PUBLIC MATTER—NOT DESIGNATED FOR PUBLICATION

Filed August 26, 2015

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case Nos. 11-O-14430, 11-O-17550 (Cons.)
	)	
JAMES HSIAOSHENG LI,	)	OPINION
	)	[As Modified on October 8, 2015]
A Member of the State Bar, No. 176662.	)	
	)	

James Hsiaosheng Li appeals a hearing judge's decision finding him culpable of six counts of professional misconduct in two client matters. Li asks us to vacate the decision recommending a six-month actual suspension from the practice of law because he maintains that he acted in good faith with respect to all of the alleged misconduct. The Office of the Chief Trial Counsel of the State Bar (OCTC) does not appeal and asks us to affirm the hearing judge's culpability determinations and discipline recommendation.

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we find Li's legal arguments and assertions of good faith to be for the most part unavailing. As discussed in detail below, we find clear and convincing evidence[1] of his culpability for five of the six challenged counts of misconduct. We further agree generally with the hearing judge's findings in mitigation and aggravation, but we find an additional aggravating factor due to Li's overreaching of one of his clients. Although we find Li culpable of one less count than the hearing judge, our finding of additional aggravation leads us ultimately to adopt the judge's

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

recommended six-month actual suspension, which is within the range provided by the applicable standards and the decisional law.[2]

I. BACKGROUND

Li was admitted to the State Bar of California in 1995, and has no record of prior discipline. On September 28, 2012, OCTC filed a Notice of Disciplinary Charges (NDC) against Li, alleging 13 counts of misconduct—six in the Wang matter and seven relating to another client, Michael Kin Wing Chui.[3] In January 2013, the parties entered into a pretrial partial stipulation as to facts and admission of documents, and the case proceeded to a nine-day trial.

After submitting the case, the hearing judge found Li culpable of six counts but dismissed the remaining seven.[4] Specifically, the judge found that in the Wang matter, Li: (1) committed an act of moral turpitude by fabricating an unjustified legal claim to avoid refunding an advance $30,000 fee; (2) failed to return the unearned fee for over four years; (3) did not deposit the $30,000 in his client trust account (CTA) upon learning the client disputed it; and (4) employed

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[2] Unless otherwise noted, all references to standards refer to of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct; all references to sections refer to the Business and Professions Code; and all references to rules refer to the Rules of Professional Conduct. Effective July 1, 2015, the standards were revised and renumbered. Because this appeal was submitted for ruling before the July 1, 2015 effective date, we apply the prior version of the standards, which was effective January 1, 2014 through June 30, 2015. All further references to standards are to the prior version of this source.

[3] Previously in 2012, Li and OCTC entered into a stipulation as to facts, conclusions of law, and disposition, by which Li agreed to accept a 90-day actual suspension for two counts of misconduct relating to his representation of Ching Wang. The Hearing Department approved the stipulation in February 2012. However, in August 2012, the Supreme Court returned it "for further consideration of the recommended discipline in light of the applicable attorney discipline standards. [Citations.]" (*James Li on Discipline* (August 27, 2012, S201629).) Thereafter, the hearing judge approved the parties' agreement to withdraw the February 2012 stipulation.

[4] These counts were: Count Two (encouraging unjust action); Count Three (maintaining unjust action); Count Four (failing to comply with laws); Count Eight (moral turpitude); Count Nine (charging unconscionable fee); Count Twelve (conflict of interest with client); and Count Thirteen (failing to comply with laws). OCTC states on appeal that it does not seek to revive the dismissed charges. The record supports these dismissals, which we affirm and therefore limit our analysis to the remaining six counts for which Li was found culpable.

means inconsistent with the truth in a personal bankruptcy filing. In the Chui matter, the hearing judge found that Li charged and collected an illegal fee and acquired an unfair and unreasonable financial interest that was adverse to his client. The judge found Li's misconduct aggravated by multiple acts of wrongdoing, his lack of insight, and significant harm to a client, but mitigated by his lack of prior discipline and his history of pro bono work.

II. THE WANG MATTER (Case No. 11-O-14430)

A. Count One: Moral Turpitude [§ 6106][5]

1. Factual Background[6]

In August of 2007, Ching Wang and JCR, Inc., hired Li to defend them in a civil lawsuit in which plaintiff Sylvia Hu sought to set aside certain real property transfers. Hu claimed Wang made the transfers fraudulently to a sham corporation, JCR, in order to frustrate her attempt to collect a roughly $118,000 judgment in her favor and against Wang in a prior lawsuit. On August 2, 2007, Wang and JCR entered into a fee agreement with Li whereby Wang and JCR agreed to pay Li a $100 hourly rate plus a $2,000 "non-refundable" retainer. The fee agreement contained the following paragraph, entitled "Client's Duties":

> Client agrees to be truthful with Attorney, to cooperate, to keep Attorney informed of any information or developments which may come to Client's attention, to abide by this Agreement, to pay Attorney's bills on time, and to keep Attorney advised of Client's address, telephone number and whereabouts. Client will assist Attorney in providing necessary information and documents and will appear when necessary at legal proceedings.

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[5] Section 6106 provides, in pertinent part: "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise . . . constitutes a cause for disbarment or suspension."

[6] Our factual findings are based on the hearing judge's determinations, which we afford great weight (see Rules Proc. of State Bar, rule 5.155(A)), the Partial Stipulation as to Facts and Admission of Documents filed January 22, 2013, the trial testimony, and the documents in evidence.

Three days later, Wang and Li agreed to an "Amendment to Contract," providing that instead of an hourly billing rate, Wang would pay an additional $10,000 "non-refundable retainer," plus a flat $30,000 advance fee, which would be "refundable when the guarantee by Attorney is not met." That guarantee was defined as follows:

> "Contingent upon clients' meeting its [*sic*] full obligations and duties enumerated in the [initial fee agreement] and this amendment, Attorney guarantees that he will prosecute the case to a favorable outcome for the named defendants, which is defined as (1) a judgment or verdict in favor of all defendants, (2) a dismissal with or without prejudice of the case in favor [of] all defendants, or (3) a resolution of the case in a way that the Clients choose to accept. . . ."

Li also agreed to handle any post-trial motions or appeal at no additional charge.

Li defended Wang in the *Hu* case through trial, but the outcome was not favorable. In January 2008, the superior court entered judgment in favor of Hu and against Wang. On January 10, 2008, Li emailed Wang expressing his opinion that "the court made a wrong decision." He advised Wang: "We should immediately prepare to appeal. As I told you, I will not charge you a penny for appealing."

Four days later, however, Li sent another email, purporting to "retract" his January 10, 2008 message, based on Wang's testimony during his direct examination at the *Hu* trial. Li explained his position to Wang:

> I will have to charge you for appeal in this case because at trial, you did not cooperate with my presentation of this case. I repeatedly warned you not to act out of what you think to be smart. At trial, you discredited your testimony by giving a completely off-the-point monologue about why you lost your case at Pasadena court when I asked you a simple question[:] "Why did you think you did not owe the [*sic*] Ms. Hu any money?"

On February 6, 2008 Li sent a second email in which he criticized Wang's direct testimony as "utterly stupid" and stated further:

> [Y]ou made a very foolish decision of straying from my question in the courtroom, and accusing a previous judge of making a wrong decision and even more foolishly accusing Ms. Hu's attorney of fabricating evidence in your Pasadena trial. I had repeatedly warned against you [*sic*] of guessing what to do. You ignored my advice, and materially failed to cooperate with me in prosecuting the case.

Additionally, Li reiterated his position that his guarantee was void based on Wang's purported failure to cooperate during the trial. Li nevertheless offered to handle an appeal of the adverse judgment, but only for an added fee (either an "upfront $6,600" or a $30,000 contingency fee to be secured against Wang's properties), and on the condition that any contract for further representation would act as Wang's "affirmation that [Li's] initial guarantee was void because the conditions for the guarantee failed."

In January of 2009, Wang and JCR sued Li, alleging breach of contract, fraud, and other theories in connection with Li's refusal to honor his guarantee and refund Wang's $30,000 advance fee. Li later stipulated that he did not immediately deposit the $30,000 in his CTA upon learning that Wang was disputing the failure to refund that sum, or even after Wang and JCR sued him to recover the fee. Li did not deposit the money into his CTA until October 25, 2011, after a jury found he was liable to Wang for fraud, breach of contract, negligent misrepresentation, conversion, breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing. Li eventually repaid Wang the $30,000 pursuant to a post-judgment settlement of the civil action.

2. Culpability

In Count One of the NDC, OCTC charged that, "by maintaining the untenable legal position that the guarantee in the amended retainer agreement he drafted is now void as against Wang, and by refusing to refund the $30,000 to Wang despite his written promise to do so, [Li] committed an act involving moral turpitude, dishonesty or corruption."[7] The hearing judge found that Li's refusal to refund the $30,000 advance fee "based on his fabrication of an

[7] OCTC also charged that Li committed moral turpitude by filing a personal bankruptcy case for the purpose of delaying trial in the civil lawsuit Wang brought against him. The hearing judge dismissed this portion of Count One, finding no clear and convincing evidence that Li filed for bankruptcy with an improper purpose. OCTC does not challenge the dismissal, and we find it supported by the record. Accordingly, we concur in the partial dismissal of Count One.

unjustified legal claim that the guarantee he had provided was voided by a breach of cooperation, constituted an act of moral turpitude in willful violation of section 6106."

Li asserts that he had a good faith belief that his guarantee to refund the $30,000 was void because Wang answered poorly while testifying in the *Hu* trial. Wang testified that he felt he did not owe any money to Hu because, inter alia, he believed Hu had testified dishonestly during the prior litigation which had resulted in a judgment adverse to Wang. Before trial, Li had advised Wang not to testify that he believed Hu lied because doing so could undermine Wang's own credibility.

While the absence of bad faith will not immunize Li from culpability for acts of moral turpitude, we evaluate a claim of good faith to determine the degree of discipline to be imposed. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1034 [conduct need not be in bad faith to constitute moral turpitude; good faith is considered to determine whether discipline should be imposed for ignorance or mistake].) However, far from being a mistake or ignorance, Li's persistence in asserting to Wang that he was not obligated to refund the $30,000 because of Wang's testimony at his trial was pretextual at best. Li's right to retain the $30,000 was conditioned upon a favorable outcome for Wang. It was *not* conditioned on the quality of Wang's testimony—it required only that Wang be truthful, pay his bills on time, keep Li apprised of his contact information, and assist in his own defense by providing relevant information and documents and appearing at legal proceedings. The record contains no evidence that Wang's testimony was false; he merely attested to his ardent *belief* that Hu had lied during the prior litigation.

According to Li, the enforceability of his refund guarantee was conditioned upon the *quality* of his client's testimony, not its truthfulness. Such a condition in the fee agreement would be unethical and unenforceable. (Rule 5-310 ["A member shall not: . . . . (B) Directly or

indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the case"]; *Pelkey v. Hodge* (1931) 112 Cal.App. 424, 425 [contract to pay witness contingent upon success of litigation is against public policy, as it "offers an inducement to perjury and tends to prevent the administration of justice"].) We find that Li's efforts to avoid refunding the $30,000 fee were both disingenuous and unethical and, thus, he is culpable of moral turpitude as charged in Count One.

B. Count Five: Employing Means Inconsistent with Truth [§ 6068, subd. (d)][8]

1. Factual Background

On May 5, 2011, the morning that Wang and JCR's trial for breach of contract and fraud against Li was set to begin, Li filed a Chapter 7 personal bankruptcy petition in the United States Bankruptcy Court, Central District of California, thereby causing an automatic stay of the civil trial.[9] The bankruptcy petition included an "Individual Debtor's Statement of Compliance with Credit Counseling Requirement" (Compliance Statement). In bolded language, the introductory paragraph of the Compliance Statement explained:

> **Warning: You must be able to check truthfully one of the five statements regarding credit counseling listed below. If you cannot do so, you are not eligible to file a bankruptcy case** . . . .

Li checked statement number two, which read as follows:

> ☐ 2. Within the 180 days **before the filing of my bankruptcy case**, I received a briefing from a credit counseling agency approved by the United States trustee or bankruptcy administrator that outlined the opportunities for available credit counseling and assisted me in performing a related budget analysis, but I do not have a certificate from the agency describing the services provided to me. *You must file a copy of the certificate from the agency describing the services provided to you and a copy of any debt repayment plan developed through the agency no later than 14 days after your bankruptcy case is filed*.

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[8] Counts Two, Three, and Four were dismissed. See footnote 3 *ante*.

[9] In Counts One, Two, Three, and Four, OCTC charged that Li filed the petition for illegal and improper purposes, thereby violating sections 6068, subdivisions (a), (c), and (g), and 6106. These are among the dismissed charges addressed *ante* in footnotes 3 and 6.

(Original emphases.) Immediately before the signature line, the following bolded language appeared:

> **I certify under penalty of perjury that the information provided above is true and correct.**

Li executed and filed the Compliance Statement on May 5, 2011, but in fact, he had not received the credit counseling. After consulting with a bankruptcy attorney, Li abandoned his petition, and on May 24, 2011, the bankruptcy court dismissed it. Li eventually obtained the credit counseling in August 2011, after receiving an inquiry from a State Bar investigator and long after his bankruptcy petition had been dismissed.

2. Culpability

The NDC charged Li in Count Five with making a false representation to the bankruptcy court by declaring under penalty of perjury in his Compliance Statement that he had completed the credit counseling prior to filing for bankruptcy. The hearing judge found that Li's under-oath representation was "knowingly false" and constituted a willful violation of section 6068, subdivision (d).[10] We agree.

Li argues that he certified the Compliance Statement in good faith, based on his understanding of its requirements. However, to establish good faith, "an attorney must prove that his or her beliefs were both honestly held and reasonable. [Citation.]" (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653.) Given the clear language of the statement Li checked, with its emphasis on the requirement that credit counseling be obtained "**before the filing of [a] bankruptcy case**," Li's certification of the statement that he had already taken an approved credit counseling course was both dishonest and unreasonable. His

[10] Section 6068, subdivision (d), requires an attorney to "employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."

nonsensical testimony that he had actually completed credit counseling *before* filing his bankruptcy petition but only later "finished the act of ordering the certificate" in response to the State Bar's inquiry does not aid in his good faith defense.

Similarly, Li's contention that he believed at the time he signed the Compliance Statement that he had the *experience* provided by credit counseling borders on frivolous and serves to further undermine his good faith claim. The hearing judge's finding that Li employed a means inconsistent with the truth is well supported on this record, and we affirm it.

C. Count Six: Failure to Refund Unearned Fees [Rule 3-700(D)(2)]

1. Factual Background

As noted *ante*, Li was no longer entitled to retain the $30,000 advance fee after the *Hu* case resulted in a verdict adverse to Wang in January of 2008. Yet he did not return the fee until four and a half years later, after Wang sued Li and obtained a jury verdict against him.

2. Culpability

The hearing judge correctly determined that Li's failure to *promptly* refund the $30,000 advance fee violated rule 3-700(D)(2).[11] However, we also agree with the hearing judge that the same misconduct is a basis for the moral turpitude finding in Count One.[12] Accordingly, we do not assign additional weight as a consequence of Li's culpability in Count Six. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127 [declining to assign additional weight to lesser-included violation for purposes of assessing discipline].)

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[11] In pertinent part, rule 3-700(D)(2) provides: "A member whose employment has terminated shall . . . [p]romptly refund any part of a fee paid in advance that has not been earned."

[12] We note, too, OCTC's acknowledgement in its response brief that, "[f]or purposes of determining appropriate discipline, the Hearing Department correctly considered the section 6106 and rule 3-700(D)(2) as one violation."

D. Count Seven: Failure to Maintain Client Funds In Trust [Rule 4-100(A)]

1. Factual Background

Li stipulated that he did not deposit the $30,000 advance fee in his CTA when he learned that Wang was disputing his retention of the fee. In fact, Li did not deposit the funds in trust until almost two years after Wang sued to recover them—after the jury rendered a verdict against him.

2. Culpability

Rule 4-100(A)(2) requires that "when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved." However, the mere fact that fees are disputed does not impart trust account status, nor does the dispute require that they be deposited into a CTA if the attorney had no obligation to initially hold the fees in trust. (1 Cal. Compendium on Prof. Responsibility, State Bar Formal Opn. No. 2006-171, p. IIA-496 ["Funds properly withdrawn from a CTA under rule 4-100(A)(2) and later disputed by the client neither retain nor regain their trust account status, and therefore do not need to be re-deposited into the attorney's CTA"].) Here, Li did not initially place the advance fee into his CTA, nor do we find he was required to do so.

Rule 4-100(A) applies to "[a]ll funds received or held for the benefit of clients by a member or law firm, including *advances for costs and expenses* . . . ." (Italics added.) However, the rule does not expressly apply to advance fees. Indeed, in *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164, the Supreme Court considered rule 8-101 (the predecessor to rule 4-100(A)) and declined to apply it to advance fees. The Court distinguished between advance costs, which it noted are expressly covered by the rule, and advance fees, which are not, concluding that it "need not . . . resolve the question of whether or not an advance payment is correctly characterized as money 'received or held for the benefit of clients' within the meaning of

[former] rule 8-101 . . . ." (*Ibid*.; see also *Katz v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 353, 356 fn. 2 ["Whether the Rules of Professional Conduct require an attorney to deposit advance fees from clients in a trust account is an unanswered question in California"].) The State Bar Standing Committee on Professional Responsibility and Conduct has opined that under rule 4-100 "an attorney is ethically *permitted, but not required* to deposit fees not yet earned into a client trust account." (1 Cal. Compendium on Prof. Responsibility, State Bar Formal Opn. No. 2007-172, p. IIA-499, italics added.) Such an interpretation is consistent with the legislative history for rule 4-100(A).[13]

Given that Li was not required to hold the advanced $30,000 fee in trust, he did not violate rule 4-100(A)(2) by failing to deposit the funds in his CTA when he learned they were disputed.[14] We therefore dismiss Count Seven with prejudice.

III. THE CHUI MATTER (Case No. 11-O-17550)

A. Count Ten: Charging and Collecting Illegal Fee [Rule 4-200(A)][15]

1. Factual Background

In August of 2007, Michael Kin Wing Chui retained Li to defend him in a lawsuit filed by Chui's sister and brother-in-law, who alleged that Chui fraudulently induced them to purchase a one-half interest in a Rosemead, California property, breached their agreement to rent the property and share the rental income, fabricated a false quitclaim deed terminating their interest

[13] The legislative history for rule 4-100(A) reflects that "a requirement that 'advances for fees' be placed in the client trust account was considered but rejected because it is believed that such a provision is unworkable in light of the realities of the practice of law." (*In the Matter of the Proposed Amendments to the Rules of Professional Conduct*, California Supreme Court Case No. Bar Misc. 5626, at "Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation" at Memorandum, Dec. 1987, p. 42.)

[14] This conclusion, of course, has no impact on Li's obligation to refund the unearned advanced fee, which we considered *ante*.

[15] Counts Eight and Nine were dismissed. See footnote 3 *ante*.

in the property, and encumbered the property with liens securing Chui's personal obligations. Li's fee agreement provided that Chui would pay him "by the hour at Attorney's prevailing rates for all time spent on Client's matter by Attorney's legal personnel." The agreement stated that Li's current hourly rate was $100 per hour.

The case proved to be heavily disputed and factually complex. Chui agreed to a number of rate increases during the course of the representation, but in late 2008, he informed Li that he no longer could pay his fees. Li offered to continue to represent him, provided Chui's obligation to pay attorney fees would be reduced to a series of promissory notes, secured by Chui's interest in the disputed property. Chui readily agreed to this proposal.

Between December 2, 2008 and December 23, 2009, Chui executed five promissory notes, which were secured by deeds of trust in Li's favor totaling roughly $130,000. All of the promissory notes bore an interest rate in excess of 10 percent, which is the maximum allowable under article XV, section 1 of the California Constitution. Two of the notes carried 13 percent interest rates and three reflected interest at 17 percent. Each of the deeds of trust included a "Savings Clause" that provided:

> If a law, which applies to this Deed of Trust or the Promissory Note/Credit Agreement and which sets maximum loan charges, is finally interpreted by a court having jurisdiction so that the interest or other loan charges collected or to be collected in connection with this Deed of Trust or the Promissory Note/Credit Agreement exceed the permitted limits, then: (i) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (ii) any sums already collected from Trustor which exceeded permitted limit will be refunded to Trustor.

Prior to January 2010, Li billed Chui for the usurious interest on eight occasions, and he collected 13 percent interest from Chui at least once. In January 2010, Li advised Chui by letter that he was reducing the interest rates that exceeded the legal maximum to 10 percent in his billing and in the promissory notes.

In October of 2010, the superior court entered judgment against Chui and ordered the sale of the property securing Li's deed of trust, with the proceeds to be distributed to the plaintiffs and to the bank lienholder prior to any distribution to Li. The court's order effectively extinguished the security for Li's prior legal fees. Nevertheless, in September 2011, Li advised Chui that he would exercise his rights under the deeds of trust unless Chui cured his defaults of the five promissory notes. Li did not take any additional steps to collect his fees.

2. Culpability

In Count Ten, OCTC charged that Li violated rule 4-200(A) by entering into the five promissory notes charging illegal usurious interest rates, which were secured by the deeds of trust. Rule 4-200(A) provides: "A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee." The hearing judge found that Li was culpable as charged, and we agree. Li claims that the promissory notes were not "illegal" because the deeds of trust contained savings clauses. However, the purported savings clauses did not come into effect unless and until the usury law, as applied to the deeds of trust or promissory notes, was "finally interpreted by a court having jurisdiction" to be illegal. That condition precedent to the savings clauses never occurred and therefore the illegal interest rate as stated in the promissory notes continued to govern the transaction between Li and Chui.

Moreover, rule 4-200(A) proscribes charging illegal fees, which Li clearly did on eight occasions, and collecting such fees, which he did on one occasion. The fact that Li may not have known the charged rate was illegal does not absolve him of culpability. (*In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 113 [attorney culpable of collecting illegal fee, despite lack of knowledge of illegality].) We therefore affirm the hearing judge's culpability finding for Count Ten.

B. Count Eleven: Acquiring Interest Adverse to Client [Rule 3-300][16]

The hearing judge found that Li contractually obligated Chui to pay usurious interest secured by deeds of trust, and he did so without first ensuring the terms were fair and reasonable. As such, Li violated rule 3-300, which provides in relevant part that "[a] member shall not . . . knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client" unless the acquisition and its terms are fair and reasonable to the client.[17] Because this violation relies on the same misconduct as Count Ten, we dismiss Count Eleven as duplicative. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060 [little, if any, purpose is served by duplicate allegations of misconduct in State Bar proceedings].)

IV. AGGRAVATION AND MITIGATION[18]

The hearing judge found three factors in aggravation (multiple acts, significant harm, lack of insight) and two in mitigation (no prior record and pro bono activities). We adopt these findings but decrease the mitigating weight for Li's lack of prior discipline. We also find an additional aggravating factor for Li's overreaching of his client, Ching Wang.

A. Aggravation

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

First, Li's misconduct is aggravated under standard 1.5(b) by his multiple acts of wrongdoing relating to two clients, including fabricating a pretextual claim to avoid refunding

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[16] Counts Twelve and Thirteen were dismissed. See footnote 3 *ante*.

[17] OCTC also charged Li with violating other requirements of rule 3-300 by failing to: (1) fully disclose the terms of the notes and deeds of trust in writing in a manner Chui should reasonably have understood; (2) advise Chui in writing that he may seek independent counsel; (3) give Chui reasonable opportunity to seek such advice; and (4) obtain Chui's informed written consent to the terms of the notes and deeds of trust. The hearing judge found the evidence did not support those allegations and, to the contrary, demonstrated that "Chui fully understood the transactions." OCTC does not challenge this conclusion, and we find it supported by the record.

[18] Standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Li to meet the same burden to prove mitigation.

Wang's unearned advance fee, certifying a false statement in his bankruptcy petition, refusing to refund an unearned fee, and, in the Chui matter, charging and collecting illegal fees.

2. Significant Harm to Wang [Std. 1.5(f)]

Additionally, Li's conduct is aggravated under standard 1.5(f) because he caused significant harm to Wang, who was deprived of the use of the $30,000 for a lengthy period of time and forced to incur the expense and inconvenience of a lawsuit to recover the funds. (*In the Matter of Casey* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 117, 126 [significant harm where client hired new attorney, incurred attorney fees, and suffered for three years due to attorney's wrongdoing].)

3. Lack of Insight and Remorse [Std. 1.5(g)]

Li's demonstrated lack of insight and remorse for the consequences of his actions further aggravates his misconduct under standard 1.5(g). We note his specious assertion on appeal that he honestly certified his bankruptcy counseling on his Compliance Statement because he "*believed* he had the experience described in the statement." Such a meritless contention reflects a lack of appreciation for his ethical obligations. (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 958 [meritless defenses show lack of insight into wrongfulness of one's actions].)

4. Overreaching [Std. 1.5(d)]

We find one additional factor in aggravation due to Li's overreaching and intimidation of Wang. "The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party. [Citations.]" (*In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 243-244.) Li's emails to Wang evidence his disregard of his role as a trusted fiduciary and

demonstrate, instead, a willingness to bully his client into submission. His written communications are inexcusable in their tone and content, and constitute clear overreaching.

B. Mitigation

1. Lack of Prior Record [Std. 1.6(a)]

The hearing judge afforded Li significant mitigating weight under standard 1.6(a) for his more than 12 years of legal practice without discipline. We agree that Li is entitled to some mitigation for his discipline-free tenure. But the hearing judge's grant of significant mitigation is not warranted, given Li's lack of insight. (*In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 279 [decreased mitigation for absence of prior record where respondent does not appreciate consequences of misconduct].)

2. Pro Bono and Community Service

Finally, the hearing judge credited Li with modest mitigation for his pro bono and community service, including serving on the State Bar's Standing Committee on the Delivery of Legal Services. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [pro bono and community service as mitigating factor].) Li requests increased mitigation based on his testimony that he has been actively engaged in educating the Chinese-American legal community regarding the constitutionality of California's "Proposition 8." In the absence of specifics about the nature and extent of this pro bono work, we agree with the hearing judge's conclusion that only modest mitigation is warranted. (See *In the Matter of Dyson* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 280, 287 [little mitigation for minimal testimony regarding pro bono activities].)

V. DISCIPLINE

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

standards, which "promote the consistent and uniform application of disciplinary measures," and are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 91 [Supreme Court will not reject recommendation arising from standards unless grave doubts as to propriety of recommended discipline].) We also give due consideration to the decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

The hearing judge's recommendation of a six-month actual suspension is within the range provided by standards 2.7 and 2.8(a), each of which calls for disbarment or actual suspension.[19] In reaching this recommendation, the hearing judge properly relied also on *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266. In *Harney*, this court recommended a six-month actual suspension for an attorney who charged an illegal fee. There, the attorney collected a fee that was $266,850 in excess of the legal limit. Although Harney's culpability occurred in a single client matter, the facts underlying his wrongdoing are similar to Li's misconduct, collectively, in the Wang and Chui matters.

In addition to collecting an illegal fee, we found the attorney in *Harney, supra,* 3 Cal. State Bar Ct. Rptr. 266, was culpable under sections 6106 and 6068, subdivision (d), for moral turpitude and employing a means inconsistent with the truth because he concealed the statutory fee limitation from his client and the court. Harney's misconduct is further comparable to Li's in that he also engaged in "clear overreaching of his own client" (*id.* at p. 284), caused his client significant harm, and showed a lack of insight into his fiduciary duties, vis-à-vis his own self-interest. Although Harney had more aggravation than Li, including lack of candor and a prior

[19] Standard 2.7 provides that "[d]isbarment or actual suspension is appropriate for an act of moral turpitude" with the "degree of sanction depend[ing] 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." Standard 2.8(a) provides that disbarment or actual suspension is appropriate for a violation of section 6068, subdivision (d). Standard 2.3(b) ("[s]uspension or reproval is appropriate for entering into an agreement for, charging, or collecting an illegal fee for legal services") also is applicable here but provides a lesser sanction than standards 2.7 and 2.8(a). Standard 1.7(a) provides that when multiple sanctions apply, the most severe shall be imposed.

public reproval for similar misconduct in particular, he also had more mitigation, including impressive character testimony reflecting a long history as an outstanding practitioner.

We look also to *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, another case recommending a six-month suspension. Wells was culpable of more serious misconduct than Li, including two instances of charging illegal *and* unconscionable fees;[20] failing to return unearned fees to two clients; the unauthorized practice of law; moral turpitude; and violating rule 4-100(A) for failing to deposit settlement funds in a trust account. Also, Wells previously had received a private reproval for similar misconduct. However, unlike Li, Wells proved significant mitigation.

On balance, we find that the *Harney* and *Wells* matters are reasonably comparable to the instant case. Additionally, we take note of OCTC's assertion to this court that "the Hearing Department's recommendation should be upheld as appropriate and reasonable." We thus conclude that a six-month actual suspension, with the conditions of probation set forth below, will adequately protect the public while preserving the integrity of the legal profession.

VI. RECOMMENDATION

For the foregoing reasons, we recommend that James Hsiaosheng Li be suspended from the practice of law for two years, that execution of that suspension be stayed, and that Li 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.

[20] While the charging of illegal and unconscionable fees both are punishable under rule 4-200, the sanctions provided are more severe for unconscionable fees (minimum six-month actual suspension under standard 2.3(a)), as compared with illegal fees (reproval or suspension under standard 2.3(b)).

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.)

8. 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 Li 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 Li 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 Business and Professions Code 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.

STOVITZ, J.*

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