PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

Filed January 25, 2016

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of JOHN CLIFTON ELSTEAD, A Member of the State Bar, No. 61048.	)))))))	Case Nos. 13-N-14409; 13-O-13428; 14-O-00579 (Cons.) OPINION AND ORDER

A hearing judge found John Clifton Elstead culpable of 11[1] of the 12 charged counts of misconduct set forth in two Notices of Disciplinary Charges. These included: two instances of failing to comply with rule 9.20 of the California Rules of Court;[2] four matters involving the unauthorized practice of law (UPL); two occasions of failing to cooperate with the Office of the Chief Trial Counsel of the State Bar of California (OCTC); and three acts of moral turpitude by gross negligence. The judge dismissed one moral turpitude charge. She also found no mitigation but two aggravating factors (two prior disciplinary matters and multiple acts of misconduct). Ultimately, considering the seriousness of the misconduct, the aggravating circumstances, and the absence of mitigation, the hearing judge recommended that Elstead be disbarred from the practice of law.

Elstead seeks review, arguing that he "substantially complied" with rule 9.20 of the California Rules of Court. He also argues that OCTC, the State Bar Court, and the Supreme

[1] The hearing judge's decision incorrectly stated that she found culpability on only nine of the 12 counts.

[2] This rule requires a suspended attorney to, inter alia, notify clients, opposing counsel, and courts of his or her suspension, refund any unearned fees, and file with the State Bar Court an affidavit of compliance with this rule.

Court are guilty of "overreaching" with respect to the processing of his rule 9.20 declarations and by "conditioning" the termination of his suspension upon payment of outstanding costs. He also cited unspecified irregularities in the State Bar Court trial that he claims require this court to reverse the lower court.[3]

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we find that Elstead willfully failed to comply with rule 9.20 of the California Rules of Court, including by falsely representing that he had filed his rule 9.20 notice with the Third Appellate District of the Court of Appeal (Court of Appeal). We also find that he held himself out as entitled to practice law and actually practiced law when he was not entitled to do so. While suspended, Elstead filed an Application and Declaration to Extend Time to File Opening Brief with the Court of Appeal. Elstead also signed and filed a Substitution of Attorney form, substituting himself into a case when he knew that he was not entitled to practice law. Further, he also signed letters on his law firm's letterhead that he mailed to the Clerk of the Court of Appeal.

We also find that Elstead is culpable of intentional acts of moral turpitude in committing UPL, in violation of Business and Professions Code section 6106.[4] We disagree with the hearing judge's dismissal of one of the moral turpitude charges, and find him culpable of all four charges. Further, we disagree that he was only grossly negligent in committing the misconduct. We find that he knowingly committed these acts of moral turpitude. Finally, we find that Elstead failed to cooperate with OCTC's disciplinary investigation, in willful violation of section 6068, subdivision (i).

Like the hearing judge, we find two circumstances in aggravation (prior record of discipline and multiple acts) and none in mitigation.

---

[3] Having independently reviewed all of the arguments raised by Elstead, those not specifically addressed herein have been considered and are rejected as lacking merit.

[4] All further references to sections are to the Business and Professions Code unless otherwise noted.

Considering the culpability findings and aggravating circumstances, including the seriousness of this and his prior misconduct as well as the surrounding circumstances, we find that Elstead's disbarment is necessary to protect the public and the profession, and we so recommend.

I. PROCEDURAL HISTORY

Elstead was admitted to the practice of law in California on December 18, 1974, and has been a member of the State Bar at all times since that date. On April 21, 2014, OCTC filed a five-count Notice of Disciplinary Charges (NDC-1). On July 29, 2014, it filed a seven-count NDC (NDC-2). The hearing judge consolidated the two cases, and conducted a two-day trial. On February 3, 2015, the judge issued her decision.

Elstead sought review and, after the parties completed briefing, he filed a letter on November 2, 2015 requesting this court to consider *In the Matter of Langfus* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 161 as additional authority. We granted this request at oral argument on November 18, 2015.

II. THE RULE 9.20 MATTER

A. Facts

In 2007, in State Bar Court case no. 08-O-11040, this court found that Elstead failed to properly account to his client, Richard Kalpakoff, for costs in a medical malpractice and fraud case, in violation of rule 4-100(B)(3) of the Rules of Professional Conduct.[5] The following year, in State Bar Court case no. 09-O-10271, Elstead accepted $15,000 from the wife and the sister of his client, Theodore Swain, without his informed written consent, in violation of rule 3-310(F). These two matters were consolidated for trial, and the Supreme Court filed its order on April 17, 2013 (Supreme Court case no. S206086, State Bar Court case no. 08-O-11040), imposing a six-

[5] All further references to rules are to the Rules of Professional Conduct of the State Bar unless otherwise noted.

month actual suspension. This order became effective on May 17, 2013, and required Elstead to comply with rule 9.20(a) and (c) of the California Rules of Court within 30 and 40 days, respectively.[6] Further, as ordered in the Supreme Court order, and pursuant to section 6140.7, Elstead was required to pay the costs assessed against him in that case before being reinstated to the active practice of law. He was further ordered to pass the Multistate Professional Responsibility Examination (MPRE) within one year of the effective date of his suspension. The order warned him that his failure to do so could result in his suspension. Pursuant to the six-month suspension, Elstead was suspended from practicing law in California commencing May 17, 2013. Because he failed to pay costs and provide proof of passage of the MPRE, that suspension continued, and Elstead remains inactive.

B. Culpability

Counts One and Two (NDC-1) charged that Elstead failed to comply with rule 9.20. The hearing judge found him culpable, and we agree.

Elstead was obligated to notify all of his clients, any co-counsel, and all opposing counsel (or adverse parties without counsel) in pending litigation of his suspension within 30 days after May 17, 2013, the effective date of the Supreme Court Order. He was then required to file a declaration within 40 days after the effective date of the Order with the Clerk of the State Bar Court, indicating he had fully complied.

---

[6] In relevant part, subdivision (a) provides that an attorney must: "Notify all clients being represented in pending matters and any co-counsel of his or her [suspension] and his or her consequent disqualification to act as an attorney after the effective date of the [suspension], and, in the absence of co-counsel, also notify the clients to seek legal advice elsewhere. [¶] . . . [¶] Notify opposing counsel in pending litigation or, in the absence of counsel, the adverse parties of the [suspension] and consequent disqualification to act as an attorney after the effective date of the [suspension], and file a copy of the notice with the court, agency, or tribunal before which the litigation is pending for inclusion in the respective file or files."

In relevant part, subdivision (c) provides that, "[w]ithin such time as the order may prescribe after the effective date of the member's [suspension], the member must file with the Clerk of the State Bar Court an affidavit showing that he or she has fully complied with those provisions of the order."

By filing a late declaration under rule 9.20(c), he willfully violated the rule 9.20 order. Elstead argues that he "substantially complied" with the order, but was simply late. We disagree with his argument that case law requires us to consider his claimed "substantial compliance." Elstead cites *Durbin v. State Bar* (1979) 23 Cal.3d 461 to support his position that substantial compliance is sufficient in rule 9.20 cases. *Durbin* is a (former) rule 955, subdivision (c) case. Although there is dictum in the opinion that "[t]he disciplinary board found petitioner had substantially complied with rule 955, subdivision (a)" based on his extensive efforts at notifying clients, closing his office, and returning all unearned fees and files, the holding of the case concerns whether Durbin complied with rule 955, subdivision (c). (*Id.* at p. 465.) The court found that he had violated this subdivision of the rule, and imposed discipline of a minimum of six months' actual suspension.

Since *Durbin*, the Supreme Court has clarified that substantial compliance is not sufficient to satisfy the requirements of the rule. (See *Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187 ["[n]othing on the face of [rule 9.20] or in our prior practice distinguishes between 'substantial' and 'insubstantial' violations" of the rule]; see also *Bercovich v. State Bar* (1990) 50 Cal.3d 116, distinguishing *Durbin* as decided before standards adopted.)

Further, Elstead falsely declared in his two rule 9.20 declarations that he had filed the notice with the Court of Appeal when he had not. We agree with the hearing judge's finding that Elstead failed to comply with both subdivisions (a) and (c) of the Supreme Court's order.

III. THE *STAUB* MATTER

A. Facts

NDC-1 and NDC-2 both arise from Elstead's actions in *Staub v. James Kiley, M.D., Regents of University of California*, case no. C071500 (*Staub*), an appeal he filed on behalf of George and Julianne Staub in the Court of Appeal for the State of California.

As noted above, on April 17, 2013, the Supreme Court filed its order in case no. S206086 (State Bar Court case no. 08-O-11040) suspending Elstead for six months and imposing conditions, effective May 17, 2013. Also on April 17, 2013, Elstead spoke with a probation deputy in the Office of Probation of the State Bar (Probation) and told her that he thought he had already completed his six-month suspension. She informed him that his suspension had not yet begun because the order was not yet effective. On that same date, Elstead filed an application to extend the time for an additional 30 days to file his clients' opening brief in the *Staub* case. In his application, Elstead incorrectly stated that he had been suspended for six months beginning October 17, 2012 and ending April 15, 2013. In fact, Elstead's suspension was to begin on May 17, 2013.

On April 30, 2013, the probation deputy sent Elstead a letter, and enclosed a copy of the Supreme Court order, copies of rule 9.20 of the Rules of Court and rules 5.330 and 5.332 of the Rules of Procedure of the State Bar, a blank rule 9.20 declaration form, and the MPRE schedule. The letter informed Elstead that the Supreme Court order suspending him was effective May 17, 2013 and that he would remain suspended until he had fully paid the costs imposed. The April 30 letter also contained a detailed listing of the relevant deadlines, including the June 26, 2013 due date for the rule 9.20 declaration and the date that Elstead must complete the MPRE and attend State Bar Ethics and Client Trust Accounting School. Elstead received these documents.

On May 18, 2013, the day after his suspension commenced and over two weeks after the detailed April 30 letter from the probation deputy, Elstead signed a declaration in support of an application to further extend time to file the opening brief in the *Staub* case. In these documents, which he filed on May 21, Elstead requested a 30-day extension of time to file the opening brief, referred to himself as the "Attorney for Plaintiffs and Appellants," and declared: "I was

suspended for 6 months, beginning October 17, 2012 but an issue has arisen as to when the suspension actually began and I may have to find other counsel to handle the appeal, an issue that I expect to resolve shorly [*sic*]." He continued in the declaration by stating: "[b]ecause of the need to be in court and to do the briefing required in that case, I have been and remain unable as a practical matter to prepare and file the Opening Brief in this case by May 28, 2013." At the time he made these statements, he knew that he was suspended.

Elstead prepared a third request for extension of time on June 12, 2013, noting in his declaration that "I have just recently learned . . . that the 6 month suspension did not begin until May 17, 2013 . . . ." The record is not clear as to whether that application was actually filed since the "Received" stamp dated June 12, 2013 on the document was crossed off by hand on the exhibit in evidence in this court.

The Supreme Court order required Elstead to comply with rule 9.20(a)(4) by June 16, 2013 and with rule 9.20(c) by June 26, 2013. He did not fulfill either requirement.

On July 1, 2013, the probation deputy sent a second letter to Elstead, reminding him that his rule 9.20(c) declaration, due June 26, 2013, had not been filed. Elstead claimed that he did not see this letter until it was offered as an exhibit at trial.[7] On July 12, 2013, an OCTC investigator sent a letter to Elstead informing him that a complaint had been filed claiming that he had represented George Staub and filed documents with the Court of Appeal on Staub's behalf while suspended. The letter requested an explanation by July 29, 2013. Elstead received this letter, but neither replied nor requested additional time to respond.

[7] Among the documents that Elstead claimed he did not timely receive were the following: the Supreme Court Order on his second discipline; the rule 9.20 declaration form sent with the probation deputy's April 30, 2013 letter; both the OCTC investigator's letters; and the probation deputy's July 1, 2013 letter. He also claimed to not remember receiving other documents. The hearing judge found that Elstead was not a credible witness "particularly when he averred that he did not receive documents from the State Bar or court orders in the mail." We afford great weight to such credibility findings. (Rules Proc. of State Bar, rule 5.155(A).)

On July 25, 2013, Elstead submitted his rule 9.20 declaration, in which he asserted that he had complied with the April 17, 2013 Supreme Court order that became effective on May 17, 2013. In fact, despite his suspension, he was still listed as the attorney of record for the Staubs at the time he filed the rule 9.20 declaration. Probation rejected his declaration on July 31, and on August 13, 2013, Elstead filed another one, stating that he had filed the notice to opposing counsel required by rule 9.20(a)(4) in the Court of Appeal. However, he had not done so.

On December 30, 2013, Elstead filed in the Court of Appeal a Substitution of Attorney form signed by the Staubs, purporting to substitute Elstead into the case in place of the Staubs, who were then acting in pro per. On January 9, 2014, the Clerk of the Court of Appeal sent Elstead a letter informing him that he was currently ineligible to practice law, and therefore, could not file the substitution form. The clerk requested that he provide proof that he was eligible to practice law. On January 14, Elstead wrote to the clerk, incorrectly stating that his six-month suspension had ended on October 17, 2013. In fact, his original six-month disciplinary suspension had ended on November 17, but he remained suspended because of his failure to pay costs, pursuant to the Supreme Court Order. When he failed to provide satisfactory proof of his entitlement to practice, the Court of Appeal struck the Substitution of Attorney form on January 24, 2014.

On January 30, 2014, Elstead wrote to the clerk, falsely stating again that his suspension ended on October 17, 2013 and asking the court for an explanation. On February 5, 2014, the clerk replied to Elstead, enclosing a copy of a page from the State Bar website showing he was not entitled to practice law. The Court of Appeal complained to the State Bar regarding Elstead's conduct. On March 4, 2014, OCTC sent Elstead a letter requesting that he answer the Court of Appeal's complaint against him and provide supporting documents. Elstead failed to respond.

B. Culpability

1. Elstead Engaged in UPL (§§ 6068, subd. (a), 6125, and 6126)[8]

Count Three (NDC-1) and Counts One, Two, and Three (NDC-2) charged Elstead with UPL. The hearing judge found him culpable, and we agree.

Elstead held himself out as entitled to practice and engaged in UPL by these actions:

a. He signed his declaration on May 18, 2013 after being informed by Probation that he would not be entitled to practice law on that date;

b. He filed his Application and Declaration with the Court of Appeal on May 21, 2013;

c. He signed the Substitution of Attorney on December 27, 2013;

d. He filed the Substitution of Attorney with the Court of Appeal on December 30, 2013; and

e. He prepared and signed two letters on "The Elstead Law Firm" letterhead dated January 14 and 30, 2014, and mailed them to the Clerk of the Court of Appeal.

We reject Elstead's claim that he was confused or unclear as to when his suspension commenced. He was told the effective date of his suspension by the probation deputy in a letter sent on April 30, 2013, which Elstead received. This letter informed him of all relevant dates, including the effective date of the Supreme Court Order. Clear and convincing evidence shows that Elstead knowingly engaged in UPL by signing and filing legal documents and holding himself out as entitled to practice when he was not.[9] (*Morgan v. State* Bar (1990) 51 Cal.3d 598, 604 [preparing and filing pleadings and other legal papers by suspended attorney constitutes UPL].)

---

[8] Section 6068 provides, in relevant part, that "[i]t is the duty of an attorney to . . . support the Constitution and laws of the United States and of this state." Section 6125 states that "[n]o person shall practice law in California unless the person is an active member of the State Bar." Section 6126 states, in relevant part, that "[a]ny person who has been . . . suspended from membership from the State Bar . . . and thereafter practices or . . . holds himself . . . out as practicing or . . . entitled to practice law, is guilty of a crime" of the unauthorized practice of law.

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

2. Elstead Committed Acts of Moral Turpitude (§ 6106)[10]

In Count Four (NDC-1) and Counts Four, Five, and Six (NDC-2), OCTC charged Elstead with acts of moral turpitude in committing the UPL discussed above. The hearing judge found that Elstead was not credible when he claimed he did not know he could not practice law on May 18 and May 21, 2013. We give great weight to this credibility finding. (Rules Proc. of State Bar, rule 5.155(A).)

The hearing judge found Elstead culpable of all but one count of moral turpitude, involving the signing and filing of the application for an extension of time to file his opening brief. (Count Four of NDC-1.) As to that count, Elstead asserted in his declaration that he was suspended for six months beginning October 17, 2012, "but an issue has arisen as to when the suspension actually began and I may have to find other counsel to handle the appeal . . . ." The hearing judge found that Elstead believed he had adequately informed the court of his suspension. Under those "limited circumstances," the judge found no clear and convincing evidence of moral turpitude, concluding that Elstead had not attempted to deceive the appellate court as to his eligibility to practice law.

We agree with the hearing judge's findings of culpability as to the moral turpitude charges in Counts Four, Five, and Six of NDC-2. However, we discern no substantive distinction between the moral turpitude in those counts and that in Count Four of NDC-1. While Elstead disclosed that he was suspended for six months, he failed to divulge in the declaration, or in any later clarification, the facts he learned from Probation. Instead, he vaguely characterized as ambiguous that which was unequivocally explained to him regarding the commencement of his suspension. Further, given the hearing judge's finding that Elstead was not credible when he

[10] Section 6106 states: "The commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension."

claimed he did not know he could not practice law on May 18 and May 21, we cannot find any justification for dismissal of the moral turpitude charge in Count Four of NDC-1.

Elstead was aware of the commencement date of his suspension on his receipt of the April 30 letter from Probation. Knowing as he did of the May 17, 2013 commencement date, he "displayed an indifferent disregard of his duty to comply with the [suspension] order" and he must have known that he was deceiving the Court of Appeal, as evidenced by his carefully written characterization of his interactions with Probation. (*In re Cadwell* (1975) 15 Cal.3d 762, 771-772 [attorney's indifferent disregard of duty to comply with suspension order, coupled with deception, sufficient to constitute moral turpitude].)

While we find that clear and convincing evidence supports all the charges of moral turpitude, we do not agree with the hearing judge's characterization of these acts as "gross negligence." Rather, we find that Elstead knowingly committed these acts. (*In the Matter of Mason* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 639, 642 [where attorney knows of suspension order and commits UPL, moral turpitude is willful, not gross negligence].)

3. Elstead Failed to Cooperate with the State Bar (§ 6068, subd. (i))

The hearing judge found Elstead culpable of violations of section 6068, subdivision (i), as charged in Count Five in NDC-1 and Count Seven in NDC-2, for failing to respond to OCTC's letters. We agree.

Elstead received but did not answer the July 12, 2013 letter sent to him by OCTC's investigator. Nor did he reply after receiving OCTC's March 4, 2014 letter seeking his response to the Court of Appeal's complaint against him. These failures prove by clear and convincing evidence that Elstead is culpable of violating section 6068, subdivision (i).

IV. ELSTEAD'S ARGUMENT THAT HE WAS TREATED UNFAIRLY IS WITHOUT MERIT

Elstead argues that he received unfair treatment in these proceedings. He challenges his continued suspension, arguing that his return from suspension was improperly conditioned on his payment of costs. As a result, Elstead contends, the State Bar falsely published on its web page that the suspension did not end after the six months expired, but continued until payment of those costs. Elstead's argument is contrary to the facts and the law.

The Supreme Court Order made clear that Elstead had to pay costs before he could return to practice law. In its order, the Supreme Court stated the following:

> Costs are awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Section 6140.7 states, in pertinent part:

> Unless time for payment of discipline costs is extended pursuant to subdivision (c) of Section 6086.10, costs assessed against a member . . . who is actually suspended or disbarred shall be paid as a condition of reinstatement of or return to active membership.

Elstead seeks to bolster his argument by requesting that we consider the case of *In the Matter of Langfus, supra,* 3 Cal. State Bar Ct. Rptr. 161, referenced in his letter filed November 2, 2015. He contends that *Langfus* stands for the proposition that the Legislature did not intend for section 6140.7 to require that members who are ordered to pay costs be automatically suspended until payment of costs, even after their disciplinary suspension terminated. Rather, he argues that members can only be suspended for failure to pay costs by administrative order conditioning reinstatement on payment of costs. Since no such order exists here, he contends that he should not have been suspended after the conclusion of his six-month suspension.

Elstead's argument is not persuasive. After *Langfus* was decided, the language of section 6140.7 was changed. For comparison, the language interpreted by the *Langfus* court provided, in pertinent part:

> Costs unpaid . . . by a member who is suspended or disbarred shall be paid as a condition of reinstatement of membership.

The current language, which was added January 1, 1997 (Stats. 1996, ch. 1104) provides, in pertinent part, that:

> Costs assessed against . . . a member who is suspended or disbarred shall be paid as a condition of reinstatement of *or return to active* membership.
> (Italics added.)

The revised language clarifies that costs shall be paid as a condition of returning from suspension. As such, we reject Elstead's claim that the Supreme Court or the State Bar Court improperly conditioned his return to active membership on his payment of costs. Further, we reject any claim that OCTC, the State Bar, the State Bar Court, or the Supreme Court "singled" him out when it recommended or imposed costs as a condition of his return to active membership.

V. SIGNIFICANT AGGRAVATION AND NO MITIGATION[11]

We agree with the hearing judge that Elstead's misconduct is aggravated by his record of two prior disciplines (std. 1.5(a)) and multiple acts of wrongdoing (std. 1.5(b)). We also agree that there is no clear and convincing evidence of mitigating factors.

A. Prior Discipline

Elstead's first discipline on October 11, 2005 was a public reproval for one year with conditions, arising out of a stipulated violation of section 6068, subdivision (d). He was found culpable of making a false and misleading statement, both orally and in writing, to a Santa Clara

[11] OCTC must establish aggravation by clear and convincing evidence (std. 1.5), while Elstead has the same burden to prove mitigating circumstances (std. 1.6).

County Superior Court judge. Specifically, he falsely stated that he was scheduled to begin another trial in Santa Clara County that conflicted with a trial pending before the judge. In fact, the other trial had already been continued, and thus presented no conflict. The judge found Elstead knew there was no conflict when he made the misrepresentation. The stipulation in the Hearing Department noted in aggravation that Elstead was indifferent toward rectification or atonement. He was ordered to pay $2,500 each in sanctions to the opposing party and to the court. (State Bar Court case no. 00-O-14958.)

This prior record of discipline is similar to aspects of the present case. Here, Elstead sought to mislead the Court of Appeal when he claimed that "I was suspended for 6 months . . . but an issue has arisen as to when the suspension actually began . . . ." In fact, no ambiguity about his suspension existed since he had already been informed of the correct facts by Probation. Further, by committing UPL, he sought to mislead the court and counsel regarding his status as an attorney entitled to practice law. (See *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443-444 [similarities between prior and current misconduct render previous discipline more serious, as they indicate prior discipline did not rehabilitate].)

In his second discipline, on October 17, 2013, the Supreme Court ordered that Elstead be suspended for two years, stayed that suspension, and placed him on probation for two years, conditioned on his actual suspension for the first six months of his probation. In that matter, he was found culpable of failing to render accounts of client funds (rule 4-100(B)(3)) and accepting fees from a non-client (rule 3-310(F)).

We assign significant weight in aggravation to Elstead's prior records of discipline, particularly because his current misconduct is similar to the misleading acts in his first prior misconduct. (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 283

[prior similar disciplinary proceeding should alert attorney to ethically questionable nature of misconduct]; *In the Matter of Gadda*, *supra,* 4 Cal. State Bar Ct. Rptr. at pp. 443-444.)

B. Multiple Acts

We also agree with the hearing judge that Elstead committed multiple acts of wrongdoing. We assign moderate weight to this factor since many of the acts of misconduct were related to or resulted from his rule 9.20 violations.

VI. DISBARMENT IS APPROPRIATE

We have found Elstead culpable of two violations of rule 9.20, four instances of UPL, four acts of moral turpitude, and two failures to cooperate with the State Bar.

Our discipline analysis begins with the standards.[12] (*In re Silverton* (2005) 36 Cal.4th 81, 91.) The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to maintain high professional standards; and to preserve public confidence. (Std. 1.1) In recommending disbarment, the hearing judge found standard 1.8(b) applicable. It provides, in relevant part, that if an attorney has two or more prior records of discipline, disbarment is appropriate if actual suspension was ordered in any one of the prior disciplinary matters unless the most compelling mitigating circumstances clearly predominate.

In addition, standard 2.10(a) applies here as it provides for disbarment or actual suspension for engaging in UPL, with the degree of discipline dependent on whether the member knowingly engaged in the UPL. Standard 2.11 provides that disbarment or actual suspension is the presumed sanction for an act of moral turpitude, dishonesty, fraud, corruption, or concealment of material fact. The degree of the sanction depends on the magnitude of the misconduct and the extent to which the misconduct harmed or misled the victim, which may

[12] Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. Effective July 1, 2015, the standards were revised and renumbered. Because this appeal was submitted for ruling after the July 1, 2015 effective date, we apply the current version, and all further references to standards are to this source.

include the adjudicator, the impact on the administration of justice, if any, and the extent to which the misconduct related to the member's practice of law.

We note that not only does standard 1.8(b) compel us to consider Elstead's disbarment, his misconduct in misrepresenting the information on his rule 9.20 declaration is an independent ground supporting this serious level of discipline. (Rule 9.20(d) [suspended member's willful failure to comply with provisions of rule is cause for disbarment or suspension]; see also *Dahlman v. State Bar* (1990) 50 Cal.3d 1088, 1092-1093 [disbarment within appropriate range of discipline for violations of rule 9.20].)

Elstead relies on *In the Matter of McCray* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 373 to support his argument that his reference to his suspension in the May 21, 2013 Application and Declaration clarified to the Court of Appeal his status as an attorney not entitled to practice law. We disagree that *McCray* assists Elstead.

Initially, it should be noted that *McCray* is distinguishable in that it was a reinstatement case, not a disciplinary matter. Further, in *McCray*, the member inappropriately referred to himself as "Attorney at Law" in his papers filed in the State Bar Court and in a public apology published in a community newspaper. But his improper statements were followed in the same documents by clear references to his then-current status as a disbarred attorney. In fact, the very purpose of the public apology was to express his remorse regarding the facts leading up to the disbarment and his hope to be reinstated. (*McCray, supra,* 1 Cal. State Bar Ct. Rptr. at pp. 379-380, 384-385.)

The facts in *McCray* are clearly distinguishable from Elstead's actions. After reciting his title as "Attorney for Plaintiffs and Appellants" in the May 21, 2013 filing, Elstead stated, under penalty of perjury:

> I represent the Appellants in this case. I was suspended for 6 months, beginning October 17, 2012 but an issue has arisen as to when the suspension actually began and I *may* have to find other counsel to handle the appeal, an issue that I expect resolved shorly [*sic*]. (Italics added.)

He then continued to convey the impression that he was entitled to practice in the Court of Appeal by stating: "[b]ecause of the need to be in court and to do the briefing required in that case, I have been and remain unable as a practical matter to prepare and file the Opening Brief in this case by May 28, 2013." The purpose of the Application and Declaration was to request a 30-day extension of time to June 27, 2013. At the time he wrote these words, he was well aware of the May 17, 2013 commencement date of his suspension, and that the suspension would last well past June 27 until at least November 2013. In fact, he had known of these dates since his receipt of the detailed April 30, 2013 letter from Probation.

Elstead's UPL did not stop with the May 21 filing. He continued by signing and filing a Substitution of Attorney form, seeking to substitute himself into the Court of Appeal matter, and writing and mailing two letters to the Court of Appeal on "The Elstead Law Firm" letterhead.

As noted above, Elstead's failure to comply with the suspension order, coupled with his misleading pleadings and letters, were not only acts of UPL, but also constituted knowing acts of moral turpitude. (*In re Cadwell, supra,* 15 Cal.3d at pp. 771-772; see also *In the Matter of Mason, supra,* 3 Cal. State Bar Ct. Rptr. at p. 642.)

Finally, this is Elstead's third discipline. Because both his first disciplinary proceeding and his misconduct here involved attempts to mislead a court, we have no confidence that an additional suspension with probation will be adequate to prevent him from committing future misconduct. In order to protect the public and the profession, we recommend that John Clifton Elstead be disbarred.

VII. RECOMMENDATION

We recommend that John Clifton Elstead be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice in California.

We further recommend that he must comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this matter.

Finally, we recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

VIII. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

The order that John Clifton Elstead be involuntarily enrolled as an inactive member of the State Bar pursuant to Business and Professions Code section 6007, subdivision (c)(4), effective February 6, 2015, will remain in effect pending consideration and decision of the Supreme Court on this recommendation.

HONN, J.

WE CONCUR:

PURCELL, P. J.

EPSTEIN, J.