

Filed October 3, 2014

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of)	Case Nos. 11-O-17393 (12-O-10066)
)	12-O-11429 (Cons.)
GREGORY MOLINA BURKE,)	
)	OPINION
A Member of the State Bar, No. 188891)	
_____)	

A hearing judge found respondent Gregory Molina Burke culpable of seven counts of misconduct in three client matters, including engaging in the unauthorized practice of law (UPL) while on a 60-day suspension in a 2011 case, making misrepresentations in a court pleading and to opposing counsel, and twice failing to pay court-ordered sanctions. Finding no mitigation and four aggravating factors, including dishonesty and lack of candor, the judge recommended suspending Burke for two years and until he proves his rehabilitation and fitness to practice in accordance with the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.2(c)(1).¹

Burke appeals, challenging the hearing judge’s culpability, aggravation, and mitigation findings, as well as the recommended level of discipline. The Office of the Chief Trial Counsel of the State Bar of California (OCTC) did not seek review and asks us to affirm the hearing judge’s decision.

Upon our independent review of the record (see Cal. Rules of Court, rule 9.12), we adopt all but one culpability finding, and reverse the dismissal of a moral turpitude charge arising from

¹ All further references to standards are to this source, and reflect the modifications to the standards effective January 1, 2014.

Burke's UPL.² Importantly, we find no dishonesty or lack of candor in aggravation, and assign mitigating credit to Burke's cooperation for entering into a stipulation.

Given these findings, we conclude that the recommended two-year suspension is too severe. Instead, the standards and the decisional law support a nine-month suspension as appropriate progressive discipline, continuing until Burke pays his court-ordered sanctions.

I. BURKE'S PRIOR DISCIPLINE CASE

Burke was admitted to the California Bar in 1997. He spent 11 years practicing law without incident. However, in 2008 and 2009, eight electronic debits and checks from his client trust account (CTA) were returned for insufficient funds because he did not properly supervise his wife, who acted as his secretary and bookkeeper. Although no client funds were affected by Burke's mismanagement of his CTA, he made numerous withdrawals to pay for personal expenses.

In 2011, Burke stipulated to culpability for commingling funds in violation of the Rules of Professional Conduct, rule 4-100(A)³ and for failing to perform with competence in violation of rule 3-110(A) for failing to supervise his wife. His misconduct was tempered by many years of practice without discipline, lack of client harm, and cooperation with OCTC. There were no aggravating circumstances.

The Supreme Court suspended Burke from the practice of law for two years, execution stayed. Effective August 7, 2011, Burke was placed on probation for two years with specified conditions, including that he serve a 60-day actual suspension and submit quarterly written reports for the period of his probation. At the time of his suspension, Burke sent certified letters

² The hearing judge dismissed five other counts — counts 1, 2, and 3 in Case no. 11-O-17393 and counts 3 and 4 in Case no. 12-O-11429. OCTC does not contest these dismissals, and we find the record supports them as well.

³ All further references to rules are to the Rules of Professional Conduct.

to all of his clients advising them of his suspension. However, thereafter, OCTC received three client complaints involving Burke, causing OCTC to file two Notices of Disciplinary Charges (NDCs) in 2012 alleging 13 counts of misconduct, including: engaging in UPL; acts of moral turpitude involving misrepresentations to the courts, to opposing counsel and to the State Bar; failing to inform his clients of significant developments; failing to obey court orders; failing to comply with conditions of probation; and making misrepresentations in his quarterly probation report. The three client matters were consolidated.

The hearing judge's factual findings were based on the parties' stipulation as to facts and the evidence offered at trial. We adopt the factual findings, except as noted below, and consider additional relevant facts from the record.

II. CASE NO. 11-O-17393 — THE MARSHALL MATTER

A. FACTS

In his prior disciplinary case, Burke signed the stipulation on February 18, 2011, agreeing to a 60-day suspension. On March 15, 2011, OCTC signed it and then filed and served it on Burke. During this one-month interim period, Burke agreed to defend John Marshall against an insurance company's cross-complaint for civil fraud.⁴ Marshall paid Burke an advance fee of \$15,000 pursuant to a legal services agreement. At the time he was retained, Burke did not inform Marshall of his pending discipline matter. Four and one-half months later, on July 8, 2011, the Supreme Court entered its discipline order, suspending Burke for 60 days, effective August 7, 2011.

Burke learned of the Supreme Court's order on or about July 15, 2011. At that time, Marshall's civil trial had been set for October 25, 2011 — two weeks after Burke's suspension ended. Burke filed an ex parte application on July 27, 2011, requesting a continuance of the

⁴ A different attorney represented Marshall's claim against the insurer in the lawsuit.

October 25th trial date because of “the size of the file in this matter, and necessity to conduct discovery on the serious fraud claim.” Burke also asserted that the October 25 trial date would deny Marshall “the opportunity to file a motion for summary judgment.” Burke did not advise the superior court of his imminent suspension. The court denied his application.

On August 2, 2011, Burke advised Marshall by email that he would be suspended from August 7th through October 7th, but the suspension would not affect his defense of the cross-complaint. Burke scheduled a meeting with Marshall on August 20, 2011, to review trial strategy. At that meeting, Marshall terminated Burke and asked him to sign a substitution of attorney form.

After his termination, Burke prepared and sent an invoice to Marshall for \$30,351.30, which included, inter alia, legal services he had rendered between August 7 and August 18, 2011, while Burke was on suspension. These services included: (1) reviewing a critique of respondent’s brief; (2) reviewing the issue of causation on insurance nonpayment; (3) receipt and review of discovery responses; (4) receipt and review of a demand for exchange of expert witnesses; and (5) reviewing Marshall’s file to prepare motions in limine and trial exhibits. In addition, Burke sent an email to Marshall on August 10, 2011, advising him about the preclusive effect of the trial court’s finding that Marshall had engaged in fraud and recommending a settlement strategy. Marshall refused to pay the invoice, and instead demanded a refund of his initial payment of \$15,000. When Burke refused, Marshall complained to the State Bar.

B. CULPABILITY

Count Three: Burke's UPL Violated Business and Professions Code⁵ sections 6068, subdivision (a), 6125, and 6126⁶

The hearing judge found Burke culpable of violating section 6068, subdivision (a) because he practiced law while on suspension. We agree. The invoice to Marshall clearly and convincingly⁷ established that Burke engaged in UPL by performing various legal services during the period he was suspended. (*In re Utz* (1989) 48 Cal.3d 468, 483, fn. 11 [practice of law “ ‘includes legal advice and counsel’ ”]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 543 [practice of law includes application of legal knowledge and technique].)

We reject Burke's argument that he did not engage in UPL because he did not charge Marshall a fee or receive payment for the services provided during his suspension. Sections 6125 and 6126 provide no exception for pro bono service, and we decline to create one here. We also reject Burke's argument that he is not culpable of UPL because he claims an individual in the State Bar of California Ethics Department advised him he could review his client's file while on suspension. Burke may not rely on the statements of a State Bar employee as a defense to violating the rules or statutes governing an attorney's professional responsibilities. (*Sheffield v. State Bar* (1943) 22 Cal.2d 627, 632 [“no employee of The State Bar can give an attorney

⁵ All further references to sections are to the Business and Professions Code.

⁶ Section 6068, subdivision (a), requires an attorney “[t]o support the Constitution and laws of the United States and of this state.” A violation of section 6068, subdivision (a), is established when an attorney violates sections 6125 and 6126. (*In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 236-237.) Section 6125 provides: “No person shall practice law in California unless the person is an active member of the State Bar.” Section 6126, subdivision (b), prohibits holding oneself out as entitled to practice law while on suspension.

⁷ Clear and convincing evidence leaves no substantial doubt and must be sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

permission to violate the Business and Professions Code or the Rules of Professional Conduct”].)

Count Four: Burke’s UPL Involved Moral Turpitude (§ 6106)⁸

The hearing judge dismissed Count Four upon concluding that Burke’s UPL did not involve dishonesty or moral turpitude because he had advised his client of his suspension prior to providing the unauthorized legal services. However, Burke *knowingly* provided legal services to Marshall while he was on suspension, which constitutes an act of moral turpitude. (*In the Matter of Mason* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 639, 641-642 [attorney sought continuance while suspended; misconduct involved moral turpitude because attorney appeared in court knowing he was suspended]; see *In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 384 [intentional violation of court order involves moral turpitude].) We accordingly reverse the hearing judge’s dismissal of Count Four and find Burke culpable as charged.

III. CASE NO. 12-O-10066 — THE NORRIS MATTER

A. FACTS

Burke represented Herman Norris in a civil lawsuit filed in San Bernardino County Superior Court. At the end of a hearing on May 18, 2010, the court granted the defendant’s unopposed motion to compel discovery responses and ordered Burke to pay \$990 in sanctions to defense counsel Margaret Cahill’s law firm within 20 days. Cahill provided Burke with a notice of the ruling, which indicated that responses to the outstanding discovery had to be completed within 20 days of service of the notice and order. But the signed order failed to specify a time for payment of the sanctions. At the time of Burke’s disciplinary trial, the sanctions remained unpaid.

⁸ Section 6106 provides in relevant part: “The commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension.”

The superior court set a case management conference (CMC) for May 28, 2010. Burke had a conflict on that date, so he contacted Cahill, who agreed to stipulate to a continuance, which she signed on May 14. However, the court did not file the stipulation Burke submitted because he did not enclose a filing fee.

Burke did not attend the CMC, but Cahill appeared telephonically. She testified that she did not advise the CMC judge that the parties had previously stipulated to a continuance because she “assumed this was the continued date, forgetting about the stipulation, since plaintiff counsel didn’t notify me that it was rejected.” She further testified that her office was very busy, and she did not recall all of the stipulations. Burke initially testified that he could not remember if the court rejected the stipulation but later testified that he told Cahill the stipulation had been rejected. Burke contends that Cahill agreed to appear at the CMC to advise the court that the parties had agreed to a continuance. Having no knowledge of the parties’ stipulation, the superior court issued an order to Burke to show cause (OSC) why the matter should not be dismissed for his failure to appear. The Court rescheduled both the OSC and the CMC for June 28, 2010.

Burke had another conflict for that date, so he again asked Cahill to agree to a continuance, which she did. Once again, he failed to enclose a filing fee with the stipulation, and the superior court rejected it. Cahill learned that the stipulation had been rejected after checking the docket and contacted Burke, who advised her that he would appear at the June 28 hearing. Burke made arrangements with Court Call for a telephonic appearance, but he was not connected until after the court had heard the matter. Cahill, who appeared at the hearing by phone, again did not advise the judge of the parties’ stipulation since she understood from her earlier conversation with Burke that he intended to appear. The court dismissed the case.

Thereafter, Burke filed a motion to set aside the dismissal pursuant to Code of Civil Procedure section 473 on the grounds that the delayed appearance at the June 28 CMC was caused by problems with Court Call. In the motion, Burke described the procedural background to the case and in so doing, he stated that Cahill had “agreed to specially appear” on his behalf at the earlier CMC held on May 28th to request a continuance pursuant to their stipulation. Cahill opposed Burke’s motion, and vigorously denied that she had agreed to specially appear. On August 4, 2010, the trial court granted Burke’s motion for relief from default, but ordered him to pay \$625 sanctions to Cahill by September 4, 2010. Burke never paid the sanctions.

B. CULPABILITY

Counts Six and Eight: Failure to Obey Court Orders (§ 6103)⁹

The hearing judge found Burke culpable of violating section 6103 because he willfully disobeyed the superior court’s May 18, 2010 and August 4, 2010 sanctions orders. We agree. To prove failure to obey a court order under section 6103, “[a]t a minimum, it must be established that an attorney ‘ “knew what he was doing or not doing and that he intended either to commit the act or to abstain from committing it.’ [Citations.]” ’ ” (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 787, quoting *King v. State Bar* (1990) 52 Cal.3d 307, 314.)

It is undisputed that Burke was aware of the court’s two sanctions orders. Although the May 18th order did not specify a deadline for payment, Burke had not paid either of the sanctions at the time of his disciplinary trial — two and a half years after the orders were issued. Such a delay is unreasonable and constitutes a violation of section 6103. (See *In the Matter of*

⁹ Section 6103 provides that an attorney’s “wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension.”

Respondent Y (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 867-868 [if sanctions order fails to indicate time for payment, attorney must comply within reasonable time].)

Burke’s claim of financial hardship is no defense for nonpayment since he failed to seek relief from the orders. (*In the Matter of Respondent Y, supra*, 3 Cal. State Bar Ct. Rptr. at p. 868 [despite financial hardship, attorney culpable of misconduct for failure to pay court-ordered sanctions when attorney fails to seek relief from order in civil courts because of inability to pay].)

Count Seven: Moral Turpitude — Misrepresentations (§ 6106)

The hearing judge concluded that Burke committed an act of moral turpitude by intentionally misrepresenting in his motion for relief from default that Cahill agreed to “specially appear” for him at the May 28, 2010 CMC. The hearing judge found Burke’s testimony about this issue to be “weak and at times confused,” while Cahill was a credible witness. We give great weight to the hearing judge’s credibility determinations. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 315 [great weight given to credibility assessments by hearing judge]; Rules Proc. of State Bar, rule 5.155(A) [hearing judge's factual findings entitled to great weight].) Although Cahill’s testimony may have been credible, it was generally inconsistent and confusing. To illustrate, Cahill testified she did not inform the CMC judge that the parties had stipulated to a continuance because she “forgot” about the stipulation. However, she also testified that she did not raise the issue of the stipulation because she “assumed this was the continued date.” If Cahill believed that she was attending the *continued* CMC, she must have been aware of the stipulation that had occasioned the continuance. In view of the inherent contradictions in Cahill’s testimony, we do not find clear and convincing evidence that Burke made an intentional misrepresentation as charged in Count Seven.

**IV. CASE NO. 12-O-11429 — THE D’EUGENIO MATTER
AND FALSE QUARTERLY REPORT**

A. FACTS

1. Burke's Representation of Anthony D'Eugenio

Anthony Reed D'Eugenio hired Burke to represent him in a wrongful termination and wage claims lawsuit against the Beverly Hills Hotel, which was assigned to arbitration by the court. On Monday, August 1, 2011, less than a week before the August 7, 2011 effective date of his suspension, Burke represented D'Eugenio at his deposition taken by opposing counsel Peter Maretz. Maretz had not finished deposing D'Eugenio when Burke indicated that he had to leave. Maretz agreed to continue the deposition but wanted to complete it by the following week in order to allow enough time to file a motion for summary judgment. The following exchange took place on the record:

MR. MARETZ: Okay. And – so there's a commitment that he will come back within a week to 10 days before the end of next week.

MR. BURKE: We'll have to have that discussion. What type of – on this deposition –

MR. MARETZ: We have had that discussion.

MR. BURKE: Right. I'm just going to call and give you dates to figure out what dates I can do it.

MR. MARETZ: But the timeframe –

MR. BURKE: I'm going to try my best to accommodate that, yes. I would like to have the deposition transcript sent to me with at least three weeks to make corrections.

MR. MARETZ: That may be too long because I may have to file a summary judgment motion pretty soon. I need a commitment that he'll be back for deposition before the end of next week.

MR. BURKE: I'll do my best, yeah, absolutely.

MR. MARETZ: I can't –

MR. BURKE: Well, then I don't know what you want me, commit to you in blood. I can't do anything else. We'll talk about it.

MR. MARETZ: I'm going to send out a notice for sometime next week and –

MR. BURKE: That's fine.

MR. MARETZ: So I'm expecting him before the end of next week.

MR. BURKE: Sure.

Burke never revealed that he would be suspended as of the following week. On

August 7, 2011, the first day of his suspension, Burke sent an email to Maretz and the arbitrator attaching his motion for summary judgment. The email did not indicate that he was suspended and he signed it “Gregory M. Burke, Esq.” Three days after his suspension began and one day before D’Eugenio’s continued deposition was to take place, Burke advised Maretz and the arbitrator by email that he would be suspended from the practice of law from August 8 through October 8, 2011. In addition, he emailed a witness on August 11 requesting that she send him a declaration, again signing it “Gregory M. Burke, Esq.”

2. Quarterly Reports

As a probation condition of his prior discipline, Burke was required to provide quarterly reports to the Office of Probation (Probation). In his October 11, 2011 quarterly report, he stated under penalty of perjury that he had not practiced law while suspended.

B. CULPABILITY

Count One: Moral Turpitude — Concealment (§ 6106)

The hearing judge found that Burke committed an act of moral turpitude by concealing his suspension from Maretz. We agree. Maretz agreed to accommodate Burke’s request to continue D’Eugenio’s deposition with the understanding that the matter would be resumed the following week. Instead of disclosing his impending suspension, Burke led Maretz to believe that he would be available to complete D’Eugenio’s deposition.

We reject Burke’s argument that he is not culpable of moral turpitude because he never “stated he would be back next week.” In fact, the deposition transcript reveals that he confirmed the deposition could go forward the following week. We also find meritless Burke’s assertion that his deception was justified because he did not believe it was in his client’s interest to reveal to Maretz that the real reason for seeking the continuance was that Burke intended to withdraw from the case because D’Eugenio’s deposition testimony was perjurious. Burke misled Maretz

and created a false impression. He had an obligation to inform Maretz that he would be on suspension and unable to attend the continued deposition the following week, yet he remained silent. Burke's concealment and deceit violated section 6106. Section 6106 "applies to the misrepresentation and concealment of material facts. [Citation.]" (*In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 220; *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 910 [moral turpitude "includes creating a false impression by concealment as well as affirmative misrepresentations"].)

Count Two: Failure to Comply with Laws (§§ 6068, subd. (a), 6125 and 6126)

The hearing judge correctly found that Burke wilfully violated sections 6068, subdivision (a), 6125 and 6126¹⁰ because he committed UPL in the D'Eugenio matter by submitting a motion for summary judgment to Maretz and the arbitrator with an email identifying himself as "Esq." and by sending an email to a witness asking for a declaration, also identifying himself as "Esq." (*Arm v. State Bar* (1990) 50 Cal.3d 763, 775 [suspension orders disqualify attorneys from holding themselves out as entitled to practice]; *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480, 494 [sending counteroffer to opposing counsel while suspended constitutes UPL even if it was prepared before suspension began]; *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 91 [suspended attorney gave false impression of current ability to practice by using term "Esq." when applying for job].)

In his defense, Burke asserts that he sent the motion for summary judgment on Sunday, August 7th, believing that his suspension did not begin until Monday, August 8th. He cites to

¹⁰ A violation of section 6068, subdivision (a) is predicated on violations of sections 6125 and 6126. (*In the Matter of Trousil, supra*, 1 Cal. State Bar Ct. Rptr. at pp. 236-237.)

Code of Civil Procedure section 12a in support of his good faith belief.¹¹ But, section 12a merely extends the *last day* for performance of acts, not the first day. Burke received Probation's July 25, 2011 letter informing him that his suspension began on August 7th.

Count Five: Moral Turpitude — Misrepresentations (§ 6106)

The hearing judge correctly found that Burke violated section 6106 because he misrepresented in his October 11, 2011 quarterly report that he did not practice law while he was suspended. Having committed UPL in the Marshall and D'Eugenio matters, his statements to the contrary under penalty of perjury were false and violated section 6106. (*In the Matter of Maloney and Virsik, supra*, 4 Cal. State Bar Ct. Rptr. 774, 786 [misrepresentations made in writing under penalty of perjury constitute acts of moral turpitude because they provide “the additional imprimatur of veracity” to misstatements and “should have put reasonable persons on notice to take care that their [statements] were accurate, complete and true”].)

V. AGGRAVATION AND MITIGATION

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

The hearing judge did not find any circumstances that mitigated Burke's misconduct, but found four aggravating factors — a prior discipline record, multiple acts, dishonesty, and lack of candor. We agree that Burke's prior record of discipline and multiple acts of misconduct are aggravating factors, but do not find clear and convincing evidence of dishonesty or lack of

¹¹ Code of Civil Procedure section 12a provides: “If the last day for performance . . . is a holiday, then that period is hereby extended to and including the next day that is not a holiday. For purposes of this section, holiday means all day on Saturdays, all holidays specified in Section 135 and, to the extent provided in section 12b, all days that by terms of section 12b are required to be considered as holidays. [¶](b) This section applies to sections 659, 659a, and 921, and to all other provisions of law providing or requiring an act to be performed on a particular day or within a specified period of time, whether expressed in this or any other code or statute, ordinance, rule, or regulation.”

candor. We also find Burke is entitled to some mitigating credit for cooperation with OCTC by entering into a stipulation.

A. AGGRAVATION

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

Burke's prior record of discipline is an aggravating factor. His previous misconduct involved mismanagement of his CTA resulting in NSF withdrawals and commingling. There was no dishonesty or client harm, and Burke stipulated to culpability and to discipline. We do not find a nexus between his prior discipline and his present misconduct. (Cf. *In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 528, 531 [greater discipline warranted due to close nexus between previous misconduct and present violation].) Nonetheless, Burke committed the present misconduct while on probation. Thus, we assign moderate weight in aggravation to his prior discipline. (*In the Matter of Katz* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 430, 438 [aggravation given greater weight when attorney committed current misconduct while on probation].)

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

Burke's misconduct involved multiple acts of wrongdoing. He is culpable of seven counts of misconduct in three client matters. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646-647 [three instances of misconduct considered multiple acts].)

3. Burke's Misconduct Was Not Followed by Dishonesty (Std. 1.5(d))

The hearing judge found that Burke was dishonest when he wrote to Probation seeking to amend his quarterly statement and to explain that he mistakenly practiced law while on suspension. Burke declared under penalty of perjury that the death of a close friend caused him to "miscalendar" the start date of his suspension as August 8, rather than August 7, 2011. In

finding dishonesty in this statement, the judge relied on the email Burke sent Marshall stating his suspension “runs Aug. 7 to October 7.”

We find that the weight of the evidence supports Burke’s explanation of this inconsistency. Burke testified that after he sent Marshall the email, he realized that August 7th fell on a Sunday, and calendared his suspension to begin the next business day, Monday, August 8th. Consistent with his understanding, Burke sent certified letters to all of his clients, superior court judges, and opposing counsel on August 17, 2011, informing them of his suspension “beginning August 8, 2011[sic] and ending October 8, 2011.” Burke’s subsequent actions corroborate his explanation offered to the OCTC investigator. Based on this record, we cannot find that Burke’s statements to Probation were dishonest.

4. No Clear and Convincing Evidence of Lack of Candor (Std. 1.5(h))

The hearing judge found that Burke lacked candor when he testified that the reason he did not advise Maretz about his suspension was because he intended to substitute out of the case. The judge based his finding on Burke’s conduct in the days following the deposition when he continued to represent D’Eugenio. But D’Eugenio testified and corroborated Burke’s explanation. When asked if Burke mentioned withdrawing from the case, D’Eugenio responded, “He told me he wanted to [withdraw] a few times during the first deposition, and we were pulled out — we went into the hallway numerous amounts of times, and it got worse and worse and worse” It was only *after* the deposition had terminated that D’Eugenio successfully prevailed upon Burke to continue to represent him. While the hearing judge’s candor determination is entitled to great weight, we do not find clear and convincing evidence in the record that Burke lacked candor.

B. ONE MITIGATING FACTOR

Burke is entitled to nominal mitigation credit for cooperating with OCTC by stipulating to certain facts prior to trial. (Std. 1.6(e).) Because the facts were easily provable, however, the weight of the mitigation is limited. (*In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 567.)

VI. LEVEL OF DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession. (Std. 1.1.) We balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.) In doing so, we look to the standards for guidance. (*In re Silverton* (2005) 36 Cal.4th 81, 91.)

Here, the applicable standards are 2.6(a) for engaging in UPL and 2.7 for misconduct involving moral turpitude, both of which suggest a range of discipline from actual suspension to disbarment. Under standard 2.6(a) the “degree of sanction depends on whether the member knowingly engaged in the unauthorized practice of law,” while the level of discipline under standard 2.7 “depends on the magnitude of the misconduct and the extent to which the misconduct harmed or misled the victim and related to the member’s practice of law.” Burke knowingly practiced law while he was suspended and therefore his misconduct involved moral turpitude. But his UPL was confined to 11 days and all of his clients were notified of his suspension. Also, Burke’s misrepresentations did not cause client harm. While we do not condone his misrepresentations, they are not at the most serious end of the spectrum of discipline cases involving dishonesty.

Given the broad range of discipline provided by standards 2.6(a) and 2.7, we look to case law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) In recommending a two-year actual suspension, the hearing judge relied on *Borré v. State Bar* (1991) 52 Cal.3d

1047, in large measure because he focused on Burke's dishonesty in aggravation. In *Borré*, the attorney abandoned the appeal of an incarcerated client, lied to his client and the State Bar, and fabricated an exculpatory letter, which he submitted to the investigator. The Supreme Court found that the attorney's abandonment of his incarcerated client was serious and "[h]is fabrication of the November 26 letter and subsequent lies, moreover, are particularly egregious." (*Id.* at p. 1053.) The Court imposed a two-year suspension.

We find Burke's dishonesty is significantly less serious than the "egregious" misconduct in *Borré*, given our reversal of the hearing judge's finding of moral turpitude arising from an alleged misrepresentation in a pleading. In addition, we have reversed the hearing judge's aggravation findings of dishonesty to a State Bar investigator and lack of candor in his explanation for terminating a deposition.

Accordingly, we find the case of *In the Matter of Wells*, *supra*, 4 Cal. State Bar Ct. Rptr. 896 is most comparable. In *Wells*, the attorney engaged in UPL in another jurisdiction in two client matters. She was also culpable of collecting an unconscionable fee, failing to refund unearned fees, a trust account violation, and moral turpitude involving dishonesty with the South Carolina authorities investigating her UPL. The attorney had a prior discipline involving trust account violations and other aggravating factors including multiple acts of wrongdoing, significant harm, and indifference. We recommended a six-month suspension due to the mitigating factors of extreme emotional distress, good character, and cooperation with the State Bar. As in *Wells*, Burke engaged in UPL in two client matters, and was also culpable of other misconduct involving dishonesty. And he has a prior discipline for trust account violations. Although the UPL in *Wells* did not involve moral turpitude and there was "significant" mitigation (*id.* at p. 912) compared to minimal mitigation in this matter, we find the *Wells* case is comparable overall to Burke's.

Since Burke's prior discipline was recent, we must consider a greater sanction than his earlier 60-day suspension. (Std. 1.8(a).) After considering *Wells* and the wide range of discipline imposed in other cases involving UPL,¹² we conclude that the appropriate progressive discipline for Burke is a nine-months suspension and until he pays the court-ordered sanctions. The latter requirement provides the necessary safeguard to ensure public protection. (*In the Matter of Luis* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 737, 742-743 [reinstatement hearing offers public protection through formal proceeding designed to ensure moral fitness and legal learning before attorney permitted to return to practice of law].)

VII. RECOMMENDATION

For the foregoing reasons, we recommend that Gregory Molina Burke be suspended from the practice of law for two years, that execution of that suspension be stayed, and that he be placed on probation for two years on the following conditions:

1. He is suspended from the practice of law for a minimum of the first nine months of probation, and will remain suspended until the following condition is satisfied:
 - a. He pays the sanctions ordered by the San Bernardino Superior Court in the total amount of \$1,615, and furnishes satisfactory proof of payment to the State Bar Office of Probation in Los Angeles.
2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

¹² *Arm v. State Bar, supra*, 50 Cal.3d 763 [18-month suspension for concealing discipline from opposing counsel and court and misrepresenting availability to appear, commingling client trust funds, heavily aggravated due to three prior disciplines involving serious misconduct but mitigated by lack of significant harm and the absence of bad faith]; *In the Matter of Wyrick, supra*, 2 Cal. State Bar Ct. Rptr. 83 [six-month suspension for suspended attorney who held himself out as entitled to practice to superior court and governmental agencies and concealed suspension on two job applications for attorney positions, aggravated by prior misconduct involving misuse of legal process in multiple cases against same client and two convictions for attempt to receive stolen property and illegal tape recording, with no mitigating factors]; *Chasteen v. State Bar* (1985) 40 Cal.3d 586 [two-month suspension for attorney who committed UPL over five-year period, and was culpable of repeated acts of incompetence, numerous misrepresentations to clients about status of cases, misappropriation of client funds and failure to return unearned fees, mitigated by attorney's recent treatment for alcoholism].)

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.
4. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation deputy either in person or by telephone. During the period of probation, he must promptly meet with the probation deputy as directed and upon request.
5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.
6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.
7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

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

VIII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Burke be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of his actual suspension in this matter and to provide satisfactory proof of such

passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

IX. RULE 9.20

We further recommend that Burke be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

X. COSTS

We further recommend that costs be awarded to the State Bar in accordance with section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

EPSTEIN, J.

WE CONCUR:

PURCELL, P. J.

McELROY, J.*

*Hearing Judge of the State Bar Court, assigned by the Presiding Judge pursuant to rule 5.155(F) of the Rules of Procedure.