PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

Filed January 12, 2017

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 13-O-17015
	)	
STEVEN MARK KLUGMAN,	)	OPINION
	)	
A Member of the State Bar, No. 53902.	)	
	)	

This is Steven Mark Klugman's third disciplinary proceeding. It arises from his mishandling of funds entrusted to him by his client and his client's ex-wife during legal proceedings involving the collection of unpaid child support.

The hearing judge found Klugman culpable for failing to maintain client funds in trust and for breaching fiduciary duties, but dismissed a charge that Klugman violated a court order. The judge further found no mitigation and two factors in aggravation (two prior records of discipline and lack of insight). In assessing the appropriate level of discipline, the judge rejected the request by the Office of the Chief Trial Counsel of the State Bar (OCTC) for disbarment under standard 1.8(b),[1] which provides that disbarment is appropriate where an attorney has two or more prior records of discipline, subject to certain exceptions. The judge found instead that this matter fell within an exception to the standard because the present and some of his prior misconduct occurred during the same time period. He recommended discipline that included a six-month actual suspension, which he concluded was consistent with other standards and prior comparable cases.

[1] Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. All further references to standards are to this source.

Both Klugman and OCTC appeal. Klugman requests a "full reversal" and asserts that he met his ethical obligations. In the alternative, he contends that if he committed a "technical violation," the proper discipline would be a reproval. OCTC requests that we find additional culpability for violating a court order and more aggravation, and renews its disbarment request.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we affirm most of the hearing judge's findings, but find that Klugman violated a court order and established minimal mitigation. We also agree with the judge that a six-month actual suspension is appropriate discipline in light of Klugman's prior disciplinary history, his present misconduct, the standards, and, particularly, the comparable case law.

I. PROCEDURAL BACKGROUND

On August 27, 2014, OCTC filed a three-count Notice of Disciplinary Charges (NDC), charging Klugman with: (1) failing to maintain client funds in trust, in violation of rule 4-100(A) of the Rules of Professional Conduct;[2] (2) failing to obey a court order, in violation of Business and Professions Code section 6103;[3] and (3) breaching his fiduciary duties and thereby failing to comply with laws, in violation of section 6068, subdivision (a).[4]

On September 25, 2015, Klugman filed a motion to dismiss. The hearing judge denied the motion on October 19, 2015. That same day, the parties filed a Stipulation as to Facts and

[2] Rule 4-100(A) requires an attorney to deposit and maintain in a trust account "[a]ll funds received or held for the benefit of clients." All further references to rules are to this source, unless otherwise noted.

[3] Section 6103 provides that an attorney's "willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension." All further references to sections are to this source.

[4] Section 6068, subdivision (a), requires an attorney "[t]o support the Constitution and laws of the United States and of this state."

Admission of Documents. A one-day trial took place on October 29, 2015. On January 27, 2016, the judge filed his decision.

II. FACTUAL BACKGROUND[5]

Klugman was admitted to practice law in California on December 14, 1972. In late 2011, Carl Pearson and his ex-wife, Adrianne Pearson,[6] were disputing unpaid child support in Los Angeles County Superior Court. Between April 2012 and August 1, 2013, Klugman was Carl's attorney, but not Adrianne's. At issue is whether Klugman was her fiduciary, and, if so, the appropriateness of his actions in that role.

In summary, four key events drive this matter: (1) on April 20, 2012, the court ordered Klugman to hold $108,377.20 in disputed funds; (2) on January 30, 2013, the court orally indicated that it would order Klugman to disburse the disputed funds and apparently directed Adrianne's counsel to prepare such an order;[7] (3) on February 6, 2013, *before* the court issued a written order, Klugman disbursed funds to Carl; and (4) on March 29, 2013, the court issued a written order dissolving the April 20, 2012 order and directing distribution of all funds subject thereto. The focus of our review is whether Klugman's disbursement of funds to Carl was without necessary court authority or contrary to a fiduciary duty he had assumed.

A. California Child Support Services Department Collected Funds from Carl

On April 9, 2012, the California Child Support Services Department (CSSD) collected $108,377.20 from Carl, pursuant to a writ of execution, for past child support. On April 10, 2012, Klugman filed an ex parte application for an order to stay distribution of those funds on the

[5] The factual background is based on the pretrial written stipulation, trial testimony, documentary evidence, and factual findings by the hearing judge, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).)

[6] We refer to Carl Pearson and Adrianne Pearson by their first names to avoid confusion.

[7] There is no written evidence in the record ordering counsel to prepare this order, but Adrianne's counsel testified that he was directed to do so, and later he did prepare it.

grounds that Carl had previously satisfied his child support obligation by transferring certain property to Adrianne. Because this contested issue required an evidentiary hearing to resolve, the court ordered a stay of distribution of the funds. It further ordered that the funds be held either by CSSD or in a client trust account (CTA) agreed to by the parties, and set the evidentiary hearing for July 9, 2012.

B. Klugman Volunteered, and Was Ordered, to Hold Disputed Funds on April 20, 2012

On April 20, 2012, Adrianne filed an ex parte application for an order dissolving the stay or, in the alternative, advancing the July 9, 2012 hearing.[8] The ex parte hearing was attended by Klugman, Adrianne, and CSSD's counsel. Adrianne informed the court that she was no longer represented by counsel and was proceeding in propria persona.

At the April 20, 2012 hearing, CSSD's counsel notified the court that CSSD's final audit calculated that Carl owed Adrianne $96,504.57, not the $108,377.20 that CSSD had collected and was holding, and indicated that the "overage" should be released to Carl. The court and the parties discussed that CSSD should be relieved of its responsibility to hold the collected funds. Klugman volunteered to serve in that capacity, stating on the record: "We believe the County shouldn't have to expend money in this case. We're all taxpayers. I'm willing to act as an officer of the Court and place the funds in a designated trust account for the benefit of the parties, that will not be disbursed until the Court so orders." The court responded, "Okay." Adrianne said she "would prefer an escrow company."

Ultimately, the court and the parties agreed that CSSD would issue two checks—one to Adrianne and one to Carl—and the court stated that it was "ordering" Klugman to hold both checks "until we're able to resolve this." The hearing judge found that the court's comments during the hearing made clear that it contemplated that Klugman would deposit the check for

[8] Klugman testified that the July 9, 2012 hearing was not held.

Carl in Klugman's CTA and hold it "pending further order of the court" or "until after we've had a hearing on disbursement."

The court also dismissed Adrianne's concern that, when the court set the hearing on Carl's claimed defense for July 9, 2012, it was unaware of or was violating the family law rule that an ex parte temporary stay order had to be scheduled for a formal hearing within 21 days or it would expire. The court reasoned, "the 21-day rule that you're referring to is about temporary restraining orders [(TROs)]. And that's not what this is." Klugman responded, "Right."

Also on April 20, 2012, the court issued a minute order (April 20 Order), ordering CSSD to disburse the funds to Klugman as follows: (1) a check for $96,504.57 to Adrianne, in care of Klugman; and (2) a check for the balance of $11,872.63 to Carl, in care of Klugman. The order also stated that both checks were to be held by Klugman and that Carl's check was to be placed in Klugman's CTA. However, Klugman did not receive the funds from CSSD at this time, as described below.

C. Carl's and Adrianne's Dispute Over the Funds Continued

On June 19 or 20, 2012, Adrianne's counsel—restored as counsel three weeks earlier—filed an ex parte application seeking: (1) dissolution of the order staying distribution of the funds; and (2) immediate release to Adrianne of all funds being held for her by Klugman.[9] Adrianne's counsel also argued that the April 20 Order had "expired, as a matter of law." The court denied the application, finding "no exigent circumstances to warrant the ex parte relief." Nevertheless, Klugman testified during his disciplinary trial that, after receiving the application, he researched the issue of whether the court's previous order had expired, concluding that it had.

[9] Despite this request, Klugman had not yet received any funds from CSSD. The record is unclear, but it appears that: (1) CSSD mailed checks to Klugman sometime after the April 20, 2012 hearing; (2) in May 2012, Klugman informed CSSD he had not received the checks; (3) CSSD reissued the checks on September 12, 2012; and (4) sometime thereafter, CSSD's counsel delivered the new checks to Klugman.

On June 20, 2012, Klugman filed a motion to quash the writ filed by CSSD (Motion to Quash), arguing that Adrianne was not entitled to any of the collected funds. On August 8, 2012, Adrianne's counsel filed a responsive declaration, requesting that the court deny the Motion to Quash and order the funds being held by Klugman to be transferred to Adrianne.[10]

D. Klugman Received and Disbursed the Funds

On October 4, 2012, Klugman deposited into his CTA two checks issued by CSSD on September 12, 2012—one for Adrianne for $96,504.57, and one for Carl for $11,872.63. On November 28, 2012, Klugman issued a check to Adrianne's counsel's CTA in the amount of $96,504.57. The remaining $11,872.63 remained in Klugman's CTA.

On January 30, 2013, the court held a hearing on Klugman's Motion to Quash. The court's docket indicates that the court made an order at this hearing, but does not include details of its content. A transcript of this hearing is not included in the record,[11] but Klugman contends that the court denied his motion, ordered the funds disbursed, and stated that the prior orders staying distribution were dissolved. Adrianne's counsel testified that the court ruled at the hearing that the motion would be denied and directed him "to prepare an order to that effect," which he eventually did. Nevertheless, we find this evidence insufficient to describe the substance of what the judge ordered.

At the time, Klugman was not clear as to what the court ordered. Just one week later, on February 6, 2013, Klugman issued Carl an $11,872.63 check, accompanied by a letter stating:

> I have informed you that *I am unclear about the pending court orders*. You have pointed out to me that the Judge stated in open court that the trial court has no jurisdiction over the funds you received from the county. I agree with you, that the statement was made, and that if the court has no jurisdiction that the money should be paid to you. *I did explain to you that even if we both understood the judges [sic] statement that her remarks from the bench, could not be consider [sic] to be binding*

[10] Klugman still had not received the funds from CSSD.

[11] In his rebuttal brief on review, Klugman asserted that neither he nor OCTC was "able to produce the transcript because the court reporter stated that she lost her notes."

> *court orders. I will not feel comfortable releasing any funds until a final court order has been issued by the court.* You violently disagreed and you stated you would make a complaint against me with the Bar if I did not release the funds to you. (Italics added.)

The letter further memorialized that "[a]s a compromise," Carl requested that Klugman issue Carl a check from Klugman's CTA, but indicated to Klugman that he would "not cash the check until such time as the [dissolution] case [was] completed." Upon receipt, Carl signed the letter to confirm his agreement to its terms—i.e., not to cash the check until completion of the case.

Klugman testified that he wrote the letter so that Carl understood the risks related to distributing the funds, including a potential contempt action. Klugman never filed a motion to clarify whether the April 20 Order was still in effect because, he testified, Carl forbade him from doing so. Despite Carl's agreement to retain the funds, he signed the $11,872.63 check over to his dentist on February 7, 2013, the day after he received it.

E. On March 29, 2013, the Court Issued an Order Dissolving the April 20 Order

On March 29, 2013, the court signed and filed an order that stated: "The Court's orders of April 10, 2012 and April 20, 2012, staying the disbursement of funds, are dissolved, and all such funds shall be distributed, first to satisfy said writ of execution, and the balance to [Carl]."[12] In the same order, the court also denied Klugman's Motion to Quash.

F. Klugman Informed the Court that He Had Previously Disbursed Funds to Carl

At a May 1, 2013 hearing, Adrianne's counsel requested that the court order Klugman to give the remaining funds to Adrianne or, in the alternative, require Klugman to continue to hold whatever funds he was supposed to be holding, pending a future hearing. In response, Klugman informed the court for the first time that he had already disbursed the funds to Carl, but he did not mention the date on which he had done so. The court neither granted Adrianne's counsel's

[12] The order was signed on March 29, 2013, but the filing stamp incorrectly indicates the date as March 29, 2012.

request nor expressed dissatisfaction with Klugman's distribution to Carl. Instead, it ordered the parties to meet and confer to try to resolve matters without incurring additional attorney fees.[13]

III. CULPABILITY

A. Count One: Failure to Maintain Client Funds in Trust Account
Count Three: Failure to Comply with Laws—Breach of Fiduciary Duties

Count One alleges that Klugman violated rule 4-100(A) when he withdrew $11,872.63 of entrusted funds from his CTA on February 6, 2013, while acting as an escrow agent for Carl and Adrianne, and while the funds were still disputed and no court order had been issued, and thereby failed to maintain that amount in trust. Count Three alleges that Klugman breached his fiduciary duties owed to Adrianne by disbursing $11,872.63 to Carl on February 6, 2013, without authority and without advising Adrianne, and thereby violated section 6068, subdivision (a). The hearing judge correctly found Klugman culpable of both counts.

At trial, Klugman argued that: the April 20 Order was governed by the time limitation of TROs and had expired before he disbursed funds to Carl; he owed no fiduciary duty to Adrianne independent of the court order; and he did not violate a fiduciary obligation to Adrianne since he believed the court order had expired. We find these arguments unavailing.[14]

The creation of a fiduciary duty on the part of an attorney does not depend on the issuance or existence of a formal court order. It may be created by actual agreement of the attorney (*Johnstone v. State Bar* (1966) 64 Cal.2d 153, 155-156; *Crooks v. State Bar* (1970) 3 Cal.3d 346, 355), as occurred here. Further, "[w]hen an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his

[13] The court later ordered Carl to pay additional money to Adrianne. Although she has obtained some funds by executing on bank accounts, "the bulk of the money" is still uncollected. The record is unclear as to how much was collected and how much is still owed.

[14] Having independently reviewed all arguments Klugman raised, those not specifically addressed herein have been considered and are rejected as lacking merit.

misconduct. [Citations.]" (*Clark v. State Bar* (1952) 39 Cal.2d 161, 166.) Like the hearing judge, we find that Klugman voluntarily assumed, at the April 20, 2012 hearing, fiduciary responsibilities for the funds transferred to him by CSSD. We also find that he explicitly affirmed to the court and Adrianne his obligation to safeguard the $11,872.63 "overage" amount that CSSD believed was owed to Carl by holding those funds in his CTA until ordered by the court to release them. He therefore owed a fiduciary duty to *both* Carl and Adrianne.

We thus reject Klugman's contention that he did not violate his fiduciary obligation because he believed that the April 20 Order had expired. Even if it had expired, his fiduciary obligation had not. Klugman violated his fiduciary duty to Adrianne by unilaterally distributing the funds to Carl. (See *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 979; *In the Matter of Respondent P* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622, 632.)

On review, Klugman primarily argues he was authorized to disburse funds to Carl based on the court's January 30, 2013 oral order. OCTC asserts that Klugman waived this argument by not raising it at trial. We are "very reluctant to consider his claim made for the first time on review." (*In the Matter of Wolfgram* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 355, 361.)

Nevertheless, pursuant to our independent review authority, we consider and reject Klugman's argument because we find that the April 20 Order was valid until the court filed its written March 29, 2013 order dissolving it. First, court orders are generally presumed valid. (*Blumberg v. Minthorne* (2015) 233 Cal.App.4th 1384, 1390.) Second, the law presumes that court rulings—such as the court's April 20, 2012 ruling that it had not issued a TRO subject to a 21-day expiration under the Family Code—are correct. (*Ibid*.) Third, no evidence indicates that the court ever found the April 20 Order expired. Instead, the March 29, 2013 order expressly dissolving it implies that it was in effect and binding up until that date. Fourth, Klugman cited

no case authority to support his claim that the April 20 Order expired as a matter of law under the Family Code.

Further, in general, "[a] trial court's oral ruling on a motion does not become effective until it is filed in writing with the clerk or entered in the minutes. [Citations.]" (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1170.)[15] Indeed, a "trial court may properly file a written order differing from its oral rulings when the rulings have not been entered in the minutes of the court." (*Ibid.*, citing *Miller v. Stein* (1956) 145 Cal.App.2d 381, 385.) In addition, since the court directed Adrianne's counsel to prepare a proposed order at the January 30, 2013 hearing, the only legally effective order was the March 29, 2013 signed written order. (*In re Marcus* (2006) 138 Cal.App.4th 1009, 1016, citing *In re Marriage of Drake*, *supra*, 53 Cal.App.4th at p. 1170.) Notably, Klugman's own testimony that he "determined that you can't enforce oral orders," "there's no such thing as an oral order or an oral ruling," and "written orders are the only orders that apply" belies his argument that he relied on the court's January 30, 2013 oral order.[16] For the same reasons, we also reject Klugman's contention that Adrianne's counsel was notified at the January 30, 2013 hearing of the court's order regarding disbursement of the funds. What Adrianne's counsel heard—like Klugman—was the court's tentative, not its final, ruling.

---

[15] There are exceptions when oral orders are effective. (E.g., *People v. Superior Court (Westbrook)* (1993) 15 Cal.App.4th 41, 47-48 [sealing order may be oral].) But Klugman cited no authority suggesting that the January 30, 2013 oral order fell within such an exception.

[16] We also note that Klugman's counsel asserted at trial: "Whatever goes on in a courtroom, whether it takes days or not, *when the Court's order is reduced to writing, that is the applicable operative order. All the dialogue that went on before is not relevant,* unless there's an ambiguity on the face of the order, I suggest. There's no ambiguity here." (Italics added.)

Moreover, contrary to Klugman's claim that the hearing judge applied the wrong standard of proof, the record shows that the judge correctly applied the clear and convincing evidence standard.[17] We have applied that standard upon our independent review.

Finally, the above facts and analysis establish that Klugman also violated his obligation under rule 4-100(A) to maintain the disputed funds in his CTA.[18] We assign no additional disciplinary weight for this violation, however, as it is based on the same facts that underlie our breach of fiduciary duty finding, which supports the same or greater discipline. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127.)

B. Count Two: Failure to Obey a Court Order

Count Two alleges that Klugman failed to comply with the court's April 20 Order, in willful violation of section 6103. The hearing judge dismissed Count Two due to a lack of evidence, finding that Klugman credibly testified he believed the order had expired before he disbursed funds to Carl. OCTC requests that we find Klugman culpable as charged, and we do.

To prove a willful violation of section 6103, OCTC must establish that the attorney knew the order was final and binding. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 787 [attorney's knowledge of final, binding order is essential element of § 6103 violation].) There is no dispute that Klugman knew of the April 20 Order, and he testified that he believed until June 2012 that the April 20 Order was valid and binding. In fact, his February 6, 2013 letter to Carl proves that he believed the April 20 Order was still valid and binding, or at least that he knew his "belief" that the order expired was questionable. Moreover, Klugman did not seek clarification from the court before disbursing the funds on

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

[18] Klugman's claim that he cannot be culpable of violating his fiduciary and CTA obligations without also violating section 6103 is moot because, as discussed below, we find him culpable of violating that section as well.

February 6, 2013, despite telling Carl that same day: "I am unclear about the pending court orders. . . . I will not feel comfortable releasing any funds until a final court order has been issued by the court."

More fundamentally, Klugman's belief about the order is irrelevant as a matter of law. (*In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar. Ct. Rptr. 1, 9, fn. 3.) "[H]e was obligated to obey the order unless he took steps to have it modified or vacated, which he did not do." (*Id.* at p. 9; see also *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 951-952 ["no plausible belief in the right to ignore final, unchallengeable orders one personally considers invalid"].) And, as noted above, the record establishes that the order was valid until the March 29, 2013 written order was filed.

Further, unlike the hearing judge, we do not find exculpatory the fact that no evidence shows the court found Klugman to have violated an order. While Klugman did inform the court, on May 1, 2013, that he had already disbursed funds to Carl, he did not disclose that he had done so on February 6, 2013—several weeks *before* the court's March 29, 2013 order. However, we assign no additional disciplinary weight to this section 6103 violation since it is based on the same facts that underlie our breach of fiduciary duty finding, which supports the same or greater discipline. (*In the Matter of Sampson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 127.)

IV. AGGRAVATION OUTWEIGHS MITIGATION

OCTC must establish aggravating circumstances by clear and convincing evidence (std. 1.5), while Klugman has the same burden to prove mitigation (std. 1.6).

A. Aggravation

1. Prior Record of Discipline

Standard 1.5(a) provides that a prior record of discipline may be an aggravating factor. The hearing judge found Klugman's discipline record to be a factor in aggravation, but did not

specify the weight to be assigned. The judge further noted that Klugman's misconduct in the present matter occurred prior to and during the same time period as the misconduct underlying his second disciplinary proceeding. Thus, the judge determined that its aggravating impact must be assessed using the framework in *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602. We agree.

OCTC argues that the judge failed to give Klugman's prior disciplines proper weight, and that their force and weight should not be reduced. It further contends that his present misconduct is similar and related to his prior misconduct, which supports assigning great weight in aggravation. Moreover, OCTC asserts that the judge erred in finding that the misconduct in his second disciplinary proceeding and the present wrongdoing occurred during the same time period, and states that most of the violations in his second disciplinary proceeding occurred before the current misconduct. We reject OCTC's contentions, and assign this factor moderate aggravating weight, as explained below. In reaching our conclusion, we set forth the key aspects of Klugman's prior discipline.

Klugman I.[19] Between approximately 1999 and 2003, Klugman committed misconduct in 12 matters, including, inter alia, acts of moral turpitude by misappropriating client funds and making misrepresentations, and failing to maintain client funds in trust, promptly refund unearned fees, perform with competence, communicate significant developments to a client, and notify the State Bar of the employment and termination of a person who had resigned with charges pending. In mitigation, Klugman had no prior record of discipline, was candid and cooperative with the State Bar, and "[a]t the time of the misconduct, [he] suffered extreme difficulties in his . . . personal life which were other than emotional or physical in nature." In

[19] Supreme Court Case No. S183845; State Bar Court Case Nos. 03-O-05112; 01-O-03385 (01-O-04537; 01-O-04688; 02-O-10290; 02-O-13271; 03-O-00224; 03-O-02613; 04-O-10834; 04-O-11115; 04-O-11408; 04-O-11739) (consolidated).

aggravation, his misconduct significantly harmed "a client, the public or the administration of justice," and evidenced multiple acts of wrongdoing or demonstrated a pattern of misconduct.

Klugman stipulated to the facts and conclusions of law giving rise to his eventual discipline during his effort to enroll in the State Bar's Alternative Discipline Program (ADP). Although the stipulation was lodged with the Hearing Department on September 19, 2005, Klugman's ADP participation delayed finalization of his discipline case until August 25, 2010, when the Supreme Court ordered that he be actually suspended for four months and placed on probation for four years, subject to conditions.

Klugman II.[20] Between approximately April 2011 and February 2014, Klugman failed to comply with probation conditions ordered by the Supreme Court in *Klugman I*. His probation violations included failing to timely file quarterly reports and client funds certificates and to make required restitution payments. In aggravation, Klugman had one prior record of discipline, and his various probation violations evidenced multiple acts of wrongdoing or demonstrated a pattern of misconduct. In mitigation, Klugman suffered from health problems that "contributed to at least some of his failures to complete his probation conditions." Specifically, at the end of 2010, Klugman was diagnosed with a large cancerous tumor on his leg, underwent two surgeries, and returned to work in about April 2011. In addition, around March 2013, Klugman was diagnosed with attention deficit disorder, for which he began taking medication.[21] On June 12, 2014, the Supreme Court ordered Klugman's probation revoked, and further ordered that he be actually suspended for 30 days and placed on probation for three years, subject to conditions.

For purposes of analyzing an attorney's prior record as aggravation, the date on which formal charges were filed in the prior matter is most relevant, as that filing puts an attorney on

[20] Supreme Court Case No. S183845; State Bar Court Case No. 13-PM-14322.

[21] Klugman also took financial and physical care of his niece, who had lung cancer and was later diagnosed with pancreatic cancer, from 2009 until her death in late 2011.

notice that the charged misconduct is ethically questionable. (E.g., *In the Matter of Burke* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 448, 461 [filed NDC put attorney on notice misconduct was disciplinable]; *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 564 [filed notice to show cause alerted attorney to ethically questionable nature of misconduct].)

OCTC argues that Klugman received earlier notice that he was required to comply with the terms of his *Klugman I* probation—via the Supreme Court's August 25, 2010 order in *Klugman I*, a September 14, 2010 reminder letter sent by the Office of Probation (Probation) outlining the terms and conditions of his probation, and an October 7, 2010 meeting Probation had with Klugman to review all his conditions and deadlines. However, we consider most relevant the date OCTC filed the initiating motion to revoke probation in *Klugman II*—i.e., August 5, 2013, because that is when Klugman received formal notice that his failure to comply with probation conditions was allegedly disciplinable misconduct. (*In the Matter of Hansen* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 464, 473-474 [date NDC filed in first matter and date motion to revoke probation filed in second matter considered in analyzing respondent's disciplinary history].)

We note that August 5, 2013 falls well after February 6, 2013—the date Klugman breached his fiduciary duty, mishandled entrusted funds, and violated a court order. He thus committed the present misconduct *before* he received formal notice that his *Klugman II* misconduct was disciplinable. "[T]he aggravating force of prior discipline is generally diminished if the misconduct underlying it occurred during the same time period [as the current misconduct]. [Citations.]" (*In the Matter of Sklar*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 619.) Given that "part of the rationale for considering prior discipline as having an aggravating impact is that it is indicative of a recidivist attorney's inability to conform his or her conduct to ethical

norms [citation], it is therefore appropriate to consider the fact that the misconduct involved here was contemporaneous with the misconduct in [*Klugman II*]." (*Ibid.*)

Ultimately, we look at the totality of Klugman's misconduct. (*In the Matter of Hansen*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 474, citing *In the Matter of Sklar*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 619.) We observe that Klugman has repeatedly failed to maintain funds in trust (first in about 2000 and more recently in 2013) and to comply with court orders (i.e., the Supreme Court's *Klugman I* order and the April 20 Order at issue here). We also note his recurring disregard for adherence to professional responsibilities: in *Klugman I*, he committed multiple acts of misconduct, including some involving moral turpitude; in *Klugman II*, he violated several probation conditions; and in this case, he breached his fiduciary duty. Thus, we assign moderate weight to Klugman's prior discipline.

2. Lack of Insight

The hearing judge found that Klugman failed to demonstrate any realistic recognition of or remorse for his wrongdoing, and instead continued to assert that his conduct was proper. Without assigning a specific weight, the judge considered Klugman's insistence that his conduct was justified to be an aggravating factor, and particularly troubling, because it suggests Klugman's misconduct might recur. Klugman contends that the judge's "fear is unfounded" because he is unlikely to encounter a similar situation, and his lack of remorse does not indicate that he would disobey a court order in the future.

We agree with Klugman that there is no clear and convincing evidence that his lack of remorse suggests he would disobey a court order in the future, but we disagree with his continuing claim that he did not violate his fiduciary duty and "fully met his obligations." We find that his actions demonstrate some lack of insight and a failure to accept responsibility for his conduct. (Std. 1.5(k); *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502,

511 [law does not require false penitence but does require respondent to accept responsibility for acts and come to grips with culpability].) We assign moderate weight to this factor.

3. No Significant Harm

The hearing judge correctly found that the evidence is not clear and convincing that Klugman's conduct significantly harmed Adrianne. (See std. 1.5(j) [significant harm to client, public, or administration of justice is aggravating circumstance].) OCTC argues that Klugman caused significant harm, in part, because the superior court later found that Carl owed Adrianne additional monies. We disagree. The reasons for the court's conclusion are not included in the record, and on March 29, 2013, it ordered Klugman to distribute all the funds. Had Klugman disbursed funds to Carl after the issuance of, and in compliance with, that order, no argument could be made that he committed misconduct. We also reject, due to lack of evidence, OCTC's contention that Klugman "harmed the administration of justice by violating the court order." We thus assign no weight to this factor in aggravation.

B. Mitigation—Cooperation

Unlike the hearing judge, we find that Klugman is entitled to minimal mitigation for cooperation with the State Bar. (Std. 1.6(e) [mitigation credit permitted for spontaneous candor and cooperation displayed to State Bar].) Prior to trial, Klugman entered into an extensive factual stipulation, albeit to facts that were easily provable. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443 [factual stipulation merits some mitigation].)

V. DISCIPLINE

Our disciplinary analysis begins with the standards and, although they are not binding, we give them great weight to promote consistency. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Importantly, the Supreme Court has instructed us to follow the standards "whenever possible"

(*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11), and also to look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to preserve public confidence in the profession; and to maintain high professional standards for attorneys. (Std. 1.1.)

Klugman argues that no discipline should be imposed since he is not culpable of any wrongdoing, and further contends that if he committed a technical violation, the proper discipline should be a reproval. OCTC asserts that disbarment is appropriate under the standards, including standard 1.8(b), and case law since this is Klugman's third disciplinary proceeding and he engaged in serious misconduct.

In analyzing the applicable standards, we first determine which standard specifies the most severe sanction for the at-issue misconduct. (Std. 1.7(a) [most severe sanction shall be imposed where multiple sanctions apply].) Standard 1.8(b) provides that disbarment is appropriate where an attorney has two or more prior records of discipline if: (1) an actual suspension was ordered in any of the prior disciplinary matters; or (2) the prior and current disciplinary matters demonstrate a pattern of misconduct; or (3) the prior and current disciplinary matters demonstrate the attorney's unwillingness or inability to conform to ethical responsibilities. Klugman's case meets at least the first of these criteria: four-month and 30-day actual suspensions were ordered in *Klugman I* and *Klugman II*, respectively.

Second, we analyze whether Klugman's case falls within an exception to standard 1.8(b), which permits us to deviate from recommending disbarment where "the most compelling mitigating circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current misconduct." Contrary to OCTC's arguments, we find that Klugman qualifies for the latter exception. As discussed above, he

committed the misconduct underlying *Klugman II* between April 2011 and February 2014 (and received formal notice that it was disciplinable in August 2013), and he committed the current misconduct in February 2013, during the same time period.

As such, we look to standard 2.12(a), which provides for disbarment or actual suspension as the presumed sanction for disobedience or violation of a court order related to a member's practice of law or to the duties required of an attorney under section 6068, subdivision (a).[22] Further, since Klugman's prior misconduct occurred during the same time period as his current misconduct, we "consider the totality of the findings in the two cases to determine what the discipline would have been had all the charged misconduct . . . been brought as one case." (*In the Matter of Sklar*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 619.)

Given the range of discipline in standard 2.12(a), we also consult case law. The hearing judge cited several cases he deemed "comparable" to the instant matter, including *Guzzetta v. State Bar*, *supra*, 43 Cal.3d 962 (six-month actual suspension), *Johnstone v. State Bar*, *supra*, 64 Cal.2d 153 (three-month actual suspension), *Clark v. State Bar*, *supra*, 39 Cal.2d 161 (six-month actual suspension), and *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91 (90-day actual suspension).

In support of its disbarment request, OCTC cited several cases that we find do not apply. Some found that standard 1.8(b) (or its predecessor) applied (e.g., *Barnum v. State Bar* (1990) 52 Cal.3d 104 [disbarment; former std. 1.7(b) applicable]; *In the Matter of Pierce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 382 [same]), which we do not, and some involved misappropriation (e.g., *Chang v. State Bar* (1989) 49 Cal.3d 114 [disbarment; misconduct included $7,898 misappropriation]; *Kennedy v. State Bar* (1989) 48 Cal.3d 610 [disbarment; misconduct included $10,000 misappropriation]), which was not charged here.

[22] Standard 2.2(b), which provides that suspension or reproval is the presumed sanction for a violation of rule 4-100(A), also applies.

Klugman cited no comparable cases to support his request for a reproval, a downward departure from standard 2.12(a), which calls for a period of actual suspension at a minimum. In considering whether such a deviation is warranted, we take into account the seriousness of the misconduct and the factors in aggravation (prior record and lack of insight) and mitigation (cooperation). We find that the net effect of the aggravating and mitigating factors does not justify a departure from the standards. (Stds. 1.2(i), 1.7(c) [lesser sanction than recommended in standard may be warranted where misconduct is minor, little or no injury to client, public, or profession, and attorney able to conform to ethical responsibilities in future]; see *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [clear reasons for departure from standards should be shown].)

Overall, we find the most guidance in two pre-standards cases upon which the hearing judge relied: *Clark v. State Bar*, *supra*, 39 Cal.2d 161, and *Johnstone v. State Bar*, *supra*, 64 Cal.2d 153. In *Clark*, an attorney with one prior discipline (a public reproval) received a six-month actual suspension where he served as guardian of an incompetent's estate. Clark intentionally included a large sum of money in a final account filed with the court under an entry designed to mislead the court, and was guilty of grossly negligent acts in his performance of his duties as guardian. In *Johnstone*, an attorney with no prior discipline received a three-month actual suspension where he represented an injured worker, agreed with an insurer to share proceeds recovered on a personal injury claim in exchange for the insurer's release and discharge of its lien on the recovery, but later reneged on the agreement, and, thus, breached his fiduciary duty to the insurer after agreeing to act as a trustee. Both cases involved misconduct similar to that involved here (e.g., mishandling entrusted funds in which a non-client had an interest). Further, like Klugman, the attorney in *Clark* had a prior disciplinary history.

Guided by the standards, the case law, and all relevant factors, we find that the hearing judge properly recommended discipline comparable to that imposed in *Clark*. Moreover, as noted above, we consider the totality of the findings in this case and in *Klugman II* had they been brought as one matter. (*In the Matter of Sklar*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 619.) Since Klugman received a four-month actual suspension in *Klugman I*, the six-month actual suspension recommended by the hearing judge here is also in accordance with standard 1.8(a), which states that when "a member has a single prior record of discipline, the sanction must be greater than the previously imposed sanction," subject to certain exceptions not applicable here. We thus conclude that a six-month actual suspension is necessary to impress upon Klugman the seriousness of his misconduct and to protect the public, the courts, and the legal profession.

VI. RECOMMENDATION

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

1. He must be suspended from the practice of law for the first six months of the period of his probation.

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code, section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

4. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation deputy either in person or by telephone. During the period of probation, he must promptly meet with the probation deputy as directed and upon request.

5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and of the State Bar's Client Trust Accounting School and passage of the tests given at the end of those sessions. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School or Client Trust Accounting School. (Rules Proc. of State Bar, rule 3201.)

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

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

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

VIII. RULE 9.20

We further recommend that Klugman be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a)

and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

IX. COSTS

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

HONN, J.

WE CONCUR:

PURCELL, P. J.

STOVITZ, J.*

*Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.