STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of	)	Case Nos. 16-O-11694
	)	(16-O-16495)-MC
DONALD CHARLES SCHWARTZ,	)	
	)	DECISION
State Bar No. 122476.	)	
	)	

Introduction

In this contested disciplinary matter, Respondent Donald Charles Schwartz is charged with nine counts of misconduct in two matters, including various violations of Rule 9.20 of the California Rules of Court, seeking to mislead a judge, and knowingly making misrepresentations. The Office of Chief Trial Counsel of the State Bar (OCTC) has the burden of proving these charges by clear and convincing evidence.[1] The court finds that Respondent is culpable of the misconduct alleged in two of the nine counts. Based on the facts and circumstances of this case, as well as the applicable mitigating and aggravating factors, the court recommends that Respondent be suspended from the practice of law for two years, execution stayed, and that he be placed on probation for three years subject to conditions, which include a one-year actual suspension.

[1] Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

Significant Procedural History

OCTC filed a Notice of Disciplinary Charges (NDC) on July 30, 2018, and on August 27, Respondent filed a response. Trial was set for February 12, 2019. On February 6, the court granted Respondent's motion to continue trial based on scheduling of his medical procedure and because Respondent recently hired new counsel. On February 7, OCTC filed a First Amended NDC and Respondent filed a response on February 15.

The court held a three-day trial on March 4, 8, and 25, 2019. The parties filed their respective closing argument briefs on April 8 and this matter was submitted for decision on the same day.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law on February 14, 1986 and has since been a licensed attorney of the State Bar of California at all times.

Case No. 16-O-11694 – Rule 9.20 Matter

Facts

Pursuant to an order of the Supreme Court filed on June 11, 2014 (Supreme Court case No. S216609 [State Bar Court case No. 07-O-12304]), Respondent was suspended for two years, execution stayed, and placed on probation for three years subject to conditions, which included a six-month period of actual suspension. The order was served on Respondent. In addition to the suspension, Respondent was ordered to comply with California Rules of Court, rule 9.20, after the effective date of the order and perform the acts specified in parts (a) and (c) of that rule within 30 and 40 days respectively. Respondent received the Supreme Court order finalizing his discipline on or about the date it was filed on June 11, 2014. Respondent received the order from Ed Lear, his counsel.

Respondent was unfamiliar with the requirements of rule 9.20 because it was the first time he received a period of actual suspension pursuant to a discipline matter. Respondent reviewed the requirements of the rule and contacted Lear to discuss his suspension.[2]

Based on his own review of rule 9.20 and Lear's advice, Respondent believed that the effective date of the Supreme Court discipline was one month later, July 11, 2014. Also, based on his discussion with Lear, Respondent believed that it was unnecessary for him to send out the formal notices to opposing counsel and his clients as required by the rule if he did not have any clients on the effective date of his suspension.[3] Upon receiving the Supreme Court order, Respondent contacted all of his clients, notified them of his suspension, and discussed their options on how to proceed.

Respondent had several litigation matters pending at the time the Supreme Court order was filed: 1) *Temmerman, Cilley and Kohlman v. Ritchey*, Santa Cruz County Superior Court case No. CV179072; *Barton v. Lunquist,* Santa Cruz County Superior Court case No. CV177609; *Zias v. Instant Checkmate, Inc.*, Santa Cruz County Superior Court case No. CV178086; *Jacobson v. National Railroad*, Monterey County Superior Court case No. M127118; and *Baum v. Arnold*, Santa Cruz County Superior Court case No. CV178366. In the *Zias* matter, the court ordered the parties to arbitration, and there was no case activity from

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[2] Respondent also contacted his probation case specialist but did not receive a reply, an assertion not contested by OCTC.

[3] Lear provided a declaration, submitted under penalty of perjury and dated July 29, 2018. In the declaration, Lear states: "Mr. Schwartz confirmed with me his understanding of Rule 9.20 that if he withdrew from all client pending litigation, and had no clients, before the July 11, 2014 effective date of the suspension order (plus 5 for mailing) that he did not have to serve Rule 9.20 notices. I agreed with his assessment and further advised Mr. Schwartz not to practice law during the 6-month actual suspension." Lear's declaration is admissible under Rules of Procedure of State Bar, rule 5.104(C) because it is relevant and signed declarations are the type of evidence that responsible persons are accustomed to relying on in the conduct of serious affairs. The declaration is, however, hearsay evidence and not direct testimony. Thus, the court relies on Lear's declaration to the extent that it corroborates Respondent's credible testimony. (See Rules Proc. of State Bar, rule 5.104(D).)

May 21 through November 4, 2014. Respondent remained attorney of record during that five-month period, but did not represent a party during the arbitration. Respondent filed substitutions of attorney on July 7, 2014, in the *Temmerman* matter and on July 11, 2014, in the *Barton* matter. On July 11, 2014, Respondent signed a substitution of attorney in the *Jacobson* case, but the substitution was not filed until July 15, 2014.[4] The superior court dismissed the *Baum* matter on July 10, 2014, after the case settled.

Respondent carefully followed Lear's instructions.[5] Because on or before July 11, 2014, the *Baum* case had been dismissed, Respondent withdrew as counsel of record in the *Temmerman* and *Barton* cases, and the *Zias* case had been ordered to arbitration, Respondent believed that he had no obligation to provide the notices required by rule 9.20.[6] He believed that he had no clients by the time the Supreme Court order became effective, therefore, Respondent did not send out notices regarding his suspension via certified or registered mail, return receipt requested, to his clients, opposing counsel, or any court.

Conclusions of Law

Count One - (§ 6103 [Failure to Obey a Court Order])

OCTC charged Respondent with willfully violating Business and Professions Code, section 6103,[7] by disobeying the June 11, 2014 Supreme Court order directing Respondent to comply with rule 9.20(a), (b), and (c). Section 6103 provides, in part, that a willful disobedience

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[4] Respondent admits in his amended response to the First Amended NDC that he did not file a rule 9.20 notice as required in the *Jacobson* case.

[5] Not only is Lear an attorney but he is a former trial counsel for OCTC and currently specializes in defending respondents in discipline matters. Respondent's reliance on Lear's legal guidance is reasonable.

[6] *Jacobson* was one of Respondent's pending matters until July 15, 2014, when the substitution of attorney was filed.

[7] All statutory references are to the Business and Professions Code, unless otherwise indicated.

or violation of a court order requiring an attorney to do or forbear an act connected with or in the course of the attorney's profession, which an attorney ought in good faith to do or forbear, constitutes cause for suspension or disbarment. Respondent is culpable of willfully violating section 6103.

To establish a violation of section 6103, OCTC must prove by clear and convincing evidence that the attorney willfully disobeyed a court order and that the order required the attorney to do or forbear an act in the course of his profession "which he ought in good faith to have done or not done." (*In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 603.) In addition, the attorney must have knowledge of the court order. (See *In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 666 [Review Department adopted hearing judge's finding that attorney's failure to obey court order did not violate section 6103 because attorney did not receive notice of the order in time to comply with it]; *In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 867-868 [Review Department agreed with hearing judge that, because attorney clearly knew of the relevant court order, the only issue regarding the charged violation of section 6103 was whether attorney had a reasonable time to comply with the order].) Here, Respondent acknowledged that on or about June 11, 2014, he received the Supreme Court discipline order directing him to comply with rule 9.20.

Rule 9.20(a)(1) and (4) require an attorney to do the following: (1) notify clients being represented in pending matters, along with any co-counsel, of a suspension and consequent disqualification to act as an attorney after the suspension's effective date; (2) notify clients to seek other legal advice if there is no co-counsel; (3) notify opposing counsel in pending litigation; (4) if no opposing counsel, notify adverse parties of the suspension and consequent disqualification to act as an attorney after the suspension's effective date; and (5) file a copy of

the notice with the court, agency, or tribunal before which the litigation is pending. Rule 9.20(b) requires strict mailing guidelines for notification under this rule. All notices must be by registered or certified mail, return receipt requested, and must contain an address for the suspended attorney.

The Supreme Court has determined that "the operative date for identification of 'clients being represented in pending matters' and of others to be notified under rule [9.20] is the filing date of [its] order for compliance therewith and not any later 'effective date.' " (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45 [discussing former rule 955].) Thus, Respondent had to notify any clients and opposing counsel about his suspension in matters that were pending as of June 11, 2014. The court finds a lack of clear and convincing evidence establishing that Respondent failed to notify his clients about his suspension. The evidence demonstrated that Respondent withdrew from pending litigation matters by filing a substitution of attorney in several cases, which supports Respondent's testimony that he notified his clients about his suspension.

However, Respondent neither notified any opposing counsel in pending litigation regarding his suspension nor sent any notices regarding his suspension by certified or registered mail to his clients and opposing counsel. In addition, Respondent did not file a copy of the required notices with any court. Thus, Respondent willfully violated section 6103 by failing to comply with the requirements outlined in rule 9.20(a)(4) and (b).

Counts Two, Three and Four are Duplicative

In Count Two, OCTC charged Respondent with violating rule 9.20(a)(1) by failing to notify his clients about his suspension. Count Three charged Respondent with violating rule 9.20(a)(4) by failing to notify opposing counsel about his suspension. Count Four charged Respondent with violating rule 9.20(b) by failing to send notices of his suspension to his clients by registered or certified mail. The court finds that Counts Two, Three and Four are duplicative

of Count One, which encompasses all of the alleged misconduct in these counts. There is "no benefit to duplicative charges." (*In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 634.) The section 6103 charge addresses the same alleged misconduct as the rule 9.20 charges and supports identical or greater discipline. (See Cal. Rules of Court, rule 9.20 [disbarment or suspension for failure to comply with rule 9.20]; Rules Proc. of the State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 2.12 [disbarment or actual suspension for violating court order].) Counts Two, Three and Four are dismissed with prejudice.

Count Five - (§ 6106 [Moral Turpitude - Misrepresentation])

In Count Five, the NDC alleges that Respondent violated section 6106 by stating in his rule 9.20 declaration that he complied with the requirements of the rule when he knew or was grossly negligent in not knowing that his statement was false. Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. Respondent is not culpable of the misconduct alleged in Count Five.

The court does not find that Respondent intentionally misrepresented that he had complied with the requirements of rule 9.20 nor was he grossly negligent in making the misrepresentation. First, there is a lack of sufficient evidence establishing that Respondent made an intentional misrepresentation in his 9.20 compliance declaration. Respondent credibly testified that, after reviewing the Supreme Court discipline order and rule 9.20, he thought he did not have to serve the notices because he believed that he had no clients at the time of the Supreme Court order's effective date.

Second, Respondent did not solely rely on his own interpretation of the Supreme Court order and rule 9.20. He consulted with Lear, an experienced ethics attorney formerly employed as trial counsel with OCTC. Lear incorrectly confirmed Respondent's mistaken belief that he

was not obligated to serve any of the notices required by rule 9.20. Based on these facts, the court does not find clear and convincing evidence that Respondent was grossly negligent for failing to know that his statement in his 9.20 compliance declaration was false. (Cf. *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 155 [gross negligence amounting to moral turpitude where attorney filed verification that clients were out of country without first confirming that fact].) Count Five is dismissed with prejudice.

Case No. 16-O-16495 – *Simpson* Matter

Facts

In 2015, Respondent represented Michelle Simpson in *Simpson v. Klinger*, a marriage dissolution filed in Santa Cruz County Superior Court. This was Respondent's first family law case involving financial disclosures, and he was not knowledgeable about the various disclosures or the relevant Judicial Council forms. On August 31, 2015, Respondent served opposing counsel, Lisa Hillegas, with Judicial Council form FL-150 (income and expense declaration), a Statement of Assets/Debts that was not on a Judicial Council form but was created by Respondent, as well as various bank statements. This information was intended to satisfy the requirements for Respondent's client to disclose her finances.

The financial disclosures in the dissolution were complicated because the parties had a marijuana growing business. Respondent did not think that Judicial Council form FL-142 (Schedule of Assets and Debts) was useful for disclosing the required information so he created his own Statement of Assets/Debts. This document contained information that mirrored the disclosures provided by Hillegas on behalf of her client. Respondent, who was focused on the accuracy and the honesty of the disclosure more than the format, believed he had supplied the same information that would have been included in form FL-142. Respondent did not think that form FL-142 was mandatory to disclose financial information in a family law case.

In addition to the aforementioned documents, on August 31, 2015, Respondent served Hillegas and filed in the superior court, form FL-141 (Declaration Regarding Service of Declaration of Disclosure and Income and Expense Declaration). Form FL-141 is the only document filed with the court to confirm that the parties have exchanged financial information. Respondent accidentally checked off the box that this was both petitioner and respondent's declaration, but the contents of the document were otherwise true.

On August 31, 2015, Respondent also served Hillegas with form FL-140 (Declaration of Disclosure). This document is not filed with the court. On this form, Respondent stated under penalty of perjury that he attached a completed Schedule of Assets and Debts (form FL-142) to the Declaration of Disclosure. Respondent believed that this was a true statement because he provided Hillegas with the Statement of Assets/Debts.

Hillegas received forms FL-140 and FL-141 and the Statement of Assets/Debts from Respondent. In several email exchanges during September 2015, Hillegas repeatedly requested that Respondent provide form FL-142 and a revised form FL-141.[8] Respondent had already provided Hillegas with the same information in a different format, a point not disputed by OCTC or Hillegas. Hillegas failed to explain why she needed form FL-142 when she had already received the requisite financial disclosures. There was no evidence presented that form FL-142 was required in family law proceedings.

On October 17, 2015, Respondent's client signed form FL-142. On October 19, Respondent emailed Hillegas a courtesy copy of form FL-142 and indicated that it was "not substantially different than what was previously sent." In the email, Respondent stated that the information in the Statement of Assets/Debts on August 31 is "exactly or essentially the same

[8] Hillegas also sent Respondent letters via fax and U.S. Mail about the missing and updated forms.

client information" as he provided in October. The only difference was that he provided the information on form FL-142 as requested by Hillegas.[9]

On October 17, 2015, Respondent signed a proof of service, which was filed with the superior court on November 7, 2016, where he indicated that he served a "[Supplemental] Schedule of Assets and Debts" on Hillegas. (Brackets in original.) There is nothing on the form to indicate that it was a supplemental version. Hillegas was confused by the term "supplemental" because she had only received the form FL-142 served on October 17, 2015.

Respondent did not file a revised declaration form FL-141 with the court because he did not believe it was required. In emails in November and December 2015, Hillegas again asked Respondent to file a revised form FL-141 because Respondent had incorrectly represented to the court that he had previously served her with form FL-142 on August 31, 2015.

On January 11, 2016, Respondent and Hillegas exchanged emails detailing that their clients had reached an agreement, which indicated that Simpson would receive $200,000 in cash from Hillegas' client. Respondent stated that the transaction would be pursuant to an "IRC section 1041." Respondent credibly testified that he wanted the transaction to comply with federal tax law so his client would not be at risk of criminal liability. Respondent also pushed to open escrow with a title company to deposit the funds, rather than have such a large sum of cash exchange hands.

On April 1, 2016, Respondent substituted out of the case due to concerns about the legality of the parties' agreement. On November 30, Respondent filed a corrected form FL-141 with the court. He was driven to revisit the case and file a new declaration after OCTC began investigating the matter.

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[9] The court notes that Respondent could have saved himself some difficulties by clearly stating to Hillegas in their numerous exchanges that he had already provided her with the information she needed but in a different format. Instead, he kept promising to provide it to her in the format she requested.

Conclusions of Law

Count Six - (§ 6068, subd. (d) [Attorney's Duty to Employ Means Consistent with Truth])

In Count Six, Respondent is charged with willfully violating section 6068(d) by filing a declaration of service (form FL-141) in *Simpson v. Klinger* on September 1, 2015, where he declared under penalty of perjury that he served Hillegas with a schedule of assets and debts referred to as form FL-142, when Respondent had not served the form and knew his statement was false. Section 6068(d) provides that an attorney has a duty to employ those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of law or fact. The court does not find Respondent culpable of willfully violating section 6068(d).

The Supreme Court has explained that whether an attorney has violated section 6068(d) "depends first upon whether his representation to the . . . court was in fact untrue, and secondly, whether he knew that his statement was false and he intended thereby to deceive the court." (*Vickers v. State Bar* (1948) 32 Cal.2d 247, 252-253; accord, *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Here, Respondent's representation under penalty of perjury that he served a "completed Schedule of Assets and Debts (form FL-142)" was untrue as he created his own form, Statement of Assets/Debts.[10] Although the use of form FL-142 was optional, his statement under penalty of perjury that he used such a form was false. However, the court does not find sufficient evidence to establish that Respondent intended to deceive the court. Respondent did not believe that form FL-142 was required and believed that it was insufficient to disclose the financial information of his client due to her unique business. He provided all the requisite asset and debt information but just in a different format. Respondent is not culpable of willfully violating section 6068(d) and Count Six is dismissed with prejudice.

[10] Unlike forms FL-140 and FL-141, the use of form FL-142 was not mandatory.

Count Seven - (§ 6068, subd. (d) [Attorney's Duty to Employ Means Consistent with Truth])

Respondent is charged with willfully violating section 6068(d) by filing a declaration of disclosure (form FL-140) in *Simpson v. Klinger* on August 31, 2015, where he declared under penalty of perjury that he served Hillegas with form FL-142, when Respondent had not served the form and he knew his statement was false. The court does not find Respondent culpable of the misconduct alleged in Count Seven because there is a lack of clear and convincing evidence that Respondent filed form FL-140 with the superior court. There is no file date stamp on the document and the form states, "DO NOT FILE DECLARATIONS OF DISCLOSURE OR FINANCIAL ATTACHMENTS WITH THE COURT." Thus, the court dismisses Count Seven with prejudice.

Count Eight - (§ 6106 [Moral Turpitude - Misrepresentation])

Respondent is charged with willfully violating section 6106 on August 31 and September 1, 2015,[11] by stating in writing and under penalty of perjury in his proofs of service that he served Hillegas with form FL-142 (Schedule of Assets and Debts), when Respondent knew that he had not served the form on Hillegas. There is no section 6106 violation based on the statements Respondent made under penalty of perjury in the proofs of service attached to forms FL-140 and FL-141 because Respondent never indicated that he served Hillegas with "form FL-142" as Count Eight alleges.

However, Respondent did misrepresent on forms FL-140 and FL-141 that he served Hillegas with form FL-142, which was untrue. Section 6106 applies to misrepresentations and concealment of material facts. (See *In the Matter of Crane and Depew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 154–155.) "No distinction can ... be drawn among concealment, half-truth, and false statement of fact. [Citation.]" (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315,

[11] Respondent signed the Declaration of Service (form FL-141) and proof of service on August 31, 2015

quoted in *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 156.) "The actual intent to deceive is not necessary; a finding of gross negligence in creating a false impression is sufficient for violation of section 6106. [Citations.]" (*Ibid.*) The evidence clearly and convincingly demonstrates that Respondent declared under penalty of perjury that he served Hillegas with form FL-142, but he had not done so.

Respondent maintains that he is not culpable of violating section 6106 because the "Statement of Assets/Debts" that he served on Hillegas contained the same information that would have been included in form FL-142. Respondent argues that it is the substance of the document that controls, not the form number. This court disagrees. "Attorneys have the duty to be forthright and honest with the court, and to be honest with each other." (*Williams v. Superior Court* (2007) 147 Cal.App.4th 36, 56.) Although form FL-142 was an optional form, Respondent never indicated that he served a different document to disclose his client's assets and debts. Respondent falsely declared under penalty of perjury that he served form FL-142 on Hillegas. By signing forms FL-140 and FL-141 under penalty of perjury, Respondent gave "the additional imprimatur of veracity" to his misstatements, and he should have been put "on notice to take care that [his statements] were accurate, complete and true." (*In the Matter of Maloney and Virsik* (Review Dept.2005) 4 Cal. State Bar Ct. Rptr. 774, 786.) Respondent's false statements were not intentional, but do constitute moral turpitude by gross negligence. As such, Respondent is culpable of willfully violating section 6106.

Count Nine - (§ 6106 [Moral Turpitude - Misrepresentation])

OCTC charged Respondent with willfully violating section 6106 because he stated in writing and under the penalty of perjury in his proof of service that he served Hillegas a "supplemental" form FL-142, but in truth he was serving the form FL-142 referenced in his declaration of service dated August 31, 2015. Respondent credibly testified that he considered

the October 17, 2015 Schedule of Assets as a supplement to the Statement of Assets/Debts that he served on August 31, 2015. He only provided the assets and debts on form FL-142 at Hillegas' insistence. OCTC has not provided any evidence to rebut Respondent's reasonable explanation. Moreover, Respondent never stated in writing or on the October 17, 2015 proof of service that he served Hillegas with a supplemental "form FL-142" as alleged in the NDC.[12] As such, the court does not find Respondent culpable of willfully violating section 6106 and Count Nine is dismissed with prejudice.

Aggravation and Mitigation[13]

Aggravation

OCTC bears the burden of proving aggravating circumstances by clear and convincing evidence. (Std. 1.5)

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

Respondent has two prior records of discipline.

Schwartz I

On December 2, 1996, the Supreme Court suspended Respondent from the practice of law for 30 days, execution stayed, and placed him on probation for one year subject to conditions, including restitution. Respondent stipulated to misconduct in four client matters. In the first matter, Respondent was culpable of willfully violating former rule 4-100 by failing to provide his clients with a complete accounting, improperly withdrawing fees from his client trust account (CTA), and failing to promptly withdraw his attorney's fees from his CTA. In the

[12] Respondent's proof of service indicates he served a "[Supplemental] Schedule of Assets and Debts."

[13] All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

second case, Respondent was culpable of willfully violating former rule 3-700 by improperly withdrawing from employment and by failing to promptly return his client's file.

In the third matter, Respondent was culpable of willfully violating former rule 3-110(A) by failing to perform with competence and willfully violating section 6068(m) by failing to communicate with his client. Finally, Respondent was culpable of failing to maintain disputed funds in this CTA, in willful violation of former rule 4-100(A)(2) and failing to promptly pay his client funds to which she was entitled, in willful violation of former rule 4-100(B)(4). Respondent's wrongdoing was aggravated by multiple acts of misconduct, but tempered by the lack of a prior discipline record, extreme emotional difficulties and the lack of client harm in the second matter.

Schwartz II

On July 4, 2011, the Supreme Court suspended Respondent from the practice of law for two years, execution stayed, and placed him on probation for three years subject to conditions, including a six-month actual suspension. Respondent's misconduct involved two matters. In the first matter, Respondent was found culpable of failing to perform with competence, in willful violation of former rule 3-110(A) and failing to promptly return his client's file, in willful violation of former rule 3-700(D)(1). In the second matter, Respondent committed misconduct warranting discipline due to his 2011 misdemeanor conviction of carrying a weapon concealed in his vehicle, in violation of Penal Code section 12025(a)(1). *Schwartz I* and lack of insight were the aggravating factors. Good character, community service and *pro bono* work constituted the mitigating circumstances.

Respondent's prior discipline record is a moderate aggravating factor because the current misconduct is not similar to his prior misconduct, but he committed the current acts while on probation in *Schwartz II*.

No Other Aggravating Circumstances

Multiple acts of misconduct are not an aggravating factor in this matter because Respondent's misconduct involved culpability of two charges. (See *In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 177 [multiple acts of misconduct not present where misconduct involved misappropriation of client funds and failing to pay sanctions].) Moreover, OCTC failed to present clear and convincing evidence that Respondent lacked insight into his wrongdoing. Respondent acknowledged that he did not send out the required notices pursuant to rule 9.20. His explanation about the circumstances surrounding the notices and the *Simpson* matter does not equate to indifference or a failure to atone.

Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.6)

Good Character (Std. 1.6(f).)

Respondent presented character testimony from eight witnesses, including family members, clients, attorneys, a neighbor and friends. Some of the witnesses had an understanding of the alleged misconduct while others did not. In addition, only some of Respondent's witnesses were aware of his prior disciplinary history while others did not know the extent of it. The witnesses provided testimony about Respondent's commitment to his family, his personal challenges as a parent, his integrity, skills as a lawyer, and his honesty. One witnesses testified about Respondent's participation in little league baseball, which is his only volunteer work. The court finds that Respondent's good character evidence warrants moderate weight in mitigation. (See *In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, [the mitigating value of character testimony is undermined when the witness is unaware of the full extent of respondent's misconduct].)

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 standards for attorneys. (Std. 1.1.) The disciplinary analysis begins with the standards, which, although not binding, are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 91–92.)

Standards 2.11 and 2.12(a) are most apt. Standard 2.11 provides that, "[d]isbarment or actual suspension is the presumed sanction for an act of moral turpitude, dishonesty . . . intentional or grossly negligent misrepresentation or concealment of a material fact. The degree of sanction depends on the magnitude of the misconduct; the extent to which the misconduct harmed or misled the victim, which may include the adjudicator; the impact on the administration of justice, if any; and the extent to which the misconduct related to the [attorney's] practice of law." Applying standard 2.11 to the facts of this case, Respondent's misrepresentation falls on the middle to lower-end of the misconduct spectrum because his misrepresentation was based on gross negligence, not with the intent to mislead. Moreover, Respondent's misrepresentation neither caused any actual harm nor misled the court or Hillegas, but his misconduct was related to the practice of law. Similar to standard 2.11, standard 2.12(a) provides that the presumed sanction for "disobedience or violation of a court order related to the . . . practice of law" is disbarment or actual suspension.

Since Respondent has two prior discipline records, standard 1.8(b) is also applicable. Standard 1.8(b) provides for disbarment as the appropriate discipline when an attorney has two or more prior records of discipline, provided: (1) an actual suspension was ordered in any of the prior disciplinary matters; (2) the prior and current disciplinary matters demonstrate a pattern of misconduct; or (3) the prior and current disciplinary matters demonstrate the attorney's

unwillingness or inability to conform to ethical norms. Respondent's case meets at least one of these criteria, he received a six-month actual suspension in *Schwartz II.*

The court acknowledges that standard 1.8(b) allows a departure from the recommended discipline of disbarment when "the most compelling circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current misconduct." Here, Respondent's good character evidence is not compelling, and his present misconduct did not occur at the same time as the misconduct underlying his two prior discipline cases.

However, disbarment is not mandatory in every case of two or more prior disciplines, even where compelling mitigating circumstances do not clearly predominate. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-507 [disbarment is not mandatory in every case of two or more prior disciplines, even where no compelling mitigating circumstances clearly predominate].) If the court deviates from the presumptive discipline, the court must explain the reasons for doing so. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 776.) This court finds reasons to recommend departing from standard 1.8(b). Respondent took substantial steps to comport with the court order directing him to comply with rule 9.20 and satisfied one of its primary goals – to give clients advance notice of his upcoming suspension. Respondent did not ignore his obligations under the rule, but relied on the advice of an experienced attorney and acted in good faith. His misrepresentation was not intentional or designed to deceive, and Respondent has fully participated in this disciplinary proceeding.

The court is mindful that the order Respondent violated was a rule 9.20 order, and that the Supreme Court has determined that a willful violation of rule 9.20 is, "by definition, deserving of strong disciplinary measures." (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1096.) In addition, the progressive discipline principle articulated in the standards calls for a lengthy

period of suspension.[14] The Supreme Court has already actually suspended Respondent for six months in *Schwartz II*. Thus, based on the totality of the circumstances, it is recommended that Respondent receive a one-year actual suspension and three years' probation. (See std. 1.2(c)(1) ["Actual suspension is generally for a period of thirty days, sixty days, ninety days, six months, one year, eighteen months, two years, three years, or until specific conditions are met"].) This recommendation is appropriately progressive to protect the public, the courts, and the legal profession.

RECOMMENDATIONS

Discipline – Actual Suspension

It is recommended that Donald Charles Schwartz, State Bar Number 122476, be suspended from the practice of law for two years, that execution of that suspension be stayed, and that Respondent be placed on probation for three years with the following conditions.

Conditions of Probation

Actual Suspension

Respondent must be suspended from the practice of law for the first year of the period of Respondent's probation.

Review Rules of Professional Conduct

Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent 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 Respondent's

[14] Standard 1.8(a) states: "If [an attorney] 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."

compliance with this requirement, to the State Bar's Office of Probation in Los Angeles (Office of Probation) with Respondent's first quarterly report.

Comply with State Bar Act, Rules of Professional Conduct, and Probation Conditions

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

Maintain Valid Official State Bar Attorney Records Address and Other Required Contact Information

Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must make certain that the State Bar Attorney Regulation and Consumer Resources Office (ARCR) has Respondent's current office address, email address, and telephone number. If Respondent does not maintain an office, Respondent must provide the mailing address, email address, and telephone number to be used for State Bar purposes. Respondent must report, in writing, any change in the above information to ARCR, within ten days after such change, in the manner required by that office.

Meet and Cooperate with Office of Probation

Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must schedule a meeting with Respondent's assigned probation case specialist to discuss the terms and conditions of Respondent's 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, Respondent may meet with the probation case specialist in person or by telephone. During the probation period, Respondent 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.

State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court

During Respondent's probation period, the State Bar Court retains jurisdiction over Respondent to address issues concerning compliance with probation conditions. During this period, Respondent must appear before the State Bar Court as required by the court or by the Office of Probation after written notice mailed to Respondent's official State Bar attorney records address, as provided above. Subject to the assertion of applicable privileges, Respondent must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

Quarterly and Final Reports

a. Deadlines for Reports. Respondent 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, Respondent must submit a final report no earlier than ten days before the last day of the probation period and no later than the last day of the probation period.

b. Contents of Reports. Respondent must answer, under penalty of perjury, all inquiries contained in the quarterly report form provided by the Office of Probation, including stating whether Respondent 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. Respondent is directed to maintain proof of Respondent's 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 Respondent's actual suspension has ended, whichever is longer. Respondent is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

State Bar Ethics School

Within one year after the effective date of the Supreme Court order imposing discipline in this matter, Respondent 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 Respondent will not receive MCLE credit for attending this session. If Respondent provides satisfactory evidence of completion of the Ethics School after the date of this decision but before the effective date of the Supreme Court's order in this matter, Respondent will nonetheless receive credit for such evidence toward his duty to comply with this condition.

Proof of Compliance with Rule 9.20 Obligations

For a minimum of one year after the effective date of discipline, Respondent is directed to maintain proof of Respondent's compliance with the Supreme Court's order that Respondent comply with the requirements of California Rules of Court, rule 9.20, subdivisions (a) and (c). Such proof must include the names and addresses of all individuals and entities to which notification was sent pursuant to rule 9.20; copies of the notification letter sent to each such intended recipient; the original receipt and tracking information provided by the postal authority for each such notification; and the originals of all returned receipts and notifications of non-delivery. Respondent is required to present such proof upon request by the Office of Chief Trial Counsel, the Office of Probation, and/or the State Bar Court.

Commencement of Probation

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 Respondent has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Donald Charles Schwartz be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter, or during the period of his suspension, whichever is longer and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

California Rules of Court, Rule 9.20

It is further recommended that Respondent be ordered to comply with the requirements of California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order imposing discipline in this matter.[15] Failure to do so may result in disbarment or suspension.

Costs

It is further recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against a licensed attorney who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

Dated: July 2, 2019

MANJARI CHAWLA
Judge of the State Bar Court

[15] For purposes of compliance with rule 9.20(a), the operative date for identification of "clients being represented in pending matters" and others to be notified is the filing date of the Supreme Court order, not any later "effective" date of the order. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45.) Further, Respondent is required to file a rule 9.20(c) affidavit even if Respondent has no clients to notify on the date the Supreme Court filed its order in this proceeding. *(Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or contempt, an attorney's failure to comply with rule 9.20 is, inter alia, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Court Specialist of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on July 2, 2019, I deposited a true copy of the following document(s):

DECISION

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

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

SAMUEL C. BELLICINI
SAMUEL C. BELLICINI, LAWYER
1005 NORTHGATE DR # 240
SAN RAFAEL, CA 94903

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

MARIA J. OROPEZA, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on July 2, 2019.

Bernadette Molina
Court Specialist
State Bar Court