

Filed October 16, 2020

STATE BAR COURT OF CALIFORNIA
REVIEW DEPARTMENT

In the Matter of) 17-C-03795
)
MICHAEL BERNARD POTERE,) OPINION AND ORDER
)
State Bar No. 302569.)
_____)

In 2017, Michael Bernard Potere demanded over \$200,000 from a law firm where he worked by threatening the release of confidential firm information, including financial documents, client billing rates, and associate reviews and salary offers. He was prosecuted by the United States Attorney’s Office (USAO) for the Central District of California. Potere ultimately pleaded guilty to a federal misdemeanor violation of unauthorized access to a computer to obtain information. The hearing judge found the facts and circumstances surrounding his conviction involved moral turpitude and a “complete disregard for honesty.” The judge recommended disbarment.

Potere appeals, arguing the proceedings in the Hearing Department were constitutionally defective because he had to establish by expert testimony any mental disabilities responsible for his misconduct. He also asserts he should have been provided with a mental examination, and his mitigating evidence should receive more weight and his aggravating evidence less weight than found by the hearing judge. Potere contends disbarment is not necessary and, instead, a period of actual suspension is appropriate. The Office of Chief Trial Counsel of the State Bar (OCTC) did not appeal but requests in its response that we affirm the disbarment recommendation.

Upon our independent review (Cal. Rules of Court, rule 9.12), we agree with the hearing judge that the circumstances surrounding Potere's conviction involve moral turpitude, and we affirm the judge's culpability finding and discipline recommendation. We reject Potere's constitutional claims and his argument that he was entitled to a mental examination by the State Bar. Due to Potere's serious misconduct, disbarment is necessary to protect the public, the courts, and the legal profession.

I. FACTUAL BACKGROUND¹

In March 2015, Potere began working as an associate attorney at Dentons, a large international law firm, in its Los Angeles office. Later in 2015, Potere was assigned to work on one of the firm's cases with Joel Siegel, a senior partner and managing director of Dentons. In order to prepare discovery responses for the case, Dentons provided Potere with access to Siegel's work email account. Potere's assignment on that case concluded in June 2016, which should have ended Potere's access to Siegel's account. However, neither Dentons nor Siegel took action to remove or restrict Potere's access to it.

In March 2017, Potere told Michael Duvall, a partner at Dentons, that he was leaving the firm to pursue a graduate degree in political science. Potere asked to continue working at Dentons until his graduate program began in the fall of 2017. As Potere's "practice advisor," Duvall was responsible for discussing Potere's performance reviews with him. Based on Potere's struggles at Dentons in 2016, and Duvall repeatedly speaking to him about his substandard work performance, including a poor performance review in January 2017, Dentons refused Potere's request to work until the fall. Instead, the firm informed him that his last day of work would be June 1, 2017.

¹ The factual background is based on trial testimony, documentary evidence, the stipulations as to fact, and factual findings by the hearing judge, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).)

On April 15 and May 14, 2017, without authorization, Potere accessed Siegel's email account and downloaded various documents. By doing so, he knowingly violated Dentons' internal policies, which he acknowledged receiving when he began his employment. He initially searched for information about himself and his performance at the firm. He downloaded an email from May 20, 2016, sent from Siegel to Duvall and Felix Woo, who was also a partner at Dentons and Potere's first practice advisor. Woo later became the "Associate Review Committee Director" and was also responsible for talking to Potere about his performance reviews. Siegel stated in the email Potere had taken a vacation in the middle of an important briefing schedule in a case. Potere considered Siegel's email a false accusation and defamatory.

Potere then searched through Siegel's email account for other confidential and sensitive information pertaining to Dentons and Siegel, which he downloaded to his work computer's hard drive and printed.² His work computer was synced to his personal laptop via Dropbox, an internet-based cloud storage platform, so the information was stored in these places as well. Potere also provided copies of these documents to a friend for safekeeping.

Potere arranged a meeting with Duvall and Woo on May 16, 2017, where he disclosed to them he had searched Siegel's email account. He discussed the May 20, 2016 email, describing it as upsetting and defamatory. He also admitted to searching Siegel's email account for other documents and finding evidence for a potential gender discrimination lawsuit against Dentons. Potere refused to provide copies of the documents he had taken, requesting a confidentiality

² Potere downloaded and printed many law firm documents, including (1) Dentons' quarterly financial reports; (2) documents describing Dentons' determination of its billing rates for clients and specific factors relied on to arrive at those rates; (3) a list of the firm's clients and the dollar amounts charged to each; (4) documents describing how Dentons' partners should approach clients who have outstanding and overdue balances; (5) documents describing issues to be discussed at meetings for Dentons' partners; (6) documents describing voting for full interest partner candidates; (7) confidential reviews of associate attorneys; and (8) detailed analyses describing recruitment of lateral attorneys and offers to those attorneys. Potere also downloaded a mortgage application that had been recently completed by Siegel.

agreement from Dentons before disclosing the documents. He told them he planned on bringing a defamation action, but the statute of limitations for that action would expire on May 19, 2017. Therefore, he requested a tolling agreement for his defamation claim.

Duvall and Woo relayed the information Potere shared at the meeting to Siegel and Dentons' management, which included Edward Reich, Dentons' general counsel in its New York office. Reich then contacted Potere. Potere requested confidentiality regarding their conversations, but Reich declined. On May 17, 2017, Duvall and Reich had a teleconference with Potere. Potere raised the defamation and gender discrimination cases, yet he again refused to confirm or deny that he had any of Dentons' documents. He demanded "compensatory damages" of \$210,000, life insurance for six years, and health insurance until he started school. He also demanded as "punitive damages" a piece of artwork from the office depicting a fire on a hillside in Malibu, which he claimed represented his legal career. Potere said he was speaking in hypotheticals and suggested he had a timer set that could potentially forward any documents he had to the press, including the legal website "Above the Law." Reich warned Potere such a move could be "career-ending" and result in professional and criminal charges, to which Potere replied that he no longer cared about being a lawyer. Within a couple of days of this conversation, Denton retained outside counsel for assistance with the situation.

A second call occurred on May 18, 2017, between Potere and Reich, along with Susan Mitchell, who was another partner and general counsel at Dentons. The call covered the same topics discussed the day before, including Reich again warning Potere of potential criminal consequences and ethical issues. Reich also agreed to a tolling agreement to extend the statute of limitations in the defamation suit for a week. Mitchell believed the documents contained confidential firm financial information and, if released to the public, would be damaging to Dentons. The next day, Dentons contacted the Federal Bureau of Investigation (FBI).

On May 25, 2017, Potere, Reich, and Mitchell met at Dentons' office in Los Angeles, and the meeting was recorded by the FBI. During the meeting, Potere admitted he received access to Siegel's email account when they worked on a case together and he searched Siegel's emails in April 2017, finding one he considered defamatory. He said he later searched for confidential firm documents and downloaded them. He told Reich and Mitchell he drafted complaints for a defamation lawsuit and a gender discrimination lawsuit, and reiterated his financial demands. Potere again claimed to have an auto-timer set to email the confidential firm documents to Above the Law and also that a friend had a copy of the lawsuits and was instructed to file them if something were to happen to him. He said he understood that publicly releasing the documents would cause substantial harm to Dentons.

During the meeting, Reich gave Potere the opportunity to return the documents, but Potere refused. Reich asked Potere what Dentons would be paying for and Potere responded, "[E]verything goes away, everything I have. Whatever I have is destroyed. Any thoughts I may have had for a lawsuit or any sort of other publicity about this, or any situation related to me, Dentons, or Dentons generally coming from me wouldn't happen." Potere was provided with a flash drive. He uploaded it with documents and returned it to Reich and Mitchell. The documents on the drive referenced Above the Law and also contained confidential firm financial data, Potere's emails from Dentons, and the complaints for his defamation and gender discrimination suits, along with Dentons' documents attached as exhibits.

On June 8, 2017, Reich and Mitchell told Potere that Dentons had agreed to pay him to return the documents. On June 19, Dentons delivered the artwork to Potere. On June 22, Potere met with Reich at Dentons. The meeting was monitored and recorded by the FBI. Potere gave Reich two envelopes and a flash drive, which he said represented the documents he had taken. He also showed Reich that he was deleting the documents from his personal computer and

Dropbox, assuring Reich he no longer had access to any of the documents. Potere told Reich he had disabled the program that was timed to send the documents to Above the Law. Potere and Reich discussed the release agreement, wherein Dentons would pay Potere in exchange for the return of the confidential documents. Reich placed a check on the table payable to Potere in the amount of \$213,650.49, and Reich and Potere signed the release agreement. Potere also signed a certification that he had not retained any copies of the documents from Dentons. The FBI then entered the meeting room and arrested Potere. Shortly after his arrest, the FBI interviewed Potere and asked him whether he still possessed or had access to any of Dentons' documents. He admitted to the FBI he would still have access to the documents on Dropbox because Dropbox saves deleted files for 30 days. He also admitted he possessed a flash drive at his apartment containing the exhibits and complaints he drafted, which the FBI retrieved.

On June 20, 2017, the USAO filed a complaint in the Central District of California, alleging Potere violated 18 United States Code (U.S.C.) section 1951(a) (extortion and attempted extortion affecting interstate commerce). (*United States v. Potere*, no. 2:17-cr-00446.) On July 18, the USAO filed an indictment charging Potere with violating 18 U.S.C. section 1951(a) and 18 U.S.C. section 875(d) (transmitting threatening communications with intent to extort).

On October 18, 2017, the USAO filed a first superseding information charging Potere with a misdemeanor violation of 18 U.S.C. sections 1030(a)(2)(C) and (c)(2)(A) (unauthorized access to a computer to obtain information), and Potere entered into a plea agreement for that charge. As part of the factual basis for the plea, Potere admitted he accessed a Dentons' "computer without authorization and downloaded confidential information from the [Dentons'] computer that he was not authorized to download and obtain." He admitted that, on May 17, 2017, he spoke to partners at Dentons and demanded "\$210,000 and a piece of artwork, among other items" in exchange for the return of the firm's confidential documents. He also admitted

he repeatedly stated that, if Dentons did not meet his demands, he intended to email the confidential documents to a legal blog website. The district judge accepted and entered the plea.

On January 22, 2018, the district judge sentenced Potere to a term of five months in custody. During the sentencing hearing, the judge commented that Potere had extorted Dentons because he believed he had been treated unfairly. Potere's counsel responded Potere was experiencing mental health problems and not thinking clearly. The judge disagreed and ascribed Potere's actions to his anger management issues, not any problem caused by Potere's mental health. The judge acknowledged Potere's mental health issues were well documented, but he did not find they were the reason for Potere's actions. He further stated Potere's extortion was calculated and malicious, and Potere ignored the warnings from Dentons his conduct was unlawful. In response to Potere's claim that he was simply using an aggressive negotiation strategy, the judge found Potere was actually trying to "extort the law firm into paying him a substantial sum of money for which he had absolutely no entitlement to." He found Potere's explanation for his conduct "arrogant and pure fantasy, nothing more than his continued refusal to accept and recognize full responsibility for his serious criminal conduct." The judge found Potere's expression of regret less than sincere but did recognize Potere accepted responsibility by pleading guilty to the first superseding information.

The judge granted the USAO's motion to dismiss the underlying indictment. Subsequently, Potere surrendered to the custody of the Bureau of Prisons and was released on July 25, 2018. He was then placed on one year of supervised release.

II. STATE BAR COURT PROCEEDINGS

On March 20, 2018, OCTC transmitted evidence to us that Potere's conviction was final. On April 19, we transferred the matter to the Hearing Department for a hearing and decision recommending the discipline to be imposed if it found the facts and circumstances surrounding

the misdemeanor conviction involved moral turpitude or other misconduct warranting discipline. On April 23, 2018, the Hearing Department filed and served on Potere a Notice of Hearing on Conviction.

The parties filed a stipulation as to facts, admission of documents, and conclusions of law on April 30, 2019. A supplemental stipulation as to facts and admission of documents was filed on July 16. Trial was held on July 18, 19, and 30. After the filing of posttrial briefs, the hearing judge issued her decision on October 28, 2019.

III. POTERE’S STIPULATION ESTABLISHES THAT THE FACTS AND CIRCUMSTANCES SURROUNDING HIS CONVICTION INVOLVED MORAL TURPITUDE

In attorney disciplinary proceedings, “the record of [an attorney’s] conviction [is] conclusive evidence of guilt of the crime of which he or she has been convicted.” (Bus. & Prof. Code, § 6101, subd. (a); *In re Gross* (1983) 33 Cal.3d 561, 567.) However, Potere’s misdemeanor conviction for violating 18 U.S.C. sections 1030(a)(2)(C) and (c)(2)(A) does not establish moral turpitude per se. Any finding of moral turpitude must be made after considering the facts and circumstances of the criminal conviction. (Bus. & Prof. Code, § 6102, subd. (e).) In determining whether the facts and circumstances surrounding Potere’s criminal conviction involve moral turpitude, we are not restricted to examining elements of the crime but must look at the whole course of misconduct. (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 935.) The misconduct, not the conviction, warrants discipline. (*In re Gross, supra*, 33 Cal.3d at p. 566.)

Potere stipulated in this disciplinary proceeding that he intentionally accessed an email account without authorization and downloaded confidential information from his employer’s computer, and that he demanded \$210,000 and a piece of artwork, among other items, from his

employer in exchange for the return of the confidential information. He further stipulated that these acts, in addition to others as laid out in the stipulation, constitute moral turpitude.

We accept Potere's stipulation that his acts of misconduct constitute moral turpitude because they fit within the definition of moral turpitude as set forth by the California Supreme Court: "Criminal conduct not committed in the practice of law or against a client reveals moral turpitude if it shows a deficiency in any character trait necessary for the practice of law (such as trustworthiness, honesty, fairness, candor, and fidelity to fiduciary duties) or if it involves such a serious breach of a duty owed to another or to society, or such a flagrant disrespect for the law or for societal norms, that knowledge of the attorney's conduct would be likely to undermine public confidence in and respect for the legal profession." (*In re Lesansky* (2001) 25 Cal.4th 11, 16.) We find that Potere's actions clearly demonstrate deficiencies in his character, including a lack of trustworthiness, honesty, and fidelity to fiduciary duties. First, he knew he did not have authority to access Siegel's emails when he did, months after his work for Siegel had concluded. Additionally, Potere downloaded documents unrelated to the case on which he had been assisting Siegel, including Dentons' sensitive proprietary information, trade secrets, and confidential client information, along with Siegel's personal financial information.

Potere then took calculated steps to use the information in an attempt to financially gain from his dishonest actions. He threatened Dentons under the guise of two lawsuits, unless it paid him over \$200,000 and gave him insurance coverage and a piece of artwork. He revealed the true nature of his actions when he stated he could release the law firm's documents publicly, knowing that to do so would cause substantial harm to Dentons. He further lied to Dentons at the final meeting when he stated he had returned all of the documents, when in fact, he still had access to the documents on Dropbox and on a flash drive at his apartment. These facts establish Potere's dishonesty and constitute a breach of fiduciary duties to Dentons. (See *Fowler v. Varian*

Associates, Inc. (1987) 196 Cal.App.3d 34, 41 [while employed, employee owes undivided loyalty to employer]; *Stokes v. Dole Nut Co.* (1995) 41 Cal.App.4th 285, 295 [duty of loyalty breached when “employee takes action which is inimical to the best interests of the employer”].)

Accordingly, we affirm the hearing judge’s finding that the facts and circumstances surrounding Potere’s conviction involved moral turpitude.³

IV. POTERE’S CONSTITUTIONAL CHALLENGES HAVE NO MERIT⁴

A. Potere Not Entitled to Early Neutral Evaluation Conference (ENEC)

Potere argues his equal protection rights were violated because he was not provided with an ENEC pursuant to rule 5.30 of the Rules of Procedure of the State Bar.⁵ He asserts the absence of an ENEC prejudiced him because he did not have an opportunity to discuss his conviction referral and mental health issues in a neutral setting prior to trial. Pursuant to rule 5.30, an ENEC takes place before disciplinary charges are filed. (See *In the Matter of Respondent AA* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 721, 727 [ENEC serves to provide objective view to both sides of consequences of filing formal charges].) Disciplinary charges are not filed in conviction proceedings. Instead, OCTC files a certified copy of the record of conviction in the Review

³ On review, Potere disagrees with the hearing judge’s finding that he intentionally tried to extort money from Dentons. In finding that the facts and circumstances involved moral turpitude, we need not determine whether Potere committed the crime of extortion because his actions otherwise demonstrate moral turpitude under *Lesansky*. Nonetheless, his conduct meets the definition of extortion as defined under both California and federal law. (See Pen. Code § 518 & 18 U.S.C. § 1951(b)(2) [extortion defined as wrongful use of force or fear to obtain property from another with his or her consent].) Both the hearing judge and the district judge agreed that Potere wrongfully threatened to go public with confidential documents for his own financial gain. We reject his argument that his drafted lawsuits had merit and that his demand for \$200,000 and more was just a settlement of his claims. His point that the federal extortion charges were dismissed has no relevance as we consider all of the facts and circumstances surrounding the conviction. (*In re Leansky, supra*, 25 Cal.4th at p. 16.) Potere’s additional argument that his actions did not amount to extortion because his “depression was the root cause of his misconduct” is discussed below in the mitigation section.

⁴ Potere’s constitutional arguments regarding mitigation for his mental condition are addressed below in the mitigation section.

⁵ All further references to rules are to this source unless otherwise noted.

Department. (Rule 5.341.) Because this matter is a conviction proceeding, Potere is not entitled to an ENEC under rule 5.30.

B. Lack of Mental Examination Did Not Violate Due Process

Potere also claims his constitutional rights were violated when he was not provided a mental examination under rule 5.68 by the State Bar after he raised the issue of his mental condition. He asserts that, without this examination, he was deprived of a fair hearing in violation of his constitutional right to due process. We disagree. “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’ [Citations.]” (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333.) Potere had the opportunity to present evidence regarding his mental condition at the hearing in this matter. He was not prejudiced due to the conclusion of the State Bar and the hearing judge that a rule 5.68 mental examination was not necessary to proceed to trial. Potere received ample due process and we reject his arguments because he failed to establish he was specifically prejudiced. (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 928 [due process challenge must make showing of specific prejudice].) We find Potere received a fair trial and was treated justly throughout these proceedings.

V. AGGRAVATION AND MITIGATION

Standard 1.5 of the Standards for Attorney Sanctions for Professional Misconduct⁶ requires OCTC to establish aggravating circumstances by clear and convincing evidence.⁷ Standard 1.6 requires Potere to meet the same burden to prove mitigation.

⁶ All further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

⁷ 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.)

A. Aggravation

1. Significant Harm to Client, Public, or Administration of Justice (Std. 1.5(j))

The hearing judge found Potere's misconduct caused significant harm to Dentons but did not assign any weight. OCTC requests significant weight. Potere admits on review that his conduct caused Dentons significant harm.⁸ We find that Potere's threats of publicly releasing confidential information caused significant harm because Dentons had to hire outside counsel to assist the firm. Moreover, after Potere's arrest and conviction were publicized, Dentons was forced to take action to protect its public image and address concerns from clients about confidentiality at the firm. We assign moderate aggravating weight under standard 1.5(j).

2. Indifference (Std. 1.5(k))

Potere challenges the hearing judge's determination that he lacks insight into the wrongfulness of his misconduct. Potere argues his attitude is based on an honest, but mistaken, belief in his innocence and, therefore, it cannot be used in aggravation. (See *Van Sloten v. State Bar*, *supra*, 48 Cal.3d at pp. 932–933.) First, Potere's argument is without merit as the record does not give any support for such a belief. The hearing judge found Potere lacked credibility and agreed with the district judge that Potere's depiction of the events as only his attempt at an aggressive negotiating strategy was unbelievable. The hearing judge determined Potere was insincere and refused to accept full responsibility for his misconduct. Such findings are entitled to great weight. (Rule 5.155(A); *McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 [hearing judge

⁸ Potere challenges the hearing judge's finding to the extent that he caused significant harm to Dentons because he purchased a firearm and, thereafter, Dentons took precautionary measures and hired additional security guards for the office. We agree with Potere that his ownership of a firearm does not bear on aggravation for significant harm. The judge also found Potere's actions caused significant harm to Siegel. Potere had access to Siegel's emails, which contained at least one document regarding Siegel's personal financial information. Siegel reported to the FBI that he "felt violated" because Potere searched his emails, the incident "disrupted" his life, and he had to change the passwords connected to his financial accounts. We find OCTC did not present clear and convincing evidence that Potere's actions significantly harmed Siegel.

best suited to resolve credibility having observed and assessed witnesses' demeanor and veracity firsthand].)

Second, Potere continues to deny that his actions were dishonest, even when he admits in his stipulation that his acts constituted moral turpitude. He cannot have it both ways, which leads us to conclude that he does not truly understand the wrongfulness of his course of misconduct, and instills great concern that he would commit future misconduct. (See *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 380 [lack of insight into misconduct causes concern that attorney will repeat his misdeeds and is substantial factor in discipline recommendation].) This indifference clearly warrants substantial aggravation under standard 1.5(k). (See *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511 [while law does not require false penitence, it does require attorney to accept responsibility for his or her misconduct and come to grips with his or her culpability].)

B. Mitigation

1. No Mitigation for Lack of Prior Record of Discipline (Std. 1.6(a))

Absence of a prior record of discipline over many years, coupled with present misconduct that is not likely to recur, is a mitigating circumstance under standard 1.6(a). (*Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [discipline-free record most relevant where misconduct is aberrational and unlikely to recur].) Potere was admitted to practice law in California on February 18, 2015. Because he had only two years of discipline-free practice in California before his misconduct began in April 2017, the hearing judge declined to assign mitigation under standard 1.6(a). Potere asserts, because he was admitted to practice in Illinois in 2012, he should receive mitigation for five years of practice without discipline, but five years does not satisfy the “many years” requirement of standard 1.6(a). (*In the Matter of Duxbury* (Review Dept. 1999)

4 Cal. State Bar Ct. Rptr. 61,66.)⁹ In addition, Potere has not proven his misconduct is not likely to recur, as the standard requires. We affirm the judge's determination that no mitigation is warranted for lack of a prior record of discipline.¹⁰

2. No Mitigation for Mental Disabilities (Std. 1.6(d))

Standard 1.6(d) provides that mitigation may be assigned for any mental disabilities where (1) the attorney suffered from them at the time of the misconduct; (2) they are established by expert testimony as being directly responsible for the misconduct; and (3) they no longer pose a risk that the attorney will commit future misconduct. The hearing judge found Potere failed to establish the second and third factors and thus did not afford any mitigation under standard 1.6(d). We agree.

At trial, the hearing judge admitted Potere's medical records, which documented counseling sessions in 2012 and psychotherapy sessions in 2016 and 2017. Potere did not call an expert to testify regarding his mental illness, but he submitted a psychiatric evaluation performed on January 7, 2019, by Stephen H. Dinwiddie, M.D. Dr. Dinwiddie's evaluation was requested by the Illinois Attorney Registration and Disciplinary Commission (ARDC) as part of Potere's disciplinary proceeding in Illinois for the same conviction underlying this matter. The evaluation details the facts underlying Potere's conviction and the allegations made by the ARDC that he violated rule 8.4(b) of the Illinois Rules of Professional Conduct¹¹ by (1) committing and being

⁹ We also reject Potere's argument for mitigation based on *Arden v. State Bar* (1959) 52 Cal.2d 310, which is a pre-standards case.

¹⁰ Potere also argues that giving mitigation to attorneys with "many years of practice" under standard 1.6(a) violates equal protection as it treats less experienced attorneys differently. Potere offers no legal support for his argument. Further, this circumstance is proper to consider in mitigation. (*Cooper v. State Bar, supra*, 43 Cal.3d at p. 1029.) Accordingly, we reject his argument.

¹¹ On our own motion, we take judicial notice of rule 8.4(b) of the Illinois Rules of Professional Conduct, which states, "It is professional misconduct for a lawyer to . . . (b) commit

convicted of unauthorized access to a computer to obtain information, (2) committing the crime of attempted extortion, and (3) committing the crime of transmitting threatening communications with intent to extort. Dr. Dinwiddie noted that Potere’s “long-standing feelings of being poorly treated, recurrent difficulties in his jobs, other interpersonal difficulties, and feelings of being entitled to some form of compensation can be traced, ultimately, to his personality disorder.” Dr. Dinwiddie concluded no causal connection existed between his mental illness and the misconduct in question. Based on this determination, the hearing judge found Potere did not provide any evidence that his mental disability was directly responsible for his misconduct, as required by the standard.

Potere finds fault in the hearing judge’s reliance on Dr. Dinwiddie’s conclusion that “No causal connection . . . [was] identified” between Potere’s depression and his misconduct. Potere argues Dr. Dinwiddie failed to define the misconduct and, therefore, the evaluation cannot be used to determine mitigation under standard 1.6(d). Potere believes Dr. Dinwiddie’s understanding of the misconduct is solely his actions comprising the misdemeanor conviction. Potere’s belief is without merit. Dr. Dinwiddie’s evaluation explicitly discusses all of Potere’s actions relevant to this disciplinary proceeding, including his accessing and obtaining of Siegel’s emails and Dentons’ private information, his statements to Dentons’ partners leading up to his arrest, and statements in his plea agreement.

Potere also argues his equal protection rights were violated because he was required to prove his mental disability by hiring an expert, which is the only mitigating factor that requires expert testimony; therefore, persons with disabilities are treated differently. The Supreme Court has upheld the requirement of establishing a nexus through expert testimony. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 128 [lay opinion insufficient to support mitigation under former

a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer”

std. 1.2(e)(iv)].) Requiring expert testimony under the standard does not treat persons with disabilities differently, but provides a means for the court to evaluate the weight of mitigation credit an attorney should receive. Contrary to Potere's argument, some mitigation is available under standard 1.6(d) even without expert witness testimony. (See *In re Brown* (1995) 12 Cal.4th 205, 222 [some mitigation weight for illness even though no expert testimony established illness directly responsible for misconduct]; *In the Matter of Ward* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 47, 60 [some mitigation assigned to personal stress factors established by lay testimony].) Here, Potere's only evidence in support of mitigation under standard 1.6(d) is his testimony that he was experiencing symptoms of depression around the same time as his misconduct and his lay testimony that the depression caused his misconduct. His arguments directly contradict Dr. Dinwiddie's conclusion. Potere's disputed lay testimony is not enough to establish his depression was directly responsible for his misconduct. Therefore, we find that even *some* mitigation is not warranted under standard 1.6(d).¹²

Additionally, Potere challenges the constitutionality of standard 1.6(d) because he argues it requires an attorney to show that he or she is "recovered" from his mental disability before the hearing judge decides the matter, which violates his equal protection rights. He argues, if an attorney does not show "recovery," then no mitigation under standard 1.6(d) can be found, and that attorney is disciplined as if he or she had no disability at all, even if the attorney has otherwise proven a mental disability. Therefore, Potere argues, the disability itself then becomes the basis for the disciplinary action and the attorney is being punished for having a disability. Potere

¹² Potere also argues he was denied due process because he was required to use expert testimony to prove his mental disability. Because he could not afford an expert witness, he states he was unable to put on a "defense" under standard 1.6(d) and, therefore, he was disciplined as if he were mentally healthy. He asserts, if an attorney establishes that a disability caused the misconduct in question, then that could "undermine a finding of intent or moral turpitude." We reject this argument. Potere had the opportunity to present evidence in mitigation, which he did by offering Dr. Dinwiddie's report into evidence.

misreads the language within standard 1.6(d), which requires him to establish that the mental disability “no longer poses a risk that the lawyer will commit misconduct.” An attorney does not have to show that a mental illness no longer exists; rather, the attorney must show the disorder is unlikely to cause further misconduct. (See *In re Naney* (1990) 51 Cal.3d 186, 197 [attorney must show psychological disorder that contributed to misconduct is controlled].) This aligns with the purposes of attorney discipline, including protection of the public from attorney misconduct.¹³

As a result of the alleged constitutional violations, Potere argues he was substantially prejudiced because he could not establish that his anger was a symptom of depression and the hearing judge cited to Potere’s anger issues in her decision. He asserts if he were able to do so, any intent would be negated and he would not be disbarred. We reject Potere’s arguments that he was actually prejudiced in these proceedings. His arguments boil down to speculation as to what another expert might say about Potere’s mental state related to the misconduct in this matter. The hearing judge properly considered the evidence and concluded Potere did not establish any mitigation under standard 1.6(d). For the same reasons, we also deny Potere’s request to remand the matter for a new hearing under rule 5.155(B).

¹³ Potere cites *In the Matter of Amponsah* (Review Dept. 2019) 5 Cal. State Bar Ct. Rptr. 646, arguing he must show recovery to receive mitigation under standard 1.6(d). We did not hold in *Amponsah* that every attorney must show recovery. In that case, Amponsah presented expert testimony that he was in continued therapy for his emotional difficulties and his stress and anxiety levels had normalized. As such, we found the evidence showed Amponsah had recovered, but did not state it was a requirement under standard 1.6(d). We also found expert testimony established that his extreme emotional distress was directly responsible for his misconduct. Accordingly, the attorney was entitled to substantial mitigation under standard 1.6(d). Potere also misapplies our decision from *In the Matter of Peters* (Review Dept. 2018) 5 Cal. State Bar Ct. Rptr. 536. Peters received some mitigation for her depression and prescription drug abuse problem that led to a fatal car collision. We held she was not entitled to full mitigation because she had not shown “complete, sustained recovery and rehabilitation.” Such a showing is required when substance abuse problems cause the misconduct. (See *Slavkin v. State Bar* (1989) 49 Cal.3d 894, 905 [attorney suffering from drug or alcohol dependence generally must establish that addiction is permanently under control].) Because Potere does not argue his misconduct was caused by substance abuse, *Peters* is not relevant precedent here.

3. Cooperation with the State Bar (Std. 1.6(e))

Under standard 1.6(e), Potere is entitled to mitigation for entering into the stipulations. The hearing judge assigned moderate weight in mitigation. Potere argues he is entitled to substantial mitigation because he stipulated to facts and circumstances related to his conviction that equated to moral turpitude and were not easily provable. We agree and assign substantial mitigation for Potere's cooperation. (See *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive mitigation for admission of culpability and facts].)

4. Extraordinary Good Character (Std. 1.6(f))

Potere may obtain mitigation for "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 hearing judge gave limited mitigating credit to Potere's good character evidence, which OCTC does not challenge. Potere requests additional weight for this circumstance. Potere presented letters from 13 declaratory witnesses, including eight attorneys. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [testimony of attorneys entitled to great consideration].) However, as OCTC correctly points out, these letters were written in December 2017 and submitted in Potere's underlying criminal matter before sentencing.¹⁴ Therefore, they do not mention this disciplinary proceeding, and a number of the witnesses do not indicate a full awareness of the extent of Potere's misconduct. We agree with the hearing judge and assign limited weight.

5. Pro Bono Work and Community Service

Pro bono work and community service are mitigating circumstances. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) Potere requests mitigation, arguing he testified at trial regarding his pro bono and community service activities; however, the hearing judge did not address them in her

¹⁴ Potere later amended some of the letters with certifications that they were written under penalty of perjury.

decision. OCTC does not object to this request. Potere testified about pro bono cases he worked on as a summer associate, a fellowship he received after law school to work at Northwestern University's Center on Wrongful Convictions of Youth, and pro bono cases he worked on as an associate at both Dentons and the law firm where he worked prior to Dentons, Kirkland & Ellis. He stated that he won a "volunteer of the year award" for his work on a Social Security pro bono case from the Legal Assistance Foundation of Metropolitan Chicago. After working at Dentons, Potere volunteered for Public Counsel at the bankruptcy self-help desk. However, he did not describe the amount or extent of his work there.

Potere's pro bono and community service work is commendable but does not qualify for full mitigation credit. His testimony lacked specificity, including dates and length of service, and it was uncorroborated. Potere did not provide clear and convincing evidence that would show the extent of his dedication and zeal brought to his pro bono and community service activities. (See *Rose v. State Bar* (1989) 49 Cal.3d 646, 667 [mitigation for legal abilities, dedication, and zeal in pro bono work].) Therefore, we assign limited weight in mitigation to this circumstance. (See *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 840 [limited weight given for community service where evidence based solely on attorney's testimony making extent of service unclear].)

VI. DISBARMENT IS THE NECESSARY DISCIPLINE

Our role is not to punish Potere for his crimes—the federal court has done so by sentencing him in the criminal proceeding. Instead, our purpose is to recommend appropriate professional discipline, considering the goals of the discipline system. (Std. 1.1; *In re Brown, supra*, 12 Cal.4th at p. 217 ["the aim of attorney discipline is not punishment or retribution; rather, attorney discipline is imposed to protect the public, to promote confidence in the legal system, and to maintain high professional standards"].) Our disciplinary analysis begins with the standards,

which are entitled to great weight. (*In re Silvertown* (2005) 36 Cal.4th 81, 92.) We also look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.) Ultimately, we balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.) The hearing judge recommended disbarment, which OCTC supports. In his appeal, Potere argues actual suspension is appropriate.

Standard 2.15(b) is applicable and provides for disbarment or actual suspension for a misdemeanor conviction involving moral turpitude. The hearing judge properly relied on this standard because she found that the facts and circumstances surrounding Potere’s conviction evidenced moral turpitude. The judge noted that acts of dishonesty such as his often warrant disbarment. (*In re Bogart* (1973) 9 Cal.3d 743, 748 [disbarments are rule rather than exception in cases of serious crimes involving moral turpitude].)

We agree with the hearing judge’s finding that Potere’s misconduct “involved a carefully considered, illicit plan to extort money from his employer, demonstrating [his] dishonesty.” He demonstrated disloyalty to Dentons when he improperly accessed confidential firm documents, then threatened lawsuits and the public release of the documents unless he was paid over \$200,000 plus other items. He also lied about his use of an email program that would automatically release the documents to escalate the threat. After negotiating payment from Dentons, he certified that he had returned all of the documents when he still maintained access to them. His dishonesty and violation of fiduciary duties goes directly to his fitness to practice. Honesty is absolutely fundamental in the practice of law. Without it, “the profession is worse than valueless in the place it holds in the administration of justice.” (*Tatlow v. State Bar* (1936) 5 Cal.2d 520, 524; see *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 292 [“It is critical to both the bench and the bar that we be able to rely on the honesty of counsel”]; *In the Matter of Ike* (Review Dept.

1996) 3 Cal. State Bar Ct. Rptr. 483, 489 [observance of fiduciary responsibilities central to practice of law.]) Further, his lack of insight into the wrongfulness of his misconduct confirms that his proven dishonesty presents a real and ongoing danger to the public. We have held “in a conviction referral matter, the discipline must be imposed commensurate with the gravity of the crime and the circumstances surrounding the crime.” (*In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 478 [disbarment for criminal acts involving moral turpitude including tax fraud and deceitful acts for personal gain where mitigation not sufficiently compelling].) Potere’s manifest dishonesty justifies the judge’s disbarment recommendation.

Potere argues that disbarment is not warranted based on Supreme Court precedent involving extortion. He cites three pre-standards cases where extortive conduct resulted in actual suspension, not disbarment.¹⁵ The magnitude of Potere’s misconduct far exceeds the misconduct in those three cases. Potere’s plan to demand money from Dentons involved repeated deceptions and egregious threats that stood to cause Dentons considerable harm. Potere’s misconduct stands on a level of its own and no past case law directly compares to Potere’s case.

Potere also argues his case is distinguishable from *Barton v. State Bar* (1935) 2 Cal.2d 294, a case the hearing judge used as guidance. Barton had accused an oil company of putting its gas into another company’s tanks, known as “dumping.” He contacted the oil company and demanded money in return for not filing a suit or going public. He falsely stated he had proof of

¹⁵ In *Bluestein v. State Bar* (1974) 13 Cal.3d 162, an attorney agreed to “drop” criminal assault and battery charges against his client’s husband if the husband would pay the client’s \$1,000 attorney fee in a divorce action. The court held that Bluestein’s actions constituted an oppressive method of attempting to collect a fee and involved moral turpitude. (*Id.* at p. 170.) The court affirmed the State Bar Disciplinary Board’s recommendation of a six-month suspension. In *Librarian v. State Bar* (1952) 38 Cal.2d 328, an attorney threatened to file a criminal complaint for perjury against a witness in a wage lawsuit if he did not receive \$41.50 from him. The court determined the attorney’s threats amounted to extortion, which involved moral turpitude. (*Id.* at p. 330.) The court ordered Librarian suspended for six months. In *Lindenbaum v. State Bar* (1945) 26 Cal.2d 565, in an attempt to recover a fee that a client sought to discharge in bankruptcy, an attorney threatened to, and did, report his client’s wife to immigration officials. He was suspended for six months due to his attempted extortion.

the dumping and affidavits attesting to the practice. The court found Barton's actions amounted to attempted extortion. (*Id.* at p. 297.) The court ordered Barton's disbarment, noting he had been disciplined twice before. The hearing judge determined Potere's extortion plot was similar to Barton's. Potere argues *Barton* is distinguishable because (1) he does not have a prior record of discipline and (2) his misconduct was not directly related to his practice as an attorney. Though true that Potere does not have a prior record of discipline, he has serious aggravation clearly outweighing the mitigation in this matter, demonstrating that a "greater sanction is needed to fulfill the primary purposes of discipline." (Std. 1.7(b).) Further, both Barton and Potere committed similar and significant misconduct involving moral turpitude.

In additional support for his argument that disbarment is not warranted, Potere cites *Segretti v. State Bar* (1976) 15 Cal.3d 878, contending his misconduct is not worse than Segretti's, who received a two-year actual suspension. Segretti pleaded guilty to two federal offenses related to his work on former President Richard Nixon's reelection campaign. The court found Segretti's actions involved moral turpitude as he "repeatedly committed acts of deceit designed to subvert the free electoral process." (*Id.* at p. 887.) While both cases involve dishonesty, Segretti, unlike Potere, received mitigation for recognizing the wrongfulness of his misconduct, a key distinction. Further, *Segretti* was decided pre-standards and lacks the serious aggravation present here.

In considering all of Potere's arguments on review, we find no basis to recommend a more lenient sanction than disbarment given Potere's multiple acts of moral turpitude and dishonesty, the significant harm caused, and his indifference. His lack of insight is particularly troubling as there are no assurances his misconduct will not recur. (Std. 1.7(b) [greater sanction appropriate if serious harm present along with unwillingness to conform to ethical responsibilities].) Further, Potere's mitigation for cooperation, good character, and pro bono and community service activities is not compelling when compared to his aggravation. In light of his serious misconduct,

a discipline at the high end of the spectrum provided under standard 2.15(b) is justified. Based on the entire record, we conclude that anything short of disbarment would fail to protect the public and would cast serious doubt on the public's confidence in the legal profession. Following disbarment, Potere will be required to demonstrate in a reinstatement proceeding that he is rehabilitated before he is entitled to resume practicing law.

VII. RECOMMENDATION

For the foregoing reasons, we recommend Michael Bernard Potere be disbarred from the practice of law and his name be stricken from the roll of attorneys admitted to practice law in California.

We further recommend he 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 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. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against a member who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

VIII. MONETARY SANCTIONS

The court does not recommend the imposition of monetary sanctions as all the misconduct in this matter occurred prior to April 1, 2020, the effective date of rule 5.137, which implements Business and Professions Code section 6086.13. (See *In the Matter of Wu* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 263, 267 [rules of statutory construction apply when interpreting Rules Proc. of State Bar]; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208–1209 [absent express retroactivity provision in statute or clear extrinsic sources of intended

retroactive application, statute should not be retroactively applied]; *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841 [where retroactive application of statute is ambiguous, statute should be construed to apply prospectively]; *Fox v. Alexis* (1985) 38 Cal.3d 621, 630–631 [date of offense controls issue of retroactivity].)

IX. ORDER

The order that Michael Bernard Potere be involuntarily enrolled as an inactive attorney of the State Bar pursuant to section 6007, subdivision (c)(4), effective October 31, 2019, will remain in effect pending consideration and decision of the Supreme Court on this recommendation.

McGILL, J.

WE CONCUR:

PURCELL, P. J.

HONN, J.