PUBLIC MATTER—NOT DESIGNATED FOR PUBLICATION

Filed August 23, 2018

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of DENNIS PATRICK O'CONNELL, A Member of the State Bar, No. 97769.	)))))))	Case Nos. 15-O-13703 (16-O-12256; 16-O-12998; 16-O-13050) OPINION AND ORDER

Dennis Patrick O'Connell, a criminal defense attorney, is charged with 19 counts of misconduct in four client matters. Those charges include four counts each of failure to perform with competence, refund unearned fees, render appropriate accounts to clients, and obtain consent from incarcerated clients before accepting attorney fees from their family members. He was also charged with improper division of a fee for legal services and failure to promptly release a client's file. This misconduct is similar to O'Connell's wrongdoing in two prior disciplinary matters.

The hearing judge found O'Connell culpable of 16 of the 19 charges and recommended that he be actually suspended for two years and until he provides satisfactory proof to this court of his rehabilitation, fitness to practice, and present learning and ability in the general law. The Office of Chief Trial Counsel of the State Bar (OCTC) appeals the hearing judge's discipline recommendation and asserts that disbarment is appropriate. O'Connell also appeals, maintaining that he is not culpable as charged.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we affirm most of the judge's findings of fact and culpability determinations. However, as this is O'Connell's

third discipline case, disbarment is appropriate under standard 1.8(b).[1] In not recommending disbarment, the hearing judge incorrectly found that it was not warranted because O'Connell's misconduct did not show a "habitual course of conduct." But this showing is not required where an attorney has two prior disciplines and standard 1.8(b) applies. We do not find sufficient justification to depart from standard 1.8(b), particularly since O'Connell has committed nearly identical misconduct in his prior cases. We recommend the standard's presumptive discipline of disbarment as necessary to protect the public, the profession, and the administration of justice.

I. PROCEDURAL BACKGROUND

On December 19, 2016, OCTC filed a Notice of Disciplinary Charges (NDC), charging O'Connell with 19 counts of misconduct including the 18 counts identified above and one count of appearing for a party without authority.[2] Trial was held on June 2, 5, 6, 7, and 9, 2017, and posttrial briefing followed. On September 7, 2017, the hearing judge issued her decision.

II. THE ZIMMER MATTER (15-O-13703)

A. FACTS[3]

On May 31, 2011, O'Connell was retained to represent David Zimmer, who was incarcerated after he was convicted of a special circumstances murder. O'Connell met with Zimmer's stepfather, Bennett Hollis; mother, Mary Zimmer; and grandfather, Robert Olson. Hollis signed a retainer agreement in which O'Connell charged a "non-refundable fee" of

[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.

[2] Counts six and seven of the NDC charged only Roger Hanson, an attorney hired by O'Connell to assist in the Avalos matter, with misconduct. (State Bar Court Case No. 16-O-12255.) These counts were severed from the instant proceeding.

[3] The factual background for this and all other client matters in this opinion is based on the 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).)

$15,000 to represent Zimmer in a case involving a writ of habeas corpus. Olson paid the $15,000, which O'Connell accepted without obtaining Zimmer's written consent.

O'Connell's legal strategy included confirming evidence of actual innocence so that he could file a writ of habeas corpus. Zimmer's family provided O'Connell with the names of witnesses who the family believed would recant their trial testimony against Zimmer. Justin Moore was one of these witnesses, based on representations Moore's wife made to Hollis. In 2011, O'Connell sent an investigator to talk to her, but Moore's wife refused to talk and denied that she had indicated that her husband would recant his testimony.

By January 2015, Zimmer's family was increasingly dissatisfied with O'Connell's representation. He had been non-responsive and did not seem to be making any progress in finding helpful evidence. The family urged O'Connell to talk to these witnesses in the belief that they were now willing to recant. For the first time since he was hired in 2011, O'Connell contacted Zimmer on January 21, 2015. He sent Zimmer a letter stating that he would prepare a portion of his writ within 30 days "as a showing of good faith." O'Connell asserted that he would start on the writ immediately and insert any new statements from the witnesses later. A few months later, in April 2015, O'Connell contacted another witness, Justin Wilson. Aside from Moore's wife and Wilson, he did no further investigation on Zimmer's case.

On May 26, 2015, O'Connell wrote to Zimmer requesting information about another witness, Sean Hodge. In this letter, O'Connell also asked for Zimmer's alibi on the night of the crime and for other information relevant to his case.

Zimmer sent O'Connell a letter dated June 4, 2015, terminating O'Connell's employment.[4] He requested that O'Connell return "the appellate record and other documents and papers which [he] mailed to [O'Connell] in anticipation that [O'Connell] was going to prepare a federal petition for writ of habeas corpus." He stated that O'Connell had been working on the case for four years and had "done absolutely nothing." Zimmer demanded a return of the unearned attorney fees. Hollis also contacted O'Connell and demanded a refund of the fees paid. O'Connell did not return any fees, nor did he provide an accounting to Zimmer or to Zimmer's family.

On July 14, 2015, O'Connell sent Zimmer a letter which stated that he would return the file in a week, and he asked where to deliver it. O'Connell did not return the file until December 2015, and never filed a petition for a writ of habeas corpus on Zimmer's behalf.

B. CULPABILITY

Count One: Failing to Act Competently (Rules of Prof. Conduct, rule 3-110(A))[5]

In count one, O'Connell is charged with violating rule 3-110(A) by "failing to file a petition for writ of habeas corpus for over four years." Rule 3-110(A) provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. The hearing judge found that O'Connell was hired in 2011, did not communicate with Zimmer until January 2015, and did not begin to ascertain if witnesses might recant their testimony until

[4] In order to sustain many of the counts in this and other client matters, OCTC must prove the existence of an attorney-client relationship. Neither O'Connell, the complaining witness, nor OCTC disputed that O'Connell formed an attorney-client relationship with Zimmer. Although not addressed at trial, the facts before us, including the correspondence between O'Connell and Zimmer, show that at least an implied agreement was made between Zimmer and O'Connell which formed an attorney-client relationship between them. (*Lister v. State Bar* (1990) 51 Cal.3d 1117, 1126 [the conduct of the parties can create an attorney-client relationship].) Specifically, Zimmer's termination letter shows that he believed that he had an attorney-client relationship with O'Connell.

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

April 2015. She concluded that O'Connell "failed to provide the legal services for which he was hired" over this four-year period and therefore violated rule 3-110(A).

We disagree with the hearing judge's conclusion as to culpability. The record does not provide clear and convincing[6] evidence to support a violation of rule 3-110(A) *as charged* in the NDC. O'Connell was not charged with a general failure "to provide the legal services for which he was hired," but was specifically charged with failing to file a writ of habeas corpus for over four years. There was no clear and convincing evidence that not filing a writ of habeas corpus within four years was unreasonable. O'Connell's plan was to file a writ of habeas corpus based on actual innocence if he unearthed evidence to support such a theory. No such evidence was found. His actions do not violate rule 3-110(A) as charged in the NDC because his failure to file the petition in four years does not constitute a failure to perform. (See *In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171–172 [NDC must articulate specific conduct at issue, correlating alleged misconduct with rule allegedly violated].) We therefore dismiss count one with prejudice. However, while we do not find that O'Connell committed the misconduct alleged in count one, the record is clear that he did not perform any services of value for Zimmer.

Count Two: Failing to Release File (Rule 3-700(D)(1))

Under rule 3-700(D)(1), an attorney whose employment has been terminated must promptly release, at the client's request, all client papers and property, subject to any protective order or non-disclosure agreement. We agree with the judge's conclusion that O'Connell willfully violated rule 3-700(D)(1) by waiting until December 2015 to return Zimmer's file when he had requested it in June 2015. (*In the Matter of Sullivan* (Review Dept. 1997) 3 Cal. State

[6] 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.)

Bar Ct. Rptr. 608, 612-613 [violation of rule 3-700(D)(1) for six-month delay in returning client file].)

Count Three: Failing to Return Unearned Fees (Rule 3-700(D)(2))

Rule 3-700(D)(2) requires an attorney, when terminated, to promptly refund an advance fee that has not been earned. O'Connell asserts that he earned the fees paid, even though he never filed a writ of habeas corpus, because he reviewed the transcript, interviewed witnesses, and drafted a writ. He argues that he charged a flat fee and spent 50 to 60 hours working on the case. OCTC argues that O'Connell did not earn the fees because he failed to promptly investigate Zimmer's claim of innocence or to provide any legal services of value.

The hearing judge found that O'Connell did not earn the $15,000 paid because he did not perform any legal services of value for Zimmer. (*In the Matter of Phillips* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 315, 324 (*Phillips*) [violation of rule 3-700(D)(2) for failure to perform any services of value].) The judge quoted *Phillips*: "To justify retention of legal fees, [he] was required to perform more than minimal preliminary services of no value to the client." We agree and find that O'Connell violated rule 3-700(D)(2) by failing to refund the unearned fees.[7]

Count Four: Failing to Render Accounting (Rule 4-100(B)(3))

Rule 4-100(B)(3) requires an attorney to render appropriate accounts to a client. O'Connell admits that he did not provide an accounting to Zimmer but argues that he was not required to do so. He contends that he was retained pursuant to a flat-fee agreement that he would do the work regardless of the amount of time it required, rendering an accounting unnecessary. This is an incorrect statement of the law. O'Connell was required to account for the work performed even under a flat-fee arrangement. (*In the Matter of Johnson* (Review Dept.

[7] We recognize that O'Connell did work on the Zimmer matter, but in this opinion, we do not decide the amount of fees, if any, that he earned. (See *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 425 [precise amount earned need not be determined to constitute rule 3-700(D)(2) violation].)

2000) 4 Cal. State Bar Ct. Rptr. 179, 188–189 [attorney violated rule 4-100(B)(3) by failing to provide client with accounting for $1,000 flat fee paid to modify child visitation order].) O'Connell willfully violated rule 4-100(B)(3) by failing to render an accounting to Zimmer.

Count Five: Accepting Fees from a Non-Client (Rule 3-310(F))

Rule 3-310(F) provides that an attorney must not accept compensation to represent a client from someone other than the client unless the attorney first obtains the client's informed written consent. O'Connell's argument that Zimmer consented by implication because he knew O'Connell was his attorney, accepted O'Connell's services, and did not object to his representation is without merit.[8] The rule requires *written* consent. O'Connell never obtained Zimmer's informed written consent permitting him to accept payment of his fees from Olson. The record clearly establishes that O'Connell willfully violated rule 3-310(F) when he accepted payment from Olson without such consent.

III. THE AVALOS MATTER

A. FACTS

O'Connell was hired to represent Freddy Avalos on May 23, 2015, when Avalos's mother signed a retainer agreement that O'Connell would review her son's case to determine whether he could file a federal writ of habeas corpus. Avalos was incarcerated at the time. Under this agreement, O'Connell charged $5,000. O'Connell's parents paid $4,500 in cash, and his sister wrote a check for $500.

On June 4, 2015, O'Connell again met with Avalos's family, and his sister signed an agreement wherein O'Connell would pursue federal relief for Avalos. O'Connell charged $30,000, which included the $5,000 from the May 23 agreement. On June 4, Avalos's sister paid O'Connell $25,000, half by check and half in cash. O'Connell did not obtain Avalos's written

[8] O'Connell made similar arguments as to counts 13, 17, and 21 that are also without merit.

consent to accept the $30,000 from his family members. Nor did he obtain consent from Avalos to split the fee with another attorney, Roger Hanson, whom O'Connell paid $20,000 to assist in preparing the writ of habeas corpus.

Avalos and his family believed that something needed to be filed in his case by September 2015. Avalos wrote to O'Connell in June to open "a line of communication" as O'Connell was hired to work on his habeas appeal.[9] He stated that he wanted to be updated because the deadline was quickly approaching. Avalos also asked O'Connell questions about his appeal. In July and August, Avalos expressed dissatisfaction to his sister because he had not heard from O'Connell. Avalos wanted his sister to find another lawyer. O'Connell did not contact Avalos from the time he was hired until he sent him a letter on September 1, 2015.[10] The letter explained that O'Connell planned to file a writ of habeas corpus in state court based on two issues he had identified in Avalos's case.[11] On September 9, O'Connell sent Avalos another letter in which he incorrectly stated that he had filed a writ of habeas corpus on Avalos's behalf. He told Avalos that his sister had attempted to terminate him, but that only Avalos himself could do so.

On September 15, 2015, O'Connell and Hanson filed a petition for writ of habeas corpus for Avalos in San Joaquin County Superior Court. On September 24, O'Connell sent Avalos a letter stating that he had not received Avalos's response as to whether or not he wanted to terminate his employment. In October, O'Connell received a substitution of attorney form

[9] This letter shows that Avalos was O'Connell's client and that an attorney-client relationship was formed between them. Like in the Zimmer matter, neither O'Connell, the complaining witnesses, nor OCTC disputed that O'Connell formed an attorney-client relationship with Avalos.

[10] Avalos's sister received a copy of this letter, after which she contacted O'Connell, attempted to terminate his employment, and requested a refund of the unearned fees.

[11] On September 8, Avalos's sister wrote to O'Connell again to terminate his employment. She repeated her request for a refund of the unearned fees and a detailed accounting.

signed by Avalos and his new attorney. O'Connell signed it on October 13 and substituted out of Avalos's case. He never provided a refund or an accounting to Avalos or his family.

B. CULPABILITY

Count Eight: Appearing Without Authority (Bus. & Prof. Code, § 6104)[12]

In count eight, O'Connell is charged with appearing without authority, in violation of section 6104, when he filed the writ of habeas corpus on Avalos's behalf in superior court. That section provides that an attorney can be disbarred or suspended for corruptly or willfully and without authority appearing as an attorney for a party to an action or proceeding. The hearing judge determined that O'Connell violated section 6104 by filing the writ of habeas corpus after Avalos's sister had told him twice that his employment was terminated. The judge found that Avalos's sister was his representative and had authority to terminate O'Connell's employment.

We disagree. While Avalos's sister did communicate with O'Connell about the case, no evidence beyond her own testimony established that she had the authority to act on Avalos's behalf. Avalos was the client and knew that O'Connell had been hired to represent him, as evidenced by his letter to O'Connell. O'Connell told Avalos that his sister wanted to terminate the representation and correctly informed him that termination was solely Avalos's decision to make. He then filed the writ in superior court to preserve his client's rights.[13] (See *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 280 [attorney has obligation to avoid foreseeable prejudice to client's interest until substitution of counsel is filed].)

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

[13] O'Connell told Avalos in the September 1 letter that the writ was pending in state court, but the deadline would be tolled in federal court.

OCTC failed to present clear and convincing evidence that O'Connell filed the writ corruptly or willfully without authority. Therefore, O'Connell is not culpable of violating section 6104. We dismiss count eight with prejudice.

Count Nine: Improper Division of Fee for Legal Services (Rule 2-200(A))

Rule 2-200(A) provides in pertinent part that an attorney shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the attorney unless the client has consented in writing after full written disclosure that the fees would be divided and the terms of such division. The hearing judge found that O'Connell violated rule 2-200(A) because no evidence was presented that O'Connell provided Avalos or his sister with full written disclosure of the fee division or obtained his written consent. O'Connell argues that Hanson was his associate and, therefore, rule 2-200(A) does not apply.

The Supreme Court has construed rule 2-200(A) to apply to "any division of fees where the attorneys working for the client are not partners or associates of each other, or are not shareholders in the same firm." (*Chambers v. Kay* (2002) 29 Cal.4th 142, 148.) Where a division of legal services prompts the fee splitting, written disclosure of such information is "indispensable to the client's ability to make an informed decision regarding whether to accept the fee division and whether to retain or discharge a particular attorney." (*Id*. at p. 157.) Obtaining the client's written consent in this situation "impresses on the client the importance of consent and the right to reject a fee division." (*Ibid.*) The rule does not restrict the division of fees between attorneys who are partners or associates.

However, the record contains no evidence that O'Connell and Hanson worked for the same law firm or were involved in a partnership. Like the attorneys in *Chambers*, they did not act as co-owners of a law office nor did they share in the profits and losses of a business engaged in the practice of law. (See *Chambers v. Kay*, *supra*, 29 Cal.4th at pp. 150–151.) Further,

Hanson was not an "associate" of O'Connell because he was not O'Connell's employee. (*Id.* at p. 152.) Hanson was not paid a salary or other compensation; O'Connell simply divided the fee with him. Clearly rule 2-200(A) applies to the fee division between O'Connell and Hanson, requiring O'Connell to disclose it in writing to Avalos and to obtain Avalos's written consent. (*Id.* at p. 153.) O'Connell did neither and, therefore, violated the rule.

Count Ten: Failing to Act Competently (Rule 3-110(A))

OCTC alleged that O'Connell failed to perform with competence by failing to represent Avalos in a federal appeal and by not filing a federal petition for writ of habeas corpus. The hearing judge found O'Connell culpable of violating rule 3-110(A). We disagree. The judge stated that O'Connell was aware that Avalos and his family believed a filing deadline for the writ was approaching, and they were afraid it would be missed. The judge found that O'Connell did not communicate with Avalos between June and August 2015. However, the hearing judge incorrectly found that Avalos's sister had the authority to terminate O'Connell on September 1, 2015. The judge deemed O'Connell culpable because he did not file a writ before he was terminated, concluding that Avalos's case was "time-sensitive."

OCTC asserted that O'Connell had no authority to file the writ because he was already terminated by Avalos's sister. That is incorrect. While O'Connell did not file a federal writ before the substitution of counsel form was signed, he believed he had to file in state court first, which he did. The evidence is not sufficient to show that O'Connell should have filed the federal writ before Avalos hired a new attorney. Therefore, we find that OCTC did not present evidence that O'Connell failed to act with competence. We dismiss count 10 with prejudice.

Count Eleven: Failing to Return Unearned Fees (Rule 3-700(D)(2))

Count 11 alleges that O'Connell violated rule 3-700(D)(2) when he "failed to refund promptly, upon [his] termination of employment on or about September 1, 2015, any part of the

$30,000 fee to the client." As previously stated, the hearing judge incorrectly found that Avalos's sister terminated O'Connell's employment on or about September 1, 2015. She concluded that there was a "lack of evidence establishing that [O'Connell] completed any of the work for which he was hired by the date of his termination" and thus he violated rule 3-700(D)(2) when he did not refund the unearned fees.

O'Connell argues that he performed under the Avalos agreement by filing the writ of habeas corpus in superior court and earned the fees he was paid.[14] We find that OCTC did not prove that O'Connell violated rule 3-700(D)(2) as charged in the NDC. O'Connell was not terminated on September 1, 2015, and did not have to refund unearned fees at that time. While it is true that O'Connell did not file a federal petition as he was hired to do, it is not clear that he had the opportunity to do so before Avalos hired a new attorney. We do not find that O'Connell willfully violated rule 3-700(D)(2); therefore, count 11 is dismissed with prejudice.

Count Twelve: Failing to Render Accounting (Rule 4-100(B)(3))

O'Connell submits the same arguments that he made under count four. He testified that he did not have a duty to account because he was retained pursuant to a flat-fee agreement and that he earned the $30,000. As discussed above, even under a flat-fee agreement, O'Connell was required to provide an accounting. (*In the Matter of Johnson*, *supra*, 4 Cal. State Bar Ct. Rptr. at pp. 188-189.) Like the hearing judge, we find that O'Connell willfully violated rule 4-100(B)(3) by failing to render an accounting to Avalos.

Count Thirteen: Accepting Fees from a Non-Client (Rule 3-310(F))

O'Connell never obtained Avalos's informed written consent to O'Connell accepting payment of fees from his family. Thus, the record clearly establishes that O'Connell willfully

[14] He also argues that his $20,000 payment to Hanson to assist in preparing the writ establishes that the fees were earned. We reject this argument.

violated rule 3-310(F) when he accepted the $30,000 in attorney fees from Avalos's family to represent him.

IV. THE BAKHTIARI MATTER

A. FACTS

On October 7, 2013, Zahra Farmand signed a retainer agreement hiring O'Connell to represent her son, Morteza Bakhtiari, who was incarcerated for attempted murder, involving a writ of habeas corpus. Under this agreement, O'Connell charged her a "non-refundable" fee of $10,000, consisting of a $5,000 initial payment and monthly payments of $500 until the balance was paid. Farmand paid the $5,000 on October 9, 2013 and made the installment payments until a total of $9,000 was paid. O'Connell did not obtain Bakhtiari's written consent before accepting compensation from his mother.

O'Connell discovered a sentencing error when he reviewed Bakhtiari's case. He met with the trial prosecutor, who stipulated to a two-year reduction in Bakhtiari's sentence. At a hearing on June 13, 2014, the trial judge rejected the stipulation.[15] O'Connell waited until January 21, 2015, to file a petition for a writ of habeas corpus in Orange County Superior Court based on the sentencing error.[16] The petition was denied on March 19, 2015.[17] O'Connell filed a second petition on March 10, 2015, raising an additional issue—that Bakhtiari's trial counsel had

[15] O'Connell's appearance for Bakhtiari in superior court evidences that an attorney-client relationship was formed between Bakhtiari and O'Connell. Again, as was the case in the previously discussed client matters, neither O'Connell, the complaining witness, nor OCTC disputed that O'Connell formed an attorney-client relationship with Bakhtiari.

[16] O'Connell knew the trial judge was retiring and waited until after his retirement to file the writ so that it would be heard by a different judge.

[17] The writ was not heard by the trial judge and was denied for failure to establish a prima facie case.

a conflict of interest in representing Bakhtiari. That petition was denied on June 5, 2015.[18]

In January 2015, Farmand informed O'Connell that she was dissatisfied with his representation of her son and sent him a text message requesting a refund. O'Connell did not refund any fees to Farmand or provide any accounting.

B. CULPABILITY

Count Fourteen: Failing to Act Competently (Rule 3-110(A))

The hearing judge dismissed count 14 because OCTC did not demonstrate that O'Connell failed to perform with competence, in willful violation of rule 3-110(A). OCTC does not challenge this on review, and we agree with the hearing judge's dismissal of this count.

Count Fifteen: Failing to Return Unearned Fees (Rule 3-700(D)(2))

The hearing judge also dismissed count 15 because no clear and convincing evidence showed that the advance fees paid to O'Connell had not been earned. OCTC does not challenge this on review, and we agree with the hearing judge's dismissal of this count.

Count Sixteen: Failing to Render Accounting (Rule 4-100(B)(3))

O'Connell again submits the same arguments that he made under count four. O'Connell did not provide Bakhtiari with an accounting because he believed that he did not need to do so under the retainer agreement. As discussed above, O'Connell's belief was incorrect. (*In the Matter of Johnson, supra*, 4 Cal. State Bar Ct. Rptr. at pp. 188-189.) We agree with the hearing judge's finding that O'Connell willfully violated rule 4-100(B)(3) by failing to render an accounting to Bakhtiari.

[18] The second petition was denied on two grounds: as untimely (seven-year delay) and for failure to present a prima facie case. The fact that O'Connell filed two writs of habeas corpus on behalf of Bakhtiari also shows that an attorney-client relationship was created. Additionally, Bakhtiari hired a new attorney who filed another petition in 2016. Bakhtiari's reply in that matter states that Bakhtiari retained O'Connell—further evidence that there was an attorney-client relationship.

Count Seventeen: Accepting Fees from a Non-Client (Rule 3-310(F))

O'Connell never obtained Bakhtiari's informed written consent to O'Connell accepting payment of his fees by Bakhtiari's mother. Thus, the record clearly establishes that O'Connell willfully violated rule 3-310(F) when he accepted attorney fees from Farmand.

V. THE CONTRERAS MATTER

A. FACTS

Javier Contreras was charged with burglary. On August 12, 2005, the Orange County Superior Court appointed a psychologist and a psychiatrist to examine Contreras pursuant to Penal Code sections 1026 and 1027. On December 5, the court determined that Contreras was an "insane person" under Penal Code section 1026 and not guilty by reason of insanity. He was subsequently ordered committed to Patton State Hospital. The court set the maximum sentence at 26-years-to-life in prison. The superior court held several hearings after Contreras was committed where the court concurred with the hospital's recommendation that Contreras be retained at the hospital on the grounds that he remained mentally ill and had not been fully restored to sanity. Contreras remained at the hospital until January 2014 when the court ordered him released to outpatient treatment.

On February 3, 2010, Contreras's mother, Senorina Contreras, signed a retainer agreement for O'Connell to represent her son and obtain his release from the hospital by filing a motion to withdraw his plea. The agreement charged a "non-refundable" fee of $10,000, consisting of a $5,000 down payment and monthly installments of $100. In total, Contreras's mother paid O'Connell $6,200. O'Connell did not obtain consent from Contreras to accept compensation from someone else.

After O'Connell reviewed the case, he determined that it was not in Contreras's best interest to withdraw the plea. He believed that doing so would result in Contreras having to

return to court and face the 26-years-to-life sentence in prison. O'Connell explained his conclusion to Contreras's mother.

On December 6, 2012, O'Connell substituted in as Contreras's attorney.[19] He did not appear on behalf of Contreras before that date because he believed it would have been fruitless. O'Connell reviewed Contreras's psychiatric records and appeared in court for Contreras in 2013 and 2014. However, during his employment, O'Connell did not file any pleadings or perform

[19] The parties involved in this disciplinary proceeding, including Contreras (who has since been released from Patton State Hospital) do not contest Contreras's capacity to retain O'Connell or to sign the Substitution of Attorney replacing his former deputy public defender. As discussed below, we find that Contreras entered into an attorney-client relationship and had the ability to consent to his mother's payment of his attorney's fees.

The hearing judge found that Contreras's commitment to the state hospital demonstrated a lack of clear and convincing evidence that Contreras was able to provide informed written consent for his mother to pay attorney's fees for him. We disagree. Neither the finding that Contreras was an "insane person" under Penal Code section 1026 nor his commitment to a state hospital, *ipso facto*, rendered Contreras incompetent to give informed consent or enter into a contract with O'Connell. The two findings—insanity for purposes of determining criminal guilt and incapacity to contract—have long been considered completely different and based on different public policies (see *In Re Zanetti* (1949) 34 Cal.2d 136, 142-143).

There is a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions. (Prob. Code, § 810, subd. (a).) A person who has a mental or physical disorder may still be capable of contracting. (Prob. Code, § 810, subd. (b).) A diagnosis of a person's mental disorder is not itself sufficient to support an incapacity determination. (Prob. Code, § 811, subd. (d); Ross & Cohen, Cal. Practice Guide: Probate (The Rutter Group 2017) ¶ 1:48.8-8a.) Rather, the identified deficit(s) "must *significantly impair* the person's ability to understand and appreciate the consequences of his or her actions *with regard to the type of act or decision in question* . . . [Citations]." (Ross & Cohen, *supra*, Probate ¶ section 1:48.8a; italics added.) Further, despite commitment to an institution, a patient's power to contract is left unimpaired. (*In Re Zanetti*, *supra*, 34 Cal.2d at p. 142; *Fetterley v. Randall* (1928) 92 Cal.App. 411, 416.) A court may adjudicate a person's incapacity to contract, provided it does so in a proceeding brought for that purpose, such as a guardianship or conservatorship. (Witkin, Summary of Cal. Law (11th ed. 2017) Contracts, §§ 53, 54.)

The record in this matter is devoid of any evidence rebutting the presumption of capacity to contract contained in Probate Code section 810 subdivisions (a) and (b). Therefore, we conclude that Contreras and O'Connell entered into an attorney-client relationship.

any tasks that contributed to Contreras's release. He did not refund any of the fees paid nor did he provide an accounting.

On January 23, 2014, the superior court approved the recommendations from Patton State Hospital, the Orange County Health Care Conditional Release Program (CONREP), and the court-appointed evaluator, Doctor Veronica Thomas, that Contreras be placed on outpatient status. The court ordered him, depending on bed availability, to be released to CONREP.

B. CULPABILITY

Count Eighteen: Failing to Act Competently (Rule 3-110(A))

In count 18, OCTC alleged that O'Connell agreed to perform legal services for his client, Contreras. OCTC charged O'Connell with violating rule 3-110(A) by "failing to take any action on [Contreras's] matter for two and one-half years." The hearing judge found that O'Connell failed to perform with competence because he did not provide any legal services of value that contributed to Contreras's release. We agree.

To find a violation of rule 3-110(A), we must determine that O'Connell acted "in reckless disregard of a client's cause" and not merely that he acted negligently. (*In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 155, fn. 17.) After deciding that withdrawing the plea was not in Contreras's best interest and that he could not do anything to facilitate Contreras's release from the hospital, O'Connell could have withdrawn. (Rule 3-700(C)(1)(e).) Instead, he improperly let "excessive time pass" and took no action. (*In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480, 490 [attorney "could not simply let excessive time pass, lead his client to believe he would advance her claim and neither do so nor take appropriate action to withdraw"].) O'Connell did not substitute in as Contreras's attorney until almost three years after being retained. While representing Contreras, he took no substantive action on his client's behalf. (See *In the Matter of Kaplan* (Review Dept.

1996) 3 Cal. State Bar Ct. Rptr. 547, 554 [attorney who continues to represent client has obligation to take timely, substantive action on client's behalf].) Therefore, we find that O'Connell's actions were reckless, in willful violation of rule 3-110(A). (See *In the Matter of Broderick*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 155, fn. 17.)

Count Nineteen: Failing to Return Unearned Fees (Rule 3-700(D)(2))

OCTC charged O'Connell with a violation of rule 3-700(D)(2) for his failure to return the $6,200 O'Connell received to represent Contreras because he did not perform any legal services of value for Contreras. OCTC alleged that O'Connell did not earn the $6,200. The hearing judge found that O'Connell violated rule 3-700(D)(2) by not returning the $6,200 because "he did not provide any legal services for which he was retained or that were of value to [Contreras]."

O'Connell argues that he earned the fees because he appeared in court, reviewed the psychiatric records, and visited the client and his doctors at Patton State Hospital. The hearing judge found a violation of rule 3-700(D)(2) because, as discussed above, O'Connell did not provide any services of value to Contreras and did not refund the unearned fees. We agree.

Count Twenty: Failing to Render Accounting (Rule 4-100(B)(3))

OCTC charged O'Connell with a violation of rule 4-100(B)(3) because he failed to render an appropriate accounting to his client upon the termination of his employment. The hearing judge found O'Connell culpable.

O'Connell again submits the arguments that he made under count four. He was mistaken in his belief that he did not have to provide an accounting under a flat-fee agreement. (*In the Matter of Johnson*, *supra*, 4 Cal. State Bar Ct. Rptr. at pp. 188-189.) By failing to do so, O'Connell willfully violated rule 4-100(B)(3).

Count Twenty-One: Accepting Fees from a Non-Client (Rule 3-310(F))

In count 21, OCTC charged O'Connell with a violation of rule 3-310(F) because O'Connell accepted $6,200 from Contreras's mother as compensation for representing another person, Contreras, without obtaining Contreras's informed written consent. The hearing judge found that there was a lack of evidence to establish that Contreras could have provided informed written consent for his mother's payment. Therefore, the hearing judge found that O'Connell was not culpable for violating rule 3-310(F) and dismissed count 21 with prejudice.[20] We disagree.

The record shows that O'Connell accepted "compensation for representing a client from one other than the client" without obtaining a "client's informed written consent" as required by rule 3-310(F). O'Connell accepted $6,200 from Contreras's mother for the representation of Contreras. Contreras did not give informed written consent. Accordingly, we find O'Connell culpable for willfully violating rule 3-310(F) under count 21.

VI. AGGRAVATION AND MITIGATION

The offering party bears the burden to prove aggravating and mitigating circumstances. OCTC must establish aggravating circumstances by clear and convincing evidence (std. 1.5); O'Connell has the same burden to prove mitigating circumstances (std. 1.6).

A. AGGRAVATION

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

O'Connell has two prior records of discipline. On February 27, 2001, he received a private reproval for his misconduct in 1999 and 2000 in one client matter. (State Bar Court Case No. 00-O-11476.) O'Connell stipulated that he represented an incarcerated client, received advance fees of $2,000, and then did not take sufficient reasonable action on the case.

[20] OCTC does not challenge the dismissal of this count on review.

O'Connell failed to perform legal services with competence, in violation of rule 3-110(A), and failed to respond promptly to reasonable status inquiries, in violation of section 6068, subdivision (m).[21] On August 28, 2013, the Supreme Court suspended him for two years, stayed the suspension, and placed him on probation for two years subject to an actual suspension of 30 days. (State Bar Court Case Nos. 12-O-14872 (12-O-14979); Supreme Court Case No. S211549.)

His second discipline involved two client matters.[22] In the first matter, O'Connell was hired in 2008 to handle a post-conviction writ and a second jury trial for an incarcerated client. He received $10,000 in advance fees. He represented to the client that he was working on the writ, but he never completed nor filed it. After the disciplinary matter was initiated in 2013, O'Connell refunded the $10,000 in unearned fees. Because he failed to prepare and file the writ or otherwise perform any services of value for his client, he stipulated that he failed to perform legal services with competence, in violation of rule 3-110(A). In the second client matter, O'Connell was hired on September 11, 2011, to file a petition for expungement of a prior criminal conviction, and the client paid him $2,000 in advance fees. O'Connell did not communicate with his client after that date. Following initiation of the disciplinary matter in September 2012, O'Connell refunded the $2,000 in unearned fees. He stipulated that he failed to perform legal services with competence, in violation of rule 3-110(A); to promptly refund unearned fees, in violation of rule 3-700(D)(2); and to respond promptly to reasonable status inquiries, in violation of section 6068, subdivision (m). (State Bar Court Case Nos. 12-O-14872 (12-O-14979); Supreme Court Case No. S211549.)

[21] O'Connell refunded the $2,000.

[22] The misconduct in O'Connell's second discipline overlapped in time with O'Connell's misconduct in the Zimmer, Bakhtiari, and Contreras matters. The misconduct in the Avalos matter occurred entirely after the misconduct in the second discipline and, therefore, does not overlap with any of O'Connell's prior records of discipline.

The hearing judge assigned aggravation for O'Connell's two prior records of discipline, but did not specify any weight.[23] We conclude that they merit substantial aggravating weight. The two previous disciplinary matters involved incarcerated clients and the same misconduct as here: failing to perform with competence and to refund unearned fees. This similarity signifies that O'Connell's prior disciplines did not rehabilitate him and presents concerns for future misconduct. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443-444.)

2. Multiple Acts (Std. 1.5(b)

The hearing judge assigned significant aggravation for O'Connell's multiple acts of misconduct because he was culpable of 16 ethical violations in four client matters.[24] We find him culpable of 13 ethical violations, which still warrants substantial weight in aggravation. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646-647 [three instances of misconduct considered multiple acts].)

3. Failure to Make Restitution (Std. 1.5(m))

We reject O'Connell's argument that he did not fail to make restitution in the Zimmer and Contreras matters because he earned the fees he received. We agree with the hearing judge's determination[25] and find substantial aggravation for O'Connell's failure to make restitution in those matters.[26]

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[23] OCTC also does not address the weight of this aggravating factor, and O'Connell did not discuss it on review.

[24] OCTC agrees that O'Connell's multiple acts of wrongdoing constitute a significant aggravating circumstance. O'Connell does not address this factor on review.

[25] We do not include the Avalos matter, as the hearing judge did, because we dismissed count 10.

[26] OCTC requests that we replace aggravation for failure to make restitution with aggravation under standard 1.5(k) for indifference toward rectification or atonement for the consequences of the misconduct. We decline to alter the hearing judge's finding and conclude that standard 1.5(m) is the more applicable aggravating circumstance in this situation.

4. OCTC's Requests for Additional Aggravation

OCTC asks us to assign two additional aggravating circumstances for (1) significant harm to Zimmer, Avalos, and Contreras under standard 1.5(j), and (2) the high level of vulnerability of these clients under standard 1.5(n). We decline these requests. No evidence supports a separate finding of significant harm or high level of vulnerability apart from the evidence that supports culpability. (See *In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192, 203.)

B. MITIGATION

The hearing judge found one factor in mitigation for good character. O'Connell is entitled to mitigation if he establishes "extraordinary good character attested to by a wide range of references in the legal and general communities, who are aware of the full extent of the misconduct." (Std. 1.6(f).) The judge afforded minimal mitigation for the testimony of O'Connell's daughter and two superior court judges. The daughter testified that O'Connell is a good supportive father but did not offer any testimony about his honesty. The judges' testimony was more relevant. They spoke highly of O'Connell's moral character and work ethic while being fully aware of the charged misconduct and his prior disciplinary record. (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50 [testimony of judges is entitled to great consideration because they have strong interest in maintaining honest administration of justice].)

OCTC argues that O'Connell is not entitled to any mitigation for his good character evidence. We find no support for OCTC's position. We affirm the hearing judge's mitigation finding but assign it moderate weight. (*In the Matter of Riordan*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 50 [diminished weight in mitigation for good character due to absence of wide range of references].)

VII. DISBARMENT IS THE APPROPRIATE DISCIPLINE

Our disciplinary analysis begins with the standards which, although not binding, are entitled to great weight (std. 1.1; *In re Silverton* (2005) 36 Cal.4th 81, 91-92), and should be followed whenever possible (std. 1.1; *In re Young* (1989) 49 Cal.3d 257, 267, fn. 11). The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts and the legal profession; to preserve public confidence in the profession; and to maintain high standards for attorneys. (Std. 1.1.)

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].) Considering O'Connell's record of two prior disciplinary matters, we look to standard 1.8(b), which states that disbarment is appropriate where an attorney has two or more prior records of discipline if: (1) an actual suspension was ordered in any prior disciplinary matter; (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. O'Connell's case meets two of these criteria. First, he was actually suspended for 30 days in his second disciplinary matter. Second, we find that the similarity of his misconduct in his prior and current disciplinary matters demonstrate his unwillingness or inability to conform to his ethical responsibilities.[27]

Standard 1.8(b) does not apply if: (1) the most compelling mitigating circumstances clearly predominate; or (2) the misconduct underlying the prior discipline occurred during the same time period as the current misconduct. These exceptions do not apply here. The factors in

[27] O'Connell's first, second, and current disciplinary matters involve violations for failing to perform with competence. Also, he was found culpable of violations for failing to refund unearned fees in his second disciplinary matter and this matter.

aggravation considerably overshadow the moderate mitigating circumstance, which is itself not compelling. In addition, while the misconduct in three of the four current client matters overlaps with the wrongdoing in his second disciplinary proceeding, the misconduct in the Avalos matter does not overlap. That misconduct occurred after O'Connell entered into a stipulation in his second disciplinary matter.[28] We find that the exception to standard 1.8(b) for overlapping misconduct does not apply when all of the misconduct in one client matter (Avalos) occurs: (1) after the misconduct underlying the prior discipline; and (2) after an NDC was filed or a stipulation was signed in the prior discipline.

We next consider whether any reason exists to depart from the discipline called for by standard 1.8(b). We acknowledge that disbarment is not mandatory in a third disciplinary matter, even where compelling mitigating circumstances do not clearly predominate. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-507 [analysis under former std. 1.7(b)]; *In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131 [to fulfill purposes of attorney discipline, "nature and chronology" of prior record must be examined].) Standard 1.8(b) is not applied reflexively, but "with an eye to the nature and extent of the prior record. [Citations.]" (*In the Matter of Jensen* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 283, 289.) Deviating from standard 1.8(b) requires the court to articulate clear reasons for doing so. (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.)

O'Connell has not identified an adequate reason for us to depart from applying standard 1.8(b), and we cannot articulate any. Further, we reject the hearing judge's reasons for not recommending disbarment—i.e., because O'Connell's "repeated inattention to his client's interests does not rise to the level of a 'habitual course of conduct'" justifying disbarment. This

[28] O'Connell signed a stipulation as to facts, conclusions of law, and disposition in April 2013, and it was approved and filed in May 2013. An NDC was not filed in that matter.

is not the correct analysis in determining whether to deviate from standard 1.8(b), and disbarment may be proper without making such a finding.

We next examine the chronology of O'Connell's prior discipline. (*In the Matter of Miller*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 136.) In his first disciplinary matter, he stipulated to failing to perform legal services with competence for an incarcerated client. This misconduct occurred over a five-month period during 1999 and 2000. In his second disciplinary case, involving two client matters, he stipulated to failing to refund unearned fees in one matter and to failing to perform legal services with competence in both. That misconduct took place from 2008 through 2012. O'Connell's present misconduct, involving four client matters, started in 2010 and continued through 2015.[29] The number of violations, their seriousness, and their duration have increased with each disciplinary proceeding. While the misconduct overlaps somewhat, the chronology discloses that he has repeatedly failed to adhere to his professional duties even after he was disciplined twice. As such, the chronology of O'Connell's prior misconduct and discipline does not support a departure from standard 1.8(b).

We also consider the nature of O'Connell's previous misconduct. (*In the Matter of Miller*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 136.) His prior record reveals several instances of similar wrongdoing. While a "common thread" of misconduct is not a requirement for disbarment under standard 1.8(b), it is an issue to consider. (*In the Matter of Sullivan* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 189, 196.) The facts underlying O'Connell's various violations are similar: he agrees to represent an incarcerated client, charges advance fees for specific work, and then fails to do the work and accomplish the specified goals. He delays in taking action and leaves his clients and their families without adequate information. The similar facts militate against deviating from disbarment under standard 1.8(b).

[29] As discussed above, all of the misconduct in the Avalos matter occurred in 2015.

We find no reason to depart from the presumptive discipline of disbarment under standard 1.8(b). The State Bar Court has had to intervene three times to ensure that O'Connell adheres to the professional standards required of those who are licensed to practice law in California. He has failed to meet his professional obligations since 1999 and did not present compelling mitigation. We conclude that further probation and suspension would be inadequate to prevent him from committing future misconduct that would endanger the public and the profession. (*In the Matter of Moriarty* (Review Dept. 2017) 5 Cal. State Bar Ct. Rptr. 511, 528 [disbarment appropriate under standard 1.8(b) for third disciplinary matter where aggravation outweighed mitigation, no compelling mitigating circumstances, and multiple instances of similar wrongdoing in disciplinary record].) The standards and decisional law support our conclusion that the public and the profession are best protected if O'Connell is disbarred.[30]

VIII. RECOMMENDATION

For the foregoing reasons, we recommend that Dennis Patrick O'Connell 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 O'Connell 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.

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

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[30] E.g., *In the Matter of Carver* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 427 (disbarment where attorney with two prior disciplines committed act of moral turpitude and significant aggravation outweighed limited mitigation); *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63 (disbarment where attorney with two prior disciplines was unable to conform conduct to ethical norms with multiple aggravating factors and no mitigation).

IX. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

Pursuant to section 6007, subdivision (c)(4), and rule 5.111(D)(1) of the Rules of Procedure of the State Bar, Dennis Patrick O'Connell is ordered enrolled inactive. The order of inactive enrollment is effective three days after service of this opinion. (Rules Proc. of State Bar, rule 5.111(D)(1).)

HONN, J.

WE CONCUR:

PURCELL, P. J.

McGILL, J.