convicted of driving under the influence. We found Carr did not know the medications would impair his ability to drive, and the facts and circumstances did not establish a substance abuse problem in this instance.[9] Therefore, we did not find misconduct warranting discipline. We reject Herich's reliance on *In the Matter of Carr* because of our finding, stated above, that evidence of a substance abuse problem with a nexus to the practice of law exists here. Taking medications without knowledge of their effect is very different from ignoring the potential dangers of drinking and driving, especially with a past drunk-driving conviction involving a *Watson* admonition.

IV. AGGRAVATION AND MITIGATION

Standard 1.5 of the Standards for Attorney Sanctions for Professional Misconduct[10] requires OCTC to establish aggravating circumstances by clear and convincing evidence.[11] Standard 1.6 requires Herich to meet the same burden to prove mitigation.

A. Aggravation

Significant Harm to the Client, the Public, or the Administration of Justice (Std. 1.5(j))

The hearing judge found Herich's misconduct caused significant harm to the public and the administration of justice because "first

8. We disagree with Herich's argument that OCTC was required to present evidence of an "impairment" in his law practice to warrant discipline. Lack of harm can be considered in "assessing the amount of discipline warranted in a given case, but it does not preclude imposition of discipline as a threshold matter." (*In re Kelley*, *supra*, 52 Cal.3d at p. 496.) Likewise, we also disagree with Herich's argument that he cannot be disciplined under *Kelley* because he had been practicing for almost 34 years at the time of his second arrest, while Kelley had been practicing less than four years. The length of time practicing law was not determinative in whether Kelley should be disciplined for her actions. Absence of a prior record of discipline over many years of practice may be considered in mitigation, which we appropriately consider *post*.

9. Carr had been previously disciplined for driving under the influence of alcohol in violation of Vehicle Code section 23152, subdivision (a), with the admission of two prior DUIs. (*In re Carr* (1988) 46 Cal.3d 1089.)

10. All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

11. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

responders were summoned to the accident, the criminal courts dealt with the prosecution and conviction of the DUI, and there was property damage and bodily injury." (Std. 1.5(j) [significant harm to client, public, or administration of justice is aggravating circumstance].) The judge did not assign a weight to this circumstance. Neither Herich nor OCTC challenges this finding.

We find Herich caused significant harm to the victims of the collision. The couple suffered physical injuries and their car needed extensive repairs. The record indicates they underwent physical therapy for soft tissue injuries, but the extent of those injuries is unclear given statements the wife made to the investigating officer three days after the collision. Based on the totality of the evidence presented, we assign moderate weight in aggravation to this circumstance.[12]

B. Mitigation

1. Prior Record of Discipline (Std. 1.6(a))

[3a] Standard 1.6(a) offers mitigation where there is an "absence of any prior record of discipline over many years of practice coupled with present misconduct, which is not likely to recur." The hearing judge assigned "highly substantial" mitigation for Herich's 26 years of discipline-free practice before his first DUI conviction in 2010. The judge found the misconduct is not likely to recur due to Herich's acknowledgement of his wrongdoing, his awareness of the dangers of driving under the influence of alcohol evidenced by his realization that greater injuries could have occurred, and his compliance with court obligations, including attending AA and alcohol education programming.

[3b] OCTC asserts the hearing judge's finding of "heightened mitigation" is unwarranted. We agree. Herich testified drinking and driving was a problem for him. He professed his need for a considerable behavioral change by declaring he does not plan to drive anymore, but nothing further. We credit him for making that decision, but we are not fully assured his misconduct is unlikely to recur. His prior DUI did not serve to rehabilitate him, he diminishes the seriousness of his actions by downplaying the consequences as a mere "traffic accident," and he has not identified any other measures that he plans to take to address his alcohol problem. For these reasons, we assign moderate mitigating weight to Herich's lengthy discipline-free practice.

2. Cooperation (Std. 1.6(e))

[4a] Under standard 1.6(e), Herich is entitled to mitigation for cooperation by entering into the stipulations as well as the admission of documents. The hearing judge assigned mitigation and found the stipulations negated the need for OCTC to call police officers, paramedics, and the victims to testify.

[4b] We agree mitigation is appropriate here because Herich admitted facts beyond his plea and the stipulations saved judicial time and resources. However, we find he is not entitled to full mitigation because he did not admit culpability—that is, he did not agree his actions amounted to other misconduct warranting discipline. Therefore, we assign moderate weight in mitigation for Herich's cooperation. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive mitigation for admission of culpability and facts].)

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

[5a] Herich is entitled to mitigation if he establishes "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 found Herich established good character and assigned substantial mitigating weight.

12. We also note Herich admitted fault for the collision, his insurance paid for the damages to the victims' car, and Herich is working with his insurance company to settle the personal injury claims.

[5b] Three character witnesses, all attorneys, testified on Herich's behalf at trial.[13] They have each known Herich for over 30 years and they all praised his legal work and his high moral character. They were aware this disciplinary proceeding related to his second DUI offense. Testimony from attorneys is entitled to serious consideration. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration given to attorneys' testimony due to their "strong interest in maintaining the honest administration of justice"].)

[5c] Four others submitted character declarations: Herich's alcohol recovery counselor, two friends, and his mother's caregiver. His friends have known him for a substantial length of time and stated Herich has helped them in legal matters free of charge. All of the declarants affirmed they believed Herich to be of high moral character. They asserted his misconduct was aberrational; however, none mentioned this was his second DUI. The strength of this evidence is diminished because the declarants did not state they were aware of the full extent of the misconduct. (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 538-539 [lack of awareness of full extent of misconduct undermines value of character testimony].)

[5d] Herich's good character evidence was presented from a wide range of references, including colleagues, friends, and clients. However, since most of the witnesses were unaware of the full extent of his prior actions, we assign moderate weight under standard 1.6(f). (*In re Aquino* (1989) 49 Cal.3d 1122, 1130–1131 [seven witnesses and 20 support letters not significant mitigation because witnesses unfamiliar with details of misconduct].)

4. Pro Bono Work

[6a] Pro bono work is a mitigating circumstance. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) Herich presented evidence of a recent pro bono case in which he devoted hundreds of hours of work. The hearing judge recognized Herich's dedication to the case, but only awarded limited weight in mitigation. Neither party challenges this finding.

[6b] In our independent review of the record, we find Herich's pro bono work is entitled to more mitigating weight. Ruth Cusick, an attorney for Public Counsel Law Center, corroborated Herich's testimony in a declaration regarding his assistance on the pro bono case. She stated Herich litigated the matter for over two years starting in 2015, worked extremely hard on the case, made many court appearances, and spent hundreds of hours on it. She praised Herich's legal work and stated she would be pleased to work with him again. Additionally, Herich's two friends stated he provided representation in their cases without being paid. While not much detail was provided as to these cases, they are relevant in the mitigation analysis. Herich's pro bono efforts are commendable, but he has not shown a prolonged dedication to pro bono work, which would merit substantial mitigating weight. (See *Rose v. State Bar* (1989) 49 Cal.3d 646, 667 [mitigation for legal abilities, dedication, and zeal in pro bono work].) However, we find the evidence presented is entitled to moderate mitigating weight.

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

[7a] Standard 1.6(g) provides mitigation credit where an attorney takes "prompt objective steps, demonstrating spontaneous remorse and recognition of the wrongdoing and timely atonement." The hearing judge assigned some mitigation for Herich's recognition of his wrongdoing and taking the preventive measure of using ride-sharing services instead of driving.[14]

[7b] We find Herich is entitled to mitigation under standard 1.6(g) for his cooperation and his admission to the insurance company that he was at fault for the collision. Also, during trial,

13. Another attorney submitted a declaration regarding Herich's pro bono work, which is addressed below. The declaration did not mention Herich's DUIs.

14. In discussing remorse and recognition of wrongdoing, the hearing judge found there was not clear and convincing evidence that Herich has a substance abuse problem. As discussed above, we disagree.

Herich testified he was "really sorry about what happened." He repeated this apology in his briefs on review and at oral argument. His expression of remorse, combined with his quick admission of fault in the civil matter and his level of cooperation here, is deserving of some mitigating credit. (See *Hipolito v. State Bar* (1989) 48 Cal.3d 621, 626–627, fn. 2 [expressing remorse deserves mitigation when it is combined with cooperation, accepting responsibility, and taking steps to prevent recurrence].)[15]

V. PUBLIC REPROVAL IS APPROPRIATE DISCIPLINE

We begin our disciplinary analysis by acknowledging that our role is not to punish Herich for his criminal conduct, but to recommend professional discipline. (*In re Brown* (1995) 12 Cal.4th 205, 217 [aim of attorney discipline is not punishment or retribution; it is imposed to protect the public, to promote confidence in legal system, and to maintain high professional standards; std. 1.1.) We do so by following the standards whenever possible and balancing all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266, 267, fn. 11.)

[8a] For misdemeanor convictions not involving moral turpitude, but encompassing other misconduct warranting discipline, standard 2.16(b) provides for discipline ranging from reproval to suspension. Herich argues reproval is not appropriate and a lesser sanction should be imposed under standard 1.7(c) due to the mitigation outweighing the aggravation. Standard 1.7(c) deems appropriate lesser sanctions than called for under a given standard if mitigating circumstances outweigh aggravation and "where there is little or no injury to a client, the public, the legal system, or the profession and where the record demonstrates that the lawyer is willing and has the ability to conform to ethical responsibilities." While the mitigation does outweigh the aggravation here, standard 1.7(c) does not apply because (1) Herich caused a quantifiable injury to the collision victims and (2) Herich's statements in these proceedings do not assure us that he is able to conform to ethical responsibilities in the future. Therefore, it is not appropriate for us to recommend less than reproval, which is the minimum presumed sanction under standard 2.16(b). (*Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons to deviate from standards].)

In addition to the standards, we look to case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.) The hearing judge relied primarily on *Kelley*, *supra*, 52 Cal.3d 487, and OCTC agrees with the hearing judge's reliance on *Kelley* in establishing that a public reproval is the appropriate level of discipline here.[16] In *Kelley*, the court imposed discipline of a public reproval with three years of probation for Kelley's misconduct that did not involve moral turpitude. Kelley had two DUI convictions and the court saw the need to protect the public from potential future harm stemming from Kelley's past problems with alcohol abuse and lack of respect for the legal system. As discussed above, we find Herich has a similar alcohol abuse problem. Kelley had no aggravating circumstances and the mitigating circumstances were similar to those found here.

15. We take note of OCTC's arguments in determining that only some mitigating weight be assigned here. The fact that Herich has made no other assurances or plans to address his alcohol problem beyond abstaining from driving is troubling and demonstrates a failure to fully recognize his wrongdoing.

16. OCTC also states that the hearing judge found guidance in two additional cases: *In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208 and *In the Matter of Guillory* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 402. In *Anderson*, the attorney was actually suspended for 60 days due to, among other things, his four DUI convictions over a six-year period. The misconduct in *Anderson* did not amount to moral turpitude but did constitute other misconduct warranting discipline. In *Guillory*, the attorney was actually suspended for two years. He had one DUI conviction prior to his admission to the bar and three DUI convictions after his admission and while employed as a deputy district attorney. Among other things, the attorney attempted, in the three DUI matters that occurred after his bar admission, to use his position as a prosecutor to influence the arresting officers and he was s driving on a suspended license for the last two DUI arrests. We determined in *Guillory* the facts and circumstances involved moral turpitude. The judge found that Herich's facts and circumstances were not as serious as those in either *Anderson* or *Guillory* and, therefore, less discipline was warranted. We agree.

We agree with the judge that a similar discipline to that found in *Kelley* is warranted in this matter.

We reject Herich's argument that his case is more comparable to *In the Matter of Respondent I* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 260, a case involving two DUI convictions where no discipline was imposed. The convictions occurred in Arizona while the attorney was on voluntary inactive status as a California attorney. He quit drinking after his second arrest and had not consumed alcohol for five years prior to our opinion. In addition, he attended therapy to address his alcohol abuse and the underlying problems that led to it. As such, we found no need for professional discipline to protect the public as the attorney had rehabilitated himself. (*Id.* at p. 272.) Unlike the attorney in *Respondent I*, Herich has not established that he has rectified his problem with alcohol, and we find the potential for future harm to the public. Accordingly, discipline is appropriate here.[17]

[8b] Herich has two DUI convictions, the second involving a serious collision resulting in injuries to two victims and property damage. The second DUI also involved false statements to the police officers about his actions. His repeated criminal conduct, which increased in severity, evidences an alcohol abuse problem.[18] While his actions do not involve moral turpitude, they do amount to other misconduct warranting discipline. Herich's declared solution is to abstain from driving, which, contrary to his assertions, does not solve his alcohol problem or assure us that future misconduct will not recur. The record does not establish his law practice has been affected at this point, and we take that into consideration in determining the level of discipline. Nevertheless, we must intervene in this instance to prevent future harm to the public and to impress upon Herich the seriousness of his actions. (*In re Kelley*, *supra*, 52 Cal.3d at p. 495.) This is necessary as he clearly does not fully understand the significance of his alcohol problem and how it relates to his practice of law. We credit him for several mitigating circumstances including a lengthy discipline-free practice, cooperation, good character, pro bono work, and remorse, which outweigh the sole aggravating circumstance of significant harm. We also note Herich's compliance with the terms of his criminal probation. Given these findings, we find that a public reproval with conditions,[19] which is at the low end of standard 2.16(b), is appropriate discipline. (See std. 1.1 [recommendation at high or low end of standard must be explained].)

VI. ORDER

It is ordered that Emil Walter Herich, State Bar Number 116783, is publicly reproved. Pursuant to the provisions of rule 5.127(A) of the Rules of Procedure of the State Bar, this reproval will be effective when this opinion becomes final. Furthermore, pursuant to rule 9.19(a) of the California Rules of Court and rule 5.128 of the Rules of Procedure, we find the protection of the public and the interests of Herich will be served by the following conditions being attached to this reproval. Failure to comply with any condition may constitute cause for a separate disciplinary

17. In his rebuttal brief, Herich calls our attention to the fact that OCTC omitted certain words when quoting *Respondent I* in its responsive brief. We disagree with him that *Respondent I* holds that attorneys can be disciplined for DUI convictions only when the attorney causes "significant injury or death." That part of the opinion describes holdings from out-of-state cases and does not describe our ultimate holding, which was there was no need for public protection due to the attorney's rehabilitation. (*In the Matter of Respondent I*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 271–272.) We do not find OCTC's curtailed quotation as "perniciously" concealing anything about the case from us.

[8c] 18. The facts and the case law support our finding that Herich has an alcohol problem. He committed a second DUI only two years after completing probation in his first case. The second DUI was more serious than the first, resulting in a collision and injuries. He also testified that drinking and driving was a problem for him, so much so that he needs to abstain from driving. His actions depict a problem with alcohol and potential for future harm, which requires discipline under *Kelley*. He fails to fully realize this problem. Therefore, we include an additional reproval condition below that he attend an abstinence-based self-help group.

19. We reject Herich's argument on review that he should not have to complete State Bar Ethics School (Ethics School) as a condition of a reproval. It is required and, further, we find the protection of the public and Herich's interests will benefit from his attending Ethics School. (Rules Proc. of State Bar, rule 5.135(A) [Ethics School required where discipline imposed unless completed within two years prior or Supreme Court orders otherwise]; see also *In the Matter of Respondent Z* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 85, 88.)

proceeding for willful breach of rule 8.1.1 of the State Bar Rules of Professional Conduct. Herich is ordered to comply with the following conditions attached to this reproval for one year (Reproval Conditions Period) following the effective date of the reproval.

1. Review Rules of Professional Conduct. Within 30 days after the effective date of the order imposing discipline in this matter, Herich 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 with Herich's first quarterly report.

2. Comply with State Bar Act, Rules of Professional Conduct, and Reproval Conditions. Herich must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of this reproval.

3. Maintain Valid Official State Bar Record Address and Other Required Contact Information. Within 30 days after the effective date of the order imposing discipline in this matter, Herich 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. Herich 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.

4. Meet and Cooperate with Office of Probation. Within 30 days after the effective date of the order imposing discipline in this matter, Herich must schedule a meeting with his assigned probation case specialist to discuss the terms and conditions of Herich's discipline and, within 45 days after the effective date of the court's order, must participate in such meeting. Unless otherwise instructed by the Office of Probation, he may meet with the probation case specialist in person or by telephone. During the Reproval Conditions Period, Herich 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 any other information requested by it.

5. State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court. During the Reproval Conditions Period, the State Bar Court retains jurisdiction over Herich to address issues concerning compliance with reproval conditions. During this period, Herich 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, he must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

6. Quarterly and Final Reports.

a. Deadlines for Reports. Herich 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 Reproval Conditions Period. 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 Herich must submit a final report no earlier than 10 days before the last day of the Reproval Conditions Period and no later than the last day of the Reproval Conditions Period.

b. Contents of Reports. Herich 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 to the Office of Probation by: (1) fax or email; (2) personal delivery; (3) certified mail, return receipt requested (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. Herich is directed to maintain proof of his compliance with the above requirements for each such report for a minimum of one year after the Reproval Conditions Period has ended. He is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

7. State Bar Ethics School. Within one year after the effective date of the order imposing discipline in this matter, Herich 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 Herich will not receive MCLE credit for attending this session.

8. Abstinence Program Meetings. Herich must attend a minimum of two meetings per month of an abstinence-based self-help group approved by the Office of Probation. Programs that are not abstinence-based and allow the participant to continue consuming alcohol are not acceptable. Herich must contact the Office of Probation and obtain written approval for the program he wishes to select prior to receiving credit for compliance with this condition for attending meetings of such group. He must provide to the Office of Probation satisfactory proof of attendance at such group meetings with each quarterly and final report; however, in providing such proof, Herich may not sign as the verifier of such attendance.

9. Criminal Probation. Herich must comply with all probation conditions imposed in the underlying criminal matter and must report such compliance under penalty of perjury in all quarterly and final reports submitted to the Office of Probation covering any portion of the period of the criminal probation. In each quarterly and final report, if Herich has an assigned criminal probation officer, he must provide the name and current contact information for that criminal probation officer. If the criminal probation was successfully completed during the period covered by a quarterly or final report, that fact must be reported by Herich in such report and satisfactory evidence of such fact must be provided with it. If, at any time before or during the period of probation, Herich's criminal probation is revoked, he is sanctioned by the criminal court, or his status is otherwise changed due to any alleged violation of the criminal probation conditions by him, Herich must submit the criminal court records regarding any such action with his next quarterly or final report.

COSTS

It is further ordered 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.

WE CONCUR:

PURCELL, P. J.
HONN, J.

State Bar Court
Review Department

In the Matter of

RESPONDENT BB

A Member of the State Bar

No. SBC-19-O-30685

Filed September 7, 2021

SUMMARY

While working as a new public defender, respondent violated the duty to maintain respect to the courts in two separate courtroom incidents and failed to obey a court order in one of those incidents. In the first incident, respondent made disrespectful statements to a superior court judge during jury selection but shortly thereafter apologized to the judge. In the second incident, when bailiffs were attempting to take respondent's client into custody, respondent failed to comply with a judge's orders to immediately step away from the client. When respondent, who disagreed with the court's remand of his client into custody, was told by the judge that he was subject to arrest for interfering and asked respondent if he understood, respondent stated in reference to the judge's remand of his client that respondent was "embarrassed for the [c]ourt." The judge later found respondent guilty of direct contempt for failing to abide by the judge's order to move away from his client during the remand. The Review Department found no aggravating circumstances and overall greater mitigation that the hearing judge. Acknowledging the unusual facts of the case, the Review Department concluded that discipline was not necessary to protect the public, the courts, or the legal profession and affirmed the hearing judge's determination that an admonition was the appropriate disposition.

COUNSEL FOR PARTIES

For State Bar of California:	Alex James Hackert Allen Blumenthal
For Petitioner:	Matthew Edward Gonzalez Christopher F. Gauger

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **162 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters**
213.20 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6068(b) (respect for courts and judges)

Business and Professions Code section 6068, subdivision (b), establishes attorney's duty to maintain respect due courts of justice and judicial officers. Where respondent told court it lacked backbone; repeatedly stated respondent did not respect court or its decision; and challenged judge to place respondent in custody, respondent's statements and action demonstrated disrespect to court in violation of Business and Professions Code section 6068, subdivision (b).

[2] **162 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters**
213.20 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6068(b) (respect for courts and judges)

Where respondent failed to abide by judge's order to immediately step away from criminal defendant client while client was being remanded into custody, and where respondent subsequently stated to judge respondent was "embarrassed" for court, respondent violated Business and Professions Code section 6068, subdivision (b).

[3] **162 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters**
106.30 Generally Applicable Procedural Issues – Issues re Pleadings – Duplicative charges
220.00 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6103, clause 1 (disobedience of court order)

Attorney willfully violates Business and Professions Code section 6103 when, despite being aware of final, binding court order, attorney knowingly chooses to violate order. Where respondent heard judge's oral orders to move away from criminal defendant client during client's remand into custody, and respondent failed to obey orders for several seconds when orders demanded immediate compliance, respondent willfully violated Business and Professions Code section 6103, but as same misconduct underlay section 6068, subdivision (b) violation, no additional weight assigned for section 6103 violation.

[4a-d] **801.41 Application of Standards – Deviation from standards – Found to be justified**
802.10 Application of Standards – Part A – Standard 1.1 (Purposes and Scope of Standards)
921.52 Application of Standards – Standard 2.12 – (a) Violation of court order, oath, or § 6068(a), (b), (d), (e), (f) or (h), or RPC 3.4(f) – Declined to apply – lesser or no discipline – Mitigating factors
921.59 Application of Standards – Standard 2.12 – (a) Violation of court order, oath, or § 6068(a), (b), (d), (e), (f) or (h), or RPC 3.4(f) – Declined to apply – lesser or no discipline – Other reason

1091 Miscellaneous Substantive Issues re Discipline – Proportionality with Other Cases
1094 Miscellaneous Substantive Issues re Discipline – Admonition in Lieu of Discipline

Standards for Attorney Sanctions for Professional Misconduct do not apply to non-disciplinary dispositions such as admonitions. As Review Department ordered admonition, consideration of aggravating and mitigating circumstances was not required. However, analysis of aggravating and mitigating circumstances aided court in determining that deviation from standard was warranted. Although standard provided for actual suspension or disbarment, under case law and rule 5.126 of Rules of Procedure of State Bar, admonition was appropriate due to compelling mitigation and lack of aggravating circumstances.

[5a, b] **162.11 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters – State Bar's burden – Clear and convincing standard**
586.50 Aggravation – Harm – To administration of justice – Declined to find

Speculative harm does not satisfy clear and convincing standard required for aggravation. Although very brief moment of disorder in courtroom occurred between respondent and bailiffs, that did not by itself establish aggravation for significant harm. Where Office of Chief Trial Counsel did not establish that specific, cognizable, and significant harm occurred which could be directly attributed to respondent's actions beyond respondent's violation of judge's orders to move away from client who was criminal defendant, Review Department did not affirm hearing judge's finding of substantial harm as aggravating circumstance.

[6] **586.50 Aggravation – Harm – To administration of justice – Declined to find**

Although respondent was reprimanded for his conduct by San Francisco Public Defender's Office, where any interruption to jury selection due to respondent's conduct was brief and record did not establish significant judicial time or resources were used, no aggravation for significant harm.

[7] **586.50 Aggravation – Harm – To administration of justice – Declined to find**

No aggravation for significant harm where respondent asserted his rights in defending against or appealing court's contempt order; unclear respondent's actions caused bailiff's injury; and no evidence existed regarding severity of injury.

[8] **715.50 Mitigation – Good faith – Declined to find**

Good faith belief honesty held and objectively reasonable may be mitigating circumstance. Where respondent's belief that judge's remand order of criminal defendant client was illegal, even if honestly held, did not mitigate respondent's actions of interfering with defendant client's arrest; no reasonable justification existed for respondent's failure to immediately move away from defendant client once judge ordered respondent to do so, and Review Department therefore did not assign mitigating credit.

[9a-e] **740.10 Mitigation – Good character references – Found**

Where good character evidence included 44 people who were aware of respondent's misconduct and who testified or attested to respondent's good character, including current San Francisco Public Defender, 17 other public defenders, former member of Board of Supervisors for City and County of San Francisco, captain and Assistant Sheriff with San Francisco County Sheriff's Office, former City Attorney for Santa Cruz and Capitola,

current and several former clients, two assistant district attorneys, two other attorneys, priest, and 12 others from respondent's personal life, Review Department assigned compelling mitigating weight to respondent's extraordinary good character due to breath of evidence which was wide-ranging and extensive.

[10a-d] **745.10 Mitigation – Remorse/restitution/atonement – Found**
Mitigation may include prompt objective steps demonstrating spontaneous remorse and recognition of wrongdoing and timely atonement. Where respondent, who was new public defender (1) made disrespectful statements to one judge but apologized to judge shortly thereafter; and (2) failed to abide by another judge's order and made disrespectful statement to judge but did not immediately apologize to judge, as to do so would have put respondent at odds with San Francisco's Public Defenders Office and then-Public Defender, but after being found guilty of contempt by judge paid fine, reported contempt order to State Bar, displayed remorse during disciplinary proceedings, and accepted responsibility, Review Department gave full mitigating weight to respondent's demonstration of remorse and acceptance of responsibility in both incidents, as much as one could reasonably expect under circumstances.

[11a-c] **745 Mitigation – Remorse/restitution/atonement**
750.10 Mitigation – Passage of time and rehabilitation - Found
Mitigation may be found if misconduct remote in time and subsequent rehabilitation established. Where misconduct occurred three years earlier, which was remote in time, and respondent demonstrated in those years more than not engaging in additional misconduct, but provided evidence of professional growth and maturity, respondent's improved professional deportment displayed substantial rehabilitation from misconduct, and respondent entitled to substantial mitigation. Although hearing judge considered facts under standard 1.6(g) (remorse and recognition of wrongdoing), Review Department concluded facts more appropriately considered under standard 1.6(h) to show respondent's rehabilitation.

[12] **801.41 Application of Standards – Deviation from standards – Found to be justified**
802.63 Application of Standards – Standard 1.7 – (c) Effect of mitigation on appropriate sanction
921.52 Application of Standards – Standard 2.12 – (a) Violation of court order, oath, or § 6068(a), (b), (d), (e), (f) or (h), or RPC 3.4(f) – Declined to apply – lesser or no discipline – Mitigating factors
921.59 Application of Standards – Standard 2.12 – (a) Violation of court order, oath, or § 6068(a), (b), (d), (e), (f) or (h), or RPC 3.4(f) – Declined to apply – lesser or no discipline – Other reason
Under standard 1.7(c), lesser sanction appropriate if misconduct minor; little or no injury occurred to client, public, legal system, or profession; and attorney willing and able to conform to ethical responsibilities in future. Where respondent stipulated to misconduct before one judge and immediately apologized for disrespectful comments which judge appeared to accept, and misconduct before another judge was very brief and resulted in no appreciable injury to client, public, legal system, or profession, Review Department concluded both incidents were "minor misconduct" under standard 1.7(c). Where respondent established rehabilitation by acknowledgement that respondent would act differently in future which indicated respondent willing and able to conform to ethical responsibilities in future, Review Department concluded, given circumstances, discipline unnecessary and would be punitive considering compelling mitigation, lack of aggravation, narrow extent of respondent's misconduct, and lack of consequential harm.

[13a-c] **802.63 Application of Standards – Standard 1.7 – (c) Effect of mitigation on appropriate sanction**
1094 Miscellaneous Substantive Issues re Discipline – Admonition in Lieu of Discipline

Disciplinary proceeding may be resolved by admonition if (1) it does not involve Client Security Fund (CSF) matter or serious offense; (2) violation either was not intentional or occurred under mitigating circumstances; and (3) no significant harm resulted. Where respondent's misconduct did not involve CSF matter; was not "serious offense" as defined by rule 5.126(B); both incidents of misconduct occurred under mitigating circumstances under standard 1.6 and other unique circumstances considered mitigating; and respondent acknowledged wrongdoing and demonstrated future misconduct unlikely to recur, admonition was appropriate.

ADDITIONAL ANALYSIS

Culpability

Found

213.21	**Section 6068(b) (respect for courts and judges)**
220.01	**Section 6103, clause 1 (disobedience of court order)**

Mitigation

Found

730.10	**Candor and cooperation with Bar (1.6(e); 1986 Standard 1.2(e)(v))**

Other

802.20	**Standard 1.2**

OPINION[1]

McGILL, J.

Respondent BB,[2] while a new San Francisco County Deputy Public Defender, violated his duty to maintain respect due to the courts in two separate courtroom incidents. Before his disciplinary trial, respondent stipulated to his misconduct in the first incident, in which he made disrespectful statements to a superior court judge during jury selection; he apologized to the judge shortly thereafter. In the second incident, respondent violated a court order when his client was remanded during a plea colloquy. When bailiffs were attempting to take the client into custody, respondent failed to comply with a judge's order to immediately step away from his client, which resulted in a contempt order against respondent.

The hearing judge found respondent culpable of two counts of disrespect to the courts and one count for failure to obey a court order. The judge determined an admonition was appropriate under the "unique circumstances" established at trial along with five circumstances in mitigation and only one in aggravation. The Office of Chief Trial Counsel of the State Bar (OCTC) appeals, arguing an admonition is inappropriate and some form of discipline should be imposed. It requests an actual suspension of 30 days as the minimum required here. Respondent did not appeal.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we affirm the hearing judge's culpability findings but differ in our review of the aggravating and mitigating circumstances. We find the record establishes no aggravating circumstances and four mitigating ones. Because we increase the weight assigned to three of the mitigating circumstances, the overall mitigation is greater than the judge found. We also acknowledge the unusual facts of the case and conclude, as the judge did, that discipline is not necessary here to protect the public, the courts, or the legal profession. Accordingly, we affirm an admonition as the appropriate disposition for respondent in this matter.

I. PROCEDURAL HISTORY

On December 11, 2019, OCTC filed a Notice of Disciplinary Charges (NDC). On December 30, respondent filed his response. On August 19, 2020, the parties entered into a detailed Stipulation as to Facts and Admission of Documents and Culpability as to Count One (Stipulation). Trial took place on August 26 and 27, and the hearing judge issued her decision on November 18. OCTC filed a request for review on December 2. After briefing was completed, we heard oral argument on June 10, 2021.

II. FACTUAL BACKGROUND[3]

Respondent was admitted to practice law in California on November 27, 2013. He worked as an associate in a criminal defense practice before joining the San Francisco Public Defender's Office (SFPDO) in February 2016, where he remains employed.

A. June 2017 Jury Selection Incident

On June 5, 2017, respondent represented a defendant in a misdemeanor jury trial before Judge Roger C. Chan in the Superior Court of San Francisco. During jury selection, respondent raised a *Batson-Wheeler* objection, challenging the

1. This Opinion and Order is published in accordance with rule 5.126(C) of the Rules of Procedure of the State Bar. All further references to rules are to this source unless otherwise noted.

2. We do not identify respondent by name because we dispose of this case by admonition. (See *In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439, 444, fn. 1.)

3. The facts are based on the Stipulation, 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).) The hearing judge found all the witnesses who testified were credible, including respondent. This finding, along with the judge's other findings of fact, is not disputed by OCTC in its appeal.

prosecution's striking of a Latino juror.[4] The court initially ruled in respondent's favor but, after further argument from the prosecution, reversed its ruling and found striking the juror was valid. As a result, no Latino jurors were seated in a case where the defendant was Latino.

Respondent argued about the changed ruling, and stated, "the [c]ourt has a lack of backbone." Then, interrupting the judge, he repeatedly stated he did not respect the court or its decision. The court warned respondent about his comments, and respondent challenged the court to place him in custody. The court then took a short recess. Later that day, respondent apologized to the judge. He was reprimanded for his actions by Jeff Adachi, the San Francisco Public Defender at the time, and another high-level supervisor.

B. September 2017 Remand Incident

On September 14, 2017, respondent appeared before Judge Ross C. Moody in Department 17 of the Superior Court of San Francisco. Multiple witnesses testified Department 17 is a very busy and loud courtroom, handling many criminal matters and often full of attorneys and defendants.

Respondent represented a defendant who was entering a plea and not in custody. Respondent, Judge Moody, and the bailiffs knew the defendant from previous court proceedings and were aware the defendant suffered from mental health issues. During the plea, a Tagalog interpreter was present to assist the defendant, who began talking to himself and did not use the interpreter to speak. The defendant did not respond to Judge Moody's questions but instead aggressively yelled in the interpreter's face. His erratic behavior alarmed the judge and a bailiff, Deputy Sheriff Christianne Crotty, who asked the interpreter to step away from the defendant for her safety. Judge Moody asked the defendant to calm down and then asked, "Do you want to finish the plea and walk out that door [referring to the court's exit], or do you want me to put you in custody?" Respondent asked for a brief recess, which the court granted.

When the proceeding was recalled, respondent stood with his right arm around the defendant. Judge Moody believed the defendant was continuing to be disruptive and thus ordered the bailiffs to place him in custody. Crotty and her partner acted immediately and came up behind respondent and the defendant. The following exchange occurred:

> The Court: Take him into custody.
> Respondent: Your Honor. Your Honor.
> Deputy [addressing respondent]: Step away. You don't interfere with our custody.
> The Court: Move away, [respondent]. Move away. Move away.
> Deputy: It's our job.
> Respondent: He's never hurt a person in his whole life.
> The Court: [Respondent], move away from the podium.
> Respondent: He's never hurt a person in his life. This is why—the system doesn't know how to deal with it.
> Deputy [addressing the defendant]: Put your hands behind your back. Put your hands behind your back.
> The Court: Five-minute recess.

While the exchange was taking place, respondent kept his right arm between the deputies and the defendant and briefly interfered with the arrest process. While it is unclear exactly how long respondent delayed the arrest, several witnesses, including a bailiff, testified the delay lasted from 10 to 15 seconds. After the recess, Judge Moody told respondent that he was subject to arrest for interfering and asked him if he understood. Respondent then stated, "The [c]ourt told my client

4. A *Batson-Wheeler* objection is one claiming that the prosecutor has improperly used a peremptory challenge to remove a prospective juror on the basis of race, ethnicity, or sex, in violation of a defendant's constitutional rights to a trial by a jury drawn from a representative cross-section of the community. (*Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.)

he would either finish the plea or go to jail." Judge Moody told respondent to answer his question. Respondent stated,

> That's what the [c]ourt said to my client. And I have the duty—I have a duty to protect my client in a situation with extreme mental health. In chambers I explained to the [c]ourt my concern about [the defendant]. And the [c]ourt has—is usually very diligent and very concerned about those issues. And it was very obvious while I stood here what was going on. And to put someone in a bind to say you either understand what I'm saying or go to jail is improper. And I don't know how to react. And then for it to turn physical was improper. And I'm embarrassed for the [c]ourt today.

Judge Moody then said, "[Respondent], we're talking about your actions today." Respondent replied, "You mean my reactions," to which the judge said, "All right." Respondent finished by stating he needed counsel and the matter was adjourned.

Respondent and other attorneys in the SFPDO testified it was highly unusual for an out-of-custody defendant to be taken into custody when a plea could not be completed.[5] Judge Moody also testified this incident is the only time he has remanded someone in this scenario. On September 20, 2017, respondent filed a writ of habeas corpus requesting the defendant's release and arguing the remand was illegal. Another superior court judge determined the remand order was not an abuse of discretion by Judge Moody.

A week after the remand occurred, Judge Moody issued an order to show cause as to why respondent should not be adjudged guilty of contempt of court. At the contempt hearing on September 29, 2017, Adachi represented respondent. The Public Defender's representation of his deputy during the contempt proceeding was atypical. On November 30, Judge Moody found respondent guilty of direct contempt for failing to abide by his order to move away from the defendant during the remand. Respondent unsuccessfully appealed the contempt order.[6] Respondent was ordered to pay a fine, which he did. He also reported the contempt judgment to the State Bar. He has since appeared before Judge Moody, who testified respondent has acted professionally on those occasions. The bailiffs also testified they have since interacted with respondent in the courtroom, have not had any other problems with him, and feel comfortable working with him in the future. Respondent was not reprimanded by Adachi.

III. CULPABILITY

The hearing judge's culpability determinations are not disputed by the parties. We affirm the judge's determinations as discussed below and find clear and convincing evidence[7] establishes respondent is culpable as charged under all three counts of the NDC.

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5. Brian Getz, a seasoned criminal defense attorney for over 40 years, became emotional during his testimony when describing generally the remand of a client who is out of custody. He stated that it is a rare and "devastating" occurrence, which would make him feel like he had let the client down.

6. Respondent appealed to the appellate division of the San Francisco County Superior Court; the Court of Appeal, First Appellate District; and the California Supreme Court. All appeals were denied.

7. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

A. Count One: Duty to Respect the Courts (Bus. & Prof. Code, § 6068, subd. (b))8

[1] Count one alleged respondent's conduct before Judge Chan in June 2017 violated section 6068, subdivision (b), because he failed to show respect to the court and its judicial officer. Section 6068, subdivision (b), establishes the duty of an attorney to "maintain the respect due to the courts of justice and judicial officers." Respondent admitted in the Stipulation he was culpable under count one for telling the court it lacked a backbone and for repeatedly stating he did not respect the court or its decision. The hearing judge agreed respondent's statements violated section 6068, subdivision (b). In addition, the judge found respondent's challenge to Judge Chan to place him in custody also demonstrated disrespect to the court. (See *Schaefer v. State Bar* (1945) 26 Cal.2d 739, 751–752 [attorneys obligated to show respect to courts under § 6068, subd. (b)].)

B. Count Two: Duty to Respect the Courts (§ 6068, subd. (b))

[2] Count two alleged respondent's conduct before Judge Moody on September 14, 2017, also violated section 6068, subdivision (b). The hearing judge found respondent culpable under count two for failing to abide by Judge Moody's order and for his subsequent statement that he was "embarrassed" for the court. (See *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 403–404 [failure to comply with court order shows disrespect to court in violation of § 6068, subd. (b)].) Respondent does not challenge the judge's culpability finding for this count.

C. Count Three: Failure to Obey a Court Order (§ 6103)

[3] Count three alleged respondent violated section 6103 when he failed to comply with Judge Moody's order to move away from the defendant during the remand. Section 6103 provides, in pertinent part, that a willful disobedience or violation of a court order requiring an attorney to do or forbear an act connected with or in the course of the attorney's profession, which the attorney ought in good faith do or forbear, constitutes cause for suspension or disbarment. An attorney willfully violates section 6103 when, despite being aware of a final, binding court order, he or she knowingly chooses to violate the order. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 787.) The hearing judge found respondent heard Judge Moody's oral orders, and he failed to obey them for several seconds when the orders demanded immediate compliance. The hearing judge found respondent culpable under count three, but did not assign additional disciplinary weight. (*In the Matter of Moriarty* (Review Dept. 2017) 5 Cal. State Bar Ct. Rptr. 511, 520 [no dismissal of charge where same misconduct proves culpability for another charge, but no additional weight in determining discipline].) As in count two, respondent does not challenge the judge's culpability finding for this count.

IV. FOUR MITIGATING CIRCUMSTANCES AND NO AGGRAVATION[9]

Standard 1.5 of the Standards for Attorney Sanctions for Professional Misconduct[10] requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6

8. All further references to sections are to the Business and Professions Code unless otherwise noted.

[4a] 9. Because our order of admonition is not a recommendation of discipline under the standards (std. 1.1 [standards do not apply to non-disciplinary dispositions such as admonitions]), consideration of aggravating and mitigating circumstances is not required. However, an analysis of the aggravating and mitigating circumstances aids us in determining that a sanction under the standards is not needed, but rather an admonition is appropriate under rule 5.126 and the case law, as discussed *post*.

10. All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

requires respondent to meet the same burden to prove mitigation.

A. Aggravation

1. Hearing Judge's Finding of Substantial Harm Not Affirmed

[5a] The hearing judge found one aggravating circumstance: significant harm to the administration of justice. (Std. 1.5(j).) The judge determined respondent's failure to abide by Judge Moody's orders to move away from the defendant during the remand created a "dangerous and chaotic situation in [the] courtroom." However, the judge determined the aggravation deserved limited weight because "the misconduct was very brief in time, not on-going, and under exceptional circumstances."

[5b] We disagree with the hearing judge on assigning aggravation for this circumstance. The fact that a very brief moment of disorder in the courtroom occurred between respondent and the bailiffs would not by itself establish aggravation for significant harm. The disorder certainly increased the *possibility* of a more serious or dangerous occurrence, but OCTC's stance is entirely speculative and does not satisfy the clear and convincing standard. (See *In the Matter of Jensen* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 283, 290 [no aggravation for speculative harm].) OCTC did not establish a specific, cognizable, and significant harm that occurred which can be directly attributed to respondent's actions beyond his violation of Judge Moody's orders to move away from the defendant. Therefore, we do not assign aggravation under standard 1.5(j).

[6] 2. No Additional Facts Establish Substantial Harm

On review, OCTC asserts the hearing judge did not consider the full extent of the harm caused by respondent's misconduct, which it argues warrants additional aggravation for significant harm under standard 1.5(j). OCTC argues the incident before Judge Chan delayed and disrupted jury selection and resulted in the SFPDO reprimanding respondent. Any interruption to jury selection was brief, and the record does not establish significant judicial time or resources were used. (Cf. *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 77, 79–80 [significant harm to administration of justice where court spent considerable time and resources trying to compel attorney to appear in court]; *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 48 [unnecessary delay of appellate process for two years constitutes significant harm to administration of justice].) Further, OCTC provides no authority that would recognize the SFPDO's reprimand as falling under the ambit of aggravation for significant harm.

[7] OCTC also argues additional harm should be considered for the incident before Judge Moody because judicial resources were expended in the contempt proceeding and appeals, and a bailiff was injured during the arrest. We disagree and see no basis, in fact or in law, that respondent should receive aggravation for asserting his rights in defending against or appealing the contempt order. The cases cited by OCTC involve misrepresentations by attorneys who wasted judicial resources due to their misrepresentations, a fact not present here. The argument for significant harm to the bailiff is also unsupported as no evidence exists regarding the severity of her injury, and it is unclear respondent's actions in fact caused the injury. Accordingly, we reject OCTC's contentions regarding additional aggravation for significant harm.

B. Mitigation

1. Good Faith Belief

[8] Mitigation may include a "good faith belief that is honestly held and objectively reasonable." (Std. 1.6(b); see *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 331 [credible good faith belief must also be objectively reasonable to qualify for mitigation].) The hearing judge assigned moderate mitigation under standard 1.6(b) because respondent's belief that Judge Moody's remand order was erroneous was held in good faith and was reasonable. OCTC argues respondent is not entitled to mitigation under this standard. We agree. Respondent's belief that the remand order was illegal, even if honestly held, cannot mitigate his actions here, which consisted of interfering with an arrest. No reasonable justification existed for

respondent's failure to immediately move away from the defendant once the judge ordered him to do so. Therefore, we do not assign credit for this mitigating circumstance.

2. Candor and Cooperation

Under standard 1.6(e), respondent is entitled to mitigation for entering into the Stipulation, which was extensive as to facts and admission of documents and included his admission to culpability for count one. In addition, respondent accepted the hearing judge's culpability findings on review for the remaining counts. His actions conserved significant time and resources for the court and OCTC. The judge assigned moderate weight in mitigation, which OCTC does not oppose on review. This weight is appropriate for respondent's cooperation. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive mitigation weight for admission of culpability and facts].)

3. Extraordinary Good Character

[9a] Respondent 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 assigned significant weight in mitigation, which OCTC does not challenge. We agree with the judge's finding of extraordinary good character but assign compelling weight due to the breadth of the evidence presented by respondent.

[9b] Forty-four people testified or attested to respondent's good character. More specifically, eight attorneys testified: seven public defenders, including the current San Francisco Public Defender, and respondent's former employer when he was in private practice. The remaining three witnesses consisted of a former member of the Board of Supervisors for the City and County of San Francisco, a captain and Assistant Sheriff with the San Francisco County Sheriff's Office, and a current client. Almost all of these witnesses were aware of the misconduct and almost all the attorneys testifying on respondent's behalf witnessed the incident in Judge Moody's courtroom. Thirty-three people submitted declarations: 11 additional public defenders, four former clients, two assistant district attorneys, three other attorneys (one of whom was the former City Attorney for the cities of Santa Cruz and Capitola), a priest, and 12 other people from respondent's personal life. Most of these people had known respondent for several years and were aware of his misconduct.

We highlight his professional colleagues' statements in the record to more fully demonstrate the high regard these people have for respondent. His former employer, a criminal defense attorney for over 40 years, described respondent as vigorously honest, passionate, and devoted to criminal defense. His fellow public defenders stated respondent is a "zealous" and "incredible" advocate for his clients, and he cares deeply about them. They stated respondent has integrity, is dedicated to his work, and is a mentor to others in the office. Respondent's supervisors, who are familiar with his work, echoed these sentiments and also noted they have confidence in his work. They declared he has shown exceptional growth in his professional development and maturity, and, in turn, he has been assigned a more complex and heavier caseload. His past supervisor said respondent is "the type of person that would be there for his clients no matter what." His current supervisor stated he observes respondent in court on an-almost-weekly basis. He described respondent as a vigorous and thoughtful attorney with a passion for his work that could "serve as a model for all of us." The current San Francisco Public Defender, Manohar Raju, also praised respondent's character, describing him as committed, with a "first-rate" work ethic and someone who puts his clients first.

In addition to his SFPDO colleagues, the two assistant district attorneys described him as a zealous advocate. One attested to her experience working against respondent at trial and in the courtroom, stating he is genuine, passionate, well prepared, and he makes a personal connection with his clients. She stated she enjoys working with respondent despite the adversarial nature of their work and noted their collegiality is a product of respondent's good character. The other wrote about his admiration of respondent's integrity and his commitment to his clients.

[9c] We give serious consideration to attorneys' references because they have a "strong interest in maintaining the honest administration of justice." (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319.) We agree with the hearing judge that it is noteworthy the SFPDO continues to support respondent and provided him with counsel in this disciplinary proceeding.

[9d] Further, the client, who testified at trial, stated respondent took a personal interest in his case that went beyond what another attorney might have done. Respondent's former clients, along with their relatives, reiterated this sentiment in declarations and expressed gratitude for respondent's actions as their attorney. Others, including several family friends, wrote highly of respondent's good character, describing respondent as a mentor, community volunteer, or someone who has personally assisted them in their lives.

[9e] From all of the character evidence presented, respondent's work in criminal defense is clearly a calling for him and, despite his heavy workload as a public defender, he is tenacious yet conscientious in both his professional and personal lives. The totality of the wide-ranging and extensive character evidence respondent presented from over 40 people is compelling and, therefore, we weigh it as such in mitigation. (*In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171, 185, 187 [presentation of extraordinary demonstration of good character compelling where 36 witnesses testified to attorney's professionalism, honesty, and integrity].)

4. Remorse and Recognition of Wrongdoing and Timely Atonement

[10a] Mitigation may also include "prompt objective steps, demonstrating spontaneous remorse and recognition of the wrongdoing and timely atonement." (Std. 1.6(g).) Respondent demonstrated remorse for the incident with Judge Chan by apologizing to the judge shortly after the incident occurred. We agree with the hearing judge that this deserves mitigation.

[10b] However, the hearing judge found respondent's failure to immediately apologize to Judge Moody tempered the mitigating weight. We disagree due to the unique circumstances of this case. The incident with Judge Moody placed respondent in the middle of a dispute involving the entire SFPDO. The Public Defender at the time, Adachi, immediately became involved, when typically, respondent's supervisor would have handled the situation. The SFPDO adamantly disagreed with Judge Moody's remand order and believed respondent did nothing wrong. Respondent challenged Judge Moody's remand order as illegal, and the judge initiated contempt proceedings. In those proceedings, respondent was represented by Adachi, which was again atypical. Clearly, the issue became bigger than respondent, and it is understandable why he did not immediately apologize to Judge Moody—to do so would have put him at odds with Adachi and the SFPDO. Nonetheless, after Judge Moody found respondent guilty of contempt, respondent paid the fine and reported the contempt order to the State Bar.

[10c] At trial, respondent explained his belief that his ego and Adachi's became involved, escalating the situation unnecessarily. In hindsight, he recognizes he should have handled things differently. Respondent declared his respect for Judge Moody and has sought to show it in subsequent interactions with the judge; Judge Moody's own testimony supports respondent's. We do not discredit him for not immediately apologizing to Judge Moody. Rather, we believe he is entitled to mitigation for his display of remorse during these proceedings combined with his acceptance of responsibility, payment of the fine, and reporting the contempt to the State Bar.[11] Because respondent demonstrated remorse and

[10d] 11. OCTC argues that respondent is only entitled to "slight" mitigation under standard 1.6(g), arguing that he should have apologized to Judge Moody. We disagree. As explained above, a prompt apology was not pragmatic in this situation. OCTC's analysis unreasonably stops at the failure to apologize, fails to appreciate the context in which the events occurred, and does not credit respondent's subsequent acceptance of responsibility.

acceptance of responsibility in both the Judge Chan and Judge Moody incidents as much as one could reasonably expect, we assign full mitigating weight. (See *Hipolito v. State Bar* (1989) 48 Cal.3d 621, 626–627, fn. 2 [timely atonement in consideration with other factors and acceptance of responsibility deserves significant mitigation].)

5. Remoteness in Time of Misconduct and Subsequent Rehabilitation

[11a] Under standard 1.6(h), mitigation may be found if the misconduct was remote in time and a showing of subsequent rehabilitation is established. The hearing judge assigned limited weight in mitigation. OCTC argues respondent is not entitled to any mitigation under this standard. We reject this argument, as explained below, and find respondent is entitled to substantial mitigation for this circumstance.

[11b] At the time of trial, three years had passed since respondent's misconduct and he has had no other disciplinary issues since. Case law acknowledges this period of time is sufficient for mitigation under this circumstance. (See *Amante v. State Bar* (1990) 50 Cal.3d 247, 256.)[12] Notably, in those three years, respondent has demonstrated more than simply not engaging in additional misconduct; he has provided evidence of professional growth and maturity, which is directly relevant to a conclusion that he has rehabilitated from the misconduct. First, his employer has promoted him from handling misdemeanor cases to felony cases. Additionally, several colleagues stated that, in difficult courtroom situations, respondent is poised, calm, and conscientious, and they noted his professionalism in interacting with the court and opposing counsel. Judge Moody testified his subsequent interactions with respondent were professional, as did a bailiff. Finally, respondent also described his commitment to practicing meditation and mindfulness, including his completion of a 52-hour anger management program.[13] Contrary to OCTC's argument that respondent has not demonstrated rehabilitation, his improved professional deportment clearly displays substantial rehabilitation from his misconduct.

V. ADMONITION SERVES THE PRIMARY PURPOSES OF DISCIPLINE

"The primary purposes of disciplinary proceedings ... are the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys[;] and the preservation of public confidence in the legal profession." (*In re Morse* (1995) 11 Cal.4th 184, 205.) **[4b]** As noted *ante*, an analysis of the standards as usually applied is not required where a non-disciplinary disposition, such as an admonition, occurs. Nonetheless, we will look to and consider them to aid us in promoting consistency. (See *In re Silverton* (2005) 36 Cal.4th 81, 91–92.) The Supreme Court has instructed us to follow the standards "whenever possible." (See *In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.)

[4c] The applicable sanction for violations of a court order and violations of an attorney's duties under section 6068, subdivision (b), is standard 2.12(a), which provides for disbarment or actual suspension. OCTC asserts discipline should be imposed within that range, specifically an actual suspension of 30 days, which it notes is the lowest period of actual suspension contemplated by standard 1.2(c)(1).[14]

12. In its briefs on this issue, OCTC misapplies *In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61. That case did not discuss rejecting mitigation for an attorney's *subsequent* period of discipline-free misconduct under standard 1.2(e)(viii) (the earlier version of current standard 1.6(h)), but rejected five years of discipline-free conduct *before* the misconduct occurred as mitigation under standard 1.2(e)(i) (the earlier version of current standard 1.6(a)). (*Id.* at p. 66.)

[11c] 13. The hearing judge considered these facts under standard 1.6(g) (remorse and recognition of wrongdoing), but we find that they are more appropriately considered under standard 1.6(h) to show respondent's rehabilitation.

14. In relevant part, standard 1.2(c)(1) states, "Actual suspension is generally for a period of thirty days, sixty days, ninety days, six months, one year, eighteen months, two years, three years, or until specific conditions are met."

[4d] We find it is appropriate here to impose an admonition, a lesser sanction than the one described in standard 2.12(a), because of respondent's compelling mitigation and lack of aggravating circumstances. (Std. 1.7(c) [appropriate to impose lesser sanction where net effect of mitigating and aggravating circumstances demonstrates lesser sanction will fulfill primary purposes of discipline].) **[12]** In relevant part, standard 1.7(c) also provides, "a lesser sanction is appropriate in cases of minor misconduct, where there is little or no injury to a client, the public, the legal system, or the profession and where the record demonstrates that the [attorney] is willing and has the ability to conform to ethical responsibilities in the future." The facts here meet the requirements of standard 1.7(c). Respondent stipulated to misconduct in the Judge Chan matter and immediately apologized for his comments, which the judge appeared to accept. His misconduct before Judge Moody was very brief, and while speculation has been offered that his actions could have caused a dangerous incident in the courtroom, that is not what actually occurred. His failure to immediately move away from the defendant resulted in no appreciable injury to his client, the public, the legal system, or the profession. Thus, both incidents fall within that standard's definition of "minor misconduct." Further, respondent established his rehabilitation. He has acknowledged he would react differently in the future, which indicates he is willing and has the ability to conform to his ethical responsibilities in the future. Given the circumstances, discipline is unnecessary and would be punitive considering the compelling mitigation and lack of aggravation, the narrow extent of his misconduct, and the lack of consequential harm.

Respondent requests we affirm the hearing judge's order of admonishment. OCTC argues an admonition would be inappropriate given its requirements. **[13a]** Rule 5.126(A) provides a disciplinary proceeding may be resolved by admonition if (1) it does not involve a Client Security Fund (CSF) matter or serious offense, (2) the violation either was not intentional or occurred under mitigating circumstances, and (3) no significant harm resulted. Each requirement is satisfied here.[15] Respondent's misconduct did not involve a CSF matter and was not a "serious offense" as defined under the rules. (Rule 5.126(B) [serious offense involves dishonesty, moral turpitude, corruption, or intentional breach of fiduciary relationship].) Both incidents occurred under mitigating and irregular circumstances.[16] In both, respondent acted as an advocate in a way that he thought was protecting his clients' interests. We agree with the judge that respondent was inexperienced and neglected to properly consider both courts' discretion when he was acting in defense of his clients. Since his misconduct, respondent has acknowledged his wrongdoing and has demonstrated future misconduct is unlikely to recur. Finally, as explained above, no significant harm resulted. Therefore, admonition is appropriate under rule 5.126.

In support of its argument for a 30-day actual suspension, OCTC cites *In the Matter of Collins* (Review Dept. 2018) 5 Cal. State Bar Ct. Rptr. 551. Collins was culpable of five separate violations of section 6103 for intentionally failing to comply with sanctions orders and received a 30-day actual suspension. OCTC seeks to compare respondent's misconduct to Collins's, arguing that interfering with the remand of a criminal defendant

15. The hearing judge issued the admonition without addressing rule 5.126 and analyzing its factors as required.

16. OCTC argues that we should not consider an admonition because respondent's actions were intentional. OCTC fails to acknowledge the entirety of rule 5.126(A)—an admonition can be appropriate when the violation was not intentional *or* when it occurred under mitigating circumstances. Here, we find four mitigating circumstances under standard 1.6, and also consider the other unique circumstances of this case as mitigating under the rule as well, especially respondent's exceptional concern for both of his clients' circumstances. Respondent became upset when no Latino jurors remained after Judge Chan overruled his *Batson-Wheeler* objection, and he was taken aback when Judge Moody unexpectedly remanded his client into custody. Finally, the delay in the remand caused by respondent was very brief. Therefore, we reject OCTC's argument.

should not be viewed as less serious than complying with sanctions orders. While we agree with the underlying premise OCTC makes (i.e., all court orders must be obeyed), under these circumstances, however, respondent's misconduct is factually less serious than Collins's misconduct and would thus suggest less or no discipline. Collins failed to comply with five sanctions orders for a significant period of time. At the time of his disciplinary hearing, more than 18 months later, Collins had not provided proof of payment of the sanctions. In contrast, respondent's misconduct involved two brief courtroom incidents, and, in the case of the contempt order, he paid the fine once his appeals were completed. Therefore, we do not equate the two cases.

OCTC also points to two reproval cases (*In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592 and *In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862), arguing the misconduct in those two cases is less than respondent's misconduct and thus respondent merits a greater discipline.[17] We disagree. While both cases involved attorneys violating court orders, the facts of these cases show either intentional or prolonged disobedience of a court order, along with additional issues, which makes both cases worthy of discipline as opposed to respondent's circumstances. Respondent's actions were different in that his violation of the court order was very brief and, as the hearing judge stated, his disrespectful comments to both judges "were hyperboles stemmed from frustration, not dishonesty." Contrary to OCTC's assertions, both *Respondent X* and *Respondent Y* support a sanction less than reproval as appropriate for respondent.

OCTC argues if standard 2.12(a) is not followed, case law nonetheless supports more than an admonition and cites to *In the Matter of Parish* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 370 and *In the Matter of Lindmark* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 668. The facts of *Parish* are not similar to the current matter; Parish made a factual misrepresentation about his opponent in a judicial election, which violated former rule 1-700 of the State Bar Rules of Professional Conduct (currently designated as rule 8.2 of the State Bar Rules of Professional Conduct). We found Parish's reckless decision to implicate a judge in bribery and corporate fraud warranted a public reproval instead of an admonition because his actions "*uniquely* threaten[ed] to erode public confidence in the judiciary." (*Id.* at p. 378 [italics added].) Respondent's statements to Judge Chan and his brief disobedience of Judge Moody's order to move away from the defendant during remand are not comparable to Parish's false allegation about a judge in an election and does not threaten public confidence in the judiciary, as OCTC argues. Therefore, we reject OCTC's argument that an admonition is improper here based on *Parish*.

Lindmark was a case where we imposed a public reproval for failure to refund an unearned fee. OCTC argues respondent's misconduct is worse than Lindmark's. Like *Parish*, the facts of *Lindmark* are quite dissimilar to those here. Additionally, Lindmark had aggravating circumstances and modest mitigation for eight years of discipline-free practice and good character attested to by four witnesses, while respondent has no aggravation and far more extensive mitigation, including numerous good character witnesses and rehabilitation. Comparing *Lindmark* to this case is also unhelpful as Lindmark was culpable of an attorney-client violation and is also a pre-standards case.

Finally, OCTC cites to two admonition cases, *In the Matter of Respondent V* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 442 and *In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439, to demonstrate that only

17. In *Respondent X*, an attorney received a private reproval for "deliberately" violating a confidentiality order resulting in multiple civil and criminal contempt orders against him. (*In the Matter of Respondent X*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 603.) In issuing the private reproval, we noted the attorney had several mitigating circumstances, no aggravating circumstances, and the facts of the case were "unique." (*Id.* at p. 605.) *Respondent Y* involved an attorney who received a private reproval for failure to timely report court-ordered sanctions and also pay the sanctions, which were unpaid for almost two years including through the time of his disciplinary trial.

"very minor cases" not involving aggravation merit admonition. The misconduct in these two cases is not comparable to respondent's: *Respondent V* involved improper use of the state seal in a solicitation letter, and *Respondent C* involved a failure to communicate with a client. More to the point, like respondent, the attorneys in *Respondent V* and *Respondent C* engaged in very limited misconduct, did not engage in dishonesty, no harm was done, and neither case involved aggravating circumstances. Contrary to OCTC's position, we find both cases support our conclusion to issue an admonition.

[13b] Based on rule 5.126 and the case law, we affirm the hearing judge's order of admonition. The essence of respondent's misconduct is disrespectful comments to a judge in one matter and very brief disobedience of a judge's order in another. Because misconduct occurred, we cannot dismiss the charges and respondent has not requested that from us. Respondent was upset by the superior court's ruling in the first incident and worried about the implications for his client being tried by a jury without a Latino juror. He immediately apologized for his actions and it is clear from his testimony he would not react in the same manner today. In the second incident, respondent complied with the order to move away from the defendant after 10 to 15 seconds and no appreciable harm resulted. He understands his wrongdoing and would not act similarly in the future. He also respects the court's contempt order and paid the associated fine. For these reasons, we agree with the judge that a recommendation of discipline would be punitive here and would not advance the fundamental purposes of attorney discipline—protection of the public, the courts, and the legal profession.

[13c] By issuing an admonition, we do not detract from the seriousness of respondent's misconduct. As an officer of the court, maintaining respect to the courts and following its orders are crucial duties of an attorney; our system of justice could not work otherwise. As the hearing judge aptly noted, "Disagreement with [a] court is expected, but the manner of expression of that dissent is vital." However, in the range of misconduct for these violations, respondent's actions are certainly at the lower end. Based on the record as a whole, given the unique circumstances established, no aggravation, and the extensive and compelling mitigation, we find that an admonition in lieu of discipline is the appropriate disposition of this matter.

VI. ORDER OF ADMONITION

Respondent is admonished upon the filing of this Opinion and Order. (Rule 5.126(A).) Because an admonition does not constitute the imposition of discipline (rule 5.126(D)), the State Bar is not entitled to an award of costs under Business and Professions Code section 6086.10, subdivision (a). In addition, because respondent has not been exonerated of all charges, he is not entitled to an award of costs under Business and Professions Code section 6086.10, subdivision (d).

WE CONCUR:

PURCELL, P. J.
STOVITZ, J.*

* Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

State Bar Court
Review Department

In the Matter of

EDWARD SHKOLNIKOV

A Member of the State Bar

No. SBC-20-O-30528

Filed November 10, 2021, modified January 21, 2022

SUMMARY

Respondent's misconduct, which spanned several years, involved intentional misrepresentation to a client, failure to perform with competence, failure to inform client of significant developments, and improper withdrawal from employment. In aggravation, the Review Department gave limited weight in aggravation for multiple acts of wrongdoing but concluded that respondent caused significant harm to clients in two matters. In mitigation, minimal weight was given to respondent's seven years of discipline-free conduct and emotional difficulties and limited weight was given for respondent's cooperation, good character, and pro bono work. After analyzing the applicable discipline standards and comparable case law, the Review Department increased the hearing judge's recommended 45-day actual suspension, concluding instead that a six-month actual suspension was appropriate and necessary for the protection of the public, the courts, and the legal profession and to emphasize to respondent the importance of respondent's ethical duties to clients.

COUNSEL FOR PARTIES

For State Bar of California: Rachel Simone Grunberg

For Petitioner: Robert Gordon Berke, Esq.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1a-e]

165 Standards of Proof/Standards of Review – Adequacy of Hearing Department Decision
214.30 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6068(m) (communicate with clients)

Where client testified client was not aware case dismissed, and respondent's text messages to client misled client regarding respondent's ongoing work on case and settlement of matter and showed client not aware case dismissed, Review Department concluded respondent culpable of failing to keep client reasonably informed of significant developments in client's legal matter and reversed hearing judge, who credited respondent's testimony over client's and dismissed with prejudice Business and Professions Code section 6068, subdivision (m), charge.

[2a, b]

106.30 Generally Applicable Procedural Issues – Issues re Pleadings – Duplicative charges
204.90 Substantive Issues in Disciplinary Matters Generally – Culpability – General substantive issues re culpability – Other general substantive issues re culpability
214.30 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6068(m) (communicate with clients)
221.11 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6106 – Found – Deliberate dishonesty/fraud
802.69 Application of Standards – Part A – Standard 1.7 – Generally/Other

Where respondent misrepresented case settled when it was actually dismissed, respondent's failure to inform client about dismissal was factually joined with misrepresentation respondent was working on case and getting client settlement money. Review Department therefore treated moral turpitude violation and violation of failing to inform client of significant developments as single offense involving moral turpitude for discipline purposes. No additional disciplinary weight was given to Business and Professions Code section 6068(m) violation because respondent's misconduct underlying section 6068(m) charge was factually same as misconduct underlying moral turpitude charge.

[3a, b]

106.10 Generally Applicable Procedural Issues – Issues re Pleadings – Sufficiency of pleadings to state grounds for action sought
106.20 Generally Applicable Procedural Issues – Issues re Pleadings – Adequate notice of charges
106.40 Generally Applicable Procedural Issues – Issues re Pleadings – Amendment of pleadings
192 Miscellaneous General Issues in State Bar Court Proceedings – Constitutional Issues – Due Process/Procedural Rights
214.30 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6068(m) (communicate with clients)

Notice of Disciplinary Charges must (1) cite statutes or rules attorney allegedly violated; (2) contain facts comprising violation in sufficient detail to permit preparation of defense; and (3) relate stated facts to authorities attorney allegedly violated. Where facts charged in Notice of Disciplinary Charges were very specific, charge cannot be interpreted broadly so other facts not alleged constitute misconduct; such would infringe on respondent's right to fair proceeding as respondent is entitled to adequate notice of rule or statute violated and

manner respondent allegedly violated it. Review Department rejected Office of Chief Trial Counsel's argument that respondent received notice that respondent's overall communication with clients was being charged. As Notice of Disciplinary Charges was narrowly drafted and was not amended to conform to proof, Review Department did not consider other allegations by Office of Chief Trial Counsel on review that respondent failed to communicate in other instances.

[4a, b] **162.10 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters – State Bar's burden**
277.20 Substantive Issues in Disciplinary Matters Generally – Culpability – Rules of Professional Conduct Violations – Prejudicial withdrawal
Where respondent did not take any action on clients' case after hearing where case dismissed and did not tell clients respondent had stopped working on matter, but more than year after hearing told client respondent was working on setting aside dismissal, respondent's failure to take any action resulted in constructive termination of employment. As respondent failed to give notice to clients that respondent was no longer working on case, respondent was culpable of violating former rule 3-700(A)(2).

[5] **106.30 Generally Applicable Procedural Issues – Issues re Pleadings – Duplicative charges**
162.10 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters – State Bar's burden
523 Aggravation – Multiple acts of misconduct – Found but discounted or not relied on
Where respondent was found culpable of three ethical violations (fourth violation involved same misconduct as another violation so was not considered a separate violation for disciplinary purposes), Review Department gave limited weight in aggravation for multiple acts of misconduct. Despite Office of Chief Trial Counsel's argument that respondent should receive significant aggravation for multiple acts of misconduct because misconduct spanned multiple years and caused significant harm, Review Department did not find it appropriate to consider significant harm in assigning aggravation weight for multiple acts of misconduct, as doing so would double count harm in evaluating aggravation for multiple acts of wrongdoing and harm to client, public, or administration of justice.

[6] **162.10 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters – State Bar's burden**
582.10 Aggravation – Harm – To client – Found
Where respondent failed to serve defendant in one matter for over three years and failed to oppose demurrer in another matter, causing court to dismiss clients' cases, and thereafter respondent falsely led clients to believe respondent was working on cases, and clients were distressed to learn years later their cases could no longer be pursued, Review Department agreed with hearing judge that respondent caused significant client harm and assigned substantial weight in aggravation.

[7a, b] **162.20 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters – Respondent's burden in disciplinary matters**
710.33 Mitigation – Long practice with no prior discipline record – Found but discounted or not relied on – Not in practice long enough – Prior to commission of misconduct

Under standard 1.6(a), mitigation includes absence of any prior discipline record over many years coupled with present misconduct which is not likely to recur. Where respondent had practiced law discipline-free for seven years; showed some understanding of misconduct; admitted to clients mistakes made; told clients to pursue malpractice insurance claim; did not contest hearing judge's culpability determinations; attributed misconduct to personal issues affecting focus; and showed some insight into misconduct, Review Department concluded both prongs of standard 1.6(a) were met as there was (1) absence of prior discipline record over many years; and (2) record supported finding respondent's misconduct was aberrational. Review Department, however, assigned minimal mitigation as respondent had only practiced for seven years, minimum amount without misconduct to obtain mitigating credit.

[8] **162.20 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters – Respondent's burden in disciplinary matters**
740.32 Mitigation – Good character references – Found but discounted or not relied on – References unfamiliar with misconduct

Respondent may obtain mitigation for extraordinary good character attested to by wide range of references in legal and general communities who are aware of full extent of misconduct. Where character references included three attorneys, former client, friend, and doctor with whom respondent worked when respondent worked as registered nurse; witnesses had known respondent between 12 and 29 years and spoke positively regarding respondent's character and abilities as attorney but were not aware of full extent of misconduct, limited weight in mitigation given for extraordinary good character.

[9a, b] **162.20 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters – Respondent's burden in disciplinary matters**
725.12 Mitigation – Emotional/physical disability/illness – Found – Without expert testimony
725.32 Mitigation – Emotional/physical disability/illness – Found but discounted or not relied on – Lack of causal relation to misconduct
725.36 Mitigation – Emotional/physical disability/illness – Found but discounted or not relied on – Inadequate showing of rehabilitation
725.59 Mitigation – Emotional/physical disability/illness – Declined to find – Other reason

Some mitigation for extreme emotional difficulties may be available for extremely stressful family circumstances even when no expert testimony established emotional difficulties as directly responsible for misconduct. Where no expert testimony but respondent presented evidence about emotional difficulties; friend corroborated respondent very distraught after mother's death; respondent submitted medical records documenting family members' diagnoses with serious medical issues; but problems did not fully explain respondent's misconduct as family medical issues did not begin until years after respondent took on one client matter; and respondent had not demonstrated when faced with personal problems in future he would handle them differently to avoid future misconduct, Review Department assigned minimal mitigation for respondent's emotional difficulties that coincided with misconduct but such did not mitigate misconduct that did not coincide with emotional difficulties.

[10] **162.20 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters – Respondent's burden in disciplinary matters**
765.39 Mitigation – Substantial pro bono work – Found but discounted or not relied on – Other reason
Pro bono work is a mitigating circumstance. Where two-character witnesses discussed respondent's pro bono work for client with serious drug problem; respondent worked for several years on client's various criminal cases and acted as client's mentor; and client credited respondent for client's two-year sobriety, Review Department concluded respondent's pro bono work was entitled to mitigation but assigned limited mitigating weight as respondent did not establish prolonged dedication to pro bono work.

[11a-c] **802.61 Application of Standards – Part A – Standard 1.7 – (a) Most severe applicable sanction to be used**
802.62 Application of Standards – Part A – Standard 1.7 – (b) Effect of aggravation on appropriate sanction
802.69 Application of Standards – Part A – Standard 1.7 – Generally/Other
833.90 Application of Standards – Part B – Standard 2.11 – Applied – Suspension – Other reason
1091 Miscellaneous Substantive Issues re Discipline – Proportionality with Other Cases
1093 Miscellaneous Substantive Issues re Discipline – Inadequacy of Discipline
Where respondent committed violation involving moral turpitude by misrepresenting to client that client's case settled; misled client to believe respondent was still working on case when case was actually dismissed; case's dismissal resulted from respondent's failure to perform competently by failing to serve defendant in client's case for nearly three years; respondent improperly withdrew from employment in another client matter by when respondent stopped providing services and then misled clients to believe respondent was working on clients' case, most severe applicable disciplinary standard and case law provided that respondent be actually suspended. Degree of recommended discipline, however, was informed by respondent's serious misconduct in two client matters; harm caused to both clients, including dismissal of clients' cases; and fact all misconduct related to respondent's practice of law. Based on review of case law, standards, and aggravation and mitigation, Review Department concluded six-month actual suspension was appropriate and necessary for protection of public, courts, and legal profession and would emphasize to respondent importance of ethical duties to clients.

[12] **180.35 Monetary Sanctions – Imposition of Monetary Sanctions – Not recommended**
Monetary sanctions not recommended by Review Department where matter submitted for decision in Hearing Department prior to March 1, 2021 effective date of amended rule 5.137(H) of Rules of Procedure of State Bar, and all misconduct occurred prior to April 1, 2020 effective date of rule 5.137 of Rules of Procedure of State Bar.

ADDITIONAL ANALYSIS

Culpability

Found

270.31	Intentional, reckless, grossly negligent, or repeated incompetence (RPC 1.1; 1989 RPC 3-110(A); 1975 RPC 6-101(A)(2)/(B))
214.31	Section 6068(m) (communicate with clients)
277.21	Prejudicial withdrawal (RPC 1.16(d); 1989 RPC 3-700(A)(2); 1975 RPC 2-111(A)(2))

Not Found

214.35	Section 6068(m) (communicate with clients)

Mitigation

Found but discounted or not relied on

735.30	Candor and cooperation with Bar (1.6(e); 1986 Standard 1.2(e)(v))

Discipline

1013.06	Stayed Suspension – One year (incl. anything between 1 yr. & 18 mos.)
1015.04	Actual Suspension – Six months (incl. anything between 6 and 9 mos.)
1017.06	Probation – One year (incl. anything between 1 yr. & 18 mos.)
1024	Ethics exam/ethics school

Other

802.10	Standard 1.1
802.29	Standard 1.2

OPINION

HONN, J.

Edward Shkolnikov is charged with five counts of misconduct in two client matters: moral turpitude (misrepresentation), failure to perform with competence, failure to inform client of significant developments (two counts), and improper withdrawal from employment. A hearing judge found Shkolnikov culpable on three of the five counts; he did not find Shkolnikov culpable of the two counts for failure to inform of significant developments. The judge recommended that Shkolnikov be actually suspended for 45 days. The Office of Chief Trial Counsel of the State Bar (OCTC) appeals, arguing that the record supports culpability on all five counts and that an actual suspension of six months is required. Shkolnikov accepts the hearing judge's findings and recommendation.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we find Shkolnikov culpable of four counts of misconduct. His misconduct spanned several years, involved intentional misrepresentation to a client, and caused significant harm in two client matters. Under these circumstances, a 45-day actual suspension is not appropriate. Protection of the public, the courts, and the legal profession is necessary and, in order to achieve that, we recommend a six-month actual suspension as warranted under our disciplinary standards.

I. PROCEDURAL BACKGROUND

OCTC filed a Notice of Disciplinary Charges (NDC) on August 25, 2020. Shkolnikov filed a response on September 23. On November 30, the parties filed a Stipulation to Undisputed Facts (Stipulation). Trial was held on December 8, and closing briefs were filed on December 18. The hearing judge issued his decision on February 16, 2021. OCTC filed a request for review on March 5. After briefing was completed, we heard oral argument on October 13.

II. FACTUAL BACKGROUND[1]

Shkolnikov was admitted to practice in California on June 1, 2005.

A. Herrera Matter

On March 3, 2012, Hortencia Herrera was injured while working at a recycling center in San Luis Obispo. A truck crashed into a container while she was inside, causing bundles of plastic bottles and cans to fall on her. On March 12, Herrera retained Shkolnikov to represent her in a personal injury matter. On March 3, 2014,[2] exactly two years after the accident, Shkolnikov filed a complaint on Herrera's behalf. (*Herrera v. Flowers Foods, Inc.* (Super. Ct. L.A. County, No. BC545459).) Shkolnikov and Herrera executed liens with Herrera's medical providers.

Trial was set for September 3, 2015. On August 17, Shkolnikov did not appear for the final status conference (FSC) or communicate with the court as to the non-appearance. The defendant, Flowers Foods, Inc., had not been served with the summons and complaint and did not appear. The court took the status conference off calendar but kept the trial date on calendar. On September 3, Shkolnikov appeared and advised the court that he would serve the summons and complaint by publication. The court reset the FSC for March 3, 2016, and continued the trial to March 15, 2016. The rescheduled FSC and trial did not take place. Instead, the court issued an order to show cause (OSC) regarding dismissal for failure to prosecute and serve the summons and complaint. On March 3, 2017, Shkolnikov appeared at a hearing on the

1. The facts are based on the Stipulation, trial testimony, documentary evidence, and the hearing judge's factual and credibility findings, which are entitled to great weight, unless we have found differently based on the record. (Rules Proc. of State Bar, rule 5.155(A); *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 748 [Review Department may decline to adopt hearing judge's findings if insufficient evidence exists in record to support them].)

2. The Stipulation stated that the complaint was filed on May 3, 2014. However, the record indicates that the complaint was filed on March 3.

OSC.[3] He requested a continuance to serve the defendant. The court denied the request and dismissed the case with prejudice.

Herrera testified that Shkolnikov never informed her that her case was dismissed. Instead, she stated that she believed Shkolnikov was still working on her case based on her communications with him and that he had negotiated a $40,000 settlement. In fact, the record reveals Shkolnikov failed to inform Herrera that there was no settlement and the case had been dismissed two years earlier. Herrera thought that Shkolnikov was working to track down the money from the defendant in her case, which is corroborated by the text messages between Shkolnikov and Herrera in the record. Shkolnikov texted Herrera on August 30 and 31, 2018, respectively, that he was "on the phone tracking" her settlement money, but there was "no money . . . in the account."[4] Shkolnikov texted Herrera on August 31, 2018, "I settled for 40 we need to pay doctors too. [Whatever] I will save on them will be passed on to you as well." When Herrera asked Shkolnikov to give her the settlement money, Shkolnikov responded, "I wish I could. As soon as [I] get it I will. Believe me I know how much you need it." She also asked about court dates and what other work he was doing on the case. She later texted, "[W]hy won't you send me all my documents of my case...judgment...order you send the bank...all from beginning to end[?]" About a month later, Herrera texted again asking about her money. Shkolnikov confirmed in a text message that he had promised her $40,000.[5] Herrera texted Shkolnikov that he needed to call "them" to get the money.

In April 2019, Herrera texted Shkolnikov, "There is a judgment from a judge and these people are . . . not paying off. [P]lease Edward then go back to that judge and let's get this ball rolling." Shkolnikov responded that he was working on finishing her case. Herrera responded that she was going to look into contacting the Better Business Bureau because Shkolnikov had not closed her case. He texted her, "I mean to be fully committed to you. No other cases." In May 2019, Herrera texted asking for an update on her case. Shkolnikov responded, "I am working on it constantly. I hope to give you definite news." Later she asked, "Do you need to go back to court and let the judge know they don't care what he ordered[?]" Herrera testified that she believed Shkolnikov was still working on her case in 2019.[6] The multiple text messages corroborate Herrera's understanding that the case was ongoing and that Shkolnikov was still doing work for her, not that it had been dismissed. The text messages are documentary evidence that Herrera was not aware her case was dismissed, which corresponds to her testimony. The record supports Herrera's version of events—that she was unaware that her case was dismissed, and she believed Shkolnikov was still working on it. Therefore, we find that Herrera did not know her case was dismissed.[7]

B. Macias Matter

On March 1, 2013, Peter and Leslie Macias were rear-ended in their vehicle by a Los Angeles

3. The record does not indicate why the OSC hearing was not held until 2017.

4. The texts are quoted from the record as styled in the original messages unless indicated in brackets.

5. Shkolnikov testified that the message he sent to Herrera informing her that her case had settled for $40,000 was not meant for her but for someone else. The hearing judge found that this portion of Shkolnikov's testimony was not credible. We adopt this finding.

6. Herrera testified that she told Shkolnikov that she would report him to the State Bar and afterwards he sent her the case file and told her that he could no longer talk to her because she could sue him. Shkolnikov told her that Robert Berke was representing him if she wanted to talk to him. Herrera could not recall if Shkolnikov offered his insurance information to her. She stated she discussed her case with another attorney, but the attorney said there was nothing to be done on her injury case due to the passage of time.

7. Based on the record, we decline to adopt the hearing judge's finding that Herrera heard from Shkolnikov and the court at the OSC hearing that her case was dismissed.

County Metropolitan Transportation (Metro) bus. The Maciases were injured and hired Shkolnikov shortly after the accident to represent them in a personal injury matter. In March 2013, Shkolnikov sent Metro a claim for damages on behalf of his clients, which was rejected; the rejection was served on Shkolnikov.

On February 26, 2015, Shkolnikov filed a complaint against Metro. (*Macias, et al. v. L.A. County Metropolitan Transportation Authority, et al.* (Super Ct. L.A. County, No. BC573614).) On November 2, 2016, Metro demurred to the complaint on the ground that the complaint was untimely under Government Code section 945.6 and, therefore, did not state facts sufficient to constitute a cause of action.[8] Shkolnikov did not file an opposition to the demurrer or an amended complaint. On December 16, 2016, Shkolnikov appeared in court for a hearing on the demurrer. The Maciases were also present in court and were aware that the court had made the tentative ruling to dismiss their case. After oral argument, the court adopted its tentative ruling and sustained the demurrer without leave to amend.

After the case was dismissed in December 2016, Shkolnikov did not take any other action on the Maciases' case and did not tell them that he had stopped working on it. The Maciases believed their case was still viable and that Shkolnikov was working on setting aside the dismissal. The Maciases messaged Shkolnikov asking about their case. In January 2018, Shkolnikov texted Leslie Macias that he was working on setting the dismissal aside and that he was "working on fixing it." Subsequently, the Maciases met Shkolnikov at his office where he admitted that they could no longer sue Metro. He told them that he had made mistakes in their case and they could pursue legal action against him and his insurance.

III. CULPABILITY

A. Count One: Moral Turpitude – Misrepresentation (Bus. & Prof. Code, § 6106)[9]

In count one, the NDC alleges that on August 31, 2018, Shkolnikov stated in writing to Herrera that he had settled Herrera's case, when he knew his statement was false, in violation of section 6106. Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. The hearing judge found that Shkolnikov texted Herrera on August 31, 2018, stating that her case had settled for $40,000, which was a misrepresentation. The judge found that this misrepresentation was material, as Herrera had been waiting for the resolution of her case for years. He also found Shkolnikov acted intentionally. Therefore, he was found culpable of a moral turpitude violation under count one. OCTC does not seek review of this count and Shkolnikov accepts the judge's finding. We find clear and convincing evidence[10] that Shkolnikov is culpable under count one and affirm the hearing judge's culpability determination. (See *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 910 [moral turpitude includes affirmative misrepresentations].)

B. Count Two: Failure to Perform with Competence (Rules Prof. Conduct, rule 3-110(A))[11]

8. Government Code section 945, subdivision (a)(1) generally provides that a suit brought against a public entity must be commenced not more than six months after written notice of the action is given.

9. All further references to sections are to this source, unless otherwise noted.

10. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

11. All further references to rules are to the former California Rules of Professional Conduct that were in effect until November 1, 2018, unless otherwise noted.

In count two, the NDC alleges that Shkolnikov failed to perform with competence in *Herrera v. Flowers Foods, Inc.* by failing to serve the summons and complaint on the defendant from approximately May 2014 to March 2017, in violation of rule 3-110(A). Rule 3-110(A) provides that an attorney "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." The hearing judge found Shkolnikov culpable as charged. His failure to serve the defendant for nearly three years resulted in the dismissal of Herrera's case for failure to prosecute. Neither OCTC nor Shkolnikov challenge this determination. We find clear and convincing evidence that Shkolnikov is culpable under count two and affirm the hearing judge's culpability determination. (See *In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 316 [rule 3-110(A) violation where attorney failed to timely serve summons and complaint, resulting in dismissal of client's case].)

C. Count Three: Failure to Inform Client of Significant Developments (§ 6068, subd. (m))

[1a] The NDC alleges in count three that Shkolnikov failed to inform Herrera that her case, Herrera v. Flowers Foods, Inc. had been dismissed in violation of section 6068, subdivision (m). Section 6068, subdivision (m) provides that it is the duty of an attorney to "respond promptly to reasonable status inquires of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

[1b] The hearing judge found that Herrera attended the OSC hearing on March 3, 2017, where her case was dismissed, which was consistent with Shkolnikov's testimony that he informed Herrera that the court dismissed her case on the day they attended the OSC hearing. The judge found that Herrera heard from Shkolnikov and the court that her case was dismissed, therefore, OCTC did not prove culpability by clear and convincing evidence. The judge dismissed count three with prejudice.

[1c] On review, OCTC seeks culpability under count three. OCTC challenges the finding that Herrera heard from Shkolnikov and the court that her case was dismissed and takes issue with the hearing judge crediting Shkolnikov's version of events over Herrera's. The hearing judge reasoned Herrera knew of the dismissal because she attended the OSC hearing where the case was dismissed. While Herrera could not recall the date of the hearing she attended, she was adamant that the judge did not say that her case was dismissed.[12] She testified that she did not understand what the judge said at the hearing, but she trusted Shkolnikov as her lawyer. Regardless of which hearing she attended, Herrera clearly did not know her case was dismissed. Shkolnikov testified Herrera was in court with him at the OSC hearing, he discussed the dismissal with Herrera, and he explained to her what had happened. We find this testimony is unsupported by the record, especially because Shkolnikov thereafter repeatedly misled Herrera in text messages regarding the settlement and his ongoing work on her case.

[1d] We agree with OCTC that Herrera's testimony is entitled to more weight than the hearing judge assigned. The text messages support her testimony that she did not know her case was dismissed.[13] Other than his testimony that he explained to her on the day of the OSC hearing that

12. Herrera testified that she appeared at only one court hearing. However, she could not recall the date of the hearing, only that it was "late in the case" and "[m]aybe two years after" the case started. Herrera testified that the judge at the hearing where she was present told Shkolnikov to "do a writing, a report." She then asked Shkolnikov whether he would do the writing and he stated that he would. She stated that the judge did not say the case was dismissed.

13. We disagree with Shkolnikov that only Herrera's testimony supports culpability under count three. Rather, the text messages are strong evidence that he did not tell her of the dismissal.

the case was dismissed, Shkolnikov presented no other evidence that would prove he explained to Herrera that her case was dismissed.[14] There are no messages in evidence correcting her when she referred to court orders or the case being ongoing. Instead, the messages show that he stated he was working on her case and working to get her paid in the $40,000 settlement. Herrera's testimony and the text messages are sufficient for us to reverse the judge's culpability finding as they show that she was not aware of the dismissal.[15] (*In the Matter of DeMassa, supra*, 1 Cal. State Bar Ct. Rptr. at p. 742 [reversal of hearing judge's findings when unsupported by the record]; *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 315 [under independent review, Review Department may make different findings than hearing judge based on the record].) Based on Herrera's testimony and the text messages, we find that Shkolnikov did not inform Herrera of the dismissal.

[1e] Accordingly, we find clear and convincing documentary and testimonial evidence that Shkolnikov failed to keep Herrera informed of significant developments in her case, including the dismissal, and find culpability under count three.[16] **[2a]** However, we do not assign additional disciplinary weight because Shkolnikov's misconduct underlying count three is factually the same as that underlying count one: he was dishonest about the settlement and lied to Herrera about the status of her case.[17] (*In the Matter of Moriarty* (Review Dept. 2017) 5 Cal. State Bar Ct. Rptr. 511, 520 [no additional weight in determining discipline where same misconduct underlies two violations].) Therefore, we treat the two violations as a single offense involving moral turpitude. (*Ibid.*)

D. Count Four: Failure to Inform Client of Significant Developments (§ 6068, subd. (m))

In count four, the NDC alleges that Shkolnikov failed to inform the Maciases that the court sustained the defendant's November 2, 2016 demurrer in *Macias v. L.A. County Metropolitan Transportation Authority*, in violation of section 6068, subdivision (m). The Maciases testified that they were present at the hearing on the demurrer and heard Shkolnikov's argument and the court's ruling on the matter. They also stated they spoke with Shkolnikov about the court's dismissal. Therefore, the hearing judge found that OCTC failed to establish by clear and convincing evidence that Shkolnikov violated section 6068, subdivision (m) as alleged in count four and dismissed the count with prejudice.

On review, OCTC asserts that Shkolnikov committed a section 6068, subdivision (m) violation in the Macias matter by failing to keep his clients informed about their case, including the granting of the defendant's demurrer and the significant events leading to that point. OCTC acknowledges that the NDC does not allege this specific misconduct but contends that the NDC is broad enough to put Shkolnikov on notice that all his communications, or

14. Shkolnikov's testimony was uncorroborated, and he failed to produce other text messages or other documentary evidence to support his testimony. (See In the Matter of Bleecker (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 113, 122 [appropriate to consider respondent's failure to produce corroborating evidence as indication that his testimony was not credible].)

15. We reject Shkolnikov's argument that we must review the record under Rules of Procedure of the State Bar, rule 5.150(K), as that rule applies to petitions for interlocutory review, not review of a Hearing Department decision.

16. OCTC and Shkolnikov make arguments regarding which hearing Herrera attended. We find it unnecessary to make such a finding. Even if she was at the hearing where the case was dismissed, it is clear from the record that she did not understand the court's ruling and that she justifiably believed Shkolnikov was still working on her case.

17. [2b] We disagree with OCTC that the acts under counts one and three are discrete. Shkolnikov misrepresented that the case had settled when it had actually been dismissed. His failure to inform Herrera about that development—the dismissal—is factually joined with the misrepresentation that he was working on her case and getting her the settlement money.

lack thereof, related to the demurrer would be at issue in the disciplinary trial.

[3a] "The degree of specificity required [in the NDC] does not necessitate lengthy detailed pleading." (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 173.) Rather, the NDC must (1) cite the statutes or rules an attorney allegedly violated, (2) contain facts comprising the violation in sufficient detail to permit the preparation of a defense, and (3) relate the stated facts to the authorities the attorney allegedly violated. (Rules Proc. of State Bar, rule 5.41(B).) Here, the facts charged in count four were very specific—that Shkolnikov failed to inform the Maciases that the court sustained the demurrer. OCTC now asks us to interpret that charge broadly and argues that other facts constitute misconduct that would violate section 6068, subdivision (m) in the Macias matter. We decline to include other alleged misconduct under the charge of count four. To do so would infringe on Shkolnikov's right to a fair proceeding as he is entitled to adequate notice of the rule or statute he violated and the manner in which he is alleged to have violated it. (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 928-929.)

[3b] We reject OCTC's argument that Shkolnikov received notice that his overall communication with the Maciases was being charged. OCTC's after-the-fact allegations are much broader than what was charged in the NDC and even what was stated in OCTC's pre-trial statement. (See *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, 186 [respondent must not be "left to guess" as to why he is being charged with violating a specified statute].) Further, OCTC did not amend the NDC to conform to proof at trial. If the NDC does not match the subsequent proof at the hearing, the NDC may be amended to conform to proof and the respondent must have a chance to respond. (Rules Proc. of State Bar, rule 5.44(C); *Van Sloten v. State Bar*, *supra*, 48 Cal.3d at pp. 928-929; *Marquette v. State Bar* (1988) 44 Cal.3d 253, 264-265.) Because the NDC was narrowly drafted and was not amended to conform to proof, we will not consider OCTC's allegations on review that Shkolnikov failed to communicate in other instances in the Macias matter.

The Maciases were in court with Shkolnikov when their case was dismissed. They heard and understood the judge's ruling. Therefore, no violation of section 6068, subdivision (m) occurred as alleged in count four. We affirm the hearing judge's dismissal of count four 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].)

E. Count Five: Improper Withdrawal from Employment (Rule 3-700(A)(2))

[4a] Count Five alleges that Shkolnikov failed to take any action on the Maciases' behalf after the December 16, 2016 hearing, and therefore, constructively terminated his employment. The NDC charges that Shkolnikov failed to inform the Maciases that he was withdrawing from employment and did not take reasonable steps to avoid foreseeable prejudice to them, in violation of rule 3-700(A)(2). Rule 3-700(A)(2) provides that an attorney shall not withdraw from employment until the attorney "has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules."

[4b] The hearing judge found that after the December 16, 2016 hearing where the court dismissed the case, Shkolnikov did not take any action on the Maciases' case and did not tell them that he had stopped working on the matter. Instead, more than a year after the court hearing, Shkolnikov informed Leslie Macias that he was working on setting aside the dismissal. The judge found that Shkolnikov's failure to take any action resulted in a constructive termination of the employment. Because Shkolnikov failed to give notice to the Maciases that he was no longer working on the case, the judge determined that Shkolnikov was culpable of violating rule 3-700(A)(2). We agree. Neither OCTC nor Shkolnikov challenge this determination. Shkolnikov had a duty to truthfully inform his clients about the status of their case. Instead, he stopped working for them and later lead them to believe that the case was not over and he was working on setting aside the dismissal. Therefore, we find clear and convincing evidence that Shkolnikov is culpable

under count five and affirm the judge's culpability determination. (See *In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 680 [withdrawal from employment is serious misconduct].)

IV. AGGRAVATION AND MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct[18] requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Shkolnikov to meet the same burden to prove mitigation.

A. Aggravation

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

[5] The hearing judge found culpability for three counts in the NDC and assigned limited weight in aggravation. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646–647 [three instances of misconduct considered multiple acts].) Citing *In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, *In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, and *In the Matter of Martin* (Review Dept. 2020) 5 Cal State Bar Ct. Rptr. 753, OCTC argues that Shkolnikov should receive significant aggravation for his multiple acts of misconduct because it spanned multiple years and caused significant harm. The facts of those cases are not comparable to the instant matter as they involved more acts of misconduct: 65 improper client trust account (CTA) withdrawals in *Song*, 24 counts of misconduct in *Guzman*, and 168 improper CTA uses in *Martin*. We do not find it appropriate to consider significant harm in assigning the level of aggravation for multiple acts of misconduct. Doing so would double count harm in evaluating standards 1.5(b) and 1.5(j). We reject OCTC's argument and find that Shkolnikov's three ethical violations are entitled to limited weight in aggravation.[19]

2. Significant Harm to the Client (Std. 1.5(j))

[6] The hearing judge assigned significant weight in aggravation for the harm Shkolnikov caused Herrera and the Maciases. Neither OCTC nor Shkolnikov challenge this finding. Shkolnikov's failure to serve the defendant for over three years caused the court to dismiss Herrera's case. In the Macias matter, Shkolnikov failed to oppose the demurrer, causing the case to be dismissed. In both matters, his clients did not receive their day in court. After the dismissals, he led them to believe he was working on their cases, which was false. The clients were distressed to learn years after the fact that their cases could no longer be pursued. We agree with the hearing judge that Shkolnikov caused significant client harm and assign substantial weight in aggravation. (*In the Matter of Bach*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 646 [significant aggravation where attorney failed to pursue client's case resulting in its dismissal].)

B. Mitigation

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

[7a] Mitigation includes "absence of any prior record of discipline over many years coupled with present misconduct, which is not likely to recur." (Std. 1.6(a).) Because Shkolnikov "admitted that he lacked focus due to personal matters and advised both clients that they may pursue a claim against him," the hearing judge found his misconduct was aberrational and unlikely to recur. (See *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [when misconduct is serious, long record without discipline is most relevant when misconduct is aberrational].) However, the judge assigned limited weight in

18. All further references to standards are to this source.

19. As explained above, we found Shkolnikov culpable of one additional count more than the hearing judge. However, we do not count it as an additional act under this standard as two of the counts involved the same misconduct.

mitigation because Shkolnikov had only practiced approximately seven years without misconduct.

[7b] OCTC asserts that Shkolnikov is not entitled to any mitigation under standard 1.6(a). We disagree as Shkolnikov's seven years of discipline-free practice satisfies the first prong of the standard: no prior record of discipline over many years of practice. However, this seven-year period is entitled to only minimal mitigation. (See *In the Matter of Tindall* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 652, 664 [practicing less than seven years is not significant mitigation].) Under the second prong of the standard, OCTC argues that Shkolnikov's mitigation should be further reduced because Shkolnikov did not demonstrate that his misconduct was aberrational. We disagree. We decline to totally eliminate Shkolnikov's mitigation under standard 1.6(a) as he showed some understanding of his misconduct, admitted to the Maciases he made mistakes, and told them to pursue a claim with his malpractice insurance. Further, he does not contest the hearing judge's culpability determinations. And Shkolnikov attributed his misconduct to personal issues affecting his focus and showed some insight into his misconduct. Therefore, the record supports the finding that Shkolnikov's misconduct was aberrational. However, we assign less weight than the judge because Shkolnikov had only practiced for seven years, the minimum amount of time without misconduct to obtain credit for this mitigating factor. We assign minimal mitigation for this seven-year period.

2. Cooperation (Std. 1.6(e))

The hearing judge assigned limited mitigation for Shkolnikov's Stipulation because it involved easily provable facts. Neither OCTC nor Shkolnikov challenge this finding. We agree with the judge. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive mitigation weight for admission of culpability and facts].)

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

[8] Shkolnikov 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).) Four witnesses testified at trial and two more submitted character letters. They included three attorneys, a former client, a friend, and a doctor who had worked with him in Shkolnikov's capacity as a registered nurse.[20] His character references had known him for a significant amount of time, between 12 and 29 years, and they spoke positively regarding his character and his abilities as an attorney. However, none of the witnesses stated they read the NDC or discussed the details of the charges with Shkolnikov. Because Shkolnikov's character witnesses were not aware of the full extent of the misconduct, the hearing judge assigned limited weight in mitigation. Neither OCTC nor Shkolnikov challenge this finding. We agree with the hearing judge. (See *In re Aquino* (1989) 49 Cal.3d 1122, 1131 [testimony of witnesses unfamiliar with details of misconduct not given significant weight in mitigation].)

4. Extreme Emotional Difficulties (Std. 1.6(d))

[9a] Standard 1.6(d) provides that mitigation may be assigned for extreme emotional difficulties where (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. However, some mitigation may be available for extremely stressful family circumstances even when there is no expert testimony. (See *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1364 [lay testimony of marital difficulties considered in mitigation]; *In the Matter of Mitchell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332, 338 [lay testimony regarding family concerns mitigating].) The hearing judge found that some of Shkolnikov's misconduct in 2018—his misrepresentation to Herrera and his claim to the Maciases that he was working on setting aside the

20. Prior to becoming an attorney, Shkolnikov was a registered nurse for 10 years.

dismissal—was mitigated by the emotional difficulties he suffered as a result of family stress at the time. Both his wife and mother were dealing with serious medical issues. His mother then died in September 2018, which caused Shkolnikov great distress. The judge noted that Shkolnikov's failure to perform in the Herrera matter occurred between 2012 and 2017, which preceded his family's health issues. Due to "extremely stressful family circumstances" that Shkolnikov endured when he committed some of the misconduct, the judge assigned moderate weight in mitigation.

[9b] On review, OCTC argues that mitigation for emotional difficulties is not warranted because (1) all the misconduct does not coincide with Shkolnikov's family's health issues, (2) Shkolnikov's dishonesty is not explained by his emotional distress, and (3) there were no assurances that his emotional issues are resolved.[21] We agree that Shkolnikov's personal problems do not fully explain his misconduct. The medical issues did not begin until years after Shkolnikov took on the Herrera matter, yet even without these personal problems, Shkolnikov failed to perform competently, resulting in the dismissal of her case. The pressure of dealing with his family's medical problems does coincide with some of the misconduct and is worthy of some mitigation, but not moderate weight as assigned by the hearing judge. Further, Shkolnikov has not demonstrated that when faced with personal problems in the future, he would handle them differently so as to avoid future misconduct.[22] (See *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1072-1073 [concern that routine family stresses or medical emergencies will trigger future misconduct when no assurance that emotional issues are resolved].) For these reasons, we assign minimal mitigation for Shkolnikov's emotional difficulties that occurred during some of the time he committed misconduct. We emphasize that this does not mitigate his failure to perform competently in the Herrera matter.

5. Pro Bono Work

[10] Pro bono work is a mitigating circumstance. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) Two character witnesses discussed Shkolnikov's pro bono work for a client who had a serious drug problem. Shkolnikov worked for several years on the client's various criminal cases and also acted as the client's mentor. The client testified that she has been sober for two years and credited Shkolnikov in that achievement. The hearing judge noted in footnote 12 of the decision that he considered mitigation for pro bono work as there was some witness testimony concerning it. However, the judge decided that Shkolnikov did not meet the burden of proof to establish mitigation credit for his pro bono work. On our independent review of the record, we find Shkolnikov's pro bono work for this client is entitled to mitigation. However, he did not establish a prolonged dedication to pro bono work. (See *Rose v. State Bar* (1989) 49 Cal.3d 646, 667 [mitigation for legal abilities, dedication, and zeal in pro bono work].) Therefore, we assign limited mitigating weight.

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21. OCTC also argued that we should not consider his emotional difficulties mitigating because they were not supported by expert testimony. As noted above, there is precedent for this type of mitigation even without expert witness testimony. (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]; *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].) While there was no expert testimony, Shkolnikov did present evidence on the matter. He testified about his emotional difficulties and a friend corroborated that Shkolnikov was very distraught after the death of his mother. Shkolnikov also submitted medical records documenting his family members' diagnoses.

22. Shkolnikov testified that he was never diagnosed with depression, but when looking back at the time of his difficulties, he stated it was "like a blur." He presented no evidence regarding how he would deal with future difficulties.

V. 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 Silverton* (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.) We also look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

[11a] In analyzing the applicable standards, we first determine which standard specifies the most severe sanction for the at-issue misconduct. (Std. 1.7(a) [most severe sanction shall be imposed where multiple sanctions apply].) The most severe sanction applicable here is under standard 2.11 and provides for actual suspension or disbarment for an act of moral turpitude.[23] Standard 2.11 provides, "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." The hearing judge recommended a 45-day actual suspension. OCTC argues that a six-month actual suspension is warranted due to Shkolnikov's serious misconduct. Shkolnikov did not appeal and asks us to affirm the hearing judge's recommendation.

For guidance, the hearing judge looked to *Wren v. State Bar* (1983) 34 Cal.3d 81 and *Gold v. State Bar* (1989) 49 Cal.3d 908. In *Wren*, the attorney failed to prosecute a client's claim, did not communicate adequately with a client, misrepresented the status of the case to his client, and gave misleading testimony in the disciplinary proceeding. Wren had no prior disciplinary record in over 20 years of practice. The court determined that a 45-day actual suspension was warranted. The court in *Gold* looked to the *Wren* decision and determined that the misconduct in the two cases was similar. In *Gold*, the attorney failed to perform the services for which he was hired, failed to communicate with his clients, and intentionally misrepresented to a client that he had settled her case when it had been dismissed. The court considered in mitigation that (1) Gold paid the client the $900 he had represented was her portion of the settlement, (2) he was not motivated by a desire for personal enrichment, and (3) he had practiced law for over 25 years with no prior discipline. No aggravating circumstances were found. Gold was ordered actually suspended for 30 days. The hearing judge found that Shkolnikov's mitigation was less than Gold's and a suspension longer than 30 days would be appropriate. The judge found that Shkolnikov's mitigation was more similar to Wren's but considered that Wren made misrepresentations in his testimony in addition to his client. Here, we find that Shkolnikov is entitled to limited or minimal mitigation in four circumstances. We disagree that this is of similar weight to Wren's 20 years of discipline-free practice. Shkolnikov's mitigation is much less. In addition, Shkolnikov has aggravation for multiple acts and significant harm; aggravation was not discussed in *Wren*. We look to other cases for additional guidance.

OCTC asks us to consider *Harris v. State Bar* (1990) 51 Cal.3d 1082, *King v. State Bar* (1990) 52 Cal.3d 307, and *Foote v. State Bar* (1951) 37 Cal.2d 127. The attorney in *Harris* was actually suspended for 90 days for her misconduct including abandoning a client for four years and failure to communicate. The court found that Harris's client suffered substantial prejudice and Harris failed to show remorse or an understanding of her wrongdoing. The court gave some mitigation for Harris's illness, but found that it did not excuse four years of neglect and failure to communicate. Harris also had 10 years of discipline-free practice. We find that the balance of Shkolnikov's aggravation and mitigation is similar to Harris's. Shkolnikov did not fail to show remorse, but he had additional

23. Standards 2.7(b) and 2.19 are also applicable and provide for actual suspension.

misconduct including moral turpitude for his misrepresentation to Herrera.

King v. State Bar, *supra*, 52 Cal.3d 307 involved a three-month actual suspension. King willfully neglected his clients in two matters, resulting in an $84,000 uncollected malpractice judgment against King. King's mitigating circumstances included 14 years of discipline-free practice, depression, divorce, and financial problems. In aggravation, there was a serious financial loss to one client, emotional distress to another client, and King's failure to appreciate the severity of his misconduct. Shkolnikov asserts that we should not compare his case to King's as there was no finding here that he did not accept responsibility for his misconduct. We agree that there was no such finding here and that Shkolnikov's aggravation is less than King's. But Shkolnikov's mitigation is also less than King's. We agree with OCTC that this case is instructive due to the similarities to the instant matter: the neglect in two client matters and the significant harm to clients. However, as was the case in *Harris*, missing from *King* is a moral turpitude violation.

OCTC submits that *Foote v. State Bar* (1951) 37 Cal.2d 127 is most on point. *Foote* involved an attorney who dismissed a will contest without authority and lied to his clients, stating that a hearing on the contest would be held in the future. The clients did not learn about the dismissal until after the probate proceedings were completed and the time to oppose the probate had expired. Foote's numerous misrepresentations were found to involve moral turpitude and the court imposed a nine-month actual suspension. OCTC maintains that because Shkolnikov has some mitigation and Foote had none, that lesser discipline than *Foote* is appropriate. We agree.

We find that *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269 is also instructive. Dahlz was culpable of violating the same rules and statutes as Shkolnikov: moral turpitude (§ 6106), failure to perform (rule 3-110(A)), improper withdrawal (rule 3-700(A)(2)), and failure to respond to a reasonable client status inquiry (§ 6068, subd. (m)). Dahlz did not do any substantive work on his client's case for over five years. When a status conference was approaching, Dahlz telephoned the opposing attorney and told her that his client no longer wanted to pursue her claim, which was not true. When he was terminated, he failed to advise his client of upcoming events in her case and failed to give her the case file. Dahlz received aggravation for a single prior record of discipline (no actual suspension), lack of candor for misrepresentations made to the State Bar investigator and false testimony in State Bar Court, multiple acts of misconduct, and significant harm to the client. He received slight mitigating credit for pro bono work and community service. We recommended a one-year actual suspension primarily based on Dahlz's attempt to mislead the State Bar investigator, his false testimony, and his lie to the opposing party to the detriment of his client. Shkolnikov has substantially less aggravation than Dahlz and slightly more mitigation. Therefore, a sanction less than one year of actual suspension would be appropriate. *Dahlz* is informative as it is a more-recent case applying the standard for moral turpitude.

[11b] In the Herrera matter, Shkolnikov committed a violation involving moral turpitude when he misrepresented to his client that he settled her case when that was false. Instead, he misled Herrera to believe that he was still working on her case when it was actually dismissed. And the dismissal was a result of Shkolnikov's failure to perform competently when he did not serve the defendant in Herrera's case for nearly three years. In the Macias matter, he improperly withdrew from employment when he stopped providing services and then eventually misled his clients to believe that he was working on their case. Shkolnikov's inattention to his clients in these matters is serious misconduct, especially because it involves dishonesty. (See *Rhodes v. State Bar* (1989) 49 Cal.3d 50, 60 [fundamental rule of legal ethics is that of common honesty].) The case law and standard 2.11 require that Shkolnikov be actually suspended. Applying the factors in standard 2.11, the degree of the recommended discipline is informed by Shkolnikov's serious misconduct in two client matters; the harm caused to both Herrera and the Maciases, including the dismissal of their

cases; and the fact that all of the misconduct related to Shkolnikov's practice of law.[24]

[11c] The cases mentioned above provide structure to fashioning the appropriate discipline for Shkolnikov's misconduct. The *Harris* and *King* cases guide us to a sanction higher than an actual suspension of 90 days because neither of those cases involved culpability for moral turpitude, which is present in this matter. At the other end of the discipline spectrum are the *Foote* and *Dahlz* matters. Dahlz received a one-year actual suspension for the exact violations as Shkolnikov; however, Dahlz was also found to have made misrepresentations to the State Bar, which we do not find here.[25] Foote received a nine-month actual suspension for lying to his clients, which established a moral turpitude violation. However, Foote had less mitigation than Shkolnikov. Under standard 1.2(c)(1), the typical suspension above 90 days and below one year is six months.[26] Based on the case law, the standards, and the aggravation and mitigation, we find that a six-month actual suspension is appropriate and necessary for the protection of the public, the courts, and the legal profession. This discipline will emphasize to Shkolnikov the importance of his ethical duties to his clients.

VI. RECOMMENDATION

We recommend that Edward Shkolnikov, State Bar Number 237116, be suspended from the practice of law for one year, that execution of that suspension be stayed, and that he be placed on probation for one year with the following conditions:

1. Actual Suspension. Shkolnikov must be suspended from the practice of law for the first six months of the period of his probation.

2. **Review Rules of Professional Conduct.** Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Shkolnikov 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 Shkolnikov's first quarterly report.

3. Comply with State Bar Act, Rules of Professional Conduct, and Probation Conditions. Shkolnikov must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of probation.

4. 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, Shkolnikov 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. Shkolnikov must report, in writing, any change in the above information to ARCR, within 10 days

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24. When responding to OCTC's discipline analysis, Shkolnikov stated that he apologized or otherwise admitted liability for his misconduct to his clients. Any apology or admission to his clients, which came years after his misconduct, is not entitled to any special consideration in determining discipline. (See *Hipolito v. State Bar* (1989) 48 Cal.3d 621, 627, fn. 2 ["expressing remorse for one's misconduct is an elementary moral precept"].)

25. Our finding of a lack of credibility in Shkolnikov's testimony does not equate to clear and convincing evidence that he lied in the disciplinary proceedings. (See *In the Matter of Dahlz*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 282 [discussing distinction between credibility and candor].)

26. In relevant part, standard 1.2(c)(1) states, "Actual suspension is generally for a period of thirty days, sixty days, ninety days, six months, one year, eighteen months, two years, three years, or until specific conditions are met."

after such change, in the manner required by that office.

5. **Meet and Cooperate with Office of Probation.** Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Shkolnikov must schedule a meeting with his assigned probation case specialist 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, Shkolnikov may meet with the probation case specialist in person or by telephone. During the probation period, Shkolnikov 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.

6. **State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court.** During Shkolnikov's probation period, the State Bar Court retains jurisdiction over him to address issues concerning compliance with probation conditions. During this period, Shkolnikov 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, Shkolnikov must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

7. **Quarterly and Final Reports.**

a. Deadlines for Reports. Shkolnikov 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, Shkolnikov 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. Shkolnikov 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. Shkolnikov 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. Shkolnikov is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

8. State Bar Ethics School. Within one year after the effective date of the Supreme Court order imposing discipline in this matter, Shkolnikov 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, Shkolnikov will nonetheless receive credit for such evidence toward his duty to comply with this condition.

9. 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 Shkolnikov has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

10. Proof of Compliance with Rule 9.20 Obligation. Shkolnikov 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, subdivisions (a) and (c), as recommended below. Such proof must include: the names and addresses of all individuals and entities to whom Shkolnikov 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.

VII. MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Shkolnikov 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 Shkolnikov 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.

VIII. CALIFORNIA RULES OF COURT, RULE 9.20

We further recommend that Shkolnikov be ordered to comply with the requirements of California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order imposing discipline in this matter.[27] Failure to do so may result in disbarment or suspension.

IX. MONETARY SANCTIONS

[12] The court does not recommend the imposition of monetary sanctions in this matter, as this matter was submitted for decision in the Hearing Department prior to March 1, 2021, the effective date of amended rule 5.137(H) of the Rules of Procedure of the State Bar, and all the misconduct in this matter occurred prior to April 1, 2020, the effective date of rule 5.137 of the Rules of Procedure of the State Bar. (See *In the Matter of Wu* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 263, 267 [rules of statutory construction apply when interpreting Rules Proc. of State Bar]; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208–1209 [absent express retroactivity provision in statute or clear extrinsic sources of intended retroactive application, statute should not be retroactively applied]; *Myers v. Philip*

27. For purposes of compliance with rule 9.20(a), the operative date for identification of "clients being represented in pending matters" and others to be notified is the filing date of the Supreme Court order, not any later "effective" date of the order. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45.) Further, Shkolnikov is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court filed 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).)

Morris Companies, Inc. (2002) 28 Cal.4th 828, 841 [where retroactive application of statute is ambiguous, statute should be construed to apply prospectively]; *Fox v. Alexis* (1985) 38 Cal.3d 621, 630–631 [date of offense controls issue of retroactivity].)

X. 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 reinstatement or return to active status.

WE CONCUR:

PURCELL, P. J.
McGILL, J.

State Bar Court
Review Department

In the Matter of

DEREK JAMES JONES

A Member of the State Bar

No. 16-O-17503

Filed February 11, 2022, modified April 22, 2022

SUMMARY

Respondent was originally hired as an independent contractor to work on real estate projects for a business. Eventually, respondent acted as the business's in-house counsel, used the title of chief operating officer, and was paid as an employee through his professional law corporation. In negotiating the lease of a commercial property controlled by the business with a non-client, and in connection with the non-client's purchase of a liquor license associated with the property, respondent failed to maintain in a client trust account (CTA) funds of a non-client to whom respondent owed a fiduciary duty, breached his fiduciary duty to the non-client, and intentionally misappropriated for his own personal expenses most of the non-client's funds which were to be maintained in respondent's CTA. Respondent was subsequently terminated by the business. After the termination, the business's chief financial officer requested the return of the $125,000 which should have remained in respondent's CTA. When respondent did not immediately return the funds, the business filed a complaint against respondent alleging several causes of action, including misappropriation of $125,000. When respondent tried to cover up his misconduct by opening a CTA to disburse the funds, he issued three non-sufficient funds checks, two of which were returned. In connection with the civil litigation, respondent also made a misrepresentation to a party owed a fiduciary duty, to the court, and to opposing counsel. Respondent also made a misrepresentation to the State Bar of California's Office of Chief Trial Counsel. The Review Department recommended respondent's disbarment.

COUNSEL FOR PARTIES

For State Bar of California: Alex James Hackert, Esq.

For Respondent: Derek James Jones, Esq., in pro. per.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1] **204.90 Substantive Issues in Disciplinary Matters Generally – Culpability – General substantive issues re culpability – Other general substantive issues re culpability**

Attorney-client relationship can only be created by express or implied contract. Where record established respondent was hired to, and did, legal work at business (including negotiating lease, drafting lease terms, and agreeing to hold money in escrow); business officials considered respondent to be acting as company attorney; respondent referred to himself as counsel in letter agreement; respondent filed form as escrow holder; and respondent declared in civil litigation respondent performed legal work for business, respondent and business had attorney-client relationship. Review Department rejected respondent's arguments that (1) respondent was not doing work for business but rather respondent's professional law corporation was doing work as business's "contractor;" and (2) respondent's professional law corporation was hired by other named business entity, but business that employed respondent was family-owned and associated with several different named entities, including other named business.

[2a, b] **101 Generally Applicable Procedural Issues – Jurisdiction**
102.10 Generally Applicable Procedural Issues – Improper Prosecutorial Conduct – Improper reopening of investigation

Under rule 2101, Rules of Procedure of State Bar, Office of Chief Trial Counsel (OCTC) had exclusive jurisdiction to determine whether to file charges against attorney. Furthermore, under rule 2603, Rules of Procedure of State Bar, OCTC may reopen investigations or complaints if (1) there was new material evidence; or (2) Chief Trial Counsel determines there was good cause. Decision to reopen case was within OCTC's prosecutorial discretion. Rule 2603 did not require OCTC to make good cause showing at trial or hearing judge to make good cause finding to reopen case, and Office of General Counsel approval was not required to reopen matter. Where OCTC, through letter, provided notice to attorney that case was closed but could be reopened, case was not closed "on . . .merits," as respondent contended, and OCTC had discretion to reopen case.

[3a, b] **102.30 Generally Applicable Procedural Issues – Improper Prosecutorial Conduct – Investigative and/or pretrial misconduct**
102.90 Generally Applicable Procedural Issues – Improper Prosecutorial Conduct – Other improper prosecutorial conduct
106.90 Generally Applicable Procedural Issues – Issues re Pleadings – Other issues re pleadings
191 Miscellaneous General Issues in State Bar Court Proceedings – Effect of/Relationship to Other Proceedings
192 Miscellaneous General Issues in State Bar Court Proceedings – Constitutional Issues – Due Process/Procedural Rights
199 Miscellaneous General Issues in State Bar Court Proceedings – Other Miscellaneous General Issues

Rule 2604, Rules of Procedure of State Bar, provided, in part, that Office of Chief Trial Counsel (OCTC) may file Notice of Disciplinary Charges (NDC) when attorney had received fair, adequate, and reasonable opportunity to deny or explain matters that were subject of NDC charges. Rule 5.30, Rules of Procedure of State Bar, required OCTC to notify attorney before NDC was filed of right to request early neutral evaluation conference (ENEC). Where OCTC mailed notice of ENEC right to respondent's State Bar address, but

respondent did not receive notice because respondent had not updated address, which was respondent's responsibility, Review Department held no procedural violation of rule 2604, and hearing judge did not err for not mentioning in decision that no ENEC was held as respondent not entitled to ENEC due to respondent's own failure to update State Bar address

[4a, b] **113 Generally Applicable Procedural Issues – Discovery (rules 5.65-5.71)**
167 Standards of Proof/Standards of Review – Abuse of Discretion

Rule 5.65, Rules of Procedure of State Bar, provided that, generally, written discovery requests must be made and served on other party within 10 days after service of answer to notice of disciplinary charges (NDC), or within 10 days after service of any amendment to NDC. Where respondent was aware of 2013 investigation in 2013 but did not timely request discovery of Office of Chief Trial Counsel's investigation file until one month before trial and 10 months after NDC filed; respondent offered no evidence or valid reason why respondent failed to comply with State Bar discovery rules; respondent had ample opportunity to seek discovery earlier in case; and respondent, by not making timely discovery request, could not properly make motion to compel, hearing judge did not abuse discretion by denying respondent's motion to compel as untimely.

[5a-c] **119 Generally Applicable Procedural Issues – Other Pretrial Matters**
199 Miscellaneous General Issues in State Bar Court Proceedings – Other Miscellaneous General Issues

Pursuant to rule 5.101.1(B), Rules of Procedure of State Bar, unless otherwise ordered by court, parties are required to exchange exhibits at least 10 days prior to pretrial conference, and pursuant to rule 5.101.1(I), failure to comply, without good cause, may constitute grounds for exclusion of exhibits. Where respondent failed to exchange exhibits prior to trial as required by rule and ordered by court, and respondent complained he did not do so as respondent was awaiting receipt of case file, respondent cannot hold Office of Chief Trial Counsel (OCTC) responsible for respondent's failure to exchange exhibits in respondent's possession or which respondent was capable of attaining. Where respondent contended that (1) respondent was experiencing personal problems; (2) respondent lacked litigation experience and had no experience with State Bar Court matters; (3) respondent's counsel withdrew from case 12 days before start of trial, and (4) respondent failed to explain how exclusion of exhibits prejudiced him, respondent did not establish good cause for failing to exchange exhibits with OCTC prior to trial, and Review Department affirmed hearing judge's finding excluding exhibits from evidence.

[6a, b] **119 Generally Applicable Procedural Issues – Other Pretrial Matters**
167 Standards of Proof/Standards of Review – Abuse of Discretion
199 Miscellaneous General Issues in State Bar Court Proceedings – Other Miscellaneous General Issues

Rule 5.104(C), Rules of Procedure of State Bar, required admission of relevant evidence if it was sort of evidence on which responsible persons were accustomed to rely in conduct of serious affairs. Where judge properly excluded respondent's exhibits under rule 5.101.1(I), Rules of Procedure of State Bar, relevance of respondent's evidence was not at issue because respondent had already failed to comply under rule 5.101.1. Review Department held respondent failed to show hearing judge abused discretion in excluding some of respondent's exhibits for failing to comply with Rules of Procedure and therefore rejected respondent's request to admit excluded exhibits into record.

[7a-e] **102.20 Generally Applicable Procedural Issues – Improper Prosecutorial Conduct – Delay in prosecution/limitations period (rule 5.21)**
117 Generally Applicable Procedural Issues – Dismissal
191 Miscellaneous General Issues in State Bar Court Proceedings – Effect of/Relationship to Other Proceedings

Rule 5.21, Rules of Procedure of State Bar, provided generally that disciplinary proceeding must begin within five years from date of violation. Five-year limit was tolled while civil proceedings based on same acts or circumstances as violation were pending in any court. While respondent was acting as fiduciary in holding funds in escrow, five-year limitations period did not commence. As respondent did not deliver all funds until after civil lawsuit filed against him, limitations did not begin to run prior to start of lawsuit. Where counts related to circumstances alleged in civil lawsuit, counts were tolled as related to ongoing civil proceeding. Review Department rejected respondent's argument that civil litigation did not toll limitations period as disciplinary issues related only to small part of civil complaint. Conduct related to violations alleged in notice of disciplinary charges (NDC) was clearly same conduct alleged as part of civil litigation, and no authority requires entire lawsuit or certain percentage of lawsuit to relate to alleged violations. Review Department also rejected respondent's claim that appeal did not toll limitations period because it addressed "derivative" issue related to amount of damages owed, as respondent's appeal was of lawsuit based on same act of violation. Review Department held that while civil litigation was pending, including appeal, limitations period was tolled. However, even if appeal period was not tolled, NDC was filed within limitations period, as NDC was filed well under five years from judgement in civil case.

[8a-c] **221.11 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6106 – Found – Other factual basis**
420.00 Substantive Issues in Disciplinary Matters Generally – Culpability – Common Law/Other Statutory Violations – Misappropriation

Business and Professions Code section 6106 provides, in part, that commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. Willful misappropriation of client's funds involves moral turpitude. Attorney who knowingly converts client funds for attorney's own purpose violates section 6106. When account balance drops below amount attorney required to hold for client, presumption of misappropriation arises. Burden then shifts to attorney to show misappropriation did not occur and that attorney was entitled to withdraw funds. Where letter agreement drafted by respondent contained acknowledgement and receipt signed by respondent which clearly stated respondent had placed non-client's $50,000 security deposit in CTA and funds were to be released only upon non-client's written consent; respondent acted intentionally by depositing $50,000 security fund check into business account instead of client trust account (CTA); respondent immediately began making personal withdrawals of funds; account dipped below $50,000; respondent knew at time respondent deposited money that respondent had agreed to keep funds in CTA, yet failed to do so; and respondent knew respondent was not authorized to use money for personal expenses, Review Department held respondent intentionally misappropriated $50,000 security deposit in violation of section 6106.

[9a-c] **280.00 Substantive Issues in Disciplinary Matters Generally – Culpability – Rules of Professional Conduct (RPC) Violations – Trust account/commingling**

430.00 Substantive Issues in Disciplinary Matters Generally – Culpability – Common Law/Other Statutory Violations – Breach of Fiduciary Duty
1099 Miscellaneous Substantive Issues re Discipline – Other Miscellaneous Issues

Attorney can create fiduciary relationship with non-client when attorney receives money on behalf of non-client. Attorney must then comply with same fiduciary duties in dealing with such funds as if attorney-client relationship existed. Attorney who breached fiduciary duties that would justify discipline if there was attorney-client relationship may be disciplined for such misconduct. Where respondent agreed to hold money from non-client for lease and keep it in client trust account (CTA) until appropriate to release it to proper parties, but failed to do so, respondent violated his fiduciary duties to non-client and violated former rule 4-100(A) of Rules of Professional Conduct. But Review Department assigned no additional weight in discipline as culpability based on same facts underlying Business and Professions Code section 6106 violation. Review Department rejected respondent's argument there was no written agreement regarding $50,000 security deposit's use at time of alleged misconduct, as conduct of parties, when viewed in light of later letter agreement, was strong evidence respondent was to keep security deposit in CTA.

[10] **221.11 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6106 – Found – Other factual basis**
420.00 Substantive Issues in Disciplinary Matters Generally – Culpability – Common Law/Other Statutory Violations – Misappropriation

Where respondent deposited $75,000 for liquor license from non-client into business account rather than client trust account (CTA); failed to maintain that amount; failed to rebut presumption of misappropriation as business account dipped below $75,000; and respondent used money when respondent was not entitled to do so, Review Department held respondent culpable of intentional misappropriation of liquor license funds in violation of Business and Professions Code section 6106. As respondent deposited both security deposit funds and liquor license funds in business account instead of CTA, conduct not one-time mistake but repeated practice.

[11a, b] **221.11 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6106 – Found – Other factual basis**
420.00 Substantive Issues in Disciplinary Matters Generally – Culpability – Common Law/Other Statutory Violations – Misappropriation

Where respondent received non-client's check for furniture, fixtures, and equipment (FF&E) and negotiated check, but no evidence respondent deposited and kept funds in client trust account (CTA) as respondent had agreed to do; respondent could not rebut presumption that funds were misappropriated; and repayment of FF&E funds came from CTA respondent opened over year later and funds were transferred into CTA from non-CTA, Review Department held respondent culpable of intentionally misappropriating funds in violation of Business and Professions Code section 6106.

[12a, b] **213.10 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6068(a)**
1099 Miscellaneous Substantive Issues re Discipline – Other Miscellaneous Issues

Business and Professions Code section 6068(a) provides it is attorney's duty to support Constitution and laws of United States and California. Escrow holder owes fiduciary duties

to escrow parties and must strictly comply with parties' instructions. Where respondent agreed to act as escrow holder, deposited funds into business account, and used money to make personal, unauthorized purchases, rather than safekeeping funds, respondent violated fiduciary duties when respondent distributed money in way not contemplated by parties. Review Department held respondent culpable of violating Business and Professions Code section 6068(a) but assigned no additional disciplinary weight as respondent's breach of fiduciary duties was based on same facts underlying moral turpitude violations.

[13a, b] **221.11 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6106 – Found – Deliberate dishonesty/fraud**
430.00 Substantive Issues in Disciplinary Matters Generally – Culpability – Common Law/Other Statutory Violations – Breach of Fiduciary Duty

Where Notice of Disciplinary Charges alleged respondent made misrepresentations in letter regarding holding funds from non-client business in client trust account (CTA), Review Department rejected respondent's argument that there was no fiduciary duty to non-client business as non-client testified that non-client did not believe respondent agreed to act as fiduciary for non-client or non-client's business. What non-client believed about respondent's duties did not supersede duties respondent had under law as escrow holder and fiduciary. Furthermore, whether respondent was fiduciary to non-client business was not relevant to moral turpitude charge, as section 6106 prohibits any act of attorney dishonesty, whether committed while acting as attorney or not. Review Department held respondent culpable of violating Business and Professions Code section 6106, as respondent's deception about holding money in CTA rose to moral turpitude as misrepresentation was material and intentional.

[14a, b] **221.11 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6106 – Found – Other factual basis**

Attorney's practice of issuing insufficiently funded checks involves moral turpitude. Where respondent issued three checks when there were insufficient funds in bank accounts to cover checks, resulting in two checks returned for insufficient funds, respondent culpable of moral turpitude.

[15] **521 Aggravation – Multiple acts of misconduct – Found**

Moderate weight in aggravation given for multiple acts of wrongdoing where respondent on three separate occasions was required to deposit funds into his client trust account but failed to do so and, instead, misappropriated funds; was culpable of three violations for moral turpitude misrepresentations; and issued three non-sufficient funds checks, two which were returned.

[16a-d] **591 Aggravation – Indifference to rectification/atonement – Found**

Law does not require false penitence, but it does require that attorney accept responsibility for wrongful acts and show some understanding of culpability. Where respondent (1) attempted to skirt responsibility by testifying respondent not hired as attorney for business when record showed respondent was and did legal work while there; (2) claimed even if respondent did legal work for business, work was done by respondent's professional law corporation which limited respondent's liability; (3) failed to comprehend culpability for misappropriation, referring to respondent's actions in reply brief as "clumsy accounting mistakes," believed charges were so implausible that no "Hollywood studio" would buy

screenplay, and referred to proceedings as an "absurd scenario;" (4) attempted to place blame on complainant for disciplinary proceedings; and (5) attempted to emphasize that "no harm resulted" from disciplinary violations, but did not admit any failure of respondent's professional responsibilities, respondent's indifference toward rectification or atonement for consequences of misconduct warranted substantial aggravation.

[17] **710.36 Mitigation – Long practice with no prior discipline record – Found but discounted or not relied on – Present misconduct likely to recur**

Only nominal weight in mitigation given for respondent's nine years of discipline-free practice where respondent's misconduct likely to recur as respondent completely lacked insight into misconduct as respondent failed to acknowledge any wrongdoing or demonstrated respondent had learned how to properly handle entrusted funds.

[18] **740.31 Mitigation – Good character references – Found but discounted or not relied on – Insufficient number or range of references**

Limited weight in mitigation for good character where three witnesses, including two attorneys, who had known respondent for at least 10 years and had read notice of disciplinary charges, testified and described respondent as honest and trustworthy, but character witnesses were not from "a wide range" of references as required by standard 1.6(f), Standards for Attorney Sanctions for Professional Misconduct.

[19] **755.52 Mitigation – Prejudicial delay in proceeding – Declined to find-Inadequate showing of prejudice**

Excessive delay by State Bar in conducting disciplinary proceedings causing prejudice to attorney is mitigating circumstance. For delay to constitute mitigating circumstance, attorney must demonstrate that delay impeded preparation or presentation of effective defense. Where respondent (1) was put on notice regarding potential disciplinary proceedings close in time to alleged misconduct; (2) argued bank records could have aided defense but failed to obtain and keep such records; and (3) did not present sufficient evidence to suggest that Office of Chief Trial Counsel's delay affected ability to present proper defense, Review Department assigned no mitigation.

[20] **765.31 Mitigation – Substantial pro bono work – Found but discounted or not relied on – Insufficient evidence**

Attorney's pro bono work and community service can be mitigating circumstance. Where there was lack evidence to support respondent's own claims of good deeds because respondent's testimony did not detail hours respondent had dedicated to community service or actual work for organization, Review Department afforded only limited weight in mitigation to respondent's pro bono and community service work.

[21a-e] **801.45 Application of Standards – General Issues re Application of Standards – Deviation from standards – Found not to be justified**
822.10 Application of Standards – Part B (Sanctions for specific misconduct) – Standard 2.1 Sanctions for misappropriation – Applied – disbarment (standard 2.1(a))
1092 Miscellaneous Substantive Issues re Discipline – Excessiveness of Discipline

Standard 2.1(a), Standards for Attorney Sanctions for Professional Misconduct, provides for disbarment for intentional misappropriation of entrusted funds. Disbarment may be

avoided if amount misappropriated is "insignificantly small" or "sufficiently compelling mitigating circumstances clearly predominate," but where respondent misappropriated $175,000 – a very significant amount of money – and there were no compelling mitigating circumstances, those conditions were not applicable. Furthermore, no reason existed to depart from discipline in standard 2.1(a) where respondent (1) failed to deposit $175,000 in client funds into client trust account (CTA), instead depositing portion of money in business account where respondent used money for personal expenses without authority; (2) failed to keep $175,000 in trust as respondent was required to do; (3) respondent was culpable of three moral turpitude violations for misrepresentations to non-client business, court and opposing counsel in litigation, and to Office of Chief Trial Counsel (OCTC); (4) in trying to cover up mistakes by opening up CTA to disburse funds, respondent wrote checks when there were insufficient funds to cover the checks and two checks were returned; (5) attempted to shift blame which demonstrated failure to take responsibility for actions; (6) minimized behavior; (7) failed to appreciate fiduciary duties to client and non-client business; (8) defended actions by claiming money was returned, despite clear precedent that attorney who returned misappropriated funds is still culpable of misappropriation; (9) prevalent aspect of disciplinary proceeding was respondent's dishonesty, and respondent demonstrated indifference regarding misconduct which demonstrated respondent unfit to practice law, disbarment was appropriate and necessary to protect public, courts, and legal profession.

ADDITIONAL ANALYSIS

Culpability

Found

280.01	Rule 4-100(A) (Trust account/commingling)
221.19	Section 6106 – (moral turpitude, corruption, dishonesty) – Other factual basis
213.11	Section 6068(a) (support Constitution and laws)

Mitigation

Not Found

720.50	Lack of harm to client/public justice
750.59	Passage of time and rehabilitation – Other reason

Discipline

802.10	Standard 1.1 (Purpose and Scope of Standards)
802.61	Standard 1.7(a) (Determination of Appropriate Sanctions) – Most severe applicable sanction to be used
822.59	Standard 2.1(b) (Sanctions for misappropriation) – Declined to apply – sanction less than presumed discipline imposed – Other reason
824.21	Standard 2.2(a) (Commingling/Trust Account) – Declined to apply – greater sanction imposed – Coupled with other misconduct
831.40	Standard 2.11 (Moral Turpitude, Fraud, etc.) – Declined to apply – Other reason
921.59	Standard 2.12(a) (Violation of court order, oath, or § 6068(a), (b), (d), (e), (f) or (h), or RPC 3.4(f) – Declined to apply – lesser or no discipline – Other reason
1010	Disbarment
180.35	Monetary Sanctions – Imposition of Monetary Sanctions – Not recommended
2311	Inactive Enrollment After Disbarment Recommendation – Imposed

OPINION

HONN, J.

This matter addresses important aspects of the attorney-client relationship, including the fundamental requirements to carefully maintain client funds in the client trust account (CTA) and deal honestly in interactions with clients, opposing counsel, and the court. It also reemphasizes the duties of an attorney acting in the role of a fiduciary.

Derek James Jones is charged with 11 counts of professional misconduct including failure to deposit client funds in a trust account (three counts), misappropriation of client funds (three counts), breach of fiduciary duty, misrepresentation to a party owed a fiduciary duty, issuance of non-sufficient funds (NSF) checks, misrepresentation to the court and opposing counsel, and misrepresentation to the Office of Chief Trial Counsel of the State Bar (OCTC). A hearing judge found Jones culpable of all of the charged misconduct and recommended his disbarment. Jones appeals, denying all culpability and asserting several factual and procedural arguments. OCTC does not appeal and asks us to uphold the hearing judge's recommendation.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we find Jones culpable of 11 counts of misconduct. Unlike the hearing judge, we find that Jones intentionally misappropriated client funds, rather than doing so by gross negligence. Jones's professional misconduct and his arguments during these disciplinary proceedings exhibit a propensity for dishonesty. He committed serious misconduct, including several moral turpitude violations, and has displayed indifference that is very concerning. Therefore, we affirm the hearing judge's recommendation of disbarment and find it is necessary here to protect the public, the courts, and the legal profession.

I. PROCEDURAL BACKGROUND

OCTC filed a Notice of Disciplinary Charges (NDC) on December 5, 2018. Jones did not file a timely response to the NDC. Jones asserts he delivered an answer to OCTC on January 28, 2019, but admits the answer was never filed with the court. OCTC then filed a motion for default. The court granted the motion and entered default on February 14, 2019. Jones filed a motion to set aside the default, which was granted on June 26, 2019. On that same date, Jones filed an answer to the NDC denying all charges.

Trial was held on November 12, 18, 21, and 25 and December 2 and 11, 2019. During trial, the hearing judge granted OCTC's motion to delete paragraph 38 of the NDC. The parties submitted closing briefs and the judge issued his decision on February 21, 2020. Jones filed a request for review on March 27, 2020. After briefing was completed, we heard oral argument on November 17, 2021. During oral argument, we ordered supplemental briefing related to the misappropriation charges. Both parties filed supplemental briefing and the matter was submitted on December 8, 2021.

II. FACTUAL BACKGROUND[1]

Jones was admitted to practice law in California on June 4, 2002. After working for a large law firm in the areas of land use, public works projects, and development agreements, Jones began working for Legado Companies (Legado) in November 2007. Legado's current chief executive officer, Edward Czuker, hired Jones as an independent contractor to work on Legado real estate projects, including obtaining entitlements and permits. Legado is a family-owned business and has operated under various names including

1. The facts are based on trial testimony, documentary evidence, and the hearing judge's factual and credibility findings, which are entitled to great weight, unless we have found differently based on the record. (Rules Proc. of State Bar, rule 5.155(A); *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 748 [Review Department may decline to adopt hearing judge's findings if insufficient evidence exists in record to support them].)

EMC Financial and JDC Management.[2] Jones was to work exclusively for Legado. Eventually, Jones acted as Legado's in-house counsel, used the title of chief operating officer (COO), and was paid as an employee through "Jones PLC."

The allegations in the NDC involve Jones's actions in negotiating the lease of a commercial property in Marina Del Rey controlled by Legado.[3] Killer Shrimp Marina del Rey LP (Killer Shrimp), owned by Kevin Michaels, sought to lease the property from Legado to operate a restaurant. Jones drafted a letter outlining the terms that he and Michaels had agreed would be incorporated into a sublease. The final sublease was to be drafted later. The letter provided for Killer Shrimp to pay a $50,000 security deposit and $50,000 for ownership of the furniture, fixtures, and equipment (FF&E). The agreement stated that the security deposit and the FF&E would be "held in the Jones PLC Attorney-Client Trust Account." The letter referred to Jones as Legado's counsel and COO. Michaels signed the letter on April 29, 2011, agreeing to the terms in the letter. The letter contained an acknowledgement and receipt signed by Jones, which stated Killer Shrimp had placed $100,000 "in care of the Jones PLC Attorney-Client Trust Account, which sum shall be released to [Legado] only upon [Killer Shrimp's] written consent . . . ."[4]

Prior to the signing of the letter, Killer Shrimp had issued a check to Jones PLC dated April 8, 2011, for the $50,000 security deposit. Jones deposited the money into his business checking account at Bank of America, not a CTA, on April 8. The bank account balance dropped to $49,971.04 due to a negative starting balance for the month. The balance stayed below $50,000, dropping to a low of $109.62 by April 28. Many of the withdrawals made from the account that month were for Jones's personal expenses.

On April 29, 2011, Killer Shrimp issued a check to Jones PLC for payment of the $50,000 FF&E. Killer Shrimp's bank account showed the check posting on May 2, 2011, with Jones endorsing the check. The evidence at trial did not show where Jones deposited the check and no credible evidence showed that the money was deposited into a CTA controlled by Jones. In his answer to the NDC, Jones stated he deposited the $50,000 in a Bank of America account. No evidence was produced that this was a CTA.

Negotiations regarding the lease continued through 2011 and 2012. Michaels decided to occupy a larger space at the property and to purchase a liquor license so Killer Shrimp could serve alcohol. Killer Shrimp agreed to purchase the liquor license associated with the property for $75,000. Jones agreed to keep the $75,000 in escrow and to see that the license was transferred to Killer Shrimp. Jones received a $75,000 cashier's check from Killer Shrimp, made out to Jones PLC, which was deposited into Jones's business checking account at Bank of America and credited on February 10, 2012. During the month of February, the account balance fell to a low of negative $15.80. The bank records show that Jones used this account to make personal expenditures. On February 23, 2012, Jones memorialized the terms of the negotiations in another letter, which Michaels signed, and which was intended to be incorporated into a sublease. The terms regarding the $50,000 security deposit and the $50,000 for FF&E remained the same. The agreement regarding the $75,000 for the liquor license was also included in the letter.

On May 21, 2012, Jones executed a form to transfer the liquor license to Killer Shrimp. The form indicated that Jones PLC was the escrow holder/guarantor. The form also stated that Killer Shrimp paid $125,000 in consideration, which was

2. Jones disagrees with the NDC, as it charged he worked for Legado, rather than other Czuker-owned companies. Jones claims Legado did not exist as a corporation until July 26, 2011. The record contradicts his assertion. For example, the April 29, 2011 letter drafted by Jones was written on Legado letterhead with Legado identified as the landlord.

3. The property was owned by Los Angeles County and Legado controlled the master lease.

4. The letter agreement was styled in all capital letters with some bold-faced words, which we have omitted.

comprised of the $50,000 FF&E and the $75,000 for the liquor license.

On August 28, 2012, Legado terminated Jones's employment. After the termination, Legado's chief financial officer, Gary Lubin, requested Jones return $125,000. Jones did not immediately return the funds. Subsequently, on September 14, 2012, Legado filed a complaint against Jones in Los Angeles County Superior Court (*Legado v. Jones*), which alleged 19 causes of action, including misappropriation of $125,000 of the $175,000 paid by Killer Shrimp.[5]

On September 4, 2012, Jones opened a personal checking account at Citibank. Between September 4 and 20, the Citibank account never maintained a balance of more than $11,000. However, on September 20, Jones issued a check for $65,000 from the Citibank account, made payable to "Jones PLC Client Trust Acct," a new CTA that had just recently been opened by Jones on September 17, on the advice of counsel. The $65,000 check issued from the Citibank account was returned for non-sufficient funds on September 24.

On September 18, 2012, the day after opening the new CTA, Jones issued two checks from the account, payable to Legado for "ABC Escrow Killer Shrimp / FF&E," one for $50,000 and one for $75,000. The CTA contained only $100 on the day the checks were issued. On September 19, $60,000 was wired into the CTA. The $50,000 check cleared, but the $75,000 check was returned for non-sufficient funds. On September 20, several deposits were made into the CTA. Legado redeposited the $75,000 check and it cleared on September 24. The ending balance in the CTA for September was negative $3,400; this balance remained through December 31.

In the civil suit, Jones signed a declaration under penalty of perjury on January 24, 2013, which provided, in part:

> It was agreed by Killer Shrimp and Legado that the transfer would be coordinated by and through Jones PLC, a professional law corporation. Accordingly, with the knowledge and consent of the parties, the funds were deposited (in at least two separate tranches) into a Jones PLC Attorney Client Trust Account. [¶] During this period of time, Jones PLC maintained two attorney-client trust accounts. Regrettably in the process of transferring funds from one account to the other, one of two checks made out to Legado Companies was returned unpaid. On the very same date this issue was discovered (Friday, September 21, 2012), the remaining funds were successfully transferred by wire from a Jones PLC Attorney Client Trust Account. [¶] The Jones PLC trust accounts have at various times, contained funds for clients who are unrelated to Legado, Mr. Czuker, or the present lawsuit.

A third amended complaint was filed in the civil suit on July 26, 2013. On May 28, 2014, Legado filed a notice of settlement, advising the court that a conditional settlement had been reached. On July 3, 2014, the parties filed a joint stipulation regarding the settlement, which included a resolution of the third amended complaint and Jones's cross-complaint. The parties obtained an order allowing the court to retain jurisdiction over the execution of the settlement. On December 4, 2014, Legado moved the court to enter the stipulated judgment as a result of Jones's breach of the settlement agreement. On March 16, 2015, the court entered judgment, which provided that Jones had defaulted in making payments pursuant to the settlement agreement.[6] Of the $2.4 million settlement, Jones owed the plaintiffs $1.53 million plus attorney fees and post-judgment

5. The hearing judge determined Jones had returned the $50,000 security deposit prior to September 14, 2012, as the issue was not discussed in a letter from Jones's attorney regarding the return of the $125,000, nor was it an issue in the subsequent *Legado v. Jones* litigation.

6. The settlement agreement covered allegations related to those charged in the NDC as well as several other claims.

interest. Jones appealed the judgment. On July 21, 2016, the Court of Appeal affirmed the judgment.

On May 30, 2017, OCTC sent Jones a letter requesting information about the funds from the Killer Shrimp lease. Jones responded on June 16, stating he placed the $175,000 from Killer Shrimp into a trust account in the name of Jones PLC or with Jones PLC as trustee pursuant to the lease agreement. He stated that "each and all of these three installments were paid into the Trust Account" and further, that he deposited the $125,000 (for the FF&E and the liquor license) in a trust account and disbursed it from the same. He also admitted that the $50,000 security deposit was deposited into a business account and also disbursed from that account, which he called an administrative oversight that was timely acknowledged and corrected.

III. JONES'S FACTUAL DISPUTES[7]

[1] Rule 5.152(C) of the Rules of Procedure of the State Bar provides that disputed factual issues on review must be raised by an appellant in the opening brief; factual errors not raised on review are waived. Jones raises several factual disputes. To start, we address Jones's claims that he was not engaged in the practice of law when he worked for Legado and that there was no attorney-client relationship between him and any Legado entity. An attorney-client relationship "can only be created by contract, express or implied." (*Koo v. Rubio's Restaurants Inc.* (2003) 109 Cal.App.4th 719, 729.) The hearing judge found Jones and Legado had an attorney-client relationship because he did legal work for them, which Jones also admitted in the *Legado v. Jones* litigation. We affirm this finding because the record establishes Jones was hired to do legal work at Legado and Legado officials considered him to be acting as a company attorney.[8] (See *Lister v. State Bar* (1990) 51 Cal.3d 1117, 1126 [conduct of parties can create an attorney-client relationship].) Jones did legal work at Legado, including negotiating the Killer Shrimp lease, drafting lease terms, and agreeing to hold the money in escrow as part of the deal. Czuker and Lubin described Jones's duties for Legado as "in-house counsel," Jones referred to himself as counsel in the April 29, 2011 letter agreement with Killer Shrimp, he filed the ABC form as an escrow holder, and he declared in the *Legado v. Jones* litigation that he performed legal work for Legado.

We reject Jones's argument he was not doing work for Legado, but "Jones PLC" was doing so as a "contractor." Jones, doing work as an attorney, is required to uphold his ethical duties. We also reject his related argument that he was not hired by Legado, but that Jones PLC was hired by EMC Development. As discussed in the factual background section, Legado was a family-owned business, which was associated with several different entities, including EMC Development. EMC Development came to be known as Legado. Jones was on notice that his employment with Legado related to the Killer Shrimp lease was the subject of the alleged professional misconduct.

IV. JONES'S PROCEDURAL ARGUMENTS

A. OCTC Acted Within Its Discretion in Reopening the Case

The hearing judge rejected Jones's argument that OCTC violated rule 2603 of the Rules of Procedure of the State Bar because OCTC has discretion to reopen a matter. OCTC has

7. We have independently reviewed all of Jones's factual arguments, many of which are not outcome determinative as to culpability. Any arguments not specifically addressed have been considered and are rejected as without merit.

8. Jones points to testimony from Michaels of Killer Shrimp and Timothy Martin, one of Jones's character witnesses, both of whom did not characterize Jones as working as an attorney in his role with Legado. However, the hearing judge weighed the testimony of these witnesses and credited the testimony of the Legado officials over these two individuals—both outsiders to the Legado organization. While Michaels had some understanding of Jones's role within Legado due to his interactions with Jones in negotiating the lease, his understanding does not override the credible evidence regarding Jones's relationship with Legado. Michaels had no firsthand knowledge of Jones's role within Legado. We affirm the hearing judge's finding.

exclusive jurisdiction to determine whether to file charges against an attorney. (Rules Proc. of State Bar, rule 2101.) **[2a]** Under rule 2603, OCTC may reopen investigations or complaints if (1) there is new material evidence, or (2) if the Chief Trial Counsel determines that there is good cause. The rule also provides that the Office of General Counsel (OGC) may review investigations and complaints that OCTC has closed. After review, OGC may recommend to OCTC to reopen a case for investigation.

[2b] Jones argues OCTC acted without proper authority in reopening an investigation against him because (1) OCTC did not show good cause to reopen, and (2) OCTC did not obtain OGC approval to reopen. Jones misreads and misapplies the rule. First, rule 2603 does not require OCTC to make a showing of good cause at trial or the hearing judge to make such a finding to reopen a case. That decision is within OCTC's prosecutorial discretion. Furthermore, OCTC warned Jones in an October 30, 2013 letter that the case was closed "without prejudice to further proceedings as appropriate pursuant to rule 2603 of the Rules of Procedure of the State Bar of California." The letter provided notice that the case may be reopened. Therefore, the case was not closed "on the merits" as Jones insists. Second, rule 2603 does not require OGC approval to reopen a case. Rather, OGC has the ability to review closed cases and then recommend to OCTC to reopen. OCTC is not required to get OGC approval to reopen a case.[9]

B. No Violation of Rule 2604

[3a] Rule 2604 of the Rules of Procedure of the State Bar provides, in part, that OCTC may file an NDC when "the attorney has received a fair, adequate and reasonable opportunity to deny or explain the matters which are the subject of the notice of disciplinary charges." Jones argues OCTC violated rule 2604 because it had no "actual communication" with him between June 16, 2017, and the filing of the NDC on December 5, 2018. He also complains he was denied the opportunity to have an early neutral evaluation conference (ENEC) and that the hearing judge did not mention this in the decision.

[3b] Rule 5.30 of the Rules of Procedure of the State Bar requires OCTC to notify an attorney before an NDC is filed of the right to request an ENEC. OCTC mailed this notice to Jones's membership address, but Jones did not receive the notice because he had not updated his membership address, which he admits. It is undisputed that Jones failed to update his membership records address as is his responsibility. (Bus. & Prof. Code, §§ 6002.1, subd. (a)(1) & 6068, subd. (j).) OCTC also maintains it attempted to contact Jones by phone and email. We agree with OCTC that Jones cannot complain that OCTC failed to give him a "reasonable opportunity" to address this case with OCTC or participate in an ENEC when he failed to maintain his contact information with the State Bar. We find no procedural violation of rule 2604 here and certainly no error by the hearing judge for not mentioning there was no ENEC in the procedural history, as Jones was not entitled to one due to his own lapse in responsibility for updating his membership address.

C. No Error in Denial of Jones's Motion to Compel

The hearing judge denied Jones's motion to compel discovery of OCTC's 2013 investigation file because Jones (1) did not timely request discovery pursuant to rule 5.65(B) of the Rules of Procedure of the State Bar and (2) failed to articulate how the file would have helped his case.[10]

9. Jones cites to OGC's request for public comment regarding the amendment of rule 2603 to add "second look" review by OGC, which is found at https://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2016-Public-Comment/2016-05. Jones misreads this posting as well, which contains no discussion that would require OCTC to obtain OGC's permission to reopen a matter. The plain language of the discussion states that proposed rule 2603 would provide an avenue for closed disciplinary complaints to be reviewed by OGC.

10. After hearing testimony, the hearing judge opined on the fifth day of trial that the 2013 case file was relevant. Even though relevant, the judge still found Jones's motion to compel was untimely. Therefore, the judge denied Jones's motion to reconsider the denial of the motion to compel.

The judge found that OCTC halted the investigation while *Legado v. Jones* was pending and pursued charges after it received notice the litigation was completed. In addition, OCTC stated it had not viewed the 2013 file in pursuing the current charges. The judge found Jones did not show what additional documents would have assisted in his defense and that the request for the file was "more of a delay tactic than a legitimate request for discovery." We review the denial of the motion to compel under an abuse of discretion standard. (*In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, 695 [abuse of discretion used for procedural rulings].) Therefore, we evaluate whether or not the hearing judge exceeded the bounds of reason. (See *In the Matter of Geyer* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 74, 78.)

[4a] Rule 5.65(B) provides that, generally, discovery requests "must be made in writing and served on the other party within 10 days after service of the answer to the notice of disciplinary charges, or within 10 days after service of any amendment to the notice." To receive additional discovery, a party must file a motion within 45 days after service of the answer to the NDC. The motion must be supported by a declaration describing the relevancy of the discovery to the allegations or defenses. (Rules Proc. of State Bar, rule 5.66.)

[4b] Jones did not request the 2013 case file until October 9, 2019, which was one month before trial and 10 months after the NDC was filed. His motion to compel was not filed until five days before trial. There is no dispute that Jones was aware of the 2013 investigation in 2013. He has offered no evidence or valid reason why he failed to comply with State Bar discovery rules. Jones had ample opportunity to seek this discovery earlier in the case. (See Rules Proc. of State Bar, rule 5.66(D)(3).) Jones also argues he timely filed the motion to compel under rule 5.69 of the Rules of Procedure of the State Bar, which states, "A party may move to compel compliance with discovery requests within 15 days after the date on which the discovery response was due or served." However, Jones never made a timely request for discovery, so he could not then properly make a motion to compel. For all of these reasons, we find the hearing judge did not abuse his discretion by denying Jones's motion to compel as untimely.

Jones's other arguments regarding the motion to compel have been considered and are denied as lacking good cause. OCTC did not "waive" the discovery timing rules when it proposed a late discovery exchange, especially as Jones did not accept the proposal nor did he provide OCTC any discovery responses or provide any timely exhibits. Further, OCTC's amendment of the NDC on the first day of trial would not trigger additional discovery or extend the timing of discovery under the Rules of Procedure because OCTC *eliminated* allegations. Finally, Jones's argument that *Brady v. Maryland* (1963) 373 U.S. 83 was violated is also unavailing as *Brady* relates to criminal procedure, not State Bar disciplinary procedure.

D. Exclusion of Jones's Exhibits was Proper

[5a] 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).) Jones failed to exchange exhibits prior to trial as required by the rule and ordered by the court. The hearing judge found no good cause for Jones's failure to comply and excluded certain exhibits. However, the judge admitted some of Jones's exhibits.

[5b] Jones argues the hearing judge erred in excluding his exhibits. He complains that he did not exchange exhibits because he was awaiting receipt of the 2013 case file. Jones cannot hold OCTC responsible for his own failure to exchange the exhibits he had in his possession or was capable of attaining. Jones believes he established good cause by demonstrating that he was experiencing personal problems, that he lacked litigation experience and had no experience with State Bar Court matters, and that his counsel withdrew from the case 12 days before the start of trial. None of these reasons establishes good cause for his failure to exchange exhibits with OCTC prior to trial.

Therefore, we affirm the hearing judge's finding excluding the exhibits from evidence.[11]

[6a] Finally, Jones argues the hearing judge violated rule 5.104 by failing to admit relevant evidence and requests that we admit his exhibits into the record.[12] His argument is unavailing. The judge properly excluded the exhibits under rule 5.101.1(I). Therefore, the relevance of Jones's evidence was not at issue because Jones had already failed to comply under rule 5.101.1. For these reasons, we find Jones has failed to show that the hearing judge abused his discretion in excluding some of Jones's exhibits for his failure to comply with the Rules of Procedure. Therefore, we reject Jones's request to admit the excluded exhibits into the record.

In his opening brief, Jones states that he had filed a motion to augment the record to include a declaration from Charles Colby. No such motion was filed at the time.[13] We decline to augment the record as Jones has not established that the record on review is incomplete or incorrect. (Rules Proc. of State Bar, Rule 5.156(E).) Jones also requests that we reopen the record pursuant to rule 5.113 of the Rules of Procedure. That rule requires such a motion to be made in the Hearing Department before review is requested. Accordingly, that request is denied.

E. The NDC Was Filed Within the Limitations Period

[7a] Rule 5.21 of the Rules of Procedure of the State Bar provides, generally, that a disciplinary proceeding must begin within five years from the date of the violation. The five-year limit is tolled while civil proceedings "based on the same acts or circumstances as the violation" are pending in any court. (Rules Proc. of State Bar, rule 5.21(C)(3).) The hearing judge found that counts one through 10 were tolled during the *Legado v. Jones* litigation (Rules Proc. of State Bar, rule 5.21(C)(3)) and the alleged misconduct in count 11 occurred within five years of filing the NDC.

For counts one through eight, Jones argues that *Legado v. Jones* should not trigger the tolling provision of rule 5.21(C)(3) of the Rules of Procedure of the State Bar because the issues relating to Killer Shrimp only comprised a small part of the complaint. Even if the litigation tolls the five-year limit under rule 5.21, Jones argues it should be tolled for only 20 months—from the time the complaint was filed in September 2012 until May 2014 when the settlement was reached. He asserts that the appeal should not be counted in the tolling period because the only issue in the appeal related to the amount due under the settlement agreement. He believes *In the Matter of Saxon* (Review Dept. 2020) 5 Cal. State Bar Ct. Rptr. 728 supports his position: the appeal was based only on the enforceability of a single provision of the settlement agreement and did not extend the tolling period. As to counts nine and ten, Jones argues that they are unrelated to the civil litigation and, therefore, the allegations cannot be tolled.

[7b] The alleged misconduct began in April 2011, when Jones was employed by Legado. OCTC argues the limitations period was tolled during Jones's employment under rule 5.21(C)(1), which provides for tolling "while the attorney represents the complainant." Like the attorney in *Saxon*, Jones was acting as a fiduciary in holding the funds in escrow. And while he did so, the five-year period did not commence. (*In the Matter of Saxon*, *supra*, 5 Cal. State Bar Ct. Rptr. at pp. 734-735.) Jones did not deliver all of the funds until after Legado filed suit against him. Therefore, the limitations did not begin to run prior to the start of the lawsuit. We find that counts one through 10 relate to circumstances alleged in *Legado v. Jones*. While the violation in count nine occurred after Legado sued Jones, the violation alleged relates to the misconduct in the complaint. Count 10 alleges a violation that occurred in connection with the suit,

[5c] 11. In addition, Jones failed to explain how the exclusion of the exhibits prejudiced him. (*In the Matter of Aulakh*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 695 [on appeal, party must show the procedural error was so prejudicial as to result in miscarriage of justice].) Instead, he posits in his responsive brief that OCTC would not be prejudiced if the exhibits were admitted. That is not the proper analysis in order to prevail.

[6b] 12. Rule 5.104(C) of the Rules of Procedure of the State Bar requires the admission of relevant evidence "if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs."

13. Jones later filed a motion to augment on November 16, 2021, which we denied on November 17, 2021.

therefore this count is also tolled as it relates to the ongoing civil proceeding.

[7c] We reject Jones's argument that *Legado v. Jones* did not toll the limitations period because the Killer Shrimp issues related only to a small part of the complaint. Part of the complaint was based on "the same acts or circumstances" as the alleged violations. No authority requires the entire lawsuit or a certain percentage of the lawsuit to relate to the alleged violations. The conduct related to the violations alleged in the NDC was clearly the same conduct alleged as part of *Legado v. Jones*.

[7d] We also reject Jones's claim that his appeal did not toll the limitations period because it addressed a "derivative" issue relating to the amount of damages owed. In *Saxon*, we found that two actions were "derivative" and did not toll the limitations period because they were separate actions filed to enforce an outstanding debt and not based on the same acts or circumstances as the violation. (*In the Matter of Saxon*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 735.) Here, Jones's appeal was of a lawsuit that was based on the same acts of the violation.

[7e] We agree with OCTC that while *Legado v. Jones* was pending, including the appeal, the limitations period was tolled. Even if the appeal period was not tolled, the NDC was still filed within the limitations period because judgment in the civil case was entered on March 16, 2015, and the NDC was filed on December 5, 2018, well under five years from the judgment.

V. CULPABILITY

A. Counts One through Six: Misappropriation (Bus. & Prof. Code, § 6106) and Failure to Maintain Funds in CTA (Rules Prof. Conduct rule 4-100(A))

Counts one through six allege misappropriation and CTA violations regarding the three checks Jones received from Killer Shrimp. The hearing judge found culpability as charged for these counts.

[8a] Business and Professions Code section 6106[14] provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. Willful misappropriation of a client's funds involves moral turpitude. (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 278.) An attorney who knowingly converts client funds for his or her own purpose, clearly violates section 6106. (*Ibid.*) When an account balance drops below the amount the attorney is required to hold for a client, a presumption of misappropriation arises. (See *Edwards v. State Bar* (1990) 52 Cal.3d 28, 37.) The burden then shifts to the attorney to show that misappropriation did not occur and that he was entitled to withdraw the funds. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618.) In the supplemental briefing, the parties addressed whether there was evidence of intentional misconduct for the section 6106 charges (counts four, five, and six). OCTC argued Jones intentionally misappropriated the funds, while Jones maintained there is no evidence of any misappropriation, much less any intentional misappropriation.

Rule 4-100(A) of the Rules of Professional Conduct[15] provides, in part, that client funds held by an attorney must be deposited in a CTA and maintained until the amount owed to the client is settled. (See *In the Matter of Song*, *supra*, 5 Cal. State Bar Ct. Rptr. at pp. 277-278.)

1. Security Deposit: Counts One and Four

[8b] Count four alleges Jones misappropriated the April 8, 2011 $50,000 security deposit check. The bank records show that after Jones deposited the $50,000 for the security deposit into his business account, he failed to maintain those amounts. The hearing judge found Jones failed to rebut the presumption of misappropriation, as the account dipped below $50,000, and Jones did

14. All further references to sections are to this source, unless otherwise noted.

15. All further references to rules are to the former California Rules of Professional Conduct that were in effect until November 1, 2018, unless otherwise noted.

not show he was entitled to use the money. We agree there is clear and convincing evidence Jones is culpable of misappropriation of the security deposit.[16] In addition, we find that Jones acted intentionally when he put entrusted funds into his business account instead of a CTA.[17] He then immediately began to make personal withdrawals using the funds. He knew at the time he deposited the money that he had agreed to keep the funds in his CTA, yet he failed to do so. Additionally, he knew that he was not authorized to use the money for his personal expenses. Therefore, we find that Jones intentionally misappropriated the $50,000 security deposit. (See *Zitny v. State Bar* (1966) 64 Cal.2d 787, 792 [intent may be proved by direct or circumstantial evidence]; *Grim v. State Bar* (1991) 53 Cal.3d 21, 30 [misappropriation where attorney acted deliberately and with full knowledge that funds did not belong to him].)[18]

[8c] Jones argues on review that count four improperly charges him with requiring to hold the $50,000 security deposit in escrow when no such obligation arose until at least spring 2012, when the business asset sale was finalized. We reject this argument as Jones's April 29, 2011 letter clearly states that he [Jones] had placed the security deposit in a CTA and had agreed to hold the funds until Killer Shrimp consented to the release of the funds.

[9a] Count one alleges Jones failed to deposit the $50,000 security deposit check from Killer Shrimp in his CTA in violation of rule 4-100(A). The hearing judge found culpability as Jones was required to hold these funds in a CTA and did not do so. Instead, he deposited the security deposit in his business account. Therefore, he violated rule 4-100(A) as charged in count one. (See *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 976 [rule is violated when attorney fails to deposit funds in manner designated by the rule].) We agree and find culpability for count one, but assign no additional weight in discipline as culpability is based on the same facts underlying count four. (See *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127 [no additional disciplinary weight for rule 4-100(A) violation duplicative of moral turpitude violation].)

[9b] Jones argues on review that Legado was not a "client" of his under rule 4-100(A).[19] As discussed *ante*, we find that Jones and Legado did have an attorney-client relationship. Additionally, he asserts all the funds were not for his "client," Legado, since they were not held for the benefit of Legado. Jones misunderstands his role as a fiduciary in this situation. He had a duty to Legado as its attorney doing legal work, but he also created fiduciary duties under the lease to both Legado and Killer Shrimp. An attorney can create a fiduciary relationship with a non-client when he receives money on behalf of the non-client. (See *Johnstone v. State Bar* (1966) 64 Cal.2d 153, 155-156.) The attorney "must comply with the same fiduciary duties in dealing with such funds as if an attorney-client relationship existed." (*In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632.) An attorney who breaches fiduciary duties that would justify discipline if there was an attorney-client relationship may be disciplined for such misconduct. (*In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, 373.) There is no question that Jones agreed to hold the money from the Killer Shrimp lease and keep it in a CTA until it was appropriate to release it to the proper parties. Under rule 4-100, he was required to deposit all of the money received from Killer Shrimp in a CTA. He failed to do so

16. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

17. We decline to adopt the hearing judge's finding that Jones misappropriated the $50,000 through gross negligence as we find his actions were intentional.

18. In the supplemental briefing, Jones asserts his conduct was not intentional. He compares his case to *In the Matter of Sklar*, *supra*, 2 Cal. State Bar Ct. Rptr. 602, *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, and *In the Matter of Song*, *supra*, 5 Cal. State Bar Ct. Rptr. 273. None of those cases dissuades us from our decision that Jones acted intentionally, especially in light of the other misappropriations discussed in this section (counts five and six). In addition, his argument that due process and controlling precedent militate against finding intentional misappropriation is unsupported.

19. Jones repeats this argument for counts two and three, which we similarly reject.

and thereby violated his fiduciary duties to Killer Shrimp, even if it was not his client. (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813 [violation of fiduciary duty warrants discipline even in absence of attorney-client relationship]; *In the Matter of Lilly* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 185, 191 [even if no attorney-client relationship, attorney held to same fiduciary duties to non-client as if there were an attorney-client relationship].)

[9c] Jones asserts at the time of the alleged misconduct, April 8, 2011, there was no written agreement regarding the use of the $50,000 security deposit. Therefore, he claims he cannot be culpable under count one. We reject his argument. There is no evidence in the record regarding a *written* agreement at the time the check was delivered on April 8. However, the conduct of the parties when viewed in light of the April 29 letter are strong evidence that Jones was to keep the security deposit in a CTA. The April 29 letter memorializes the terms agreed upon by Michaels and Legado, which included holding the funds in a CTA. No evidence suggests Jones could do what he wished with the $50,000 security deposit.

2. Liquor License: Counts Three and Six

[10] Count six alleges Jones misappropriated the $75,000 he held for the liquor license. Like the security deposit funds, Jones deposited the $75,000 for the liquor license into his business account and failed to maintain that amount. He failed to rebut the presumption of misappropriation as the business account dipped below $75,000 and Jones used that money when he was not entitled to do so. Accordingly, we find culpability for intentional misappropriation of the liquor license funds.[20] He deposited both the security deposit funds and the liquor license funds in his business account instead of a CTA. This was not a one-time mistake, but a repeated practice.

Under count six, Jones complains that the NDC should not charge that he was required to hold the funds for "Legado and Killer Shrimp" as no Legado entity had a claim to the funds. We reject this argument as explained *ante*—Jones had an obligation to Killer Shrimp to hold the funds, even if it was not a client.[21] Further, even if the money would not have gone to Legado in the end, according to his agreement, Jones was required to maintain that money in trust, not to use it as he wished. This is the essence of a fiduciary relationship in an escrow.

Count three alleges Jones failed to deposit the $75,000 check for the liquor license from Killer Shrimp in his CTA in violation of rule 4-100(A). We agree with the hearing judge that Jones was required to hold these funds in a CTA and did not do so. Instead, he deposited the funds in his business account. Therefore, he violated rule 4-100(A) as charged in count three. (*Guzzetta v. State Bar*, *supra*, 43 Cal.3d at p. 976.) However, we assign no additional weight in discipline as culpability is based on the same facts underlying count six. (*In the Matter of Sampson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 127.)

3. FF&E: Counts Two and Five

[11a] Count five alleges Jones misappropriated the April 29, 2011 check for $50,000 for the FF&E. The hearing judge found that Jones could not show where he deposited the money, nor could he rebut the presumption that these funds were also misappropriated. We agree. Jones received the check for the FF&E and negotiated it, but there is no evidence showing he deposited and kept the funds in a CTA as he had agreed to do. Accordingly, we find culpability for intentional misappropriation of the FF&E funds.[22]

[11b] Jones asserts he cannot be held culpable under count five for misappropriation because there was no evidence as to where the FF&E money was initially deposited or how it was used. The evidence shows the $50,000 check for the FF&E was endorsed by Jones and the money

20. We decline to adopt the hearing judge's finding that Jones misappropriated the $75,000 through gross negligence as we find his actions were intentional.

21. Jones makes the same argument for count five, which we also reject.

22. We decline to adopt the hearing judge's finding that Jones misappropriated the $50,000 through gross negligence as we find his actions were intentional.

was taken out of Killer Shrimp's account, which establishes a presumption that Jones misappropriated the money. Therefore, Jones must rebut the presumption to avoid culpability for misappropriation. He did not do so. In addition, the repayment of the FF&E came from Jones's CTA he opened in September 2012. Funds were transferred into that CTA from an account that was not a CTA. This is further evidence that Jones misappropriated the money. Accordingly, we affirm culpability for count five.

Count two alleges Jones failed to deposit the $50,000 check for the FF&E from Killer Shrimp in his CTA in violation of rule 4-100(A). No evidence was presented that Jones deposited these funds into a CTA.[23] He was required to hold these funds in a CTA and did not do so. Therefore, we agree with the hearing judge that Jones is culpable as charged in count two. (*Guzzetta v. State Bar*, *supra*, 43 Cal.3d at p. 976.) We assign no additional weight in discipline as culpability is based on the same facts underlying count five. (*In the Matter of Sampson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 127.)

For culpability under count two, Jones believes there was no evidence suggesting he mishandled the $50,000 FF&E deposit. We disagree. The record shows the check was deposited, but there are no records as to where it was deposited. Jones could not produce any records that would confirm the FF&E deposit was placed in a CTA at that time. The only account records he produced from this time period were for a Wells Fargo account, which was not a CTA. In September 2012, Jones opened a new CTA, transferred money into that account from an account that was not a CTA, and then disbursed the money for the FF&E and the liquor license. This is evidence that Jones never put the funds in a CTA to begin with or, at the least, he did not maintain the funds in a CTA as the source of the transferred money was not from a CTA.

B. Count Seven: Failure to Comply with Laws – Breach of Fiduciary Duty (§ 6068, subd. (a))

[12a] Count seven alleges Jones breached the fiduciary duty he owed to Legado and Killer Shrimp when he mishandled the $175,000 in funds and disbursed the money without knowledge or consent from Legado and Killer Shrimp, in violation of section 6068, subdivision (a). That section provides that it is the duty of an attorney to support the Constitution and laws of the United States and of this state. An escrow holder owes fiduciary duties to the escrow parties and "must comply strictly with the instructions of the parties." (*Summit Fin. Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711.) The hearing judge found Jones culpable under count seven, but assigned no additional weight in discipline as culpability was based on the same facts underlying counts four, five, and six. (*In the Matter of Sampson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 127.)

[12b] Under count seven, Jones repeats his arguments made under counts one through six, which we have rejected above. He further argues that culpability under count seven requires a finding that he disbursed the funds and enriched himself, which the record does not support. We reject this argument as there is clear and convincing evidence Jones violated his fiduciary duties to both Legado and Killer Shrimp. Jones deposited the funds into his business account and instead of safekeeping the funds, he used the money to make personal, unauthorized purchases. Jones agreed to act as an escrow holder and violated his duties when he distributed the money in a way not contemplated by the parties. Therefore, we find culpability under count seven. (*Crooks v. State Bar* (1970) 3 Cal.3d 346, 355-356 [professional misconduct and violation of fiduciary duties when attorney acted without authority in distributing escrow funds].) We decline to assign additional disciplinary weight as Jones's breach of his fiduciary duties is based on the same facts underlying the moral turpitude charges in counts four, five, and six. (*In the Matter*

23. Jones states he had Wells Fargo accounts during the relevant time period. No evidence was introduced that any of these accounts was a CTA.

of Sampson, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 27.)

C. Count Eight: Moral Turpitude – Misrepresentation (§ 6106)

[13a] Count eight alleges Jones made misrepresentations in writing in the April 29, 2011 letter regarding holding the funds from Killer Shrimp in his CTA. The hearing judge found Jones culpable for misrepresenting to Killer Shrimp that he would hold the funds in a CTA. At the time of the letter, Jones had already deposited the security deposit in his business account and had misappropriated the money.

[13b] Regarding culpability under count eight, Jones argues there was no fiduciary duty to Killer Shrimp as Michaels testified he did not believe Jones agreed to act as a fiduciary for him or Killer Shrimp. First, Michaels's belief about Jones's duties does not supersede the duties Jones has under the law as an escrow holder and fiduciary. Michaels also testified he understood that Jones held the money in escrow and had a duty not to take the money. Second, whether or not Jones was a fiduciary to Killer Shrimp is irrelevant to this moral turpitude charge. (*In the Matter of Lilly*, *supra*, 2 Cal. State Bar Ct. Rptr. at pp. 191-192 ["section 6106 prohibits *any* act of attorney dishonesty, whether or not committed while acting as an attorney"].) "[A] member of the State Bar should not under any circumstances attempt to deceive another person. [Citations.]" (*McKinney v. State Bar* (1964) 62 Cal.2d 194, 196.) Jones's deception about holding the money in a CTA rises to moral turpitude misrepresentation as it was material and intentional. Therefore, we find culpability under count eight. (See *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 910 [moral turpitude includes affirmative misrepresentations].)

We also reject Jones's argument he was not culpable under count eight because the April 29, 2011 letter was not a "lease agreement." In count eight, the NDC quoted language from the letter and then in a subsequent paragraph referred to the letter as a "lease agreement." The misrepresentation charge relates to the false statements in the letter, not whether or not the letter was a "lease agreement."

D. Count Nine: Moral Turpitude – Issuance of NSF Checks (§ 6106)

[14a] Count nine alleges Jones issued three checks when there were insufficient funds in his accounts to pay the checks. An attorney's practice of issuing such insufficiently funded checks involves moral turpitude. (*In the Matter of Heiser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 47, 54; see also *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 169 [gross negligence in handling entrusted funds, which results in issuance of NSF checks due to insufficient funds, supports moral turpitude conclusion].) On September 18, 2012, Jones issued two checks to Legado from his newly created CTA, one for $50,000 and one for $75,000. On that date, the CTA balance was $100. Funds were eventually deposited into the account to cover the checks, but the $75,000 check was initially returned. On September 20, Jones issued a check for $65,000 from his Citibank account payable to his CTA when there were insufficient funds to cover the check. This check was returned on September 24. The hearing judge found Jones was grossly negligent in handling these funds and culpable of moral turpitude as charged in count nine.

[14b] In contesting culpability under count nine, Jones seems to argue that his counsel sent out the checks before Jones had given the authorization. No evidence in the record supports this allegation. Jones also asserts the hearing judge found that the $50,000 check was returned. The judge made no such finding. Instead, the judge found that when Jones wrote the $50,000 check, he did not have sufficient funds to cover the check. The record makes clear Jones issued checks when the funds were not available to cover the amounts, resulting in two checks returned for insufficient funds. Therefore, we affirm the hearing judge's culpability determination under count nine.

E. Count Ten: Moral Turpitude – Misrepresentation to the Court and Opposing Counsel (§ 6106)

Count 10 alleges Jones made misrepresentations in a declaration filed in *Legado*

v. Jones. The hearing judge found Jones's statements were clearly intended to, and did, in fact, give the false impression he had deposited the funds from Killer Shrimp into a CTA immediately upon receipt of the funds. Therefore, he was found culpable of a moral turpitude violation. We agree and reject Jones's argument that his declaration represented a mistaken recollection, instead of a misrepresentation.

F. Count Eleven: Moral Turpitude – Misrepresentation to OCTC (§ 6106)

Count 11 alleges Jones made misrepresentations to OCTC in a June 16, 2017 letter regarding what he did with the $175,000 in funds he received from Killer Shrimp. The hearing judge found Jones falsely stated in the letter that he had placed $175,000 in a CTA. The record showed that only $125,000 was placed in a CTA, which was done in September 2012, and not when the funds were received. Therefore, the judge found culpability for moral turpitude under count 11. We agree and, like count 10, reject Jones's argument that he is being penalized for "having an incomplete recollection of events." The record supports the finding that Jones was intentionally misleading the State Bar in an attempt to hide that he failed to deposit the funds from Killer Shrimp in a CTA when they were received.

VI. AGGRAVATION AND MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, Title IV, Standards for Attorney Sanctions for Professional Misconduct[24] requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Jones to meet the same burden to prove mitigation.

A. Aggravation[25]

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

[15] On three separate occasions, Jones was required to deposit funds into his CTA, but he failed to do so and, instead, misappropriated the funds. He was also culpable of three violations for his moral turpitude misrepresentations. In addition, he issued three checks when there were insufficient funds to cover them, two of which were returned. The hearing judge found aggravation for Jones's multiple acts of misconduct. We agree and assign moderate weight in aggravation. (Cf. *In the Matter of Song*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 279 [65 improper CTA withdrawals constitute significant aggravation]; *In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 317 [significant weight in aggravation for 24 counts of misconduct involving harm to clients over four-year period].)

2. Indifference Toward Rectification or Atonement for the Consequences of the Misconduct (Std. 1.5(k))

[16a] We agree with the hearing judge that Jones's lack of insight into his misconduct calls for aggravation. While the law does not require false penitence, it does require that an attorney accept responsibility for wrongful acts and show some understanding of his culpability. (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Jones attempts to skirt responsibility by testifying that he was not hired as an attorney for Legado, when the record shows he was and did legal work while there. He asserts that even if he did legal work for Legado, it was "Jones PLC" doing the work, which would limit his liability. This attempt to avoid responsibility for his actions as an attorney shows his inability to conform to professional standards.

[16b] Jones initially testified that he did not recall whether the funds were placed in a CTA. He subsequently acknowledged that he deposited $125,000 in his business account, not his CTA. In his reply brief, he describes his actions as simply "clumsy accounting mistakes." He fails to comprehend that he is culpable of misappropriation. He believes the charges are so implausible that no "Hollywood studio" would buy the screenplay and refers to the proceedings as an "absurd scenario." His testimony and arguments on

24. All further references to standards are to this source.

25. Jones made no specific arguments in his briefs regarding aggravation.

review clearly show he lacks remorse for, or any insight into his misconduct.

[16c] Jones's failure to accept responsibility is established in the blame he attempts to place on the complainant for these disciplinary proceedings. An attorney who does not accept responsibility for his actions and instead seeks to shift it to others demonstrates indifference and lack of remorse. (*In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 14.) Jones states, "these proceedings were initiated at the unflagging insistence of a single vexatious complainant named Edward Czuker who already got much more than the proverbial pound of flesh from [Jones] through expensive civil litigation and extensive and strategic infliction of reputational damage." He finds fault in Czuker for complaining to the State Bar after the settlement agreement was executed. This blame-shifting is deserving of aggravation.

[16d] Further, Jones believes he should not be held responsible for a disciplinary violation because he later reimbursed the funds from another source. Jones's attempts to emphasize that "no harm resulted," but does not admit any failure of his professional responsibilities. These facts are troubling and cause concern that future misconduct will recur. (*In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 380.) For these reasons, we assign substantial aggravation under standard 1.5(k).

B. Mitigation[26]

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

[17] Mitigation includes "absence of any prior record of discipline over many years coupled with present misconduct, which is not likely to recur." (Std. 1.6(a).) The hearing judge assigned limited mitigation for Jones's lack of prior discipline because Jones failed to establish that his misconduct was not likely to recur. (See *Cooper v. State Bar* (1987) 43 Cal. 3d 1016, 1029 [when misconduct is serious, long record without discipline is most relevant when misconduct is aberrational].) Jones failed to acknowledge any wrongdoing or demonstrate that he has learned how to properly handle entrusted funds. Given Jones's complete lack of insight into his misconduct, we view his misconduct as likely to recur. Therefore, we assign only nominal weight in mitigation for his nine years of discipline-free practice.

2. Extraordinary Good Character (Std. 1.6(f))

[18] Jones 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).) Three witnesses, including two attorneys, testified at trial and described Jones as honest and trustworthy. They had known Jones for at least 10 years and had read the NDC. The hearing judge determined that Jones's character witnesses were not from "a wide range" as the standard requires and assigned limited weight in mitigation. We agree. (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 387 [three attorneys and three clients did not constitute wide range of references].)

3. Excessive Delay (Std. 1.6(i))

[19] Excessive delay by the State Bar in conducting disciplinary proceedings causing prejudice to the attorney is a mitigating circumstance. (Std. 1.6(i).) In order for a delay to constitute a mitigating circumstance, "an attorney must demonstrate that the delay impeded the preparation or presentation of an effective defense. [Citation.]" (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 361.) The hearing judge did not assign mitigation as Jones did not establish how he was prejudiced by the delay. We agree. Jones was put on notice regarding potential disciplinary proceedings as early as 2013, which was very close in time to the alleged misconduct. He argued that bank records could have aided him in his defense, but it was Jones who failed to obtain and keep these records, which is surprising in light of the ongoing *Legado v. Jones* litigation. We find Jones has not presented

26. Jones argues, generally, that the hearing judge underweighted the assigned mitigation, but fails to offer any specific supporting analysis.

sufficient evidence to suggest that OCTC's delay affected his ability to present a proper defense.

4. Pro Bono Work and Community Service

[20] An attorney's pro bono work and community service can be a mitigating circumstance. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) Jones testified he has taken on pro bono work and has volunteered his services for various organizations. The hearing judge assigned limited weight in mitigation due to Jones's lack of evidence to support his own claims regarding his good deeds. We agree. Further, his testimony did not detail the hours he has dedicated to community service or the actual work he did for these organizations. Therefore, he has failed to prove a dedication to pro bono work or community service that would deserve any more mitigation than that given by the hearing judge. (Cf. *Rose v. State Bar* (1989) 49 Cal.3d 646, 667 [mitigation for legal abilities, dedication, and zeal in pro bono work].)

5. No Additional Mitigation

Jones declares in his opening brief that he is entitled to mitigation for lack of harm (std. 1.6(c)) and remoteness in time of the misconduct and subsequent rehabilitation (std. 1.6(h)). However, he offers no evidence to support these claims. We have independently reviewed the record and find there is no clear and convincing evidence that would support additional mitigation under the standards.

VII. DISBARMENT IS THE APPROPRIATE 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 Silverton* (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.) We also look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

In considering the applicable standards, we first determine which standard specifies the most severe sanction for the at-issue misconduct. (Std. 1.7(a) [most severe sanction shall be imposed where multiple sanctions apply].) **[21a]** Here, standard 2.1(a) is the most severe and provides for disbarment for Jones's intentional misappropriation of entrusted funds.[27] Misappropriation of trust funds "breaches the high duty of loyalty owed to the client, violates basic notions of honesty, and endangers public confidence in the profession. [Citations.]" (*Kelly v. State Bar* (1988) 45 Cal.3d 649, 656.) It is grave misconduct for which disbarment is the usual discipline. (*Edwards v. State Bar*, *supra*, 52 Cal.3d at p. 37.) "Even a single 'first-time' act of misappropriation has warranted such stern treatment." (*Kelly v. State Bar*, *supra*, 45 Cal.3d at p. 657.)

[21b] Standard 2.1(a) also provides that an attorney may avoid disbarment if the amount misappropriated is "insignificantly small" or "sufficiently compelling mitigating circumstances clearly predominate." Neither of those conditions applies here. Jones misappropriated $175,000, a very significant amount of money. (See *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1361, 1368 [$1,355.75 held to be significant amount]; *In the Matter of Spaith*, *supra*, 3 Cal. State Bar. Ct. Rptr. 511 [disbarment for intentional misappropriation of nearly $40,000 in single client matter].)[28] Three

27. We decline to analyze discipline under standard 2.1(b) as the hearing judge did because we find Jones's misappropriation was intentional, not grossly negligent. Standards 2.2(a), 2.11, and 2.12(a) are also applicable.

28. The hearing judge also looked to *Spaith* and found that Jones's misconduct was more serious and extensive in comparison to Spaith's and that Jones had less mitigation than Spaith. We agree. Spaith received little weight in mitigation for his financial and emotional problems and his confession and repayment of the money. He also received some mitigation for 15 years of discipline-free practice, however, that was tempered by concerns of future misconduct. In addition, Spaith had strong character evidence and displayed candor and cooperation to the State Bar. Spaith's mitigation was not compelling enough to justify a sanction less than disbarment. Jones's mitigation is limited or nominal for his nine years of discipline-free practice, good character, and pro bono work and community service.

mitigating circumstances are present here, but their mitigating weight is limited. Therefore, Jones's mitigation is clearly not compelling, nor does it predominate over the serious misconduct and two aggravating circumstances.

[21c] We also consider whether any reason exists to depart from the discipline in standard 2.1(a). We acknowledge that disbarment is not mandatory in every case of attorney misappropriation. (See, e.g., *Edwards v. State Bar*, *supra*, 52 Cal.3d 28 [12 years' discipline-free practice, no acts of deceit, full repayment made before aware of complaint to State Bar; one-year actual suspension]; *Howard v. State Bar* (1990) 51 Cal.3d 215 ["relatively small sum" of $1,300 misappropriated and rehabilitation from alcoholism and drug dependency; six-month actual suspension].) However, if we deviate from recommending disbarment, we must articulate clear reasons for doing so. (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons for departure from standards].) Here, we find no reason to deviate from the presumed sanction. Jones failed to deposit $175,000 in client funds into his CTA, instead depositing a portion of the money in a business account where he used the money for personal expenses without authority. He failed to keep the $175,000 in trust as he was required to do. In addition, he is culpable of three moral turpitude violations for his misrepresentations to Killer Shrimp, to the court and opposing counsel in the *Legado v. Jones* litigation, and to OCTC. When he tried to cover up his mistakes by opening up a CTA to disburse the funds, he wrote checks when there were insufficient funds to cover the checks and two were returned.

[21d] Finally, we address Jones's arguments on review regarding discipline. Jones contends on review that disbarment is not justifiable based on the facts of the case. He complains the hearing judge "has answered the prayers of a complainant fixed on maximizing harm to [him]." This attempt to shift blame shows a failure to take responsibility for his actions, which is very concerning. He minimizes his behavior as "clumsy accounting mistakes" and argues that the agreement to hold funds in a CTA was nonbinding. He maintains he had no duty to hold the funds in a trust account, as Legado was not his client. He fails to appreciate that he had fiduciary duties to both Legado and Killer Shrimp. Jones also defends his actions by claiming the money was returned, despite clear precedent that an attorney who returns misappropriated funds is still culpable of misappropriation. (*In the Matter of Elliott* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr 541, 544.)

[21e] The prevalent aspect of this proceeding is Jones's dishonesty. As noted above, he attempts to mislead us regarding the nature of his work at Legado, claiming he did not do legal or attorney work at Legado, "Jones PLC" was the actual Legado contractor and should be held responsible, and he did not actually work for Legado, but some other entity. His misconduct is also rife with misrepresentations: to the court and opposing counsel, to OCTC, and to Killer Shrimp. He agreed to place three separate checks into a CTA and he did not do so. He then misappropriated the money, used it for personal expenses, and did not maintain the funds in his accounts. Jones attempted to cover up his misconduct by opening up a CTA and transferring funds into it so he could pay out the funds from the CTA. His professional misconduct, including misappropriation and multiple misrepresentations, along with his indifference regarding his misconduct demonstrates he is unfit to practice law. Accordingly, disbarment is appropriate and necessary to protect the public, the courts, and the legal profession.

VIII. RECOMMENDATIONS

We recommend that Derek James Jones, State Bar Number 219803, be disbarred from the practice of law in California and that his name be stricken from the roll of attorneys.

CALIFORNIA RULES OF COURT, RULE 9.20

We further recommend that Derek James Jones be ordered to comply with the requirements of California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively,

after the effective date of the Supreme Court order imposing discipline in this matter.[29]

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 reinstatement or return to active status.

MONETARY SANCTIONS

We do not recommend the imposition of monetary sanctions in this matter, as this matter was commenced before April 1, 2020. (Rules Proc. of State Bar, rule 5.137(H).)

IX. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

The order that Derek James Jones be involuntarily enrolled as an inactive attorney of the State Bar pursuant to section 6007, subdivision (c)(4), effective February 24, 2020, will remain in effect pending consideration and decision of the Supreme Court on this recommendation.

WE CONCUR:

McGILL, Acting P.J.
STOVITZ, J.*

29. For purposes of compliance with rule 9.20(a), the operative date for identification of "clients being represented in pending matters" and others to be notified is the filing date of the Supreme Court order, not any later "effective" date of the order. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45.) Further, Jones 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).)

* Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

State Bar Court
Review Department

In the Matter of

TROY LAWRENCE ELLERMAN

Petitioner

No. SBC-20-R-30300

Filed May 6, 2022

SUMMARY

Petitioner resigned with disciplinary charges pending in 2007 related to federal criminal convictions for filing a false declaration, obstructing justice, and two counts of criminal contempt arising from petitioner's leak of Bay Area Laboratory Co-operative (BALCO) federal grand jury materials in violation of a federal judge's protective order. Given the seriousness of petitioner's misconduct, which involved no less than 13 bad acts, including instances of dishonesty to the court, lying to law enforcement, and blame shifting, petitioner had the heaviest of burdens in establishing overwhelming proof of rehabilitation and present moral fitness to practice law. The Review Department concluded that although petitioner had begun his path to rehabilitation and had made rehabilitative gains, petitioner failed to meet his heavy burden of proving his rehabilitation and present moral qualifications to practice law in California by clear and convincing evidence. Though not relying entirely on the same factors as the hearing judge, the Review Department upheld the hearing judge's denial of petitioner's second petition for reinstatement to the practice of law in California.

COUNSEL FOR PARTIES

For State Bar of California: Peter Allen Klivans, Esq.

For Petitioner: Michael Erik Vinding, Esq

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a, b] **2590 Issues in Reinstatement Proceedings – Miscellaneous Issues in Reinstatement Proceedings**

Petitioner's claim in book he wrote that he chose to break law for sake of exposing truth about performing enhancement drug use in professional baseball and federal government's inconsistent claim it was cleaning up professional sports while not going after athletes using those drugs did not demonstrate a lack of present insight into misconduct. Rather it supports only a finding that petitioner had not established cognizable steps towards reform until at least a couple of years after petitioner wrote book.

[2 a-h] **2504 Issues in Reinstatement Proceedings – Burden of Proof/Showing Required for Reinstatement**
2551 Issues in Reinstatement Proceedings – Reinstatement Not Granted – Inadequate Showing of Rehabilitation

Petitioner seeking reinstatement to practice law must satisfy a number of requirements, including establishing rehabilitation and present moral qualifications for reinstatement. Overwhelming proof of reform must be presented. Petitioner's rehabilitation must be viewed in light of moral shortcomings that preceded resignation. When prior misconduct is sufficiently egregious, petitioner's burden is a heavy one, and overwhelming proof must include lengthy period of not only unblemished but exemplary conduct. Where petitioner engaged in reprehensible misconduct, including numerous and egregious acts involving significant deceit, such as dishonesty to court, lying to law enforcement, and blame shifting, petitioner had not demonstrated sustained exemplary conduct over extended time. While record demonstrated petitioner had begun path to rehabilitation and had made rehabilitative gains since felony convictions for obstructing justice, filing false declaration, and criminal contempt, including work as court-appointed paralegal with federal court requiring him to guard confidential records such as matters subject to protective orders, dedication to community involvement, and impressive character evidence, petitioner had not yet met required overwhelming proof of reform necessary to establish successful rehabilitation in light of misconduct.

[3 a-e] **143 Evidentiary Issues – Attorney-Client/Work Product Privileges**
213.50 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6068(e) (preserve client confidences)
2590 Issues in Reinstatement Proceedings – Miscellaneous Issues in Reinstatement Proceedings

Duty of confidentiality is broader than attorney-client privilege and prohibits attorney from disclosing facts and allegations that might cause client or former client public embarrassment. Where petitioner testified at reinstatement trial that it dawned on petitioner that former client in child molestation case, whose full name petitioner testified to at reinstatement trial, committed crime when petitioner noticed similarities between witnesses' testimony about former client's odd odor and petitioner's own recollection of former client's odor, Review Department held that while petitioner's divulgence of client confidences went beyond what was appropriate disclosure to explain prior misconduct and displayed carelessness regarding professional responsibility to former client, it did not demonstrate lack of rehabilitation as hearing judge found. Petitioner's work as court-appointed paralegal with federal court, which required him to guard confidential records such as matters subject

to protective orders, diminished petitioner's carelessness regarding testimony about former client.

[4] **2590 Issues in Reinstatement Proceedings – Miscellaneous Issues in Reinstatement Proceedings**

Impressive character evidence and commitment to service, on its own, is not determinative of reform, no matter how positive or great in quantity.

ADDITIONAL ANALYSIS

None

OPINION

McGILL, Acting P.J.

This is Troy Lawrence Ellerman's second petition for reinstatement to practice law in California. In 2007, he resigned with disciplinary charges pending related to his criminal convictions for obstructing justice, filing a false declaration, and criminal contempt. His criminal misconduct began in 2004 and involved multiple egregious acts during the practice of law. Ellerman now requests review of the hearing judge's decision denying his petition for reinstatement. The judge found insufficient evidence to support reinstatement and determined that Ellerman demonstrated a lack of insight by committing a further breach of his fiduciary duty to a former client during the reinstatement trial. The Office of Chief Trial Counsel of the State Bar (OCTC) requests we affirm the judge's decision.

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we conclude Ellerman failed to meet his heavy burden of proving by clear and convincing evidence[1] that he has been rehabilitated and has the present moral qualifications to practice law in California. Given the seriousness of Ellerman's misconduct—involving no less than 13 bad acts, including instances of dishonesty to the court, lying to law enforcement, and blame shifting—he has the heaviest of burdens in establishing overwhelming proof of rehabilitation and present moral fitness to practice law. While our analysis does not rely entirely on the same factors as the hearing judge in deciding whether Ellerman's rehabilitation efforts support reinstatement, we ultimately agree that Ellerman has failed to meet the required burden of proof and, therefore, reinstatement should be denied.

I. PROCEDURAL HISTORY

On February 28, 2007, Ellerman tendered his resignation from the practice of law with disciplinary charges pending, which the Supreme Court accepted on April 13, 2007. He filed his first petition for reinstatement on May 9, 2016. After a contested trial in early 2018, the petition was denied and Ellerman did not appeal. He filed the present petition on May 11, 2020. On March 1, 2021, Ellerman and OCTC filed a joint pretrial Stipulation Concerning Undisputed Facts (Stipulation). A five-day trial was held on March 19 and then from March 23 through 26. Following closing briefs, the matter was submitted for decision on April 16, and the hearing judge issued her decision on June 16, 2021.

II. ELLERMAN'S MISCONDUCT LEADING TO CONVICTION AND RESIGNATION

A. Background

Ellerman was admitted to practice law in California on December 14, 1992. After two years in private practice, he began working for the Sacramento County District Attorney's Office. In 1996, he opened a solo practice handling criminal defense matters. Ellerman had no prior record of discipline before engaging in the criminal misconduct underlying the reinstatement petition, which began around June 2004 and led to his federal conviction and bar resignation.

B. Ellerman's Criminal Conduct and Federal Conviction

In September 2003, Ellerman received a phone call from Victor Conte, founder and president of Bay Area Laboratory Co-operative (BALCO), regarding criminal defense representation after the Federal Bureau of Investigation (FBI) executed search warrants on Conte's home and the BALCO laboratory. A few days after the call, Ellerman, Conte, and another attorney, Robert Holley, met to discuss the FBI investigation. During the phone call and a later meeting, Ellerman obtained client confidences from Conte.

1. Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

On February 12, 2004, a federal grand jury returned an indictment against Conte and other defendants, including James Valente, in the United States District Court for the Northern District of California. Ellerman and Holley entered into a joint defense agreement representing, respectively, Valente and Conte. On February 27, the prosecution agreed to provide the defendants with a copy of the grand jury testimony of various professional and amateur athletes, including Tim Montgomery, Jason Giambi, Barry Bonds, and Gary Sheffield. Ellerman agreed during a court hearing that production of the grand jury transcripts would be subject to a stipulated protective order.

On March 4, 2004, Ellerman signed the stipulated protective order. In that order, United States District Court Judge Susan Illston stated that copies of all the grand jury transcripts provided to the defendants by the government "shall not be disseminated to the press or used for economic benefit" by any parties or their attorneys. In our proceedings, Ellerman stipulated that, before signing the protective order, he read it and knew it prohibited disclosure of the grand jury transcripts.

In June 2004, Ellerman willfully disobeyed Judge Illston's protective order by allowing Mark Fainaru-Wada, a reporter for the *San Francisco Chronicle* (*Chronicle*), to take verbatim notes of Tim Montgomery's grand jury testimony. *Chronicle* reporters Fainaru-Wada and Lance Williams later published excerpts of Montgomery's testimony in the *Chronicle*. On June 25, Judge Illston held a hearing on the apparent violation of her protective order regarding the *Chronicle* story. During the hearing, Ellerman denied he was the source of the leak and told the judge he was "angry" about it and stated, "there's a lot of damaging information that is out there that we don't want to be released."

On July 12, 2004, Ellerman filed a declaration with the district court, signed under penalty of perjury, stating he had not copied nor discussed any grand jury transcripts with anyone. He falsely asserted he had no idea who discussed Montgomery's grand jury testimony with the media or why. Ellerman further declared the leak was "very damaging to Mr. Conte's right to a fair trial and slanderous to him both personally and professionally."

Ellerman stipulated during our proceedings that he knew the statement in his declaration was false at the time he filed it and that his statements were material to Judge Illston's efforts to determine who violated the protective order. On August 27, 2004, Ellerman signed a document entitled Status of Memorandum Re: Media Leaks (Memorandum), which was also filed with the district court. In the Memorandum, Ellerman stated that, because of the media leaks, the defendants could not get a fair trial with "the case and the media leaks spinning out of control."

On October 8, 2004, Ellerman and Holley filed a motion to dismiss the indictment. The motion alleged, in pertinent part, that a dismissal was warranted based on "repeated government leaks of confidential information to the media [making] a fair trial practically impossible anywhere in the country," and that "the government ... [disseminated] information furiously, maliciously, and dishonorably in such a manner that it amounts to outrageous governmental conduct...." Ellerman again stipulated during our proceedings that, in signing the motion, he acted corruptly with the specific intent to obstruct and impede the due administration of justice against his client.

In November 2004, while the motion to dismiss was pending, Ellerman again willfully disobeyed the protective order. This time he allowed Fainaru-Wada to take verbatim notes of the grand jury testimony of Jason Giambi, Barry Bonds, and Gary Sheffield, which the reporter published in the *Chronicle*. Ellerman also gave the reporter a copy of Barry Bonds's testimony.

On November 18, 2004, Ellerman signed a closing brief related to the motion to dismiss, which was filed the next day. In this document, Ellerman again asserted that the government leaked the grand jury transcripts. He accused the government of "deliberately" sabotaging the defendants and "so badly [tilting] the playing field in this case that no safeguard could ever bring back the ability of the Court to insure the defendants their Sixth Amendment right to a fair trial."

On December 3, 2004, Judge Illston notified the parties that grand jury transcripts and possibly discovery materials had been disclosed or disseminated in violation of her protective orders and that she was referring the matter to the United States Department of Justice for an investigation. Later that day, Assistant United States Attorney Jeff Nedrow and Special Agent Jeff Novitsky called Ellerman, who claimed the leaks were coming from co-defendant Victor Conte. Ellerman stated, "Victor is doing things on his own."

On September 25, 2006, Fainaru-Wada and Williams were held in contempt of court for their failure to comply with subpoenas requiring them to name the source who provided them with grand jury transcripts. The reporters faced up to 18 months in prison. Ellerman chose to remain silent during the reporters' contempt proceedings. On October 16, a confidential witness working with the FBI recorded statements from Ellerman indicating that Ellerman was the source of the grand jury transcripts published in the *Chronicle*.

On October 31, 2006,[2] Ellerman was interviewed by FBI agents, and he lied to them about the grand jury transcripts. He told them he did not leak BALCO federal grand jury materials, and he did not know for sure who did. He stated he thought Conte leaked them, but Conte would deny if asked. Ellerman also told the agents that Conte was playing two newspapers, the *San Jose Mercury News* and the *Chronicle*, against each other and that Valente, now his former client, had a relationship with the reporters covering the BALCO investigation.

On December 13, 2006, FBI agents confronted Ellerman at his home in Colorado. Ellerman initially denied he had been the source of the leaks. When confronted with the recording's existence, he demanded to hear it. He then acknowledged that he allowed Fainaru-Wada to review the grand jury transcripts but claimed that it was before he signed Judge Illston's protective order. He also stated he never provided the *Chronicle* reporters with copies of the transcripts, when in fact he did provide Fainaru-Wada with an actual copy of Barry Bonds's transcript.

On January 24, 2007, Ellerman's counsel contacted the prosecutors and informed them Ellerman would admit to disclosing the grand jury testimony of Tim Montgomery, Jason Giambi, Barry Bonds, and Gary Sheffield to Fainaru-Wada and enter into a plea agreement with the government. On February 16, Ellerman pleaded guilty to two counts of criminal contempt (18 U.S.C. § 401), one count of filing a false declaration (18 U.S.C § 1632(a)), and one count of obstruction of justice (18 U.S.C. § 1503). On July 12, 2007, United States District Court Judge Jeffrey S. White sentenced Ellerman to 30 months of incarceration and three years of supervised release with conditions, including that he undertake 10 law school presentations on ethics. During the sentencing hearing, Judge White stated that Ellerman's case was not just a case of "somebody wrongfully revealing protected or secret information . . . [Ellerman's] crimes have really affected and infected every aspect of our judicial system, the relationship to the court, the functioning of the grand jury, the integrity of the [government], and it's hard . . . to conceive a series of events that have had a greater impact on our system."

Ellerman's sentence was reduced to 10 months after he completed a 500-hour residential drug abuse program. In July 2008, he transitioned from prison to a halfway house. Ellerman complied with the terms of his probation, which ended on January 15, 2012.

C. Ellerman's Release from Custody and Post-Conviction Activity

After Ellerman's release from custody, he completed his court-ordered community service. He also sought therapy from Jordan Hamilton, Ph.D., Marvin Todd, Ph.D., and Chuck May, Ph.D. To date, he has engaged in over 150 hours of personal therapy.

In 2010, Ellerman began assisting Jason Harper as a non-paid volunteer for Character

2. By this point in time, Conte and Valente's criminal proceeding had concluded.

Combine, a San Francisco non-profit community outreach organization for economically and socially disadvantaged children. That same year, he enrolled at Western Seminary to pursue a master's degree in Marriage and Family Therapy. As part of his studies, he completed coursework in substance abuse. Ellerman graduated with his master's degree in May 2013.

[1a] Also in 2010, Ellerman wrote a book titled *Forging Iron*, which was published in 2011. Ellerman authored the book as a memoir, in which he stated his motivations for violating the protective order and releasing the grand jury transcripts. In *Forging Iron,* he claimed that he chose to break the law for the sake of exposing the truth about performing enhancement drug use in professional baseball and the federal government's inconsistent claim that it was cleaning up professional sports while not going after the athletes using those drugs. Ellerman justified his criminal conduct as a solution to injustices in professional baseball.

In January 2011, Ellerman was approved by federal judges in the United States District Court for the Eastern District of California to assist defense counsel as a court-appointed paralegal. In 2012, he started working as a paralegal for Brady & Vinding, a law firm specializing in environmental law and business litigation. He continues to work as a court-appointed paralegal and a paralegal for Brady & Vinding.

III. LEGAL PRINCIPLES

[2a] Under rule 5.445 of the Rules of Procedure of the State Bar, Ellerman must satisfy a number of requirements before he may be reinstated to the practice of law: (1) pass a professional responsibility examination within one year prior to filing the petition; (2) establish rehabilitation; (3) establish present moral qualifications for reinstatement; and (4) establish present ability and learning in the general law by providing proof of taking and passing the Attorneys' Examination within three years prior to the filing of the petition. In accordance with the parties' stipulation, the hearing judge found that Ellerman had passed the Multistate Professional Responsibility Examination within one year of filing his petition, and that he had passed the Attorneys' Examination within three years prior to filing his petition.[3]

Accordingly, we focus our analysis on the two remaining issues: whether Ellerman has demonstrated that he is rehabilitated and that he possesses the requisite moral qualifications for reinstatement. **[2b]** To do so, Ellerman must present overwhelming proof of reform. (*Feinstein v. State Bar* (1952) 39 Cal.2d 541, 547; see also *In re Glass* (2014) 58 Cal.4th 500, 520 [more serious misconduct warrants stronger showing of rehabilitation].) He must also show rehabilitation by "sustained exemplary conduct over an extended period of time." (*In the Matter of Giddens* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 25, 30.)

IV. ELLERMAN'S REHABILITATION EVIDENCE

A. Character Witnesses

Ellerman presented 32 character witnesses who affirmed his longstanding commitment to community service, legal acuity, remorsefulness, honest character, and kind demeanor. These witnesses included a psychologist, two psychotherapists, 15 attorneys, a retired superior court judge, a university professor, a sheriff, a rabbi, a bishop, four family members, three friends, and two community service leaders. All of the witnesses stated they were fully aware of the scope of Ellerman's misconduct. Several have known Ellerman for over 20 years and testified that his misconduct and convictions did not affect their positive views of his character. One attorney witness, who has known Ellerman for 25 years, testified that he was "candid and honest regarding his misconduct" and praised Ellerman's "excellent

3. The hearing judge also found that Ellerman has paid all discipline costs and fees and does not owe the Client Security Fund any money, as required by the pre-filing requirements under rule 5.441(B)(2) of the Rules of Procedure of the State Bar.

legal support" as a paralegal in federal criminal defense cases.[4] Rabbi Seth Castleman, the director for the Exodus Project—a program for felons re-entering society—observed Ellerman serving as a mentor to other felons. The rabbi described him as a man with integrity and stated Ellerman has worked to make amends for his misconduct.

In its brief, OCTC argues "many of the witnesses had inaccurate understandings of petitioner's rehabilitation and insights into his misconduct" and very few witnesses acknowledged that Ellerman had attempted to justify his misconduct after his release from custody. OCTC also argues that some witnesses recommended his reinstatement with the understanding that he would not practice criminal defense. We reject OCTC's arguments on this point as overbroad or unsupported when the full record of the witnesses' statements is reviewed.

Ellerman's current employer, Robert Gladden, testified that he has personally noticed Ellerman's reform and believes he will be scrupulous about his ethical obligations if reinstated. Other attorneys held similar opinions. Retired Judge James Roeder has known Ellerman since the beginning of the 1990's and testified Ellerman contacted him after prison, expressing "extreme remorse" and apologizing for the harm he caused to the legal system. Several witnesses testified Ellerman has become humbler and understands the gravity of his misconduct. They believe Ellerman is remorseful, experienced personal growth, and is unlikely to engage in similar misconduct again.

B. Ellerman's Community Service

Ellerman has a notable record of involvement in community service since his release from custody. He completed his court ordered community service in 2012. In 2014, he volunteered an additional 30 hours of service by presenting nine presentations on ethics. He volunteered at The Salvation Army between 2015 to 2016 as a group presenter and designed curriculum based on his own failures, which included his battle with substance abuse. He mentors recently released felons to assist them with their transition from prison into society. Between 2019 and 2021, Ellerman made multiple presentations to undergraduate and law school students on his moral development and the importance of adhering to attorney ethical obligations. One of his character witnesses, Jason Harper, who serves as a pastor and community service leader, testified regarding Ellerman's substantial community involvement and stated he constantly shows remorse. We commend Ellerman for continuing to perform meaningful community service for several years after being required to do so as a condition of parole. (*In the Matter of Bodell* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 459, 464 [greater weight assigned to positive contributions performed after completion of criminal probation].)

V. DISCUSSION

A. The Seriousness of Ellerman's Dishonesty and Crimes Heightens His Burden

[2c] The seriousness of Ellerman's past misconduct, involving multiple acts of dishonesty and moral turpitude committed in the practice of law, requires a showing of truly exemplary conduct over a sustained period of time to demonstrate fitness to practice law. (*In re Glass*, *supra*, 58 Cal.4th at p. 522.) We are guided by the Supreme Court's opinion in *Glass*, which instructs, "[w]hen there have been very serious acts of moral turpitude, we must be convinced that the applicant 'is no longer the same person who behaved so poorly in the past[.]'"[5] (*Id.* at p. 521.)

4. The hearing judge concluded that Ellerman's limited role in working as a paralegal in federal criminal defense cases shields him from strategic calls and responsibility. She also determined that his changed lifestyle, which Ellerman testified includes reduced stress due to his sobriety and therapy, suggests he is "performing in a highly protected environment," and does not strongly support his rehabilitation to practice law. We reject these findings as unsupported by any authority.

5. We acknowledge that *In re Glass* was a moral character case and not a reinstatement case as is this matter. However, the Supreme Court has recognized that these two case types share many of the same legal purposes and principles. (See *In re Glass, supra,* 58 Cal.4th at p. 521.)

[2d] We must view Ellerman's rehabilitation in light of the moral shortcomings that preceded his resignation. Ellerman's numerous and egregious acts involved significant deceit. He violated a court order by disseminating confidential grand jury transcripts and spent two years engaging in multiple lies to cover up his acts. He tried to leverage his lies to his advantage by misleading a federal judge and filing multiple pleadings that falsely blamed the government for the leaks. Ellerman also attempted to shift blame to Conte and remained silent while *Chronicle* reporters faced contempt charges due to Ellerman's misconduct. He lied to FBI agents on multiple occasions, and it was only after he was confronted with the recording that exposed his lies that he admitted guilt. Ellerman's actions struck a terrible blow to the integrity of the judicial system and the credibility of the legal profession—in sum, Ellerman's past misconduct was reprehensible. While case law favors rehabilitation (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 316, citing *Resner v. State Bar* (1967) 67 Cal.2d 799, 811), Ellerman's acts of misconduct establish a very low point from which he needs to climb in order to demonstrate his rehabilitation.

B. Ellerman's Testimony During His Reinstatement Trial

The hearing judge found Ellerman's reinstatement testimony "troubling," because she found that he voluntarily disclosed client confidences from an unrelated criminal case.

[3a] Specifically, Ellerman testified about a child molestation case involving his former client MS.[6] He testified that, while serving as MS's criminal defense counsel, it dawned upon him that "[MS] did it" when he noticed similarities between the witnesses' testimony about MS's odd odor and Ellerman's own recollection of his former client's odor.

[3b] OCTC urges adoption of the hearing judge's finding and argues Ellerman's disclosure was both a new instance of misconduct and proof of a lack of understanding of his duty to maintain client confidences and secrets. Ellerman claims he commented about his former client only to provide context about the mental stressors he faced during the time that he committed the underlying misconduct.

[3c] The nature of reinstatement proceedings invites petitioners to be candid in explaining their thoughts and motivations regarding past misconduct and Ellerman did exactly that. However, his testimony on this point, albeit well-intentioned, displayed carelessness regarding his professional responsibility to MS. The duty of confidentiality is much broader in scope than the evidentiary attorney-client privilege and it "prohibits an attorney from disclosing facts and even allegations that might cause a client or former client public embarrassment." (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189, citing *Dixon v. State Bar* (1982) 32 Cal.3d 728, 735, 739.)

[3d] We reject Ellerman's attempts at oral argument to minimize his careless testimony by asserting that the details regarding MS's odor was a matter of public record. (*In the Matter of Johnson*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 190 [unnecessary disclosure of client's felony conviction, although matter of public record, breaches duty of confidentiality to client].) Ellerman's divulgence of client confidences went beyond what was appropriate for him to disclose in

6. As the hearing judge noted, MS's full name was referenced during the disciplinary trial. Like the judge, we will refer to Ellerman's former client by his initials out of privacy concerns in light of the dismissal of MS's criminal charges. We also note Ellerman testified that his former client's unrelated criminal case was dismissed based on a statute of limitations "technicality." The hearing judge concluded that Ellerman's use of the word "technicality" further showed a lack of rehabilitation as it was an attempt to suggest his former client's guilt. We disagree. We do not take issue with Ellerman's use of such legal terminology.

order to explain his prior misconduct in connection with this reinstatement proceeding, but we do not find the incident to demonstrate a lack of rehabilitation as the hearing judge found.

C. Ellerman's Rehabilitative Efforts Are Commendable, but He Has Not Sustained Exemplary Conduct over an Extended Period of Time

[2e] [3e] Ellerman has made rehabilitative gains since his convictions. His current work as a court-appointed paralegal with the United States District Court for the Eastern District of California is noteworthy. His appointment was judicially approved and requires him to guard confidential records such as matters subject to protective orders. In our view, his activity here serves to specifically diminish his carelessness regarding his testimony about MS previously discussed. We equally credit his dedication to community involvement, as shown through Ellerman's law school presentations to students on the importance of ethics after the conclusion of his criminal probation. **[4]** However, despite Ellerman's impressive character evidence and commitment to service, such evidence on its own is not determinative of reform, no matter how positive or great in quantity. (*Feinstein v. State Bar*, *supra*, 39 Cal.2d at p. 547.)

[2f] Although perfection from a petitioner is not required, when prior misconduct is sufficiently egregious, overwhelming proof must include a lengthy period of not only unblemished but exemplary conduct. (*In re Menna* (1995) 11 Cal.4th 975, 989.) OCTC argues Ellerman lacks responsibility and understanding of his misconduct because he spent two years engaging in multiple lies to cover up his wrongdoing. OCTC also claims Ellerman minimized his misconduct in *Forging Iron*. Ellerman asserts his rehabilitation has been a gradual process—he could not fully appreciate the extent of the internal troubles that led to his criminal behavior until after starting therapy sessions with Dr. May.

Dr. May began treating Ellerman in December 2012. He determined Ellerman suffered from an immature personality and from issues related to his ego, and both contributed to his decision to not take full responsibility for his actions in *Forging Iron*. Dr. May provided therapy for Ellerman's depression and attachment-disorder issues and worked with him to address his alcohol and substance abuse. He opined Ellerman was fully rehabilitated by 2013.

[1b] The hearing judge factored Ellerman's explanations in *Forging Iron*, in which he depicted his choice to break the law as an attempt to clean up professional baseball, as evidence of a present lack of insight. We disagree that Ellerman has a present lack of insight and conclude the evidence only supports a finding that Ellerman had not established cognizable steps towards reform until at least 2012. This view is also supported by the prior hearing judge's finding in Ellerman's 2018 reinstatement case—that Ellerman began accepting full responsibility for his actions and gained insight into his misconduct between mid-2012 to early 2013.

Ellerman relies on four cases to support his petition for reinstatement.[7] He argues that, in comparison to relevant case law, his exemplary behavior supports reinstatement. In *Brown*, the petitioner sought reinstatement 15 years after his misconduct that resulted in three criminal convictions for obstructing justice, falsifying documents, and falsifying public records. Brown engaged in an illegal scheme with a municipal court clerk to improperly reduce driving under the influence (DUI) charges against his clients by having his clients admit guilty pleas to reckless driving in 54 cases, without the knowledge of the judge or prosecuting attorney. Two years later, Brown initiated a similar scheme that resulted in the illegal manipulation of 85 DUI cases. Ellerman believes *Brown* lends supports for his reinstatement

7. *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309; *In the Matter of Bodell* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 459; *In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423; and *In the Matter of Rudman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 546.

since the court concluded the egregiousness of Brown's misconduct did not preclude reinstatement.

Ellerman's case shares certain similarities to *Brown*. Both attorneys engaged in numerous acts of deceitful misconduct involving the judicial process while practicing law. Nonetheless, one of the biggest differences between these cases is the severity of Ellerman's misconduct. As discussed above, Ellerman was convicted of four federal felony charges involving 13 acts of dishonesty, lies, and deceit in a two-year coverup that greatly impacted the administration of justice, as noted by the federal judge who sentenced him. He lied to another federal judge, a federal prosecutor, and FBI agents. He falsely attempted to cast blame onto Conte and the government regarding his failure to follow a protective order, and failed to accept responsibility even when the reporters faced criminal contempt charges. These factual distinctions reveal Ellerman has further to go before his rehabilitation is supported under *Brown*.

We also find distinctions between Ellerman's record and other cases he cites in support of proving rehabilitation. *Bodell* involved an attorney convicted of a single count of felony mail fraud. The *Bodell* court found that the attorney had established rehabilitation in the ten years following his conviction and distinguished Bodell's misconduct from "extremely serious misconduct for an extensive time" found in other cases where petitioners had committed multiple felonious acts involving moral turpitude. (*Bodell*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 463.)

In *Miller*, petitioner misappropriated over $80,000 from his client in a probate proceeding. Miller confronted the severity of his wrongdoing by confessing his misconduct to the probate court and the State Bar; he also admitted his ethical violation to the family and ended his extravagant lifestyle for which he had misappropriated the funds. Miller voluntarily decided to resign and rehabilitate himself whereas no evidence exists to suggest that Ellerman would have stopped his dishonesty or admitted to his misconduct absent the FBI's investigation.

Lastly, we do not find that *Rudman* lends much support to Ellerman's case. Rudman's misconduct—which included federal convictions for conspiracy and counterfeiting currency—was limited in duration, occurring over a period of less than five months.

The Supreme Court in *Glass* emphasized the court's duty to protect the public and maintain the integrity and high standards of the profession and, therefore, our focus is "on the [petitioner's] moral fitness to practice law." (*In re Glass*, *supra*, 58 Cal.4th at p. 526.) Like the applicant in *Glass*, Ellerman expended considerable efforts to fabricate his lies and, once exposed, both Glass and Ellerman initially chose to protect themselves rather than "freely and fully admit and catalogue all of [their] fabrications." (*Id.* at p. 523.) If Ellerman is reinstated to practice law, California courts and others will rely on his word and moral fitness as an officer of the court. **[2g]** On this record, Ellerman has demonstrated that he has begun his path to rehabilitation, but not yet met the required overwhelming proof of reform that is necessary to establish successful rehabilitation in light of his misconduct. (See *Feinstein v. State Bar*, *supra*, 39 Cal.2d at p. 547 [overwhelming proof required to establish rehabilitation].)

VI. CONCLUSION

[2h] We reiterate that the burden to show rehabilitation, when a petitioner has engaged in misconduct as egregious as Ellerman, is a very heavy one. Examining Ellerman's past misconduct and focusing on the nine-year period since he completed his felony probation, we find insufficient evidence at this point to prove rehabilitation when weighed against his 13 acts of moral turpitude. When the "record fails to show that [a petitioner] has sufficiently rehabilitated himself to be entrusted with the responsible duties of an attorney at law, his application for reinstatement should be denied. [Citation.]" (*Wettlin v. State Bar* (1944) 24 Cal.2d 862, 869.) We thus find Ellerman has not yet established the requisite rehabilitation and moral fitness to resume the practice of law, and we affirm

the hearing judge's decision to deny Troy Lawrence Ellerman's petition for reinstatement.

WE CONCUR:

HONN, J.
VALENZUELA, J.*

*Currently serving as a hearing judge of the State Bar Court, appointed by the California Supreme Court, and designated to serve as a review judge in this matter by the Acting Presiding Judge of the State Bar Court, pursuant to rule 5.155(F) of the Rules of Procedure of the State Bar.

State Bar Court
Review Department

In the Matter of

DAVID ROMANO ISOLA

A Member of the State Bar

No. SBC-20-O-30310

Filed May 25, 2022

SUMMARY

Respondent represented a family in an environmental remediation matter but failed to memorialize the attorney-client relationship. In finding that respondent had authority to represent the family, the review department resolved reasonable doubts resulting from the evidence in respondent's favor. Although respondent successfully pursued his clients' interests, he neglected to communicate with his clients over a six-year period. Unlike the hearing judge, the review department held that respondent's lack of communication with his clients did not negate or undermine the original authority to act on his clients' behalf that he received when he was hired. Respondent was culpable of two counts of misconduct involving failing to communicate. As respondent admitted at trial his failure to communicate and acknowledged that he should have memorialized the attorney-client relationship, and mitigating circumstances outweighed one aggravating circumstance, the review department recommended a 30-day actual suspension to protect the public, the courts, and the legal profession.

COUNSEL FOR PARTIES

For State Bar of California: Kimberly G. Anderson, Esq

For Respondent: James Irwin Ham, Esq.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1a, b] **162.90 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters – Other/general**
204.90 Substantive Issues in Disciplinary Matters Generally – Culpability – General substantive issues re culpability – Other general substantive issues re culpability

Reasonable doubts resulting from evidence are resolved in respondent's favor. Evidence leading to differing reasonable factual interpretations must lead court to adopt inference of no culpability. Where respondent met with family representative – who had ability to hire attorney to handle environmental remediation for him and his family – and considering principles regarding reasonable inferences and resolving reasonable doubts in respondent's favor, review department held attorney had authority to represent family.

[2a, b] **204.90 Substantive Issues in Disciplinary Matters Generally – Culpability – General substantive issues re culpability – Other general substantive issues re culpability**

Attorney's duty to client depends on existence of attorney-client relationship created by contract, express or implied. Implied-in-fact contract arises from parties' conduct that shows relationship despite absence of formal agreement. Attorney-client relationship may be informally created by parties' acts without written contract. There are several indicia of attorney-client relationship, but parties' intent and conduct are critical to attorney-client relationship formation. Although no written agreement memorialized attorney-client relationship, where attorney met with family representative – who was aware of family's involvement with environmental issues at former place of business – and discussed usual aspects of representation in environmental remediation matters, including securing insurance coverage and occasional need for lawsuit; family representative authorized attorney to begin working on environmental remediation matter for family; no evidence that after meeting family representative took further action regarding remediation; family representative did not contact insurer to make claim or contact another attorney to deal with remediation – even though family representative knew of insurance policies' existence and was experienced real estate professional; and after meeting attorney began working to establish coverage and discharge family from liability, conduct of both parties was consistent with finding attorney-client relationship.

[3] **204.90 Substantive Issues in Disciplinary Matters Generally – Culpability – General substantive issues re culpability – Other general substantive issues re culpability**

Authority conferred upon attorney is, in part (1) apparent authority – the authority to do that which attorney was hired to do – and (2) actual authority implied in law. Where attorney was hired to discharge family's liability for environmental issues, attorney had apparent authority to take reasonable actions to achieve that objective, and authority was not "limited," as found by hearing judge. While attorney should have communicated with family representative that lawsuit against them had been filed – as this was significant development in case – failure to inform did not decrease attorney's authority to work on environmental remediation matter for which attorney was hired. Attorney's failure to communicate cannot be conflated with lack of authority. Attorney believed in good faith he had authority to act.

Record therefore supports finding that attorney had full authority to act as attorney for family and their business in discharging family's liability for environmental contamination.

[4a-d] **162.11 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters – State Bar's burden – Clear and convincing standard**
162.90 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters – Other/general
204.90 Substantive Issues in Disciplinary Matters Generally – Culpability – General substantive issues re culpability – Other general substantive issues re culpability
221.50 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6106 (moral turpitude, corruption, dishonesty) – Not Found

Business and Professions Code section 6106 provides, in part, that commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. Where respondent believed (1) claim was issued by governmental agency targeting clients, and (2) that even if clients had not already been targeted by governmental agency, they would be soon, it was reasonable to believe attorney simply was mistaken regarding existence of governmental claim against clients, and no clear and convincing evidence supported conclusion attorney made material misrepresentation amounting to either grossly negligent or intentional moral turpitude when he wrote letter to insurance company stating governmental entity was implicated in matter.

[5a-c] **162.20 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters – Respondent's burden in disciplinary matters**
220.30 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6104 (appearing without authority)

Willfully or corruptly and without authority appearing as attorney for party to action or proceeding constitutes cause for suspension or disbarment. Where attorney credibly testified possible litigation was discussed at meeting with family representative, who retained attorney at that meeting to represent him and his family in matters related to environmental remediation, and family was sued for remediation liability, attorney believed he had authority to act as family representative's attorney in litigation. Although attorney should have updated family representative on case status, this is not evidence of lack of authority. Attorney's failure to communicate did not limit authority he believed in good faith he had obtained from family representative to act as family's attorney. Accordingly, Office of Chief Trial Counsel failed to prove attorney corruptly or willfully appeared without authority in violation of Business and Professions Code section 6104 and hearing judge's culpability finding was reversed.

[6a, b] **162.20 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters – Respondent's burden in disciplinary matters**
221.50 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6106 (moral turpitude, corruption, dishonesty) – Not Found

Where attorney reasonably believed he had authority to represent family representative in environmental remediation; attorney understood from meeting with family representative that he was authorized to try to ensure remediation was paid for without cost to family; and possibility of lawsuit to be filed against family to trigger coverage from insurer was probable outcome discussed at meeting, attorney did not commit act involving moral turpitude, dishonesty, or corruption within meaning of Business and Professions Code section 6106 by claiming he represented family representative on four separate occasions in two environmental lawsuits. Review department reversed hearing judge's culpability finding based on finding attorney unreasonably believed he had authority to represent family representative in litigation and committed misrepresentation to court through gross negligence by appearing on family representative's behalf. Even if attorney was mistaken by authority to act – which review department did not conclude – attorney's actions would not rise to grossly negligent moral turpitude as attorney sincerely believed conduct was justified.

[7] **221.50 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6106 (moral turpitude, corruption, dishonesty) –Not Found**

Where attorney settled third-party complaint involving claims related to insurer's duty to pay defense costs for environmental lawsuit, Office of Chief Trial Counsel failed to show attorney's actions amounted to settlement of claim without authority, involving moral turpitude, as it was not settlement agreement and did not bind parties; rather, it was interim agreement regarding payment of attorney fees that could be further negotiated and finalized later; there was no enforceable settlement agreement affecting attorney's clients; ultimate agreement regarding insurer's liability had not been reached; and attorney's actions showed attorney was furthering client's interests by trying to find money to fund attorney's representation.

[8] **162.90 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters – Other/general**
204.90 Substantive Issues in Disciplinary Matters Generally – Culpability – General substantive issues re culpability – Other general substantive issues re culpability
221.50 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6106 (moral turpitude, corruption, dishonesty) – Not Found

Where attorney stated in deposition that he estimated he had "five to ten" telephone conversations with client after meeting, but attorney actually had not communicated with client at all during relevant period, deposition statement was not intentional or grossly negligent misrepresentation in violation of Business and Professions Code section 6106, as

attorney had not reviewed case file before appearing at deposition; attorney asserted testimony was based on attorney's experience with these cases generally – not specific memory of speaking with client; and at trial, attorney characterized statement as "guess" at time of deposition, which attorney later corrected in interview with New Jersey Office of Attorney Ethics. Record therefore supported reasonable inference attorney was simply mistaken when attorney testified, and testimony reflected attorney's recollection of case at that time.

[9] **214.30 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6068(m) (communicate with clients)**

Business and Professions Code section 6068, subdivision (m), required attorney to keep clients reasonably informed of significant developments in matters with regard to which attorney had agreed to provide legal services. Where attorney failed to inform client (1) regarding insurer's denial of coverage; (2) that 2012 environmental lawsuit was filed; and (3) that attorney filed answer and third-party complaint, which attorney also dismissed, attorney failed to communicate significant developments in violation of Business and Professions Code section 6068, subdivision (m).

[10a-c] **162.90 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters – Other/general**
204.90 Substantive Issues in Disciplinary Matters Generally – Culpability – General substantive issues re culpability – Other general substantive issues re culpability
213.10 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6068(a) (support Constitution and laws)
430.00 Substantive Issues in Disciplinary Matters Generally – Culpability – Common Law/Other Statutory Violations – Breach of Fiduciary Duty
490.00 Substantive Issues in Disciplinary Matters Generally – Culpability – Common Law/Other Statutory Violations – Miscellaneous

Business and Professions Code section 6068, subdivision (a), provides that attorney has duty to support Constitution and laws of United States and California. Office of Chief Trial Counsel failed to establish that attorney's actions related to form which reflected client was responsible for remediation at site amounted to breach of attorney's fiduciary duties or duty of loyalty to client where (1) record showed clients had some responsibility for premises' remediation; (2) attorney's representation strategy was to engage governmental agency, involve insurer, and obtain insurance coverage for remediation; (3) attorney asserted form did not admit sole responsibility – as site owners also had responsibility – rather, form simply indicated who was taking charge of conducting remediation, which is not indication of sole liability; (4) governmental agency was already aware of attorney's clients, as property owners stated in remediation timeframe extension request that owners were working to find insurance coverage from attorney's clients as they were previous tenant and also responsible for remediation; and (5) review of record points to reasonable inference that attorney was acting in clients' best interests and was following representation strategy discussed with client at meeting.

[11a-e] **213.10 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6068(a) (support Constitution and laws)**
430.00 Substantive Issues in Disciplinary Matters Generally – Culpability – Common Law/Other Statutory Violations – Breach of Fiduciary Duty
490.00 Substantive Issues in Disciplinary Matters Generally – Culpability – Common Law/Other Statutory Violations – Miscellaneous

Business and Professions Code section 6068, subdivision (a), provides that attorney has duty to support Constitution and laws of United States and California. Where trial showed attorney acted in best interests of clients by obtaining release of liability to property owners and finding coverage for environmental remediation; attorney's actions aligned with attorney's presentation at client meeting; attorney negotiated settlement, then handed matter to client's attorney in related matter to discuss with client who approved settlement agreement; no evidence of deceit or that attorney negotiated terms of settlement agreement to clients' detriment, no evidence demonstrated attorney overstepped bounds of attorney's representation or overreached in way that was unfair to clients. While attorney violated ethical obligations by failing to inform client of significant developments, this failure alone did not equate to overreaching where attorney did not stop working on case or abandon clients; rather, attorney competently completed representation. Accordingly, there was no overreaching or breach of fiduciary duties in violation of Business and Professions Code section 6068, subdivision (a).

[12a, b] **106.90 Generally Applicable Procedural Issues – Issues re Pleadings – Other issues re pleadings**
213.10 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6068(a) (support Constitution and laws)
214.30 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6068(m) (communicate with clients)
410.00 Substantive Issues in Disciplinary Matters Generally – Culpability – Common Law/Other Statutory Violations – Failure to Communicate with Client (pre- or non-6068(m))

Amended Notice of Disciplinary Charges (NDC) charged assortment of actions that, taken together, alleged overreaching and breach of fiduciary duties. However, failure to communicate allegations were already alleged under more specific Business and Professions Code subsection – section 6068, subdivision (m) – in separate Amended NDC count. Before enactment of subdivision (m), which was added in 1986 and became effective in 1987, there was "common law" duty to communicate and proper to base culpability under subdivision (a). Now, improper to find violations for same facts under both subdivisions (a) and (m) of Business and Professions Code section 6068. Specific statute should be charged instead of using broader subdivision (a).

[13a, b] **275.30 Substantive Issues in Disciplinary Matters Generally – Culpability – Rules of Professional Conduct Violations – Failure to communicate settlement offer**

Rule 3-510 requires attorney to promptly communicate to client all written settlement offers, regardless of significance or whether binding under contract law. Where attorney did not communicate written settlement offer to client or client's attorney in related matter, but rather waited until settlement agreement was ready for signature before sending to client's attorney to share with client, attorney violated rule 3-510 of the former California Rules of Professional Conduct by failing to communicate settlement offers. While attorney reported significant settlement developments to clients' insurer, insurer was not attorney's client. Attorney was required to inform client of written offer regardless of whether it was significant or likely to be accepted.

[14a, b] **221.50 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6106 (moral turpitude, corruption, dishonesty) – Not Found**

Where attorney and opposing counsel credibly testified multiple versions of agreement were used, accidentally sending attorney for client in related matter wrong version which incorrectly stated insurer did not object to settlement agreement, and attorney did not notice oversight and maintained not aware version being provided contained erroneous statement, no violation of Business and Professions Code section 6106 for misrepresentation. Conduct simple negligence and not disciplinable offense.

[15] **162.11 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters – State Bar's burden – Clear and convincing standard**
162.90 Standards of Proof/Standards of Review – Quantum of Proof Required in Disciplinary Matters – Other/general
199 Miscellaneous General Issues in State Bar Court Proceedings – Other Miscellaneous General Issues
204.90 Substantive Issues in Disciplinary Matters Generally – Culpability – General substantive issues re culpability – Other general substantive issues re culpability
221.50 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6106 (moral turpitude, corruption, dishonesty) – Not Found

Office of Chief Trial Counsel (OCTC) failed to prove by clear and convincing evidence that attorney made misrepresentations to client's attorney in related matter regarding insurer's objection to settlement agreement in violation of Business and Professions Code section 6106. Where one email to client's attorney in related matter did not mention insurer at all; second email summarized attorney's report to judge at settlement status conference, disclosed that insurer had been provided copy of proposed settlement agreement, and did not mention insurer's response; attorney believed settlement agreement did not contain insurer's position, as attorney had not carefully read drafts with erroneous statement; and attorney had no indication that would lead attorney to believe that client's attorney in related matter thought insurer had not objected, it could not be determined attorney's omission in email to

client's attorney in related matter constituted intentional misrepresentation, especially as one email was only summary of status conference and attorney asserted insurer's position was not discussed at status conference. Reasonable factual interpretation is attorney was unaware client's attorney in related matter believed insurer had not objected. Attorney therefore had no reason to mention insurer's objection in emails. Review department therefore held OCTC did not prove by clear and convincing evidence that attorney made misrepresentations to client's attorney in related matter regarding insurer's objection to settlement agreement by omitting this fact from emails.

[16] **521 Substantive Issues in Disciplinary Matters Generally – Aggravation – Multiple acts of misconduct – Found**

Where attorney failed to keep client informed of significant developments, including that (1) clients had been sued; (2) attorney filed and dismissed third-party complaint; (3) attorney received written settlement offers; and (4) attorney filed several pleadings and participated in court hearings without informing client, such numerous failures to communicate over several years warranted moderate weight in aggravation under standard 1.5(b). For aggravation purposes under standard 1.5(b), it did not matter multiple acts were done in single client matter.

[17] **595.90 Substantive Issues in Disciplinary Matters Generally – Aggravation – Indifference to rectification/atonement – Declined to find – Other reason**

Indifference toward rectification or atonement for consequences of misconduct is aggravating circumstance. While law does not require false penitence, it does require attorney to accept responsibility for wrongful acts and show some understanding of attorney's culpability. Where attorney admitted he should have used written retainer agreement with family representative; should have regularly reported to family representative on case status; and admitted to failure to communicate, no clear and convincing evidence of indifference because attorney accepted responsibility for actions. Review department therefore did not assign aggravation under standard 1.5(k).

[18a, b] **710.10 Substantive Issues in Disciplinary Matters Generally – Mitigation – Long practice with no prior discipline record – Found**

Where attorney admitted culpability for failing to communicate, and testified he would do things differently, review department did not agree misconduct would likely recur and held attorney established he was entitled to substantial weight in mitigation for 21-year discipline-free practice. Review department considered attorney's period of post-misconduct practice without further misconduct in determining under standard 1.6(a) that further misconduct was unlikely to recur, rather than giving attorney mitigation for period of post-misconduct practice without further misconduct.

[19] **715.50 Substantive Issues in Disciplinary Matters Generally – Mitigation – Good faith – Declined to find**

Mitigation includes good faith belief that was honestly held and objectively reasonable. Where attorney unreasonably ignored ethical responsibilities in failing to communicate with

clients, no weight in mitigation given for attorney's assertion of good faith belief. Attorney's regular communications with insurer did not absolve attorney of obligation to inform clients of significant developments.

[20a, b] **844.19 Application of Standards – Part B – Standard 2.7 – (b) Multiple matters but no habitual disregard – Applied – actual suspension – Other reason**
846 Application of Standards – Part B – Standard 2.7 – Violations limited in scope or time – suspension or reproval

Where attorney's failures to communicate were numerous and occurred over several years in single client matter, review department held standard 2.7(b) was most applicable standard, even though standard mentions "multiple client matters," as less severe sanction standard 2.7(c) was for violations limited in scope or time. As standard 2.7(b) provides for actual suspension for communication violations, given broad range of discipline suggested by standard, review department looked to guiding case law, focusing on communication violations, to determine appropriate discipline recommendation.

[21a-d] **844.19 Application of Standards – Part B – Standard 2.7 – (b) Multiple matters but no habitual disregard – Applied – actual suspension – Other reason**

Lesser sanction was appropriate in cases of minor misconduct, where there was little or no injury to client, public, legal system, or profession, and where record demonstrates attorney was willing and had ability to conform to ethical responsibilities in future. Although attorneys have duty to communicate adequately with clients, where attorney failed to inform client of significant developments in representation for substantial time period – over six years – but continued to work to advance clients' interests, completed representation, and achieved good result for clients; attorney given substantial mitigation for no prior discipline record and good character, which markedly outweighed aggravation for multiple acts, sanction at lower end of discipline spectrum specified in standard 2.7(b) was warranted. Review department concluded 30-day actual suspension was appropriate, as it was lowest level for actual suspension for communication violations under standard 2.7(b). Recommended discipline considered seriousness of misconduct, but also accounted for attorney's admissions to culpability and commitment to doing things differently in future.

[22] **180.12 Monetary Sanctions – General Issues re Monetary Sanctions – Appropriate amount of monetary sanctions**
180.31 Monetary Sanctions – Imposition of Monetary Sanctions – Recommended

Based on monetary sanction guidelines set forth in rule 5.137 of State Bar Rules of Procedure, and taking into consideration attorney was culpable of violations related solely to failure to communicate in single client matter and discipline warranted was lowest presumed length of time for actual suspension, review department recommended attorney be ordered to pay monetary sanctions in amount of $500.

ADDITIONAL ANALYSIS

Culpability

Found

214.31	Section 6068(m) (communicate with clients)
275.31	1989 RPC 3-510 (failure to communicate settlement offer)

Not Found

213.15	Section 6068(a) (support Constitution and laws)
213.45	Section 6068(d) (do not mislead courts and judges)
220.35	Section 6104 (appearing without authority)
270.35	1989 RPC 3-110(A) (intentional, reckless, grossly negligent, or repeated incompetence)
273.35	1989 RPC 3-310 (conflicts of interest)
277.65	1989 RPC 3-700(D)(2) (failure to refund unearned fees)

Aggravation

Not Found

616.59	Failure to make restitution

Mitigation

Found

740.10	Good character references

Discipline

1013.06	Stayed Suspension – One year (incl. anything between 1 yr. & 18 mos.)
1015.01	Actual Suspension – One month or less
1017.06	Probation – One year (incl. anything between 1 yr. & 18 mos.)
1024	Ethics exam/ethics school

OPINION

HONN, J.

In his first disciplinary case after 21 years of practice, David Romano Isola is charged with 26 counts of misconduct in an environmental remediation matter. A hearing judge dismissed 15 of those counts, finding culpability on 11 counts, including six acts of moral turpitude, appearing for a party without authority, failing to inform a client of significant developments, breach of fiduciary duties, overreaching, and failing to communicate a settlement offer. The judge recommended two years actual suspension, with conditions, including continuing the suspension until proof of rehabilitation, fitness to practice, and present learning and ability in the law.

Isola appeals, denying culpability for all charges except his failure to communicate. He advocates for an actual suspension less than 90 days. The Office of Chief Trial Counsel of the State Bar (OCTC) also appeals, asserting that Isola is culpable of additional misconduct, that his actions were intentional, and that disbarment is appropriate.

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we agree with the hearing judge's dismissals, but find that additional counts also require dismissal. In sum, we find that Isola did not act with moral turpitude. Instead, he neglected to communicate with his clients over a six-year period, while he successfully pursued their interests. Importantly, Isola admitted at trial his failure to communicate and acknowledged that he should have memorialized the attorney-client relationship. Unlike the hearing judge, we do not find that Isola's lack of communication with his clients negates or undermines the original authority he received when he was hired. We find culpability on two counts of misconduct involving failure to communicate (counts twenty-one and twenty-two). Based on Isola's misconduct and the aggravating and mitigating circumstances, we find that a 30-day actual suspension is necessary to protect the public, the courts, and the legal profession.

I. PROCEDURAL BACKGROUND

OCTC filed a Notice of Disciplinary Charges (NDC) on May 28, 2020. Isola timely filed his response, denying all allegations. OCTC filed an Amended Notice of Disciplinary Charges (ANDC) on September 10. The court deemed Isola's response to the NDC as his response to the ANDC. On September 17, the parties filed a Stipulation as to Facts (Stipulation). Trial was held on September 21, 22, and 23; October 27 and 30; November 9, 10, and 13; December 17; and January 6 and February 9, 2021. The parties submitted closing briefs and the hearing judge issued her decision on June 16, 2021. The parties submitted requests for review in July 2021. After briefing was completed, we heard oral argument on March 28, 2022.

II. FACTUAL BACKGROUND

The facts are based on the Stipulation, trial testimony, documentary evidence, and the hearing judge's factual findings, which are entitled to great weight unless we have found differently based on the record. (Rules Proc. of State Bar, rule 5.155(A); *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 748 [Review Department may decline to adopt hearing judge's findings if insufficient supporting evidence exists in record]; see also *In the Matter of Lingwood* (Review Dept. 2019) 5 Cal. State Bar Ct. Rptr. 660, 672, fn. 15.) If the evidence leads to differing reasonable interpretations of the facts, we must adopt the inference that misconduct was lacking as OCTC has the burden to prove culpability. (*In the Matter of DeMassa*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 749 [appropriate to resolve reasonable doubts in favor of respondent and reject contrary finding as unsupported by clear and convincing evidence].) Our recital of the facts utilizes these principles.

A. The Parties

In May 2011, Isola met with Gregory Hahn, Thomas DeArth, and Richard Greco in a diner in New Jersey to discuss representation of the Hahn family in an environmental remediation

matter (Diner Meeting).[1] The Hahns owned a dry-cleaning business, Cameo Dry Cleaners of Fair Lawn, Inc. (Cameo Cleaners of Fair Lawn), from 1983 to 2002. Cameo Cleaners of Fair Lawn was located at a property in Fair Lawn, New Jersey, known as 31-01 Broadway. The Grecos (Richard, Michael, and Robert) owned the property and their family had previously operated a dry-cleaning business there, Cameo Fabric Care Center, Inc., also known as Cameo Cleaners. The Hahns bought the dry-cleaning business from the Grecos and they entered into a lease agreement for the property. Gregory currently works as a commercial real estate broker.

DeArth was a founding partner of Genesis Engineering & Redevelopment (Genesis), a consulting firm working on environmental remediation projects. Isola partnered with Genesis; he did legal work while Genesis did consulting work. Genesis and Isola promoted their services as environmental remediation at no cost to a client with insurance coverage.

B. Initial Environmental Remediation Events

The New Jersey Department of Environmental Protection (NJDEP) has the power to oversee remediation of contaminated sites.[2] In 2003, the NJDEP notified the Grecos about environmental contamination from dry-cleaning solvents at 31-01 Broadway. The NJDEP sent further correspondence in 2008 and 2009 regarding environmental remediation of the site. Richard[3] told Gregory about the environmental issues and asked him to assist him in finding insurance policies to help cover remediation.

In 2009, Richard retained Anderson Kill & Olick, P.C. (Anderson Kill) to help the Grecos locate any historical insurance coverage on the site.[4] Anderson Kill discovered two Travelers policies related to the Hahns: one from January 1985 to January 1986 and the second from January 1986 to October 1986. The policies insured Cameo Cleaners of Fair Lawn, Chung Hee, Min-Ku, and Chang Woo Hahn.[5] In 2010, letters were sent to Travelers regarding the Hahns' insurance policies. Even though the letters were purportedly sent from Gregory, the hearing judge found that the letters were likely sent by Richard on Gregory's behalf, with Gregory's consent, as they were working together to find insurance coverage for 31-01 Broadway.

In January 2011, DeArth and Richard entered into a service agreement for Genesis to assist with environmental remediation at 31-01 Broadway. In March 2011, Michael and DeArth executed an NJDEP form that stated that insurance from the Hahns had been identified and could be used for coverage in addition to the insurance identified by the Grecos. The form also asserted that Genesis was working with "Ms. Hahn" in obtaining project funding through the tenant's historical insurance assets.

C. Isola's Involvement

Around 2010 or 2011, DeArth introduced Richard to Isola at a trade show and Richard told Isola about the environmental remediation at 31-01 Broadway. Richard mentioned his relationship with Gregory, who had helped him locate insurance policies for the site. Gregory was aware of the environmental issues resulting from the dry-

1. Isola was admitted to practice law in California in 1990 and later expanded his practice to New Jersey. He opened an office there, hired a New Jersey licensed attorney, and then became licensed to practice law there in 2013. All of the misconduct charged in this matter related to events that occurred in New Jersey. Isola is currently inactive in New Jersey and no longer plans to practice there. A grievance regarding the at-issue misconduct was also made to the New Jersey Office of Attorney Ethics. Isola testified that the New Jersey matter is in abeyance while this proceeding is ongoing.

2. 13C Slowinski & Walentowicz, N.J. Practice, Real Estate Law and Practice (3d ed. 2014) Environmental Controls § 46:8, pp. 21-22.

3. We refer to the Grecos and the Hahns by their first names to avoid confusion; no disrespect is intended.

4. When there is a continuing triggering event in environmental claims, coverage can be obtained from consecutive policies. (Kenny & Lattal, New Jersey Insurance Law (2022) § 21-35, p. 780.) Insurance policies triggered under a continuous trigger scheme are not jointly and severally liable. Rather, coverage is allocated among triggered policies based on years on the risk and policy limits; this is referred to as "weighted allocation." (*Id.* at § 21-36, p. 780; *Owens-Illinois v. United Ins. Co.* (1994) 138 N.J. 437.)

5. Min-Ku is Gregory's Korean name. Chung Hee is his mother and Chang Woo is his father.

cleaning business the Hahns had previously operated there.

At the May 2011 Diner Meeting, where Isola met with Gregory, DeArth, and Richard,[6] Isola presented information about the services he and Genesis could provide, including the possibility of a lawsuit to force Travelers to cover the remediation.[7] They discussed the insureds listed in the Travelers' policies, and making a claim using Min-Ku as the insured.[8] They then exchanged business cards and shook hands. Isola understood from the conversation at the Diner Meeting that he was authorized to represent Min-Ku and Cameo Cleaners of Fair Lawn to discharge all liability under the "Spill Act" utilizing insurance.[9] A retainer agreement was never signed. Isola did not discuss with Gregory how best to communicate with him.

Isola began working on the case. He did not contact Gregory until nearly six years later when he finalized a settlement agreement on behalf of the Hahns. The record is clear that Isola only acted as the Hahns' attorney; he never represented the Grecos. Even though Gregory was aware of the environmental issues at 31-01 Broadway, nothing in the record suggests that he took any action after meeting with Isola regarding remediation. This is consistent with the various accounts that Gregory hired Isola at the Diner Meeting and believed that Isola would find coverage and represent the Hahns in any environmental claims related to the site.

D. Contact with the NJDEP on Behalf of the Hahns

Isola's initial strategy was to partner with Genesis and file an NJDEP claim that would trigger Travelers' duty to defend and provide coverage for the remediation costs.[10] Isola directed Genesis to contact the NJDEP on behalf of the Hahns, which they did.[11]

On March 30, 2012, Genesis completed an NJDEP receptor evaluation form that identified Min-Ku as the person responsible for conducting the remediation. On April 23, Kenneth Wenz, a Genesis employee, sent a letter to Min-Ku, enclosing a Licensed Site Remediation Professional

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6. DeArth testified that he was at the Diner Meeting and believed that Gregory hired Isola. Richard did not testify at Isola's disciplinary trial, but a deposition transcript was introduced where Richard stated that Isola was introduced to Gregory at the Diner Meeting as the attorney who would represent Gregory, who was "fine" with the representation. Isola testified about the subjects discussed at the Diner Meeting, which the hearing judge found credible. Despite Gregory's testimony that he did not retain Isola at the Diner Meeting, the judge did not rely on this testimony due to inconsistencies in his prior deposition testimony. We rely on Isola's version of events as it was corroborated at trial by DeArth and was consistent with Richard's deposition testimony. This finding is consistent with the principle that reasonable doubts must be resolved in favor of the respondent. (*In the Matter of DeMassa*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 749.) Therefore, we reject OCTC's argument that the hearing judge erred in crediting Isola's testimony. As discussed *post*, OCTC failed to prove that Isola lacked authority to represent the Hahns.

7. "An insurer's obligation under an insurance policy is generally triggered by an event and notice to the insurer of a potentially covered claim." (Guevara & Deveau, Environmental Liability and Insurance Recovery (2012) p. 322.) Most policies require insurers to defend "suits" against the insured. (Kenny & Lattal, New Jersey Insurance Law, *supra*, §§ 21-2 & 21-3, pp. 726-727.)

8. At this point in the factual history, the identity of Min-Ku, one of the names listed on the policies, was confusing. Isola believed that Min-Ku was Gregory's mother, not Gregory himself. As discussed *post*, whether Isola knew Min-Ku's actual identity is not outcome determinative because Gregory, as spokesperson for the Hahns, had authority to hire Isola to represent himself, Cameo Cleaners of Fair Lawn, and the other family members connected to the remediation.

9. Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq. [establishing liability for damages from discharge of hazardous substances in New Jersey, including cleanup and removal costs]. The NJDEP has broad authority to enforce the Spill Act. (13C Slowinski & Walentowicz, N.J. Practice, Real Estate Law and Practice, *supra*, § 46:150, p. 211.)

10. An NJDEP directive ordering action will trigger the duty to defend. (Kenny & Lattal, New Jersey Insurance Law, *supra*, §§ 21-2 & 21-3, pp. 726-727.) "[T]he best strategy in insurance coverage is, frankly, to implement an aggressive offense in seeking coverage for the loss." (Guevara & Deveau, Environmental Liability and Insurance Recovery, *supra*, p. 297.)

11. Later, on March 9, 2012, DeArth signed a master services agreement for Genesis to perform remediation services on behalf of Min-Ku. No one signed the document for Min-Ku. Isola testified that he never got a signature for the services agreement as Travelers had not agreed to pay for any remediation and, therefore, Genesis did not have funding to do the work.

(LSRP) retention form. The form notified the NJDEP that remediation work conducted by Genesis would be supervised by an LSRP.[12] Wenz asked Min-Ku to sign the form. Instead, Isola signed it on April 30, as "counsel for" Min-Ku, the "owner" of the dry-cleaner. Above the signature line, the form provided, in part, "I certify under penalty of law that I have personally examined and am familiar with the information submitted herein, and that to the best of my knowledge, I believe that the submitted information is true, accurate and complete." Isola believed he had authority to execute this form as counsel for the Hahns since it was part of his strategy to access the insurance coverage.[13] He testified that it was not his practice to notify clients when he completed an NJDEP form in the course of representation.

E. Isola's Dealings with Travelers

Most of Isola's relevant communications with Travelers were with Diane Colechia, a senior account executive responsible for evaluating claims in the company's Environmental Coverage Unit.

1. Isola Tenders Claim to Travelers on Min-Ku's Behalf

On July 18, 2011, Isola sent Colechia a letter stating that he represented Min-Ku in claims asserted by the NJDEP and demands made by the Grecos. Isola stated that, based on liability insurance Min-Ku and her husband purchased while operating the dry-cleaning business, Min-Ku was now tendering her defense and indemnity to Travelers. At this time, Isola mistakenly believed Min-Ku was Gregory's mother; as noted previously, Chung Hee was Gregory's mother.

Colechia responded on August 4, stating she had no documentation of demands or claims made against Cameo Cleaners of Fair Lawn or Min-Ku. Isola responded on September 8, stating, "There are two claimants *implicated* in this matter." (Italics added.) He stated these claimants were (1) the NJDEP, which was compelling Min-Ku "and others" to undertake an investigation and remediation of dry cleaning-related solvents at 31-01 Broadway, and (2) the Grecos, who owned 31-01 Broadway. At the time he wrote the letter, Isola had instructed Genesis to get a claim from the NJDEP, but an actual claim had not been filed. Isola believed that Min-Ku, as a tenant, was an additionally responsible party in the eyes of the NJDEP.[14] If the Hahns had not already been targeted, he believed they would soon be—data had been collected showing potential vapor intrusion at a nearby elementary school.

Isola testified that at the time he wrote this letter, he was unaware of the distinction between "Cameo Cleaners of Fair Lawn" and "Cameo Cleaners." The hearing judge found this testimony was not credible because it conflicted with Isola's testimony that he "jumped the gun" by disclosing in the letter that Min-Ku was already involved in an NJDEP claim. Isola testified that at the time he wrote this letter, he knew that Genesis had met with the NJDEP on behalf of the Hahns. When asked about the letter, Isola also stated, "I jumped the gun. I fully anticipated that there would be [an NJDEP] claim forthcoming, and that's what I indicated to Ms. Colechia . . . . I thought that we would be seeing [NJDEP] demand for the sensitive receptor survey and the school investigation imminently, if it hadn't already been issued." At the time, Isola believed Cameo Cleaners of Fair Lawn was already the subject of an NJDEP claim. His comment that he "jumped the gun" was made in hindsight at trial; he was explaining that he now knows that an NJDEP claim had not been made against the Hahns. Therefore, there is no inconsistency between his

12. Under the Site Remediation Reform Act, an LSRP is responsible for overseeing remediation of contaminated sites. (N.J.S.A. 58:10C-1 et seq.; 13C Slowinski & Walentowicz, N.J. Practice, Real Estate Law and Practice, *supra*, § 46-8, pp. 21-22.) The NJDEP retains oversight under certain circumstances. (*Id.* at § 46:118, pp. 180-181.)

13. The expert testimony at trial was unclear as to whether an attorney could sign an LSRP retention form on behalf of a client. Our independent research has not revealed whether an attorney could sign the form on behalf of a client.

14. Persons "in any way responsible" for any hazardous substance are liable under the Spill Act; that is, anyone with ownership or control over the property at the time of the discharge may be liable. (*State, Dept. of Environmental Protection v. Ventron Corp.* (1983) 94 N.J. 473, 502; 13C Slowinski & Walentowicz, N.J. Practice, Real Estate Law and Practice, *supra*, § 46:143, pp. 202-203.)

testimony that he did not yet know the distinction between Cameo Cleaners of Fair Lawn and Cameo Cleaners and the comment. Based on our review of the record, we reverse the hearing judge's credibility finding. (See *In the Matter of DeMassa*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 748; *In the Matter of Lingwood*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 672, fn. 15.)

2. The Grecos File an Environmental Lawsuit against the Hahns

On February 3, 2012, the Grecos filed a complaint in New Jersey Superior Court against Min-Ku and the dry-cleaning business (2012 environmental lawsuit). Isola accepted service of the suit on behalf of Min-Ku. He did not inform Gregory about the lawsuit because its sole purpose was to trigger coverage by Travelers, which was the stated goal from the Diner Meeting. On February 14, Isola sent Colechia a copy of the lawsuit. In March 2012, he filed an answer denying the allegations without consulting the Hahns.

On August 3, Isola sent Colechia a copy of the amended complaint. Colechia responded that Travelers would participate in the defense of Min-Ku and Cameo Cleaners of Fair Lawn, including paying attorney fees.[15] Isola later filed answers to the amended and second amended complaints, again without consulting the Hahns. The 2012 environmental lawsuit was eventually dismissed without prejudice and refiled as a new lawsuit in January 2016, with identical claims (2016 environmental lawsuit).

3. Travelers' Defense Obligations

On November 5, 2012, Isola sent Colechia a letter with a proposal for resolving the case, which included settlement with the Grecos and a policy buyback agreement. He also attached the task order from Genesis to evaluate the contamination site. Travelers refused to fund the Genesis evaluation because its insureds were not subject to an NJDEP order and thus not required to perform a site investigation. On January 8, 2013, Colechia sent Isola a letter stating that Travelers would contribute six percent toward the fees for the defense-related work performed on behalf of its insured. This was much lower than Isola expected.

After many discussions with Travelers, Isola filed a third-party complaint against Travelers on July 29, 2013, in the 2012 environmental lawsuit. The aim of the suit was to pressure Travelers to increase the defense costs. Isola did not discuss the complaint with the Hahns as it only affected the amount Travelers would pay for the defense costs, and these funds did not directly or indirectly come from his clients. In September 2013, Travelers agreed to increase its share of the defense costs to 36.84 percent in exchange for dismissal of the third-party complaint.[16] No formal settlement agreement was signed. Isola dismissed the third-party complaint without prejudice and without discussing it with the Hahns.

F. Greco and Hahn Settlement Agreement

Isola discussed settlement of the 2016 environmental lawsuit with the Grecos' attorney, Ryan Milun. Isola told Milun that the Hahns would only pay what Travelers would cover. Isola and Milun went back and forth on what the remediation would cost, ranging from a few hundred thousand to two million dollars. Isola did not discuss the cost proposals with the Hahns.

On December 13, 2016, Isola proposed to Milun that Min-Ku assign the Travelers policies to the Grecos. He had not discussed this with the Hahns. Milun made settlement offers, proposing that the Hahns pay over $1.5 million. Travelers then asserted that it would not consent to an assignment of the Hahns' policies. Isola did not reveal this to the Hahns or Milun because he did not believe Travelers' position was "binding or material or relevant." In January 2017, Milun again made a $1.5 million demand to Isola for settlement.

15. In defending an insured in an environmental claim, insurers often agree to pay defense costs. (Guevara & Deveau, Environmental Liability and Insurance Recovery, *supra*, p. 330.)

16. The weighted allocation between policies also applies to the allocation of defense costs. (Kenny & Lattal, New Jersey Insurance Law, *supra*, § 21-41, pp. 789-790; *Owens-Illinois v. United Ins. Co.*, *supra*, at p. 477.) Isola believed that the proposal to pay 36.84 percent of the defense costs was consistent with Travelers' obligation under the law.

Isola tentatively agreed, without consulting the Hahns, subject to a condition that limited the Grecos to obtaining the money only from the Hahns' insurance coverage.

Milun and Isola then began to prepare the settlement agreement. Multiple versions of the settlement agreement were drafted, including one version with the erroneous statement that Travelers had not objected to the settlement. Travelers had told Isola on March 17, 2017, that it did not agree with the settlement.

Meanwhile, the Grecos had filed a separate lawsuit in January 2017 against the Hahns alleging a breach of a lease guarantee (lease guarantee lawsuit); Peter Kim represented Gregory in the lease guarantee lawsuit. Milun told Kim of the 2016 environmental lawsuit, and Kim thereafter informed Gregory. Isola learned from Milun that Kim was representing Gregory in the lease guarantee lawsuit. On March 27, 2017, Isola emailed Kim, introducing himself and informing Kim of the settlement agreement involving Min-Ku. Isola asked for assistance in contacting the Hahns.

Attached to the March 27 email was a draft of the settlement agreement containing the erroneous statement about Travelers' position on the settlement. Isola was not aware the draft sent to Kim contained the error. Isola believed the version being used stated that Travelers had been informed of the settlement negotiations, with no indication of Travelers' position.[17] On April 12, Isola emailed Kim a summary of a recent status conference with the court in the 2016 environmental lawsuit. The email was silent as to Travelers' objection.

Another insurance company, Hartford, then notified Milun of additional insurance policies for the Hahns' business from Hartford. Isola proposed to Milun and Kim that the Hartford policies could be assigned to the Grecos, which could resolve all the lawsuits. Gregory discussed the settlement with Kim, but not with Isola.[18]

During April discussions as to who would sign the settlement agreement, the parties learned that Min-Ku was actually Gregory's name, not his mother's.[19] On May 1, 2017, Gregory approved the agreement and arranged for his mother to sign it. The settlement agreement between the Grecos and the Hahns was executed on May 11, 2017, and signed by Chung Hee, Gregory's mother, on behalf of herself and Cameo Cleaners of Fair Lawn.[20] The Hahns agreed to a $1.5 million consent judgment and the Grecos agreed that they could only seek enforcement of the judgment through insurance.[21] The Hahns also agreed to assign their proceeds under the insurance policies to the Grecos. The agreement was not contingent on Travelers' consent and Isola never informed Kim or Milun that Travelers had objected. However, Isola did not look at the signed version of the settlement agreement as Milun and Kim handled the final stages of the settlement. Later, Travelers paid Isola $26,085.69 for his services on behalf of Min-Ku.[22]

Isola's representation of the Hahns resulted in a positive outcome for his clients. The goal of the representation was to find insurance coverage

17. We agree with the hearing judge that Isola's failure to catch the erroneous statement amounted to simple negligence as Isola and Milun credibly testified that multiple versions were involved and the wrong one was accidentally sent to Kim.

18. Isola did not communicate with any Hahn family member after the Diner Meeting until nearly six years later when he finalized the terms of the settlement agreement. However, at a June 2018 deposition in another case, *Greco v. Travelers*, Isola testified that he recalled having approximately "five to ten" conversations with Gregory. Later, at the disciplinary trial in the Hearing Department and in an interview with the New Jersey Office of Attorney Ethics, he admitted that this testimony was incorrect and that he had spoken directly to Gregory only at the Diner Meeting.

19. Kim was also unaware until this time that Min-Ku was actually Gregory.

20. The signed version contained the erroneous statement that Travelers had not objected to the settlement. Gregory's father was not alive at the time of the settlement.

21. The Hahns had coverage for up to $2 million. Therefore, the $1.5 million settlement left $500,000 in coverage for the Hahns for any future claims.

22. In July 2017, the Grecos filed a lawsuit against Travelers and Hartford to demand they pay the Hahns' share of the remediation costs. A New Jersey superior court determined in a summary judgment order that the settlement agreement could not be enforced against Travelers and Hartford. The summary judgment order did not affect the release the Hahns obtained from the Grecos for the claims against them.

so that the Hahns would not have to pay out-of-pocket for the remediation. He initiated discussions with Travelers so that Travelers would share in the investigation and remediation costs of 31-01 Broadway with the Grecos' insurance. Despite Isola's efforts, Travelers did not acknowledge its duty to defend until the 2012 environmental lawsuit was filed. Subsequently, Travelers appointed Isola as counsel and paid for him to defend against the environmental claims. Thereafter, Isola kept Travelers informed of the remediation efforts and the possible settlement of the lawsuit. Isola negotiated the settlement on behalf of the Hahns. The settlement agreement procured a complete release of the Hahns from liability to the Grecos and preserved insurance coverage for possible future claims. Isola completed the representation at no cost to the Hahns.

III. CULPABILITY

OCTC must prove culpability by clear and convincing evidence. (Rules Proc. of State Bar, rule 5.103; *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552 [clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command unhesitating assent of every reasonable mind].) **[1a]** Any reasonable doubts resulting from the evidence are resolved in favor of the respondent. (*Himmel v. State Bar* (1971) 4 Cal.3d 786, 793-794.) Evidence leading to differing reasonable interpretations of facts must lead us to adopt the inference of no culpability. (*In the Matter of DeMassa, supra*, 1 Cal. State Bar Ct. Rptr. at p. 749.)

Like the hearing judge, we first discuss the issue of Isola's authority as attorney for the Hahns and Cameo Cleaners of Fair Lawn. **[2a]** An attorney's duty to a client depends on the existence of an attorney-client relationship. (*Fox v. Pollack* (1986) 181 Cal.App.3d 954, 959.) "[T]he relationship can only be created by contract, express or implied. [Citations.]" (*Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th 719, 729.) An implied-in-fact contract arises from conduct of the parties that shows there is a relationship despite the absence of a formal agreement. An attorney-client relationship may be informally created by acts of the parties without a written contract. (1 Witkin, Cal. Procedure (6th ed. 2022) Attorneys, § 40.) There are several indicia of an attorney-client relationship, but the intent and conduct of the parties are critical to the formation of such a relationship. (*Lasky, Haas, Cohler & Munster v. Super. Ct.* (1985) 172 Cal.App.3d 264, 285.)

[2b] We agree with the hearing judge that the record supports the existence of an attorney-client relationship between Isola and Gregory, as representative of Cameo Cleaners of Fair Lawn. At the meeting, Isola met with Gregory, who represented the Hahn family.[23] They discussed the usual aspects of representation in these types of matters, including securing insurance coverage and the occasional need for a lawsuit. Gregory authorized Isola to begin working on the environmental remediation matter for his family. The conduct of the parties is consistent with the finding of an attorney-client relationship.[24] Gregory was aware of his family's involvement with the environmental issues at 31-01 Broadway. Nothing in the record suggests that after the Diner Meeting Gregory took further action regarding the remediation, which comports with the inference that Gregory hired Isola to act as his attorney to address the Hahns's liability. Gregory did not contact Travelers to make a claim or contact another attorney to deal with the remediation, even though he knew of the existence of the policies and was an experienced real estate professional. Isola's conduct also comports with the existence of an attorney-client relationship. After the Diner Meeting, Isola began working to establish coverage and discharge the Hahns from liability. He then acted as the Hahns' attorney when they were sued by the Grecos.

[3] We next address the extent of Isola's authority as the Hahns' attorney. Authority conferred upon an attorney is, in part (1) apparent

23. As noted *ante*, the hearing judge did not rely on Gregory's recollections of the Diner Meeting. He was the only one to testify that Isola was not hired at the Diner Meeting.

24. We note that it would have been much easier to establish the existence of an attorney-client relationship if Isola had memorialized the understanding from the Diner Meeting in a signed retainer agreement.

authority—the authority to do that which the attorney was hired to do—and (2) actual authority implied in law. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396, 404.) Considering our finding that Gregory hired Isola to discharge the Hahns' liability for the environmental issues at 31-01 Broadway, it follows that Isola had apparent authority to take reasonable actions to achieve that objective. Therefore, we disagree with the hearing judge that Isola's authority was somehow "limited." As the attorney, Isola was tasked with advancing the interests of the Hahns regarding the remediation. He did so by initiating a claim with Travelers, accepting service of the environmental lawsuit, and filing an answer to a complaint, among other things. Even though the Grecos had not yet sued the Hahns at the time of the Diner Meeting, the possibility of a lawsuit was discussed then. Clearly, Isola should have communicated with Gregory that the Grecos had sued, as it was a significant development in the case. However, this failure to inform did not decrease his authority to work on the environmental remediation matter for which he was hired. We agree with Isola that his failure to communicate cannot be conflated with a lack of authority. He believed in good faith that he had authority to act. (See *In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 240-241, citing *In the Matter of Lazarus* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 387, 397-398, [no moral turpitude where attorney acts with apparent authority believed in good faith to have obtained].) Accordingly, we find that the record supports the finding that Isola had full authority to act as attorney for the Hahns and Cameo Cleaners of Fair Lawn in discharging their liability for the contamination.

[1b] OCTC argues on review that no attorney-client relationship existed with any of the Hahns and that Isola had no authority after the Diner Meeting to represent any of the Hahn family members. We disagree and we find that Isola had authority to represent the Hahns and Cameo Cleaners of Fair Lawn after the discussion between Isola and Gregory at the Diner Meeting.[25] In addition, considering our principles regarding reasonable inferences and resolving reasonable doubts in favor of the respondent, we hold that Isola had authority to represent the Hahns. At the Diner Meeting, Isola met Gregory, who had the ability to hire Isola to handle the remediation for him and his family. The confusion regarding Gregory's name and the fact that Isola had not met Gregory's mother does not reduce or eliminate Isola's authority as the attorney hired by Gregory to represent the Hahns and find coverage for Cameo Cleaners of Fair Lawn.

A. Counts One, Three, and Twenty-Five: Moral Turpitude (Bus. & Prof. Code, § 6106)

Counts one, three, and twenty-five alleged that Isola committed various moral turpitude violations including dishonest and corrupt acts (count one), a scheme to defraud (count three), and habitual disregard of client interests (count twenty-five). **[4a]** Business and Professions Code section 6106[26] provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. The hearing judge dismissed these counts with prejudice after finding OCTC failed to present clear and convincing evidence establishing culpability. She found that Isola had an honest belief that he was representing the Hahns' best interests, and that he was not spurred by a corrupt, dishonest, or fraudulent purpose. Neither party challenges these dismissals on review. The record shows that Isola did not engage in moral turpitude in his representation of the Hahns. He believed he was advancing their interests by securing insurance coverage and representing them in lawsuits related to the remediation. Therefore, we affirm the dismissal of counts one, three, and twenty-five with prejudice. (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 843 [dismissal of charges

25. OCTC argues that we should reverse the hearing judge's finding that Isola credibly asserted that the Diner Meeting included a discussion about his services and the possibility of a lawsuit. OCTC's argument is based on the belief that Isola was dishonest. As evidence of Isola's dishonesty, OCTC points to Isola's failure to correct the settlement agreement regarding Travelers's objection. We disagree, as discussed *post*, because we find that his actions did not amount to misconduct. There is no clear and convincing evidence that Isola was dishonest.

26. All further references to sections are to this source, unless otherwise noted.

for want of proof after trial on merits is with prejudice].)

B. Counts Two, Seven, and Eleven: Moral Turpitude—Misrepresentation (§ 6106)

Counts two, seven, and eleven alleged Isola made various false and misleading statements to Travelers. The hearing judge found OCTC did not prove these charges by clear and convincing evidence and dismissed counts two, seven, and eleven with prejudice.

Count two alleged that Isola falsely stated in a July 18, 2011 letter to Travelers, that he represented Min-Ku, that Min-Ku was female, and that Min-Ku had decided to tender her defense and indemnity to Travelers. At this time, Isola was unaware that Min-Ku was actually Gregory and not Gregory's mother. OCTC argues we should reverse the hearing judge on count two because Isola had no authority to represent Min-Ku. As discussed *ante*, we find that Isola had authority to represent the Hahns and to advance their interests concerning the remediation. Therefore, we affirm the dismissal of count two with prejudice. (*In the Matter of Kroff*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

Count seven alleged Isola made false and misleading statements to Travelers in January 2017 regarding his representation of Min-Ku and his authority to negotiate a settlement of the 2016 environmental lawsuit. OCTC again argues that we should find culpability because Isola had no authority to represent Min-Ku. We disagree. Isola was the attorney for the Hahns and made no intentional misrepresentation in his January 2017 discussions with Travelers regarding his representation. Therefore, we affirm the dismissal of count seven with prejudice. (*In the Matter of Kroff*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

Count eleven alleged Isola falsely represented in a September 8, 2011 letter to Travelers that (1) Min-Ku was the insured making the claim and split her time between Korea and the United States; (2) Min-Ku had knowledge of New Jersey claims since 2002; (3) Min-Ku had received and was compiling several letters from the NJDEP;[27] and (4) Min-Ku believed she had purchased insurance exclusively from Travelers during the relevant period and had not corresponded with any other insurers. The hearing judge dismissed count eleven, finding no clear and convincing evidence that the assertions were false or not honestly held. Neither party disagrees with the dismissal of count eleven on review. After review of the record, we agree with the dismissal because, at the time he wrote the letter, Isola believed he was conveying correct information based on his discussion with Gregory at the Diner Meeting. Therefore, count eleven is dismissed with prejudice. (*In the Matter of Kroff*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

C. Count Ten: Moral Turpitude—Misrepresentation (§ 6106)

Count ten alleged Isola made false statements in letters to Travelers, dated July 18 and September 8, 2011, regarding the existence of an NJDEP claim against Min-Ku. In the July 2011 letter, Isola stated that he represented Min-Ku regarding "claims asserted by the [NJDEP] and demands made by the owner of the real property known as 31-01 Broadway." The hearing judge found it reasonable to infer that Isola did not actually know there was no NJDEP claim against Cameo Cleaners of Fair Lawn when writing the July 2011 letter, and found his misstatement was not an act of moral turpitude. Neither party disputes this finding. We affirm the dismissal of the portion of count ten relating to the July 18, 2011 letter.

[4b] Regarding the September 8, 2011, letter, the ANDC alleged the following statement was a misrepresentation: "There are two claimants implicated in this matter, the first being the [NJDEP], which is compelling Min-Ku Hahn (and others) to undertake an investigation and

27. The hearing judge found that the statement regarding the NJDEP letters was false but was duplicative of the allegations charged in count ten, for which she found culpability. As discussed *post* under count ten, we find that there was not clear and convincing evidence of a moral turpitude misrepresentation.

remediation of dry-cleaning-related solvents at . . . 31-01 Broadway . . . . The second claimant is the current property owner, 31-01 Broadway Associates, and [its] representative, Richard Greco." The hearing judge found this statement was grossly negligent and amounted to moral turpitude because an NJDEP claim had not been made against Min-Ku or Cameo Dry Cleaners of Fair Lawn. The judge found that Isola made this representation in order to trigger Travelers' duty to defend and had not verified that an NJDEP claim had been made.[28]

[4c] We disagree that Isola's statement amounted to moral turpitude. Isola's letter discussed coverage and remediation of the site as it related to the Hahns. He stated that the NJDEP was "implicated in this matter," and was compelling Min-Ku and others to remediate 31-1 Broadway. Isola asserts that it was not false to say that the NJDEP was implicated as claims had been made related to the site and the Hahns had some liability as the prior tenants of 31-01 Broadway. In March 2011, the Grecos submitted an NJDEP form identifying the Hahns and stating that the Hahns' insurance could be used to obtain additional coverage. Additionally, Isola's letter was sent early in the case, and he was confused about Cameo Cleaners of Fair Lawn and Cameo Cleaners. He believed an NJDEP claim had been made against the Hahns. Therefore, we find no clear and convincing evidence to support the conclusion that Isola made a material misrepresentation amounting to either grossly negligent or intentional moral turpitude.

[4d] OCTC argues on review that Isola intentionally made this statement in order to "create an adversarial situation in which Travelers would provide coverage." That argument is not based on the record. It ignores the fact that Travelers did not rely on the statement and, further, that Travelers did not get involved until the Grecos sued the Hahns, which had nothing to do with the existence of an NJDEP claim against the Hahns.[29] From the evidence, it is reasonable to believe that Isola was simply mistaken regarding the existence of an NJDEP claim against the Hahns. He believed that an NJDEP claim had been issued targeting the Hahns when it was actually against Cameo Cleaners. However, he also believed that even if the Hahns had not already been targeted by the NJDEP, they would be soon since they were a tenant and an additionally responsible party. For these reasons, we find that OCTC did not prove by clear and convincing evidence that Isola's statement in the September 8, 2011, letter amounted to a misrepresentation involving moral turpitude. Therefore, we dismiss count ten with prejudice. (*In the Matter of Kroff, supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

D. Count Four: Appearing for a Party without Authority (§ 6104)

[5a] Count four alleged Isola appeared for Min-Ku in the 2012 environmental lawsuit without authority by filing pleadings, accepting service, claiming he had settlement authority, and appearing for Min-Ku in court. Section 6104 states, "Corruptly or willfully and without authority appearing as attorney for a party to an action or proceeding constitutes a cause for disbarment or suspension."

[5b] The hearing judge found that Isola's discussions with Travelers regarding settlement did not amount to a court appearance that would violate section 6104. However, the judge found culpability under section 6104 for Isola's appearances in court and pleadings filed in the 2012 environmental lawsuit. The judge determined that Isola had no authority to appear on behalf of Min-Ku in the lawsuit by the Grecos "as it was not reasonably contemplated or discussed at the only client meeting."

[5c] We disagree that Isola lacked authority to appear in the 2012 environmental lawsuit, as discussed *ante*. Isola credibly testified that possible litigation was discussed at the Diner Meeting. At that meeting, Gregory retained Isola to represent him and his family in matters related to the environmental remediation. The Grecos sued the

28. The hearing judge noted that the NJDEP never made a claim against the Hahns.

29. Travelers did not rely on Isola's statement in the letter and conducted its own investigation of the status of any NJDEP claims.

Hahns for remediation liability. Therefore, it follows that Isola believed he had authority to act as Min-Ku's attorney in the litigation. While we agree that Isola should have updated Gregory on the case status, this is not evidence of a lack of authority. His failure to communicate does not limit the authority he believed in good faith he had obtained from Gregory to act as the Hahns' attorney. OCTC failed to prove that Isola corruptly or willfully appeared without authority in violation of section 6104. (See *In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 916 [§ 6104 prohibits actual appearance which is willful or corrupt and without authority].) Rather, the evidence shows that Isola was retained at the Diner Meeting to represent the Hahns and that he believed he had authority to appear in litigation related to the environmental remediation.[30] Therefore, we dismiss count four with prejudice. (*In the Matter of Kroff, supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

E. Count Five: Moral Turpitude—Misrepresentation to the Court (§ 6106)

[6a] Count five alleged Isola falsely claimed he represented Min-Ku on four separate occasions in the 2012 and 2016 environmental lawsuits. Isola filed an amended answer and third-party complaint, and executed the tolling agreement in the 2012 environmental lawsuit. He filed an answer in the 2016 environmental lawsuit. The hearing judge found that Isola unreasonably believed he had authority to represent Min-Ku in the litigation and committed a misrepresentation to the court through gross negligence by appearing on Min-Ku's behalf. Therefore, she found culpability under count five, but did not assign additional disciplinary weight because the conduct was duplicative of the conduct charged in count four. OCTC supports the judge's culpability determination, but argues that the judge should have found that his misrepresentations were intentional. Isola asserts he had authority from the Diner Meeting to engage in the litigation.

[6b] We disagree with the hearing judge that Isola operated from a "mistaken and unreasonable belief" as to his authority to represent Min-Ku. As discussed *ante*, we find that Isola reasonably believed he had authority to represent Min-Ku in the environmental remediation. Isola understood from the Diner Meeting that he was authorized to try to ensure that the remediation was paid for without cost to the Hahns. A suit by the Grecos to trigger coverage from Travelers was a probable outcome discussed at the meeting. Therefore, we cannot find that Isola committed an act involving moral turpitude, dishonesty, or corruption within the meaning of section 6106. (See *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].) Even if Isola was mistaken about his authority to act, which we do not find, his actions would not rise to grossly negligent moral turpitude as he sincerely believed that his conduct was justified. (*Id.* at fn. 5, citing *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83 & *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404 [gross negligence found, and no evidence belief was sincere and honestly held].) Accordingly, we dismiss count five with prejudice. (*In the Matter of Kroff, supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

F. Counts Six and Twenty: Moral Turpitude—Settling Without Authority (§ 6106)

Counts six and twenty set forth alternative theories of culpability regarding Isola's settlement of the third-party complaint in the 2012 environmental lawsuit. Count six alleged that Isola had no authority to represent Min-Ku and could not settle the third-party complaint. Count twenty alleged that Isola had authority to represent Min-Ku, but he settled the third-party complaint without discussing it with Min-Ku. The hearing judge found that Isola had "limited authority to act as counsel for Min-Ku," and therefore dismissed count six with prejudice. The judge found

30. We reject OCTC's reliance on *In the Matter of Regan* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 844 and *In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315. Those cases dealt with attorneys who acted in contravention to stated client directives, which is not the case here.

culpability under count twenty because Isola filed and settled the third-party complaint without client knowledge or consent. The judge determined Isola's actions amounted to overreaching and constituted moral turpitude. On review, OCTC argues that the judge should have found culpability under count six instead of count twenty because Isola had no authority to represent Min-Ku. As discussed *ante*, we find that Isola did have authority to represent Min-Ku in the environmental lawsuits and therefore, we reject OCTC's argument for culpability under count six.

[7] The third-party complaint involved claims relating to Travelers' duty to pay the defense costs. Isola had informed Gregory at the Diner Meeting that Isola would be compensated for his work solely from compensation he would receive from Travelers pursuant to its duty to defend. Travelers initially proposed to pay only six percent of the defense costs. To pressure it into paying a larger percentage, Isola filed the third-party complaint. Travelers then proposed to pay approximately 36 percent of the defense costs. Isola believed that this was consistent with Travelers' obligation under the law and decided to dismiss the third-party complaint without prejudice. He argues that this was not a settlement agreement and did not bind the parties. Rather, it was an interim agreement regarding payment of attorney fees that could be further negotiated and finalized later. We agree. There was no enforceable settlement agreement affecting the Hahns, and an ultimate agreement regarding Travelers' liability had not been reached. Isola's actions show that he was furthering the Hahns' interests by trying to find the money to fund his representation. Therefore, OCTC failed to show that Isola's actions regarding the third-party complaint amounted to settlement of a claim without authority, involving moral turpitude. Accordingly, we dismiss both counts six and twenty with prejudice. (*In the Matter of Kroff*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 843)

G. Counts Eight and Twenty-Four: Moral Turpitude—Misappropriation (§ 6106)

Counts eight and twenty-four alleged Isola misappropriated the $26,085.69 in attorney fees he received from Travelers. Travelers was obligated to pay defense costs. The fees paid to Isola were not paid from funds owed or attributable to the Hahns and did not affect their liability coverage. As Isola had explained at the Diner Meeting, there would be no out-of-pocket expenses for the Hahns' attorney fees. Therefore, the hearing judge found no evidence of misappropriation and dismissed counts eight and twenty-four with prejudice. Neither party challenges these dismissals on review. We agree that OCTC did not establish that Isola misappropriated any client funds, and we affirm the dismissals with prejudice. (*In the Matter of Kroff*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

H. Count Nine: Failure to Return Unearned Fees (Rules Prof. Conduct, rule 3-700(D)(2))

Count nine alleged Isola failed to earn the $26,085.69 in fees received from Travelers in violation of rule 3-700(D)(2) of the Rules of Professional Conduct.[31] Rule 3-700(D)(2) provides that upon termination, an attorney shall "promptly refund any part of a fee paid in advance that has not been earned." The hearing judge found Isola performed the work for which he billed and, therefore, no culpability was established for a violation of rule 3-700(D)(2). The judge dismissed count nine with prejudice. Neither party challenges the dismissal on review, and we affirm it with prejudice. (*In the Matter of Kroff*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

I. Count Twelve: Moral Turpitude—Misrepresentation (§ 6106)

Count twelve alleged Isola made false and misleading statements in the LSRP form, which he signed as "counsel for" Min-Ku. The hearing judge found Isola committed moral turpitude through gross negligence because he signed without consulting his client. The judge found that Isola's signature on the form represented that Min-Ku was

31. All further references to rules are to the former California Rules of Professional Conduct that were in effect until November 1, 2018, unless otherwise noted.

familiar with the information contained in the form. We disagree. Isola signed the LSRP form as counsel for Min-Ku. The attestation on the form provided that he was certifying to the best of *his* knowledge that the information submitted in the form was "true, accurate, and complete." The record supports his argument that the statements were facts that he believed to be true. OCTC failed to establish that Isola's signature amounted to a misrepresentation involving moral turpitude.[32] Isola believed he had authority as Min-Ku's attorney to sign and submit this document. Also, the statements depict Isola's understanding of the situation at the time. For these reasons, we dismiss count twelve with prejudice. (*In the Matter of Kroff, supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

J. Count Thirteen: Seeking to Mislead a Judge (§ 6068, subd. (d))

Count thirteen alleged Isola sought to mislead a judge when he stated in the third-party complaint that Min-Ku demanded judgment against Travelers because Isola had not communicated with Min-Ku and, therefore, did not actually know what Min-Ku would demand. Section 6068, subdivision (d), prohibits an attorney from misleading a judge or judicial officer by a false statement of law or fact. The hearing judge found that Isola did not intend the third-party complaint to be misleading. Instead, Isola believed he had authority to file the complaint against Travelers to secure payment of the defense costs. Therefore, the judge dismissed count thirteen with prejudice.

OCTC argues on review that the hearing judge should have found culpability because Isola intentionally sought to mislead by filing the third-party complaint. This argument is again premised on OCTC's belief that Isola did not have authority to act as Min-Ku's attorney, which we have rejected *ante*. We agree with the judge that Isola did not intentionally seek to mislead a judge when he filed the third-party complaint. Accordingly, we affirm the dismissal of count thirteen with prejudice. (*In the Matter of Kroff, supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

K. Counts Fourteen and Fifteen: Moral Turpitude—Misrepresentation (§ 6106)

Counts fourteen and fifteen alleged that Isola made misrepresentations in a June 7, 2018, deposition related to a lawsuit where the Grecos sued Travelers (*Greco v. Travelers*). Count fourteen alleged Isola falsely stated in that deposition that he had never represented the Grecos. The hearing judge found OCTC failed to establish that Isola's statement was false. Isola maintained he never represented the Grecos, who had their own counsel at all relevant times. OCTC maintains on review that Isola's statement was false but offers no support for its argument. We agree with the hearing judge that the record does not support culpability for count fourteen and we dismiss it with prejudice. (*In the Matter of Kroff, supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

[8] Count fifteen alleged that Isola falsely stated in the deposition that he estimated that he had "five to ten" telephone conversations with Gregory after the Diner Meeting. Actually, Isola had not communicated with Gregory at all during the relevant period. Isola later admitted in the disciplinary trial and in an interview with the New Jersey Office of Attorney Ethics that his statement in the deposition was incorrect. The hearing judge found the statement in the deposition to be a grossly negligent misrepresentation in violation of section 6106. We find, however, that OCTC has failed to carry its burden of proof that Isola's statement amounted to moral turpitude. Isola had not reviewed his file for the Hahn case before appearing at the deposition. He asserts that his testimony was based on his experience with these cases generally, not a specific memory of speaking with Gregory. At trial in this case, he characterized the "five to ten" statement as a "guess" at the time of the deposition, which he later corrected in his interview with the New Jersey Office of Attorney

32. OCTC argues on review that we should affirm culpability under count twelve, but find that Isola acted intentionally. Citing New Jersey law, OCTC argues that it was improper for Isola to sign the form on behalf of Min-Ku because it was equivalent to an affidavit or a declaration that an attorney may not sign on behalf of client. However, as noted *ante*, the expert testimony at trial was unclear as to whether an attorney could sign an LSRP form on behalf of a client. OCTC has not established that it was improper for Isola to do so. Our independent research did not reveal that an attorney is prohibited from signing an LSRP form on behalf of a client.

Ethics. The record supports a reasonable inference that Isola was simply mistaken when he testified and that his testimony reflected his recollection of the case at the time. OCTC argues on review that Isola's statement was an intentional lie to cover up the fact that he had acted without authority and failed to communicate. However, this is based on OCTC's conjecture and not substantial evidence. Further, a reasonable inference exists that Isola was simply mistaken. Therefore, we reject OCTC's claim, and dismiss count fifteen with prejudice. (*In the Matter of Kroff, supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

L. Counts Sixteen and Seventeen: Conflicts (Rule 3-310(C)(1) & (C)(2))

Counts sixteen and seventeen alleged violations of rule 3-310(C), which requires informed written consent from each client if an attorney represents more than one client in a matter in which the interests of the clients potentially or actually conflict. These counts were premised on the allegation that Isola had an attorney-client relationship with the Grecos, which was not established at trial. Accordingly, the hearing judge dismissed counts sixteen and seventeen with prejudice. Neither party challenges these dismissals on review, and we affirm them with prejudice.[33] (*In the Matter of Kroff, supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

M. Count Eighteen: Failure to Perform with Competence (Rule 3-110(A))

Count eighteen alleged Isola failed to perform with competence in his representation of Min-Ku in violation of rule 3-110(A). Rule 3-110(A) provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. The hearing judge found OCTC was unable to establish by clear and convincing evidence that Isola failed to perform with competence; the judge dismissed count eighteen with prejudice. Neither party challenges this dismissal on review, and we affirm it with prejudice. (*In the Matter of Kroff, supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

N. Count Twenty-One: Failure to Inform Client of Significant Developments (§ 6068, subd. (m))

[9] Count twenty-one alleged that Isola violated section 6068, subdivision (m), which requires an attorney to "keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services." Count twenty-one alleged that Isola should have informed Min-Ku of the following events: (1) that on or about October 21, 2011, Travelers stated it would not provide coverage in the absence of litigation; (2) that the 2012 environmental lawsuit was filed against Min-Ku and Cameo Cleaners of Fair Lawn; (3) that Isola agreed to accept service on behalf of Min-Ku in the 2012 environmental lawsuit; (4) that Isola filed an answer in the 2012 environmental lawsuit; (5) that Isola filed a third-party complaint against Travelers; (6) that Isola dismissed the third-party complaint; (7) that Isola executed a tolling agreement; and (8) that from December 2016 through April 2017, Isola engaged in settlement negotiations on behalf of Min-Ku. The hearing judge found that Isola should have informed his client regarding Travelers' denial of coverage in October 2011, that the 2012 environmental lawsuit was filed, and that Isola filed an answer and a third-party complaint, which he also dismissed. Neither party challenges this finding on review. Rather, Isola admits that he failed to communicate significant developments and acknowledges culpability. Thus, we affirm culpability under count twenty-one.

O. Counts Nineteen and Twenty-Three: Breach of Fiduciary Duty (§ 6068, subd. (a))

[10a] Counts nineteen and twenty-three alleged Isola breached his common law fiduciary duties to Min-Ku. Section 6068, subdivision (a), provides that an attorney has a duty to support the Constitution and laws of the United States and California. An attorney's duties to his client are governed by the Rules of Professional Conduct and

33. OCTC does not dispute the dismissals because it asserts that Isola never represented the Hahns, which we reject *ante*.

other law relating to fiduciary relationships. (*Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1147; *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890.)

1. Count Nineteen

[10b] Count nineteen alleged that Isola breached his fiduciary duties to Min-Ku by writing on the LSRP form that Min-Ku was responsible for the remediation at 31-01 Broadway. OCTC alleged this was an admission of liability or responsibility and occurred without Min-Ku's permission. The hearing judge held that Isola's actions in placing Min-Ku before the NJDEP and signing the LSRP form without client knowledge or consent was a breach of fiduciary duties. However, the judge did not assign additional weight in discipline because she found the facts underlying count nineteen were the same as those underlying count twelve.[34]

[10c] On review, we find that OCTC failed to establish that Isola's actions related to the LSRP form amounted to a breach of fiduciary duties. The record shows that the Hahns did have some responsibility for remediation at 31-01 Broadway. Isola's representation strategy was to engage the NJDEP, involve Travelers, and obtain insurance coverage for the remediation. Isola asserts that the form does not admit sole responsibility because the Grecos, as owners of the site, also had responsibility. The form simply indicates who is taking charge of conducting the remediation, which is not an indication of sole liability. Further, the NJDEP was already aware of the Hahns as the Grecos stated in a remediation timeframe extension request that they were working to find insurance coverage from the Hahns as they were a previous tenant and also responsible for remediation. Additionally, OCTC argues on review that Isola breached a duty of loyalty to Min-Ku. Our review of the record, however, points to a reasonable inference that Isola was acting in the best interests of Min-Ku and the Hahns and that he was following the representation strategy discussed at the Diner Meeting. Therefore, we dismiss count nineteen with prejudice. (*In the Matter of Kroff, supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

2. Count Twenty-Three

[11a] Count twenty-three alleged that Isola committed several acts that amounted to overreaching and a breach of fiduciary duties in violation of section 6068, subdivision (a). The following actions were alleged under count twenty-three: failing to represent the interests of Min-Ku rather than the interests of the Grecos, causing Min-Ku and the Hahns to admit to the NJDEP responsibility for environmental contamination, settling a third-party complaint without communicating with Min-Ku, prompting Min-Ku and the Hahns to agree to liability of $1.5 million to the Grecos, causing Min-Ku and the Hahns to lose their insurance policy asset, providing legal advice to the Grecos that was not in Min-Ku's interest, and failing to communicate with Min-Ku for over six years.

[11b] "The relationship between an attorney and client is a fiduciary relationship of the very highest character." (*Clancy v. State Bar* (1969) 71 Cal.2d 140, 146.) Typical discipline cases for overreaching and breach of fiduciary duties involve business transactions where the attorney uses his position to unfairly exert influence over a client. (See, e.g., *Beery v. State Bar* (1987) 43 Cal.3d 802, 812-815 [discussion of cases involving breach of fiduciary duty]; see also *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 317 [repeated evasions and deceit surrounding attorney's business transaction with client are inconsistent with high degree of fidelity owed by attorney to profession and public]. Overreaching is often found where an attorney exploits a vulnerable client. (See, e.g., *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 959 [attorney used technical legalese in fee agreement to disadvantage of clients who spoke limited English].)

[11c] Here, the ANDC made several allegations that were not proven at trial, including

34. Count twelve alleged a section 6106 moral turpitude misrepresentation charge for signing the LSRP. As discussed *ante*, we do not find culpability under count twelve.

that Isola represented the interests of the Grecos, that he gave legal advice to the Grecos, and that he caused the Hahns to admit to liability to the Grecos and lose their insurance policy asset. Instead, the trial showed that Isola acted in the best interests of the Hahns by obtaining a release of liability to the Grecos and finding coverage for the remediation. Isola's actions aligned with his presentation at the Diner Meeting. No evidence demonstrates that Isola overstepped the bounds of his representation or overreached in a way that was unfair to the Hahns. He negotiated the settlement and then handed the matter to Kim to discuss with Gregory, who approved the settlement agreement. (Cf., *In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 314 [overreaching when attorney signed releases for clients without their knowledge or consent].)

[11d] The hearing judge found culpability was established under count twenty-three because Isola dismissed the third-party complaint. The judge did not assign additional weight in discipline because these facts also underlie count twenty. As discussed *ante*, we disagree that Isola committed misconduct by dismissing the third-party complaint.

[11e] The hearing judge also determined that Isola's "failure to communicate *at all* with his client over six years while pursuing litigation on the client's behalf constitute[d] an egregious breach of fiduciary duties, amounting to overreaching." We find no evidence of overreaching here. There is no evidence of deceit or that Isola negotiated terms of the settlement agreement to the detriment of the Hahns. While it is true that Isola did violate his ethical obligations by failing to inform his client of significant developments, this failure alone does not equate to overreaching.[35] He did not stop working on the case nor did he abandon the Hahns; instead, he competently completed the representation. (See *In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 680 [inadequate communication may be element in violations of other attorney duties].) **[12a]** Further, the ANDC was charged as an assortment of actions that, taken together, alleged overreaching and a breach of fiduciary duties; the failure to communicate allegations were already alleged under the more specific subsection—section 6068, subdivision (m)—in count twenty-one.[36] No additional facts in the record support culpability for overreaching or a breach of fiduciary duties. Therefore, we dismiss count twenty-three with prejudice. (*In the Matter of Kroff, supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

P. Count Twenty-Two: Failure to Communicate Settlement Offer (Rule 3-510)

[13a] Count twenty-two alleged that Isola learned of written settlement offers in the 2016 environmental lawsuit around January to March 2017 and failed to promptly communicate them to Min-Ku. Rule 3-510 requires an attorney to promptly communicate to a client all written offers of settlement, regardless of their significance or whether they are binding under contract law. (*In the Matter of Yagman* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 788, 795.) Isola did not communicate the offers to Gregory or Kim. Instead, he waited until the settlement agreement was drafted in April 2017 and sent a copy to Kim. The hearing judge found that Isola should have communicated these offers to his client and found Isola culpable under count twenty-two.

[13b] On review, Isola argues that the hearing judge discounted the fact that he reported

35. A breach of an attorney's fiduciary duty to a client involving failure to communicate was found in *Van Sloten v. State Bar* (1989) 48 Cal.3d 921. Van Sloten failed to perform the legal services for which he was hired, did not withdraw from the case, and then failed to communicate with the client. The failure to communicate was tied to Van Sloten's inaction on the case and demonstrated a breach of the good faith and fiduciary duty owed by an attorney to a client. (*Id.* at pp. 931-932.) The facts here are not similar as Isola acted in good faith to advance his clients' interests.

[12b] 36. Section 6068, subdivision (m) was not added until 1986, and became effective in 1987. (See *In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439, 450.) Before the enactment of subdivision (m), there was a "common law" duty to communicate, and it was proper to base culpability under subdivision (a). (*Ibid.*; see also *In the Matter of Hindin, supra*, 3 Cal. State Bar Ct. Rptr. at p. 680.) Now, it is improper to find violations for the same facts under both subdivisions (a) and (m) of section 6068. (*In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 369.) The specific statute should be charged instead of using the broader subdivision (a). (*Ibid.*)

significant settlement developments to Travelers. We agree with the judge that this fact is irrelevant to the charge under count twenty-two as Travelers was not his client. Further, Isola's argument under count twenty-two conflicts with his assertion that Travelers' objection was not material to the settlement agreement. Isola's duties are clear under the Rules of Professional Conduct; he was required to inform his client of a written offer regardless of whether it was significant or likely to be accepted. He did not do so. His emails show that he was discussing proposals for the settlements for months. He waited until the settlement agreement was ready for signature before sending it to Kim to share with Gregory. We reject Isola's argument that the earlier written offers did not have to be communicated. Therefore, we affirm culpability under count twenty-two.

Q. Count Twenty-Six: Moral Turpitude—Misrepresentation (§ 6106)

[14a] Count twenty-six alleged Isola made several misrepresentations in emails to Kim regarding Travelers' position and objection to the settlement agreement between the Grecos and the Hahns in the 2016 environmental lawsuit. The hearing judge found that Isola acted negligently by sending Kim a draft of the settlement agreement that stated that Travelers did not object to the settlement agreement. However, the judge found that Isola should have informed Kim about Travelers' objection and determined that his failure to do so amounted to moral turpitude by intentional misrepresentation. The judge found culpability under count twenty-six.

1. Isola acted negligently by sending drafts of the settlement agreement to Kim with the erroneous statement regarding Travelers' objection.

[14b] We agree with the hearing judge that Isola acted negligently when he sent Kim drafts of the settlement agreement containing the erroneous statement that Travelers had not objected to the settlement. Isola and Milun credibly testified that they used multiple versions of the agreement, accidentally sending Kim the wrong one. Isola did not notice the oversight and maintains that he was not aware that the version being provided contained the erroneous statement. Therefore, we agree with the finding that this was simple negligence and not a disciplinable offense.

2. Isola's failure to tell Kim that Travelers had objected was not intentional misrepresentation.

[15] We do not agree with the hearing judge's finding that Isola's March 27 and April 12, 2017 emails to Kim, omitting Travelers' objection, amounted to intentional misrepresentations. The March 27 email did not mention Travelers at all. The April 12 email summarized Isola's report to the judge at an April 10 settlement status conference. Isola disclosed that Travelers had been provided a copy of the proposed settlement agreement. His email does not mention Travelers' response. Resolving reasonable doubts in Isola's favor, we must conclude that culpability for an intentional misrepresentation was not established here. Isola believed the settlement agreement did not contain Travelers' position, as he had not carefully read the drafts with the erroneous statement sent to Kim. Isola had no indication that would lead him to believe that Kim thought that Travelers had not objected. As such, it cannot be determined that his omissions in the emails to Kim constituted intentional misrepresentation, especially as the April 12 email was only a summary of the status conference and Isola asserts Travelers' position was not discussed at the status conference. A reasonable interpretation of the facts is that Isola was unaware that Kim believed that Travelers had not objected. Therefore, Isola had no reason to mention Travelers' objection in his emails. For these reasons, we find that OCTC did not prove by clear and convincing evidence that Isola made misrepresentations to Kim regarding Travelers' objection to the settlement agreement. Accordingly, we dismiss count twenty-six with prejudice. (*In the Matter of Kroff, supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

IV. AGGRAVATION AND MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct[37] requires

37. All further references to standards are to this source.

OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Isola to meet the same burden to prove mitigation.

A. Aggravation

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

[16] We find that Isola committed multiple acts of wrongdoing related to his failures to communicate. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646-647 [three instances of misconduct considered multiple acts].) He failed to keep his client informed of significant developments, including that the Grecos had sued the Hahns, that he filed and dismissed a third-party complaint, and that he had received written settlement offers. He filed several pleadings and participated in court hearings without informing his client. These numerous failures to communicate over several years warrant moderate weight in aggravation under standard 1.5(b).[38] (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 279 [aggravation for multiple acts not limited to counts pleaded].) Isola committed multiple acts of wrongdoing—it does not matter for aggravation purposes under standard 1.5(b) that the acts were done in a single client matter.

2. No Aggravation for Indifference (Std. 1.5(k))

[17] Indifference toward rectification or atonement for the consequences of misconduct is an aggravating circumstance. While the law does not require false penitence, it does require an attorney to accept responsibility for wrongful acts and show some understanding of his culpability. (See *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) The hearing judge found substantial weight in aggravation for Isola's failure to accept responsibility.[39] However, this was based on culpability that we do not now find. We also reject the judge's finding of "overwhelming evidence of [Isola's] dishonesty" as not supported by the record. Isola admitted at trial that he should have used a written retainer agreement with Gregory and should have regularly reported to him on the status of the case. As Isola admitted to his failure to communicate, we do not find clear and convincing evidence of indifference because he has accepted responsibility for his actions. (Cf. *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 14 [attorney who fails to accept responsibility for actions and instead blames others demonstrates indifference].) Therefore, we do not assign aggravation under standard 1.5(k).

3. No Aggravation for Failure to Make Restitution (Std. 1.5(m))

OCTC argues on review that the hearing judge should have assigned aggravation for Isola's failure to return the "unauthorized" $26,085.69 in fees he received from Travelers. OCTC asserts that Isola falsely represented to Travelers that he represented Min-Ku when he had no authority to do so. As discussed *ante*, we find that Isola had authority to do the defense work for the Hahns and he earned the fees from Travelers. Accordingly, we do not assign aggravation under standard 1.5(m).

B. Mitigation

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

[18a] Mitigation includes "absence of any prior record of discipline over many years coupled with present misconduct, which is not likely to recur." (Std. 1.6(a).) Prior to his misconduct, Isola practiced law for approximately 21 years without discipline. However, the hearing judge assigned moderate weight in mitigation due to his indifference.[40] Given Isola's admission to culpability for failing to communicate and his testimony that he would do things differently, we do not agree that the misconduct will likely recur. Accordingly, we find that Isola has established that he is entitled to substantial weight in mitigation for his 21 years of discipline-free practice. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [significant

38. The hearing judge found substantial weight in aggravation for multiple acts, but included counts of culpability that we have determined should be dismissed. Therefore, we assign less aggravating weight and reject OCTC's argument for substantial aggravation for multiple acts.

39. OCTC supports this finding.

40. OCTC does not dispute the hearing judge's finding.

mitigation where attorney practiced over 10 years before first act of misconduct and misconduct not likely to recur].)[41]

2. Extraordinary Good Character (Std. 1.6(f))

Isola 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).) Six witnesses, including one attorney, a client, friends, and a family member, testified at trial and provided declarations attesting to Isola's good character. Four other character witnesses, including another attorney, submitted declarations. The witnesses observed that Isola is a remarkable friend, honest, and trustworthy. The attorney who testified has worked with Isola and stated that he is ethical, has high integrity, and goes above and beyond for his clients. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration given to attorneys' testimony due to their "strong interest in maintaining the honest administration of justice"].) Two witnesses discussed Isola's community involvement, including fundraising. Isola also testified regarding his community service. He stated he organized a coat drive for needy children and helped to establish a science museum in Lodi. He testified about his church activities, including fundraising and serving on the executive committee.

The hearing judge assigned substantial weight in mitigation for Isola's character evidence based on the witnesses' testimony and because they had known Isola for many years, were aware of the charges, and represented a cross-section of the community. OCTC argues on review that the judge should have given less weight in mitigation under this standard because the witnesses did not know about Isola's dishonesty. We reject this argument. The witnesses were aware of the misconduct alleged and we do not find dishonesty.[42] We agree with the hearing judge's finding and assign substantial weight in mitigation for Isola's good character evidence.

3. No Mitigation for Good Faith (Std. 1.6(b))

[19] Mitigation includes a "good faith belief that is honestly held and objectively reasonable." (Std. 1.6(b).) The hearing judge did not find mitigation for good faith based on her determination that Isola could not have reasonably believed he had authority to act as the Hahns' attorney.[43] We disagree because we find Isola did have authority. The judge also held that Isola could not have reasonably believed he had no obligation to communicate with the Hahns about the significant actions he was taking on their behalf. We agree. Isola unreasonably ignored his ethical responsibilities in failing to communicate. (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653 [attorney must prove beliefs were honestly held and reasonable to qualify for good faith mitigation].) We reject his argument that his regular communications with Travelers absolved him of his obligation to inform the Hahns of significant developments. Therefore, we give no weight in mitigation for Isola's assertion of a good faith belief.

V. DISCUSSION

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 Silverton* (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.) We also look to comparable case law for guidance. (See

[18b] 41. Isola asserts in his responsive brief that the hearing judge should have also given him mitigation for the period of post-misconduct practice without further misconduct. We have considered this fact in our finding under standard 1.6(a) that further misconduct is unlikely to recur.

42. We also do not rely on the fact that DeArth testified that Isola was unethical, as OCTC requests. DeArth did not explain why he believed Isola to be unethical and the record suggests that they ended their business relationship on poor terms.

43. OCTC supports this finding.

Snyder v. State Bar (1990) 49 Cal.3d 1302, 1310-1311.)

[20a] In analyzing the applicable standards, we first determine which standard specifies the most severe sanction for the at-issue misconduct. (Std. 1.7(a) [most severe sanction shall be imposed where multiple sanctions apply].) The most severe sanction applicable here is standard 2.7(b) and provides for actual suspension for communication violations.[44] Actual suspension is generally for 30 days, 60 days, 90 days, six months, one year, 18 months, two years, three years, or until specific conditions are met. (Std. 1.2(c)(1).) Given the broad range of discipline suggested by standard 2.7(b), we look to guiding case law, focusing on communication violations.[45]

[21a] Attorneys have a duty to communicate adequately with their clients, which is "an integral part of competent professional performance as an attorney." (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 782, 785.) The attorney in *Calvert* failed to adequately communicate with her client, but continued to work on her client's case. Calvert performed competently and obtained good results through the trial phase of the representation, but she did not devote sufficient time to her client's case after the trial. Based on the fact that Calvert continued representation when she knew she did not have sufficient time, the court found she failed to perform legal services with competence. No aggravation was established, and Calvert received mitigation for her pro bono work and community service. She had a prior record of discipline but did not receive aggravation as the misconduct in this case and the "prior" case occurred contemporaneously. She received an actual suspension of 60 days. Isola's case is similar as he also failed to adequately communicate, but Isola continued to work to advance his clients' interests. Isola has substantial mitigation for his lack of a prior record of discipline and good character. However, Isola does have aggravation for his multiple instances of failing to communicate and Calvert had no aggravation. Nonetheless, no facts suggest that Isola failed to perform with competence like Calvert. Rather, he completed the representation for which he was hired and achieved a good result for his clients. Both Calvert and Isola committed serious misconduct. The cases differ in that Isola's failure to communicate was for a greater period of time, but he did not have performance issues. While *Calvert* is not exactly on point, it serves as a guide for discipline and suggests actual suspension is appropriate here.

The same is true for *Stuart v. State Bar* (1985) 40 Cal.3d 838, which also involved a failure to communicate. However, the essence of the misconduct was Stuart's negligence and carelessness in handling a personal injury case. Discipline was based on his lack of diligence and concern for his client's interests, his failure to maintain contact with his client, and the loss of the client's file and opportunity to pursue his case. The court was especially concerned that Stuart committed this misconduct shortly after being privately reproved in a separate disciplinary matter. The Supreme Court imposed a 30-day actual suspension to make clear to Stuart that clients are owed a "high degree of care and fiduciary duty." The facts of the instant matter are not exactly comparable to *Stuart*, but we take from *Stuart* that failure to communicate is serious misconduct. Isola did not abandon his client like Stuart, but he did fail to inform Gregory of significant developments in the representation for a substantial period of time—over six years.

Another guiding case is *In the Matter of Respondent C*, *supra*, 1 Cal. State Bar Ct. Rptr. 439. An attorney did not respond to four letters sent during a four-month period requesting status reports on the case until the client threatened to complain to the State Bar. The attorney then responded to the client that he was working on settling the matter. Subsequently, he determined that pursuing the lawsuit further would be pointless, but he failed to inform the client. No further

[20b] 44. We find that standard 2.7(b) is most applicable, even though it mentions "multiple client matters," as standard 2.7(c)—the less severe sanction—is for violations limited in scope or time. Isola's failures to communicate were numerous and occurred over several years. The hearing judge analyzed discipline under standards 2.11, 2.12(a), and 2.18 based on culpability for moral turpitude, breach of fiduciary duties, and appearing without authority, which we do not find.

45. OCTC argues Isola should be disbarred based on culpability for moral turpitude and appearing without authority, which we do not find.

communication occurred between the attorney and the client. We noted that the failure to communicate deprived his client of the benefit of his professional advice and deprived the client of an opportunity to consult with another attorney if she chose to do so. We found that the attorney competently performed the services for which he was hired, exercised good judgment in not pursuing the claim further, and did not cause the client harm. Due to the attorney's significant mitigation for no prior discipline in over 30 years of practice, we admonished the attorney instead of issuing a private reproval. Isola's failure to communicate is much more extensive than the attorney in *Respondent C.* As such, discipline is warranted here.

[21b] Isola presented mitigation evidence of no prior disciplinary record and extraordinary good character, which markedly outweighs the aggravation for multiple acts. Accordingly, a sanction at the lower end of the discipline spectrum specified in standard 2.7(b) is warranted. (Std. 1.7(c).) "[A] lesser sanction is appropriate in cases of minor misconduct, where there is little or no injury to a client, the public, the legal system, or the profession and where the record demonstrates that the lawyer is willing and has the ability to conform to ethical responsibilities in the future." (*Ibid.*) Here, Isola admitted culpability for his communication violations, and he has assured us that he would behave differently in the future. Therefore, a 30-day actual suspension is warranted under standard 2.7(b), as it is the lowest level for actual suspension for communication violations under that standard. (See also std. 1.2(c)(1).) Isola failed to communicate several important developments to the Hahns over several years. Fortunately, Isola performed competently, achieved a good result for the Hahns, and completed the representation. We conclude that a 30-day actual suspension is appropriate given the case law and the standards and it adequately protects the public, the courts, and the legal profession. This suspension considers the seriousness of the misconduct, but also accounts for Isola's admissions to culpability and commitment to doing things differently in the future.

VI. RECOMMENDATIONS

We recommend that David Romano Isola, State Bar Number 150311, be suspended from the practice of law for one year, that execution of that suspension be stayed, and that he be placed on probation for one year with the following conditions:

1. **Actual Suspension.** Isola must be suspended from the practice of law for the first 30 days of the period of his probation.

2. **Review Rules of Professional Conduct.** Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Isola 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 Isola's first quarterly report.

3. **Comply with State Bar Act, Rules of Professional Conduct, and Probation Conditions.** Isola must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of probation.

4. **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, Isola 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. Isola 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.

5. **Meet and Cooperate with Office of Probation.** Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Isola must schedule a meeting with his assigned probation case specialist 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, Isola may meet with the probation case specialist in person or by telephone. During the probation period, Isola 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.

6. **State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court.** During Isola's probation period, the State Bar Court retains jurisdiction over him to address issues concerning compliance with probation conditions. During this period, Isola 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, Isola must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

7. **Quarterly and Final Reports.**

   a. Deadlines for Reports. Isola 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, Isola 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. Isola 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. Isola 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. Isola is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

8. **State Bar Ethics School.** Within one year after the effective date of the Supreme Court order imposing discipline in this matter, Isola 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, Isola will nonetheless receive credit for such evidence toward his duty to comply with this condition.

9. **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 Isola has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VII. MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Isola 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 Isola 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.

VIII. MONETARY SANCTIONS

[22] We further recommended that Isola be ordered to pay monetary sanctions to the State Bar of California Client Security Fund in the amount of $500 in accordance with Business and Professions Code section 6086.13 and rule 5.137 of the Rules of Procedure of the State Bar. The sanctions amount is based on the guidelines set forth in rule 5.137. It takes into consideration that Isola is culpable of violations related solely to failure to communicate in a single client matter and that the discipline warranted is the lowest presumed length of time for an actual suspension. 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.

IX. 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 reinstatement or return to active status.

WE CONCUR:

McGILL, Acting P.J.
STOVITZ, J.*

* Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

State Bar Court
Review Department

In the Matter of

JEFFREY GRAY THOMAS

A Member of the State Bar

No. 15-O-14870; SBC-20-O-00029 (Consolidated)

Filed August 26, 2022

SUMMARY

Respondent pursued unjust and frivolous actions in two superior court matters. He pursued the same arguments in the state court actions, both of which he appealed to the appellate court, the California Supreme Court, and the Supreme Court of the United States. He received significant sanctions in those actions and has not paid any money towards the sanctions. The sanctions orders did not deter respondent, and he continued to repeat his failed arguments in two federal lawsuits, both of which were dismissed as improper collateral attacks on the state court decisions. Respondent appealed both those decisions to the Ninth Circuit, where the second action was still pending. The appeal of his second federal lawsuit occurred after the Hearing Department's decision recommended respondent's disbarment. Besides maintaining multiple unjust actions, respondent failed to obey four court orders, failed to report judicial sanctions, and threatened charges to gain an advantage in a civil suit. The Review Department found respondent's misconduct serious, repetitive, and ongoing for over several years and concluded the misconduct demonstrated a pattern of wrongdoing which warranted disbarment under standard 2.9 of the Standards for Attorney Sanctions for Professional Misconduct (standard). However, even if the Review Department had not found a pattern of misconduct, disbarment would be appropriate discipline to recommend under standard 1.7(b), due to respondent's multiple instances of serious misconduct combined with several substantial aggravating factors that outweighed nominal mitigation.

COUNSEL FOR PARTIES

For State Bar of California: Alex James Hackert, Esq.

For Respondent Jeffrey Gray Thomas, Esq., in pro. per.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1a-c] **101 Generally Applicable Procedural Issues – Jurisdiction**

Action by court or judge is presumed valid and made within lawful exercise of jurisdiction. Final judgments are subject to collateral attack only on following grounds: (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; or (3) actions in excess of jurisdiction. To succeed on collateral attack, respondent must prove jurisdictional defect from face of record. Where respondent failed to establish jurisdictional defect, civil court decisions must be viewed as valid, and Review Department rejected respondent's collateral attacks on civil court decisions. Furthermore, where respondent already challenged certain court orders in courts of record, respondent cannot continue to do so in State Bar Court, as civil court orders were final and binding for disciplinary purposes. Similarly, respondent failed to prove any jurisdictional defect in case that led to respondent's involuntary inactive enrollment, which case was now final and closed, and respondent did not provide any support for Review Department's ability to review case long after case was final.

[2] **102.30 Generally Applicable Procedural Issues – Improper Prosecutorial Conduct – Investigative and/or pretrial misconduct**
102.90 Generally Applicable Procedural Issues – Improper Prosecutorial Conduct – Other improper prosecutorial conduct

Respondent's assertion that Office of Chief Trial Counsel had unclean hands for never properly investigating respondent's claims against others was unsupported and therefore rejected by Review Department. Respondent's allegations against others were irrelevant and had no effect on Review Department's culpability conclusions for respondent's own misconduct.

[3] **159 Evidentiary Issues – Miscellaneous Evidentiary Issues**
167 Standards of Proof/Standards of Review – Abuse of Discretion

Standard of review applied to procedural rulings is abuse of discretion or error of law. Where respondent asserted Office of Chief Trial Counsel (OCTC) presented irrelevant, inflammatory, and prejudicial evidence of other pleadings filed by respondent, but respondent failed to identify specific evidence to which he objected, respondent failed to establish hearing judge abused discretion or erred by admitting OCTC's evidence. Respondent further did not specify how judge's decisions prejudiced case. Review Department therefore rejected respondent's evidentiary arguments.

[4] **196 Miscellaneous General Issues in State Bar Court Proceedings – Comparison to ABA Model Code and/or Model Rules**

Review Department rejected as meritless respondent's arguments that the American Bar Association (ABA) Model Rules of Professional Conduct should be followed rather than California Rules of Professional Conduct, and ABA rules take precedence over State Bar Act and California disciplinary statutes.

[5a-c] **163 Standards of Proof/Standards of Review – Proof of Wilfulness**
220.00 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6103, clause 1 (disobedience of court order)

Business and Professions Code section 6103 provides, in pertinent part, that willful disobedience or violation of court order requiring attorney to do or forbear act connected

with or in course of attorney's profession, which attorney ought in good faith do or forbear, constitutes cause for suspension or disbarment. Attorney willfully violates section 6103 when, despite being aware of final, binding court order, respondent knowingly chooses to violate order. Respondent asserted Office of Chief Trial Counsel failed to introduce evidence that respondent's disobedience of court orders caused harm to administration of justice, but that was not relevant to defense to misconduct under Business and Professions Code section 6103. Where respondent was aware of the court orders, admitted he had not complied with them, and had made no effort to comply, there was no evidence that this conduct was "negligence," and Review Department held respondent acted willfully and was culpable of violating Business and Professions Code section 6103 as charged.

[6a, b] **213.30 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6068(c) (counsel only legal actions/defenses)**

Business and Professions Code section 6068, subdivision (c), provides it is attorney's duty "[t]o counsel or maintain those actions, proceedings, or defenses only as appear . . . legal or just," except defense of person charged with public offense. Where respondent used abusive litigation tactics where he initiated and maintained multiple claims and defenses, at trial and appellate levels, which were foreclosed by legal authority, Review Department held respondent's claim that notices of appeal, briefs, and motions respondent filed did not qualify as "actions" under section 6068, subdivision (c), was meritless, and respondent was culpable of violating section 6068, subdivision (c).

[7a-c] **521 Aggravation – Multiple acts of misconduct – Found**
531 Aggravation – Pattern of misconduct – Found

Where respondent repeatedly pursued unsupported legal claims in multiple legal proceedings, made improper threats, disobeyed four court orders, and failed to report sanctions order, Review Department held acts sufficiently established multiple acts of misconduct under standard 1.5(b). Furthermore, where respondent was told by court he was wrong and pleadings were frivolous and harassing, but respondent did not stop repeatedly advancing arguments without legal basis; began putting forth frivolous arguments in 2013 in interpleader action, appeal of that action, another civil matter, appeal of other civil matter, has also done so twice in federal court; and appeal of second federal lawsuit was still pending, Review Department agreed with hearing judge that aggravation also warranted under standard 1.5(c) for respondent's pattern of serious misconduct which spanned several years. Review Department assigned substantial aggravation under standards 1.5(b) and (c) for respondent's multiple acts and pattern of misconduct.

[8a-c] **584.10 Aggravation – Harm – To public – Found**
586.19 Aggravation – Harm – To administration of justice – Other basis

Where respondent's relentless litigation campaign caused courts and parties to expend excessive time and money, shown by $188,350.64 in sanctions against respondent, including $8,500 for reimbursement to court of appeal for administrate costs; frivolous litigation caused courts to consider and rule on meritless motions, which wasted judicial resources; respondent's misconduct caused stress and emotional harm to certain parties and opposing counsel, as they were repeatedly forced to defend against respondent's meritless claims and appeals, Review Department held respondent's misconduct caused significant harm to public and administration of justice, warranting substantial aggravation under standard 1.5(j).

[9a-c] **591 Aggravation – Indifference to rectification/atonement – Found**

Where respondent blamed others; testified his conduct was moral and correct; characterized himself as victim; made no payments towards court-ordered sanctions; asserted he did not understand why disciplinary charges were brought and intended to continue to pursue litigation related to underlying misconduct; in closing argument at trial said he was "going to stick by [his] guns;" announced at oral argument he would appeal to Supreme Court if discipline not overturned; refused to acknowledge actions were wrong and harmed courts and others; and continued to raise same unsuccessful arguments already struck down by several courts; respondent's gross lack of insight into wrongfulness of actions merited substantial aggravation.

[10] **710.36 Mitigation – Long practice with no prior discipline record – Found but discounted or not relied on – Present misconduct likely to recur**

Where respondent practiced law for nearly 35 years without discipline before misconduct commenced but had complete lack of insight into misconduct, only nominal weight in mitigation given for respondent's absence of prior discipline record.

[11a, b] **740.53 Mitigation – Good character references – Declined to find – Inadequate showing generally**

Where respondent's character evidence consisted of four witnesses who testified at trial (two of whom also submitted character letters) and two additional character letters; witnesses had known respondent for many years; witnesses reported respondent is honest, of good moral character, and dedicated to clients, but one witness revealed limitations as to respondent's interpersonal and legal skills, and witnesses were all former or current clients and were unaware of full extent of respondent misconduct, respondent failed to establish mitigation for extraordinary good character.

[12a-f] **802.61 Application of Standards – Part A (General Standards) – Standard 1.7 – (a) Most severe applicable sanction to be used**
802.62 Application of Standards – Part A (General Standards) – Standard 1.7(b) (Effective of aggravation on appropriate sanction)
829.51 Application of Standards – Part B (Sanctions for specific misconduct) – Standard 2.9 – Applied – disbarment – Significant harm to individual
829.52 Application of Standards – Part B (Sanctions for specific misconduct) – Standard 2.9 – Applied – disbarment – Significant harm to administration of justice
829.53 Application of Standards – Part B (Sanctions for specific misconduct) – Standard 2.9 – Applied – disbarment – Pattern of misconduct
829.54 Application of Standards – Part B (Sanctions for specific misconduct) – Standard 2.9 – Applied – disbarment – Coupled with other misconduct
829.55 Application of Standards – Part B (Sanctions for specific misconduct) – Standard 2.9 – Applied – disbarment – Other aggravating factors
1091 Miscellaneous Substantive Issues re Discipline – Proportionality with Other Cases

Where respondent pursued unjust and frivolous actions in two superior court matters; pursued same arguments in state court actions; appealed both state court actions to appellate court, California Supreme Court, and United States Supreme Court; received significant sanctions in those actions but had not paid any money towards sanctions; repeated failed

arguments in two federal lawsuits (both dismissed as improper collateral attacks on state court decisions); appealed both federal decisions to Ninth Circuit (where second action remained pending); appealed second federal lawsuit after Hearing Department's decision recommended his disbarment; and besides maintaining multiple unjust actions, respondent failed to obey four court orders, report judicial sanctions, and threatened charges to gain advantage in civil lawsuit, Review Department concluded respondent's misconduct was serious, repetitive, and ongoing for over several years and held misconduct demonstrated pattern of wrongdoing and therefore appropriate under standard 2.9 to recommended disbarment. However, even if pattern of wrongdoing not found, disbarment would be appropriate discipline to recommend under standard 1.7(b), due to respondent's multiple instances of serious misconduct combined with several substantial aggravating factors that outweighed nominal mitigation.

ADDITIONAL ANALYSIS

Culpability

Found

213.31	Section 6068(c) (counsel only legal actions/defenses)
214.51	Section 6068(o) (comply with reporting requirements)
220.01	Section 6103, clause 1 (disobedience of court order)
300.01	Improper threat to bring charges

Discipline

180.35	Monetary Sanctions – Imposition of Monetary Sanctions – Not recommended
1010	Disbarment
2311	Inactive Enrollment After Disbarment Recommendation – Imposed

OPINION

McGILL, J

Jeffrey Gray Thomas was charged with ethical violations relating to his pursuit of unjust and frivolous actions in two superior court matters. A hearing judge found Thomas culpable on five counts of misconduct, including failing to obey a court order (two counts), failing to report judicial sanctions, threatening charges to gain an advantage in a civil suit, and maintaining unjust actions. The judge recommended Thomas be disbarred. Thomas appeals, asserting this matter should be dismissed due to constitutional violations and other errors by the judge. The Office of Chief Trial Counsel of the State Bar (OCTC) supports the judge's decision.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we affirm the hearing judge's culpability determinations and reject Thomas's various constitutional arguments and collateral attacks. We also agree with the judge on discipline and recommend that Thomas be disbarred due to the seriousness of his multiple violations, the harm caused, and his inability to recognize the wrongfulness of his misconduct.

I. PROCEDURAL BACKGROUND

On September 2, 2016, OCTC filed a notice of disciplinary charges in State Bar Court No. 15-O-14870 (First NDC). That notice charged Thomas with (1) failure to obey a court order, in violation of Business and Professions Code section 6103,[1] and (2) failure to report judicial sanctions, in violation of section 6068, subdivision (o)(3). The matter was abated shortly thereafter while related civil proceedings ensued.

On January 21, 2020, OCTC filed a notice of disciplinary charges in SBC-20-O-00029 (Second NDC). That notice charged Thomas with (1) threatening charges to gain an advantage in a civil suit, in violation of the former Rules of Professional Conduct, rule 5-100(A);[2] (2) maintaining an unjust action, in violation of section 6068, subdivision (c); and (3) failure to obey a court order, in violation of section 6103.[3]

On February 24, 2020, the abatement was terminated in State Bar Court No. 15-O-14870. Both matters were abated in March and continued through June 29, 2020, due to the COVID-19 pandemic. On August 28, the matters were consolidated.

A three-day trial was held February 24 through 26, 2021.[4] The parties filed closing briefs on March 15, and the hearing judge issued her decision on May 25. Thomas's request for review was filed on October 15.[5] We heard oral argument on June 8, 2022.

II. FACTUAL BACKGROUND[6]

A. General Background

Thomas was admitted to practice law in California on November 29, 1978, and has been a licensed attorney at all times thereafter. The facts in this matter relate to litigation disputing the ownership of property at 1130 South Hope Street in Los Angeles (Property). Litigation concerning the Property began in 2003 when 1130 Hope Street Investment Associates, LLC (Hope Street) sued

1. All further references to sections are to the Business and Professions Code unless otherwise noted.

2. All further references to rules are to the California Rules of Professional Conduct that were in effect until November 1, 2018, unless otherwise noted.

3. Two other counts were alleged in the Second NDC. In the decision, the hearing judge granted OCTC's motion to dismiss those counts (two and five).

4. In a separate disciplinary case, Thomas was enrolled on August 22, 2020, as an inactive attorney pursuant to Business and Professions Code section 6007, subdivision (c)(2) (TE case). (SBC-20-TE-30411.)

5. Thomas's earlier requests for review, filed on June 18 and August 2, 2021, were vacated and dismissed, respectively.

6. The facts are based on trial testimony, documentary evidence, and the hearing judge's factual and credibility findings, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).) The judge found the testimony of Hugh Gibson, Rosario Perry, and Norman Solomon to be highly credible.

True Harmony, Inc. (True Harmony) to quiet title. In a 2009 judgment, a trial court found in favor of Hope Street and determined it was the "sole owner" of the Property. The judgment stated that, "True Harmony has not had any interest in the Property that could be transferred or encumbered since October 9, 2003." True Harmony was enjoined from representing that it was the owner of the Property. In addition, the judgment stated that Ray Haiem, a donor to True Harmony, never had authority to act on Hope Street's behalf. Instruments purporting to transfer interest in the Property to Haiem were void and had no effect. Subsequently, the Property was sold.

B. Thomas Begins His Representation of Haiem

On July 28, 2011, Hope Street filed an interpleader action against Solomon; Hope Park Lofts, LLC (HPL); True Harmony; Haiem; Perry; and others.[7] (*Hope Street v. Solomon et al.* (Super. Ct. Los Angeles County, No. BC466413).) On October 6, Haiem filed a cross-complaint in propria persona, but did not serve the cross-defendants. That cross-complaint was later struck because Haiem did not serve it, despite several warnings he received from the court.

In October 2012, Thomas substituted into the case as counsel for Haiem. Despite the court striking the cross-complaint, Thomas filed a motion on November 15 attempting to amend the stricken cross-complaint.[8] On February 1, 2013, the court denied the motion as procedurally improper and legally baseless, as no cross-complaint existed. To the extent that Thomas's motion could be construed as seeking to file an initial cross-complaint, the court denied it as the claims were barred by issue preclusion—the court had previously determined that Haiem had "no right to, interest in, or lien in the [P]roperty at all." The court noted Thomas's arguments were unsupported and "based solely on conjecture." On March 29, the court denied Thomas's motion for reconsideration of the February 1 order.

In February 2013, Haiem was dismissed from the interpleader action. On May 22, the court entered an order directing that the Property sale proceeds be distributed to HPL and Perry.

Meanwhile, on May 14, 2013, Thomas had filed a motion to vacate the stricken cross-complaint—over six months after it had been stricken. Hugh Gibson, opposing counsel for HPL and Solomon, wrote to Thomas pointing out the motion's deficiencies as well as the court's lack of jurisdiction to hear it. Thomas received Gibson's letter but did not withdraw his motion. Gibson filed a motion for sanctions in August 2013. The motion for sanctions was put on hold pending Thomas's appeal of the May 22 order, detailed *post*.[9] On December 4, 2013, the superior court denied Thomas's motion to vacate as untimely.

C. Thomas Appeals Interpleader Action

On July 22, 2013, Thomas filed a notice of appeal seeking review of the May 22 order directing distribution of the Property sale proceeds. At the time of the order, Haiem was no longer a party to the interpleader action. Therefore, on December 16, the appellate court dismissed the appeal for lack of standing.[10]

On January 31, 2014, Thomas filed another notice of appeal in the interpleader action seeking to appeal the February 1, March 29, May 22, and December 4, 2013 orders. Gibson tried to convince Thomas to restrict his appeal to only the December 4 order, as the others were untimely or duplicative of previously dismissed appeals. Thomas received Gibson's letters, but declined to limit his appeal. Thereafter, Gibson filed a motion to dismiss the appeal of the February 1 and May 22 orders,[11] which was granted on August 28, 2014.[12]

7. According to the 2009 judgment, Perry was the sole manager of Hope Street and Solomon formed HPL.

8. On November 13, 2012, Thomas filed an ex parte application to amend the cross-complaint, which was denied the same day.

9. The motion for sanctions was granted in August 2016.

10. In the interpleader action, Thomas also filed a petition for writ relief, which was denied as untimely.

11. Thomas opposed the motion, stating that Gibson's argument was "a fictive horse soon curried."

12. In its April 27, 2015 decision, detailed *post*, the appellate court dismissed the appeal of the March 29, 2013 order as untimely.

(*Hope Street v. Solomon et al.* (Court of Appeal, Second Appellate District, No. B254143).) The appeal of the December 4, 2013 order continued. Gibson also filed a motion for sanctions against Thomas and Haiem to recover his client's expenses incurred in the appeal.

On April 27, 2015, the appellate court affirmed the trial court's December 4, 2013 ruling denying the motion to vacate. It also imposed sanctions against Thomas for filing a frivolous appeal. The appellate court found that Thomas's motion to vacate the dismissal of the cross-complaint was untimely. The court stated the time period for filing a motion to vacate was jurisdictional, noting Thomas failed "to cite even a single case to the contrary." The court also dismissed Thomas's argument that the deadline should have been extended by five days and noted Thomas did not present a colorable supporting argument.

Further, the court found Thomas's appeal was frivolous and intended to harass HPL and increase its litigation costs, describing Thomas's conduct as "unprofessional and at times outrageous." The court described Thomas's communications with Gibson as "gratuitous and unprofessional."[13] The court found Thomas's conduct "even more egregious" as the appeal proceeded. Gibson tried to prepare an adequate record on appeal, but Thomas resisted, asserting he was not obligated to send an appendix and calling Gibson's clients "crooks, thieves[,] charlatans and should be behind bars for the rest of their lives." Thomas sent another email depicting Gibson's "skills as an attorney at law to be noncompensable" based on a recent appellate court opinion. He stated, "Enjoy yourself, Mr. Gibson and don't get in a family way before midnight." (Capitalization omitted.) After Gibson pleaded with Thomas to keep his emotions in check, Thomas told Gibson that the work on this case was very difficult and "beyond your capabilities." He added that he would "consider this request but you can rest assured that it will be given the proper priority not the rush doctors waiting room shrink wrapped in southern [C]alifornia plastic attention that you give to pleadings in this case. [¶] You really ought to see a psychiatrist immediately." The appellate court found,

> Thomas's conduct, including his refusal to limit the scope of the appeal, his resistance to Gibson's effort to prepare an adequate record on appeal, his threat to communicate to Gibson's clients regarding alleged malpractice in a prior case, and his repeated gratuitous and unprofessional comments highlight the improper motives in prosecuting this appeal. Indeed, Thomas's comments that he will only respond to a "settlement offer" and that work on the case "will increase exponentially" over time reveal Thomas's intent to harass [HPL] and drive up its litigation costs in the hope of a settlement.

Finally, the appellate court stated Thomas's appeal "indisputably has no merit." The court found that Thomas failed to "cite even a single authority" supporting his positions and the cases he did cite "do not stand for the propositions he argues." The court concluded the appeal was "frivolous both because it is objectively devoid of merit and because it is subjectively prosecuted for an improper motive—to harass [HPL] and increase its litigation costs."

Accordingly, the appellate court found significant sanctions were appropriate for the frivolous appeal. The court found a high "degree of objective frivolousness" and that the hours Gibson worked were "caused in large part by Thomas's obstructive conduct." The court ordered Thomas to pay $58,650 in sanctions, individually, within 30

13. The court noted that Thomas said only a "settlement offer" or "state bar letter" would get his attention, that Thomas was rejecting Gibson's "purification efforts," and that there were "consequences" from Gibson's "client just hang[ing] around with the 'lessee university' crowd."

days from the date of the remittitur, which included $48,650 for HPL's attorney fees and $10,000 to "discourage the type of inappropriate conduct displayed by Haiem and Thomas in this appeal."

On May 12, 2015, Thomas filed a petition for rehearing, which was denied. The court then issued the remittitur on August 21. On October 30, Thomas filed a motion to recall the remittitur, which was denied on November 2. Thomas then unsuccessfully attempted to petition the California Supreme Court and the Supreme Court of the United States for review. He did not pay the sanctions and did not report them to the State Bar.

D. Superior Court Orders Sanctions in Interpleader Action

Because the remittitur had been issued, the superior court could now rule on Gibson's motion for sanctions filed in August 2013. On August 24, 2016, the superior court granted that motion. (*Hope Street v. Solomon et al.* (Super. Ct. Los Angeles County, No. BC466413).) The court found that Thomas's motion to vacate the dismissal of the cross-complaint was untimely and, when informed of this fact, Thomas refused to withdraw the motion, which justified sanctions under section 128.7 of the Code of Civil Procedure. The court stated,

> [I]t is clear beyond a doubt that Mr. Thomas not only delayed far beyond a "reasonable time" in making his application for relief, not only pushed to the six month limit, but actually then pushed five days beyond that and now wants the court to rescue him and grant him [Code of Civil Procedure section] 473 relief even though more than the statutory six months have elapsed from the time of the order he now seeks to challenge. Mr. Thomas's strategy of delay has backfired on him.

The court further found that Thomas's arguments were "without any legal or factual basis," that he pursued the motion "after having been expressly warned that said motion was without merit and should be dismissed," and, that he did so "for the purpose of harassing [HPL] and needlessly driving up the costs of this litigation." The court imposed sanctions against Thomas, individually, in the amount of $40,870, which included $22,810 for HPL's attorney fees and $18,060 under Code of Civil Procedure section 128.7.

Over three months after the sanctions order was filed, Thomas filed a motion for clarification and relief from the sanctions order on December 5, 2016. In this motion, Thomas acknowledged the sanctions order entered on August 24, but claimed he never received "communication of any kind directly from the court regarding the reserved decision on the motion for sanctions." In his supporting declaration, Thomas acknowledged he received a letter from the State Bar in October 2016 regarding the sanctions. However, he testified that he was never "served" with a copy of this order until receiving it from OCTC in 2020. Thomas did not pay the sanctions.

E. Thomas Files Lawsuit in Superior Court on Behalf of True Harmony

In May 2014, Thomas filed a separate lawsuit on behalf True Harmony against Perry, Solomon, and HPL (True Harmony matter). (*True Harmony v. Perry et al.* (Super. Ct. Los Angeles County, No. BC546574.) Perry filed a demurrer. In response, Thomas sent a letter to Perry's attorneys, Gibson and Lisa Howard, dated August 26, 2016, which provided, in part,

> Please be advised that YOU are guilty of mail fraud in violation of 18 U.S.C. § 1341 because YOU have not corrected the misrepresentation created by YOUR prior written notices for the dates of hearings on said motions by filing and serving written notices of the hearing dates that YOU have selected that are different from the dates that YOU have chosen. [¶] Please be advised that YOU will be indicted, found guilty and sentenced to five years in the federal penitentiary for the

> mail fraud if YOU do not correct YOUR violations of the Code of Civil Procedure. [¶] . . . [¶] Please be advised that YOUR illegalities described herein may be referred to the Attorney General of California for collection of civil penalties per day for every day that YOUR violations of the mail fraud statute, 18 U.S.C. § 1341, continue . . . . [¶] . . . [¶] Please be advised that YOU have committed criminal violations of my civil rights under 18 U.S.C. § 241 and § 242 by permitting the illegal appellate sanctions in case #B254143 to continue to persist without requesting the second court of appeals to remit them. [¶] Please be advised that YOU may be tried, convicted and sent to prison for the remainder of YOUR lives for the criminal violations of 18 U.S.C. § 241 and § 242 that YOU have committed.

Gibson was concerned he would have to deal with various authorities to address these unfounded charges.[14] He viewed the letter as a credible threat that Thomas would make the reports and feared he would have to expend significant time and effort to defend against them. Thomas testified it was probably "not the wisest letter to write," but it was an expression of his frustration.

In January 2017, over two years later, Thomas filed a second amended complaint, seeking to void the trial court's prior judgment and declare True Harmony as the owner of the Property. The defendants filed demurrers, which the court sustained without leave to amend on April 7, finding one failed to state a claim and the rest were barred by res judicata. Accordingly, the court entered judgment in favor of the defendants on April 7.

Thomas did not appeal the judgment, and instead filed a motion for reconsideration of the court's ruling sustaining the demurrers on April 17, 2017.[15] Gibson again tried to convince Thomas to withdraw his motion due to lack of jurisdiction, providing statutory and case authority in his letters. Thomas read the letters and case authority, but nonetheless refused to withdraw his motion. The court denied Thomas's motion on October 17, 2017, using citations raised by Gibson in his letter to Thomas. The court found it did not have jurisdiction to grant a motion for reconsideration because judgment had been entered on April 7, and Thomas filed for reconsideration after that date—on April 17.

Once again, Gibson filed a motion for sanctions on October 17, 2017, which was granted. The court found in its November 30 order that Thomas's motion for reconsideration "had no basis in law at the time it was filed," and was not supported by existing law. Further, the court described Thomas's arguments as contrary to "clear and unambiguous authority" and "undisputed fact," lacking in "substantive merit," "irrelevant," "inapplicable," procedurally "improper," and "without merit." The court ordered Thomas to pay sanctions of $23,350 for Solomon's attorney fees, which Thomas has not done.

F. Thomas Appeals True Harmony Matter

On December 18, 2017, Thomas filed two appeals: one on behalf of himself and the other on behalf of True Harmony. The appeals sought review of three trial court orders: (1) an October 10, 2017 order denying True Harmony's application to file a supplemental memorandum of law; (2) the October 17, 2017 order denying True Harmony's motion to reconsider the decision entering judgment for the defendants; and (3) the November 30, 2017 order granting Solomon's motion for sanctions. (*True Harmony et al. v. Perry et al.* (Court of Appeal, Second Appellate District, No. B287017.) Once again, Gibson wrote to Thomas that his appeals were untimely and

14. The hearing judge found Gibson's testimony credible.

15. Thomas did not appeal the judgment dismissing the second amended complaint within the required 60 days from the notice of entry of judgment. As a result, the judgment became final on June 7, 2017.

jurisdictionally improper, with the exception of Thomas's personal request for review of the November 30 sanctions order. Gibson urged Thomas to withdraw, but Thomas declined to withdraw or limit his appeals. In April 2018, Gibson filed a motion to dismiss the True Harmony appeal and Thomas's appeal of the October 10 and October 17 orders.

The court granted Gibson's motion on May 4, 2018. It held that True Harmony lacked standing to appeal the November 30, 2017 sanctions order because the sanctions were only issued against Thomas. Thomas's individual appeal of the sanctions order was not dismissed. The court found that Thomas and True Harmony could not appeal the October 10 and October 17 orders because they were linked to a motion for reconsideration, which is not appealable.[16] The court stated Thomas failed to offer "any reason or authority" for his argument that the motion for reconsideration should be treated as a motion to vacate judgment.

On October 12, 2018, Gibson filed his third motion for sanctions, which was granted on December 13. The appellate court affirmed the November 30, 2017 order imposing sanctions on Thomas. Thomas failed to support his arguments with citations to the record or to applicable legal authority. The court held Thomas's "unclean hands" argument was "merely an attempt to relitigate the underlying complaint and True Harmony's claims of fraud. In making this frivolous argument, Thomas has violated our court order specifically limiting his appeal to the sanctions motion."

The court further found that Thomas's conduct on appeal warranted sanctions because his "appellate filings were largely frivolous and done in violation of court orders and rules." The court held that Thomas "sought to prosecute an appeal on behalf of a party that clearly lacked standing and attack a judgment that had long become final." Even though only Thomas could properly appeal the sanctions order, he filed it on behalf of himself and True Harmony, and attempted to appeal two other orders that were not appealable. He refused to limit his appeal as Gibson asked, and Solomon "unnecessarily incurred costs in filing a successful motion to dismiss the improper appeals." Thomas then filed an improper brief on behalf of True Harmony and refused to withdraw it, causing Solomon to incur further costs bringing a successful motion to strike the opening brief. The court summed up Thomas's actions by stating, "It is evident from Thomas's pursuit of improper appeals and plain disobedience of our court orders that his briefing and motions are frivolous and intended to harass Solomon. Such improper briefing generated unnecessary and substantial costs for Solomon." Accordingly, the court found considerable sanctions were appropriate. Thomas was ordered to pay $65,480.64 in sanctions within 90 days of the date of remittitur—$56,980.64 in attorney fees for Solomon and $8,500 to be paid directly to the clerk of the appellate court. Thomas did not pay the sanctions.

On December 27, 2018, Thomas filed a petition for rehearing of the appellate court order, which was denied. He then filed successive petitions for review in the California Supreme Court and the Supreme Court of the United States, which were also denied.

G. Thomas v. Zelon et al.

In August 2016, Thomas filed a complaint on behalf of himself in federal court alleging civil rights violations against two appellate court justices who decided the interpleader appeal, as well as Solomon, Perry, HPL, Gibson, and others. (*Thomas v. Zelon et al.* (C.D.Cal., No. 16-cv-06544).) The defendants filed a motion to dismiss, which was granted in February 2017. The court dismissed Thomas's complaint without leave to

16. Thomas then filed a 45-page petition for rehearing of the dismissal, arguing that all his appeals and all True Harmony's appeals should be allowed to proceed. The appellate court denied the petition. Thomas then ignored the court's order and filed an opening brief on behalf of True Harmony, even though the court had dismissed all its appeals. Thomas then submitted a supplement to the opening brief, arguing yet again that True Harmony should be given the right to file a third amended complaint in the underlying action. The court struck the opening brief and supplemental brief, and allowed Thomas to file a new opening brief, which he did. The court found that this brief "went outside the scope of the appeal by launching into an argument about the ownership and sale of the property in the fact section and a section on 'unclean hands.'"

amend. It found Thomas's federal claims were barred by the *Rooker-Feldman* doctrine, which precludes federal adjudication of a claim that "amounts to nothing more than an impermissible collateral attack on prior state court decisions." (*Ignacio v. Judges of U.S. Court of Appeals* (9th Cir. 2006) 453 F.3d 1160, 1165 [explaining *Rooker-Feldman* doctrine].) Accordingly, Thomas could not pursue his additional state law claims in federal court under supplemental jurisdiction.

Thomas appealed the district court's decision. In March 2018, the United States Court of Appeals for the Ninth Circuit affirmed the district court's dismissal. The court held, "The district court properly dismissed Thomas's action as barred by the *Rooker-Feldman* doctrine because Thomas's claims stemming from the prior state court action constitute a 'de facto appeal' of prior state court judgments, or are 'inextricably intertwined' with those judgments. [Citations]."

H. *True Harmony et al. v. Department of Justice of the State of California et al.*

In January 2020, Thomas filed a federal lawsuit on behalf of himself, True Harmony, and Haiem, suing the California Department of Justice, Perry, Solomon, Gibson, HPL, Hope Street, and others. (*True Harmony et al. v. Dept. of J. of Cal. et al.* (C.D.Cal., No. 20-cv-00170).) This action again attempted to relitigate claims relating to the Property and previous legal actions. The district court dismissed Thomas's lawsuit with prejudice in May 2021. The court held that it did not have subject matter jurisdiction over some of the causes of action due to lack of standing, some were barred by the *Rooker-Feldman* doctrine, others were barred by res judicata, and some failed to state a claim. The court determined that the claims brought were "nearly identical" to those in *Thomas v. Zelon et al.* and Thomas was seeking to relitigate previous dismissals.

In June 2021, Thomas filed a notice of appeal. Because Thomas was no longer eligible to practice law, in November, the Ninth Circuit dismissed the appeal as to True Harmony and Haiem as they were not represented by counsel. Thomas appealed this decision to the Supreme Court of the United States. At oral argument before us, he stated his individual appeal was still pending in the Ninth Circuit.

III. THOMAS'S VARIOUS CHALLENGES TO THE HEARING JUDGE'S DECISION HAVE NO MERIT

Thomas makes several constitutional and jurisdictional arguments on review, all of which we have carefully considered. We note his arguments are largely unsupported and his briefing on review is difficult to understand, particularly as to the relevance of points he asserts in defense of these proceedings. We have independently reviewed all of his arguments; any not specifically addressed here have been considered and rejected without merit.

A. Collateral Attacks

[1a] An action by a court or judge is presumed valid and made within the lawful exercise of jurisdiction. (Evid. Code, § 666.) Final judgments are subject to collateral attack only on the following grounds: (1) lack of subject matter jurisdiction, (2) lack of personal jurisdiction, or (3) actions in excess of jurisdiction. (*In the Matter of Pyle* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 929, 933.) To succeed on collateral attack, Thomas must prove a jurisdictional defect from the face of the record. (*Ibid.*)

1. Challenges to Court Decisions in Civil Litigation

In the decision, the hearing judge stated Thomas was given the opportunity to present evidence to contradict, temper, or explain all admitted records from the various civil actions. After considering the evidence, the judge determined that the civil litigation findings were supported by substantial evidence and, therefore, adopted them. (See *Maltaman v. State Bar* (1987) 43 Cal.3d 924; *In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195; *In the Matter of Kinney* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 360.)

Throughout his opening brief, Thomas challenges several court decisions and arguments made by his opponents there. He claims the decisions in the interpleader action and the appeal

of the interpleader action were "frauds on the court" and the court lacked "all basis in jurisdiction." Thomas alleges the hearing judge erred by ignoring his evidence relating to jurisdiction in the civil litigation.

[1b] Thomas claims OCTC and witness testimony were not produced to establish jurisdiction for the court decisions he now attacks. However, it is Thomas's burden to prove the jurisdictional defect since court actions are presumed valid. (*In the Matter of Pyle*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 933.) Because he has not established any jurisdictional defect, we must view the court decisions as valid, as the hearing judge did. Accordingly, we reject Thomas's collateral attacks on these decisions. Further, Thomas has already challenged certain court orders in the courts of record. He may not continue to do so here as the orders are final and binding for disciplinary purposes. (See *In the Matter of Collins* (Review Dept. 2018) 5 Cal. State Bar Ct. Rptr. 551, 559; *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 403-404.) "There can be no plausible belief in the right to ignore final, unchallengeable orders one personally considers invalid." (*Maltaman v. State Bar*, *supra*, 43 Cal.3d at p. 952.)

2. Challenge to Involuntary Inactive Enrollment

[1c] Thomas's briefs on review make several challenges to the TE case where he was placed on involuntary inactive enrollment.[17] He argues that the hearing judge lacked personal and subject matter jurisdiction over him in that matter. As with his other collateral attacks, discussed *ante*, Thomas has failed to prove any jurisdictional defect in the TE case. Also, that case is final and closed. He has not provided any support for our ability to review it long after it became final.

B. Constitutional Arguments

Thomas makes several constitutional objections regarding the hearing judge's decision, the constitutionality of sections 6103 and 6068, subdivision (c), and the sanctions orders. However, none of these arguments are supported by fact or law. After review of the record, we do not find any violation of Thomas's constitutional rights in this disciplinary matter.

C. Unclean Hands Defense and Other Alleged Hearing Judge Errors

[2] Thomas argues the hearing judge erred by rejecting his affirmative defense of unclean hands. He asserts OCTC has unclean hands because it has never properly investigated Thomas's claims that Perry, Gibson, and Solomon committed moral turpitude and other misconduct. Thomas's unclean hands argument is unsupported. His allegations against others are irrelevant and have no effect on our findings of culpability for his own misconduct.

[3] He also asserts OCTC presented irrelevant, inflammatory, and prejudicial evidence of other pleadings filed by him. However, he fails to identify the specific evidence to which he objects. The standard of review we apply to procedural rulings is abuse of discretion or error of law. (*In the Matter of Respondent L* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 454, 461.) Thomas failed to establish the hearing judge abused her discretion or erred by admitting OCTC's evidence. Further, he did not specify how the judge's decisions prejudiced his case. (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 469 [attorney must show specific prejudicial effect].) Therefore, we reject his evidentiary arguments.

In addition, Thomas argues the hearing judge improperly dismissed his "judicial estoppel" defense. He asserts the judge ignored his arguments and evidence that his motions were not frivolous. He also believes some actions taken in the civil litigation were "approved" by the court. Any proper actions he took in the civil litigation do not negate his multiple acts of misconduct, discussed *post*. Thomas failed to provide support for his various arguments or to explain how the judge's decisions prejudiced him. The judge's culpability determinations are supported by the

17. See *ante*, p. 2, fn. 4.

record. Therefore, Thomas's various evidentiary and culpability arguments must be rejected.

IV. CULPABILITY[18]

A. Count One of State Bar Court No. 15-O-14870: Failure to Obey Court Order (§ 6103)

Count one of the First NDC alleged Thomas violated section 6103 by failing to comply with the April 27, 2015 court order for sanctions of $58,650 in the appeal of the interpleader action. (*Hope Street v. Solomon et al.* (Court of Appeal, Second Appellate District, No. B254143).) **[5a]** Section 6103 provides, in pertinent part, that a willful disobedience or violation of a court order requiring an attorney to do or forbear an act connected with or in the course of the attorney's profession, which the attorney ought in good faith do or forbear, constitutes cause for suspension or disbarment. An attorney willfully violates section 6103 when, despite being aware of a final, binding court order, he or she knowingly chooses to violate the order. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 787.) The hearing judge found Thomas had actual knowledge of the order, the order was final and binding, and he did not comply with it since he did not pay the sanctions within 30 days as ordered. The judge found a willful violation of section 6103.

Thomas argues that the sanctions ordered in the interpleader action and the True Harmony matter were "grossly erroneously decided."[19] As discussed *ante*, his collateral attacks of the court orders in the civil litigation fail.

[5b] Thomas also asserts OCTC failed to introduce evidence that his disobedience of court orders caused harm to the administration of justice. This is not relevant to a defense for misconduct under section 6103.

[5c] Thomas argues the hearing judge improperly found he acted willfully based on the state court sanctions orders that his motions and appeals were frivolous. Thomas believes the judge could not infer that he acted willfully as "negligence is never willfulness." He asserts the testimony of Perry, Gibson, and Solomon concerning willfulness was cumulative. We reject these arguments. Thomas was aware of the orders, admits he has not complied with them, and has made no effort to comply. No evidence suggests this was "negligence." We agree with the judge that Thomas acted willfully and find culpability as charged.

B. Count Two of State Bar Court No. 15-O-14870: Failure to Report Judicial Sanctions (§ 6068, subd. (o)(3))

Count two of the First NDC alleged Thomas violated section 6068, subdivision (o)(3), by failing to report to the State Bar within 30 days the April 27, 2015 sanctions order in the appeal of the interpleader action. (*Hope Street v. Solomon et al.* (Court of Appeal, Second Appellate District, No. B254143).) Section 6068, subdivision (o)(3), requires attorneys to report to the State Bar, in writing, within 30 days of knowledge of "[t]he imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000)." The hearing judge found that, at the latest, Thomas knew of the sanctions order on May 12, 2015—the date of his petition for rehearing seeking review of the sanctions order. He did not report the order, and the judge found culpability as charged.

Thomas makes no specific argument on review as to his lack of culpability of misconduct for his failure to report the April 27, 2015 sanctions

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[4] 18. We note that in his briefs and at oral argument, Thomas made several arguments regarding the American Bar Association (ABA) Model Rules of Professional Conduct, asserting they should be followed rather than the California Rules of Professional Conduct. Thomas also contended the ABA rules take precedence over the State Bar Act and the California disciplinary statutes. We reject his arguments as meritless.

19. The True Harmony matter was charged in the Second NDC.

order. Based on our review of the record, we affirm the hearing judge's culpability finding.

C. Count One of SBC-20-O-00029: Threatening Charges to Gain Advantage in Civil Suit (rule 5-100(A))

Count one of the Second NDC alleged Thomas violated rule 5-100(A) when he stated, in his August 26, 2016 letter to Gibson and Howard, that they would be convicted of mail fraud and sentenced to five years in the federal penitentiary if they did not correct their violations of the Code of Civil Procedure and that they would be convicted of violating title 18 United States Code sections 241 and 242 and would be sent to prison for the remainder of their lives. The allegation stated Thomas made these charges to gain an advantage in the True Harmony matter, by hampering and delaying Perry's attorneys, increasing litigation costs, and harassing Perry. Rule 5-100(A) provides, "A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute." The hearing judge found culpability as charged. In the letter, Thomas expressly threatened the recipients that they would be criminally indicted, found guilty, sentenced, and sent to prison if they did not take specific actions regarding their demurrers to the complaint in the True Harmony matter. The judge concluded the letter conveyed the message that Thomas would report Gibson and Howard for alleged criminal violations and that the letter was sent to intimidate and harass opposing counsel to gain an advantage in the True Harmony litigation.

Again, Thomas makes no specific argument on review as to his culpability of a rule 5-100(A) violation. Based on our review of Thomas's statements to opposing counsel threatening criminal charges, we affirm the hearing judge's culpability finding. (*In the Matter of Malek-Yonan* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 627, 637 [violation of rule 5-100 by sending letter threatening criminal investigation].)

D. Count Three of SBC-20-O-00029: Maintaining an Unjust Action (§ 6068, subd. (c))

[6a] Section 6068, subdivision (c), provides that it is an attorney's duty "[t]o counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense." Count three of the Second NDC alleged Thomas violated section 6068, subdivision (c), by (1) making multiple claims and arguments lacking any legal or factual basis and filing and pursuing an untimely motion (despite being forewarned that the motion was without merit and should be dismissed) in the interpleader action; (2) filing a frivolous appeal of the interpleader action, which lacked any merit and was prosecuted for the improper purpose to harass and increase litigation costs; (3) filing a motion for reconsideration in the True Harmony matter, which had no basis in law and unnecessarily increased the costs of litigation; and (4) repeatedly pursuing improper appeals and filing frivolous and harassing briefs and/or motions, which unnecessarily increased the costs of litigation in the appeal of the True Harmony matter. The hearing judge found culpability under section 6068, subdivision (c), for Thomas's use of abusive litigation tactics where he initiated and maintained multiple claims and defenses, at the trial and appellate levels, which were foreclosed by legal authority.

[6b] Thomas argues, without any support, that the notices of appeal, briefs, and motions he filed do not qualify as "actions" under section 6068, subdivision (c). We reject his claim as meritless and we affirm the hearing judge's culpability finding. (See *In the Matter of Kinney*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 365 [attorney who unreasonably pursued lawsuits "after unqualified losses at trial and on appeal" culpable under § 6068, subd. (c)].)

E. Count Four of Case No. SBC-20-O-00029: Failure to Obey a Court Order (§ 6103)

Count four of the Second NDC alleged Thomas failed to comply with three court orders: (1) the August 24, 2016 order requiring him to pay sanctions of $18,060 and attorney fees of $22,810 in the interpleader action; (2) the November 30, 2017 order requiring him to pay $23,350 in sanctions in the True Harmony matter; and (3) the December 13, 2018 order requiring him to pay $65,480.64 in sanctions, including $8,500 to the clerk of court, in the appeal of the True Harmony matter. The hearing judge found culpability as

charged. Thomas admitted he has not paid the ordered sanctions.

Thomas's arguments on review involve collateral attacks on these sanctions orders. As discussed *ante*, we find the orders are valid. Thomas advances no other arguments concerning culpability under section 6103. Based on our review of the record, we affirm the hearing judge's culpability finding. (*In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 603 [elements of § 6103 violation].)

V. AGGRAVATION AND MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct[20] requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Thomas to meet the same burden to prove mitigation.

A. Aggravation

1. Multiple Acts of Wrongdoing (Std. 1.5(b)) and Pattern of Wrongdoing (Std. 1.5(c))

[7a] The hearing judge found Thomas committed multiple acts of misconduct by repeatedly pursuing unsupported legal claims in multiple legal proceedings, making improper threats, disobeying four court orders, and failing to report the sanctions order in the interpleader appeal. We agree these acts sufficiently establish multiple acts of misconduct under standard 1.5(b). (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646-647 [three instances of misconduct considered multiple acts].)

[7b] The hearing judge also found Thomas's misconduct demonstrated a pattern. He continually maintained frivolous legal positions in various proceedings, from 2013 to the time of the disciplinary trial, which was an abuse of the justice system. In addition, Thomas disregarded numerous court orders intended to curb his improper conduct. (Std. 1.5(c); *In the Matter of Kinney*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 368 [multiple acts and pattern where attorney repeatedly pursued vexatious litigation over more than six years]; *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 555 [pattern must involve serious misconduct spanning extended time period].) The judge assigned substantial aggravation, collectively, under standards 1.5(b) and (c).

[7c] Thomas argues the hearing judge's finding had no foundation in the record and did not satisfy the hearsay evidence exception for "custom or practice." These arguments are unsupported. Thomas was told by the courts that he was wrong and his pleadings were frivolous and harassing. Yet, he did not stop repeatedly advancing arguments without a legal basis. He began putting forth frivolous arguments in 2013 in the interpleader action and has done so in the appeal of that action, the True Harmony matter, and the appeal of the True Harmony matter. He has also done so twice in federal court. In 2020, he filed a second federal lawsuit, which was dismissed because the claims were nearly identical to the federal lawsuit dismissed by the district court in 2017 and affirmed by the Ninth Circuit in 2018. His appeal in the second federal lawsuit is still pending. We agree with the judge that aggravation is warranted under standard 1.5(c) for Thomas's pattern of misconduct. The misconduct was serious and spanned several years (with evidence that Thomas continues to pursue these claims even now). We assign substantial aggravation under standards 1.5(b) and (c).

2. Significant Harm (Std. 1.5(j))

[8a] The hearing judge found Thomas's misconduct caused significant harm to the public and the administration of justice, warranting substantial aggravation under standard 1.5(j). We agree with the judge's findings and reject Thomas's argument that OCTC did not prove harm to the administration of justice.

[8b] Thomas's relentless litigation campaign caused the courts and the parties to expend excessive time and money, as illustrated by the $188,350.64 in sanctions against him, including $8,500 for reimbursement to the court of appeal for administrative costs he generated. His frivolous

20. All further references to standards are to this source.

litigation caused the courts to consider and rule on his meritless motions, which was a waste of judicial resources. (*In the Matter of Reiss* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 206, 217 [acts wasting judicial time and resources constitute significant harm].)

[8c] In addition, Thomas's misconduct caused stress and emotional harm to Solomon, Perry, and Gibson, which was established by their testimony at trial. They were repeatedly forced to defend against Thomas's meritless claims and appeals. Solomon testified he incurred over $700,000 in legal fees owed to Gibson for dealing with Thomas's frivolous litigation.[21] Additionally, Thomas has not paid any of the ordered sanctions to Solomon and HPL. Solomon also testified that the litigation took time away from his business and that he must disclose the litigation each time he applies for a loan. Perry testified that Thomas's actions have caused him a great deal of stress and that he has spent hundreds of hours involved with this litigation. Gibson testified he has had stressful interactions with opposing counsel during his five decades of litigation, but never like the ones he experienced with Thomas. He also stated that, prior to filing motions for sanctions against Thomas, he had filed, at most, one or two motions for discovery sanctions. He testified he spent approximately 2,000 hours working on this litigation. Gibson also stated he paid $5,000 to his malpractice insurer for his defense of the federal lawsuits Thomas filed against him.

3. Indifference (Std. 1.5(k))

[9a] Standard 1.5(k) provides that an aggravating circumstance may include "indifference toward rectification or atonement for the consequences of the misconduct." The hearing judge assigned substantial weight in aggravation for Thomas's failure to accept responsibility for his actions and to atone for the resulting harm. Thomas made no specific arguments on review concerning this aggravation finding.

[9b] Thomas has blamed others, testified his conduct was moral and correct, and characterized himself as the victim. For example, he stated the appellate court in the interpleader action was wrong and "roasted" him with a "gross error." He complained he was "at the butt end of a litigation machine juggernaut" and believed the sanctions orders were unfair. Further, he has made no payments towards the court-ordered sanctions. Thomas asserted he does not understand why OCTC brought the charges and he intends to continue to pursue litigation related to the underlying misconduct. In his closing argument at trial, he said he was "going to stick by my guns," which he has. He announced later at oral argument before us that he would appeal to the Supreme Court if his discipline was not overturned and he is continuing to pursue the second federal lawsuit.

[9c] Thomas has the right to defend himself vigorously; however, his arguments "went beyond tenacity to truculence." (*In re Morse* (1995) 11 Cal.4th 184, 209.) We agree with the hearing judge that his gross lack of insight into the wrongfulness of his actions merits substantial aggravation. (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511 [law does not require false penitence, but does require attorney to accept responsibility for his or her wrongful acts and show some understanding of culpability]; *In re Morse*, *supra*, 11 Cal.4th 184 at p. 209 [unwillingness to consider appropriateness of legal challenge or acknowledge lack of merit is aggravating factor].) Thomas has refused to acknowledge he was wrong and that his actions have harmed the courts and others. He continues to raise the same unsuccessful arguments already struck down by several courts. His failure to accept responsibility is a substantial aggravating factor. (*Carter v. State Bar* (1988) 44 Cal.3d 1091, 1100-1101 [blanket refusal to acknowledge wrongful conduct constitutes indifference].)

B. Mitigation

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

[10] Mitigation includes "absence of any prior record of discipline over many years coupled with present misconduct, which is not likely to recur." (Std. 1.6(a).) Thomas practiced for nearly 35 years without discipline before the misconduct

21. At trial, Gibson confirmed this amount.

in this matter started. The hearing judge assigned minimal mitigation because Thomas stated at trial that he will not cease litigation related to legal claims that have already been rejected. Accordingly, Thomas has failed to establish his misconduct is aberrational and not likely to recur. (See *Cooper v. State Bar* (1987) 43 Cal. 3d 1016, 1029 [when misconduct is serious, long record without discipline is most relevant when misconduct is aberrational].) Given his complete lack of insight into misconduct, we assign only nominal weight in mitigation for his absence of a prior record of discipline.

2. Extraordinary Good Character (Std. 1.6(f))

[11a] Thomas 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).) Thomas's character evidence consisted of four witnesses who testified at trial (two of whom also submitted character letters) and two additional character letters. The witnesses have known Thomas for many years and reported he is honest, of good moral character, and dedicated to his clients. The hearing judge found the witnesses did not represent a wide range as they were all current or former clients. (See *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 387 [three attorneys and three clients did not constitute wide range of references].) In addition, the witnesses were unaware of the full extent of the misconduct. (See *In re Aquino* (1989) 49 Cal.3d 1122, 1131 [testimony of witnesses unfamiliar with details of misconduct not significant in determining mitigation].) Finally, one witness revealed limitations as to Thomas's interpersonal and legal skills, disclosing that Thomas sometimes does not get along with others and the quality of his work is inconsistent. For these reasons, the judge did not assign mitigation credit under standard 1.6(f).

[11b] On review, Thomas failed to assert any specific arguments regarding the hearing judge's finding. We agree with the judge that Thomas has failed to establish mitigation for extraordinary good character.

VI. DISBARMENT IS THE APPROPRIATE 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 Silverton* (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.) We also look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

In analyzing the applicable standards, we first determine which standard specifies the most severe sanction for the at-issue misconduct. (Std. 1.7(a) [most severe sanction shall be imposed where multiple sanctions apply].) The most severe and applicable sanction here is standard 2.9(a), which applies because of Thomas's culpability under section 6068, subdivision (c).[22] **[12a]** Standard 2.9(a) provides for actual suspension when an attorney maintains a frivolous claim for an improper purpose and disbarment is appropriate if the misconduct demonstrates a pattern.

The hearing judge found that Thomas's repeated pursuit of frivolous legal actions—

22. Standard 2.12(a) is also applicable and provides for disbarment or actual suspension for disobedience of a court order. (See also § 6103 [disbarment or suspension for violation of court order]; *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112 [violations of court orders are serious misconduct].) Standard 2.12(b) provides for reproval for failure to report judicial sanctions. A rule 5-100(A) violation is subject to suspension of up to three years or reproval under standard 2.19.

repetitively recycling previously rejected arguments, while consistently defying court orders aimed at curbing his improper conduct—demonstrates a pattern. "[O]nly the most serious instances of repeated misconduct over a prolonged period of time could be characterized as demonstrating a pattern of wrongdoing. [Citations.]" (*Levin v. State Bar* (1989) 47 Cal.3d 1140, 1149, fn. 14; see also *In the Matter of Kinney*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 368 [pattern where attorney repeatedly engaged in vexatious litigation over six-year period].) **[12b]** Thomas has relentlessly pursued the same arguments in two state court actions—the interpleader action and the True Harmony matter—both of which he appealed to the appellate court, the California Supreme Court, and the Supreme Court of the United States. He was heavily sanctioned in those actions ($188,350.64), and has not paid any money towards the sanctions. The sanctions orders have not deterred him, and he has continued to repeat his failed arguments in two federal lawsuits, which were both dismissed as improper collateral attacks on the state court decisions. He appealed both of those decisions to the Ninth Circuit, where the second action is still pending. His appeal of the second federal lawsuit occurred in June 2021, after the Hearing Department's decision in this disciplinary proceeding recommending his disbarment. Besides maintaining multiple unjust actions, Thomas is also culpable of failing to obey four court orders, failing to report judicial sanctions, and threatening charges to gain an advantage in a civil suit. All of these acts may be considered in determining if a pattern of misconduct exists. (*Read v. State Bar* (1991) 53 Cal.3d 394, 423 [pattern of misconduct may be found even though acts encompass wide range of improper behavior].) We find Thomas's misconduct is serious, repetitive, and has been ongoing for over seven years. Accordingly, we agree with the hearing judge that it demonstrates a pattern of wrongdoing. Thus, recommending disbarment would be appropriate under standard 2.9(a).

[12c] Even if we were to not find a pattern of wrongdoing, disbarment would be the appropriate discipline to recommend due to Thomas's multiple instances of serious misconduct combined with several substantial aggravating factors that outweigh nominal mitigation for lack of a prior disciplinary record. Standard 1.7(b) provides a greater sanction than specified in a given standard may be appropriate due to serious aggravating circumstances that outweigh the mitigation. "On balance, a greater sanction is appropriate where there is serious harm to the client, the public, the legal system, or the profession and where the record demonstrates that the lawyer is unwilling or unable to conform to ethical responsibilities." (Std. 1.7(b).)

The findings from the state and federal courts highlight the seriousness of Thomas's misconduct. He pursued untimely motions, failed to cite authority to support his arguments, and filed frivolous claims intended to harass his opponents and increase their litigation costs. Thomas presented claims to the court when he lacked standing or when the claims were barred by res judicata. The courts often found his arguments to be without merit, unsupported, irrelevant, and procedurally improper. He also disobeyed court orders requiring him to limit his appeals. In federal court, he improperly presented claims that were barred from collateral attack. These actions caused serious harm, wasting judicial resources and unnecessarily burdening opposing parties, including two appellate court justices who had ruled against him.

[12d] In addition to maintaining unjust actions, being sanctioned for them, and failing to report the sanctions, he threatened criminal charges against his opponents. Further, his communications with opposing attorneys were very unprofessional. All of these actions by Thomas demonstrate that he is unable to conform to his ethical responsibilities. He fails to realize that his actions go beyond zealous advocacy, which leads us to no other conclusion than he will likely continue to abuse the legal system. Therefore, he meets the requirements of standard 1.7(b). Using that standard to enhance the presumed sanction of actual suspension under standard 2.9(a) for maintaining an unjust action without demonstrating a pattern, we find that recommending disbarment is still appropriate.

We agree with the hearing judge that Thomas's misconduct is highly comparable to the

misconduct in *In the Matter of Kinney, supra*, 5 Cal. State Bar Ct. Rptr. 360 and *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, even though Kinney and Varakin were both culpable of moral turpitude violations in addition to maintaining unjust actions. Both Kinney and Varakin were culpable of violating section 6068, subdivision (c), and were disbarred despite lengthy years in practice without prior discipline. Thomas's misconduct is less extensive than both Kinney's and Varakin's misconduct, but *Kinney* and *Varakin* do not establish a minimum level of misconduct necessary to justify disbarment as an appropriate sanction for maintaining an unjust action, and **[12e]** no precedent requires that a moral turpitude finding is a requisite for disbarment in such cases. In this matter, recommending disbarment is appropriate under standards 1.7(b) and 2.9(a).

[12f] We emphasize that Thomas has shown a lack of insight into the wrongfulness of his actions. We are troubled that he has declared he will continue to litigate issues that have already been foreclosed by the courts. He has become embroiled in the issues surrounding this litigation and has shown he is unable to refrain from engaging in frivolous litigation. Court orders sanctioning him have not deterred him from filing frivolous litigation.[23] Thomas has committed five separate and serious ethical violations, causing significant harm with indifference to his misconduct. Accordingly, protection of the public, the courts, and the legal profession calls for us to recommend Thomas's disbarment.

VII. RECOMMENDATIONS

We recommend that Jeffrey Gray Thomas, State Bar Number 83076, be disbarred from the practice of law in California and that his name be stricken from the roll of attorneys.

CALIFORNIA RULES OF COURT, RULE 9.20

We further recommend that Jeffrey Gray Thomas be ordered to comply with the requirements of California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order imposing discipline in this matter.[24]

MONETARY SANCTIONS

We do not recommend the imposition of monetary sanctions in this matter, as this matter was commenced before April 1, 2020. (Rules Proc. of State Bar, rule 5.137(H).)

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

23. We do not recommend Thomas be ordered to pay the sanctions as OCTC requests in light of our disbarment recommendation and because the state courts have already ordered such payments. (*In the Matter of Schooler* (Review Dept. 2017) 5 Cal. State Bar Ct. Rptr. 494, 498.)

24. For purposes of compliance with rule 9.20(a), the operative date for identification of "clients being represented in pending matters" and others to be notified is the filing date of the Supreme Court order, not any later "effective" date of the order. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45.) Further, Thomas is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court filed 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).)

suspended or disbarred must be paid as a condition of reinstatement or return to active status.

VIII. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

The order that Jeffrey Gray Thomas be involuntarily enrolled as an inactive attorney of the State Bar pursuant to section 6007, subdivision (c)(4), effective May 28, 2021, will remain in effect pending consideration and decision of the Supreme Court on this recommendation.

WE CONCUR:

HONN, P. J.
STOVITZ, J.*

* Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

State Bar Court
Review Department

In the Matter of

ERIC ADRIAN JIMENEZ

A Member of the State Bar

No. SBC-21-C-30086

Filed November 8, 2022

SUMMARY

Respondent, who was self-employed as an information technology consultant, was hired by a construction company to work as a computer network consultant and had access to the company's confidential network password. When the company failed to pay respondent's invoices after multiple requests for payment, respondent remotely accessed the company's network, changed the password without permission, and moved accounting files so the owners would be unable to locate them. When the company's Chief Executive Officer (CEO) asked respondent to change the password back or provide a new password, respondent refused, and the company had to hire another consultant to have the password reset to regain access to the company's computer network. A criminal complaint was filed, and respondent pleaded guilty and was convicted of a misdemeanor violation of Penal Code section 502, subdivision (c)(5), knowingly and without permission disrupting computer services to an authorized user of a computer system or network. As respondent assumed a fiduciary role in the company and knowingly and without permission used his position of trust in the company to restrict authorized users' access to the company's computer system, respondent's actions demonstrated character deficiencies including lack of trustworthiness and fidelity to fiduciary duties, which evidenced moral turpitude. Furthermore, respondent's testimony lacked credibility and candor, and respondent's statements to police, superior court, and Bureau of Criminal Information and Analysis were false and done with intent to cover up and minimize his criminal conduct. Review Department therefore concluded that the facts and circumstances surrounding respondent's conviction involved moral turpitude. Having grave concerns about dishonest statements respondent made to law enforcement, the courts, and in the disciplinary proceeding, the Review Department concluded that six months' actual suspension was necessary to protect the public and the courts, to maintain high professional standards, and to impress upon respondent the seriousness of his conduct.

COUNSEL FOR PARTIES

For State Bar of California: Peter A. Klivans

For Respondent: Edward O. Lear

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a, b] **142 Evidentiary Issues – Hearsay**
142.10 Evidentiary Issues – Hearsay – Admissibility (rule 5.104(D) (2011))

Police reports are not considered business records, an exception to hearsay rules. Respondent's statements in police report, however, were admissible as party admissions, an exception to hearsay rule.

[2 a-e] **142 Evidentiary Issues – Hearsay**
142.10 Evidentiary Issues – Hearsay – Admissibility
142.20 Evidentiary Issues – Hearsay – Insufficiency to Support Finding
151 Evidentiary Issues – Evidentiary Effect of Stipulations

Under rule 5.104 of Rules of Procedure of State Bar, only hearsay evidence that is relevant and reliable may be considered for admission, and hearsay may only be used for purpose of supplementing or explaining other evidence. Over timely objection, however, hearsay will not be sufficient itself to support finding unless it would be admissible over objection in civil actions. Unlike hearing judge, who overruled respondent's counsel's hearsay objection and concluded statements in police report were admissible under rules of procedure, Review Department held some statements in police report were inadmissible hearsay, as they did not fall under rule 5.104 as corroborative evidence. Where third-party statements in police report were multi-layered hearsay, not relevant to disciplinary proceeding, did not supplement record, or were insufficient to support other evidence in record, statements were inadmissible hearsay, and Review Department did not consider those third-party statements in police report in findings on review. However, hearsay statements that supplemented or explained respondent's statements/admissions in police report were admissible and, as stipulated facts are binding on parties, third-party witness statements that supplemented parties' stipulation were also admissible.

[3 a-c] **141 Evidentiary Issues – Relevance**
141.10 Evidentiary Issues – Relevance – Relevant and Reliable Evidence Admissible
167 Standards of Proof/Standards of Review – Abuse of Discretion

Hearing judge had broad discretion to determine admissibility and relevance of evidence. Standard of review generally applied to evidentiary rulings is abuse of discretion. To prevail on claim of error, abuse of discretion and actual prejudice resulting from ruling must be established. Where hearing judge denied admission of documents from six separate lawsuits in which company was defendant, as well as company's 2009 bankruptcy petition, hearing judge did not abuse her discretion as civil lawsuits and evidence of company's bankruptcy were irrelevant as evidence had no bearing on circumstances pertaining to respondent's conviction; documents concerning company's perceived financial distress would not mitigate or excuse respondent's misconduct as bankruptcy proceeding filed in 2009 and respondent's conviction occurred in August 2008; and respondent failed to identify specific additional facts or arguments he would have offered if evidence admitted or that he suffered any actual prejudice.

[4 a-f] **430.00 Common Law/Other Statutory Violations – Breach of Fiduciary Duty**
1517 Substantive Issues in Conviction Proceedings – Nature of Underlying Conviction – Violation of Regulatory Laws
1523 Substantive Issues in Conviction Proceedings – Moral Turpitude – Found Based on Facts and Circumstances

Moral turpitude includes deficiency in any character trait necessary for practice of law (such as trustworthiness, honesty, fairness, candor, and fidelity to fiduciary duties) or if it involves such serious breach of duty owed to another or to society, or such flagrant disrespect for law or societal norms, that knowledge of attorney's conduct would be likely to undermine public confidence in and respect for legal profession. Attorney who accepts responsibility of fiduciary nature held to legal profession's high standards whether or not attorney acts in capacity of attorney. Where respondent, who worked as company's computer network consultant, assumed fiduciary role in company based on job responsibilities, and knowingly and without permission used position of trust in company to restrict authorized users' access to computer system, though for only brief time period, and who, when confronted refused to reset passwords so users could regain access which forced employer to hire another technology consultant to remedy issue, even though respondent eventually made restitution to company, respondent's actions demonstrated character deficiencies including lack of trustworthiness and fidelity to fiduciary duties, which evidenced moral turpitude. Furthermore, where respondent's testimony that he acted with company president's permission was contrary to his guilty plea, Review Department would not consider claims that would negate elements of crime to which respondent pled guilty. Additionally, where, due to respondent's testimony which was unsupported by record and was inconsistent, confusing, and contradicted other evidence in record, including his own admissions, Review Department affirmed hearing judge's conclusions that respondent's testimony lacked credibility and candor; and where respondent's statements to police, superior court, and Bureau of Criminal Information and Analysis were false and done with intent to cover up and minimize criminal conduct, Review Department held respondent was culpable of moral turpitude.

[5 a-c] **513.90 Aggravation – Prior record of discipline – Found but discounted or not relied on – Other reason**

Where discipline in respondent's prior disciplinary matter was stipulated to several years after misconduct in current matter started, respondent did not have full opportunity to heed importance of earlier discipline, even though similarities existed between prior discipline and current matter which was concerning. However, considering totality of respondent's misconduct, Review Department assigned limited aggravation for respondent's prior record of discipline, rather than no aggravation as found by hearing judge.

[6 a, b] **588.50 Aggravation – Harm – To all of the above (or unspecified, or other) – Declined to find**

To be aggravating factor, harm to court, client, or administration of justice must be "significant." Where respondent unlawfully accessed company's computer system and caused interruption which affected business operations for no more than one day, and respondent's refusal to restore computer password caused company to hire technical expert resulting in $1,500 in expenses, Office of Chief Trial Counsel did not establish significant harm as aggravating circumstance.

[7 a-c] **601 Aggravation – Lack of candor/cooperation with victim – Found**

Where respondent's explanations were unbelievable, uncorroborated, and implausible, no other reasonable inference could be drawn from respondent's testimony other than finding that respondent was dishonest. Review Department concluded respondent deliberately presented false testimony in State Bar Court and affirmed hearing judge's finding of substantial weight in aggravation for this circumstance. Aggravation assigned was based on respondent's dishonesty during disciplinary trial, rather than misconduct and dishonesty surrounding respondent's conviction which was used in finding moral turpitude.

[8 a, b] **591 Aggravation – Indifference to rectification/atonement – Found**

Where respondent continued to perceive himself as victim and denied full responsibility for criminal conduct by maintaining he acted under company president's authority when he disrupted company's computer system, even though respondent initially admitted to police he acted intentionally and pleaded guilty and was convicted of knowingly disrupting computer network without permission, record supported finding that respondent lacked insight into wrongfulness of misconduct and had refused to accept full responsibility. Respondent's failure to accept responsibility for misconduct led Review Department to conclude respondent did not truly understand wrongfulness of misconduct and suggested risk for future misconduct. Review Department therefore assigned substantial weight in aggravation to respondent's indifference.

[9] **740.32 Mitigation – Good character references – Found but discounted or not relied on – References unfamiliar with misconduct**

Good character evidence, consisting of 10 letters, including from attorneys, former clients, employee, respondent's wife, and friends, four of whom also testified on respondent's behalf, entitled to moderate weight in mitigation as most character references did not demonstrate full awareness of extent of respondent's misconduct as required by standard l.6(f).

[10] **740.39 Mitigation – Good character references – Found but discounted or not relied on – Other reason**

Assigning limited weight to character witnesses solely because witnesses have financial or familial relationship with respondent not supported by case law.

[11] **765.10 Mitigation – Substantial pro bono work – Found**

Where character witness testified to respondent's pro bono work, which was confirmed by respondent and corroborated by letters from two additional character witnesses, and declaration from respondent's wife contained summary of numerous community service activities respondent had engaged in, quantity and quality of services was commendable and supported finding of substantial weight in mitigation for community service.

[12 a, b] **750.52 Mitigation – Passage of time and rehabilitation – Declined to find – Inadequate showing of rehabilitation**

Mitigation under standard 1.6(h) requires both that misconduct be remote in time and that there be subsequent rehabilitation. Although respondent had practiced law for nine years without misconduct since conviction in underlying disciplinary matter, respondent's completion of criminal probation terms was not determinative of rehabilitation. Where respondent, during disciplinary proceedings had shown indifference, lack of truthfulness and

candor, and unwillingness to accept full responsibility for criminal act, respondent had not established clear and convincing evidence of rehabilitation.

[13 a, b] **1091 Miscellaneous Substantive issues re Discipline – Proportionality with Other Cases**
805.10 General Issues re Application of Standards – Part A (General Standards) – Standard 1.8 – (a) Current discipline should be greater than prior – Applied
1553.89 Application of Standards to Discipline Based on Criminal Conviction – Standard 2.15(b) – Applied – actual suspension – Other reason

Where respondent was convicted of misdemeanor involving moral turpitude; lacked candor, including misconduct during disciplinary proceedings; had prior discipline record resulting in 30-day period of actual suspension (which was given diminished weight as that misconduct occurred after misconduct in current disciplinary matter); and aggravation equaled mitigation, based on totality of facts and comparing it to other cases, Review Department concluded six-month actual suspension was minimum discipline necessary to protect public, courts, and legal profession. Review Department concerned that respondent's prior discipline, which involved nearly 70 instances of filing false pleadings, combined with respondent's lack of insight and failure to accept responsibility for dishonesty in current disciplinary matter, showed possibilities of future recidivism.

[14] **180.12 Monetary Sanctions – General Issues re Monetary Sanctions – Appropriate amount of monetary sanctions**

Upward deviation to $3,000 from monetary sanction guideline suggested in rule 5.137 of Rules of Procedure of State Bar appropriate because respondent's misconduct was aggravated by lack of candor.

ADDITIONAL ANALYSIS

Mitigation

Found

735.30	Cooperation with State Bar

Discipline

180.31	Monetary Sanctions – Imposition of Monetary Sanctions – Recommended
1024	Ethics exam/ethics school
1613.06	Stayed Suspension – One year
1615.04	Actual Suspension – Six months (including between 6 and 9 mos.)
1617.06	Probation – One year

OPINION

McGILL, J

On April 19, 2010, Eric Adrian Jimenez pleaded guilty in Los Angeles Superior Court to a misdemeanor violation of Penal Code section 502, subdivision (c)(5) (knowingly and without permission disrupting computer services to an authorized user of a computer system or network). After his conviction was transmitted to us, we referred the case to the Hearing Department to determine if the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline.

The hearing judge determined that the facts and circumstances surrounding Jimenez's conviction involved moral turpitude and recommended discipline to include a six-month actual suspension. Jimenez appeals. He argues that the facts and circumstances surrounding his crime did not involve moral turpitude and that the judge improperly relied on hearsay statements contained in a police report that was admitted into evidence. Jimenez also requests we reverse the judge's aggravation findings that he lacked candor and insight into his misconduct and argues he is entitled to more mitigation. He contends a one-year stayed suspension would be sufficient in this case. The Office of Chief Trial Counsel of the State Bar (OCTC) requests we affirm the judge's findings and suspension recommendation.

Upon our independent review (Cal. Rules of Court, rule 9.12), we agree with the hearing judge that the facts and circumstances surrounding Jimenez's conviction involves moral turpitude and reject Jimenez's arguments. While we do not rely on certain hearsay statements, we reach the same conclusions as the judge and affirm most of the aggravation and mitigation findings. We see no reason to disturb the judge's credibility findings pertaining to Jimenez's testimony and, like the judge, we have grave concerns about the dishonest statements he made to law enforcement, the courts, and in this disciplinary proceeding. Given the overall record, we conclude that six months' actual suspension is necessary to protect the public and the courts, to maintain high professional standards, and to impress upon Jimenez the seriousness of his actions.

I. FACTUAL BACKGROUND[1]

A. Jimenez Works as a Network Consultant for Allied Construction Management Group, Inc.

Jimenez was admitted to practice law in California on June 4, 2007, and has one prior disciplinary record. From June 2007 to August 2008, Jimenez was self-employed and worked as a consultant within the information technology (IT) field. During this time, he was hired by a construction company, Allied Construction Management Group, Inc. (Allied) to work as a network administrator and desktop support consultant. As a network consultant, Jimenez was responsible for setting up remote access for Allied's computer network, backing up data, and updating the system as needed. Due to the nature of his work, Jimenez had access to Allied's confidential network password.

Jimenez billed Allied for the work he performed on an hourly basis and submitted monthly invoices to the company. In 2008, Allied had not paid Jimenez for two months of consulting services and owed him at least $1,500. Jimenez submitted multiple requests for payment, but the invoices remained unpaid. Between August 26 and August 27, 2008, Jimenez remotely accessed Allied's computer network and changed the password without permission. He also moved accounting files so that the owners would be unable to locate them. On August 27, Jimenez received a call from Allied's Chief Executive Officer, Joseph Casey, who was very upset about not being able to access the system. When Casey asked Jimenez to

1. 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 parties' pretrial stipulation, 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).)

change the password back or provide the new password, Jimenez refused.

The next day, Casey hired another consultant, Terry Crouch, and paid him $1,500 to have the password reset in order to regain access to Allied's computer network. On August 29, 2008, Casey filed a complaint with the Los Angeles Police Department (LAPD), stating there had been unauthorized access to Allied's network. Detective Janice Louie from LAPD's Computer Crimes Unit was assigned to investigate the case.

At the disciplinary trial, Jimenez testified that Allied's President, A.J. Foley, requested the password to Allied's computer network be changed and the accounting files copied to an external hard drive. Jimenez claimed Foley was concerned that Casey was defrauding clients and not paying on accounts owed, including Jimenez's account. Jimenez also claimed he called Foley after receiving the phone call from Casey and informed him that Casey was requesting the password be changed back. According to Jimenez, Foley asked him not to take any further action and not change or give Casey the password.[2] OCTC proffered Detective Louie's police report, which contained details involving the incident and notes from her interviews with multiple parties.[3] Jimenez's attorney objected to the admission of the report, which the hearing judge overruled.

B. LAPD's Investigation of Jimenez's Criminal Conduct

After Casey filed the complaint, Detective Louie and another detective interviewed him regarding the complaint. According to Detective Louie's police report, Casey believed that Jimenez disrupted the system because Allied had not paid Jimenez's invoices. Detective Louie also interviewed Crouch and noted in her police report that Crouch believed the intruder had prior knowledge of the system based on how the files were hidden and deleted. The police report also indicated that Crouch provided the Internet Protocol (IP) addresses associated with the network intrusion, which Detective Louie used to identify the subscriber information and obtain a search warrant of Jimenez's residence and other locations.

Early in the morning on March 12, 2009, the LAPD executed a search on Jimenez's residence pursuant to a warrant. The detectives interviewed Jimenez and he admitted that he remotely accessed Allied's network, changed the password, and moved the accounting files to an unknown location on the hard drive. Jimenez also admitted that he did not have authorization to take those actions. He also stated that he believed Allied was sheltering money in another construction business. According to Jimenez, in 2008 five businesses owed him money, and four of those businesses could not pay him because they were struggling financially. Jimenez explained that he moved Allied's accounting files to another location so that Casey would need him to retrieve it and to get the password from him. Jimenez also stated that he did this to help his friends who were also not being paid by Casey.

Approximately five hours after his interview with Detective Louie, Jimenez telephoned her with additional details, stating that he, in fact, did have permission from Foley to remotely log in to Allied's network. Jimenez stated that after speaking with his wife, he decided not to "tak[e] the fall for the intrusion crime." At the disciplinary trial when questioned about his discussion with the detectives during the search warrant, Jimenez testified that the police "started talking about [Foley] funneling money to . . . other businesses, and what I knew about that . . . . I didn't want to talk about [Foley]. I admittedly didn't bring him into the conversation at all." He testified that he called Detective Louie and provided additional

2. The hearing judge found Jimenez's claim that he acted with Foley's permission as unsupported by the record and determined that his "self-serving testimony went beyond incredible to lacking in candor." Jimenez challenges the judge's credibility findings on review, which are discussed in our moral turpitude section, *post*.

3. Detective Louie's report contained statements from her interviews with Casey, Foley, Crouch, Jimenez, Marina Jimenez (Jimenez's wife), and other Allied employees. Of these people, only Jimenez and Detective Louie testified at the disciplinary trial. Jimenez's counsel objected to certain questions asked of Detective Louie, arguing that it elicited improper hearsay statements. We address Jimenez's hearsay arguments in our evidentiary challenges discussion, *post*.

information not given to her earlier because he "didn't know if [Foley] had implicated me in some other bigger scheme." Foley never corroborated Jimenez's statements.[4]

C. Jimenez Pleaded Guilty to Unpermitted Disruption of Allied's Computer System

On March 4, 2010, the Los Angeles County District Attorney's Office filed a two-count complaint against Jimenez charging him with one felony count for violating Penal Code section 502, subdivision (c)(4) (knowingly accessing and without permission adding, altering damaging, deleting or destroying any data, computer software or computer programs which reside or exist internal or external to a computer, computer system, or computer network), and one felony count for violating Penal Code section 502, subdivision (c)(5) (knowingly and without permission disrupting or causing the disruption of computer services or denying or causing the denial of computer services to an authorized user of a computer, computer system or computer network).

On April 19, 2010, Jimenez pleaded guilty to the Penal Code section 502, subdivision (c)(5) violation (count two). On February 16, 2012, the superior court ordered that count two be deemed a misdemeanor and placed Jimenez on two years' summary probation. He was also ordered to perform community service and pay $2,000 in restitution, among other probation conditions. Jimenez completed his probation, complying with all its terms.

On January 15, 2019, Jimenez sent a letter to the Bureau of Criminal Information and Analysis (BCIA) seeking to correct his criminal record, which inaccurately reflected a felony conviction rather than a misdemeanor. In the letter, Jimenez stated that he was "falsely accused by persons who were defrauding others on construction contracts." On March 12, Jimenez filed a petition with the superior court to seal his criminal record. To support this filing, he submitted an Interest of Justice Statement, which he executed under penalty of perjury. Jimenez stated the following:

> A dispute arose between the two officers of [Allied] regarding accounting inaccuracies. A.J. Foley approached me and asked me to change the password to the [s]erver and [d]esktops in an effort to limit Joseph Casey's access, due to his belief [that] Casey was "up to no good" and defrauding their clients. I accessed the [n]etwork remotely and changed the passwords as instructed and moved the accounting files to an external hard drive that Foley was supposed to confiscate.
>
> The day after this was accomplished, I received a call [from] Casey and was asked to reverse the process. I explained that Foley had informed me that Casey was defrauding clients and not paying all accounts, including my own, and that Casey needed to resolve these issues before I would reverse the steps taken by me at Foley's direction.
>
> [¶] . . . [¶] I attempted to defend myself in this case by pointing out the correlation between the lawsuits against Allied CMD and Casey, and Casey's need to validate his excuse of destruction of computer files by prosecuting me as a scape goat [*sic*].

During the disciplinary proceeding, Jimenez maintained that his actions were taken "under the authority of Foley and pursuant to Foley's instructions." In his Answer to the Notice of Hearing on Conviction, Jimenez stated,

4. According to the police report, Detective Louie interviewed Foley on April 2, 2009, and Foley's statements are discussed as part of Jimenez's evidentiary challenges, *post*.

> Later that morning of 26-Aug-2008, I received a call [from] a very upset Casey and was asked to reverse the process. I called Foley to inform him that I was going to change the password once again, and Foley informed me that Casey was defrauding clients and not paying employees or accounts payable, and there were hundreds of thousands of dollars unaccounted for in their business accounts. Foley asked me not to take any further action and not to change or give Casey the password. I confirmed with the [in-house] accountant (Doris Robertson) and with one of the sub-contractors (Pierro Longi), and they both indeed confirmed that many checks issued by Allied had come back "Insufficient Funds." I informed Casey of the allegations by Foley and that I felt more comfortable taking no further action on the issue that needed to be resolved between Casey and Foley.

II. STATE BAR COURT PROCEEDINGS

On February 11, 2021, OCTC transmitted evidence to us of Jimenez's conviction, and, on April 8, OCTC transmitted evidence that his conviction was final. On April 30, we referred this matter to the Hearing Department for a hearing and decision as to whether the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline, and if so found, the discipline to be imposed.

On May 4, 2021, the Hearing Department filed and served on Jimenez a Notice of Hearing on Conviction. Jimenez filed an Answer on May 27. The parties filed a Stipulation of Undisputed Facts and Admission of Documents (Stipulation) on August 26, 2021. Trial was held on August 31 and September 1. After the filing of posttrial briefs, the hearing judge issued a decision on December 14.

Jimenez requested review on December 28, 2021. After briefing was completed, we heard the parties' oral arguments on August 17, 2022.

III. JIMENEZ'S EVIDENTIARY CHALLENGES[5]

A. Admissibility of the Police Report and Hearsay Statements

As indicated above, Jimenez's attorney objected to the admissibility of Detective Louie's police report at trial, arguing that it contained inadmissible hearsay.[6] The hearing judge overruled the hearsay objection and concluded that the statements in the report were admissible hearsay under our rules of procedure because they supplemented or explained other evidence in the record. Jimenez contends here that, since Detective Louie was the only third-party witness to testify during the disciplinary trial, the judge erred in considering the statements of Casey, Foley, Crouch, and Marina Jimenez when made during their respective police interviews. Specifically,

5. Jimenez argues certain factual challenges that are not relevant or outcome-determinative to this disciplinary proceeding (e.g., facts pertaining to charges on which he was not convicted and are thus not at issue). Having independently reviewed all arguments set forth by Jimenez, those not specifically addressed have been considered and rejected as without merit. Any challenges not raised on review are waived. (See In the Matter of Regan (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 844, 857 [where no objection to admission of evidence, well settled that any objection on that point is waived].)

6. We note that in his reply brief on review, Jimenez makes clear that he does not dispute the general admissibility of the police report but disputes the third-party witness statements contained within the report. As discussed in detail in this section, we find that certain statements from the police report are admissible as administrative hearsay.

Jimenez claims error in the admission of the following statements:[7]

(1) Foley stating that, in response to his request for Jimenez's help with accessing the network, Jimenez said, "When you pay me, I'll fix it;"

(2) Foley stating that he believed Jimenez was angry because the invoice had not been paid;

(3) Casey's statements regarding his belief that Jimenez disrupted the system because Allied had not paid Jimenez's invoices and that it cost over $1,500 for Crouch to repair the system;

(4) Casey's statement that it would have cost him approximately $250,000 in damages if Crouch was unable to recover files;

(5) Crouch's statements that the intruder had prior knowledge of the system and that Crouch provided the IP addresses associated with the network intrusion to Detective Louie; and

(6) Marina Jimenez's statements that Jimenez had several clients who had not paid him and that the couple had experienced financial hardship in 2008.[8]

[2a] In our independent review, we conclude that some of the statements in the police report reflect inadmissible hearsay under our rules of procedure. Rule 5.104(C) of the Rules of Procedure of the State Bar[9] provides, in pertinent part, that "Any relevant evidence must be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions." Therefore, only hearsay evidence that is relevant and reliable may be considered for admission. **[1b]** We do not agree with OCTC's position regarding the admissibility of Detective Louie's police report as a business record. (See *People v. McVey* (2018) 24 Cal.App.5th 405, 415-416, citing *People v. Sanchez* (2016) 63 Cal.4th 665, 695 [police reports are not considered business records as an exception to the hearsay rules]; *MacLean v. City & County of San Francisco* (1957) 151 Cal.App.2d 133, 143 [third-party narrators in police reports have no business duty to report to police].) Additionally, hearsay may only be "used for the purpose of supplementing or explaining other evidence, but over timely objection will not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Rule 5.104(D).)

[2b] As to Foley's statement that Jimenez said, "When you pay me, I'll fix it," this is inadmissible multi-layered hearsay. (*In the Matter of Jensen* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 283, 288 [multi-layered hearsay not the sort of evidence on which responsible persons usually rely].) Given Jimenez's objection, Foley's out-of-court statement cannot be used to supplement or explain Jimenez's testimony because it is insufficient to support a finding on its own, in light

7. **[1a]** The police report also contains statements by Jimenez that he admitted to remotely accessing Allied's network in early September 2008 and that Jimenez did so to help his friends who were not getting paid by Casey. We note that such statements by Jimenez are admissible as party admissions, an exception to the hearsay rule. (Evid. Code, § 1220.)

8. During the execution of the search warrant on March 12, 2009, Detective Louie and another detective interviewed Jimenez's wife, Marina Jimenez. The police report documented Marina Jimenez's hearsay statements describing her knowledge that Jimenez had several clients who were not paying him consistently.

9. All further references to rules are to this source.

of the evidence within the record.[10] Foley's statement that he believed Jimenez was angry because the invoice had not been paid was also inadmissible hearsay for the same reason. We do not find this statement relevant because Jimenez's state of mind is not an element of our analysis—his conviction alone is conclusive evidence that he committed the crime. (Bus. & Prof. Code, § 6101, subd. (a).) Foley's speculation as to Jimenez's state of mind was not only inadmissible but also irrelevant. Accordingly, we do not consider any of Foley's statements from the police report in our findings on review.

[2c] Next, we consider Casey's statements in the police report that it cost over $1,500 to hire Crouch to reconfigure the network and that Jimenez disrupted the system because Allied had not paid Jimenez's invoices. As to Casey's statement regarding his payment to Crouch, Jimenez stipulated that Casey "had to hire and pay another IT consultant over $1,500 to have the passwords reset and regain access to Allied's network." Stipulated facts are binding on the parties. (Rule 5.54(B).) Therefore, this statement is admissible because it supplements the stipulation. Similarly, Casey's statement regarding his belief that Jimenez disrupted the system also supplements a stipulated fact, Jimenez's admissions, and the elements established by his guilty plea. The portion of Casey's statement regarding his belief that Jimenez unlawfully accessed the network due to unpaid invoices is admissible hearsay, which can be used to explain Jimenez's statements in the police report indicating that when he called Casey for money owed, he was met with negative responses. However, Casey's statement regarding Crouch's estimate of $250,000 in potential damages is inadmissible. This statement is not relevant and does not supplement the record—actual damages were $1,500, as stipulated.

We also find Crouch's statements contained within the police report to be inadmissible hearsay. The parties' Stipulation and Jimenez's guilty plea establish only that he unlawfully accessed Allied's network. Crouch's hearsay statements regarding his suspicions about the intruder's prior knowledge of the network system and the IP addresses he provided to Detective Louie does not supplement other evidence in the record.

[2d] Lastly, we find that Marina Jimenez's statement to Detective Louie that Jimenez had been unable to collect outstanding payments from several clients is admissible hearsay. This statement supplements and explains Jimenez's own admissions to Detective Louie that his clients, including Allied, owed him money during the time that he disrupted Allied's system. We determine that the remainder of Marina Jimenez's statements in the report, including when she stated she and Jimenez had experienced financial hardship in 2008, are inadmissible hearsay because those portions alone are insufficient to support other evidence in the record.

[2e] In sum, some of the third-party statements in the police report are not admissible because they do not fall under rule 5.104 as corroborative evidence; nonetheless, this does not otherwise affect our view that the facts and circumstances demonstrate moral turpitude, discussed post.

B. The Hearing Judge Properly Excluded Irrelevant Documents

Jimenez next argues the hearing judge erred by denying the admission of several civil lawsuits pending against Allied, as well as Allied's bankruptcy filings. Specifically, the judge denied the admission of documents from six separate lawsuits, in which Allied was the defendant, as well as Allied's 2009 bankruptcy petition. Jimenez asserts that the judge's refusal to admit this evidence was prejudicial to him in terms of "weighing his credibility." He also argues these documents show Allied's financial distress at the time and establish Casey and Foley's motives in "lying about the alleged facts that files were

10. Outside of the record and during oral argument, Jimenez made rebuttal arguments in place of his attorney of record and stated he told Casey that he would not "fix [the network password] unless [Casey] pays the money."

deleted" and the assertion that Jimenez's actions could have potentially caused $250,000 in damages. Jimenez's arguments have no merit.

[3a] A hearing judge has broad discretion to determine the admissibility and relevance of evidence. (In the Matter of Farrell (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 499.) The standard of review we generally apply to the review of evidentiary rulings is abuse of discretion. (*In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, 695; see *H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1368 ["appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered"].) To prevail on a claim of error, 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 [absent actual prejudice, party not entitled to relief from hearing judge's evidentiary ruling].)

Despite Jimenez's arguments to the contrary, the hearing judge did not need to rely on the financial status of Allied in making credibility determinations. As discussed in detail in the section post, the judge made adverse credibility findings against Jimenez based on his dishonesty, which was revealed through several inconsistencies between his testimony and the documentary evidence. **[3b]** We agree with the judge's determination that the civil lawsuits against Allied and evidence of its bankruptcy were irrelevant because it held no bearing on circumstances pertaining to Jimenez's conviction. To be clear, Allied's financial status was not at issue in this case. Likewise, Jimenez's argument pertaining to "deleted files" underlying the dismissed criminal charge (Pen. Code, § 502, subd. (c)(4)) is irrelevant to this proceeding because Jimenez was not convicted under that count. Because we determined that Crouch's hearsay statement regarding potential damages of $250,000 was inadmissible hearsay, it was not considered in the facts and circumstances surrounding Jimenez's crime.

[3c] Additionally, as OCTC points out on review, Allied's bankruptcy proceeding was filed in December 2009 and the misconduct underlying Jimenez's conviction occurred in August 2008. Thus, the documents concerning Allied's perceived financial distress would not mitigate or excuse Jimenez's misconduct as the bankruptcy documents came into existence after his misconduct occurred. Finally, Jimenez failed to identify the specific additional facts or arguments he would have offered had the evidence been admitted or that he suffered any actual prejudice. (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 469 [attorney must show specific prejudicial effect].) Accordingly, we find that the hearing judge did not abuse her discretion in denying the admission of Allied's civil lawsuits and bankruptcy filing.

IV. THE FACTS AND CIRCUMSTANCES SURROUNDING JIMENEZ'S CONVICTION INVOLVE MORAL TURPITUDE

As we noted, *ante*, for the purposes of attorney discipline, Jimenez's conviction is conclusive proof of the elements of his crime. (See Bus. & Prof. Code, § 6101, subds. (a) & (e).) Thus, his guilty plea and misdemeanor conviction establish that he knowingly and without permission disrupted Allied's computer network. (Pen. Code, § 502, subd. (c)(5).) The issue before us is whether the facts and circumstances surrounding his criminal conviction, which was not committed in the practice of law, demonstrate moral turpitude. (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 935 [moral turpitude analysis not restricted to examining elements of crime but must look at whole course of misconduct].) Additionally, the court may not reach conclusions inconsistent with the conclusive effect of the attorney's conviction. (*In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 588.)

[4a] We are guided here by the Supreme Court's definition of moral turpitude, which includes, "a deficiency in any character trait necessary for the practice of law (such as trustworthiness, honesty, fairness, candor, and fidelity to fiduciary duties) or if it involves such a serious breach of a duty owed to another or to society, or such a flagrant disrespect for the law or for societal norms, that knowledge of the attorney's conduct would be likely to undermine public

confidence in and respect for the legal profession." (*In re Lesansky* (2001) 25 Cal.4th 11, 16.) The hearing judge found that Jimenez's misconduct involved moral turpitude because (1) he breached his fiduciary duty to his employer and (2) Jimenez made false and deceitful statements to the LAPD, the BCIA, and the superior court to cover up and minimize his criminal conduct. Like the judge, we also find that the facts and circumstances surrounding Jimenez's conviction involve moral turpitude for the reasons discussed *post*.

[4b] Jimenez was entrusted with a confidential network password and access to the network system while working for Allied. Because of his access to Allied's network, there can be no question that Jimenez assumed a fiduciary role in this situation based on his job responsibilities as Allied's network consultant.[11] "'An attorney who accepts the responsibility of a fiduciary nature is held to the high standards of the legal profession whether or not he acts in his capacity of an attorney.'" (*In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, 373, quoting *Worth v. State Bar* (1976) 17 Cal.3d 337, 341).) Jimenez breached his duty when he knowingly and without permission used his position of trust to restrict authorized users' access to the computer system. (See *Stokes v. Dole Nut Co.* (1995) 41 Cal.App.4th 285, 295 [duty of loyalty breached when "employee takes action which is inimical to the best interests of the employer"].)

We reject Jimenez's argument that his misconduct does not amount to moral turpitude because the "owners Casey and Foley were only prevented from accessing Allied's network and files for a brief 24-hour period," and because he paid restitution to Casey. The duration of time that Allied's network was inaccessible to authorized users does not negate Jimenez's criminal behavior. Nor does his restitution payment made years later minimize the significance of his misconduct. **[4c]** Jimenez intentionally disrupted Allied's network, without permission, to restrict Casey and Foley from using it. The nature of Jimenez's actions was further revealed when he refused to reset the passwords so that the users could regain access once confronted, which forced Casey to hire another IT consultant to remedy the issue. By taking actions against the interests of his employer, Jimenez abused his position of trust and dishonored his fiduciary duties.[12] We find that Jimenez's actions demonstrate deficiencies in his character including a lack of trustworthiness and fidelity to fiduciary duties, which is evidence of moral turpitude. (*In re Lesansky*, *supra*, 25 Cal.4th at p. 16.)

Jimenez's attempt to limit his wrongdoing, by arguing that he acted on Foley's direction in changing the password, which disrupted Allied's network, similarly lacks merit. **[4d]** Jimenez's self-serving claims are contrary to his guilty plea, and we do not consider claims that would negate the elements of the crime to which he pled guilty—that Jimenez knowingly and without permission, disrupted Allied's computer system or caused the denial of computer services to an authorized user of that computer or computer network. (Pen. Code, § 502, subd. (c)(5); see *In the Matter of Respondent O*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 588.) Also, Jimenez's testimony on this point was inconsistent, confusing, and contradicts other evidence in the record, including his own admissions as detailed in the hearing judge's decision. The judge rejected Jimenez's testimony that he acted with Foley's permission as unsupported by the record. Specifically, she concluded that his testimony was "self-serving" and "went from incredible to lacking in candor." She also noted that when testifying Jimenez was "unable to keep his new story straight." A judge's credibility findings are accorded great weight because the judge presided over the trial and heard the testimony. (Rule 5.155(A) [great weight given to hearing judge's factual findings]; see *McKnight*

11. Jimenez's point during oral argument that his employment status (employee compared to independent contractor) should affect our conclusion regarding his culpability for moral turpitude is irrelevant as the proper focus of our analysis is the fiduciary aspects of his work for Allied, which included access to Allied's computer system and its financial records.

12. Separately, we reject Jimenez's attempt to distinguish crimes found to involve moral turpitude from an impeachment standpoint where the hallmark measure is "readiness to do evil." (See *In re Grant* (2014) 58 Cal.4th 469, 476 [treatment of prior conviction for purposes of impeachment has "limited relevance in attorney discipline proceedings"].)

v. State Bar (1991) 53 Cal.3d 1025, 1032 [hearing judge best suited to resolve credibility questions "because [she] alone is able to observe the witnesses' demeanor and evaluate their veracity firsthand"].) We affirm her conclusions regarding Jimenez's credibility.

[4e] Upon our independent review of the record, we find no reason to discredit the hearing judge's remaining findings, including her finding that Jimenez's statements to Detective Louie, the superior court, and the BCIA were false and done with the intent to cover up and minimize his criminal conduct. When Jimenez was first interviewed by Detective Louie, during the execution of the search warrant at his home in 2009, Jimenez admitted to intentionally disrupting Allied's system and changing the network password. He also mentioned that he took these actions because he wanted to help his friends, who were owed by Allied, to get paid. This fact was corroborated by Detective Louie's testimony. During the initial interview with Detective Louie, Jimenez did not mention his purported claim that Foley directed him to disrupt the system in order to keep Casey from accessing it. It was not until hours later that Jimenez called Detective Louie and recast his self-serving story.

At the disciplinary trial, when questioned by OCTC about the incident, Jimenez claimed he did not mention Foley in his initial interview because he wanted to protect Foley since the police "started talking about [Foley] funneling money to other businesses, and what I knew about that." This explanation is implausible given the undisputed circumstances in which his statements were made. Jimenez was being questioned by the police about him disrupting Allied's network without permission; notably, nothing in the record suggests that Jimenez was being implicated in a crime with Foley or that Foley was subject to criminal investigation.

[4f] We find further support for the hearing judge's moral turpitude conclusion by examining the Interest of Justice Statement that Jimenez submitted to the superior court under penalty of perjury. In that statement he elaborated on his narrative that he had Foley's authorization to act and claimed, inter alia, that Casey "need[ed] to validate his excuse of destruction of computer files by prosecuting me as a scape goat [*sic*]." The judge found his statement to be a "false narrative," along with the letter he wrote to BCIA as "outlandish" and a lie when he claimed he was "falsely accused." Jimenez's multiple statements as discussed are inconsistent with the established facts, which amount to deceit and half-truths. (*Cutler v. State Bar* (1969) 71 Cal.2d 241, 252-253 ["An attorney's practice of deceit involves moral turpitude"].) Accordingly, we adopt the judge's conclusion that Jimenez is culpable of moral turpitude.

V. AGGRAVATION AND MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct [13] requires OCTC to establish aggravating circumstances by clear and convincing evidence. Jimenez has the same evidentiary burden to establish mitigation circumstances under standard 1.6.

A. Aggravation

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

[5a] Jimenez has one prior record of discipline. On June 28, 2012, the Supreme Court ordered him on probation for one year and actually suspended from the practice of law for 30 days. Jimenez stipulated he was culpable of violating Business and Professions Code section 6068, subdivision (c), by filing false and inaccurate documents in bankruptcy court in bad faith, thus failing to maintain just actions. His misconduct in the prior matter began in 2009. In aggravation, Jimenez committed multiple acts of misconduct, which involved approximately 70 instances of false and inaccurate filings in the bankruptcy court. In mitigation, he experienced emotional difficulties following the passing of a close family member. He also cooperated with OCTC by entering into a prefiling stipulation.

13. All further references to standards are to this source.

The hearing judge found no aggravation under standard 1.5(a), concluding that Jimenez's misconduct in the current matter occurred in August 2008, which was before the period of the time that he engaged in misconduct in the prior matter. Jimenez requests that we affirm the judge's finding. On review, OCTC argues that the judge failed to assign aggravation to Jimenez's prior discipline and argues that his present misconduct is similar to his prior because both cases involve dishonesty, which OCTC argues supports significant aggravation. OCTC also asserts that the judge incorrectly applied the analysis of *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602 to this case.

Prior discipline is a proper factor in aggravation when discipline is imposed. (*In the Matter of Sklar*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 618). This court in *Sklar* concluded that the aggravating weight of prior discipline is generally reduced if the prior misconduct occurred during the same time period as the current misconduct. (*Id*. at p. 619.) In *Sklar*, we emphasized that "the rationale for considering prior discipline as having an aggravating impact is that it is indicative of a recidivist attorney's inability to conform his or her conduct to ethical norms [citation]." (*Ibid*.) **[5b]** Here, Jimenez's prior misconduct began in 2009, which was subsequent to his misconduct in this disciplinary proceeding that started in August 2008, and we must consider this chronology of Jimenez's record of discipline in order to properly recommend discipline for him. (*In the Matter of Miller* (Review Dept. 1990) 1 Cal State Bar Ct. Rptr. 131, 136.) We find that because the discipline in Jimenez's prior matter was stipulated in December 2011, but his misconduct in this matter started in 2008, Jimenez did not have a full opportunity to heed the importance of his earlier discipline. (*In the Matter of Seltzer* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 263, 269.)

[5c] As OCTC points out, similarities exist between Jimenez's prior discipline and this matter, as both involve his issues with truthfulness and candor, which is most concerning. However, even in circumstances where an attorney's prior misconduct was similar, the aggravating weight of the prior disciplinary record is "somewhat diluted because the misconduct in the present case occurred before [the attorney was put on notice of discipline in the prior case]." (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646.) After considering the totality of Jimenez's misconduct, we assign limited aggravation for Jimenez's prior record of discipline instead of none as the hearing judge found.

2. Significant Harm to the Victim (Std. 1.5(j))

[6a] To be an aggravating factor, harm must be "significant" to a client, a court, or the administration of justice. (Std. 1.5(j).) The hearing judge found Jimenez's misconduct caused significant harm to Casey and Foley because he "caused Allied's computer system to be offline for several days, resulting in administrative delays and frustration to [them]," in addition to Casey having to incur $1,500 in expenses to hire another consultant to reconfigure and secure the system. The judge assigned substantial weight in aggravation to this circumstance. On review, Jimenez admits that he caused harm to Allied by forcing it to incur fees to pay for Crouch to restore access to its system. However, Jimenez contends that since access was regained within one day and he fully reimbursed Casey for the costs, only moderate weight in aggravation is warranted. OCTC requests that we affirm the judge's finding.

[6b] We find that the record does not support a finding of significant harm. Jimenez unlawfully accessed Allied's system and caused an interruption which affected its business operations for no more than one day, which OCTC apparently does not dispute. Jimenez's refusal to restore the password caused Casey to hire a technical expert that resulted in $1,500 in expenses to restore access to the network. On these particular facts, OCTC has not established this aggravating circumstance. (Cf. *In the Matter of Casey* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 117, 126 [significant harm to client occurred when client paid "significant amount" to hire another attorney and suffered "three years of misery" in unsuccessful attempt to fix attorney's misconduct].)

3. Lack of Candor (Std. 1.5(l))

Standard 1.5(l) allows aggravation for lack of candor "during disciplinary investigations or proceedings." The hearing judge assigned

substantial weight to Jimenez's lack of candor by finding he made misrepresentations during the trial in order to diminish his misconduct and portray himself as a victim. The judge not only found Jimenez's claim during trial, that he acted with Foley's permission, lacked credibility, but she also determined that his testimony lacked candor. (See *In the Matter of Bach*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 638 [deference given to hearing judge's credibility-based findings unless specific showing that such were made in error].)

On review, Jimenez argues no aggravation should be assigned to lack of candor because his testimony was "unrebutted" and consistent with statements made to the LAPD, BCIA, and the superior court. Jimenez's argument lacks merit when the whole record is considered. As we discussed in making our credibility determination *ante*, there were instances of inconsistencies and contradictions between Jimenez's testimony and that of Detective Louie and other evidence in the record.

[7a] Like the hearing judge, we do not find that Jimenez testified credibly, and his self-serving claim that he acted with Foley's permission was not supported by any evidence other than Jimenez's own testimony. Jimenez's admission to Detective Louie in 2009 contradicts his subsequent false narrative. The evidence of Jimenez's guilty plea in 2012 also contradicts his claim at trial that he acted with Foley's permission. In Jimenez's Answer to the Notice of Hearing on Conviction in this matter, he stated that he only pleaded guilty for financial reasons and regrets not going to trial. However, if Jimenez truly acted under Foley's permission, he clearly could have used this claim as a defense to the Penal Code section 502, subdivision (c)(5), charge. (See Pen. Code, § 502, subd. (h)(1) [acts committed by person within scope of lawful employment are not punishable]; *Mahru v. Superior Court* (1987) 191 Cal.App.3d 545, 548-549 [statutory predecessor to Pen. Code, § 502, subd. (c) did not apply where defendant altered computer system "at the behest of his employer"]; see also *People v. Childs* (2013) 220 Cal.App.4th 1079, 1105, fn. 33 [noting that Pen. Code, § 502 specifically provides that acts taken at employer's request are *not criminal*].) Again, Jimenez's explanations are unbelievable, uncorroborated, and implausible.

[7b] No other reasonable inference can be drawn from Jimenez's testimony other than a finding that he was dishonest when claiming that he acted with Foley's permission. We find that Jimenez deliberately presented false testimony in the State Bar Court and affirm the hearing judge's finding of substantial weight in aggravation to this circumstance.[14] (See *Franklin v. State Bar* (1986) 41 Cal.3d 700, 712 [Supreme Court made clear deception to State Bar "may constitute an even more serious offense than the conduct being investigated"].)

4. Indifference (Std. 1.5(k))

The hearing judge found Jimenez's lack of insight into his own misconduct warranted substantial weight in aggravation for indifference. (Std. 1.5(k) [aggravation for indifference toward rectification or atonement for consequences of misconduct].) On review, Jimenez challenges the judge's indifference finding by arguing that he expressed remorse for his actions. **[8a]** Contrary to Jimenez's claim, the record supports a finding that he lacks insight into the wrongfulness of his misconduct and has refused to accept full responsibility. Jimenez continues to perceive he is the victim and denies full responsibility for his criminal conduct by maintaining that he acted under Foley's authority when he disrupted Allied's system, even though he initially admitted to the police that he acted intentionally, and he pleaded guilty and was convicted of knowingly disrupting the computer network without permission.

[8b] Though the law does not require false penitence, it does mandate that an attorney accept

14. **[7c]** We emphasize that the aggravation assigned under this circumstance is based on Jimenez's dishonesty during the disciplinary trial, rather than the misconduct and dishonesty surrounding his conviction that was used in our finding of moral turpitude, *ante*.

responsibility for his or her misconduct and come to grips with his or her culpability. (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Jimenez's unwillingness to come to grips with his conviction—demonstrated by his lack of candor to the courts, while maintaining that his guilty plea was due to financial reasons—remains a real concern. His failure to accept responsibility for his misconduct leads us to conclude that he does not truly understand the wrongfulness of misconduct and suggests a risk for future misconduct. (See *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 380 [lack of insight into misconduct causes concern attorney will repeat misdeeds and is substantial factor in discipline recommendation].) Accordingly, we assign substantial weight to this aggravating circumstance.

B. Mitigation

1. Cooperation (Std. 1.6(e))

Mitigation may be assigned under standard 1.6(e) for cooperation with the State Bar. The hearing judge afforded moderate mitigation for this circumstance, which neither Jimenez nor OCTC challenge. Before trial, Jimenez stipulated to facts that were easy to prove, along with the admission of documents. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 ["more extensive weight in mitigation is accorded those who, where appropriate, willingly admit their culpability as well as the facts"].) Accordingly, we agree with the judge that Jimenez is entitled to moderate weight for his cooperation.

2. Extraordinary Good Character (Std. 1.6(f))

Jimenez is entitled to mitigation if he establishes "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 found that Jimenez established good character and assigned moderate mitigating weight. On review, Jimenez requests substantial mitigation for his good character. OCTC argues no mitigating weight should be assigned because Jimenez failed to meet his burden under standard 1.6(f) because his witnesses were not aware of the nature of his misconduct, and many adopted a narrative that identified him as a victim.

[9] Ten character references—including attorneys, former clients, an employee, his wife, and friends—presented letters attesting to Jimenez's character.[15] Also, four of the witnesses testified on his behalf. These references, representing a broad spectrum of the community, described him as trustworthy, supportive, genuine, and hardworking. The attorney witnesses affirmed Jimenez's professionalism and integrity. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration given to attorneys' testimony due to their "strong interest in maintaining the honest administration of justice"].) However, we note that most of the character references did not demonstrate full awareness of the extent of Jimenez's misconduct as the standard requires. (*In re Aquino* (1989) 49 Cal.3d 1122, 1131 [testimony of witnesses unfamiliar with details of misconduct not given significant weight in mitigation].) For instance, one witness—Jimenez's close friend— declared, "The facts just don't add up as to how these police decided to raid his home," and stated that he has no "doubt that [Jimenez's] reasons for accepting a plea bargain were strictly for financial and personal reasons, not because he committed a crime." Like the hearing judge, we find that the mitigating weight afforded to Jimenez's good character evidence is somewhat diminished. We also assign moderate weight to this factor.

3. Community Service

Pro bono work and community service are mitigating circumstances. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) The hearing judge assigned moderate weight to this factor. On review,

15. **[10]** We disagree with the hearing judge's conclusion to assign limited weight to the witnesses who have a financial or familial relationship with Jimenez as such a conclusion is not supported by case law solely on that basis. (See *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 592 [testimony of acquaintances, neighbors, friends, associates, employers, and family members, who had broad knowledge of attorney's good character, work habits, and professional skills, entitled to great weight].)

Jimenez argues that he should receive substantial mitigation for his commitment to pro bono work and community service. OCTC contends that Jimenez is only entitled to nominal mitigation for pro bono work but did not specify the reasoning for this position.

[11] In our independent review of the record, we find evidence of Jimenez's pro bono and volunteer work. Julio Jaramillo, an attorney and character witness, declared that Jimenez undertakes many pro bono cases for the Hispanic community. Jimenez confirmed Jaramillo's testimony, and it was corroborated by letters from two additional character witnesses. Jaramillo also declared Jimenez has volunteered at the Domestic Violence Project of the Los Angeles Superior Court and the Self-Help Center for bankruptcy court. A declaration from Jimenez's wife contains a summary of numerous community service activities, in which Jimenez has engaged over the years, including volunteering in various capacities at his children's schools (2003-2018), sponsoring an annual scholarship for University of Southern California students (2017-2022), working with the Marine Corps's "Toys for Tots" (1995-2005), dedicating time during the holiday season to serve food to the homeless, and providing pro bono assistance to friends and neighbors. The quantity and quality of these services are commendable and clearly support a finding of substantial weight. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 667 [mitigation for legal abilities, dedication, and zeal in pro bono work].)

4. Remoteness in Time of the Misconduct and Subsequent Rehabilitation (Std. 1.6(h))

Jimenez seeks mitigation for the nine years he practiced law without misconduct since his February 16, 2012 conviction underlying this disciplinary matter. **[12a]** The standard requires a showing of subsequent rehabilitation in addition to remoteness in time. (Std. 1.6(h) [remoteness in time of misconduct and subsequent rehabilitation can be mitigating].) The hearing judge declined to afford any mitigation to this circumstance, concluding that Jimenez's lack of candor and remorse in this disciplinary proceeding undermines his claim of rehabilitation. We agree.

Jimenez argues his rehabilitation is proven by him completing the terms of his probation. **[12b]** We do not consider the completion of his probation in the criminal matter determinative for this mitigation circumstance. Instead, we look at his recent actions to conclude that Jimenez has not demonstrated rehabilitation. During these disciplinary proceedings Jimenez has shown indifference, a lack of truthfulness and candor, and an unwillingness to accept full responsibility for his criminal act. (See *Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 939 ["It is not enough that petitioner kept out of trouble while being watched on [criminal] probation; he must affirmatively demonstrate over a prolonged period his sincere regret and rehabilitation"].) Accordingly, Jimenez has not established clear and convincing evidence of rehabilitation.

VI. DISCIPLINE

We begin our disciplinary analysis by acknowledging that our role is not to punish Jimenez for his criminal conduct, but to recommend professional discipline. (*In re Brown* (1995) 12 Cal.4th 205, 217 [aim of attorney discipline is not punishment or retribution; it is imposed to protect the public, to promote confidence in legal system, and to maintain high professional standards]; std. 1.1.) We do so by following the standards whenever possible and balancing all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis, to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266, 267, fn. 11.)

Standard 2.15(b) applies to Jimenez's misconduct. It provides that disbarment or actual suspension is appropriate for a misdemeanor conviction involving moral turpitude.[16] Standard 1.8(a) is also relevant, which states that when an attorney has a single prior record of

16. Pursuant to standard 1.2(c)(1), actual suspension is generally for a period of thirty days, sixty days, ninety days, six months, one year, eighteen months, two years, three years, or until certain conditions are met.

discipline, the sanction must be greater than the previously imposed sanction, subject to certain exceptions not applicable here. Jimenez submits, without discussing standard 1.8(a), that no more than a one-year stayed suspension should be imposed; however, we note his prior discipline included a 30-day actual suspension. Jimenez cites to *In re Brown*, *supra*, 12 Cal.4th 205, to support his argument, but we do not consider *In re Brown* in our analysis because that case did not involve moral turpitude. OCTC requests that the hearing judge's discipline recommendation of a six-month actual suspension be upheld.

In addition to the standards, we look to case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) Although there is no case law involving similar facts with the same conviction as presented here, we find guidance from the two pre-standard California Supreme Court decisions relied upon by the hearing judge. In recommending six months' actual suspension, the hearing judge considered *Bluestein v. State Bar* (1974) 13 Cal.3d 162 and *Lindenbaum v. State Bar* (1945) 26 Cal.2d 565, two cases where an actual suspension of six months was ordered in each.

In *Bluestein*, the Supreme Court found that an attorney acted with moral turpitude by agreeing not to prosecute assault and battery charges against his client's husband—filed after Bluestein and the client's husband engaged in a fist fight—if the husband agreed to pay the client's $1,000 attorney's fees in a divorce action. Bluestein was also found culpable of aiding and abetting an unlicensed person to practice law in California. In aggravation, he had a prior record of discipline that resulted in a public reproval for falsely mispresenting to his client that services had been performed when they had not.

Lindenbaum v. State Bar, *supra*, 26 Cal.2d 565, involved an attorney who committed acts of moral turpitude and violated his attorney's oath by threatening to and actually reporting allegations of adultery concerning his client's wife to immigration officials in an effort to coerce payment from his client. In the two letters that Lindenbaum sent to immigration officials, he made several accusations to initiate an investigation of the client's wife, when he had no reason to believe that his allegations were true. Lidenbaum established mitigation for 13 years of discipline-free practice and good character.

As the hearing judge found, we also find similarities between Jimenez's misconduct involving moral turpitude and the conduct of the attorneys in *Bluestein* and *Lindenbaum*. Bluestein attempted to leverage potential criminal prosecution for financial gain while Jimenez used his technical knowledge and fiduciary position to improperly disrupt Allied's business operations for financial reasons (i.e., obtaining payment for his billed services). Also, Bluestein and Jimenez both had prior records of discipline that called their honesty into question. Although Lindenbaum's misconduct was more serious than Jimenez's, considering his goal of affecting his client's wife's immigration status for financial gain, it was Lindenbaum's first disciplinary case in 13 years of practice, whereas Jimenez started engaging in misconduct just one year after he was admitted to practice law in California.

While Jimenez's conviction occurred in 2010, his lack of candor and dishonesty extended into at least 2021 during these disciplinary proceedings. Notably, the Supreme Court has said that lack of candor may be considered more serious than the misconduct itself. (*In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 282, citing *Franklin v. State Bar* (1986) 41 Cal.3d 700, 712 (dis. opn. of Lucas, J.).) In a case more recent than *Bluestein* and *Lindenbaum* involving moral turpitude with aggravation based on an attorney's lack of candor, six months' actual discipline was imposed. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166.) In *Chesnut*, the attorney received six months' actual suspension when he was found culpable under Business and Professions Code sections 6068, subdivision (d), and 6106 for making misrepresentations to two judges. Like Jimenez, the attorney in *Chesnut* had equal weight between mitigation and aggravation, which included aggravation for lack of candor because that attorney made "untruthful" and "knowingly false" statements during his disciplinary trial.

[13a] Applying standard 1.8(a), and also considering that Jimenez's aggravation is equal to his mitigation, the discipline that we recommend in

this case should be in the mid-range of standard 2.15(b) and exceed the 30-day actual discipline imposed in his prior matter. We therefore agree with the hearing judge's recommendation of six months' actual suspension. Our lack of candor finding, which includes misconduct occurring during these disciplinary proceedings, is also of great concern. Honesty is paramount to the legal profession and the Supreme Court has emphasized that "dishonest conduct is inimical to both the high ethical standards of honesty and integrity required of members of the legal profession and to promoting confidence in the trustworthiness of members of the profession. [Citations.]" (*Stanley v. State Bar* (1990) 50 Cal.3d 555, 567.)

[13b] Although we diminished the weight of Jimenez's prior discipline because that misconduct occurred after the misconduct prosecuted here, it involved nearly 70 instances of false pleadings filed in the bankruptcy court.[17] Thus, we have concerns that his prior discipline combined with his lack of insight and his failure to accept responsibility for his dishonesty in this matter show possibilities of recidivism in the future. Based on the totality of the facts of this case and comparing it to *Bluestein*, *Lindenbaum*, and *Chesnut*, we find that a six-month actual suspension is the minimum discipline necessary to protect the public, the courts, and the legal profession.

VII. RECOMMENDATIONS

We recommend that Eric Adrian Jimenez, State Bar Number 249468, be suspended from the practice of law for one year, that execution of that suspension be stayed, and that he be placed on probation for one year with the following conditions:

1. Actual Suspension. Jimenez must be suspended from the practice of law for the first six months of the period of his probation.

2. Review Rules of Professional Conduct. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Jimenez 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 Jimenez's first quarterly report.

3. Comply with State Bar Act, Rules of Professional Conduct, and Probation Conditions. Jimenez must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of probation.

4. 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, Jimenez 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. Jimenez 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.

5. Meet and Cooperate with Office of Probation. Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Jimenez must schedule a meeting with his assigned probation case specialist 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, he may meet with the probation case specialist in person or by telephone. During the probation period, Jimenez

17. We also conclude that a recommendation of six months' actual suspension would be appropriate if both his prior misconduct and his current misconduct were considered together. (*In the Matter of Sklar*, *supra,* 2 Cal. State Bar Ct. Rptr. at p. 619 [proper to consider totality of findings in prior misconduct and current misconduct had all misconduct been brought as one case].)

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.

6. State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court. During Jimenez's probation period, the State Bar Court retains jurisdiction over him to address issues concerning compliance with probation conditions. During this period, he 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 membership address, as provided above. Subject to the assertion of applicable privileges, he must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

7. Quarterly and Final Reports

a. Deadlines for Reports. Jimenez 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, Jimenez 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. Jimenez 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. Jimenez is directed to maintain proof of his 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 his actual suspension has ended, whichever is longer. He is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

8. State Bar Ethics School. Within one year after the effective date of the Supreme Court order imposing discipline in this matter, Jimenez 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 the session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and Jimenez will not receive MCLE credit for attending these sessions. 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, Jimenez will nonetheless receive credit for such evidence toward his duty to comply with this condition.

9. 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 Jimenez has complied with all conditions of probation, the period of stayed suspension will be satisfied, and that suspension will be terminated.

10. Proof of Compliance with Rule 9.20 Obligation. Jimenez 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, subdivisions (a) and (c), as recommended below. Such proof must include: the names and addresses of all individuals and entities to whom Jimenez 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.

VIII. MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Eric Adrian Jimenez 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 Jimenez 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 Jimenez be ordered to comply with the requirements of California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order imposing discipline in this matter.[18] Failure to do so may result in disbarment or suspension.

X. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable as provided in section 6140.7 and as a money judgment. 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 reinstatement or return to active status.

XI. MONETARY SANCTIONS

[14] We further recommend that Eric Adrian Jimenez be ordered to pay monetary sanctions to the State Bar of California Client Security Fund in the amount of $3,000 in accordance with Business and Professions Code section 6086.13 and rule 5.137 of the Rules of Procedure of the State Bar. The guidelines suggest monetary sanctions of up to $2,500 for an actual suspension. However, the hearing judge made an upward deviation and ordered Jimenez to pay $3,000 in monetary sanctions. After considering the facts and circumstances of the case, we determine that a $3,000 sanction is appropriate because Jimenez's misconduct was aggravated by his lack of candor. Monetary sanctions are enforceable as a money judgment and may be collected by the State Bar through any means

18. For purposes of compliance with rule 9.20(a), the operative date for identification of "clients being represented in pending matters" and others to be notified is the filing date of the Supreme Court order, not any later "effective" date of the order. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45.) Further, Jimenez 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).)

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.

WE CONCUR:

STOVITZ, J.*
WANG, J.**

* Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

** Judge of the Hearing Department of the State Bar Court, designated to serve in this matter as a Review Department Judge Pro Tem, pursuant to rule 5.155(F) of the Rules of Procedure of the State Bar.

State Bar Court
Review Department

In the Matter of

APPLICANT C

A Member of the State Bar

No. SBC-19-M-XXXX

Filed November 15, 2022

SUMMARY

Good moral character is required for admission to practice law in California. Applicant C appealed an adverse moral character determination from the Committee of Bar Examiners of the State Bar (Committee). While the matter was pending in the State Bar Court Hearing Department, Applicant C failed to appear for two deposition dates, improperly refused to answer questions at a third deposition, and unilaterally terminated a fourth deposition. Having extended many opportunities for Applicant C to sit for her deposition and having denied two prior motions to dismiss filed by the Committee, the hearing judge imposed terminating sanctions under rule 5.124(I) of the Rules of Procedure of the State Bar and granted the Committee's third motion to dismiss the proceeding with prejudice based on Applicant C's failure to participate in a deposition. Applicant C sought review of the dismissal order, arguing the dismissal was in error. The Review Department affirmed the hearing judge's dismissal of the proceeding with prejudice. Because the dismissal is with prejudice, applicant cannot again appeal the same adverse moral character determination by the Committee. If applicant wants to seek admission to practice law in California, applicant must submit a new Application for Determination of Moral Character. The Committee may determine when applicant may file such a new application. Applicant may appeal any other adverse moral character determinations by the Committee in the future, as allowed by applicable rules, based on a different Application for Determination of Moral Character.

COUNSEL FOR PARTIES

For State Bar of California: Peter Allen Klivans

For Applicant: Applicant C, in pro. per.

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1 a, b] **113 Generally Applicable Procedural Issues – Discovery**
166 Standards of Proof/Standards of Review – Independent Review of Record
2602 Issues in Admissions Moral Character Proceedings – Special Procedural Issues – Burdens of Proof
2604 Issues in Admissions Moral Character Proceedings – Special Procedural Issues – Discovery
2609 Issues in Admissions Moral Character Proceedings – Special Procedural Issues – Other Procedural Issues
2690 Issues in Admissions Moral Character Proceedings – Miscellaneous Issues in Admissions Moral Character Proceedings

Once applicant appeals to State Bar Court adverse moral character determination by State Bar's Committee of Bar Examiners (Committee), court must determine whether applicant possesses good moral character. In moral character proceedings, State Bar's Office of Chief Trial Counsel (OCTC) investigates applicant's moral character, discovery occurs, and then matter proceeds to trial. OCTC may take applicant's deposition. Moral character hearings in State Bar Court are de novo and not limited to matters Committee considered. Applicant bears burden of establishing good moral character and cannot meet burden by refusing to cooperate in State Bar investigation.

[2] **113 Generally Applicable Procedural Issues – Discovery**
167 Standards of Proof/Standards of Review – Abuse of Discretion

Discovery sanctions are reviewed under abuse of discretion or error of law standard. Two requirements to impose discovery sanctions: (1) failure to comply with court-ordered discovery; and (2) failure must be willful. In analyzing discovery ruling, court is guided by California's long-standing public policy favoring disclosure and objectives that discovery rules were enacted to accomplish: (1) ascertaining truth and preventing perjury; (2) providing effective means to detect and expose false claims and defenses; (3) making facts available in simple, convenient, and inexpensive way; (4) educating parties before trial as to value of claims and defenses; (5) expediting litigation; (6) safeguarding against surprise; (7) preventing delay; (8) simplifying and narrowing issues; and (9) expediting and facilitating preparation and trial.

[3 a-d] **113 Generally Applicable Procedural Issues – Discovery**
117 Dismissal
165 Standards of Proof/Standards of Review – Adequacy of Hearing Department Decision
2604 Issues in Admissions Moral Character Proceedings – Special Procedural Issues – Discovery

Disobeying court order to provide discovery is misuse of discovery process under Civil Discovery Act which is applicable in State Bar Court proceedings. Permissible sanction in State Bar Court under Civil Discovery Act is terminating sanction that dismisses action. Where applicant chose not to appear for two scheduled depositions, improperly refused to answer questions at another deposition, and terminated a fourth deposition, applicant did not comply with hearing judge's orders requiring her to sit for deposition and cooperate with investigation and discovery; applicant's failure to comply was willful; and hearing judge had denied two other motions to dismiss by State Bar's Committee of Bar Examiners based on applicant's failure to participate in deposition, hearing judge correctly determined that

discovery sanctions were appropriate and did not abuse her discretion by imposing terminating sanctions. Applicant had opportunity to comply with orders to participate in deposition but did not do so. Applicant obstructed discovery, causing dismissal, which prevented State Bar Court from determining whether applicant was morally fit to practice law. Review Department held terminating sanctions were appropriate and affirmed hearing judge's dismissal order.

[4] **113 Generally Applicable Procedural Issues – Discovery**
117 Generally Applicable Procedural Issues – Dismissal
130 Generally Applicable Procedural Issues – Procedure on Review
2604 Issues in Admissions Moral Character Proceedings – Discovery
2690 Issues in Admissions Moral Character Proceedings – Miscellaneous Issues in Admissions Moral Character Proceedings

Where applicant failed to seek stay of proceedings in Hearing Department, Review Department rejected applicant's argument that hearing judge should not have dismissed case while request for interlocutory review of hearing judge's order denying applicant's motion for relief from further deposition was pending.

[5 a, b] **117 Generally Applicable Procedural Issues – Dismissal**
2690 Issues in Admissions Moral Character Proceedings – Miscellaneous Issues in Admissions Moral Character proceedings

Where moral character proceeding dismissed with prejudice, and no moral character hearing on merits occurred, applicant prohibited from beginning new proceeding in State Bar Court based on same adverse moral charter determination from State Bar's Committee of Bar Examiners (Committee). To allow applicant to do so would reward applicant for obstructing discovery. If applicant wants to continue to seek admission to practice law in California, applicant must submit new Application for Determination of Moral Character, and Committee determines when applicant may file such new application. Applicant may appeal any other future adverse moral character determinations by Committee, as allowed by applicable rules, based on different Application for Determination of Moral Character.

ADDITIONAL ANALYSIS

None.

OPINION

HONN, J.

Applicant C[1] requests review of a Hearing Department order dismissing her moral character case with prejudice as a discovery sanction. The proceeding was before the Hearing Department as Applicant C had appealed an adverse moral character determination from the Committee of Bar Examiners of the State Bar (Committee). The Committee is represented by the Office of Chief Trial Counsel of the State Bar (OCTC). The hearing judge granted the Committee's motion to dismiss the proceeding with prejudice based on Applicant C's failure to participate in a deposition, which Applicant C argues was in error.[2] The Committee maintains that dismissal was appropriate.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we agree with the hearing judge's dismissal of the proceeding with prejudice.

I. BACKGROUND

On September 4, 2019, the Committee determined that Applicant C had not met her burden of establishing good moral character, which is required for admission to practice law in California. Applicant C appealed the determination by filing an Application for Moral Character Proceeding and Request for Hearing on November 1.

On June 22, 2020, Applicant C filed a motion for relief from participating in a deposition, which the hearing judge denied on June 23, 2020. On June 30, 2020, the Committee filed a motion to dismiss because Applicant C did not appear at a deposition on June 29. Applicant C later appeared and participated at a deposition on August 17. Therefore, on August 20, the hearing judge denied the Committee's June 30 motion as moot.

On August 24, 2020, the Committee filed a motion to dismiss the matter, or in the alternative, to compel Applicant C to answer questions she refused to answer at the August 17 deposition. The Committee stated that Applicant C asserted the federal Fifth Amendment privilege against self-incrimination when asked questions regarding her California bank accounts and insufficient funds activity from 2001 through 2003. Applicant C filed an opposition to the Committee's August 24, 2020 motion on August 31. On March 24, 2021, she filed a revised opposition, asserting that the Committee's August 24, 2020 motion was moot because she provided OCTC with a declaration answering the questions it had asked the court to compel her to answer in the motion.

The case was stayed and/or abated from August 24, 2020, through August 25, 2021.[3] On August 25, 2021, the hearing judge entered an order setting trial dates.

On September 10, 2021, the Committee filed a motion requesting an extension of the investigative period and requesting additional discovery. Applicant C opposed the motion. On October 1, the hearing judge granted the Committee's motion and ordered: the investigation period extended to November 15, that discovery may be conducted until December 22, and that the trial dates were vacated.

The hearing judge issued another order on October 1, 2021, granting in part the Committee's August 24, 2020 motion, and allowing for "further deposition of [Applicant C]—in the proposed areas (overruling the assertion of Fifth Amendment

1. Because this case involves an important legal issue to applicants seeking admission to practice law in California, we have deemed it appropriate for publication. (Rules Proc. of State Bar, rule 5.159(E).) However, the underlying proceedings and hearings in this moral character matter remain confidential, and applicant, who we refer to as Applicant C, has not waived confidentiality. (Rules of State Bar, tit. 4, Admissions and Educational Stds., rule 4.4 [applicant records are confidential].)

2. The proceeding was dismissed before trial.

3. On August 24, 2020, we stayed proceedings in the Hearing Department while we considered Applicant C's petition for interlocutory review she had filed in the Review Department. On September 25, we granted in part Applicant C's request and stayed the matter until an in-person hearing could be held and remanded the proceedings to the Hearing Department. The matter was then abated in the Hearing Department until August 25, 2021.

privilege), as well as in any new relevant areas resulting from OCTC's investigation."

Applicant C requested clarification and reconsideration of the October 1, 2021 orders. On October 4, the hearing judge denied reconsideration. The judge stated that the October 1 order granting the Committee's August 2020 motion for alternative relief "allow[ed] for a continued deposition of Applicant [C] in the proposed areas where the Fifth Amendment was asserted." The judge also clarified the order's granting of OCTC's request for further deposition of Applicant C in any "new relevant areas," stating that further deposition of Applicant C could include "issues, topics, and materials learned, *post* the date of [Applicant C's] previous OCTC deposition."

On December 14, 2021, Applicant C filed a motion requesting relief from any further depositions. She stated she attended a deposition that day, but terminated it when OCTC asked her questions she considered to be outside of the scope of the hearing judge's orders. The Committee opposed the motion. On December 15, the hearing judge denied Applicant C's motion and stated that Applicant C was "expected to cooperate with the sitting through of her deposition by the close of the extended investigation period (December 22, 2021). (See generally, Rules Proc. of State Bar, rule 5.463 [deposition]; Rules of the State Bar, rules 4.40, 4.42 [duty and burden of applicant].)"

OCTC then scheduled Applicant C's deposition for December 20, 2021. On December 17, the Committee requested an order requiring Applicant C to appear at the December 20 deposition. Applicant C filed an opposition asserting that the hearing judge was not adhering to the judge's own orders from October. On December 17, the judge stated that the December 15 order "stands," and denied the Committee's motion as moot. The judge reiterated that the investigation period would close on December 22 and that OCTC was "allowed to conduct its deposition of [Applicant C] under rule 5.463 of the Rules of Procedure."[4]

On December 20, 2021, the Committee filed a motion to dismiss the matter with prejudice, asserting that Applicant C did not attend the deposition scheduled for that day. Applicant C filed an opposition, asserting that the December 15 order did not require her to sit for a deposition. She stated that she was "not opposed to sitting [for] a further deposition as defined in [the] October 1 and October 4 orders," noting that she appeared at the December 14 deposition, but "there were no questions within the scope" put to her on December 14, and, therefore, "there was no deposition to attend."

On January 4, 2022, Applicant C requested interlocutory review of the hearing judge's December 15, 2021 order denying her motion requesting relief from further depositions. On January 6, 2022, the judge granted the Committee's December 20, 2021 motion to dismiss. The judge stated that the December 15, 2021 order had required Applicant C to cooperate by sitting through her deposition before December 22. The judge found that dismissal with prejudice was appropriate:

> The Committee is entitled to discovery, which includes the taking of [Applicant C's] deposition. (Rules Proc. of State Bar, rule 5.463(B); rule 5.124(I) [dismissal with prejudice as discovery sanction].) The court has extended many opportunities for [Applicant C] to sit for her deposition, having denied the Committee's two prior motions to dismiss. However, considering that [Applicant C] has now willfully chosen to not appear for two deposition dates, improperly refused to answer questions at a third, and unilaterally terminated a fourth, the court sees little reason not to order

4. Rule 5.463(B) of the Rules of Procedure of the State Bar provides, in part, "The Office of Chief Trial Counsel may take the applicant's deposition."

> terminating sanctions.[5] Moreover, as the extended discovery period has now expired without [Applicant C] sitting for her full deposition, the court sees no justification for extending it again to cure the prejudice to the Committee by [Applicant C's] willful decision not to participate—particularly where it is the applicant who carries the burden of proof and has the duty to cooperate with the moral character investigation. (Rules of the State Bar, rules 4.40, 4.42.)[6]

The judge imposed terminating sanctions under rule 5.124(I) of the Rules of Procedure of the State Bar and dismissed the proceeding.[7]

On January 10, 2022, Applicant C filed a motion to reconsider the January 6 order. The Committee filed an opposition. On January 12, the hearing judge denied the motion for reconsideration for failure to present any new facts or law. The order stated:

> [Applicant C's] decision to pursue an interlocutory review of this court's December 15 Order is irrelevant to the basis from which this court decided the merits of the dismissal order. Indeed, [Applicant C's] decision to pursue relief in the Review Department *after* the period of the extended investigation had lapsed—rather than immediately after this court's order of October 1 which extended the investigation period, or immediately after this court's December 15 order denying [Applicant C's] motion to be relieved from sitting through a deposition—does not alter the analysis, the procedural history in this matter, or the clarity of this court's previous orders and [Applicant C's] decision to disregard them.

On January 13, 2022, we denied Applicant C's request for interlocutory review as moot as the matter had been dismissed on January 6. On January 27, Applicant C filed a request for review of the January 6 order dismissing the case; she also requested reconsideration of our January 13 order. On February 3, we denied the request for reconsideration, but deemed the remainder of Applicant C's January 27 pleading as a request for review of the January 6 order dismissing the case. (Rules Proc. of State Bar, rule 5.151(A) [hearing judge order disposing of entire proceeding is reviewable].)

After briefing on review, on July 7, 2022, we gave notice to the parties that oral argument would be held in this matter on August 18. Applicant C and OCTC filed notices indicating that they intended to appear remotely at oral argument. OCTC then filed a request for Committee representatives to observe the remote proceeding. On August 16, Applicant C filed an objection to the request. On August 17, we denied the Committee's request. On August 18, Applicant C failed to attend oral argument. We heard oral argument from OCTC and then submitted the matter.

II. TERMINATING SANCTIONS WERE PROPER

[1a] In moral character proceedings, once an applicant has appealed to the State Bar Court after an adverse determination from the Committee, the court must determine whether the applicant possesses good moral character. (Rules Proc. of

5. The judge stated in a footnote: "The court has further considered the effect on the protection of the public and concludes that granting the requested dismissal does not negatively impact the public. (Rules Proc. of State Bar, rule 5.69.)" Rule 5.69(C) of the Rules of Procedure of the State Bar states: "The Civil Discovery Act's provisions about misuse of the discovery process and permissible sanctions (except provisions for monetary sanctions and the arrest of a party) apply in State Bar Court proceedings. The Court may not order dismissal as a discovery sanction without considering the effect on the protection of the public."

6. Rules of State Bar, tit. 4, Admissions and Educational Stds., rules 4.40(A) (applicant has burden of establishing good moral character), 4.42 (duty to update application with information relevant to moral character application).

7. The order contained a typographical error, citing rule 5.125(I) of the Rules of Procedure of the State Bar, where no such rule exists. Rule 5.124(I) of the Rules of Procedure of the State Bar provides: "Dismissal may be ordered as a discovery sanction. Unless the Court orders otherwise for good cause shown, dismissal is with prejudice."

State Bar, rule 5.460; Bus. & Prof. Code, § 6060, subd. (b).) During a moral character proceeding, OCTC investigates the applicant's moral character, discovery occurs, and then the matter proceeds to trial. During discovery, OCTC is permitted to take the applicant's deposition. (Rules Proc. of State Bar, rule 5.463(B).) Moral character hearings in the State Bar Court are de novo and not limited to matters considered by the Committee. (Rules Proc. of State Bar, rule 5.460.) The burden of establishing good moral character is on the applicant. (Rules of State Bar, tit. 4, Admissions and Educational Stds., rule 4.40(A); *Hallinan v. Committee of Bar Examiners* (1966) 65 Cal.2d 447, 451.)

[2] The standard of review we apply to procedural rulings is abuse of discretion or error of law. (*In the Matter of Respondent L* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 454, 461.) Therefore, we evaluate whether or not the judge exceeded the "bounds of reason," given all the circumstances before the court. (See *In the Matter of Geyer* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 74, 78.) The same standard is used to review discovery sanctions. (*In the Matter of Torres* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 19, 23-24.) To impose a discovery sanction, two requirements must be met: (1) failure to comply with court-ordered discovery and (2) the failure must be willful. (*Id*. at p. 23, citing *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545; *Calvert Fire Ins. Co. v. Cropper* (1983) 141 Cal.App.3d 901, 904.) In analyzing a discovery ruling, we are guided by long-standing California public policy favoring disclosure and the objectives that the discovery rules were enacted to accomplish: (1) ascertaining the truth and preventing perjury; (2) providing an effective means to detect and expose false claims and defenses; (3) making facts available in a simple, convenient, and inexpensive way; (4) educating the parties before trial as to the value of their claims and defenses; (5) expediting litigation; (6) safeguarding against surprise; (7) preventing delay; (8) simplifying and narrowing the issues; and (9) expediting and facilitating preparation and trial. (*In the Matter of Torres*, *supra*, 5 Cal. State Bar Ct. Rptr. at pp. 22-23 & fn.7, citing *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 376.)

[3a] Disobeying a court order to provide discovery is a misuse of the discovery process under the Civil Discovery Act. (Code Civ. Proc., § 2023.010, subd. (g); see also Rules Proc. of State Bar, rule 5.69(C) [Civil Discovery Act provisions about misuse of discovery and sanctions applicable in State Bar Court proceedings].) A permissible sanction in the State Bar Court under the Civil Discovery Act is a terminating sanction that dismisses the action. (Code Civ. Proc., § 2023.030, subd. (d)(3); Rules Proc. of State Bar, rules 5.69(C) [court must consider effect on protection of public when ordering dismissal as discovery sanction], 5.124(I) [dismissal as discovery sanction].)

[3b] The facts here meet the requirements of an appropriate discovery sanction as Applicant C failed to comply with court-ordered discovery and the failure was willful. Applicant C did not comply with the hearing judge's orders requiring her to sit for a deposition and cooperate with the investigation and discovery. In addition, we find that Applicant C's failure to comply was willful: the orders plainly required Applicant C to appear for a deposition and her motion for relief from further depositions was denied. Even after the December 17, 2021 order stating that the Committee was "allowed to conduct its deposition of [Applicant C]," she refused to attend the properly-noticed December 20 deposition. Therefore, the judge correctly determined that sanctions were appropriate.

[3c] We also find that the hearing judge did not abuse her discretion by imposing terminating sanctions. "Terminating sanctions are warranted against a litigant who persists in the outright refusal to comply with [her] discovery obligations. [Citation.]" (*In the Matter of Torres*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 25.) The judge issued several orders requiring Applicant C's appearance at a deposition, however, Applicant C continually refused to comply. Applicant C's deposition was necessary for discovery and for OCTC to proceed to trial. As Applicant C was the moving party in this proceeding, OCTC was entitled to ascertain the truth of her claim of good moral character, explore the facts of her application, evaluate its own position regarding her moral character, and use the deposition to expedite the proceeding and trial. (*In the Matter of Torres*, *supra*, 5 Cal. State Bar Ct.

Rptr. at pp. 22-23 & fn.7.) Applicant C's refusal to participate in the deposition halted discovery and precluded a trial from occurring. "[B]ecause of the drastic nature of a terminating sanction, it should only be granted when the party has had an opportunity to comply with a court order. [Citation.]" (*Id*. at p. 25.) Applicant C had the opportunity to comply with the orders to participate in the deposition, but did not do so. Therefore, terminating sanctions were appropriate.

III. APPLICANT C'S ARGUMENTS ON REVIEW

We have carefully considered all of Applicant C's arguments on review and find they are unsupported. Any arguments not specifically addressed here have been considered and rejected as meritless.

In the October 1, 2021 order, the hearing judge overruled Applicant C's arguments regarding the Fifth Amendment to the United States Constitution. Applicant C argues this was in error because there was no controversy concerning the Fifth Amendment because she had answered the questions in a March 2021 declaration provided to OCTC. However, the statements provided in the declaration did not fully answer the questions and were not a substitute for a deposition. In her request to reconsider the October 1 order, Applicant C specifically requested the judge reconsider the decision allowing OCTC to further depose her concerning the questions she had previously refused to answer under the Fifth Amendment. The judge denied reconsideration in the October 4 order. The October orders clearly required Applicant C to cooperate and answer specific questions, and she repeatedly refused to do so. We reject Applicant C's arguments that the orders only required her to answer questions pursuant to "new" matters under the extended investigation and discovery period. Accordingly, we reject her related argument that it was proper for her to terminate the December 14 deposition because OCTC asked questions beyond the scope of the judge's orders. Nothing in the record supports her interpretation of the October orders.

Applicant C also argues that the Rules of Procedure of the State Bar do not provide for a new investigation period after a case has been abated. She also asserts that OCTC asked for the new investigation period to harass her and frustrate her request for a trial, which she bases on OCTC's failure to "make use" of the period because OCTC did not issue subpoenas, make further discovery requests, or interview witnesses—OCTC sought only Applicant C's deposition. These arguments are also without merit. The rules regarding moral character proceedings allow for extension of the investigation period and for abatement. (Rules Proc. of State Bar, rules 5.462(A) [investigation period may be extended for good cause], 5.464 [proceeding may be abated].) Nothing in the Rules of Procedure of the State Bar specifies that the investigation period cannot be extended after an abatement. There is no evidence of harassment by OCTC. Applicant C's *own* actions in failing to cooperate with the deposition caused the dismissal of her case without a trial.

Applicant C argues the hearing judge's December 15, 2021 order only denied her requested relief and did not *require* her to attend further depositions. We reject this argument. The order denied Applicant C's motion requesting relief from further depositions and explicitly stated that Applicant C was to cooperate and sit through a deposition before December 22. The court reiterated in an order on December 17 that OCTC was allowed to take Applicant C's deposition.

[4] Next, Applicant C argues that her procedural rights were violated when the hearing judge dismissed the case while her January 4, 2022 request for interlocutory review was pending.[8] Applicant C failed, however, to seek a stay of the proceedings in the Hearing Department. (Rules Proc. of State Bar, rule 5.150(H) [party intending to file interlocutory petition and seek stay in Hearing Department must file petition and concurrently make motion to hearing judge to stay].) Applicant

8. Applicant C requested review of the hearing judge's December 15, 2021 order denying her motion for relief from further deposition.

C points to no law requiring the judge to wait to issue an order on OCTC's pending dismissal motion while she sought interlocutory review of the judge's December 15 order requiring her to cooperate at a deposition by the end of the discovery period. This argument is also rejected.

Finally, Applicant C argues that the hearing judge committed misconduct in an August 23, 2021 status conference because the judge brought up the possibility of another deposition, without a request from OCTC. She asserts that the judge was trying to "trick" her into a further deposition and that this was "procedural harassment." Nothing in the record supports Applicant C's interpretation of the proceedings and we find no misconduct committed by the judge at the status conference. In addition, Applicant C has failed to show any actual prejudice she suffered. (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 469 [attorney must show specific prejudicial effect].) Therefore, we reject Applicant C's argument. **[1b]** As we noted, *ante*, the State Bar is tasked with determining an applicant's moral character and the applicant has the burden to prove good moral character. Applicant C cannot meet this burden by refusing to cooperate in the investigation; it was not harassment to take Applicant C's deposition on matters related to her moral character.

IV. CONCLUSION AND DISPOSITION

[3d] Applicant C chose not to appear for two scheduled depositions, improperly refused to answer questions at another deposition, and terminated a fourth deposition. Before granting the motion to dismiss, the hearing judge had denied two other motions to dismiss from the Committee. The dismissal of Applicant C's appeal of the Committee's adverse moral character determination was not an abrupt decision. The judge issued valid orders directing Applicant C to cooperate and sit for a full deposition, and Applicant C repeatedly refused. As an applicant, Applicant C must demonstrate that she has good moral character for admission to practice law in California. She obstructed discovery, causing dismissal, which prevented the State Bar Court from determining whether she is morally fit to practice law. For the reasons discussed *ante* throughout this opinion, we find that dismissal was appropriate and affirm the judge's order dismissing the case.

[5a] In analyzing the dismissal, we find it necessary to make clear what a dismissal "with prejudice" means in a moral character proceeding such as this, where the case was dismissed without a moral character hearing on the merits. Rule 5.124(I) of the Rules of Procedure of the State Bar states, "Dismissal may be ordered as a discovery sanction. Unless the Court orders otherwise for good cause shown, dismissal is with prejudice." After a dismissal with prejudice, an applicant is prohibited from beginning a new proceeding in the State Bar Court based on the same adverse moral character determination from the Committee. (See Rules of State Bar, tit. 4, Admissions and Educational Stds., rule 4.49 [applicant who has received adverse moral character determination must wait two years from date of final determination to file another Application for Determination of Moral Character].) Because Applicant C's case was dismissed with prejudice, she may not again appeal the underlying moral character determination from the Committee. (Rules Proc. of State Bar, rule 5.465 [effect of State Bar Court decision].) To allow Applicant C to do so would reward her for obstructing discovery in this matter. Therefore, if Applicant C continues to seek admission to practice law in California, she must submit a new Application for Determination of Moral Character.[9] Under the Rules of the State Bar, the Committee may determine when Applicant C may file a new Application for Determination of Moral Character. (Rules of State Bar, tit. 4, Admissions and Educational Stds., rule 4.49 [date to file new Application for Determination of Moral Character determined by State Bar].)

[5b] Accordingly, we affirm the dismissal with prejudice. Applicant C may not reopen this proceeding or begin a new proceeding in the State

9. This Opinion does not alter any other requirements Applicant C may need to complete in order to seek admission to practice law in California.

Bar Court based on the underlying Application for Determination of Moral Character. This opinion does not preclude Applicant C from appealing any other adverse moral character determinations from the Committee in the future, as allowed by applicable rules, based on a different Application for Determination of Moral Character.

WE CONCUR:

STOVITZ, J.*
CHAWLA, J.**

* Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

** Judge of the Hearing Department of the State Bar Court, designated to serve in this matter as a Review Department Judge Pro Tem, pursuant to rule 5.155(F) of the Rules of Procedure of the State Bar.

State Bar Court
Review Department

In the Matter of

LISA FISHER

A Member of the State Bar

No. SBC-21-J-30482

Filed December 5, 2022

SUMMARY

This reciprocal discipline matter, brought under Business and Professions Code section 6049.1, arose as a result of respondent's public reprimand by the Supreme Court of South Carolina for violating rules 3.1 and 8.4(a) of the South Carolina Rules of Professional Conduct while she was counsel admitted to practice *pro hac vice* in a family-related probate matter pending in the South Carolina state courts. The South Carolina Supreme Court, in essence, concluded that while acting *pro hac vice* in a probate action, respondent engaged in frivolous litigation which protracted the underlying court proceeding for 10 years. Section 6049.1, subdivision (a), provides, subject to only two exceptions set forth in section 6049.1(b), that final determination of professional misconduct found by another jurisdiction is conclusive evidence that the California attorney is culpable of professional misconduct disciplinable in California. One such exception set forth in section 6049.1, subdivision (b), is whether the proceedings in the other jurisdiction lacked fundamental constitutional protection. Although respondent contended that the law governing California reciprocal discipline cases provided too narrow a definition of the other states' "proceedings," the Review Department held that the only apt reading of this exception is that California looks to the fundamental constitutional protection afforded only by the disciplinary proceeding in the other jurisdiction and not an analysis of any underlying court proceedings in the other jurisdiction. The Review Department therefore held that respondent did not sustain her burden of establishing this exception to section 6049.1, subdivision (a). The Review Department affirmed the hearing judge's (1) findings and conclusions that respondent was culpable of violating Business and Professions Code section 6068, subdivision (c), and former rule 3-200 of the Rules of Professional Conduct; (2) balance of aggravating and mitigating circumstances; and (3) the imposition of a public reproval.

COUNSEL FOR PARTIES

For State Bar of California:	Peter Allen Klivans Kimberly Gay Anderson
For Respondent:	Ashod Mooradian

Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

HEADNOTES

[1a-f] **161 Standards of Proof/Standards of Review – Duty to Present Evidence**
162.30 Standards of Proof/Standards of Review – Issues and burden of proof in section 6049.1 proceedings
1933.10 Discipline in Other Jurisdictions (Section 6049.1) – Special Substantive Issues – Respondent's Burden of Proof
1933.30 Discipline in Other Jurisdictions (Section 6049.1) – Special Substantive Issues – Constitutionality of Foreign Proceeding

Business and Professions Code section 6049.1, subdivision (a), provides that, subject only to two exceptions in section 6049.1, subdivision (b), final determination of professional misconduct found by another jurisdiction shall be conclusive evidence that California law licensee is culpable of professional misconduct disciplinable in California. Licensee has burden to establish that exceptions do not warrant imposition of discipline in California. One exception set forth in section 6049.1, subdivision (b)(3), is whether proceedings of other jurisdiction lacked fundamental constitutional protection. Word "proceedings" in section 6049.1, subdivision (b)(3) concerns only attorney disciplinary proceeding imposed on California attorney in other jurisdiction and not predicate court proceedings in other jurisdiction that may have led to disciplinary proceeding in other jurisdiction. To conclude that "proceedings" included underlying court proceedings in other jurisdiction which led to disciplinary proceeding in other jurisdiction would be contrary to law's plain meaning and would alter very purposes of section 6049.1, by routinely allowing collateral attacks on disciplinary proceedings taken by other bodies and which extend beyond two limited statutory exceptions in section 6049.1, subdivision (b). Where respondent (1) had ample notice of South Carolina charges, participated, and was represented by counsel in evidentiary hearing before Hearing Panel in South Carolina; (2) litigated matter before Supreme Court of South Carlina; (3) sought review before United States' Supreme Court; (4) South Carolina disciplinary proceeding required opposing counsel to present clear and convincing evidence of misconduct to support culpability; and (5) respondent's participation in South Carolina proceedings was opportunity for her to put at issue and litigate any relevant or cognizable topic as to state proceedings which formed basis of reprimand, respondent failed to sustain her burden to establish that disciplinary proceedings in South Carolina lacked fundamental constitutional protection. While local South Carolina counsel was not subjected to sanctions and disciplinary proceedings in South Carolina as was respondent, different treatment did not show unfairness of disciplinary proceeding as to respondent, especially since record of South Carolina disciplinary proceedings ascribed to respondent responsibility for frivolous and dilatory basis of litigation.

[2] **106.40 Generally Applicable Procedural Issues – Issues re Pleadings – Amendment of pleadings**
115 Generally Applicable Procedural Issues – Issues re Pleadings – Continuances
1931.50 Discipline in Other Jurisdictions (Section 6049.1) – Special Procedural Issues - Use of Record from Foreign Proceeding
1931.90 Discipline in Other Jurisdictions (Section 6049.1) – Special Procedural Issues – Other Special Procedural Issues

Where hearing judge allowed State Bar's Office of Chief Trial Counsel (OCTC) to amend Notice of Disciplinary Charges (NDC) three days before trial started and did not allow

continuance of trial, but it was undisputed that only amendments made to NDC were to allege and attach certified copies of final South Carolina disciplinary order and underlying attorney disciplinary rules, in place of uncertified records submitted with original NDC, and respondent had not established required showing of prejudice, Review Department upheld hearing judge's allowance of OCTC's amendment to original NDC as non-substantive when denying respondent's request for trial continuance.

[3] **595.90 Aggravation – Indifference to rectification/atonement – Declined to find – Other reason**

Indifference not established as aggravating circumstance where, although respondent testified she did not consider her probate filings in South Carolina case underlying her reprimand frivolous, respondent (1) credibly testified respecting finality of South Carolina discipline; (2) has brought increased level of care to law practice; and (3) has paid in full South Carolina disciplinary cost assessment incident to her disciplinary proceeding in that state, which showed she had appropriately accepted her culpability.

[4] **745.39 Mitigation – Remorse/restitution/atonement – Found but discounted or not relied on – Other reason**

Since respondent's misconduct lasted decade, respondent's actions evidencing remorse were not prompt, as required for this mitigating factor, but based on (1) respondent's evidence of contrition; (2) increased care respondent now gives matters currently handled by her before courts; and (3) respondent satisfied in full costs assessed by South Carolina within three months of South Carlina reprimand becoming final, Review Department affirmed limited weight to mitigating factor of remorse given by hearing judge, which was consistent with decisions cited by hearing judge which did not normally accord remorse significant weight by itself.

[5 a-d] **829.61 Application of Standards – Part B (Sanctions for specific misconduct) – Standard 2.9 – Applied – Stayed suspension or reproval – Harm not significant**
829.62 Application of Standards – Part B (Sanctions for specific misconduct) – Standard 2.9 – Applied – Stayed suspension or reproval – Mitigating factors
829.69 Application of Standards – Part B (Sanctions for specific misconduct) – Standard 2.9 – Applied – Stayed suspension or reproval – Other reason
1091 Miscellaneous Substantive Issues re Discipline – Proportionality with Other Cases

Where disciplinary standard 2.9(b) provided for discipline ranging from reproval to suspension for respondent's filing of frivolous litigation which did not show proof of significant harm to individual or administration of justice; mitigating circumstances clearly predominated, as no aggravating circumstances were found; and respondent's misconduct was less serious and more mitigated than comparable case where 30-day actual suspension ordered, Review Department affirmed hearing judge and ordered respondent publicly reproved.

ADDITIONAL ANALYSIS

Culpability

Found

213.31	Section 6068(c)
271.01	Rule 3-200(B)

Aggravation

Not found

535.90	Pattern
586.50	Significant harm

Mitigation

Found but Discounted

710.39	No prior record
740.39	Good character

Discipline

180.35	Monetary Sanctions – Imposition of Monetary Sanctions – Not recommended
1024	Ethics exam/ethics school
1041	Public reproval with conditions

OPINION

STOVITZ, J*

In her first disciplinary case since her December 1997 licensure to practice law in California, Lisa Fisher was publicly reprimanded by the Supreme Court of South Carolina for misconduct committed while she served as counsel admitted to practice *pro hac vice* in a case pending before the South Carolina courts. A hearing judge of this California State Bar Court, proceeding on the South Carolina reprimand as a reciprocal discipline matter, has now imposed a public reproval with certain duties attached to it. Fisher appeals, contending that the law governing California reciprocal discipline cases provides too narrow a definition of the other states' "proceedings," but if we were to uphold the hearing judge on this aspect, Fisher does not challenge the judge's findings of culpability, on aggravating and mitigating factors, or her decision of public reproval. The Office of Chief Trial Counsel of the State Bar (OCTC) supports the judge's culpability findings, all but one of the judge's findings in mitigation, and the decision of public reproval.

Upon our independent review (Cal. Rules of Court, rule 9.12), we affirm the decision of the hearing judge, including public reproval as appropriate discipline.

I. PROCEDURAL BACKGROUND

This reciprocal discipline case originated following the finality of the unanimous memorandum opinion and order of the Supreme Court of South Carolina, filed January 27, 2021. It issued a public reprimand of Fisher as a result of her misconduct while appearing *pro hac vice* in family-related matters pending in the South Carolina state courts.[1]

On June 30, 2021, OCTC filed in our Hearing Department a Notice of Disciplinary Charges (NDC), pursuant to California's expedited disciplinary procedures when a California State Bar licensee is found culpable of professional misconduct in another jurisdiction. (Bus. & Prof. Code, § 6049.1, subd. (b);[2] Rules Proc. of State Bar, rules 5.350-5.354.) OCTC filed an amended NDC on September 16, 2021, which attached certified copies of the South Carolina disciplinary order but did not include any substantive changes.

Trial on the charges was conducted in our court's Hearing Department in September 2021. After post-trial briefing, the hearing judge filed her decision on December 28, 2021. Fisher appealed that decision to us. On September 28, 2022, we heard oral argument.

II. BASIS OF FISHER'S DISCIPLINE IN SOUTH CAROLINA

The South Carolina Supreme Court publicly reprimanded Fisher based on its statement of Fisher's misconduct, *post*. It held that Fisher had violated rules 3.1 and 8.4(a) of the South Carolina Rules of Professional Conduct.[3] In essence, the South Carolina Supreme Court concluded that, while acting *pro hac vice* in a probate action, Fisher engaged in frivolous litigation which protracted the underlying court proceeding for ten years:

> [Fisher's] great-aunt passed away in February 2009, and through a series of frivolous pleadings, motions, and appeals, [Fisher] raised various challenges to the will and protracted the related litigation for over ten years until the Supreme Court of the United States finally denied her petition for a writ of certiorari. [Citations.] In our opinion addressing the lower court's

*Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court

1. South Carolina and California each provide that, when appearing in courts of the state *pro hac vice*, attorneys are subject to the regulation of the courts of the state and the jurisdiction of the state's attorney disciplinary body. (Rule 404(d)(9) and (g), SCACR; Cal. Rules of Court, rule 9.40(f).)

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

3. Rule 3.1 bars an attorney from bringing, defending, asserting, or controverting an action or matter without a basis in law or fact for doing so which is not frivolous. Rule 8.4(a) makes it an act of professional misconduct, inter alia, to violate or attempt to violate, the South Carolina Rules of Professional Conduct, or violate those rules through the acts of another.

> award of sanctions against [Fisher], this Court concluded [she] lacked standing and repeatedly pursued claims that were meritless and wholly without evidence to support them. *See Fisher v. Huckabee*, 140 S.Ct. 59 (2019) (denying certiorari); *Fisher v. Huckabee*, 422 S.C. 234, 811 S.E.2d 739 (2018) (rejecting [Fisher's] legally flawed claims). In our opinion addressing the lower court's award of sanctions against [Fisher,] this Court concluded [Fisher] lacked standing and repeatedly pursued claims that were meritless and wholly without evidence to support them. *Fisher v. Huckabee*, Op. No. 2018-MO-039 (S.C. Sup. Ct. filed Dec. 12, 2018) (withdrawn, substituted, and refiled Jan. 16, 2019). In doing so, we observed [Fisher] "has certainly engaged in abusive litigation tactics that amount to sanctionable conduct" under Rule 11, SCRCP. [Citation.] [Fisher's] misconduct resulted in a substantial waste of time, judicial resources, and estate assets.
>
> Accordingly, we accept the [Hearing] Panel's finding that [Fisher] violated Rule 3.1, RPC, Rule 407, SCACR (setting forth a lawyer's duty not to abuse legal procedure through frivolous proceedings). We further find [Fisher] committed professional misconduct under Rule 8.4(a), RPC, Rule 407, SCACR, which constitutes grounds for discipline under Rule 7(a)(1), RLDE, Rule 413, SCACR. We find a public reprimand is the appropriate sanction [citation], and we hereby publicly reprimand [Fisher]. . . .

The findings of the Hearing Panel of the South Carolina Commission on Lawyer Conduct (Hearing Panel), accepted by the South Carolina Supreme Court, showed these additional background facts. In 2008, Fisher retained South Carolina counsel to represent her and her mother in a guardianship or conservatorship action in South Carolina concerning Fisher's elderly aunt. After the aunt passed away in 2009, Fisher's counsel challenged the aunt's will. In June 2009, the probate court granted Fisher's application to act *pro hac vice* as counsel in the litigation. She remained as counsel *pro hac vice* until April 2018, when the South Carolina Supreme Court terminated Fisher's *pro hac vice* status. About this time, the probate court conducted a trial on the will contest. This resulted in a jury verdict upholding the will. The probate court then resolved the equitable claims set forth in the probate action. In doing so, the probate court found in March 2018, that, by "overwhelming clear and convincing evidence," Fisher's claims in the probate action were entirely frivolous and Fisher and her counsel had violated rule 11 of the South Carolina Rules of Civil Procedure, subjecting them to sanctions.

Fisher appealed the probate court's decision to the Supreme Court of South Carolina, which upheld it by opinion of December 12, 2018 (revised and refiled on January 16, 2019) (*Fisher v. Huckabee* (2018) Op. No. 2018-MO-039) and reduced the amount of the sanctions imposed by the probate court. The 2018 opinion clarified that the sanctions rested only on Fisher's violations of rule 11 of the South Carolina Rules of Civil Procedure. Fisher unsuccessfully petitioned the Supreme Court of the United States for certiorari. (*Fisher v. Huckabee* (2019) 140 S.Ct. 59, cert. den.)

The Hearing Panel explained in its report why its findings of fact did not contain more detail as to Fisher's conduct. As the Hearing Panel reported, South Carolina's prosecuting disciplinary counsel chose to rely solely on the prior orders entered by the probate court and the South Carolina Supreme Court's resolution of Fisher's appeal of the probate court decision. The disciplinary counsel also chose not to present evidence of specific instances of abusive litigation tactics utilized by Fisher. The Hearing Panel noted that, when the South Carolina Supreme Court affirmed the probate court's decision, it admonished Fisher and imposed sanctions upon her.

III. RECIPROCAL DISCIPLINE IN CALIFORNIA IS WARRANTED

The NDC starting this California proceeding was based solely on Fisher's discipline in South Carolina, and its supporting record.

For the past 36 years, California law, following the practice of sister jurisdictions, has provided a streamlined process for trial and adjudication of State Bar disciplinary proceedings when California attorneys have been found by another jurisdiction to have committed professional misconduct in that other jurisdiction. (§ 6049.1; e.g., *In the Matter of Jenkins* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 157, 162-163 [California attorney's Michigan law license previously revoked by Supreme Court of Michigan for corrupt conduct while serving as Michigan state court judge; disbarred in California].) These cases are commonly referred to as "reciprocal" disciplinary proceedings.

In addition to *In the Matter of Jenkins*, *supra*, our court has published three opinions in reciprocal discipline cases. (*In the Matter of Romano* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 391 [California attorney suspended indefinitely by United States Bankruptcy Court for the Central District of California for professional misconduct committed in cases pending before that court]; *In the Matter of Freydl* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 349 [California attorney suspended for misconduct in Michigan]; and *In the Matter of Kauffman* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 213 [California attorney suspended for professional misconduct committed while handling Illinois cases].)

[1a] Section 6049.1, subdivision (a), provides that, subject only to the two exceptions in section 6049.1, subdivision (b), the final determination of professional misconduct found by another jurisdiction shall be conclusive evidence that the California law licensee is culpable of professional misconduct disciplinable in this state. The two exceptions are whether, as a matter of law, the attorney's culpability in the other jurisdiction's proceeding would not warrant imposition of discipline in California under the governing laws or rules at the time of the misconduct, and whether the proceedings of the other jurisdiction lacked fundamental constitutional protection. (§ 6049.1, subd. (b)(2)-(3).) Moreover, the licensee shall have the burden to establish that the exceptions do not warrant the imposition of discipline by our court. (§ 6049.1(b).)

In this case, the hearing judge determined that the record of the South Carolina disciplinary proceedings of Fisher met the criteria of section 6049.1 in order to warrant giving conclusive effect of culpability under California law. The judge found neither of that section's two exceptions was established by Fisher. Further, the judge found that, as charged in the NDC, Fisher's South Carolina misconduct constituted willful violations of California ethical duties found in section 6068, subdivision (c),[4] and former rule 3-200(B) of the Rules of Professional Conduct.[5]

On appeal, Fisher focuses her main argument on the point that the hearing judge's decision rests on too narrow an interpretation of section 6049.1, subdivision (b)(3). As Fisher argues, the section's exception to treating the South Carolina decision as conclusive evidence of culpability in California should be interpreted by considering whether all of the court proceedings in the underlying probate action, which led the South Carolina Supreme Court to impose a public reprimand, lacked fundamental constitutional protection. Since the judge evaluated the exception in section 6049.1, subdivision (b)(3), only as to

4. Section 6068, subdivision (c) provides, "It is the duty of an attorney . . . [t]o counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense."

5. Former rule 3-200(B) provides that an attorney must not seek, accept, or continue employment if the attorney knows or should know that the objective of that employment is "[t]o present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law." All further references to rules are to the former California Rules of Professional Conduct that were in effect until November 1, 2018, unless otherwise noted.

whether the South Carolina *disciplinary* proceedings lacked fundamental constitutional protection, Fisher argues the judge held an incorrectly narrow view of this exception.

OCTC has not sought review but argues that the hearing judge correctly interpreted section 6049.1, subdivision (b)(3), as relating only to whether the South Carolina *disciplinary* proceeding lacked fundamental constitutional protection. **[1b]** We agree with OCTC and uphold the judge's analysis and decision to give conclusive evidence of culpability to Fisher's South Carolina reprimand.

[1c] The plain meaning of section 6049.1 is apparent that it concerns only the attorney *disciplinary* proceeding imposed on a California attorney in a separate jurisdiction, and not predicate court proceedings that may have led to the disciplinary proceeding. Accordingly, in this situation, no resort is needed to discern legislative history or to consult related interpretive sources. (*Hoechst Celanese Corporation v. Franchise Tax Board* (2001) 25 Cal.4th 508, 519.) Moreover, the meaning of a statute's words is informed from the context of the law. (*Busker v. Wabtec Corp*. (2021) 11 Cal.5th 1147, 1159.) Section 6049.1 begins with the phrase, "In any disciplinary proceeding under this chapter, a certified copy of a final order made by any . . . body authorized . . . to conduct disciplinary proceedings against attorneys . . . determining that a [California attorney] committed professional misconduct in such other jurisdiction shall be conclusive evidence that the [attorney] is culpable of professional misconduct in this state, subject only to the [exceptions of subdivision (b)]."

[1d] Section 6049.1 concerns only creating an expedited California disciplinary proceeding to consider and act on the separate, and final, disciplinary proceeding which resulted in discipline in another jurisdiction. Thus, the only apt reading of section 6049.1, subdivision (b)(3)'s exception is that California looks to the fundamental constitutional protection afforded only by the *disciplinary* proceeding and not an analysis of any underlying court proceedings in the foreign jurisdiction. To analyze section 6049.1, subdivision (b)(3), as broadly as Fisher urges would not only be contrary to the law's plain meaning, it would also alter the very purposes of section 6049.1 by routinely allowing collateral attacks on disciplinary proceedings taken by other bodies and which extend beyond the two limited statutory exceptions we discussed, *ante.*

[1e] We are aware that a record of discipline in another jurisdiction could show constitutional infirmity, which could call into question the fairness of imposing discipline in California based on giving the other jurisdiction's discipline conclusive effect. (§ 6049.1, subd. (b)(3).) But in this case, Fisher has not sustained her burden to establish such infirmity. (§ 6049.1, subd. (b).) Her primary argument before us on this point is that she was subjected to sanctions and disciplinary proceedings in South Carolina, but her local counsel, who filed all papers and made all appearances in the underlying probate matters was not so subjected. However, this different treatment does not show unfairness of the proceeding as to Fisher, especially since we read the record of South Carolina disciplinary proceedings to ascribe to Fisher responsibility for the frivolous and dilatory basis of the probate litigation.

[1f] The record shows that Fisher had ample notice of the South Carolina charges, participated, and was represented by counsel in an evidentiary hearing before the Hearing Panel, litigated the matter before the Supreme Court of South Carolina, and sought review before the Supreme Court of the United States. As is the evidentiary burden in California, the South Carolina disciplinary proceeding required presentation by Fisher's opposing counsel of clear and convincing evidence of misconduct in order to support culpability. (*In re Pennington* (2008) 380 S.C. 49, 58 [668 S.E.2d 402, 406].) Fisher's participation in the South Carolina proceedings was the opportunity for her to put at issue and litigate any relevant or cognizable topic as to the civil or probate court proceedings used by the courts of that state which formed the basis of her reprimand.

Fisher advances two other procedural arguments which we hold are unmerited. First, she urges that the hearing judge erred by allowing OCTC to amend the NDC just three days before the start of trial. Second, she claims that the judge erred by not allowing a continuance of trial after allowing OCTC to amend the NDC. **[2]** However, it is

undisputed that the only amendments OCTC made to the NDC were to allege and attach *certified* copies of the final South Carolina disciplinary order and underlying attorney disciplinary rules, in place of the uncertified records submitted with the original NDC. OCTC offered no substantive amendments to the NDC. Yet Fisher contends on review that the allowed amendment prejudiced her defense strategy by affecting the nature of her defense, including what witnesses to call at trial. We uphold the judge's allowance of OCTC's amendment to the original NDC as non-substantive when denying Fisher's request for a continuance of trial. Such an amendment to the NDC is allowed by rules 5.44(B) and 5.354(C) of the Rules of Procedure of the State Bar. Moreover, the record shows that Fisher was fully prepared to defend OCTC's case and to offer witness testimony, and she did both. Thus, she has not established the required showing of prejudice to support her claims.

Returning to the merits of the hearing judge's decision finding Fisher culpable of section 6068, subdivision (c), and former rule 3-200(B), we note Fisher has stated her position on review that if we reject her argument on broadening section 6049.1, subdivision (b)(3), as she urged, which we have rejected, *ante*, then Fisher does not challenge the judge's findings regarding culpability, aggravating and mitigating circumstances, or the judge's decision for a public reproval. Accordingly, we uphold the judge's findings and conclusions that Fisher is culpable of section 6068, subdivision (c), and former rule 3-200(B).

OCTC also supports in full the above aspects of the hearing judge's decision and urges our affirmance. Nevertheless, as is our function, we have independently reviewed the record and adopt the judge's findings of culpability. As we discuss, *post*, we shall uphold the judge's balance of aggravating and mitigating circumstances, and her decision of public reproval.

IV. PUBLIC REPROVAL IS APPROPRIATE DISCIPLINE

Significantly, California reciprocal disciplinary proceedings have more flexibility than found in many other states' reciprocal proceedings in one key area, in that the degree of discipline is a completely open issue in California. (§ 6049.1, subd. (b)(1); *In the Matter of Jenkins*, *supra*, 4 Cal. State Bar Ct. Rptr. at pp. 163-164.)

Guided by the Standards for Attorney Sanctions for Professional Misconduct (Standards),[6] we next consider the record as it reflects on aggravating and mitigating circumstances. (*In the Matter of Freydl*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 358-359.). Standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence. Fisher has the same burden to prove mitigation. (Std. 1.6.)

A. Aggravation

Although, at trial, OCTC urged that the record showed three aggravating circumstances surrounding Fisher's misconduct, the hearing judge did not find that the evidence showed that they were aggravating. On our review, we agree with the judge, noting that OCTC has not disputed the judge's findings. Accordingly, we discuss them briefly.

Significant harm to the client, public, or the administration of justice is an aggravating circumstance if established. (Std. 1.5(j).) The hearing judge decided that the record—including a paucity of evidence bearing on any specific harm Fisher caused—did not warrant concluding that whatever burden Fisher caused to the courts was significant harm. We agree.

[3] Indifference as to the consequences of misconduct (std. 1.5(k)) was also not established in the hearing judge's decision. Although the judge noted Fisher's testimony that she did not consider her probate filings in the South Carolina case

6. All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

underlying her reprimand to be frivolous, the judge believed that Fisher's actions showed she had appropriately accepted her culpability. Supporting this conclusion, the judge noted Fisher's credible testimony respecting the finality of her South Carolina discipline, that she since brought an increased level of care to her law practice, and that she has paid in full the South Carolina disciplinary cost assessment incident to her disciplinary proceeding. We agree with the judge's decision.

Finally, OCTC sought to prove in aggravation that the record established Fisher had engaged in a pattern of misconduct. The hearing judge rejected this, noting that a significant showing is required to establish a pattern of misconduct (citing *Levin v. State Bar* (1989) 47 Cal.3d 1140, 1149, fn. 14), which was not made by the small quantum of evidence adduced. Again, we agree with the judge's conclusion.

B. Mitigation

The hearing judge found three mitigating factors: Fisher's lack of prior discipline, her evidence of good character, and her remorse. Fisher does not take issue with the mitigation found or weighed by the judge. OCTC takes issue only with one mitigating factor found, which we discuss, *post*.

As to lack of prior discipline (std.1.6(a)), the hearing judge gave moderate weight to Fisher's history of no prior discipline since her licensure in California in 1997. What was not established by the record, was whether Fisher's involvement in the frivolous filings and improper litigation steps she took in South Carolina lasted the entirety of a ten-year period or occurred over a lesser time. We agree with weighing this factor as moderate.

Regarding Fisher's evidence of good character, the hearing judge also assigned moderate weight, noting that the quality and quantity of character evidence supports "at least" moderate weight. Of the nine witnesses who submitted character declarations, five were attorneys and two of these attorneys testified before the hearing judge. These two attorneys held long practice experience in South Carolina and were well familiar with Fisher's conduct which led to her public reprimand. The witnesses were highly laudatory of her character, diligence, and honesty. We agree with the moderate weight assigned by the judge.

[4] Finally, the hearing judge accorded limited weight to the mitigating factor of remorse. (Std. 1.6(g).) On review, OCTC takes issue with the judge crediting Fisher with mitigation for showing remorse. As OCTC argues, the requirement for this factor calls for the evidence of remorse to be shown as prompt and objective steps, and Fisher's actions were not prompt, since her misconduct lasted a decade. However, the judge correctly cited Fisher's evidence of contrition and the increased care that she gives matters she currently handles before courts. Our review shows that within three months of her South Carolina reprimand becoming final, Fisher satisfied in full the costs assessed by that court. In our view, these factors justify the slight mitigating weight found. This finding also appears consistent with the decisions, cited by the judge, which do not normally accord the expression of remorse significant weight by itself. (*Hipolito v. State Bar* (1989) 48 Cal.3d 621, 626-627, fn.2; *Calaway v. State Bar* (1986) 41 Cal.3d 743, 748.). We therefore affirm limited weight under this circumstance.

C. Discussion on Degree of Discipline

The purpose of attorney discipline is not to punish the violator but to protect the public and courts, preserve confidence in the legal profession, and maintain high professional standards for attorneys. (Std. 1.1; e.g., *In the Matter of Hoffman* (Review Dept. 2020) 5 Cal. State Bar Ct. Rptr. 698, 710.) Our disciplinary analysis begins with the standards. Although not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) We are guided by the Supreme Court to follow them whenever possible (see *In re Young* (1989) 49 Cal.3d 257, 267, fn. 11), and to look to comparable case law for additional guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

When we analyze the applicable standards, we determine first which standard specifies the most severe sanction for the at-issue misconduct. (Std. 1.7(a) [most severe sanction shall be imposed where multiple sanctions apply].) **[5a]** The hearing

judge correctly applied standard 2.9(b), as it is the substantive guideline for violations of section 6068, subdivision (c), through Fisher's filing of frivolous litigation steps, which, as here, do not show proof of significant harm to an individual or to the administration of justice.[7] That standard provides for a range of reproval to suspension as the basic guideline.

[5b] Our balancing of the mitigating and aggravating circumstances leads us to conclude that mitigating circumstances clearly predominate, as there are no aggravating ones found.

In her decision, the hearing judge found the 30-day actual suspension ordered in *Sorensen v. State Bar* (1991) 52 Cal.3d 1036, cited by Fisher, to be far more comparable to this case than the decisions cited below by OCTC when it was seeking actual suspension.[8] In *Sorensen*, the attorney brought litigation against a court reporter over a $45 billing dispute in which Sorensen sought $14,000 in exemplary damages as part of a baseless fraud action. **[5c]** Correctly, the judge assessed that Fisher's case revealed less serious and more mitigated conduct than in Sorensen's case. On review, as we noted *ante*, OCTC seeks to uphold the public reproval ordered by the judge as appropriate discipline. Fisher also accepts public reproval, upon our rejection of her overly expansive interpretation of section 6049.1.

[5d] For all the reasons set forth, we shall impose a public reproval.

V. ORDER

We order that Lisa Fisher, State Bar Number 192777, is publicly reproved. Pursuant to the provisions of rule 5.127(A) of the Rules of Procedure of the State Bar, this reproval will be effective when this Opinion becomes final. Furthermore, pursuant to rule 9.19(a) of the California Rules of Court and rule 5.128 of the Rules of Procedure of the State Bar, the court finds that the protection of the public and the interests of Fisher will be served by the following conditions being attached to this reproval. Failure to comply with any condition attached to this reproval may constitute cause for a separate disciplinary proceeding for willful breach of rule 8.1.1 of the State Bar Rules of Professional Conduct. Fisher is ordered to comply with the following conditions attached to this reproval for one year following the effective date of the reproval.

1. Review Rules of Professional Conduct. Within 30 days after the effective date of the order imposing discipline in this matter, Fisher 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 her compliance with this requirement, to the State Bar's Office of Probation with Fisher's first quarterly report.

2. Comply with State Bar Act, Rules of Professional Conduct, and Reproval Conditions. Fisher must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of this reproval.

3. Maintain Valid Official State Bar Record Address and Other Required Contact Information. Within 30 days after the effective date of the order imposing discipline in this matter, Fisher must make certain that the State Bar Attorney Regulation and Consumer Resources Office (ARCR) has her current office address, email address, and telephone number. If she does not maintain an office, she must provide the mailing address, email address, and telephone number to be used for State Bar purposes. Fisher must report, in

7. Although, as we noted *ante*, the hearing judge also found that Fisher's South Carolina misconduct would warrant finding a violation of former rule 3-200(B), the judge found it redundant of Fisher's violation of section 6068, subdivision (c), and did not weigh the former rule 3-200(B) violation as warranting additional discipline, citing *In the Matter of Kinney* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 360, 365, fn. 5. We agree with the judge's decision on this point.

8. In OCTC's closing brief after the disciplinary trial, it cited the following cases, which the hearing judge correctly rejected as involving more serious misconduct: *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179 [disbarment]; *In the Matter of Kinney*, *supra*, 5 Cal. State Bar Ct. Rptr. 360 [disbarment]; and *In the Matter of Scott* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 446 [60-day actual suspension].

writing, any change in the above information to ARCR within 10 days after such change, in the manner required by that office.

4. Meet and Cooperate with Office of Probation. Within 30 days after the effective date of the order imposing discipline in this matter, Fisher must schedule a meeting with her assigned probation case specialist to discuss the terms and conditions of Fisher's discipline and, within 45 days after the effective date of the court's order, must participate in such meeting. Unless otherwise instructed by the Office of Probation, she may meet with the probation case specialist in person or by telephone. During the Reproval Conditions Period, Fisher 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 any other information requested by it.

5. State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court. During the Reproval Conditions Period, the State Bar Court retains jurisdiction over Fisher to address issues concerning compliance with reproval conditions. During this period, Fisher must appear before the State Bar Court as required by the court or by the Office of Probation after written notice mailed to her official State Bar record address, as provided above. Subject to the assertion of applicable privileges, she must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

6. Quarterly and Final Reports.

a. Deadlines for Reports. Fisher 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 Reproval Conditions Period. 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 Fisher must submit a final report no earlier than 10 days before the last day of the Reproval Conditions Period and no later than the last day of the Reproval Conditions Period.

b. Contents of Reports. Fisher must answer, under penalty of perjury, all inquiries contained in the quarterly report form provided by the Office of Probation, including stating whether she 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 to the Office of Probation by: (1) fax or email; (2) personal delivery; (3) certified mail, return receipt requested (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. Fisher is directed to maintain proof of her compliance with the above requirements for each such report for a minimum of one year after the Reproval Conditions Period has ended. She is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

7. State Bar Ethics School. Within one year after the effective date of the order imposing discipline in this matter, Fisher 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 Fisher will not receive MCLE credit for attending this session.

8. Multistate Professional Responsibility Examination. Within one year after the effective date of the order imposing discipline in this matter, Fisher must take and pass the Multistate

Professional Responsibility Examination administered by the National Conference of Bar Examiners and provide satisfactory proof of such passage to the State Bar's Office of Probation within the same period.

VI. MONETARY SANCTIONS

We do not recommend the imposition of monetary sanctions in this matter as sanctions are not applicable since actual suspension or disbarment was not imposed. (Rules Proc. of State Bar, rule 5.137(A).)

VII. COSTS

We further order 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.

WE CONCUR:

HONN, P.J.
McGILL, J.