State Bar Court
Review Department

In the Matter of

STANLEY HOWARD KIMMEL

A Member of the State Bar

No. SBC-20-O-30782

Filed Date March 16, 2023

SUMMARY

Respondent, who had one prior record of discipline, violated various conditions of his disciplinary probation by failing to timely complete certain probation conditions. Respondent's belief that he did not disregard the seriousness of his duty to comply with his probation conditions was irrelevant, as his actions in not following the Supreme Court's disciplinary order, of which he was aware, were willful acts. Furthermore, respondent's argument that the Office of Chief Trial Counsel was estopped from initiating the disciplinary proceeding against him based on the Office of Probation (Probation) marking respondent's first quarterly report as "compliant," which supposedly caused him to believe that he was, in fact, compliant with all the actions stated in his first quarterly report, was also rejected by the Review Department because (1) as a matter of policy, estoppel arguments are not persuasively considered in attorney disciplinary proceedings; (2) respondent had not established a credible basis to support an estoppel claim as the evidence established respondent was aware of his probation terms; and (3) respondent had failed to demonstrate that he justifiably relied on any communications from Probation contrary to his probation's terms. The Review Department determined there was no compelling reason to depart from the need for progressive discipline set forth in Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.8. As respondent had a prior record of discipline involving 60 days' actual suspension, the Review Department recommended a 90-day actual suspension in the probation matter. However, the Review Department recommended a lesser amount of monetary sanctions than the hearing judge because of the single probation violation found, respondent's actions when he became aware of the violations, and mitigation outweighed aggravation.

COUNSEL FOR PARTIES

For State Bar of California: Alex James Hackert

For Respondent: Alison Sara Minet Adams

HEADNOTES

[1a, b] **163 Standards of Proof/Standards of Review – Proof of Wilfulness**
214.10 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Action Violations – Section 6068(k)
204.10 Substantive Issues in Disciplinary Matters Generally – Culpability – General substantive issues re culpability – Wilfulness requirement

Attorney who fails to fully comply with probation conditions is in willful breach of probation. While level or extent of compliance versus non-compliance may affect degree of discipline recommended to Supreme Court, violation of Business and Professions Code section 6068, subdivision (k), occurs when attorney fails to comply with any probation condition. Willfulness in context of failing to comply with probation condition means attorney purposely committed an act or omitted to do an act; it does not require any intent to violate probation condition and does not necessarily involve bad faith. Where record established by clear and convincing evidence that respondent willfully failed to timely schedule and attend initial meeting with State Bar's Office of Probation (Probation), read Rules of Professional Conduct and relevant Business and Professions Code sections, submit final quarterly report to Probation, and submit proof of completion of Ethics School, respondent willfully violated Business and Professions Code section 6068, subdivision (k).

[2a-c] **102.90 Generally Applicable Procedural Issues – Improper Prosecutorial Conduct – Other improper prosecutorial conduct**

As matter of policy, estoppel arguments are not persuasively considered in attorney disciplinary proceedings. Moreover, where (1) evidence in record established respondent was aware of probation terms; and (2) respondent failed to demonstrate that respondent justifiably relied on any communications from Office of Probation contrary to respondent's probation terms, respondent did not establish basis to support estoppel claim.

[3] **513.90 Aggravation – Prior record of discipline – Found but discounted or not relied on – Other reason**

Where respondent's prior discipline was based on two counts of failing to perform with competence and two counts of failing to keep client reasonably informed of significant developments, and current misconduct involved probation violations, though both prior and current misconduct related to respondent's diligence as attorney overall, moderate weight was appropriate because prior and current misconduct were not so similar as to deserve substantial weight, and no other facts supported more significant aggravation under standard 1.5(a).

[4] **523 Aggravation – Multiple acts of misconduct – Found but discounted or not relied on**

Where respondent's misconduct was based solely on violations of probation terms from a single prior discipline, only limited weight in aggravating was assigned under standard 1.5(b).

[5] **725.31 Mitigation – Emotional/physical disability/illness – Found but discounted or not relied on – Lack of expert testimony**
725.32 Mitigation – Emotional/physical disability/illness – Found but discounted or not relied on – Lack of causal relation to misconduct

725.39 Mitigation – Emotional/physical disability/illness – Found but discounted or not relied on – Other reason

Some mitigation may be available for extremely stressful family circumstances even when no expert testimony was presented. Where respondent's emotional difficulties only occurred during part of time respondent committed misconduct; were not related to respondent's failure to fully comply with all probation conditions; and emotional stress was not established by expert testimony, limited mitigation was assigned for respondent's emotional difficulties.

[6] 735.30 Mitigation – Candor and cooperation with Bar – Found but discounted or not relied on

Pursuant to Standard 1.6, mitigation may be assigned for cooperation with State Bar. Where respondent entered into pretrial stipulation, which conserved judicial time and resources but did not admit culpability, cooperation was not extensive enough to warrant full mitigating weight. Respondent was therefore entitled to only moderate weight for cooperation.

[7] 745.10 Mitigation – Remorse/restitution/atonement – Found

Where respondent worked quickly to rectify noncompliance with probation conditions and admitted mistakes and was candid with Office of Probation and Office of Chief Trial Counsel, record supported substantial mitigation under Standard 1.6(g), because respondent demonstrated remorse and recognition of wrongdoing through belated compliance with probation conditions.

[8] 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
795 Mitigation – Other mitigating factors – Declined to find

Pursuant to rule 5.310 of Rules of Procedure of State Bar, Office of Chief Trial Counsel has discretion to charge attorney's probation violation as original disciplinary proceeding under Business and Professions Code section 6068, subdivision (k), rather than as probation revocation proceeding.

[9] 755.52 Mitigation – Prejudicial delay in proceeding – Declined to find – Inadequate showing of prejudice

For delay by State Bar to constitute mitigating circumstance, attorney must demonstrate delay impeded preparation or presentation of effective defense. Where respondent presented no such evidence, respondent failed to meet evidentiary burden to prove additional mitigation for excessive delay caused by State Bar in conducting disciplinary proceedings.

[10a-c] 805.10 Application of Standards – Part A (General Standards) – Standard 1.8(a) (current discipline should be greater than prior) – Applied
891 Application of Standards – Part B (Sanctions for specific misconduct) – Standard 2.14 – Applied
1091 Miscellaneous Substantive Issues re Discipline – Proportionality with Other Cases

Where respondent, who had prior discipline of 60 days' actual suspension for failing to act competently and keep client informed, violated conditions of disciplinary probation, even though respondent's mitigation outweighed aggravation, Review Department held no compelling reason to depart from need for progressive discipline set forth in standard 1.8(a).

Respondent's prior 60-day actual suspension should have placed respondent on heightened notice that respondent must strictly comply with ethical obligations, especially involving court orders. Review Department held 90 days' actual suspension was appropriate discipline to protect public, courts, and legal profession and reflected court's increasing concern about respondent's failure to comply with ethical obligations.

[11] **180.11 Monetary Sanctions – General Issues re Monetary Sanctions – Effective date/retroactivity of authorizing statute and rule**

Rule 5.137(H) of Rules of Procedure of State Bar provides that rule regarding monetary sanctions applies "to all disciplinary and criminal conviction proceedings commenced and stipulations signed on or after April 1, 2020." Where misconduct occurred before April 1, 2020 (effective date of rule 5.137), but disciplinary proceeding commenced on November 16, 2020, when Notice of Disciplinary Charges filed, imposition of monetary sanctions was appropriate.

[12 a, b] **180.12 Monetary Sanctions – General Issues re Monetary Sanctions – Appropriate amount of monetary sanctions**

Rule 5.137(E)(1) of Rules of Procedure of State Bar provides, in part, that State Bar Court shall make recommendations to Supreme Court regarding monetary sanctions in any disciplinary proceeding resulting in actual suspension. Guideline in rule 5.137(E)(2) recommended sanction of up to $2,500 for discipline including actual suspension, depending upon facts and circumstances of case. Rule 5.137(E)(3) further provides that, upon consideration of all facts and circumstances, State Bar Court may deviate from ranges recommended under rule 5.137(E)(2). Where respondent was culpable of one count of violating disciplinary probation based on various failures related to untimely compliance with probation terms; seriousness of violation was diminished by respondent's belated efforts to comply with disciplinary obligations; respondent was cooperative with Office of Probation and expressed desire to rectify noncompliance once respondent was in contact with that office; respondent was candid with Office of Probation about respondent's failure to timely review Rules of Professional Conduct and relevant Business and Professions Code sections as ordered by Supreme Court; respondent cooperated with Office of Chief Trial Counsel by entering into Stipulation; established limited mitigation for good character and emotional difficulties; had substantially proven remorse and recognized misconduct; and had not proffered any evidence to suggest financial hardship or inability to pay sanctions, Review Department held that $500 sanction was appropriate because single probation violation found, respondent's actions when respondent became aware of violations, and mitigation outweighed aggravation.

ADDITIONAL ANALYSIS

Culpability

Found

214.11 Section 6068(k) (comply with disciplinary probation)

Mitigation

Found but discounted or not relied on

214.11 Section 6068(k) (comply with disciplinary probation)
740.31 Good character references – Insufficient Number or Range of References
740.32 Good character references – References Unfamiliar with Misconduct

Discipline

180.31 Monetary Sanctions – Recommended
1013.06 Stayed Suspension – One year (incl. anything between 1 yr. & 18 mos.)
1015.03 Actual Suspension – Three months (incl. anything between 3 and 6 mos.)
1017.06 Probation – One year (incl. anything between 1 yr. & 18 mos.)

OPINION

McGILL, J.

In his second disciplinary case, Stanley Howard Kimmel was charged with one count of misconduct for violating various conditions of his disciplinary probation. The hearing judge found Kimmel culpable as charged and recommended a 90-day actual suspension. Kimmel appeals and argues that the judge's factual findings are not supported by clear and convincing evidence, the State Bar is estopped from prosecuting his probation violations, and the recommended discipline is excessive. The Office of Chief Trial Counsel of the State Bar (OCTC) does not appeal and requests that we uphold the judge's recommendation.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we affirm the hearing judge's findings, apart from the weight given to the aggravating factors and the amount of monetary sanctions recommended. We also conclude that Kimmel has offered no justification to impose less discipline than the hearing judge recommends. To protect the public, the courts, and the legal profession, we recommend a 90-day actual suspension as warranted under our disciplinary standards.

I. PROCEDURAL BACKGROUND

On November 16, 2020, OCTC filed a one-count Notice of Disciplinary Charges (NDC), charging Kimmel with failing to comply with several conditions of his disciplinary probation in violation of Business and Professions Code section 6068, subdivision (k).[1] Kimmel filed a response on December 8. On March 8, 2021, the parties entered into a pretrial Stipulation as to Facts and Admission of Documents (Stipulation). On March 9, the hearing judge held a one-day trial and posttrial briefing followed. The judge issued a decision on July 2, 2021.

II. FACTUAL BACKGROUND[2] AND CULPABILITY

A. Kimmel's Prior Record of Discipline

Kimmel was admitted to practice law in California on December 21, 1977, and he has one prior record of discipline. In the prior matter, Kimmel stipulated to two counts of failing to perform with competence and two counts of failing to keep a client reasonably informed of significant developments. This misconduct involved two clients in four court cases where Kimmel failed to appear for a civil trial, failed to timely file a response to a civil complaint, failed to inform a client that his civil action had been dismissed, and failed to oppose a motion for summary judgment. Kimmel stipulated to a one-year suspension that was stayed, with one year of probation and a 60-day actual suspension. The Hearing Department approved the stipulation and filed it on October 18, 2018.

On February 1, 2019, the Supreme Court issued its order imposing the stipulated discipline (Discipline Order). (S252853.) The Discipline Order was properly served on Kimmel and became effective on March 3,[3] 30 days after it was entered (Cal. Rules of Court, rule 9.18(a).) The Discipline Order, in relevant part, required Kimmel to provide to the State Bar's Office of Probation (Probation) proof of passing the Multistate Professional Responsibility Examination (MPRE) and to comply with the probation conditions as recommended by the Hearing Department in the stipulation filed on October 18, 2018. Those conditions included the

1. All further references to sections are to the Business and Professions Code.

2. We base the factual background on trial testimony, documentary evidence, the Stipulation, and the hearing judge's factual findings, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).) We also 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 issues "because [the judge] alone is able to observe the witnesses' demeanor and evaluate their veracity firsthand"].)

3. Two days before the Discipline Order became effective, on March 1, 2019, Kimmel attempted to file in the Supreme Court a request to modify the Discipline Order because he needed additional time to resolve client matters before his actual suspension would take effect. He was informed by a clerk of the Supreme Court that the request could not be filed with the Supreme Court. The Supreme Court did not file or rule on Kimmel's request. Kimmel contacted OCTC regarding his request but did not file a request in the State Bar Court.

timely scheduling of a meeting with Probation by March 18, 2019, submitting quarterly reports (on January 10, April 10, July 10, and October 10, 2019) and a final report (by March 3, 2020) to Probation, reviewing the relevant Rules of Professional Conduct and Business and Professions Code sections by April 2, 2019, and submitting evidence of successful completion of the State Bar's Ethics School (Ethics School) to Probation by March 3, 2020.

B. Probation's Reminder Letter and Kimmel's Belated Meeting with Probation

On February 21, 2019, a Probation case specialist sent Kimmel an email at his membership records e-mail address informing him that Probation had uploaded a courtesy reminder letter to his My State Bar Profile on the State Bar website. Probation received a delivery confirmation email that the email was successfully delivered. The reminder letter restated the terms and conditions of Kimmel's disciplinary probation and provided him with the compliance dates for each requirement. The Discipline Order was enclosed with the letter and portions of the stipulation containing the discipline and conditions of probation. Also, the letter clearly indicated that any request for an extension of time or modification of the terms of probation must be filed with the State Bar Court. Based on the effective date of the Discipline Order, Kimmel was required to schedule a meeting with Probation by March 18, 2019, and participate in the required meeting no later than April 2. Kimmel did not open and review the case specialist's email until May 1, when he was cleaning out his inbox. That same day, Kimmel immediately called Probation to schedule his required initial meeting. Probation sent Kimmel an email confirming May 3 as the date for their initial meeting and informed him that he was not compliant with the terms of his probation because the meeting was untimely. Kimmel received the email and reviewed it. He also asked Probation how to achieve compliance but was informed that he could not.

Kimmel participated telephonically in the required meeting with Probation on May 3, 2019. He again asked Probation how he could cure his reported noncompliance and was told that he did not need to do anything. After the meeting, Probation sent Kimmel an email with a copy of the meeting record attached. Probation received a delivery confirmation and receipt that the email had been read.

C. Kimmel's Probation Violations

According to his probation conditions, Kimmel was required to review the Rules of Professional Conduct and certain sections from the Business and Professions Code by April 2, 2019, and provide a declaration of compliance with his first quarterly report due by July 10. The hearing judge found that Kimmel credibly testified that he printed the rules and sections, placed them in a binder, and read them as it had been 40 years since he attended law school and he wanted to make sure he was abreast of the latest rules. He testified that, after reviewing the quarterly report form, he realized he was only required to read specific sections. Accordingly, on July 7, he read again Business and Professions Code sections 6067, 6068, and 6103 through 6126.

Kimmel's first quarterly report was due on July 10, 2019. He submitted the report to Probation on July 7, and included a declaration that he did not read the rules and specified sections by the due date of April 2, 2019, but he did so belatedly on July 7. Probation deemed the report compliant. Kimmel's second and third quarterly reports were submitted timely, on October 2, 2019, and January 8, 2020, respectively. Probation deemed these reports compliant. Kimmel's final probation report was due by March 3. Kimmel calendared the wrong deadline and filed his final report on March 9. Probation deemed the report noncompliant because it was filed six days late.

Kimmel was required to provide Probation proof of his completion and passage of the required test at the end of Ethics School by March 3, 2020. On October 10, 2019, Kimmel registered for Ethics School and submitted the required payment. OCTC sent him a letter dated October 16, 2019, notifying him that his session was scheduled for December 10, between 9:00 a.m. and 4:00 p.m. Kimmel planned to attend on December 10, but, as he was driving to downtown Los Angeles for the class, he realized he would not make it on time. He called the number provided on the letter from OCTC and left a voicemail requesting a callback to reschedule. Kimmel testified that he expected to receive a

callback, but he did not. Kimmel did not make any other attempts to reschedule his Ethics School class by the March 3, 2020 deadline.

On March 30, 2020, Probation sent Kimmel a letter and email summarizing his compliance and noncompliance with the conditions of his probation. The letter specified that Kimmel was compliant in filing three quarterly reports and with submitting his compliance declarations with the first quarterly report on July 7, 2019. Kimmel was also compliant with taking and passing the MPRE. However, the letter noted that he was not compliant in timely scheduling and participating in his required initial meeting, timely reading the rules and relevant sections, and timely submitting his final report. Kimmel was also not compliant with the requirement that he successfully complete Ethics School and submit proof of completion to Probation by March 3, 2020. Kimmel received and read the letter.

After receiving Probation's March 30, 2020 letter, Kimmel registered to attend the next available Ethics School class that was scheduled for June 2. He attended and successfully completed the session. Kimmel believed OCTC would provide the proof of completion to Probation; however, OCTC did not. Kimmel was later advised by Probation that he still had not submitted proof of his completion of Ethics School. On September 23, Kimmel sent an email advising OCTC that he completed Ethics School, and he submitted his proof of completion to Probation on October 9, 2020.

D. Kimmel is Culpable of Violating Section 6068, subdivision (k) (Failure to Comply with Probation Conditions)

Section 6068, subdivision (k), provides that an attorney must comply with all conditions attached to any disciplinary probation. Based on his multiple probation violations, the hearing judge found that Kimmel willfully violated section 6068, subdivision (k), by failing to timely schedule and participate in the required meeting with Probation by March 18 and April 2, 2019, respectively; read the rules and relevant sections by April 2; submit a final quarterly report to Probation by March 3, 2020; and submit to Probation evidence of completing Ethics School by the same date. We agree with the judge's conclusions for the reasons discussed *post*.

Kimmel raises two arguments on review in an attempt to excuse his multiple late acts, but both are unavailing.[4] First, he claims that OCTC fails to make any distinction between "the level of compliance or non-compliance of [a] respondent attorney [and OCTC believes that] failing to comply with any condition of probation is the same as failing to comply with all [probation] conditions." He further "admits to several violations of the strict terms of his probation but denies any disregard for the seriousness of his duty to comply with probation conditions," and therefore concludes he should not face any additional discipline. Kimmel is wrong on both points.

[1a] In determining culpability, case law makes clear that an attorney who fails to *fully comply* with probation conditions is in willful breach of probation. (*In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 81, 86; see *In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 537 ["it is misguided to distinguish between 'substantial' and 'insubstantial' or 'technical' violations of . . . probation conditions"].) While the level or extent of compliance versus non-compliance may affect the degree of discipline ultimately recommended to the Supreme Court, a violation of section 6068, subdivision (k), occurs when an attorney fails to comply with *any* condition of probation. Thus, Kimmel's argument, which we interpret as he "substantially complied" with his probation conditions, is meritless.

[1b] Further, Kimmel's belief that he has not disregarded the seriousness of his duty to comply with the probation conditions is irrelevant. The salient point here is that Kimmel's actions in not following the Discipline Order, of which he was

4. Having independently reviewed all arguments set forth by Kimmel, those not specifically addressed have been considered and rejected as without merit.

aware, until May 1, 2019, are willful acts.[5] Willfulness in this context means that the attorney purposely committed an act or omitted to do an act; it does not require any intent to violate the probation condition and does not necessarily involve bad faith. (*In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 309.) Consequently, the record establishes by clear and convincing evidence[6] that Kimmel willfully failed to timely schedule and attend his initial meeting with Probation, read the Rules of Professional Conduct and relevant Business and Professions Code sections, submit his final quarterly report to Probation, and submit proof of completion of Ethics School. He is culpable as charged in the NDC. Therefore, we reject his argument that the hearing judge's factual findings are not supported.

We also reject Kimmel's second argument that OCTC is estopped from initiating this proceeding against him. While Kimmel acknowledges that he did not timely comply with each of his probation conditions, he argues that, since Probation marked his first quarterly report filed on July 7, 2019, as "compliant," it caused him to believe that he was in fact compliant with all the actions stated in his first quarterly report. **[2a]** As a matter of policy, estoppel arguments are not persuasively considered in attorney disciplinary proceedings. (*In the Matter of Taggart*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 309 ["goals of attorney discipline—protection of the public, courts, and legal profession—are strong public policy considerations that militate against applying the doctrine"].)

[2b] Moreover, Kimmel has not established a credible basis to support an estoppel claim as the evidence in the record establishes Kimmel was aware of the terms of his probation. (*Bib'le v. Committee of Bar Examiners* (1980) 26 Cal.3d 548, 552 [party invoking estoppel against agency must show ignorance of the true state of facts and agency intended for him to act on conduct to his injury].) The Discipline Order imposed conditions to which Kimmel had stipulated in October 2018. After the Supreme Court issued its Discipline Order, Kimmel received a copy of the order in the mail on February 4, 2019. The fact that Kimmel was aware of his probation's terms is further established based on his unsuccessful attempt to file a request to modify the Discipline Order in the Supreme Court on March 1, 2019.

[2c] Probation emailed Kimmel, as a courtesy, on February 21, 2019, and reminded him of the duties and obligations of his probation. Kimmel was careless in not regularly checking his email and therefore did not read the email until May 1, which was over a month after the first deadline to schedule a meeting with Probation. Kimmel asserts that the Probation case specialist assured him that he did not need to do anything when he asked how to cure his reported noncompliance for failing to timely schedule his initial meeting and that she "deemed him compliant." However, the record does not support Kimmel's assertions. Kimmel called Probation on May 1 to schedule his initial meeting when he was required to do so by March 18. Cheung sent Kimmel an email shortly after the call to confirm their initial meeting for May 3, and in the email she stated that Kimmel's "scheduling is late and not compliant." Kimmel could not reasonably believe that his failure to comply was waived. The communication and reminders from Probation should have made clear that strict compliance with the terms of probation was required. Kimmel has failed to demonstrate that he justifiably relied on any communications from Probation contrary to his probation's terms. (*Kelley v. R. F. Jones Co.* (1969) 272 Cal.App.2d 113, 120-121 [justifiable reliance essential element of estoppel doctrine].) Accordingly, we find ample evidence of Kimmel's failure to comply with all

5. Kimmel asserts that he did not receive proper notice of the terms of his obligations because Probation sent its initial reminder letter via email, and he was late in reading it because he did not understand its importance. As OCTC aptly points out in its brief, Probation's courtesy reminder email was exactly that, a courtesy. Kimmel had actual knowledge of his compliance duties and timelines from the Discipline Order, which he was bound to follow. Therefore, we reject his arguments.

6. 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.)

conditions attached to his disciplinary probation in willful violation of section 6068, subdivision (k).

III. AGGRAVATION AND MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct[7] requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Kimmel to meet the same burden to prove mitigation.

A. Aggravation

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

The hearing judge assigned substantial weight in aggravation for Kimmel's one prior record of discipline. The judge determined that Kimmel's prior and current discipline involved similar misconduct, finding that both instances of misconduct relate to his ability to timely perform and adequately communicate with respect to his obligations as an attorney. OCTC supports the judge's reasoning. Kimmel, without citing authority, argues that no aggravation is warranted.

[3] We differ with the hearing judge in that we find Kimmel's prior misconduct is not similar enough to his current misconduct to justify substantial weight in aggravation. In his prior discipline, Kimmel received a 60-day actual suspension for two counts of failing to perform with competence and two counts of failing to keep a client reasonably informed of significant developments. We acknowledge some similarity in Kimmel's prior and current misconduct because both relate to his diligence as an attorney overall; however, his previous discipline did not include a probation violation. Nonetheless, the judge correctly determined that Kimmel's prior record, which underlies this probation revocation proceeding, is an aggravating circumstance. (Std. 1.5(a) [prior record of discipline is aggravating circumstance]; see also *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619 [prior discipline aggravating because it indicates recidivist attorney's inability to conform conduct to ethical norms].) Every attorney found culpable of disciplinary probation violations will necessarily have a prior record of discipline. (See, e.g., *In the Matter of Amponsah* (Review Dept. 2020) 5 Cal. State Bar Ct. Rptr. 646, 653.) We find that moderate weight is appropriate for this circumstance because the prior and current misconduct are not so similar as to deserve substantial weight and no other facts support more significant aggravation under standard 1.5(a).

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

The hearing judge found that Kimmel committed multiple acts of wrongdoing and assigned moderate weight in aggravation because Kimmel violated the terms of probation on three separate occasions. The judge treated Kimmel's failure to timely schedule and participate in a meeting with Probation (in March and April 2019, respectively) and his failure to timely review the Rules of Professional Conduct and relevant Business and Profession Code sections by April 2, 2019, as a singular act deriving from his failure to timely review the reminder email from Probation. Kimmel also failed to timely submit his final quarterly report by March 3, 2020, and failed to submit to Probation evidence of his completion of Ethics School, which was due on the same day. Kimmel asserts that no aggravation should be assigned. OCTC does not challenge this finding on review.

[4] We agree that aggravation is warranted for Kimmel's multiple violations of his probation conditions. (*In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 529 [multiple acts for failing to cooperate with probation monitor and failing to timely file two probation reports].) However, because all of Kimmel's misconduct stems from violating the terms of his probation from a single prior discipline, we assign only limited weight under standard 1.5(b). (*In the Matter of Carver* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 348, 355 [multiple acts of misconduct found for violating three separate conditions of public reproval; modest weight as violations concerned single reproval order]; *In the Matter of Amponsah*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 653 [modest

7. All further references to standards are to this source.

aggravating weight for violating two conditions of probation and Cal. Rules of Court, rule 9.20].)

B. Mitigation

1. Extreme Emotional Difficulties (Std. 1.6(d))

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. The hearing judge afforded limited mitigation based on stressors that Kimmel expressed through his testimony. We agree.

[5] Kimmel testified that he suffered greatly from stressful family circumstances between December 10, 2019, and March 30, 2020, which was around the time he was due to complete Ethics School. In 2019, his mother-in-law was diagnosed with congestive heart failure and was under hospice care until her death on January 6, 2020. This greatly impacted him and his wife. Like the hearing judge, we note that the emotional difficulties suffered by Kimmel only account for a limited period and are not related to his failure to fully comply with all the probation conditions—such as not timely scheduling and attending his initial meeting with Probation. Kimmel argues he is entitled to "considerable weight," but his contention is not supported under the standard because evidence of his emotional stress was not established by expert testimony. However, some mitigation may be available for extremely stressful family circumstances even when no expert testimony was presented. (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].) Accordingly, we assign limited mitigation for Kimmel's emotional difficulties that occurred during some of the time he committed misconduct.

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

[6] Standard 1.6(e) provides that mitigation may be assigned for cooperation with the State Bar. The hearing judge assigned moderate mitigation credit for Kimmel's cooperation because he entered into the pretrial Stipulation, which conserved judicial time and resources. Neither party challenges this finding on review. Because Kimmel did not admit culpability, we find that this cooperation was not extensive enough to warrant full mitigating weight. (*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].) Accordingly, we agree with the judge that Kimmel is entitled to moderate weight for his cooperation.

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

Standard 1.6(f) entitles Kimmel 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." Kimmel presented testimony and character letters from three witnesses, which included one attorney and two clients. The hearing judge concluded that the witnesses spoke highly of Kimmel's excellent character and were sufficiently aware of the extent of his misconduct. However, the judge only afforded Kimmel limited weight because the witnesses did not represent a wide range of references. Neither OCTC nor Kimmel challenge this finding. We find that, while the three witnesses testified to having a positive opinion of him, their testimony was not fully informed, and the witnesses did not constitute a wide range of references from the legal and general communities. (*In re Aquino* (1989) 49 Cal.3d 1122, 1131 [testimony of witnesses unfamiliar with details of misconduct not given significant weight in mitigation]; *In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 476–477 [character evidence entitled to limited weight where it was not from wide range of references].) Thus, we also assign limited weight in mitigation for good character.

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

[7] 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 substantial weight in mitigation for this circumstance because Kimmel worked quickly to rectify his noncompliance with probation upon being reminded of his failure to meet obligations. For instance, Kimmel immediately contacted Probation to schedule his initial meeting after reading Probation's initial email and reminder letter on May 1, 2019. He also attempted, albeit unsuccessfully, to reschedule his Ethics School session by leaving a voicemail when he realized that he would not make it on time. Kimmel admitted that he made mistakes and was candid with Probation and OCTC about his shortcomings. While OCTC noted in its brief that the judge found substantial weight for this circumstance, it did not indicate if it opposed or supported the judge's finding. Like the judge, we conclude the record supports substantial mitigation because Kimmel demonstrated remorse and recognition of wrongdoing through his belated compliance. (See *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 150.)

5. No Additional Mitigation is Warranted

[8] Kimmel appears to seek additional mitigation for an excessive delay caused by the State Bar in conducting the disciplinary proceedings against him, as well as for OCTC initiating this proceeding as an original discipline matter rather than a probation revocation proceeding. We do not find clear and convincing evidence to prove any additional mitigation. OCTC correctly points out that, pursuant to rule 5.310 of the Rules of Procedure of the State Bar,[8] it has discretion to charge an attorney's probation violation as an original disciplinary proceeding under section 6068, subdivision (k). **[9]** Further, upon our review of the record, we do not find Kimmel has demonstrated an excessive delay by the State Bar. 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.) Kimmel presented no such evidence here. Therefore, Kimmel has failed to meet his evidentiary burden to prove any additional mitigation.

IV. A 90-DAY ACTUAL SUSPENSION 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 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.) In determining an appropriate level of discipline, we also weigh factors in aggravation and mitigation. (Std. 1.7(b), (c).) Finally, we look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

[10a] Standard 2.14 provides that actual suspension is the presumed sanction for Kimmel's misconduct in violating the conditions attached to his disciplinary probation. Standard 2.14 further provides that the degree of sanction depends on the nature of the condition violated and the attorney's unwillingness or inability to comply with disciplinary orders. To determine the appropriate discipline, we must also consider standard 1.8(a), which provides, "If a lawyer has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust."

The hearing judge recommended discipline that included a 90-day actual suspension. OCTC asks that we affirm the judge's recommendation based on standard 1.8(a)'s principle of progressive discipline, considering that a 60-day actual suspension was imposed in Kimmel's prior

8. All further references to rules are to the Rules of Procedure of the State Bar unless otherwise noted.

disciplinary case.[9] Kimmel argues that a 90-day actual suspension is excessive.[10]

In recommending a 90-day actual suspension, the hearing judge found *In the Matter of Gorman* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567 and *Conroy v. State Bar* (1990) 51 Cal.3d 799 to be instructive. In *Gorman*, this court found a 30-day actual suspension appropriate where an attorney violated two conditions of his probation by paying restitution nine months late and failing to timely attend Ethics School. Gorman had one prior record of discipline for failing to maintain trust funds in his client trust account and for failing to update his official State Bar record's address for which he received a stayed suspension. We found that Gorman's failure to make restitution was related to his trust account violation in his prior discipline. Like in *Gorman*, Kimmel's prior misconduct (failing to act competently and keep a client informed) and failure to adhere to his probation conditions for the prior discipline demonstrate concern regarding his ability to timely, efficiently, and competently handle his ethical obligations as an attorney. In *Conroy*, the attorney received a 60-day actual suspension for violating conditions attached to a reproval by failing to timely take and pass the MPRE. Conroy, unlike Kimmel, received aggravation for his failure to participate in the disciplinary proceedings and lack of remorse. We agree that both cases used by the judge provide some guidance in making a discipline recommendation, in that, in each case, the attorney received greater discipline than had been imposed in the first discipline, which reflects standard 1.8's requirement of progressive discipline.

[10b] We find that Kimmel's primary failing, as an attorney and an officer of the court, is his inattention to ethical duties and obligations which has resulted in him disobeying the Supreme Court's Discipline Order. We are mindful of Kimmel's remorse, candor, and cooperation during the investigation and these proceedings, which saved time and resources. Nevertheless, the 60-day suspension Kimmel suffered in his prior discipline case should have placed him on heightened notice that he must strictly comply with ethical obligations, especially involving court orders. (See *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 403 [obedience to court orders intrinsic to respect attorneys and their clients must accord judicial system].)

[10c] Even though his mitigation outweighs his aggravation, we find no compelling reason to depart from the need for progressive discipline as set forth in standard 1.8(a). Consequently, the next level of progressive discipline is 90 days' actual suspension, which we conclude is the appropriate discipline to protect the public, the courts, and the legal profession. This discipline reflects our increasing concern about Kimmel's failure to comply with his ethical obligations. Therefore, we affirm the hearing judge's discipline recommendation.

V. RECOMMENDATIONS

We recommend that Stanley Howard Kimmel, State Bar Number 77007, 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. Kimmel must be suspended from the practice of law for the first 90 days of the period of his probation.

2. Comply with State Bar Act, Rules of Professional Conduct, and Probation Conditions. Kimmel must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of probation.

3. Review Rules of Professional Conduct. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Kimmel must (1) read the California Rules of Professional Conduct (Rules of Professional Conduct) and Business and Professions Code

9. Standard 1.2(c)(1) states, in relevant part, "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."

10. Kimmel has also argued that he should not receive any discipline because he should not be found culpable of the section 6068, subdivision (k), charge, and he has, at times, argued that he should receive a private reproval, a stayed suspension, or a 30-day actual suspension.

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 Kimmel's first quarterly report.

4. Complete E-Learning Course Reviewing Rules and Statutes on Professional Conduct. Within 90 days after the effective date of the Supreme Court order imposing discipline in this matter, Kimmel must complete the e-learning course entitled "California Rules of Professional Conduct and State Bar Act Overview." Kimmel must provide a declaration, under penalty of perjury, attesting to Kimmel's compliance with this requirement to the Office of Probation no later than the deadline for Kimmel's next quarterly report due immediately after course completion.

5. Maintain Valid Official State Bar Record Address and Other Required Contact Information. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Kimmel 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. Kimmel must report, in writing, any change in the above information to ARCR, within 10 days after such change, in the manner required by that office.

6. Meet and Cooperate with Office of Probation. Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Kimmel must schedule a meeting with his assigned Probation Case Coordinator to discuss the terms and conditions of his discipline and, within 30 days after the effective date of the court's order, must participate in such meeting. Unless otherwise instructed by the Office of Probation, Kimmel may meet with the Probation Case Coordinator in person or by telephone. During the probation period, Kimmel must promptly meet with representatives of the Office of Probation as requested by it and, subject to the assertion of applicable privileges, must fully, promptly, and truthfully answer any inquiries by it and provide to it any other information requested by it.

7. State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court. During Kimmel's probation period, the State Bar Court retains jurisdiction over him to address issues concerning compliance with probation conditions. During this period, Kimmel 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, Kimmel must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

8. Quarterly and Final Reports.

a. Deadlines for Reports. Kimmel 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, Kimmel 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. Kimmel 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. Kimmel 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. Kimmel is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

9. State Bar Ethics School Not Recommended. It is not recommended that Stanley Howard Kimmel be ordered to attend the State Bar Ethics School because he has completed the Course within the last two years of the decision in this matter. (See Rules Proc. of State Bar, rule 5.135(A).)

10. Commencement of Probation/ Compliance with Probation Conditions. The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the probation period, if Kimmel has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

11. Proof of Compliance with Rule 9.20 Obligation. Kimmel 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 Kimmel 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.

VI. MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION

It is not recommended that Stanley Howard Kimmel be ordered to take and pass the MPRE because Kimmel took and passed the MPRE on August 10, 2019. (*In the Matter of Respondent G* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 181, 183 [public protection and interests of attorney do not require passage of professional responsibility exam where respondent recently took and passed such exam in compliance with prior disciplinary order].)

VII. CALIFORNIA RULES OF COURT, RULE 9.20

We further recommend that Kimmel 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 calendar days, respectively, after the date the Supreme Court order imposing discipline in this matter is filed.[11] (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45 [the operative date for identification of clients being represented in pending matters and others to be notified is the filing date of the Supreme Court order imposing discipline].) Failure to do so may result in disbarment or suspension.

VIII. MONETARY SANCTIONS

The hearing judge recommended that Kimmel pay $1,500 in monetary sanctions. On review, OCTC asks that we affirm the judge's recommendation, and Kimmel argues that monetary sanctions should not be imposed. He

11. Kimmel 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).)

asserts that his misconduct occurred before April 1, 2020, the effective date of rule 5.137. Kimmel's reading of the rule is misguided. Rule 5.137(H) explicitly states that the rule regarding monetary sanctions applies "to all disciplinary and criminal conviction proceedings commenced and stipulations signed on or after **[11]** April 1, 2020." In this case, the disciplinary proceeding commenced when the NDC was filed on November 16, 2020; therefore, the imposition of monetary sanctions is appropriate.

[12a] Rule 5.137(E)(1) provides, in part, that this court shall make recommendations to the Supreme Court regarding monetary sanctions in any disciplinary proceeding resulting in an actual suspension. The guidelines recommend a sanction of up to $2,500 for discipline including an actual suspension, depending upon the facts and circumstances of the particular case. (Rule 5.137(E)(2).) Rule 5.137(E)(3) further provides that, upon consideration of all the facts and circumstances, we may deviate from the ranges recommended under rule 5.137(E)(2). The hearing judge provided some rationale for his $1,500 monetary sanctions recommendation, stating Kimmel was found culpable of a single violation not involving client matters. As detailed below, we agree that a downward departure from the guidelines is appropriate in this case but conclude that the amount recommended by the judge is excessive given the facts and circumstances established here.

[12b] Kimmel is culpable of one count of violating his disciplinary probation based on various failures related to untimely compliance with the terms of his probation. The seriousness of Kimmel's violation is diminished by his belated efforts to comply with his disciplinary obligations. Once Kimmel was in contact with Probation, he was cooperative and expressed his desire to rectify his noncompliance. He was also candid with Probation about his failure to timely review the Rules of Professional Conduct and relevant Business and Professions Code sections as ordered by the Supreme Court. In making our recommendation, we also consider that Kimmel has cooperated with OCTC by entering into a Stipulation, established limited mitigation for his good character and emotional difficulties, and has substantially proven he is remorseful and recognizes his misconduct. We also note that Kimmel has not proffered any evidence to suggest financial hardship or an inability to pay sanctions. After considering the facts and circumstances of this case, we determine that a $500 sanction is appropriate because of the single probation violation found, Kimmel's actions when he became aware of his violations, and the mitigation outweighed the aggravation.

Accordingly, we recommend that Kimmel 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. 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.

IX. COSTS

We further recommend that costs be awarded to the State Bar in accordance with 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, 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 section 6086.10, subdivision (c), 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, P. J.
RIBAS, J.

State Bar Court
Review Department

In the Matter of

APPLICANT D

A Member of the State Bar

No. SBC-21-M-XXXXX

Filed May 12, 2023

SUMMARY

Applicant seeking admission to practice law in California sought review of a Hearing Department decision affirming the Committee of Bar Examiners' adverse moral character determination that Applicant lacked the requisite moral character for admission as an attorney. The hearing judge found that Applicant had not met his burden of proof to establish a prima facie showing of good moral character. The Review Department affirmed the hearing judge's decision, concluding that Applicant's stable employment, which lasted for many years but which had ended several years ago, a security clearance that ended almost 20 years prior to Applicant's 2018 moral character application, other inactive licenses, and no witness who vouched, either in writing or by testimony, for Applicant's good character, did not meet the threshold to establish a prima facie case of good moral character.

COUNSEL FOR PARTIES

For State Bar of California: Alex James Hackert, Esq.

For Applicant: Applicant D, in pro. per.

HEADNOTES

[1a-c] **161 Standards of Proof/Standards of Review – Duty to Present Evidence**
2602 Issues in Admissions Moral Character Proceedings – Special Procedural Issues – Burdens of Proof
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

One requirement for admission to practice law is that applicant must be of good moral character. Applicant bears burden of establishing good moral character. There are three phases in State Bar Court moral character proceeding. First phase: applicant must present enough evidence to establish prima facie showing of good moral character. Second phase: if applicant make prima facie showing of good moral character, Committee of Bar Examiners (Committee) must rebut applicant's prima facie showing with evidence of bad moral character. Third phase: if Committee rebuts applicant's prima facie showing, burden shifts to applicant to prove rehabilitation from misconduct or other bad character evidence established by Committee. Parties' burden of proof is by clear and convincing evidence in second and third phases.

[2a-h] **161 Standards of Proof/Standards of Review – Duty to Present Evidence**
2602 Issues in Admissions Moral Character Proceedings – Special Procedural Issues – Burdens of Proof
2657 Issues in Admissions Moral Character Proceedings – Good Moral Character Not Found – Other Factors

Although applicant's burden to establish prima facie showing of good moral character is relatively low, affirmative showing of good moral character is required. Prima facie case of good moral character is not established by default by mere absence of moral turpitude. Where applicant merely showed he graduated from college and law school; was continuously employed for 20 years but had not worked in many years; held several licenses that were inactive; had security clearance that ended almost 20 years prior to most recent moral character application; and none of applicant's personal references testified on his behalf at trial or submitted letters affirming applicant's good moral character, Review Department affirmed hearing judge's finding that applicant did not establish prima facie showing of good moral character and declined to recommend applicant for admission to practice law in California.

ADDITIONAL ANALYSIS

None.

OPINION

RIBAS, J.

Applicant D[1] appeals a May 27, 2022 Hearing Department decision affirming an adverse moral character determination that he lacks the requisite moral character for admission as an attorney. In this appeal, Applicant D argues the Committee of Bar Examiners of the State Bar (Committee) did not establish he lacks the requisite good moral character. He also raises various constitutional challenges, alleges the Committee used vague standards to deny him a positive moral character determination, and asserts error in discovery and evidentiary rulings. The Committee does not seek review and agrees with the hearing judge's decision.

After independent review of the record (Cal. Rules of Court, rule 9.12), we affirm the decision of the hearing judge that Applicant D did not make the required prime facie showing of good moral character. As the resolution of this issue is dispositive, we do not address Applicant D's remaining issues presented on review.

I. BACKGROUND

Applicant D twice submitted an "Application for Determination of Moral Character" (moral character application) to the Committee. The first moral character application, submitted in 2006, was denied in February 2009. He did not timely perfect a request for review to this court and the Committee's decision became final. Applicant D was advised he could submit another moral character application in two years. Applicant D's second moral character application was submitted to the Committee in January 2018. He understood that both the 2006 and 2018 moral character applications were submitted under penalty of perjury and that he had a continuing duty to make disclosures. Applicant D submitted four amendments to his 2018 moral character application in September and December 2018, March 2020, and March 2021. Approximately two weeks after Applicant D submitted his final amendment and following a recorded informal interview, the Committee issued a written determination that Applicant D had not established his burden of showing good moral character. In its March 19, 2021 letter, the Committee articulated that the reasons for its determination were Applicant D's lack of candor, lack of respect for the judicial process, insufficient rehabilitation, and his general failure to establish he was of good moral character.

Applicant D sought and received review by the Committee pursuant to rule 4.47.1. Among other contentions, Applicant D argued the Committee's decision was based on "vague, arbitrary[,] and subjective statements" and inadmissible evidence of disqualifying conduct. Applicant D claimed he did not need to establish rehabilitation as there was no misconduct or evidence of bad moral character that required rehabilitation. The Committee was unpersuaded, and in a June 21, 2021 letter, notified Applicant D of the adverse decision. It repeated the reasons it set forth in its March 19 letter and added that his lack of insight was a considered factor.

Pursuant to rule 4.47 and rule 5.461, Applicant D filed an application for a moral character proceeding in the Hearing Department on August 23, 2021. Trial was held on March 9 and 10, 2022, during which Applicant D was the only witness. At the close of Applicant D's case-in-chief, the Committee argued Applicant D did not meet his initial burden of proof and moved to dismiss the proceeding, which was denied. After the close of evidence, Applicant D filed a closing brief, and the matter was submitted on March 24.

The hearing judge issued her decision affirming the Committee's moral character determination on May 27, 2022. She found, inter alia, that Applicant D did not meet his burden of proof to establish a prima facie showing of good moral

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 of State Bar, tit. 5, Discipline, Rules Proc. of State Bar, rule 5.159(E).) However, the underlying proceedings and hearings in this moral character matter remain confidential, and the applicant, who we refer to as Applicant D, has not waived confidentiality. (Rules of State Bar, tit. 4, Admissions and Educational Stds., rule 4.4 [applicant records are confidential].) All further references to rules are to the Rules of the State Bar; rules beginning with a "4" are admission rules under title 4 and rules beginning with a "5" are to the Rules of Procedure under title 5.

character.[2] Applicant D submitted a motion for reconsideration on June 13, which was denied on July 19. Applicant D filed a request for review pursuant to rule 5.151. Following the submission of briefs, we heard oral argument on February 16, 2023.

II. MORAL CHARACTER PROCEEDINGS

[1a] The California Supreme Court may admit an applicant to practice law upon certification by the Committee that the applicant has fulfilled the requirements for admission. (Bus. & Prof. Code, § 6064;[3] rule 4.1; *Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1067.) One of the requirements is that the applicant be of good moral character. (§ 6060, subd. (b); *Kwasnik v. State Bar*, *supra*, 50 Cal.3d at p. 1067.) This is because "[a] lawyer's good moral character is essential for the protection of clients and for the proper functioning of the judicial system itself. [Citation.]" (*In re Glass* (2014) 58 Cal.4th 500, 520.)

A. Legal Framework

[1b] The applicant bears the burden of establishing good moral character. (*In re Gossage* (2000) 23 Cal.4th 1080, 1095 [burden rests upon applicant for admission to prove own moral fitness].) A moral character proceeding in the State Bar Court has three phases. First, the applicant must present enough evidence to make a prima facie showing of good moral character. (*In re Menna* (1995) 11 Cal.4th 975, 984; *Lubetzky v. State Bar* (1991) 54 Cal.3d 308, 312.) Even though it is the applicant who bears the burden of proof, all reasonable doubts are ordinarily resolved in favor of the applicant. (*Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 937.) A moral character proceeding is a de novo one, and the judge is not limited to those matters considered by the Committee. (Rule 5.460.)

[1c] If an applicant makes a prima facie showing, the matter then moves to the second phase during which the Committee must rebut an applicant's prima facie showing with evidence of bad moral character. (*Lubetzky v. State Bar*, *supra*, 54 Cal.3d at p. 312.) If the Committee rebuts the applicant's prima facie showing, the proceeding enters the third phase in which the burden shifts back to the applicant to prove his rehabilitation from the misconduct or other bad character evidence established by the Committee. (*Ibid*.) In the second and third phases, the parties' burden of proof is 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].) The California Supreme Court has long held that an applicant can be denied admission based on conduct that would not result in disbarment of a licensed attorney. (*In re Stepsay* (1940) 15 Cal.2d 71, 75.)

B. Applicant D Failed to Establish a Prima Facie Showing of Good Moral Character

Applicant D asserts that in presenting a prima facie case of good moral character, he need only establish the absence of moral turpitude. He contends that other than a 2006 speeding ticket in South Dakota, he does not have a criminal record, and he has "not violated the rights of any other person." Applicant D claims that by default, he has shown a respect for laws, others, and the judicial process, and the absence of any disqualifying act shows he has met his prima facie burden that he possesses good moral character. We note the hearing judge reminded Applicant D at the pre-trial conference and again at trial that he had the

2. The hearing judge found in the alternative that the Committee rebutted any prima facie showing of good moral character with sufficient evidence of bad acts, such as Applicant D: (1) failing to disclose numerous lawsuits and other legal proceedings on his 2018 moral character application and amendments; (2) being removed as a personal representative of his mother's estate due to a probate court's determination that he was not meeting his statutory and fiduciary obligations; (3) pursuing legally unsupportable litigation; (4) being declared a vexatious litigant in one of multiple lawsuits he filed against his neighbor; and (5) providing dishonest deposition testimony. The judge also found that Applicant D did not present evidence of rehabilitation, because he asserted, as he does on review, that he had done nothing improper that required rehabilitation.

3. All further references to sections are to the Business and Professions Code unless otherwise noted.

initial burden to establish a prima facie case of *good* moral character. Disregarding this admonition, and on at least two occasions, Applicant D informed the judge he would proceed with his case by rebutting the Committee's case "in advance." As discussed below, Applicant D's strategy to focus on refuting the Committee's evidence is not a substitute for his own affirmative burden of proof at the prima facie stage.

[2a] A prima facie case of good moral character is not established by default. While an applicant's burden is relatively low, an affirmative showing of good moral character is required. (*Konigsberg v. State Bar of California* (1961) 366 U.S. 36, 41 ["an applicant must initially furnish enough evidence to make a prima facie case"]; *In re Glass*, *supra*, 58 Cal.4th at p. 520 [applicant must present evidence that is "sufficient to establish a prima facie case"]; *In re Gossage*, *supra*, 23 Cal.4th at pp. 1095-1096 ["the applicant presents a prima facie case of good character and the Committee rebuts with evidence of bad character"].)

As set forth in rule 4.40(B), "good moral character includes qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the law, and respect for the rights of others and the judicial process." Applicant D directs us to his application and its amendments for affirmative evidence of his good moral character, specifically citing his education and employment history, various licenses and certifications, and personal references. We consider each in turn.

1. Education and Employment

For several years following high school, Applicant D had intermittent periods of employment, and then he attended college in Los Angeles from September 1978 to February 1980.[4] While attending college, he was occasionally employed at the Los Angeles International Airport. From March 1982 to August 2000, Applicant D worked at three different companies as a manufacturing engineer, with his most significant period of employment occurring at an aerospace company from June 1987 to April 1999. Meanwhile, he earned a Bachelor of Science degree in 2000. The last job Applicant D held was as an aircraft systems engineer from August 2000 to April 2002. Applicant D attended law school in Los Angeles beginning in January 2003 and earned his Juris Doctor degree in January 2007. Applicant D has not passed the California Bar exam, although he has spent several years studying for it.

[2b] That Applicant D graduated from college and law school is not itself evidence of good moral character. If Applicant D had provided evidence of high marks or academic awards, for example, this could have been considered in conjunction with other evidence to make a prima facie case. (See, e.g., *Siegel v. Committee of Bar Examiners* (1978) 10 Cal. 3d 156, 160-164 [prima facie case established by ample evidence, including evidence of high scholarly achievement in high school, college, and law school].) And while Applicant D was continuously employed for 20 years, he has not worked since 2002. Thus, any attribute of good moral character that his prior steady employment reveals, such as, potentially, trustworthiness, is of the distant past and of limited value.

2. Licenses

Turning to Applicant D's various licenses, in February 1980, he was licensed as an aircraft mechanic from the Federal Aviation Administration (FAA), although the license is currently inactive. From June 1982 to April 1999, he received a secret security clearance from the Defense Industrial Security Clearance Office (DISCO) while employed at the aerospace company. In December 1992, the FAA granted him a commercial pilot license, which is currently inactive. In August 2017, he received from the California Bureau of Real Estate a salesperson license, which states, "This license is issued in a nonworking status. The licensee may not perform licensed activities." Indeed, Applicant D testified that he is not permitted to sell real estate. **[2c]** Hence, the evidence shows that the most recent *active* license or credential Applicant D held was his security clearance in 1999.

4. These are the dates Applicant D identified in his September 26, 2018 amendment, which differ slightly from the dates provided in his original 2018 moral character application. This minor discrepancy does not affect the outcome of this case.

Applicant D argues that his commercial pilot license reflects good moral character because it "subjected him to the possibility of regulatory violations," and he has no such violations. Since there is no evidence that Applicant D ever utilized his pilot license, his assertion has little, if any, value. (Cf. *Hall v. Committee of Bar Examiners* (1979) 25 Cal.3d 730, 735 [that applicant had a current license to operate employment agency and did so full-time with no recent complaints lodged with the agency overseeing the license was considered as part of a prima facie case].)

Applicant D further contends that his security clearance demonstrates that the federal government "entrusted [him] with national security secrets for life" and required an extensive background investigation, citing title 50 United States Code (U.S.C.) section 3341 and a 2017 op-ed article.[5] First, title 50 U.S.C. section 3341 is part of the Intelligence Reform and Terrorism Prevention Act of 2004, which was not in effect when Applicant D held a security clearance, and thus, cannot be relied on to describe the quality of investigation he underwent, the scope of security clearance he held, or any post-employment obligations. (*See* Intelligence Reform and Terrorism Prevention Act of 2004, Pub.L. No.108-458 (Dec. 17, 2004) 118 Stat. 3638, title III § 3001.) Second, Applicant D's statements do not provide any evidence as to the type of information sought in the background investigation that could illuminate his good moral character. **[2d]** And third, resolving any reasonable doubt in favor of Applicant D, even if we assumed that a background investigation reflected his good moral character at the time, it is not evidence of Applicant D's good moral character currently or in the recent past.

[2e] Regarding Applicant D's inactive salesperson license, that application seeks information about prior criminal convictions, pending criminal charges, sex offender registration, adverse actions on business or professional licenses, pending disciplinary actions on licenses, and whether there have been any adverse actions by an administrative agency or professional association regarding a breach of ethics or unprofessional conduct—to which Applicant D responded in the negative (with the exception of a 2006 speeding violation). This is not evidence of good moral character, because the information does not result in *affirmative* evidence of Applicant D's good character. And finally, we find that his inactive license as an aircraft mechanic itself is not evidence of good moral character, but rather, is evidence of a skill acquired by Applicant D.[6]

3. Personal References

[2f] Lastly, Applicant D notes that he provided personal references on his application, and indeed there are five listed. In admissions cases, "'significant weight' [is given] in making a prima facie case to testimonials from attorneys on an applicant's behalf [Citations.]." (*Lubetzky v. State Bar*, *supra*, 54 Cal.3d at p. 315, fn. 3.) Of his five references, one was from an attorney who had known Applicant D for a year. The remainder consisted of individuals from Applicant D's past employment and others whom Applicant D had known for many years. However, what is noteworthy is that none of these individuals submitted letters affirming Applicant D's good moral character or testified on his behalf at trial. Even if not from an attorney, some evidence from those vouching for an applicant's good character, in addition to other evidence, has long been a hallmark of a successful prima facie case. (*In re Garcia* (2014) 58 Cal.4th 440, 446 ["numerous individuals" including an attorney, law school professor, and administrative law judge praised applicant]; *Lubetzky v. State Bar*, *supra*, 54 Cal. 3d at p. 314 [testimony, declarations, and letters from attorneys, state senator, colleagues, former teachers, schoolmates, and neighbors attested to applicant's good moral character]; *Kwasnik v. State Bar*, *supra*, 50 Cal.3d at p. 1068 [letters from seven judges, seven attorneys, and one pastor praising applicant's integrity and reputation, professionally and personally]; *Hall v. Committee of Bar Examiners*, *supra*, 25 Cal.3d at p. 735 [testimony from two non-attorney witnesses averring to applicant's good moral character]; *Greene v. Committee of Bar Examiners* (1971) 4 Cal.3d 189, 192 [numerous favorable letters of recommendation]; *Hallinan v. Committee of Bar Examiners* (1966) 65 Cal.2d 447, 453-454 [letters and testimony of attorney, judge, prosecutor, two state assemblymen, and law professor affirming applicant's good character]; *In re Stepsay*, *supra*, 15 Cal. 2d at p. 76 [letters from judges

5. The op-ed article is not part of the record on review.

6. Applicant D did not provide evidence or even allege that there was a background investigation associated with this license that could reflect his good moral character.

and attorneys regarding applicant's honesty, integrity, and good character].)

[2g] In sum, we are left with Applicant D's stable employment that lasted until 2002, a security clearance that ended almost 20 years prior to his 2018 moral character application in addition to other inactive licenses, and not a single witness who vouched, either by testimony or in writing, for his good character. Although the bar is low, we find Applicant D's submission does not meet the threshold to establish a prima facie case of good moral character.

III. CONCLUSION

[2h] Based upon our independent review of the record, we affirm the hearing judge's finding that Applicant D did not make a prima facie showing of good moral character. A failure to make a prima facie showing of good moral character is outcome determinative; therefore, we need not address Applicant D's remaining arguments on appeal.[7] We decline to recommend Applicant D for admission to practice law in California.

WE CONCUR:

HONN, P. J.
McGILL, J.

7. Resolution of Applicant D's other arguments would not alter our finding that he failed to make a prima facie showing of good moral character. Applicant D challenges the hearing judge's failure to admit several exhibits, some of which he did not even introduce at trial, that pertain to his effort to undercut the Committee's rebuttal evidence, rather than to establish his good moral character at the prima facie stage. Similarly, he contests the judge's denial of his motion to compel discovery, which he described in his motion to compel as his "effort to discover the specific disqualifying act(s) upon which the Committee based its decision to deny [his] moral character application." We, accordingly, find this issue is not relevant to establishing his prima facie case. Finally, his federal and state constitutional claims that the Committee violated his substantive due process rights, his rights under the Privileges and Immunities Clause of the Fourteenth Amendment to the United States Constitution, and that the Committee did not afford him equal protection of the law as a self-identified older, white male, are directed at the Committee's actions and are not pertinent to his burden of making a prima facie showing.

State Bar Court
Review Department

In the Matter of

SANJAY BHARDWAJ

A Member of the State Bar

No. SBC-22-R-30503

Filed August 8, 2023

SUMMARY

This opinion addresses various reinstatement procedural matters. Following his disbarment, petitioner sought reinstatement to the practice of law. The hearing judge dismissed petitioner's reinstatement petition with prejudice, finding that petitioner failed to comply with the discipline costs payment requirement nor properly filed a motion to establish a payment plan. Petitioner also failed to show proof of passage of the Multistate Professional Responsibility Examination within one year prior to filing his reinstatement petition, as required by the Rules of Procedure of the State Bar. Petitioner appealed. The Review Department held that the hearing judge did not abuse her discretion in dismissing petitioner's reinstatement petition. The Review Department affirmed the dismissal but did so without prejudice, as the dismissal was made pursuant to rule 5.441(E) of the Rules of Procedure of the State Bar. The Review Department held that the hearing judge may dismiss a reinstatement petition pursuant to rule 5.441(E) if petitioner fails to comply with filing and prefiling requirements under rule 5.441, but the hearing judge is not prohibited from holding a reinstatement hearing.

COUNSEL FOR PARTIES

For State Bar of California: Peter Allen Klivans, Esq.

For Respondent: Sanjay Bhardwaj, in pro. per

HEADNOTES

[1a-i] **167 Standards of Proof/Standards of Review – Abuse of Discretion**
2505 Regulatory Proceedings – Issues in Reinstatement Proceedings – Special Procedural Issues – Interpretation of Rules of Procedure, Div. 7, Ch.3 (rules 5.440-5.447)
2509 Regulatory Proceedings – Issues in Reinstatement Proceedings – Special Procedural Issues – Other Procedural Issues
2590 Regulatory Proceedings – Issues in Reinstatement Proceedings – Miscellaneous Issues in Reinstatement Proceedings

Reinstatement proceedings are governed under rule 5.440 et seq. of Rules of Procedure of State Bar. Rule 5.441(B) requires petitioner for reinstatement to satisfy certain requirements prior to filing reinstatement petition and must attach proof of compliance to petition. Failure to comply with any requirement is grounds to dismiss reinstatement petition pursuant to rule 5.441(E). Rule 5.441(B)(2) requires petitioner to submit proof of discipline costs payment, unless petitioner files motion for extension of time for payment or has already been granted extension which has not expired at time of filing reinstatement petition. Pursuant to rule 5.441(B)(2) and Business and Professions Code section 6086.10, payment of discipline costs is condition of *applying* for reinstatement. Where petitioner did not pay discipline costs prior to applying for reinstatement, but attached payment plan motion to reinstatement petition but did not file such motion in underlying disciplinary case, and motion was not accompanied by completed financial statement in form prescribed by State Bar Court as required by rule 5.130(B), dismissal was appropriate under rule 5.441(E), and hearing judge's dismissal of reinstatement petition was not abuse of discretion. Hearing judge may dismiss reinstatement petition pursuant to rule 5.441(E) if petitioner fails to comply with filing and prefiling requirements under rule 5.441, but hearing judge was not prohibited from holding reinstatement hearing.

[2a-d] **2505 Regulatory Proceedings – Issues in Reinstatement Proceedings – Special Procedural Issues – Interpretation of Rules of Procedure, Div. 7, Ch.3 (rules 5.440-5.447)**
2509 Regulatory Proceedings – Issues in Reinstatement Proceedings – Special Procedural Issues – Other Procedural Issues
2590 Regulatory Proceedings – Issues in Reinstatement Proceedings – Miscellaneous Issues in Reinstatement Proceedings

Under rule 5.445(A) of Rules of Procedure of State Bar, petitioner for reinstatement who was previously disbarred must, inter alia, pass a professional responsibility exam within one year prior to filing reinstatement petition. Pursuant to rule 5.445(A)(1), proof of timely passing professional responsibility examination is not prefiling requirement and passing Multistate Professional Responsibility Examination may be proven during reinstatement process.

[3] **167 Standards of Proof/Standards of Review – Abuse of Discretion**

Test for abuse of discretion is whether court exceeded bounds of reason, all circumstances before it being considered. To prevail on claim of error, abuse of discretion and actual prejudice resulting from ruling must be established.

[4a-b] **2505 Regulatory Proceedings – Issues in Reinstatement Proceedings – Special Procedural Issues – Interpretation of Rules of Procedure, Div. 7, Ch.3 (rules 5.440-5.447)**

2509 Regulatory Proceedings – Issues in Reinstatement Proceedings – Special Procedural Issues – Other Procedural Issues
2590 Regulatory Proceedings – Issues in Reinstatement Proceedings – Miscellaneous Issues in Reinstatement Proceedings

Under rule 5.441(B) of the Rules of Procedure of State Bar, petitioner seeking reinstatement must satisfy certain requirements prior to filing reinstatement petition and must attach proof of compliance to petition. Prefiling requirement as to discipline costs contains exception to requirement that proof of payment must be attached if petitioner *files* motion to extend time for payment. Rule 5.441(B)(2) does not expressly state whether motion to extend time for payment of discipline costs based on financial hardship must be filed in reinstatement case or underlying disciplinary case; rather, rule requires that filing of such motion be made "under these rules." As motion for extension of time to pay discipline costs seeks to modify order issued in underlying disciplinary case, Review Department held motion must be filed in that disciplinary case.

[5] **2505 Regulatory Proceedings – Issues in Reinstatement Proceedings – Special Procedural Issues – Interpretation of Rules of Procedure, Div. 7, Ch.3 (rules 5.440-5.447)**
2509 Regulatory Proceedings – Issues in Reinstatement Proceedings – Special Procedural Issues – Other Procedural Issues
2590 Regulatory Proceedings – Issues in Reinstatement Proceedings – Miscellaneous Issues in Reinstatement Proceedings

When court clerk accepted petition that commenced reinstatement proceeding, such acceptance did not equate to determination that petitioner had satisfied all prefiling requirements under rule 5.441(B) of Rules of Procedure of State Bar.

[6a-b] **105.20 Electronic Service of Process (rule 5.26.1)**

For purposes of electronic service, "[p]rior consent of the party . . . to be served electronically is not required." (Rules Proc. of State Bar, rule 5.4(28).) Rule 5.4(29), which governs service to non-attorneys, provides that party's electronic service address is email address provided to court and parties for service of documents. Rule 5.26.1(D) states that party's initial electronic service address is deemed valid unless party filed change of electronic service address. Where petitioner provided email address in attachment to reinstatement petition; never filed change of electronic service address; attended conference noticed electronically after receiving by email information for joining conference by video; did not inform hearing judge or Office of Chief Trial Counsel (OCTC) during conference that email address should not be used to communicate with petitioner, Review Department concluded (1) petitioner's email address was deemed valid under rule 5.4(29) and (2) since rule 5.26.1(B) permits party to electronically serve document that is not initial pleading to other party's email address as defined under rule 5.4(29), OCTC's electronic service to petitioner of motion to dismiss was proper. Although petitioner asserted he never received OCTC's email containing motion to dismiss, electronic service is deemed complete at time of transmission or at time electronic notification was sent. (Rule 5.26.1(G).) Even if electronic service to petitioner was done in error, it was harmless and not prejudicial to petitioner, because petitioner was not precluded from presenting challenges to dismissal to hearing judge and, in fact, did so in motion for reconsideration.

[7] **119 Generally Applicable Procedural Issues – Other Pretrial Matters**
192 Miscellaneous General Issues in State Bar Court Proceedings – Constitutional Issues – Due Process/Procedural Rights

2509 Regulatory Proceedings – Issues in Reinstatement Proceedings – Special Procedural Issues – Other Procedural Issues
2590 Regulatory Proceedings – Issues in Reinstatement Proceedings – Miscellaneous Issues in Reinstatement Proceedings

Although petitioner did not file opposition to Office of Chief Trial Counsel's motion to dismiss, where petitioner presented due process and evidentiary challenges in motion for reconsideration after receiving dismissal order, and hearing judge properly considered petitioner's arguments on merits before issuing order denying reconsideration, petitioner had not shown petitioner entitled to relief under Code of Civil Procedure section 473, subdivision (b).

[8] 146 Evidentiary Issues – Judicial Notice

Rule 5.104(H)(2) of Rules of Procedure of State Bar permitted hearing judge to take judicial notice of State Bar Court records relevant to proceedings. Where (1) petitioner had not claimed records were incomplete or not authentic; (2) petitioner requested that Review Department take judicial notice of same disciplinary case; (3) reinstatement petition instructed that petitioner must continue to update information contained in petition whenever changes to information occur and must promptly file updates with State Bar Court; and (4) petitioner filed updated petition prior to hearing judge denying petitioner's motion for reconsideration, hearing judge did not improperly take judicial notice of petitioner's disciplinary case or improperly consider updated reinstatement petition when hearing judge denied petitioner's motion for reconsideration.

[9] 2590 Regulatory Proceedings – Issues in Reinstatement Proceedings – Miscellaneous Issues in Reinstatement Proceedings

Unlike rules governing discipline costs and monetary sanctions that contain waiver provisions, no similar authority to waive reinstatement petition filing fee. Reinstatement filing fee is mandatory.

[10] 2502 Regulatory Proceedings - Issues in Reinstatement Proceedings – Special Procedural Issues – Waiting Period to Apply for Reinstatement
2505 Regulatory Proceedings – Issues in Reinstatement Proceedings – Special Procedural Issues – Interpretation of Rules of Procedure, Div. 7, Ch. 3 (rules 5.440-5.447)
2590 Regulatory Proceedings – Issues in Reinstatement Proceedings – Miscellaneous Issues in Reinstatement Proceedings

Limitation on earliest time to file subsequent reinstatement petition, as set forth in rule 5.442(C), was not applicable to petitioner's case, because Review Department's dismissal without prejudice did not constitute an "adverse decision." Petitioner is therefore not bound by two-year filing restriction prescribed under rule 5.442(C).

ADDITIONAL ANALYSIS

None.

OPINION

RIBAS, J.

This case presents an opportunity to address various reinstatement procedural matters. After being disbarred from the practice of law, petitioner Sanjay Bhardwaj filed a petition for reinstatement (petition) on May 27, 2022. The Office of Chief Trial Counsel of the State Bar (OCTC) moved to dismiss the petition, and a hearing judge exercised her discretion and dismissed Bhardwaj's petition with prejudice. The judge found that Bhardwaj: (1) failed to comply with the discipline costs payment requirement of rule 5.441(B)(2) of the Rules of Procedure of the State Bar;[1] and (2) failed to show proof of passage of the Multistate Professional Responsibility Examination (MPRE) within one year prior to filing his petition as required under rule 5.445(A)(1).

Bhardwaj appeals and argues the hearing judge erred by prematurely dismissing his petition. He claims he did not have notice of OCTC's motion to dismiss, was not afforded an opportunity to be heard, and he raises several procedural challenges. He seeks multiple remedies, including remand, or alternatively requests that he be permitted to immediately file a new petition with the filing fee waived.[2] OCTC does not appeal and requests that we affirm the judge's decision.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we find the hearing judge did not abuse her discretion in dismissing Bhardwaj's petition pursuant to rule 5.441(E). Except as modified, we affirm the dismissal, and do so without prejudice.

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND

A. Bhardwaj's Disbarment

Bhardwaj was admitted to practice law in California on December 1, 2008. He has one prior record of discipline. On June 6, 2016, OCTC filed disciplinary charges against him in State Bar Court case number 14-O-00848 (disciplinary case). Bhardwaj was ordered inactive, pursuant to Business and Professions Code section 6007, subdivision (c)(4),[3] effective May 11, 2017, when the hearing judge recommended disbarment. This court filed its opinion and also recommended that Bhardwaj be disbarred on May 1, 2019. On January 2, 2020, the Supreme Court ordered Bhardwaj disbarred from the practice of law and awarded costs to the State Bar in accordance with section 6086.10.[4] (S256601.) Bhardwaj filed a motion for a new trial and petition for rehearing, which were both denied. Thus, Bhardwaj's disbarment became effective on April 29, 2020.

B. Reinstatement Proceeding

On May 27, 2022, Bhardwaj filed his petition seeking reinstatement to the practice of law.[5] He stated in his petition that he had "filed a motion concurrent with the petition for reinstatement to be able to pay any and all disciplinary costs through an installment plan of $200 monthly." He attached to his petition an exhibit entitled, "Notice of and Motion for Approving Payment Plan for Disciplinary Costs" (payment plan motion).[6]

On July 11, 2022, the hearing judge held a status conference and discussed the timeline for the proceedings in the reinstatement case; she also ordered OCTC to file its response to Bhardwaj's petition by October 4, 2022. During the conference, the judge stated that she noticed in his petition that

1. All further references to rules are to Rules of Procedure of the State Bar unless otherwise noted.

2. Under rule 5.442(C), if a petitioner receives an adverse decision on a prior petition for reinstatement following disbarment, a subsequent petition cannot be filed for two years after the effective date of an adverse decision, unless the court orders a shorter period for good cause shown.

3. All further references to sections are to the Business and Professions Code unless otherwise noted.

4. The total amount of discipline costs assessed according to the certificate of costs was $25,404.82.

5. In accordance with rule 5.442(B), Bhardwaj waited five years from the date he was transferred to involuntary inactive status before filing his petition.

6. Bhardwaj included his email address in the caption of his payment plan motion, and the Hearing Department utilized this email address for the purpose of electronic service of its orders.

Bhardwaj had not taken the MPRE. Bhardwaj informed the judge he would be taking the August 2022 exam; consequently, the judge requested that he "file any update after the MPRE." In fact, Bhardwaj had stated in his petition that he took the March 2022 MPRE but was "not fully satisfied with his performance" and planned to retake the exam in August 2022. He also attached a copy of his March 2022 MPRE score to the petition, which showed that he received a score of 83.[7]

On July 20, 2022, OCTC filed a motion to dismiss the petition on the grounds that Bhardwaj did not comply with the filing requirements of rules 5.441(B) and 5.445(A)(1), respectively, because he failed to pay discipline costs or file a motion for an extension of time to pay costs prior to filing the petition, and he failed to pass the MPRE within one year prior to filing the petition. On August 18, the hearing judge granted OCTC's motion and dismissed Bhardwaj's reinstatement proceeding with prejudice (Dismissal Order). On August 26, Bhardwaj filed a motion for reconsideration and to set aside the dismissal (motion for reconsideration). He contended that OCTC's electronic service was improper because he never received its motion to dismiss and argued that dismissal was premature because his failure to file the payment plan motion should not be a basis to dismiss his petition. On September 8, OCTC filed an opposition to Bhardwaj's motion for reconsideration.

On September 8, 2022, Bhardwaj filed an update to his petition which included a copy of his August 11, 2022 MPRE results, showing he received a passing score of 113. On September 30, the hearing judge issued an order denying Bhardwaj's motion for reconsideration (Order Denying Reconsideration) and affirmed the dismissal of the petition for reinstatement.

On October 4, 2022, Bhardwaj filed a request for review of the hearing judge's dismissal of his petition. After the parties satisfied the briefing schedule, oral arguments were heard on May 18, 2023, and the matter was submitted the same day.

II. DISCUSSION[8]

A. Requirements for Reinstatement

[1a] Reinstatement proceedings are governed under rule 5.440 et seq. Rule 5.441 provides a list of "filing requirements" that a petitioner must comply with when seeking reinstatement; failure to comply with any of the requirements is "grounds to dismiss the petition." (Rule 5.441(E).) Some of these requirements are designated as "prefiling" requirements set forth in rule 5.441(B). Specifically, rule 5.441(B)(2) requires a petitioner to submit proof of payment of discipline costs under section 6086.10, subdivision (a), unless the petitioner falls within one of two exceptions. **[2a]** Additionally, under rule 5.445(A), a petitioner for reinstatement who previously had been disbarred must: (1) pass a professional responsibility exam (PRE) 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.

B. Dismissal of the Petition Was Appropriate

[1b] After a petition is filed, the hearing judge may dismiss it pursuant to rule 5.441(E) if a petitioner fails to comply with the filing and prefiling requirements under rule 5.441. The hearing judge dismissed Bhardwaj's petition with prejudice, concluding that the petition contained

7. Like the hearing judge, we note that Bhardwaj did not receive a passing score on his March 2022 MPRE. Rule 4.59 of title 4, division 1, chapter 5 of the Rules of the State Bar states that the passing score of the MPRE is determined by the Committee of Bar Examiners (the Committee). The judge properly took judicial notice that the Committee had determined the passing score to be 86. (See rule 5.104(H)(4).)

8. In his briefs, Bhardwaj requests that we take judicial notice of the court dockets in this proceeding and in his disciplinary case. OCTC does not oppose the request. We grant Bhardwaj's request, in part, and take judicial notice of the court docket in State Bar Court case number 14-O-00848 and note that the docket in the instant proceeding (SBC-22-R-30503) is already part of the record on review. (Rule 5.156(B) [Review Department may take judicial notice of Supreme Court or State Bar Court decisions and orders arising out of any State Bar Court proceeding involving party who is subject of proceeding under review].)

incurable prefiling deficiencies under rule 5.441(B)(2), because Bhardwaj had not satisfied the discipline costs payment requirement, and under rule 5.445(A)(1), as Bhardwaj had failed to timely pass the MPRE.

[1c] We agree but clarify that, pursuant to rule 5.441(B)(2), paying discipline costs is a condition of applying for reinstatement while, pursuant to rule 5.445(A)(1), passing the MPRE may be proven during the reinstatement process. In any event, dismissal was appropriate under rule 5.441(E).

We review the hearing judge's dismissal of Bhardwaj's petition for an abuse of discretion. (*In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690 [hearing judge's procedural ruling reviewed under abuse of discretion standard].) **[3]** The test for an abuse of discretion is whether the court "exceeded the bounds of reason, all of the circumstances before it being considered." (*H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1368.) 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.)

1. The payment of discipline costs is a condition of applying for reinstatement.

It is undisputed that Bhardwaj did not pay the assessed discipline costs at or prior to the time he filed his petition. He argues that the payment of discipline costs is a condition of reinstatement, not a condition of applying for reinstatement, and he was entitled to a hearing on the matter.

[1d] Rule 5.441(B) states that "[p]rior to filing the petition, the petitioner must satisfy the following requirements and must attach proof of compliance to the petition . . . ." One of these requirements concerns the payment of discipline costs and monetary sanctions. Specifically, rule 5.441(B)(2) provides that "[u]nless the petitioner files a motion for extension of time for payment under these rules, or has already been granted an extension which has not expired at the time of the filing of the petition," the petitioner must submit proof of payment of the aforementioned costs and sanctions. This part of the rule derives from section 6140.7, which states in relevant part that "unless time for payment of discipline costs is extended pursuant to subdivision (c) of [s]ection 6086.10,[9] costs assessed against a licensee . . . who is actually suspended or disbarred shall be paid as a condition of applying for reinstatement of his or her license to practice law . . . ." Thus, the plain language of the statute requires discipline costs to be paid as a condition of applying for reinstatement.

[1e] Bhardwaj correctly asserts that our unpublished Opinion and Order (modified June 5, 2019) in the underlying disciplinary case informed him that the imposed discipline costs must be paid "as a condition of reinstatement or return to active status."[10] Section 6140.7, which previously required the payment of discipline costs as a condition of reinstatement, was amended by the Legislature, effective January 1, 2019, to expressly require the payment of such costs "as a condition of *applying* for reinstatement." (Italics added.) Although our modified Opinion and Order did not capture the amended language, we informed Bhardwaj in the same paragraph that discipline costs were "enforceable as provided in section 6140.7," as did the Supreme Court when it issued its disbarment order and assessed costs, which is the effective order. Furthermore, a petitioner is bound by the statutes that are in effect when applying for reinstatement. Because the amendment to section 6140.7 clarifies that payment of discipline costs is required as a condition of applying for reinstatement, it was not error for the hearing judge to dismiss the petition without a hearing if such proof did not accompany the petition and if one of the exceptions, discussed below, did not apply. (Rule 5.441(E).)

9. Section 6086.10, subdivision (c), states that a petitioner may be granted relief from costs or an extension of time to pay costs "in the discretion of the State Bar, upon grounds of hardship, special circumstances, or other good cause."

10. Bhardwaj also relies on rule 5.137, but that rule concerns the imposition and payment of monetary sanctions, which is not at issue in this case.

2. Bhardwaj did not properly file his payment plan motion.

Bhardwaj contends that an exception to the rule requiring the payment of disciplinary costs applies because he filed a motion for extension of time to pay. (See Rule 5.441(B)(2).) He argues that his payment plan motion was attached to his petition and was, therefore, filed, and the hearing judge should have inquired with the clerk regarding the status of his motion. An extension of time to pay discipline costs may be granted in the discretion of the State Bar Court for good cause shown. (§ 6086.10, subd. (c); see *In the Matter of Respondent J* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 273.) OCTC asserts that the filing of the payment plan motion was a prefiling requirement with which Bhardwaj failed to comply, as it was not filed in his underlying disciplinary case.

[1f] [4a] Rule 5.441(B) states that a petitioner is required to satisfy certain requirements prior to filing the petition and must attach proof of compliance to the petition. The prefiling requirement pertaining to discipline costs contains an exception to the requirement that proof of their payment must be attached—if the petitioner "*files* a motion for extension of time for payment under these rules"—which is the essence of Bhardwaj's payment plan motion that was attached to his petition. (Rule 5.441(B)(2), italics added.) The fact that the pertinent exception is written in the present tense indicates that filing a motion for extension of time for payment is something that can be accomplished simultaneous to the filing of the petition. Meanwhile, all other prefiling requirements contained in rule 5.441(B)(1), (3), and (4) are written in the past perfect tense, indicating that they are to have been completed—or perfected—before the filing of the petition. Rule 5.441(B)(2) does not specifically require Bhardwaj to submit proof with his petition that he filed the motion; rather, the proof of compliance refers only to proof that he paid disciplinary costs, which would not occur if he was seeking an extension of time to pay those costs.

[4b] Rule 5.441(B)(2) does not expressly state whether a motion to extend time for payment of discipline costs based on financial hardship must be filed in the reinstatement case or in the underlying disciplinary case. Instead, the rule requires that the filing of such a motion be made "under these rules." Motions for relief or an extension of time to comply with costs orders are decided by the Hearing Department and governed by rule 5.130(B), which provides that motions based on financial hardship be filed "as soon as practicable under the circumstances" or "within 30 days after the effective date of . . . the filing of a Supreme Court order assessing costs." Because a motion for extension of time to pay discipline costs is seeking to modify an order issued in the underlying disciplinary case, we find that it must be filed in that disciplinary case.[11]

We are not persuaded by Bhardwaj's claim that he was repeatedly told by the State Bar Court that it lacked jurisdiction to hear motions he filed in the underlying disciplinary case; thus, he could not file his payment plan motion in his disciplinary case. Bhardwaj is referring to a Motion for a New Trial and/or Alternative Relief (motion for new trial) that he filed in the Review Department on January 13, 2020, and shortly thereafter in the Hearing Department on January 21, even though he had been informed by the Review Department in a July 5, 2019 order that his case had been transmitted to the Supreme Court on June 26, 2019. After judges in the Hearing Department and Review Department dismissed his motions for lack of jurisdiction due to his case having been transmitted to the Supreme Court (see *In the Matter of Applicant B* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 731, 733), Bhardwaj pressed on, filing motions for reconsideration in both departments, which were again dismissed for lack of jurisdiction. On April 29, 2020, the Supreme Court not only denied Bhardwaj's motion for new trial and petition for rehearing that he filed on January 16, but it also imposed costs and closed the case. Rule 5.130(B) specifically contemplates that motions for extension of time to pay discipline costs will occur *after* the Supreme Court issues an order imposing

11. Hence, rule 5.130(B) requires that the case number be placed on the motion, which was lacking in Bhardwaj's payment plan motion.

costs, indicating that jurisdiction returns to the State Bar Court to address any such motion.

[1g] Even if the payment plan motion had been considered to have been properly filed, it still did not satisfy a threshold requirement. As OCTC correctly points out, rule 5.130(B) requires that motions for relief for complying or extending the time to comply with discipline costs based on financial hardship must be accompanied by a completed financial statement in the form prescribed by the State Bar Court, and Bhardwaj's payment plan motion lacked the requisite financial statement.[12] Thus, even with us resolving all reasonable doubts in Bhardwaj's favor[13] and assuming the payment plan motion attached to his petition should have been deemed filed with the State Bar Court, we conclude dismissal would still be appropriate under rule 5.441(E), because Bhardwaj's payment plan motion claiming financial hardship did not conform with rule 5.130(B).

[5] We equally reject Bhardwaj's argument that because the clerk filed his petition, it "means that the petition met the requirements [of the rules governing reinstatement] on its face." While there is no published case law that discusses rule 5.441(B), we discussed the prefiling discipline costs requirement in *In the Matter of MacKenzie* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 56, which interpreted former rule 662(c), the predecessor to rule 5.441(B).[14] It was undisputed that the petitioner in *MacKenzie* had not filed proof of payment of discipline costs when filing his petition for reinstatement. This court concluded it would be unreasonable for the clerk, when filing the petition, to determine whether a petitioner's pleadings satisfied the discipline cost requirement because a clerk is not a judicial officer, and the clerk's role is "limited to ministerial duties." (*In the Matter of MacKenzie*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 63, fn. 9.) We further concluded that only the court can determine whether a petitioner has been relieved of costs payment obligations. (*Ibid*.) We apply the same reasoning in this case to find that when a clerk accepts a petition that commences a reinstatement proceeding, such acceptance does not equate to a determination that the petitioner has satisfied all requirements under rule 5.441(B).

3. Proof of timely passage of the MPRE is not a prefiling requirement.

Bhardwaj also asserts that the hearing judge erroneously assumed that the MPRE is a prefiling requirement. He argues that because the requirement—that he "pass a professional responsibility examination within one year prior to filing the petition" (rule 5.445(A)(1))—is contained within the rule describing his burden of proof, passage of the MPRE is not a prefiling requirement; rather, it is an element to be proven during the course of the reinstatement process. OCTC argues that passing the MPRE prior to the filing of the petition makes the requirement a de facto prefiling requirement.

[2b] We agree with Bhardwaj only to the extent that proof of timely passing a PRE is not a prefiling requirement. The language in rule 5.445(A) is derived from the California Rules of Court. Specifically, California Rules of Court, rule 9.10(f), requires applicants for readmission or reinstatement to pass a PRE, establish their rehabilitation and present moral qualifications, and demonstrate present ability and learning in the general law. But it does not compel applicants to prove they passed a PRE as a prefiling requirement.

[2c] We previously found that former rule 665(a), concerning passage of a PRE, was a requirement that could be proven during the reinstatement process as opposed to one that must be established upon filing the petition. (*In the Matter of Sheppard* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 91, 99.) OCTC discounts our holding in *Sheppard*, arguing that we were

12. In its responsive brief, OCTC requests that we take judicial notice of the fact that the required form entitled "Financial Declaration in Support of Motion for Relief" is available on the State Bar Court's website. We grant OCTC's request. (Rule 5.156(B).)

13. Reasonable doubts are ordinarily resolved in favor of the petitioner. (See *Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 937.)

14. Former rule 662(c) stated in pertinent part that "[n]o 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."

interpreting ambiguous language in former rule 665(a). However, in holding that the PRE passage could be established during the reinstatement process, we determined that our interpretation was consistent with and would not impose greater burdens on a petitioner than those established by former rule 951(f) of the California Rules of Court.[15] (*Ibid.*) We reaffirmed this specific position, as well as the general proposition that the Rules of Procedure of the State Bar are subordinate to and must not conflict with the California Rules of Court, in *In the Matter of Mackenzie*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 64, stating, "We thus made it clear that the interpretation we were adopting saved rule 665(a) [of the Rules of Procedure] from impermissibly conflicting with rule 951(f) of the California Rules of Court." Thus, while rule 5.445(A)(1) requires that a petitioner pass a PRE within one year prior to filing a petition for reinstatement, a petitioner is not required to *show* compliance upon the filing of the petition, which is consistent with California Rules of Court, rule 9.10(f).[16] As we noted in *Sheppard*, a petitioner who takes this approach without being able to show proof at the hearing "takes a calculated risk," as an adverse decision on the petition could follow, and the petitioner would presumably be prohibited from filing another petition for reinstatement for two more years. (*In the Matter of Sheppard*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 100.)

[2d] However, we disagree with Bhardwaj's claim that because he passed the Attorneys' Examination, which contains a professional responsibility component, he timely satisfied the requirement that he pass a PRE. The obligatory passage of a PRE is a requirement of the California Rules of Court separate and apart from the passage of the Attorneys' Examination, which is demonstrated by the Supreme Court's consideration of the PRE requirement:

> [U]pon request of the State Bar we have recently adopted an amendment to California Rules of Court rule 952(d), effective January 1, 1976, relating to applications for readmission or reinstatement by former members of the bar who have been disbarred or have resigned with prejudice. New rule 952(d) requires all such applicants not only to establish their present moral fitness and knowledge of the law, but also to take and pass the Professional Responsibility Examination. In its letter of transmittal to this court the State Bar explained that the latter requirement, now imposed on all persons seeking admission to the California bar for the first time, becomes "even more essential" in the case of individuals who, once admitted, have demonstrated by their misconduct their failure to live up to the ethical standards of the profession.

(*Segretti v. State Bar* (1976) 15 Cal.3d 878, 890.) To adopt Bhardwaj's view would render the addition of the PRE passage requirement in the California Rules of Court superfluous, and accordingly, we reject it. (See *In re C.H.* (2011) 53 Cal.4th 94, 103 ["It is a settled principle of statutory construction, that courts should 'strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous.' [Citations]"].)

[1h] Since Bhardwaj's petition was deficient from the outset by failing to show proof of payment of discipline costs or by correctly filing a motion to extend such payment, the hearing judge appropriately exercised her discretion and

15. The California Rules of Court was subsequently reorganized, and rule 951(f) became rule 9.10(f).

16. In *Sheppard*, we also rejected the State Bar's assertion that our interpretation would strain or waste the resources of the State Bar. (*In the Matter of Sheppard*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 100.)

dismissed the proceeding without a hearing.[17] (*In the Matter of MacKenzie*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 66; rule 5.441(E).) Considering that dismissal was proper under rule 5.441(E), we need not address whether Bhardwaj established his burden of proof for reinstatement under rule 5.445.

C. Bhardwaj's Additional Arguments Are Unavailing[18]

On review, Bhardwaj claims he did not receive notice of OCTC's motion to dismiss due to improper service, thereby resulting in his case being dismissed without a hearing. He further asserts errors by the hearing judge in denying his motion for reconsideration.

1. There was no error with OCTC's electronic service of its motion to dismiss.

Bhardwaj asserts that he was not served with OCTC's motion to dismiss and had no notice of the motion so that he could respond. He states that because he never consented to electronic service, he was not properly served with OCTC's motion and never actually received it. He also claims that he is entitled to relief under Code of Civil Procedure section 473, subdivision (b), because the reinstatement proceeding was dismissed against him through "surprise," and the hearing judge failed to schedule a hearing before ruling on OCTC's motion. We find that his arguments lack merit.

[6a] Contrary to Bhardwaj's claim, rule 5.4(28) states that for the purposes of electronic service, "[p]rior consent of the party . . . to be served electronically is not required." And pursuant to rule 5.4(29)(c), which governs service to non-attorneys, a party's electronic service address is the email address provided to the court and parties for service of documents. Rule 5.26.1(D) states that a party's initial electronic service address is deemed valid, as defined under rule 5.4(29), unless the party has filed a change of electronic service address. The evidence in the record establishes that Bhardwaj provided his email address in an attachment when he filed his petition—it was listed in the contact header of the payment plan motion. Thereafter, he never filed a change of electronic service address. Additionally, on June 3, 2022, the court electronically issued to the parties a Notice of Assignment and Notice of Initial Status Conference. The court subsequently provided to the parties, via email, information for joining the conference by video. Bhardwaj received the email and attended the initial status conference, but he did not inform the hearing judge or OCTC during the conference that his email address should not be used to communicate with him.

[6b] Under these circumstances, we find that Bhardwaj's email address was deemed valid under rule 5.4(29). Accordingly, since rule 5.26.1(B) permits a party to electronically serve a document that is not an initial pleading to the other party's email address as defined under rule 5.4(29), we find that OCTC's electronic service to Bhardwaj of its motion to dismiss was proper. And although Bhardwaj asserts that he never received OCTC's email containing its motion to dismiss, electronic service is deemed complete at the time of transmission or at the time the electronic notification of service is sent. (Rule 5.26.1(G).) Even if electronic service to Bhardwaj was done in error, it was harmless and not prejudicial to him, because he was not precluded from presenting his challenges to the dismissal to the hearing judge, and he in fact did so in his motion for reconsideration. (See *In the Matter of Johnson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 241 [absent actual prejudice, party not entitled to relief].)

[7] Finally, Bhardwaj's argument that we should grant a remand based on his claim of alleged surprise under Code of Civil Procedure,

[1i] 17. We disagree with the assertion by OCTC that if the petition is deficient under rule 5.441, then the hearing judge is required to dismiss the petition. Rule 5.441(E) states only that such a deficiency will be grounds for dismissal, but it does not go so far as to *prohibit* a judge from holding a hearing. (See, e.g., *In the Matter of MacKenzie*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 66 [judge can consider failure to timely pay costs as adverse factor in petitioner's rehabilitation].)

18. We have independently reviewed each argument set forth by Bhardwaj on review and those not specifically addressed in this opinion are rejected as having no merit.

section 473, subdivision (b),[19] is not persuasive. Even though Bhardwaj did not file an opposition to OCTC's motion, he presented his due process and evidentiary challenges in his motion for reconsideration after receiving the Dismissal Order, and the hearing judge properly considered his arguments on the merits before issuing the Order Denying Reconsideration. Thus, we find that Bhardwaj has not shown he is entitled to relief under section 473, subdivision (b), of the Code of Civil Procedure.

2. The hearing judge's consideration of evidence to which Bhardwaj objects was not error.

Bhardwaj raises additional arguments claiming that the hearing judge improperly took judicial notice of his disciplinary case and improperly considered the updated petition he filed on September 8, 2022, when she denied his motion for reconsideration. We disagree.

[8] Rule 5.104(H)(2) permitted the hearing judge to take judicial notice of State Bar Court records relevant to the proceedings. On review, Bhardwaj has not claimed that the records in question are incomplete or not authentic, which could have prevented the judge from taking judicial notice of them. (See rule 5.104(H)(3).) And as previously discussed, Bhardwaj requested that we take judicial notice of the same disciplinary case. Bhardwaj asserts, without citing any authority, that the judge did not have jurisdiction over the matter to consider the updated pleading, and he was prejudiced. Bhardwaj is incorrect. The language on the petition instructs that a petitioner must "continue to update the information contained in the petition whenever changes to the information occur and must promptly file the updates with the State Bar Court." Bhardwaj filed his updated petition prior to the hearing judge denying his motion for reconsideration, and we find it was, therefore, properly considered by the judge. Accordingly, we reject Bhardwaj's argument as lacking merit.

3. Bhardwaj is not entitled to a waiver of the petition filing fee.

[9] Bhardwaj requests that the $1,600 filing fee imposed by rule 5.441(C) be waived. Bhardwaj cites no authority in support of his request. The rule governing the commencement of a reinstatement proceeding demonstrates that the filing fee is mandatory. To initiate a reinstatement proceeding, a petitioner must file and serve a petition and "pay[] the *required* fee." (Rule. 5.440(C), italics added.) The compulsory nature of the fee is reiterated in rule 5.441(C) explaining the consequence of not paying the fee: "The petition must include a filing fee of $1,600, which will be given to [OCTC] to defray incurred costs. The Clerk will reject the petition for filing if the fee is not included." The obligation is further underscored in section 6.a of the petition form, which specifically notifies petitioners that the court will not waive the filing fee. Unlike the rules governing discipline costs and monetary sanctions that contain waiver provisions, we discern no similar authority to waive the petition filing fee, and Bhardwaj has not identified any. (See § 6086.10, subd. (c); rule 5.130(B); rule 5.137(E)(4).) Accordingly, we deny his request.

III. CONCLUSION

We affirm the hearing judge's decision to dismiss Sanjay Bhardwaj's petition for reinstatement to the practice of law but do so without prejudice because the dismissal is made pursuant to rule 5.441(E).[20]

WE CONCUR:

HONN, P. J.
McGILL, J.

19. Code of Civil Procedure section 473, subdivision (b), states, in part, that a "court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."

[10] 21. The limitation on the earliest time to file a subsequent petition, as set forth in rule 5.442(C), is not applicable to Bhardwaj's case, because our dismissal without prejudice does not constitute an "adverse decision." Consequently, Bhardwaj is not bound by the two-year filing restriction prescribed under rule 5.442(C) if he chooses to file a second petition.

State Bar Court
Review Department

In the Matter of

RESPONDENT CC

A Member of the State Bar

No. SBC-22-O-XXXXX

Filed October 2, 2023

SUMMARY

Respondent, with two prior records of discipline, sought to participate in the State Bar Court's Alternative Discipline Program (ADP). As part of the ADP evaluation process in the instant matter, the parties entered into a Stipulation Regarding Facts and Conclusions of Law (ADP Stipulation). The Hearing Department issued an order accepting respondent into the ADP, and the Office of Chief Trial Counsel thereafter filed a petition for interlocutory review of the hearing judge's order. OCTC asserted that respondent was ineligible for the ADP under rule 5.382(C)(1) and (C)(3) of the Rules of Procedure of the State Bar.

The Review Department found that rule 5.382(C)(3) was not applicable in this matter because, while the parties stipulated that respondent's misconduct harmed one set of clients, the stipulation did not provide for *significant* harm as required by the rule.

Rule 5.382(C)(1), however, provides that an attorney will not be accepted to participate in the ADP if the "the stipulation of facts and conclusions of law, including aggravating factors . . . shows that the attorney's disbarment is warranted, despite mitigating circumstances." In interpreting rule 5.382(C)(1), the Review Department looked to (1) the rule's plain, commonsense meaning and concluded "is warranted" did not have a plain meaning; (2) extrinsic aids, such as a regulation's purpose, legislative history, public policy, and the regulatory scheme of which the regulation is a part, which were limited in this instance; and (3) case law. In looking at case law, the Review Department concluded that under rule 5.382(C)(1), an attorney is ineligible for ADP when disbarment is required by the attorney's misconduct and the aggravating circumstances. Only those attorneys who would otherwise necessarily be disbarred should be prohibited from being accepted into the ADP, not just those attorneys who have a substantial possibility of disbarment. After considering the evidentiary record and applicable case law, the Review Department (1) held that the ADP Stipulation, including aggravating circumstances, did not require respondent's disbarment, despite mitigating circumstances; (2) did not conclude that respondent was ineligible to participate in the ADP under rule 5.382(C)(1) or (C)(3); and (3) affirmed the Hearing Department's order accepting respondent into the ADP and denied OCTC's request relief.

COUNSEL FOR PARTIES

For State Bar of California: Danielle Adoracion Lee

For Respondent: Anthony Patrick Radogna

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 5.150-5.162)**
166 Standards of Proof/Standards of Review – Independent Review of Record
167 Standards of Proof/Standards of Review – Abuse of Discretion
3150 Issues in Alternative Discipline Program Proceedings – Review (rule 5.389)

In reviewing Hearing Department order accepting respondent into State Bar Court's Alternative Discipline Program (ADP), Review Department was required to follow rule 5.389 of State Bar Rules of Procedure (rule). Rule 5.389 required Review Department to independently review record and permitted Review Department to adopt findings, conclusions, and decision or recommendation different from those of ADP Judge, rather than standard of review of abuse of discretion or error of law applied for interlocutory petitions under rule 5.150.

[2] **199 Miscellaneous General Issues in State Bar Court Proceedings – Other Miscellaneous General Issues**

As rule of procedure promulgated by State Bar, rule 5.382(C)(1) is administrative regulation.

[3a-d] **199 Miscellaneous General Issues in State Bar Court Proceedings – Other Miscellaneous General Issues**
3110 Issues in Alternative Discipline Program Proceedings – Interpretation of Rules of Procedure, Div. 6, ch. 5 (rules 5.380-5.389)
3120.10 Issues in Alternative Discipline Program Proceedings – Eligibility to Participate (rule 5.381) – Participation Granted
3122 Issues in Alternative Discipline Program Proceedings – Grounds for Ineligibility (rule 5.382(C))

Under rule 5.382(C)(1) of State Bar Rules of Procedure, attorney will not be accepted to participate in Alternative Discipline Program (ADP) if stipulation of facts and conclusions of law, including aggravating factors, shows attorney's disbarment is warranted, despite mitigating circumstances. In interpreting rule 5.382(C)(1), Review Department looked to rule's plain, commonsense meaning and concluded "is warranted" did not have plain meaning since it had wide range of meaning when used as verb. When plain meaning or intent cannot be determined directly from regulation's language, Review Department may look to extrinsic aids, including regulation's purpose, public policy, legislative history, and regulatory scheme which regulation is part. Review Department can also look to case law. Review Department concluded, after looking at case law, that under rule 5.382(C)(1), attorney is ineligible for ADP when disbarment is *required* by attorney's misconduct and aggravating circumstances. Only attorneys who would otherwise necessarily be disbarred should be prohibited from acceptance into ADP, not just attorneys who have substantial possibility of disbarment. After considering evidence in record and applicable case law, Review Department concluded that ADP Stipulation, including aggravating circumstances, did not require respondent's disbarment, despite mitigating circumstances. Review Department, therefore, did not find that respondent was ineligible to participate in ADP under rule 5.382(C)(1). Review Department affirmed Hearing Department's order accepting respondent into ADP and denied relief requested by Office of Chief Trial Counsel.

[4] **801.20 General Issues re Application of Standards – Purpose of standards (see also Topic Numbers 802.10, 802.30)**

801.90 General Issues re Application of Standards – Other General Issues re Standards
3122 Issues in Alternative Discipline Program Proceedings – Grounds for Ineligibility (rule 5.382(C))
3190 Issues in Alternative Discipline Program Proceedings – Other Issues in Alternative Discipline Program Proceedings

Utilizing disciplinary standards in evaluating Alternative Discipline Program (ADP) ineligibility under rule 5.382 of State Bar Rules of Procedure was inappropriate, as disciplinary standards are used to determine appropriate disciplinary sanction in particular case. ADP evaluation by Program Judge, however, does not, in itself, result in disciplinary sanction.

[5] **199 Miscellaneous General Issues in State Bar Court Proceedings – Other Miscellaneous General Issues**
3190 Issues in Alternative Discipline Program Proceedings – Other Issues in Alternative Discipline Program Proceedings

Legislative intent of Business and Professions Code section 6230 was for State Bar to establish means and ways to identify and rehabilitate attorneys with substance use or mental health disorder affecting competency so attorneys so afflicted may be treated and returned to legal practice in manner that will not endanger public health and safety. ADP was specifically established by State Bar to accomplish this goal.

[6] **3122 Issues in Alternative Discipline Program Proceedings – Grounds for Ineligibility (rule 5.382(C))**

Rule 5.382(C)(3) provides that attorney is not eligible for ADP if current misconduct by attorney involves acts of dishonesty, moral turpitude, or corruption that resulted in significant harm to administration of justice or to one or more clients. Where parties stipulated respondent violated Business and Professions Code section 6106 by making false statements to former employee, and respondent's misconduct harmed one set of clients, but stipulation did not provide for *significant* harm as required by rule, Review Department found rule 5.382(C)(3) was not applicable.

[7] **510 Aggravation – Prior Record of Discipline**
3190 Issues in Alternative Discipline Program Proceedings – Other Issues in Alternative Discipline Program Proceedings

For purpose of evaluating respondent for Alternative Discipline Program (ADP), both respondent's prior disciplines and current misconduct were considered as one extended period, even though respondent's misconduct in three instant matters overlapped with respondent's prior disciplines. Review Department held case law holding that aggravating weight of prior discipline is reduced if prior misconduct occurred during same time period as instant misconduct applied in determining weight to give to aggravating circumstance which is different task than evaluating respondent for ADP.

ADDITIONAL ANALYSIS

None.

OPINION

McGill, J

In April 2022, the Office of Chief Trial Counsel of the State Bar (OCTC) filed a notice of disciplinary charges against respondent CC in the instant matter.[1] In June 2022, respondent filed a request for participation in the Alternative Discipline Program (ADP)[2] pursuant to rule 5.381(B) of the Rules of Procedure of the State Bar. Pursuant to rule 5.382, the Hearing Department issued an order later that month accepting respondent into ADP.[3] OCTC then filed a petition for interlocutory review of the order, asserting that respondent is ineligible for the ADP under rule 5.382(C)(1) and (C)(3).[4] Respondent filed a response to the petition, and OCTC later filed its reply.

[1] In undertaking a review of the Hearing Department order, we are required to follow rule 5.389 of the Rules of Procedure of the State Bar. Unlike the abuse of discretion or error of law standard of review that generally applies for rule 5.150 petitions,[5] we must "independently review the record and may adopt findings, conclusions, and a decision or recommendation different from those of the Program Judge." (Rules Proc. of State Bar, rule 5.389(B)(1).) Pursuant to rule 5.150(C) and (G), we review the record as provided to us by OCTC in its appendix, along with a confidential appendix filed the same date.[6]

I. RESPONDENT'S STIPULATED MISCONDUCT

Under rule 5.382(C)(1) of the Rules of Procedure of the State Bar, an attorney will not be accepted to participate in the ADP if "the stipulation of facts and conclusions of law, including aggravating factors . . . shows that the attorney's disbarment is warranted, despite mitigating circumstances." As part of the ADP evaluation process by the Program Judge in the instant matter and pursuant to rule 5.382(A)(2), the parties filed a Stipulation Regarding Facts and Conclusions of Law (ADP Stipulation), which states respondent engaged in professional misconduct in five client matters and two probation violation matters (*Respondent CC III*). The ADP Stipulation also referenced respondent's two prior discipline matters (*Respondent CC I* and *Respondent CC II*), in which respondent stipulated to misconduct and the Supreme Court ordered discipline. We summarize the stipulations in this section to explain respondent's misconduct and evaluate that misconduct in light of the issues raised by OCTC's appeal.

A. *Respondent CC I*

Respondent's first discipline matter began with charges filed against him in July 2020, and was resolved with a stipulation signed in November and approved by the court in December (2020 Stipulation). Respondent admitted to professional misconduct spanning from 2015 to 2017 and involving 31 clients. Respondent stipulated that he violated former rule 3-110 of the California Rules

1.We do not identify respondent by name because we rely on certain confidential information. (Rules Proc. of State Bar, rule 5.388.)

2. Both "ADP" and "Program" are used in the Rules of Procedure of the State Bar to refer to the State Bar Court's Alternative Discipline Program.

3. As part of respondent's acceptance into ADP three months ago, respondent agreed to a high and a low level of discipline as set forth in the Confidential Statement of Alternative Dispositions by the Program Judge. In 2014, respondent established a solo practice that caused significant stress for him, resulting in his abuse of alcohol beginning in 2017 and his use of cocaine in 2018. Respondent entered the State Bar's Lawyer Assistance Program (LAP) in 2022. The Program Judge found a nexus between respondent's substance abuse issues and the charged misconduct as required pursuant to rule 5.382(A)(3).

4. As OCTC has limited its appeal of the Hearing Department order to respondent's ineligibility under rule 5.382(C)(1) and (C)(3), we presume that all other conditions for respondent's participation in ADP under rule 5.382(A) have been satisfied.

5. See rule 5.150(K) of the Rules of Procedure of the State Bar.

6. We previously struck the filing of the confidential appendix. OCTC then filed a motion to seal the confidential appendix and a motion for reconsideration of our order. Respondent did not file a response to these motions. As OCTC has now requested the confidential appendix be sealed and explained that the documents contained therein were mentioned in OCTC's petition, we find them necessary to be included in the appended record under rule 5.150 of the Rules of Procedure of the State Bar. Therefore, we vacate the portion of our previous order striking the confidential appendix from the record. We grant OCTC's motion for reconsideration and its request to seal the confidential appendix.

of Professional Conduct (failure to perform competently)[7] by filing perfunctory petitions that failed to identify the issues of each case in 31 matters, failing to file motions for a stay in 31 matters, failing to pay a filing fee in 27 matters, failing to file a required opening brief in 12 matters, and failing to attach an underlying order to the petition in four matters. He also stipulated that he violated Business and Professions Code section 6103[8] 13 times by failing to follow orders issued to correct errors in his filings and violated former rule 3-700(A)(2) four times by constructively withdrawing from employment without taking reasonable steps to avoid foreseeable prejudice to his client. Respondent also agreed that he failed to inform the State Bar within 30 days of being disbarred by the Board of Immigration Appeals on January 25, 2018, in violation of section 6068, subdivision (o)(6).[9]

As part of the 2020 Stipulation, the parties agreed to a number of aggravating circumstances as provided under standard 1.5:[10] multiple acts; a pattern of misconduct, including that he had "completely abandoned" three clients; significant harm, including that several of his clients had their cases dismissed because they could not obtain new representation; and all 31 clients were immigrants and thus vulnerable victims. As for mitigating circumstances under standard 1.6, the parties stipulated to a number of those: credit for extraordinary good character; entering into the stipulation; payment of restitution to at least 24 clients; remorse and recognition of wrongdoing; and severe family and emotional stress.

The 2020 Stipulation recognized that respondent's misconduct "demonstrated a habitual disregard of his clients' interests," but the presumption of disbarment under standard 2.7(a)[11] was not "necessary or warranted" due to respondent's highly significant mitigating circumstances. Consequently, the Supreme Court ordered respondent actually suspended for 30 months and until he proves rehabilitation; the suspension was effective in May 2021.[12]

B. *Respondent CC II*

Respondent's second discipline matter was resolved with a stipulation signed and accepted by the court in June 2021 (2021 Stipulation). He admitted to professional misconduct in one matter involving two clients, which occurred from October 2017 through June 2018. Respondent allowed his paralegal to accept fees and provide legal services to his clients in violation of former rule 1-300(A). He also failed to refund his clients' fees after he terminated the representation in violation of former rule 3-700(D)(2); failed to inform them that he had withdrawn from their case in violation of section 6068, subdivision (m); and failed to avoid reasonably foreseeable prejudice to those clients upon termination of the employment in violation of former rule 3-700(A)(2).

The parties stipulated to aggravating circumstances including prior record of discipline, though reduced due to the overlapping misconduct from the 2020 Stipulation; multiple acts; vulnerable victims; and pattern of misconduct from the 2020 Stipulation. The parties stipulated to mitigating circumstances including credit for entering into the

7. The former California Rules of Professional Conduct were in effect until November 1, 2018, and we refer to them as "former rules."

8. All further references to sections are to the Business and Professions Code.

9. The January 25, 2018 order also disbarred respondent from practicing before the Department of Homeland Security and the United States Immigration Courts.

10. 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, unless otherwise noted.

11. Standard 2.7(a) provides for disbarment when performance, communication, or withdrawal violations demonstrate "habitual disregard of client interests."

12. The parties relied on *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498 to support this level of discipline. In *Valinoti*, that attorney received a three-year actual suspension when he engaged in a "habitual failure to give reasonable attention to the handling of the affairs" of his nine clients over two and a half years. His misconduct was very similar to respondent's misconduct, but Valinoti additionally engaged in acts of moral turpitude that included aiding the unauthorized practice of law and intentional misrepresentations to an immigration judge, along with serious aggravating circumstances that included, inter alia, a lack of candor to the State Bar.

2021 Stipulation and incorporated the mitigation from the 2020 Stipulation given the overlapping time period.

As for discipline, the 2021 Stipulation again referred to a "habitual disregard of [respondent's] clients' interests," and his "significant mitigating circumstances." The 2021 Stipulation concluded that disbarment was not necessary or warranted, and no progressive discipline was needed, such that only a stayed suspension was necessary. Consequently, the Supreme Court ordered respondent be placed on a stayed suspension, effective in November 2021, along with a one-year stayed probation subject to conditions, including that respondent pay his clients $500 in restitution within the first 30 days of his probation.

C. *Respondent CC III* (Instant Matter)

In the ADP Stipulation, respondent stipulated to professional misconduct in three immigration matters, two criminal defense matters, and two probation violation matters related to *Respondent CC I* and *Respondent CC II*. The ADP Stipulation covers misconduct from March 2017 through January 2022.

1. Immigration Matters

Respondent stipulated to misconduct related to three immigration clients, all occurring in 2017.[13] In the first matter, respondent agreed he failed to inform his client about his suspension in violation of section 6068, subdivision (m), and former rule 3-700(A)(2); failed to perform competently in violation of former rule 3-110(A) by failing to file a motion to reopen an immigration matter; failed to provide an accounting in violation of former rule 4-100(B)(3); failed to provide a refund of unearned fees in violation of former rule 3-700(D)(2); and failed to respond to State Bar communications regarding the investigation of this matter in August 2021 in violation of section 6068, subdivision (i). In the second matter, respondent agreed he again failed to provide an accounting, issue a refund, and respond to the State Bar between March 2021 and July 2021 regarding the investigation. In the third matter, respondent accepted an attorney's fee from a third party without informed written consent from his client in violation of former rule 3-310(F). Also, he again failed to inform the client about his suspension and other significant developments in the case;[14] failed to perform competently by failing to substitute a new attorney to his client's case, reacquire the client's confiscated property, file an appellate brief in March 2018, and respond to an appellate order; and failed to respond to the State Bar in September 2021 and January 2022 regarding the investigation. In addition, he agreed he violated section 6106 by making false statements to his former employee regarding her responsibilities to the client and the status of the client's case.

2. Criminal Defense Matters

Respondent stipulated to misconduct in two criminal defense matters. The first matter involved respondent's representation from January 2020 to May 2021, and the second matter involved representation from June 2020 to May 2021. In the first matter, he failed to inform his client of his suspension in violation of section 6068, subdivision (m), and rule 1.16(d);[15] failed to provide an accounting in violation of rule 1.15(d)(4); and failed to respond to State Bar communications regarding the investigation of this matter in July and August 2021 in violation of section 6068, subdivision (i). In the second matter, respondent failed to perform competently by failing to appear at a hearing in March 2021 to address a bench warrant issued against his client in violation of rule 1.1(a). He again failed to inform his client of his suspension, to provide an accounting, and to respond to State Bar communications in August 2021 regarding the investigation.

13. The first and third matters occurred during respondent's representation of two clients from March to November 2017; the second matter was for representation around October and November 2017.

14. He did not tell his client that the attorney handling the case had left respondent's firm, that he had not filed a brief in the client's petition for review in March 2018, and that the appellate court had issued an order in August 2018 requiring the client to move for voluntary dismissal or show cause otherwise.

15. All further references to rules are to the Rules of Professional Conduct, effective November 1, 2018, unless otherwise noted.

3. Probation Violations

Respondent stipulated he did not comply with certain probationary conditions as required from his two prior disciplines, thus violating section 6068, subdivision (k). Regarding *Respondent CC I*, respondent did not submit quarterly reports from October 2021 to October 2022 (five times) and did not file a rule 9.20 compliance declaration by the June 2021 deadline. His first attempt to file his compliance declaration was timely but rejected, and he correctly submitted it again about one month later, which was past the deadline. Regarding *Respondent CC II*, respondent did not schedule a meeting with his probation case specialist by November 2021, and he failed to provide proof of restitution by December 2021.[16]

4. Aggravation and Mitigation in the ADP Stipulation

Regarding aggravation, the parties stipulated that respondent's two prior records were of significant weight because he was on notice to his misconduct following the filing of charges in July 2020. The parties also stipulated that these acts indicated a common pattern spanning across all three stipulations, along with aggravation for multiple acts, significant harm, failure to make restitution, and vulnerable victims. As for mitigation, the parties stipulated that the ADP Stipulation entitled respondent to mitigation. While the parties also stipulated that other mitigating factors applied (evidence of extraordinary good character, remorse and recognition of wrongdoing, and severe family and financial stress), the mitigation applied to only the immigration matters because they overlapped with the prior discipline, and did not apply to the criminal defense and probationary matters.

II. RESPONDENT'S MISCONDUCT DOES NOT WARRANT DISBARMENT

[3a] We have not previously decided a matter that applies rule 5.382(C)(1) of the Rules of Procedure of the State Bar.[17] Therefore, we begin with the pertinent language from that rule: "An attorney will not be accepted to participate in the [ADP] if (1) the stipulation of facts and conclusions of law, including aggravating factors . . . shows that the attorney's disbarment is warranted, despite mitigating circumstances." In interpreting this rule, we look to its "plain, commonsense meaning" in its application. (*Berkeley Hills Watershed Coalition v. City of Berkeley* (2019) 31 Cal.App.5th 880, 890 [administrative regulations interpreted like statutes].) Employing this principle, we focus on the operative phrase, "is warranted," and conclude that this phrase does not have a plain meaning as it has a wide range of meanings when used as a verb.[18]

[3b] When a plain meaning or intent "'cannot be discerned directly from the language of the regulation, we may look to a variety of extrinsic aids, including the purpose of the regulation, the legislative history, public policy, and the regulatory scheme of which the regulation is a part.' [Citation.]" (*Berkeley Hills Watershed Coalition v. City of Berkeley*, *supra*, 31 Cal.App.5th at p. 891.) While we have limited extrinsic aids to guide us here,[19] we can also turn to case law. In *Natural Resources Defense Council v. Fish & Game Com.*, 28 Cal.App.4th 1104, the definition of the phrase "may be warranted" is discussed as part of an evidentiary standard under the California Endangered Species Act. The court found that the word "may" in that phrase describes a "substantial possibility" because "may" is "an auxiliary verb qualifying the meaning of another verb by expressing ability, competency, liberty, permission, possibility, probability or contingency." (*Id*. at

16. Regarding *Respondent CC II*, the ADP Stipulation also states he failed to submit four quarterly reports from January 2022 to October 2022, but this misconduct appears to overlap with *Respondent CC I*.

[2] 17. As a rule of procedure promulgated by the State Bar, rule 5.382(C)(1) is an administrative regulation.

18. According to Black's Law Dictionary, "warrant" as a verb has many meanings, including (1) "[t]o guarantee the security of"; (2) "to give warranty of"; (3) "[t]o promise or guarantee"; (4) "to justify"; or (5) "to authorize." (Black's Law Dict. (11th ed. 2019) p. 1902, col. 1.)

19. On July 14, 2023, OCTC filed a request for judicial notice of the prior versions of the Rules of Procedure of the State Bar governing ADP eligibility. Respondent did not object to the request. We find good cause and grant OCTC's request. Over the years, the eligibility rules have changed, narrowing who is eligible for ADP.

p. 1119.) From that discussion, we discern that the phrase "disbarment is warranted" would require more than a "substantial possibility" of disbarment because our rule does not use "may." Using that definition, we interpret rule 5.382(C)(1) of the Rules of Procedure of the State Bar to convey that disbarment is conclusive or guaranteed, which is also consistent with the way "warrant" is defined in Black's Law Dictionary. In other words, under rule 5.382(C)(1), we conclude that an attorney is ineligible for ADP when disbarment is required by his misconduct and the aggravating circumstances.

[3c] The narrowing of ADP eligibility under the Rules of Procedure of the State Bar also supports such an interpretation. In 2004, there were no limitations on eligibility; in 2007, attorneys who were subject to summary disbarment were ineligible; and, since 2009, attorneys are ineligible if "disbarment is warranted," which we interpret as disbarment is *required*. OCTC's arguments in the petition also support this interpretation at times: "Attorneys who have committed serious misconduct warranting disbarment should in fact be disbarred and required to submit to a full reinstatement proceeding to show rehabilitation from their substance or mental health issues, and not through an abbreviated ADP proceeding."[20] Such a statement supports the conclusion that only those attorneys who would otherwise *necessarily* be disbarred should be prohibited from acceptance into ADP, not just those attorneys who have a substantial possibility of disbarment.[21]

In its appeal, OCTC mainly argues that the disciplinary standards, particularly standards 1.8(a) and 2.7(a), along with relevant case law and section 6001.1, "compel" respondent's disbarment. **[4]** First, we conclude that utilizing the disciplinary standards in evaluating ineligibility under rule 5.382 of the Rules of Procedure of the State Bar is inappropriate because standard 1.1 states that the disciplinary standards are "a means for determining the appropriate disciplinary sanction in a particular case." While using the standards would be appropriate in determining potential dispositions for discipline by the Program Judge pursuant to rule 5.384, an evaluation by the Program Judge does not, in itself, result in a disciplinary sanction. **[5]** Second, while we agree that "protection of the public shall be paramount" concerning the disciplinary functions of the State Bar as stated in section 6001.1, we are also reminded that section 6230 declares the Legislature's intent to have the State Bar establish "ways and means to identify and rehabilitate attorneys with impairments due to substance use or a mental health disorder affecting competency so that attorneys so afflicted may be treated and returned to the practice of law in a manner that will not endanger the public health and safety."[22] The State Bar has specifically established the ADP to accomplish this goal, which includes giving attorneys, like respondent with substance abuse problems who have become unable to practice law competently, the opportunity to rehabilitate and return to the practice of law.

As to OCTC's argument that relevant case law compels respondent's disbarment, it cites to a number of disbarment cases to support its conclusion that respondent is ineligible for the ADP under rule 5.382(C)(1) of the Rules of Procedure of the State Bar:[23] *Twohy v. State Bar* (1989) 48 Cal.3d 502; *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547; *In the Matter*

20. We disagree with OCTC's other description for ineligibility, that "attorneys who engage in serious misconduct [are] ineligible for participation [in ADP]." We find the word "serious" to be too vague and would disqualify more attorneys than the current grounds for ineligibility under rule 5.382(C) are intended to do. There are many attorney discipline cases involving serious misconduct that do not result in disbarment.

21. This appears to be consistent with both OCTC's and respondent's briefs regarding the appropriate level of discipline given respondent's participation in ADP, which state that disbarment should be the outcome if respondent fails to successfully complete ADP.

22. Pursuant to section 6230, the State Bar subsequently established LAP to implement the intent of the Legislature.

[6] 23. OCTC also argues that rule 5.382(C)(3) makes respondent ineligible because "respondent committed an act of moral turpitude that resulted in harm to a client . . . ." OCTC misreads the rule, which clearly states that an attorney is ineligible for ADP if "the attorney's current misconduct involves acts of moral turpitude, dishonesty, or corruption that has resulted in *significant* harm to one or more clients or to the administration of justice." (Italics added.) In the ADP Stipulation, regarding the third immigration matter, the parties stipulated that his misconduct "harmed one set of clients because his lack of communication allowed the client to be misled by respondent's former employee into thinking that their case was still being handled appropriately by respondent and his staff." Because the stipulation does not provide for significant harm, rule 5.382(C)(3) does not apply.

of Lenard (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 250; *In the Matter of Dixon* (Review Dept 1999) 4 Cal. State Bar Ct. Rptr. 23; and *In the Matter of Berg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725. Upon review, we conclude that the misconduct in these cases exceeds that of respondent's and does not support a conclusion that respondent's conduct would necessitate or require disbarment.

For instance, in *Twohy*, the Supreme Court disbarred an attorney who had been already disciplined twice and additionally had probation revoked in those matters for failing to comply with the terms of probation.[24] Twohy committed additional misconduct that occurred after the misconduct that was the subject of his earlier disciplines. The misconduct included moral turpitude and failure to communicate with another client, failure to take timely action and to appear at scheduled court appearances on his client's behalf, a failure to return an advance fee, and failure to cooperate with the State Bar investigation. (*Twohy v. State Bar*, *supra*, 48 Cal.3d at p. 510.) Twohy's misconduct resulted in a habitual disregard of his clients' interests, but the Supreme Court did not base disbarment solely on that determination. Important to the recommendation was that Twohy's actions constituted several acts of moral turpitude, occurring over two to three years, resulting in significant detriments to his client including having a bench warrant issued against him and having no ability to contact Twohy to obtain a refund of unearned fees. (See *id*. at p. 512.)

In the instant matter, respondent also stipulated to a habitual disregard of his clients' interests and misconduct involving moral turpitude. However, the moral turpitude to which respondent stipulated is less serious than the misconduct in *Twohy*.[25] OCTC's argument that respondent should be ineligible for the ADP due to a pattern or habitual disregard of client interest overlooks the role of moral turpitude in the disbarment cases it cites and the moral turpitude stated in the ADP Stipulation.[26] We find it relevant that OCTC agreed in *Respondent CC I* and *Respondent CC II* that disbarment was not "necessary or warranted" despite involving 32 client matters that demonstrated a habitual disregard of client interests.[27] However, OCTC now argues that the misrepresentations in March and April 2018

24. The misconduct in Twohy's first discipline included failure to use reasonable diligence in representing clients' interests, failure to communicate with clients, failure to return unearned fees and client funds, failure to return client files and documents, commingling client funds, and making misrepresentations to clients regarding settlement (moral turpitude). (*Twohy v. State Bar*, *supra*, 48 Cal.3d at p. 513.) He had another discipline later that year resulting in a stayed suspension and probation, which ran concurrently with the first discipline. Twohy was then suspended for failing to pass the professional responsibility examination related to his probation. While suspended, he continued to practice law, resulting in a conviction for the unlawful practice of law and another State Bar disciplinary matter for misrepresenting his status to the court, which we determined was misconduct involving moral turpitude. (*Id*. at pp. 506-507.)

25. Respondent stipulated to one violation of section 6106 for telling an attorney, his former employee, in March and April 2018 false and misleading statements regarding representation of clients with his firm, including that an appellate brief had been filed and was being handled by the firm.

26. OCTC also argues that respondent has failed to comply with his disciplinary probation conditions and case law warrants his disbarment because he is not a candidate for any new or further probation, citing to cases including *Barnum v. State Bar* (1990) 52 Cal.3d 104. In *Barnum*, the Supreme Court stated that disbarment was supported by the attorney's "poor performance on probation," but that attorney had no evidence for his claimed clinical depression, and the court emphasized such evidence was "critical to determining whether we risk exposing the public to additional harm by departing from the disbarment recommendation." (*Id*. at p. 113.) Here, we have a completely different situation, specifically the psychiatric examination used to establish the required nexus that diagnoses respondent's clinical syndromes and the LAP that provides treatment for his substance use disorders. Successful completion of LAP would be evidence that would justify the risk that the Supreme Court could not justify in *Barnum*.

[7] 27. OCTC states in its brief that respondent's misconduct in the three immigration matters as described in the ADP Stipulation "can [be treated] . . . as part of respondent's prior discipline[s] because they overlap . . . ." (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619 [aggravating weight of prior discipline reduced if prior misconduct occurred during same time period as instant misconduct].) We interpret this statement to mean that OCTC considers the three immigration matters to not be sufficient additional misconduct to necessitate or warrant disbarment as that is the conclusion stated in both the prior disciplines, but that consideration of the two criminal defense matters and the two probationary matters thus makes respondent ineligible under rule 5.382(C)(1) of the Rules of Procedure of the State Bar. However, we see no reason to not consider all of respondent's misconduct as one extended period for the purpose of evaluating him for the ADP. We do not see *Sklar* as

require respondent's disbarment. *Twohy* is not sufficiently analogous to the instant matter to come to such a conclusion.[28] Likewise, our reading of the remainder of the disbarment cases cited by OCTC reveals acts that are or equate to moral turpitude and appear to be far more serious than respondent's: bad faith, dishonesty, and breach of fiduciary duties (*Lenard*); misrepresentations to courts (*Dixon*); fraudulent billing of client (*Berg*); or the pattern of misconduct itself is moral turpitude (*Kaplan*).

We have also found cases where the Supreme Court ordered discipline less than disbarment, even where that attorney's acts demonstrated a pattern of willfully disregarding professional obligations or where the attorney had abandoned clients. First, in *Hawes v. State Bar* (1990) 51 Cal.3d 587, the attorney failed in multiple matters, to act competently, improperly withdrew from employment, failed to return unearned fees, demonstrated a lack of support of state law, showed disrespect to the courts, and failed to cooperate in a State Bar investigation. While we acknowledge that respondent's misconduct is more extensive than the misconduct in *Hawes*, we also observe that the Supreme Court's discipline order was only one year of actual discipline, far less than disbarment.[29] The *Valinoti* case, discussed *ante*, is another case where a habitual disregard was found but the discipline ordered was less than disbarment, even though serious acts of moral turpitude greater than respondent's were established. Finally, *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944 [two years' actual suspension for abandonment of clients and overreaching] and *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1 [18-month actual suspension for abandoning over 300 indigent dependency clients and failing to appear in 39 matters] demonstrate that respondent's misconduct resulting in client abandonment, while serious, does not require disbarment.

III. CONCLUSION

We acknowledge that respondent's professional misconduct for the approximately seven years that lead to his request to participate in the ADP is considerable. However, we believe that the ADP should be provided to attorneys such as respondent, even when their misconduct is considerable. In accordance with rule 5.384(B) of the Rules of Procedure of the State Bar, the ADP provides incentives for attorneys to overcome substance abuse or mental issues. If they successfully complete the program, they receive a lesser disposition than if they did not complete the program. Failure to complete ADP may result in disbarment, which is a potential risk respondent faces, and one that he has acknowledged would be appropriate if he does not complete the program.

[3d] Therefore, upon consideration of the evidence provided in the record, along with the applicable case law, we conclude that the ADP Stipulation, including aggravating circumstances, does not require respondent's disbarment, despite mitigating circumstances. We do not find that respondent is ineligible to participate in the ADP under rule 5.382(C)(1) or (C)(3). Consequently, we affirm the Hearing Department's order accepting respondent into the ADP and deny the relief requested in OCTC's petition.

WE CONCUR:

HONN, P. J.
RIBAS, J.

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limiting here, as *Sklar* applies in determining the weight to give to an aggravating circumstance, a different task than the one we are called to do here.

28. We also conclude that *Twohy* has limited application as disbarment was predicated on that attorney's substance abuse issues due to stress, which the Supreme Court indicated it was "hesitant to consider . . . as a mitigating factor." (*Twohy v. State Bar*, *supra*, 48 Cal.3d at p. 514.) *Twohy* was decided in 1989, prior to the establishment of a diversion program in 2002 by the Legislature or the ADP that was later established by the State Bar. The ADP is specifically designed to address substance abuse issues such as respondent's. (Rules Proc. of State Bar, rule 5.380.) Further, the Supreme Court determined that Twohy was unable to show that he recovered from his addiction, which also lead to the conclusion of disbarment. (*Id.* at p. 515.) Under ADP, an attorney participates over an 18- to 36-month period and is successful only when LAP certifies that the attorney has been substance-free for at least one year.

29. The Supreme Court's discipline order was based on mitigating evidence, which, in part, demonstrated Hawes's rehabilitation for slightly less than a year from his substance addiction and bipolar disorder issues. While we do not use mitigation here to evaluate respondent's ineligibility for ADP, we conclude that this case is sufficiently applicable to show that respondent's misconduct would not require disbarment.

State Bar Court
Review Department

In the Matter of

GEORGE MARTIN DERIEG

A Member of the State Bar

No. SBC-21-O-30532

Filed December 7, 2023
[As Modified following remand by Supreme Court Order on July 12, 2023]

SUMMARY

This case (1) reemphasizes the improper use of Business and Professions Code section 6068, subdivision (a), when an applicable rule of professional conduct is charged, and (2) reflects the important role of mitigation and aggravation evidence in assessing appropriate discipline. Respondent committed misconduct in a single client matter and was found culpable of failing to deposit funds in a client trust account (two counts), moral turpitude misappropriation (two counts), collecting an illegal fee, moral turpitude misrepresentation to the superior court, and seeking to mislead a judge. Respondent's misconduct was based on respondent taking an early distribution of legal fees in a probate matter, without prior court approval, and then seeking distribution of his legal fees in his accounting to the probate court without disclosing he had already been paid. The Review Department affirmed the hearing judge's discipline recommendation of a 15-month actual suspension. Respondent's misconduct was aggravated by a finding of multiple acts of wrongdoing, but respondent established sufficiently compelling mitigating circumstances demonstrating that actual suspension, not disbarment, was appropriate discipline to protect the public, the courts, and the legal profession. Where a respondent exhibits overwhelming and convincing mitigation, discipline for even very serious misconduct may be mitigated.

COUNSEL FOR PARTIES

For State Bar of California: Alex James Hackert

For Respondent: Megan Elizabeth Zavieh

HEADNOTES

[1a, b] **106.30 Generally Applicable Procedural Issues – Issues re Pleadings – Duplicative – Charges**
213.10 Substantive Issues in Disciplinary Matters Generally – Culpability – State Bar Act Violations – Section 6068(a) (Support Constitution and Laws)
290.00 Rules of Professional Conduct (RPC) Violations – Illegal or Unconscionable Fee

Where misconduct was disciplinable under former rule 4-200(A) of Rules of Professional Conduct, Business and Professions Code section 6068, subdivision (a) charge was properly dismissed, as misconduct was already disciplinable under Rules of Professional Conduct.

[2] **523 Aggravation – Multiple Acts of Misconduct – Found But Discounted or Not Relied On**

Limited weight in aggravation for multiple acts of wrongdoing, including failing to deposit client funds in client trust account, misappropriating legal fee from estate, directing misappropriation of co-counsel's fee, and seeking to mislead judge, where unique facts surrounded misappropriation, including that fees were earned but simply taken early in probate case.

[3] **582.50 Aggravation – Harm – To Client – Declined to Find**

Generalized harm due to delay, without more, does not support aggravation for significant client harm. Where respondent caused some delay, but not all delay was solely respondent's fault, and Review Department declined to speculate about harm to client's family, Office of Chief Trial Counsel did not carry its burden of proving *significant* harm by clear and convincing evidence, and Review Department did not assign aggravation under standard 1.5(j) of Standards for Attorney Sanctions for Professional Misconduct.

[4] **710.10 Mitigation – Long Practice with no Prior Discipline Record – Found**

Respondent's 11 years of practice without discipline warranted substantial weight in mitigation under standard 1.6(a), Standards for Attorney Sanctions for Professional Misconduct, as respondent established aberrational nature of misconduct: respondent expressed remorse, refunded estate without court order, took seminar on probate practice, and hired paralegal experienced in probate matters.

[5a-c] **735.10 Mitigation – Candor and Cooperation with Bar – Found**

In assigning mitigating weight for cooperation displayed to State Bar, magnitude of stipulated facts and whether there was admission to culpability are factors in assigning weight – one aspect is not determinative. Where respondent accepted hearing judge's culpability findings on review for all counts; did not challenge 15-month actual suspension; willingly provided bank records; entered into stipulation which established some culpability and conserved judicial time and resources; and agreed to admission of documents, Review Department afforded respondent substantial mitigation for cooperation even through respondent did not admit culpability at trial.

[6a-e] **740.10 Mitigation – Good Character References – Found**
765.10 Mitigation – Substantial Pro Bono Work – Found

Where 53 witnesses submitted character letters, eight of whom also testified at trial; witnesses, many of whom were attorneys, had known respondent for substantial amount of time and included people who had worked with respondent or had personal knowledge of respondent's legal work and clients who were beneficiaries of respondent's pro bono services; and witnesses (1) represented broad range of legal and general communities; (2) discussed respondent's extensive volunteer work; (3) attested to respondent's trustworthiness, honesty, and dedication to clients and community; (4) understood the charged misconduct; (5) stated respondent's misconduct was inconsistent with respondent's overall character; and (6) stated respondent provided full disclosure of respondent's misconduct, respondent's impressive evidence of good character and community service deserved compelling weight in mitigation.

[7] **745.39 Mitigation – Remorse/Restitution/Atonement – Declined to Find – Other Reason**

Where respondent promptly refunded the estate; apologized to superior court for billing escrow and receiving attorney fee prior to court authorization, and testified that respondent alerts potential probate clients about disciplinary matter and makes clear respondent cannot be paid until order by court, respondent's actions were commendable and warranted mitigating credit for remorse and recognition of wrongdoing, but mitigation only went to respondent's mishandling of client funds, not misrepresentation to court, Review Department assigned moderate weight in mitigation due to respondent's prompt efforts to correct misconduct.

[8a-f] **822.34 General Issues re Application of Standards – Part B – Standard 2.1 – Applied – Actual Suspension in Lieu of Disbarment (Standard 2.1(A)) – Sufficiently Compelling Mitigation (Standard 2.1(a))**
1091 Miscellaneous Substantive Issues re Discipline – Proportionality with Other Cases

Where mitigation for no prior record of discipline, cooperation, extraordinary good character, community service, and remorse and recognition of wrongdoing outweighed misconduct and aggravation assigned for multiple acts of misconduct, respondent's mitigation was compelling. Respondent exhibited genuine remorse, took concrete steps to atone for misappropriation, and made prompt and full restitution. Considering respondent's remorse, steps respondent took after misconduct, and respondent's long record of discipline-free practice, respondent's misconduct was aberrational. Where respondent displayed candor, cooperation, and remorse throughout disciplinary proceedings and accepted culpability and recommended discipline, while also taking efforts to prevent misconduct from occurring again, respondent's mitigation was "sufficiently compelling" under standard 2.1(a), Standards for Attorney Sanctions for Professional Misconduct, to support actual suspension as opposed to disbarment for intentional misappropriation of entrusted funds. As respondent was not danger to public, as misconduct was aberrational event, and respondent showed remorse, took corrective steps, and was forthright with potential clients and others in community, Review Department affirmed hearing judge's 15-month actual suspension discipline recommendation.

ADDITIONAL ANALYSIS

Culpability

Found

213.41	Section 6068(d)
221.10	Section 6106
280.01	Trust account/commingling
290.01	Illegal or unconscionable fee

Not Found

213.15	Section 6068(a)

Discipline

180.31	Monetary Sanctions – Recommend
1013.08	Stayed Suspension – Two years (incl. anything between 2 & 3 yrs.)
1015.06	Actual Suspension – One year (incl. anything between 1 yr. & 18 mos.)
1017.08	Probation – Two years (incl. anything between 2 & 3 yrs.)
1024	Ethics exam/ethics school

OPINION[1]

Honn, P.J.

This case illustrates two different issues important to the development of lawyer disciplinary law. First, it reemphasizes the improper use of Business and Professions Code section 6068, subdivision (a)[2] (duty of attorney to support constitutions and laws of United States and California), when an applicable rule of professional conduct is charged. Second, and most salient, this matter reflects the important role of mitigation and aggravation evidence in assessing appropriate discipline. Indeed, the facts developed in this matter represent an effective presentation of mitigation in support of a downward departure from the discipline set forth in the Standards for Attorney Sanctions for Professional Misconduct. Where, as here, a respondent exhibits overwhelming and convincing mitigation, discipline for even very serious misconduct may be mitigated.

Respondent George Martin Derieg committed misconduct in a single client matter, including misappropriating client funds and making misrepresentations to a probate court regarding those funds. A hearing judge recommended a 15-month actual suspension. The Office of Chief Trial Counsel of the State Bar (OCTC) appealed, arguing Derieg should be disbarred, or at least subject to a two-year actual suspension continuing until Derieg proves rehabilitation, fitness to practice, and learning and ability in the general law. Derieg does not appeal and asserts the hearing judge's recommendation is "more than adequate."

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we affirm the hearing judge's recommendation of a 15-month actual suspension. Derieg's mitigation weighs heavily in reducing the discipline of his serious misconduct, which was aggravated by a finding of multiple acts of wrongdoing. A 15-month actual suspension is sufficient to fulfill the purposes of discipline in this case. Derieg does not challenge culpability on review, practiced for 11 years before committing the misconduct, promptly repaid the funds, completed a seminar on probate practice, hired an experienced paralegal, and has expressed remorse. He established sufficiently compelling mitigating circumstances, demonstrating that actual suspension, not disbarment, is appropriate here. In addition, as detailed *post*, disbarment is not necessary here to protect the public, the courts, and the legal profession.

I. PROCEDURAL BACKGROUND

OCTC filed a Notice of Disciplinary Charges (NDC) on July 30, 2021. The parties filed a Stipulation as to Facts and Admission of Documents (Stipulation) on November 1. Trial was held November 16, and the parties subsequently submitted closing briefs. The hearing judge issued her decision on February 25, 2022. OCTC filed a request for review on March 29. After briefing was completed, we heard oral arguments on October 20.

On May 1, 2023, OCTC filed a petition for review of our initial opinion, challenging our interpretation of the appropriateness of alleging a violation of section 6068, subdivision (a), where an applicable rule violation is also alleged. The Supreme Court remanded this matter back to our court to reconsider this issue. In response to the Court's order, we have expanded our discussion of the statutory and case law authority supporting our position in this opinion.

II. FACTUAL BACKGROUND

The parties do not dispute the underlying factual findings in this matter: (1) Derieg took an early distribution of legal fees in a probate matter, without prior court approval, and (2) he then sought distribution in his accounting to the probate court but failed to disclose he had already been paid.[3] Derieg was counsel in a probate matter, along with

1. This modified Opinion was prompted by the Supreme Court of California's July 12, 2023 order. While the outcome set forth in the original opinion does not change, portions of the language in section III.A. have been deleted and replaced with a new analysis which expands on and clarifies the appropriate case law. In addition, other minor, non-substantive changes have been made in other parts of the opinion to complement the newly added discussion.

2. All further references to sections are to the Business and Professions Code, unless otherwise noted.

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).)

attorney Bridget Mackay, representing Jack Asvitt, who was administering his son's estate. Mackay worked on the matter until September 2016, and thereafter, Derieg continued to represent Asvitt.

Sometime before January 2017, Derieg complained to another attorney about payment issues he was having in his probate cases. The attorney advised Derieg he could secure his fees by directly billing escrow, "so long as you don't touch the payment until after the final petition is ordered."

In January 2017, the sole real property for the Asvitt estate sold. In order to avoid payment issues Derieg had while administering prior probate estates, he decided to ask his client if he could take his fee by directly billing escrow. Derieg contacted his client and discussed taking his and Mackay's fees directly from the escrow company. He told Asvitt his fees would be placed in a client trust account (CTA). Derieg then directed the escrow company to remit the fees "when escrow closes," which the escrow company did, sending a check to Mackay for $4,000, and a check to Derieg for $14,300. Derieg deposited the $14,300 check into his business checking account, not a CTA. Between January 10 and February 23, 2017, Derieg spent the $14,300 on expenses unrelated to the Asvitt estate.

Derieg then prepared the final account and petition for the estate, which the client signed on March 21, 2017. Derieg did not file the final account and petition in the superior court until May 2. In the final account and petition, Derieg asked that $14,300 in legal fees be paid to him, even though he had already been paid. In making this request, Derieg did not intend to be paid twice. He considered his petition a ratification of the fees he had already been paid.

Asvitt then consulted with attorney Linda Pasqual in May 2017, asking for her help in preparing a tax form. Thereafter, Asvitt asked Pasqual to review the final account and petition. Pasqual alerted Asvitt to the fact that Derieg was requesting fees when he had already received them. On July 20, Asvitt terminated Derieg's representation. Pasqual substituted into the probate matter on August 1, and filed a supplement to the final account and petition on that same day, alerting the court that Derieg and Mackay had already received their fees from escrow.[4] On its own motion, the court continued a hearing regarding the petition for final distribution from August 7 until November 14, due to procedural and substantive issues in both Derieg's and Pasqual's pleadings, which were discovered by the county probate examiner.

On November 13, 2017, Pasqual filed a third supplement to the final account and petition, asking the court to redistribute the attorneys' fees: $4,290 for Pasqual, $4,972 for Mackay, and $5,038 for Derieg.[5] She also asserted Derieg's compensation should be further reduced by $1,430, due to the delay in administering the estate under Probate Code sections 12200 and 12205. On receipt of Pasqual's filing, and *without* court order, Derieg immediately paid the estate $10,692, which accounted for the statutory compensation limit and the delay. On November 14, the superior court ordered Derieg to refund the estate $10,692, the amount he had paid the day before.

The court then issued an order to show cause (OSC) for Derieg regarding whether he should be sanctioned for taking his fees prior to the court's final distribution. On December 1, 2017, Derieg filed an OSC statement, stating he took another attorney's advice to bill escrow to guarantee payment. Derieg added that the attorney told him not to "touch the payment until after the final petition is ordered." He apologized for his actions and acknowledged he had "broken a rule of court." On December 5, the court held a hearing on the OSC. The judge stated he had read Derieg's statement and was inclined to discharge the OSC. Derieg was then given a chance to add anything, and he declined. The judge asked Pasqual if she had anything to say on the issue, and she stated the Asvitts were fine with discharging the OSC. The judge then discharged the OSC and declined to order sanctions. Derieg never told the court he had put the funds into his business checking account,

4. Pasqual filed additional supplements on November 7 and 13.

5. These amounts totaled $14,300, which Pasqual asserted was the total compensation allowed under Probate Code section 10810.

not a CTA, and spent the funds before court approval.

III. CULPABILITY

Of the nine counts charged in the NDC, the hearing judge found Derieg culpable of moral turpitude misrepresentation to the superior court (§ 6106) (count eight); seeking to mislead a judge (§ 6068, subd. (d)) (count nine); collecting an illegal fee (Rules Prof. Conduct, former rule 4-200(A))[6] (count seven); and two counts of moral turpitude misappropriation (§ 6106) (counts three and four). The judge also found culpability for two counts of failure to deposit funds in a CTA (former rule 4-100(A)) (counts one and two) but did not assign additional disciplinary weight to those counts as the underlying facts were the same as those underlying the misappropriation counts. The judge dismissed two counts for failure to comply with the laws (§ 6068, subd. (a)) (counts five and six), which alleged that Derieg violated the Probate Code. Derieg does not challenge the judge's culpability findings.

A OCTC Challenges Dismissal of Count Six

On review, OCTC challenges the dismissal of count six, one of the section 6068, subdivision (a), charges.[7] Section 6068, subdivision (a), provides that it is the duty of an attorney to support the constitutions and laws of the United States and California. Count six alleged that Derieg violated Probate Code sections 10830 and 10831 by (A) requesting and collecting $14,300 from the escrow company without court order; and (B) directing the escrow company to pay $4,000 to Mackay for attorney's fees.[8] The NDC alleged these actions were in violation of Probate Code sections 10830 and 10831, which require a court order to set compensation for services rendered in an estate proceeding.[9]

The hearing judge found that count six failed as a matter of law because the misconduct alleged was disciplinable under the State Bar Act and the Rules of Professional Conduct, making a section 6068, subdivision (a), charge improper. The judge stated that the misconduct in count six was also alleged as misconduct in count seven for violating former rule 4-200(A), which prohibits attorneys from collecting "an illegal or unconscionable fee." The judge found Derieg culpable under count seven for collecting his fees without court approval.[10] As this was a rule violation, the judge determined it was improper to also find culpability in count six under section 6068, subdivision (a). **[1a]** As is more fully set forth below, we find the section 6068, subdivision (a), charge was properly dismissed because the misconduct is already disciplinable under the Rules of Professional Conduct. (*In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 323 [violation of Probate Code by failing to obtain required Probate Court prior approval violates former rule 4-200].)

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6. 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.

7. The hearing judge also dismissed the other section 6068, subdivision (a), charge (count five). Neither party challenges the dismissal of count five with prejudice, and we affirm. (*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].)

8. These are the same two sections of the Probate Code that form part of the allegations in count seven for violations of rule 4-200(A), illegal fees.

9. Probate Code section 10830 applies to a non-final petition in an estate proceeding, while Probate Code section 10831 applies to the final account and petition.

10. Count seven alleged Derieg violated former rule 4-200(A) by (A) collecting legal fees in excess of the statutory limit of Probate Code section 10810; and (B) collecting legal fees without a court order under Probate Code sections 10830 and 10831. The hearing judge found culpability in count seven under (B) only, and dismissed the charge in (A) with prejudice. Neither party challenges these findings. We affirm the dismissal of part (A) in count seven with prejudice. (*In the Matter of Kroff*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

1. Section 6068, subdivision (a), Analysis[11]

In summary, we agree with the hearing judge's ultimate conclusion of dismissal, but we bolster the analysis supporting that conclusion and present additional authorities for our position. Initially, it should be noted that OCTC has acknowledged that in its recent petition for review to the Supreme Court, it is not seeking a change in the level of discipline, including fifteen months' actual suspension and other probation conditions. As such, its narrow review only seeks to clarify the interpretation of current case authority regarding the propriety of alleging a section 6068, subdivision (a), violation along with an applicable violation of the Rules of Professional Conduct, in this case, involving illegal fees paid to attorneys handling a probate matter.

Our original opinion filed in this matter dismissed the section 6068, subdivision (a), charge in count six because the misconduct contained in that count was properly charged as an illegal fee (former rule 4-200(A))[12] in count seven. We found that dismissing the section 6068, subdivision (a), count was proper, given current case law. OCTC, while acknowledging that our dismissal had no bearing on the discipline in this matter, objects to the dismissal because it contends that it would limit its ability to charge the statutory violation in *future* cases. In this modified Opinion, we hope to further clarify our interpretation of the relevant case law and provide additional guidance for future cases.

As noted *ante*, OCTC has alleged both a section 6068, subdivision (a), count and a separate, but entirely overlapping, former rule 4-200 (illegal fee) count regarding the same misconduct. In *Bates v. State Bar* (1990) 51 Cal.3d 1056, the Supreme Court faced a similar fact pattern: *Bates* involved both a section 6068, subdivision (a), count and a charged rule violation (former rule 8-101)[13]. In *Bates*, the Court was not inclined to change the discipline from the six months of actual suspension recommended by the Review Department. Similarly, in this case, OCTC has accepted our recommended 15-month actual suspension and recognized that "given the Review Department also found culpability on a moral turpitude charge, the Review Department's rejection of the section 6068, subdivision (a) charge did not affect the discipline imposed." That is, like in *Bates*, the discipline in this case was not going to include disbarment, so the addition of the 6068, subdivision (a), count was not required to avoid the limitation of section 6077, which prescribes a maximum discipline for rule violations of three years' suspension.

The Court in *Bates* then discussed the minimal value of focusing on the number of charges, noting that because the petitioner admitted his rule violation and the 6106 charge, "the appropriate discipline does not depend on whether multiple labels can be attached to the misconduct, in particular, whether petitioner's misconduct also violated sections 6068, subdivision (a) and 6103." (*Bates v. State Bar*, *supra*, 51 Cal.3d at pp. 1059-1060.) The Court in *Bates* recognized that the State Bar was uncertain whether the Rules of Professional Conduct were *laws of this state* within the meaning of section 6068, subdivision (a). But the Court took a broader view in response and explained how the context of the charging pleading is important:

> Because the discipline in this case does not depend on whether the misconduct violated both the rules and section 6068, we need not definitively answer this question. Indeed, the State Bar's agreement that the question is moot as a practical matter indicates that little, if any, purpose is served by duplicative allegations of misconduct. [footnote] If,

11. California derives its attorney discipline law from multiple sources. While the Supreme Court maintains plenary authority over attorney discipline (*In re Attorney Discipline System* (1998) 19 Cal.4th 582; *In re Rose* (2000) 22 Cal.4th 430), unlike many other states where the high court is the sole source of law on the subject, California has law and rules derived from the Supreme Court, the Legislature, and the Board of Trustees of the State Bar. This case presents an issue involving the interplay between a rule of professional conduct and a legislative statute.

12. Former rule 4-200 of the Rules of Professional Conduct involved fees for legal services and is now rule 1.5.

13. Former rule 8-101 of the Rules of Professional Conduct involved preserving the identity of funds and property of a client and was later renumbered as former rule 4-100. It is now contained in rule 1.15.

> as in this case, misconduct violates a specific Rule of Professional Conduct, there is no need for the State Bar to allege the same misconduct as a violation of sections 6068, subdivision (a), and 6103.

(*Id*. at p. 1060.) This is consistent with our cases after *Bates*. (See *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297, 304 ["As the discipline in this case does not depend on whether respondent violated both the rule and the statute, we need not and do not address the section 6068(a) violation."]; *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 369 [6068, subdivision (a), count rejected in favor of two rule violations as the basis for imposing discipline].)

We also recognized in *Whitehead* the additional potential mischief associated with adding a section 6068, subdivision (a), charge to misconduct otherwise charged as rule violations: "We also note that if rule violations were automatically also violations of section 6068(a), the result would be that the limitation on the [former] State Bar Board of Governors' authority to impose a maximum three-year suspension for any rule violations (Bus. & Prof. Code, § 6077) would be rendered meaningless. In such event, all rule violations could result in disbarment by virtue of constituting section 6068(a) violations as well. We decline to place such illogical construction on the statutory scheme." (*In the Matter of Whitehead*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 369.)

We resolved this issue in *In the Matter of Lilley* (1991) 1 Cal. State Bar Ct. Rptr. 476, 482-483. We noted that, as in this case, "The examiner's sole reason for requesting review in this matter was to object to this department's stated intention to strike the referee's conclusion that the respondent, by virtue of the misconduct he was found to have committed in counts one and two of the notice to show cause, also violated Business and Professions Code sections 6068(a) and 6103." (*Id*. at p. 482.) We then clarified the precise issue in the case as *not* whether rules are "laws" within the meaning of section 6068, but "whether, by enacting sections 6068(a) and 6103 of the State Bar Act, the Legislature intended to make disbarment available for rule violations." (*Id*. at p. 484.) We then found that "[t]here is absolutely no evidence that either section 6103 or section 6068(a) was intended to refer to the Rules of Professional Conduct or to make disbarment available for violations of such rules." (*Ibid*.) We concluded, consistent with and quoting *Bates v. State Bar, supra,* 51 Cal.3d at p. 1060, "'little, if any, purpose is served by duplicative allegations of misconduct. If … misconduct violates a specific Rule of Professional Conduct, there is no need for the State Bar to allege the same misconduct as a violation of sections 6068, subdivision (a), and 6103.'" (*Ibid*.)

[1b] Therefore, we affirm the hearing judge's dismissal of count six with prejudice. (*In the Matter of Kroff*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.) We find that the judge appropriately found Derieg culpable of the properly alleged former rule 4-200(A) violation contained in count seven, as discussed *post*. (See *In the Matter of Phillips*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 323 [illegal fee under former rule 4-200(A) where attorney did not obtain court approval as required under Prob. Code].)

B. Remaining Culpability Not Disputed

The parties do not dispute the hearing judge's culpability findings under counts one, two, three, four, seven, eight, and nine. After independent review, we affirm the judge's culpability findings for these counts, summarized *post*.

Under counts three and four, the hearing judge found misappropriation under section 6106 based on the early distribution of funds from escrow to Derieg and Mackay without prior court approval.[14] The judge found that the same facts underlying counts three and four were charged as former rule 4-100(A) violations in counts one ($14,300 deposit in business checking account, not CTA) and two (directing the escrow company pay

14. Section 6106 provides that an 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.)

$4,000 to Mackay).[15] Accordingly, the judge did not assign additional disciplinary weight for counts one and two. (See *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127 [no additional disciplinary weight for former rule 4-100(A) violation duplicative of moral turpitude violation].) The judge also found culpability under count seven for collecting an illegal fee in violation of former rule 4-200(A), based on Derieg's unauthorized distribution of the funds without court approval as required under the Probate Code. (See *In the Matter of Phillips*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 323.) The judge did not assign additional disciplinary weight for count seven as the underlying facts are the same as the facts underlying one of the misappropriation charges (count three).

Finally, the hearing judge found culpability under counts eight (§ 6106) and nine (§ 6068, subd. (d))[16] because Derieg sought to mislead the superior court judge regarding whether he had already been paid for his services to the estate. The judge found that Derieg's actions rose to an act of moral turpitude because he intentionally failed to disclose that he had already collected attorney's fees, deposited them in a business checking account, and spent the funds on expenses unrelated to the estate. Because the same misconduct underlies both counts eight and nine, we treat them as a single offense involving moral turpitude.[17] (*In the Matter of Moriarty* (Review Dept. 2017) 5 Cal. State Bar Ct. Rptr. 511, 520 [violations of § 6106 and § 6068 treated as single moral turpitude violation with no additional weight for duplication].)

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

A. Aggravation

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

[2] We agree with the hearing judge that OCTC established aggravation for Derieg's multiple acts of wrongdoing, including failing to deposit client funds in a CTA, misappropriating his fee from the estate, directing the misappropriation of Mackay's fee, and seeking to mislead a judge. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646-647 [three instances of misconduct considered multiple acts].) The hearing judge assigned moderate weight in aggravation, which the parties do not challenge. We agree with the judge's finding of aggravation under this standard but modify it only slightly due to the unique facts surrounding the misappropriation in this probate case, including the fact that the fees were earned but simply taken early. We find that only limited weight is appropriate. (See *In the Matter of Amponsah* (Review Dept. 2019) 5 Cal. State Bar Ct. Rptr. 646, 653 [modest aggravation for three acts of wrongdoing].)

2. Significant Harm (Std. 1.5(j)) Not Established

The hearing judge declined to find aggravation for significant harm to the client under standard 1.5(j). On review, OCTC argues that Derieg's misconduct caused a delay in closing the probate matter until November 14, 2017, which resulted in significant harm to Asvitt and his family. OCTC asserts that the final account and petition was due on February 23, but Derieg did not have the client sign it until March 21 and did not file it until May 2. The court then continued the hearing on the final distribution from August 7 until November 14. OCTC also asserts that Derieg was unresponsive to his client's inquiry regarding a county tax form, which caused Asvitt to seek advice from Pasqual. Pasqual then discovered Derieg's misconduct, requiring further litigation. OCTC

15. Former rule 4-100(A) requires client funds to be deposited in a CTA.

16. Section 6068, subdivision (d), provides, in pertinent part, that it is the duty of an attorney never to seek to mislead a judge by an artifice or false statement of law or fact.

17. The hearing judge did not explicitly indicate whether counts eight and nine were treated as a single offense.

18. See *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).

pointed to the court's reduction of Derieg's fee by $1,430 for his delay. Finally, OCTC inferred that Derieg's delay extended a painful chapter in the Asvitts' lives.

[3] Derieg argues on review that OCTC did not establish by clear and convincing evidence that his misconduct caused significant harm to the Asvitts. Derieg admits his fee was reduced due to a two-and-a-half-month delay in filing the final account and petition (February 23 to May 2). However, he notes that the delay from May until November was not the direct result of his conduct alone, citing the court's continuance on its own motion. Derieg asserts that a generalized harm due to delay, without more, does not support aggravation for significant harm to the client. We agree. While Derieg caused some delay, not all the delay was solely his fault. Further, we decline to speculate about harm to the family. OCTC did not carry its burden of proving *significant* harm by clear and convincing evidence. Therefore, we do not assign aggravation under standard 1.5(j).

B. Mitigation

1. Lack of Prior Discipline (Std. 1.6(a))

[4] Mitigation includes "absence of any prior record of discipline over many years of practice coupled with present misconduct, which is not likely to recur." (Std. 1.6(a).) The hearing judge assigned substantial weight for Derieg's 11 years of practice without discipline. Neither party challenges this finding. We agree that Derieg's absence of prior discipline warrants substantial weight, as he established the aberrational nature of his misconduct: he expressed remorse, refunded the estate without a court order, took a seminar on probate practice, and hired a paralegal experienced in probate matters. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [significant mitigation where attorney practiced over 10 years before first act of misconduct and misconduct not likely to recur].) Accordingly, we affirm the judge's finding under standard 1.6(a).

2. Cooperation (Std. 1.6(e))

Mitigation includes "spontaneous candor and cooperation displayed to the victims of the misconduct or to the State Bar." (Std. 1.6(e).) The hearing judge determined that Derieg deserved substantial mitigation credit for cooperating with the State Bar "from the start," providing bank records voluntarily and entering into the Stipulation before trial, which included material facts establishing some culpability and conserved judicial time and resources, reducing trial to one day. The Stipulation also provided for the admission of all the trial exhibits.

In *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, we gave limited cooperation for entering into a stipulation covering background facts for *most* of the at-issue matters. However, we noted that "more extensive weight in mitigation is accorded those who, where appropriate, willingly admit their culpability as well as the facts. [Citations]." (*Id*. at p. 190.) OCTC asserts that less mitigation is warranted here as Derieg did not admit culpability in the Stipulation. There was no discussion in *Johnson* of whether the respondent also stipulated to the admission of documents or if the stipulation conserved judicial time and resources. Therefore, we do not rely on *Johnson* to reduce the weight for Derieg's cooperation.

[5a] We have assigned limited weight in mitigation for cooperation when a stipulation is not extensive and involves easily provable facts with no admission to culpability. (*In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 318; see also *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 567 [limited mitigation for stipulating to easily provable facts].) *Guzman* does not offer authority for reduction of Derieg's mitigation as the Stipulation here was expansive. Further, "[w]hether facts are easy to prove is just one aspect to consider in assigning mitigating weight" to a stipulation. (*In the Matter of Chavez* (Review Dept. 2021) 5 Cal. State Bar Ct. Rptr. 783, 792.) Chavez's cooperation conserved judicial time and resources, and the facts he stipulated to formed the basis of the culpability findings for one count. Therefore, in *Chavez*, we assigned substantial weight in mitigation under standard 1.6(e), even though the facts were easily provable and he disputed some culpability. (*Ibid*.; see also *In the Matter of Braun* (Review Dept. 2020) 5 Cal. State Bar Ct. Rptr. 738 [significant mitigation for cooperation where attorney admitted to facts beyond the charges and admitted

culpability, even though stipulation contained easily provable facts and did not save significant court time].) The magnitude of the facts and whether there was admission to culpability are factors in assigning weight—one aspect is not determinative.

Moreover, in *Pineda v. State Bar* (1989) 49 Cal.3d 753, the Supreme Court found mitigation for a respondent's cooperation with the State Bar "throughout the disciplinary proceedings" and he showed a willingness to accept discipline because he stipulated to the relevant facts and forfeited a potentially meritorious defense to some of the charges. (*Id*. at p. 760.) **[5b]** Here, Derieg has accepted the hearing judge's culpability findings on review for all counts and does not challenge the 15-month actual suspension. This supports substantial weight in mitigation for cooperation, even though there was no admission of culpability at trial. (Cf. *In the Matter of Herich* (Review Dept. 2021) 5 Cal. State Bar Ct. Rptr. 820, 829 [moderate weight in mitigation where respondent did not admit culpability and then appealed culpability determination].)

[5c] Considering the relevant authority and factors present here, we agree with the hearing judge's finding of substantial weight for Derieg's cooperation. Derieg willingly provided bank records, entered into the Stipulation which established some culpability and conserved judicial time and resources, and agreed to the admission of documents. Further, he has accepted the culpability findings for all counts and the hearing judge's recommended discipline. We afford him substantial mitigation even though he did not admit to culpability at trial. (See *In the Matter of Silver* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 902, 906 [substantial mitigation for stipulating to facts underlying charged misconduct; cannot punish respondent for seeking day in court on level of discipline].)

3. Extraordinary Good Character (Std. 1.6(f)) and Community Service

Derieg 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).) Community service can also be mitigating. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) The hearing judge assigned substantial weight to Derieg's good character evidence and community service, which neither party disputes.

[6a] Fifty-three witnesses submitted character letters, eight of whom also testified at trial. The witnesses, many of whom were attorneys,[19] had known Derieg for a substantial amount of time. The witnesses included people who had worked with Derieg or had personal knowledge of his legal work and clients who were the beneficiaries of his pro bono services. They represented a broad range of the legal and general communities, consisting of educators and teachers, clergy members, lawyers, and board members and directors of nonprofit organizations.

[6b] The witnesses discussed Derieg's volunteer work as a substitute teacher, working when called and without taking compensation, and with the Lawyers in the Library program where he gives free legal advice to the community. They stated he does extensive mentoring in both the law and religious development, including providing counsel to members of his church and their friends and families. He has mentored youth in his church and high school students accused of crimes, and he advises students who are interested in applying to law school. He earned recognition for his volunteer work from 2014 through 2016 with Bay Area Legal Aid.

[6c] The witnesses attested to Derieg's trustworthiness, honesty, and dedication to his clients and the community. They understood the charged misconduct—that Derieg took an advanced fee and made a misrepresentation to the court. (See *In re Aquino* (1989) 49 Cal.3d 1122, 1130-1131 [not entitled to significant weight in mitigation because most witnesses unaware of details of attorney's misconduct].) The witnesses stated that Derieg's misconduct was inconsistent with his overall character. One stated it was impossible to reconcile that Derieg would do anything against the

19. 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.)

best interests of his clients; another described Derieg as "morally driven."

[6d] The witnesses also stated that Derieg provided full disclosure of his misconduct, so that they could choose to stop referring clients to him if they liked. Derieg told a notary that he would understand if he chose to no longer work with him. The notary was impressed with the disclosure, continuing to believe Derieg to be trustworthy and to have confidence in him. Derieg also apologized to a pastor, even though the pastor did not feel an apology was owed. The pastor stated this was evidence of Derieg's solid character and exhibited a willingness to right his wrongs, showing Derieg's integrity and honesty.

[6e] On review, we find Derieg's impressive evidence of good character and community service deserves compelling weight in mitigation. (See *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 (Std. 1.6(g))

Standard 1.6(g) provides mitigation for "prompt objective steps, demonstrating spontaneous remorse and recognition of the wrongdoing and timely atonement." The hearing judge found that Derieg exhibited genuine remorse with respect to his mishandling of client funds and credited him for his endeavors to atone, including promptly refunding the estate after receiving Pasqual's request, hiring a paralegal, and completing a probate seminar. In addition, more than three months before the final petition was approved by the superior court, Derieg offered to pay for Pasqual's legal fees of $1,430, which she had requested be paid from the estate. The hearing judge commended Derieg for these efforts, but found they related only to his culpability for mishandling funds and not for seeking to mislead the court. Therefore, the judge assigned moderate weight in mitigation under standard 1.6(g).

On review, OCTC argues that Derieg should receive no more than limited or minimal weight in mitigation for remorse, arguing Derieg waited three months after Pasqual first raised the issue with the probate court to return the funds to the estate. OCTC also points to standard 1.6(j), which provides for mitigation for restitution only if it is made without the threat or force of a disciplinary or civil proceeding, arguing that Derieg should receive less credit because he did not return the funds until after the probate court was made aware of his misconduct. We reject this argument as Derieg did not have the opportunity to do so—his representation was terminated on July 20, 2017, and Pasqual alerted the court about the discrepancy on August 1. This short amount of time did not provide him the opportunity to alert the court that he had actually already received the funds and does not diminish the other steps he took to demonstrate his remorse.

[7] OCTC's other arguments are also unpersuasive.[20] The hearing judge factored into her assignment of weight that Derieg's steps to timely atone went only to the misappropriation misconduct. The three-month delay was necessary as Pasqual did not request a specific amount until the November 13, 2017 supplement. After receiving the supplement, Derieg refunded the requested amount the same day. He also apologized to the superior court for billing escrow and receiving his fee prior to authorization. In the OSC statement, he wrote: ". . . I am not going to try to convince this court not to sanction me, as I have broken a rule of court and will accept any punishment this court feels is just. I wholeheartedly apologize for these actions, and they will never happen again." In addition, Derieg testified that he alerts potential probate clients about this disciplinary matter and makes clear that he cannot

20. OCTC also cited *In the Matter of Romano* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 391, a case where we assigned moderate weight in mitigation for remorse where the attorney disgorged $18,500 in wrongfully obtained fees, pursuant to a court-imposed sanctions order. Romano's misconduct related to 82 fraudulent bankruptcy petitions filed in numerous client matters. We found that her statements of remorse were somewhat belated, but displayed a recognition of her wrongdoing. Unlike Romano, Derieg paid the fees before the court issued an order, and the fees related to a single client matter. Therefore, an assignment of moderate weight for remorse in the instant matter is not disproportionate to the weight given in *Romano*.

be paid until ordered by the court. We agree with the judge that Derieg's actions are commendable and warrant mitigating credit, but that mitigation only goes to his mishandling of client funds. He took prompt efforts to correct his misconduct and we assign moderate weight in mitigation for these actions.

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 *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].) **[8a]** The most severe sanction applicable here is standard 2.1(a), which provides that disbarment is the presumed sanction for Derieg's intentional misappropriation of entrusted funds.[21] 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* (1990) 52 Cal.3d 28, 38.) "Even a single 'first-time' act of misappropriation has warranted such stern treatment." (*Kelly v. State Bar*, *supra*, 45 Cal.3d at p. 657.)

[8b] 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." The first condition does not apply, as Derieg misappropriated $18,300, a significant amount of money. (See *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1361, 1368 [$1,355.75 not insignificantly small].) The hearing judge found that the second condition applied because Derieg's five mitigating circumstances far outweighed the one aggravating circumstance found.

The hearing judge also looked to comparable disciplinary cases and determined that actual suspension, not disbarment, was warranted. (See *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576 [two-year actual suspension for misappropriation involving single client where attorney had no prior discipline record, strong good character evidence, extensive community service, and no additional misconduct for five years]; *Edwards v. State Bar*, *supra*, 52 Cal.3d 28 [one-year actual suspension for misappropriation involving single client where attorney had no prior discipline record, no "acts of deceit," made repayment before State Bar investigation, showed cooperation, and took steps to improve CTA management]; *Kelly v. State Bar*, *supra*, 45 Cal.3d 649 [disbarment for misappropriation where attorney spent client money and overreached by forcing clients to sign a statement saying funds were loaned].) Comparing the instant matter to *Edwards*, the judge found that Derieg had additional culpability for misrepresentation which Edwards did not have, warranting a sanction slightly greater than a one-year actual suspension.

On review, OCTC argues the hearing judge did not adequately address the language in standard 2.1(a) calling for *sufficiently compelling* mitigating circumstances that clearly predominate. OCTC contends that under *Edwards*, to establish compelling mitigation, the misconduct must be aberrational. In *Edwards*, the court noted that misappropriation cases not resulting in disbarment involve "a variety of 'extenuating circumstances'" that warrant a lesser punishment, including "compelling mitigating circumstances relating to the attorney's background or character or to

21. Standard 2.11 provides for disbarment or actual suspension for Derieg's misrepresentation to the probate court. Standard 2.3 provides for suspension or reproval for collecting an illegal fee.

unusual difficulties the attorney was experiencing at the time of the misconduct, which [tend] to prove that the misconduct was aberrational and hence unlikely to recur. [Citations.]" (*Edwards v. State Bar*, *supra*, 52 Cal.3d at pp. 37-38.) OCTC claims that the judge's reliance on *Edwards* was "misplaced" because Derieg's misconduct is significantly different due to his misrepresentation to the probate court. OCTC argues that Derieg's subsequent misrepresentation in his OSC statement suggests his misconduct was not aberrational and that, due to his more severe misconduct, the "threshold for finding compelling mitigation that clearly predominates is much higher." As detailed throughout this opinion, we disagree. **[8c]** Derieg's mitigation is "sufficiently compelling" to support actual suspension as opposed to disbarment. When an attorney displays candor, cooperation, and remorse throughout the disciplinary proceedings, and accepts culpability and the recommended discipline, while also taking efforts to prevent the misconduct from occurring again, discipline less than disbarment is sufficient. (*Doyle v. State Bar* (1976) 15 Cal.3d 973, 979.) Further, any misrepresentation in the OSC statement was not charged in the NDC and we do not consider it in analyzing culpability and appropriate discipline.

OCTC also compares the instant matter to *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, asserting that disbarment is appropriate when misappropriation is followed by additional dishonesty. This simplification of *Spaith* ignores that Spaith engaged in far more egregious misconduct than Derieg by taking funds that did not, and never would, belong to him. Spaith also repeatedly lied to his client about the status of the funds, saying they were in his CTA and that he was seeking a court order to invest them when he had already spent the funds for his own benefit. Further, Derieg established greater mitigation and less aggravation than Spaith. *Spaith* does not support a recommendation of disbarment for Derieg.

Additionally, OCTC argues that Derieg should receive at least a two-year actual suspension like the attorney in *In the Matter of Davis*, *supra*, 4 Cal. State Bar Ct. Rptr. 576. This argument is premised on overruling the hearing judge's aggravation and mitigation findings, which we decline to do. As discussed *ante*, we affirm the mitigation findings, clarifying that his community service and character evidence was worthy of compelling mitigating weight, and giving slightly less weight to the single aggravating circumstance. **[8d]** We agree with the judge that Derieg's mitigation for no prior record of discipline, cooperation, extraordinary good character, community service, and remorse and recognition of wrongdoing, outweighs the aggravation assigned for multiple acts of misconduct. The judge concluded that Derieg's mitigation was compelling, unlike Davis, whose mitigation was outweighed by serious aggravating circumstances. Therefore, she determined that a sanction far less than two years of actual suspension was appropriate for Derieg. We agree with the judge's analysis of *Davis*. Derieg's mitigation was compelling—as already noted, he exhibited genuine remorse, took concrete steps to atone for the misappropriation, and he made prompt and full restitution. Further, Derieg misappropriated $18,300, while Davis misappropriated almost $80,000, and Davis committed various acts of concealment and duplicity, which we do not find here.

Finally, OCTC argues that the hearing judge erroneously interpreted standard 2.1(a) by failing to weigh Derieg's mitigation against his aggravation *and* his misconduct. (See *In the Matter of Jones* (Review Dept. 2022) 5 Cal. State Bar Ct. Rptr. 873 [attorney did not have compelling mitigation to predominate over his misconduct and aggravation].) OCTC proved culpability under seven counts. However, when accounting for the same facts underlying multiple counts, the misconduct is boiled down to two counts for misappropriation—collecting and spending his fee before court approval and directing Mackay's fee be paid before court approval—and one count of moral turpitude misrepresentation for not disclosing these facts to the superior court. Derieg never intended to be paid twice when he asked the court to approve his fee. **[8e]** Considering his remorse, the steps he took after the misconduct, and his long record of discipline-free practice before this incident, we are persuaded that this is an aberrational episode in his career. He earned a fee for working on the matter, but he unfortunately took it early. However, he took out only the amount he believed was proper under the Probate Code. This behavior differentiates Derieg from

misappropriations in other cases we have heard and decided. Under these circumstances, we find that Derieg established sufficiently compelling mitigation outweighing the aggravation and the misconduct.

As to the appropriate length of Derieg's actual suspension, the hearing judge found that Derieg's misrepresentation, which was not present in *Edwards*, warranted a sanction "slightly greater" than the one-year actual suspension imposed in that case. And under *Davis*, the judge found a sanction "far less" than two years was appropriate. The mid-way point between one and two years is 18 months, but the judge recommended a 15-month actual suspension. **[8f]** While 15 months is not an amount of time specified in the standards,[22] under the unique facts of this case we find that the judge's overall analysis justifies such a length of time. Derieg is not a danger to the public as this appears to be an aberrational event and he has shown remorse, taken corrective steps, and has been forthright with potential clients and others in the community. Accordingly, we affirm the recommendation of an actual suspension spanning 15 months.

VI. RECOMMENDATIONS

We recommended that George Martin Derieg, State Bar Number 238193, 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. Actual Suspension. Derieg must be suspended from the practice of law for the first 15 months of the period of his probation.

2. Comply with State Bar Act, Rules of Professional Conduct, and Probation Conditions. Derieg must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of probation.

3. Review Rules of Professional Conduct. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Derieg 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 Derieg's first quarterly report.

4. Complete E-Learning Course Reviewing Rules and Statutes on Professional Conduct. Within 90 days after the effective date of the Supreme Court order imposing discipline in this matter, Derieg must complete the e-learning course entitled "California Rules of Professional Conduct and State Bar Act Overview." Derieg must provide a declaration, under penalty of perjury, attesting to Derieg's compliance with this requirement, to the Office of Probation no later than the deadline for Derieg's first quarterly report.

5. Maintain Valid Official State Bar Record Address and Other Required Contact Information. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Derieg 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. Derieg must report, in writing, any change in the above information to ARCR, within 10 days after such change, in the manner required by that office.

6. Meet and Cooperate with Office of Probation. Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Derieg 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, Derieg may meet with the probation case specialist in person or by telephone. During the probation period, Derieg must promptly meet with representatives of the

22. "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." (Std. 1.2(c)(1).)

Office of Probation as requested by it and, subject to the assertion of applicable privileges, must fully, promptly, and truthfully answer any inquiries by it and provide to it any other information requested by it.

7. State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court. During Derieg's probation period, the State Bar Court retains jurisdiction over him to address issues concerning compliance with probation conditions. During this period, Derieg must appear before the State Bar Court as required by the court or by the Office of Probation after written notice is mailed to his official State Bar record address, as provided above. Subject to the assertion of applicable privileges, Derieg must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

8. Quarterly and Final Reports.

a. Deadlines for Reports. Derieg 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, Derieg 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. Derieg 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. Derieg 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. Derieg is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

9. State Bar Ethics School. Within one year after the effective date of the Supreme Court order imposing discipline in this matter, Derieg 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, Derieg will nonetheless receive credit for such evidence toward his duty to comply with this condition.

10. Commencement of Probation/ Compliance with Probation Conditions. The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the probation period, if Derieg has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

11. Proof of Compliance with Rule 9.20 Obligation. Derieg is directed to maintain, for

a minimum of one year after commencement of probation, proof of compliance with the Supreme Court's order that he comply with the requirements of California Rules of Court, rule 9.20, (a) and (c), as recommended below. Such proof must include: the names and addresses of all individuals and entities to whom Derieg 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 Derieg 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 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 Derieg 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 Derieg be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the date the Supreme Court order imposing discipline in this matter is filed.[23] (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45 [the operative date for identification of clients being represented in pending matters and others to be notified is the filing date of the Supreme Court order imposing discipline.) Failure to do so may result in disbarment or suspension.

IX. MONETARY SANCTIONS

We further recommend that Derieg be ordered to pay monetary sanctions to the State Bar of California Client Security Fund in the amount of $2,500 in accordance with Business and Professions Code section 6086.13 and rule 5.137 of the Rules of Procedure of the State Bar. We adopt the hearing judge's reasons for the monetary sanctions recommendation. 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.

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 applying for reinstatement or return to active status.

WE CONCUR:

McGILL, J.
CHAWLA, J.*

23. Derieg 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).)

*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.