PUBLIC MATTER—NOT DESIGNATED FOR PUBLICATION

Filed August 14, 2020

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	18-O-12311
	)	
IVAN BARRY SCHWARTZ,	)	OPINION AND ORDER
	)	
A Member of the State Bar, No. 153264.	)	
	)	

This is Ivan Barry Schwartz's third disciplinary proceeding since 1997. He is charged with three counts of misconduct surrounding his *pro hac vice* admission to Montezuma County District Court in Colorado. Specifically, the Notice of Disciplinary Charges (NDC) alleged that Schwartz: committed an act of moral turpitude by misrepresentation; failed to obey a court order; and engaged in the unauthorized practice of law (UPL) in another jurisdiction. The hearing judge found culpability on all counts and concluded that Schwartz's current misconduct, along with his prior misconduct and lack of any compelling mitigation, made clear that no discipline short of disbarment would suffice to protect the public and the courts and maintain confidence in the legal profession.

Schwartz seeks review. He requests discipline of a one-year actual suspension rather than disbarment, arguing, among other things, that the Office of Chief Trial Counsel of the State Bar (OCTC) failed to establish culpability by clear and convincing evidence.[1] OCTC does not appeal and asks that we affirm the judge's disbarment recommendation. Upon independent review of the record (Cal. Rules of Court, rule 9.12), we dismiss count two (failure to obey a court order) for

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

lack of proof, but find culpability for the remaining counts and affirm the judge's discipline recommendation and most of the aggravating and mitigating findings. Schwartz committed acts of moral turpitude and did not prove compelling mitigation. Disbarment is therefore appropriate under our disciplinary standards and case law.

I. PROCEDURAL BACKGROUND

OCTC filed the NDC on December 19, 2018. On January 14, 2019, Schwartz filed a response to the NDC. On April 15, the parties filed a Stipulation as to Facts and Admission of Documents (Stipulation). A one-day trial was held on April 23. After OCTC rested its case-in-chief, Schwartz made an oral motion to dismiss count one, which was denied by the hearing judge. On July 22, the judge issued her decision recommending Schwartz be disbarred and placing him on involuntary inactive status. After the decision was filed, Schwartz filed a motion for a new trial, which was denied. On October 7, 2019, Schwartz requested review.

II. FACTUAL BACKGROUND[2]

A. Schwartz's Prior Discipline

Schwartz was admitted to practice law in California on June 5, 1991, and has two prior disciplinary suspensions. His misconduct began in 1993, shortly after his admission to the bar. In his first disciplinary matter, Schwartz stipulated to the following six counts of misconduct in two client matters: commingling, two counts of failing to maintain client funds in trust, failing to promptly pay medical providers, failing to promptly pay settlement funds to his client, and failing to respond to client inquiries. His misconduct was aggravated by multiple acts and mitigated by his stipulation with the State Bar, extreme emotional difficulties involving alcoholism, remorse and recognition of wrongdoing, restitution, community service, and lack of

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

a prior record of discipline. The California Supreme Court imposed a 60-day actual suspension with two years' probation, which became effective January 29, 1998.[3]

Three years after his probation ended in 2000, Schwartz engaged in further misconduct spanning 2003 to 2007. In his second disciplinary proceeding, he stipulated to eight counts of misconduct in three client matters and was placed on a six-month actual suspension with three years of probation, effective February 4, 2012, but with credit for his inactive enrollment.[4] Specifically, Schwartz's misconduct involved: failing to perform services competently, failing to maintain client funds in trust, failing to promptly pay client funds, entering into an illegal fee agreement, failing to avoid the representation of an adverse interest, committing an act of moral turpitude by misappropriating clients' settlement funds, committing an act of moral turpitude through misrepresentation, and commingling. His misconduct was aggravated by his prior record and mitigated by his stipulation with the State Bar and his successful completion of the Alternative Discipline Program (ADP). Schwartz's probation ended in 2015.

B. Novak Litigation

The current disciplinary matter arises from Schwartz's misconduct in 2016 in a Colorado probate action. On December 21, 2015, Linda Novak filed suit in Montezuma County District Court against the D'Casa Villa Trust (the Trust) and Gilbert Schwartz,[5] individually, as the Trustee. Gilbert is Schwartz's father. Novak claimed that she was a beneficiary of the Trust through inheritance but never received her distributional share after the Trust sold property in 2012. Novak believed that Gilbert was the sole trustee for the Trust and responsible for making

[3] Supreme Court No. S065079 (State Bar Court Nos: 94-O-10585; 94-O-11091; 94-O-15531).

[4] Supreme Court No. S197332 (State Bar Court Nos: 06-O-13672; 08-O-13868; 08-O-14600).

[5] Further references to Gilbert Schwartz are to his first name only to differentiate him from his son; no disrespect is intended.

distributions from it. At the time the Novak action was filed and thereafter, Schwartz was also a "member"[6] of the Trust and had served as the attorney for Gilbert and the Trust in California.

On March 14, 2016, Schwartz filed an Out-of-State Counsel's Verified Motion Requesting *pro hac vice* Admission (*pro hac vice* Motion) in Montezuma County District Court to appear as attorney for the defendants in the Novak action. He filed the motion in association with Colorado attorney George Buck. The motion stated that Schwartz was required to provide, inter alia, an affidavit with the following information:

> [*Name of Applicant Attorney*] has been publicly disciplined, placed under an order of disability, or has had a request for pro hac vice admission denied or revoked in the following jurisdictions: _____ (*state the jurisdiction, the date of transfer to disability, the date of discipline, the date of the denial or revocation, or pro hac vice admission, the nature of the violation and the discipline imposed or the reason for the denial or revocation of pro hac vice admission)*

Schwartz signed and attached his affidavit to the *pro hac vice* Motion, characterizing his two prior disciplines in California as: "1998 failure to maintain funds in trust and timely pay, 60-day suspension; 2012, failure to timely pay health care provider, communicate with client, undertook representation without disclosing prior representation, 6 months suspension and completion of the Lawyers Assistance Program." On March 15, Novak's attorney, Jon Kelly, filed a response objecting to Schwartz's application. Kelly also attached Schwartz's California disciplinary record. On April 8, Montezuma County District Court Judge Todd Plewe denied Schwartz's *pro hac vice* Motion without hearing, finding that "[t]he California attorney discipline record of the attorney does not merit *pro hac vice* admission."

The district court set a hearing in the Novak matter for July 7, 2016. On May 25, attorney Buck, local counsel for Schwartz, Gilbert, and the Trust, filed a Notice of Withdrawal and sent a copy to Schwartz and Gilbert. The district court granted Buck's withdrawal request on June 9.

[6] The record characterizes Schwartz's role as being "a member" of the Trust, which he clarified at oral argument to mean that he was a beneficiary.

On June 22, Gilbert filed a Motion for Continuance seeking to postpone the July 7 hearing for 45 days. The motion was signed by Gilbert but drafted by Schwartz, and stated, "[o]n May 25, 2016, my current local counsel, George R. Buck, Jr. filed a Notice of Withdrawal as Attorney of Record. This was the first Notice received that Mr. Buck intended to withdraw and now I need to locate, interview and retain new counsel." On that same day, Gilbert also filed a Notice of Change of Address substituting Schwartz's office address for Gilbert's home address. This notice was also drafted by Schwartz. After the motion was filed, Schwartz called the district court clerk on several occasions to check the case status. On or about July 5 or 6, 2016, Schwartz attempted to file a Motion to Dismiss with the Dolores County court clerk; however, the motion was rejected because the Novak action was pending in Montezuma County.

On July 5, Schwartz sent an email to attorney Kelly and attached a copy of the Motion to Dismiss. In the email, Schwartz claimed that Novak's verified petition was false, misleading, fraudulent, and perjurious. He further stated that he was available to speak with Kelly about the motion or any matter related to the Novak action and that he planned to appear telephonically at the July 7 hearing as a representative of the Trust.

On July 6, the district court denied Gilbert's motion to continue the July 7 hearing. On July 7, Schwartz faxed a letter, with a copy of the Motion to Dismiss, to Judge Plewe on behalf of Gilbert, stating that:

> I had sent this UPS for delivery yesterday, but UPS failed to deliver it on time. I appreciate your Clerk's staff (Wendy) allowing me to fax this to you this morning due to the exigent circumstances. I believe the motion is on point and dispositive. The Motion makes it abundantly clear that the Petitioner Linda Novak has misled the Court in her Verified Petition and that at all relevant time [*sic*], the Trust was in regular and frequent communication with her. My son, Ivan, is authorized to speak In Pro Per on my behalf this morning. Thank you for allowing us to appear telephonically this morning.
>
> Very Sincerely Yours,
> /s/ Gilbert Schwartz

At the July 7 hearing, Schwartz appeared by telephone on behalf of the Trust. He stated that he was appearing on behalf of Gilbert and hoped the court had received the information faxed that morning. Judge Plewe asked Schwartz who drafted the motion. Schwartz responded that he had. Judge Plewe found that by drafting and attempting to file a pleading, and by calling in and appearing on behalf of the Trustee and the Trust, Schwartz was violating the court's prior order denying his *pro hac vice* Motion and that he was engaging in UPL. Judge Plewe also informed Schwartz that he would be referring the matter to the Colorado Attorney Regulation Office (CARO) for his UPL. The judge set a status conference for August 22, 2016, allowing Gilbert and the Trust adequate time to retain counsel. They retained local counsel in Colorado on July 15 when attorney Richard Sims filed an entry of appearance in the trust litigation. The probate action was later dismissed without prejudice.

C. Schwartz's Colorado Discipline

After Judge Plewe referred the matter to CARO, on December 5, 2017, Schwartz entered into a stipulation with CARO, which stated that he violated the following Colorado Rules of Professional Conduct: rule 3.4(c) [knowing disobedience of obligation under rules of tribunal], rule 5.5(a)(1) [UPL in Colorado], and rule 5.5(a)(2) [practice of law in jurisdiction where doing so violates regulations of legal profession in that jurisdiction]. The stipulation specified that Schwartz's state of mind was "negligent." The Colorado Supreme Court approved the stipulation on December 22, 2017, and Schwartz was publicly censured.

III. CULPABILITY

A. Count One: Misrepresentation (Bus. & Prof. Code § 6106)[7]

Section 6106 applies to misrepresentations and concealment of material facts. (See *In the Matter of Crane and Depew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 154–155.) OCTC charged Schwartz with misrepresenting his prior records of California discipline to the Montezuma County District Court through his *pro hac vice* Motion. OCTC claims Schwartz committed an act of moral turpitude because he knew that the motion contained material omissions and was therefore false and misleading. The hearing judge found that Schwartz willfully violated section 6106 by gross negligence through his lack of candor, material omissions, and misleading disclosure.[8] As detailed below, we agree.

It is well established that moral turpitude includes an attorney's false or misleading statements to a court or tribunal. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 786.) "No distinction can . . . be drawn among concealment, half-truth, and false statement of fact. [Citation.]" (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315, quoted in *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 156.) To gain *pro hac vice* admission to practice law before the Colorado court, Schwartz was required to file a verified motion and affidavit. Specifically, as it pertains to prior discipline, the motion required that he state: *the jurisdiction, date of discipline, nature of the violation* and *discipline imposed*.

Schwartz characterized his first disciplinary matter as "1998 failure to maintain funds in trust and timely pay, 60-day suspension[.]" This was not accurate because Schwartz stipulated to six counts of misconduct in his 1998 discipline, which included: commingling, two counts of

[7] All further references to sections are to the Business and Professions Code unless otherwise noted. Section 6106 states in relevant part: "The commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension."

[8] Although the hearing judge characterized Schwartz's misconduct as "an intentional mischaracterization of his prior discipline," she ultimately concluded that his misrepresentation constituted a violation of section 6106 through gross negligence.

failing to maintain client funds in trust, failing to promptly pay medical providers, failing to promptly pay settlement funds to his client, and failing to respond to client inquiries in two client matters. Omitted from his disclosures to the Colorado court was his culpability for commingling and failing to communicate with a client from his first disciplinary record.[9]

Schwartz also misrepresented the extent of his 2012 disciplinary matter. In his motion, he listed this discipline as "2012, failure to timely pay health care provider, communicate with client, undertook representation without disclosing prior representation, 6 months suspension and completion of the Lawyers Assistance Program." He did not disclose his culpability for commingling, failing to perform competently, and entering into an illegal fee agreement. Significantly, he also omitted his two more serious moral turpitude violations for misappropriation and misrepresentation, which we find especially troubling.

On review, Schwartz contends that the Colorado court failed to clarify what he was required to disclose and that OCTC failed to produce any evidence of what was required. He argues that the only evidence regarding the amount of detail required was his uncontroverted testimony of his call to the Colorado licensing agency. We are not persuaded by Schwartz's arguments. Not only did Schwartz's factual misrepresentations and omissions create a false depiction of the extent of his prior misconduct, but they were material given the court's purpose in making a determination about his fitness to practice law necessary for *pro hac vice* admission in a case involving trust administration. He had a duty of candor to advise the Colorado court of the true extent of his prior discipline. (See *Williams v. Superior Court* (2007) 147 Cal.App.4th 36, 56 ["Attorneys have the duty to be forthright and honest with the court"].)

We also reject Schwartz's argument that no evidence suggests that he was aware of the detailed findings of fact and conclusions of law contained in the multiple stipulations from his

[9] In his motion, Schwartz listed "failing to communicate with a client" as misconduct in his second disciplinary record from 2012; however, it was actually from his 1998 discipline.

prior disciplinary matters. He should have known, with minimal diligence, the misconduct to which he stipulated; notably, Novak's attorney was able to obtain Schwartz's disciplinary record and accurately report it in the opposition to the *pro hac vice* Motion. Even if we were to assume Schwartz's omissions were unintentional, he had a duty to confirm the accuracy of his statements prior to filing an affidavit with the court. (*In the Matter of Downey*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 155 [gross negligence amounting to moral turpitude where attorney filed verification stating his clients were out of county without first confirming that fact]; *In the Matter of Yee* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 330 [culpability under § 6106 for act of moral turpitude where attorney was found to be grossly negligent in reporting her MCLE compliance without making any effort to confirm its accuracy].) In view of these facts, particularly his failure to confirm his prior discipline, we find that Schwartz's misrepresentations constituted moral turpitude by gross negligence in violation of section 6106.

B. Count Two: Failure to Obey Court Order (§ 6103)[10]

Count two alleged that Schwartz disobeyed or violated the Montezuma County District Court's April 8, 2016 order denying his request for *pro hac vice* admission by subsequently drafting pleadings, attempting to file a pleading, communicating with opposing counsel regarding substantive legal matters, and making a telephonic appearance on July 7, 2016, in the Novak action. The hearing judge found Schwartz culpable as charged.

To prove failure to obey a court order under section 6103, it must be established, at a minimum, that an attorney *knew* what he or she was doing or not doing and that he or she intended either to commit the act or to abstain from committing it. (*In the Matter of Maloney and Virsik*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 787, citing *King v. State Bar* (1990) 52 Cal.3d

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

307, 313–314.) The record establishes that Schwartz was aware of the district court's April 8 order denying him *pro hac vice* status. That order states "[t]he California attorney discipline record of the attorney does not merit *pro hac vice* admission." And Schwartz acknowledged the court's denial in his Stipulation. However, he argues that he did not attempt to appear telephonically *pro hac vice* on behalf of the Trust, but rather, on the Trustee's behalf since his father was unavailable, so that the defendants did not fail to appear and default.[11] OCTC contends that by filing pleadings and appearing on behalf of his father and the Trust, Schwartz violated the court's order.

We find OCTC did not prove by clear and convincing evidence that Schwartz violated section 6103. The language of the Colorado court's order is limited to denying him *pro hac vice* status. Put differently, the order did not state an affirmative prohibition from practicing law in Colorado by obtaining admission through other means. The order simply denied him the *pro hac vice* avenue of doing so.

OCTC argues that Schwartz is culpable because he stipulated with CARO to violating Colorado Rules of Professional Conduct, rule 3.4(c) (knowing disobedience of an obligation under the rules of a tribunal). We examined Schwartz's underlying stipulation with CARO and note that it states "[a]fter [Schwartz's] *pro hac vice* application had been denied by the Court, his conduct constituted the unauthorized practice of law." We agree with this interpretation. The record clearly supports that Schwartz engaged in UPL in Colorado, as discussed below in our culpability findings under count three. However, OCTC did not prove that Schwartz willfully intended to disobey or that he otherwise violated the court's denial of his motion for *pro hac vice* status. Resolving all reasonable doubts in Schwartz's favor (*Lee v. State Bar* (1970) 2 Cal.3d

[11] We note that the Colorado Supreme Court held in *Application for Water Rights of Town of Minturn* (Colo. 2015) 359 P.3d 29, 32, a non-attorney trustee cannot represent a trust pro se. At the July 7, 2016 hearing, Schwartz acknowledged that he was unaware of this authority and apologized to the court.

927, 939), we do not find sufficient evidence to support a section 6103 violation. Accordingly, we dismiss count two with prejudice for lack of evidence. (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 843 [dismissal of charges for want of proof after trial on merits is with prejudice].)

C. Count Three: UPL in Another Jurisdiction (Former Rules Prof. Conduct , rule 1-300(B))[12]

Rule 1-300(B) provided that "[a] member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." Schwartz argues that no evidence supports a finding that he intentionally practiced law or was grossly negligent in practicing law in Colorado. In the NDC, OCTC alleged that he practiced law in Colorado by drafting and attempting to file a pleading with the court, and by calling into and appearing telephonically at a court hearing on behalf of the Trust, in violation of the Colorado Rules of Professional Conduct, and thus in violation of rule 1–300(B). The hearing judge concluded that Schwartz's testimony during the disciplinary trial supports a finding that he intentionally practiced law or at least was grossly negligent by engaging in UPL in Colorado.[13] Upon our independent review, we find that the record supports Schwartz's culpability for willfully violating rule 1-300(B).

The Colorado Supreme Court's finding that Schwartz violated Colorado Rules of Professional Conduct rule 5.5(a)(1) [UPL in Colorado] and rule 5.5(a)(2) [practice of law in jurisdiction where doing so violates regulations of legal profession in that jurisdiction] is conclusive evidence that he did so. (*In the Matter of Jenkins* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 157, 162 ["record of discipline imposed in Michigan conclusively established

[12] All further references to rules are to the Rules of Professional Conduct that were in effect until November 1, 2018, unless otherwise noted.

[13] These findings are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A) [great weight given to hearing judge's factual findings].)

[attorney's] culpability here"].) Schwartz appeared on behalf of Gilbert at the July 7 hearing, drafted a pleading, attempted to file a motion to dismiss, and engaged in substantive legal discussions with opposing counsel in the Novak matter; these actions constitute the practice of law. (See *People v. Merchants' Protective Corp.* (1922) 189 Cal. 531, 535 [practice of law embraces wide range of activities such as giving legal advice and preparing documents to secure client rights]; *Morgan v. State Bar* (1990) 51 Cal.3d 598, 603–604 [negotiating settlement with opposing counsel constitutes practice of law].)

We do not consider Schwartz's belated claim that the evidence does not support this finding because it is inconsistent with the discipline to which he already stipulated in Colorado. (*In the Matter of Lenard* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 250, 257 [foreign jurisdiction's authority determines whether California attorney has violated professional regulations in foreign jurisdiction].) He stipulated to the Colorado disciplinary findings on December 15, 2017, admitting that he engaged in UPL in that jurisdiction by drafting pleadings and appearing in court on behalf of a party. Accordingly, Schwartz committed UPL in a foreign jurisdiction in willful violation of rule 1-300(B).

IV. AGGRAVATION AND MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct[14] requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Schwartz to meet the same burden to prove mitigation.

[14] Further references to standards are to this source.

A. Aggravation

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

Schwartz I.[15] Schwartz's misconduct began just two years after being admitted to practice law. Between 1993 to 1995, he commingled personal and client funds, failed to maintain client funds in trust, failed to promptly pay medical providers, failed to promptly pay settlement funds to his client, and failed to respond to client inquiries in two separate client matters. His misconduct was aggravated by multiple acts. In mitigation, he had no prior record of discipline, cooperated with the State Bar, experienced extreme emotional difficulties involving alcoholism, expressed remorse and recognition of wrongdoing, paid restitution, and performed pro bono work. Schwartz received an actual suspension of 60 days and a two-year period of probation, which ended in January 2000.

Schwartz II.[16] From 2003 to 2007, Schwartz engaged in misconduct in three client matters. He stipulated to commingling, failing to perform services competently, failing to maintain client funds in trust, entering into an illegal fee agreement, failing to avoid the representation of adverse interests, committing acts of moral turpitude by misappropriating clients' settlement funds, and misrepresenting to a client's family that he had filed an action when he had not because the statute of limitations had run. His misconduct was aggravated by a prior record of discipline and mitigated by his entering into a stipulation with the State Bar and his successful completion of ADP. Schwartz received a six-month actual suspension with three years' probation, which ended in 2015. But in 2016, Schwartz again engaged in misconduct, in the Novak action, which resulted in this matter.

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[15] Supreme Court No. S065079 (State Bar Court Nos. 94-O-10585; 94-O-11091; 94-O-15531).

[16] Supreme Court No. S197332 (State Bar Court Nos. 06-O-13672; 08-O-13868; 08-O-14600).

The hearing judge assigned significant weight to Schwartz's prior records of discipline, finding that the span of his bad acts occurring just two years after he was admitted to practice and continuing through 2016, coupled with the relatively short period of time between his multiple acts of misconduct, evidences a lack of rehabilitation. We affirm and assign substantial weight. Over the course of his legal career, Schwartz has been engaged in misconduct or has been actively involved with the disciplinary system more frequently than not. He argues that the hearing judge improperly focused on the "quantum of the discipline" without regard to the "common thread" of the repetitiveness of his offenses and discipline. This argument fails. In fact, we note his recurring acts of moral turpitude—in *Schwartz II*, he made misrepresentations, and in this case, he made misrepresentations regarding the extent of his prior discipline in the *pro hac vice* Motion. We also observe that he has repeatedly committed trust account violations. This causes concern and great weight is placed on a common thread among past and present misconduct. (*In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 841; *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443–444 [similarities between prior and current misconduct indicate lack of rehabilitation].)

2. Multiple Acts of Wrongdoing (Std. 1.5(b))

The hearing judge found Schwartz's multiple violations to be a significant aggravating circumstance. Schwartz contends that significant weight is not warranted because his misconduct, when viewed in context, was limited in scope to the Novak action. We find that Schwartz committed the following 11 bad acts for which we assign substantial weight. He appeared on behalf of Gilbert at the July 7 hearing, drafted a pleading, attempted to file a motion to dismiss, engaged in substantive legal discussions with opposing counsel, and failed to disclose in his *pro hac vice* Motion two counts of misconduct from his 1998 discipline and five counts of misconduct from his 2012 discipline. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State

Bar Ct. Rptr. 631, 646–647 [three instances of misconduct considered multiple acts]; see also *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594 [multiple acts in aggravation for one count of moral turpitude where attorney made 11 misrepresentations over 18-month period].)

B. Mitigation

1. Extreme Emotional Difficulties (Std. 1.6(d))

Standard 1.6(d) provides that mitigation may be assigned for extreme emotional difficulties or physical or mental disabilities if (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 did not afford Schwartz any mitigating credit for his emotional problems upon finding that they were diminished by his testimony and already considered as mitigation in his prior discipline. On review, Schwartz argues that several letters in support of his good character mitigation establish that he was embroiled in a difficult divorce at the time of his misconduct.

We find that Schwartz is not entitled to mitigation for emotional difficulties because he failed to establish a nexus between them and his misconduct, as required under the standard. He relies on general characterizations provided by his friends and colleagues to explain the personal troubles he suffered because of his divorce. However, this evidence is insufficient to support mitigation because it does not prove that his emotional difficulties were directly responsible for his misconduct. (*In the Matter of Elkins* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 160, 168 [no mitigation credit where attorney failed to establish causal nexus between emotional difficulties and misconduct].) Like the hearing judge, we assign no mitigation credit for emotional difficulties.

2. Candor and Cooperation (Std. 1.6(e))

Schwartz's Stipulation is a mitigating circumstance, and the hearing judge assigned moderate mitigating weight. (Std. 1.6(e) [spontaneous candor and cooperation with State Bar is mitigating].) Schwartz did not admit culpability, and "more extensive weight in mitigation is accorded those who, where appropriate, willingly admit their culpability as well as the facts." (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190.) Further, the Stipulation was not extensive and contained easy-to-prove facts. (*In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 318 [limited weight for non-extensive stipulation to easily proved facts].) Therefore, we assign limited weight in mitigation for this circumstance.

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

Schwartz 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 afforded mitigation credit for Schwartz's good character. Eleven character references—including two superior court judges, one former superior court judge, three attorneys, colleagues, and friends—presented letters attesting to Schwartz's good character. These references, representing a broad spectrum of the community, described Schwartz as compassionate, caring, dedicated, and respected. The judges and attorneys affirmed his exemplary moral character and strong commitment to the legal profession. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration given to attorneys' testimony due to their "strong interest in maintaining the honest administration of justice"].) We therefore find that Schwartz is entitled to substantial mitigation for his good character.

4. Pro Bono Work and Community Service

Pro bono work and **c**ommunity service are mitigating circumstances. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) The hearing judge found that Schwartz's contributions to Pathfinders of San Diego (Pathfinders), a residential alcohol-recovery center, warrant some weight in mitigation. Schwartz testified that he has provided legal services on a sliding scale fee rate to members of Pathfinders for at least 25 years. He also refers to his character reference letter from S.G. Stanley, Pathfinders' president, to highlight his commitment and outstanding contributions to the organization over the decades. Although Schwartz did not provide specific details as to the amount of hours worked or clients whom he helped on a pro bono basis, we note that Stanley's letter generally corroborates that Schwartz has volunteered his legal services over the years to new residents at Pathfinders without charge. We find that this evidence is entitled to moderate mitigation. (See *Rose v. State Bar* (1989) 49 Cal.3d 646, 667 [mitigation for legal abilities, dedication, and zeal in pro bono work].)

5. Good Faith Belief (Std. 1.6(b))

An attorney may be entitled to mitigation credit if he can establish a "good faith belief that is honestly held and objectively reasonable." (Std. 1.6(b); *In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653 [good faith established as mitigating circumstance when attorney proves belief was honestly held and reasonable].) Schwartz contends that he should be given mitigation credit for his good faith belief that his partial disclosure of his prior discipline in his *pro hac vice* Motion was adequate. He relies on his testimony regarding his conversation with the Colorado licensing board, which Schwartz claims supports his belief. OCTC argues that Schwartz is not entitled to any good faith mitigation because his beliefs were objectively unreasonable. We find OCTC's argument persuasive. First, the hearing judge found Schwartz's testimony to be not credible. (*McKnight v. State Bar* (1991)

53 Cal.3d 1025, 1032 [hearing judge best suited to resolve credibility having observed and assessed witnesses' demeanor and veracity firsthand].) And even if his good faith belief was honestly held, it was not objectively reasonable. The unequivocal language of the affidavit required Schwartz to attest to the jurisdiction, date, and the nature of the violation and discipline imposed for all prior disciplinary matters, which he did not sufficiently provide. In addition, the Colorado court denied Schwartz's *pro hac vice* Motion upon finding out the full nature and extent of his prior misconduct. Accordingly, we do not assign mitigating credit for good faith.

6. Remoteness in Time (Std. 1.6(h))

Standard 1.6 requires a showing of subsequent rehabilitation in addition to remoteness. (Std. 1.6(h) [remoteness in time of misconduct and subsequent rehabilitation can be mitigating].) Schwartz argues his rehabilitation is proved by compliance with prior probation terms and his successful completion of the Lawyer Assistance Program (LAP), which afforded him ADP disposition. We consider his prior misconduct to be an aggravating circumstance that evidences a *lack* of rehabilitation. We further decline to assign mitigation under this standard because Schwartz was under an obligation to comply with his supervised probation. (See *Seide v. Committee of Bar Examiners* (1989) 49 Cal.3d 933, 939 ["It is not enough that petitioner kept out of trouble while being watched on probation; he must affirmatively demonstrate over a prolonged period his sincere regret and rehabilitation"].)

7. Schwartz's Request for Additional Mitigation

Schwartz seeks additional mitigation for his purported remorse and recognition of wrongdoing, as well as for lack of harm. We do not find clear and convincing evidence to prove any additional mitigation. Upon our review of the record, we do not find that Schwartz has demonstrated remorse and recognition of wrongdoing. In fact, we find that he attempted to shift blame by testifying that during his telephonic appearance in the Novak action, Judge Plewe

"never said anything [prohibiting him from appearing before the court] . . . [Judge Plewe] had every opportunity to do that." (See *Gadda v. State Bar* (1990) 50 Cal.3d 344, 356 [lack of insight where attorney is reluctant to recognize seriousness of misconduct or accept responsibility for wrongdoing by attempting to blame others].) Further, during his Colorado discipline, Schwartz stipulated that his misconduct harmed the administration of justice by causing a delay in the proceedings, resulting in injury to the court and the opposing party.

V. DISBARMENT IS THE APPROPRIATE DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to preserve public confidence in the profession; and to maintain high professional standards for attorneys. (Std. 1.1.) Our disciplinary analysis begins with the standards. While they are guidelines for discipline and are not mandatory, we give them great weight to promote consistency. (*In re Silverton* (2005) 36 Cal.4th 81, 91–92.) The Supreme Court has instructed us to follow the standards "whenever possible." (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) We also look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.)

In considering 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].) Here two standards are applicable. Standard 2.11 addresses an act of moral turpitude and provides that disbarment or actual suspension is the presumed sanction and standard 2.10(b) addresses a UPL violation and presumes suspension or reproval as appropriate discipline. Thus, standard 2.11 applies.

Given Schwartz's disciplinary history, we also 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.[17] Schwartz's case meets two of these criteria. First, he was actually suspended for 60 days and for six months, respectively, in his two prior disciplinary matters in 1998 and 2012. Second, like the hearing judge, we find that Schwartz repeatedly failed to comply with his ethical obligations. His two prior disciplinary matters included a total of 14 counts of culpability—two of which involved moral turpitude—in five separate client matters. The fact that Schwartz's 2012 discipline and his misconduct in the current matter both involve moral turpitude by misrepresentations demonstrates that he still has not learned from his past mistakes.

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 for a third discipline. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506–507 [disbarment is not mandatory in every case of two or more prior disciplines].) However, if we deviate from recommending disbarment, we must articulate clear reasons for doing so. (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons for departure from standards].) Schwartz has not identified an adequate reason for us to depart from applying standard 1.8(b), and we cannot discern any. His history of misconduct began in 1993 and has continued off and on through 2016. The repetitive nature of his prior and current misconduct establishes his unwillingness or inability to conform to ethical norms.

Schwartz argues that a one-year suspension is adequate, relying on *Arm v. State Bar* (1990) 50 Cal.3d 763, 780.) We do not find this case applicable. In *Arm*, the Supreme Court rejected a disbarment recommendation and suspended Arm for one year by finding that

[17] 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.

compelling mitigating circumstances predominated, no similarities existed between prior and current acts of misconduct, and there was no bad faith or resulting harm.

Schwartz also cites to multiple cases involving UPL to support an actual suspension: *In the Matter of Palmer* (Review Dept. Jan. 6, 2016) State Bar Court No. 12-O-16924 [nonpub. opn.]); *In the Matter of Downey*, *supra*, 5 Cal. State Bar Ct. Rptr. 151; and *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896. We note, however, that none of these cases involves attorneys with two prior records of discipline and a long history of recurring misconduct, which Schwartz has. Thus, we do not find that they provide much guidance here.

Beginning just two years after his admission to practice law, Schwartz has consistently failed to meet his professional obligations for two decades. After commingling personal funds with client funds, failing to maintain funds in trust, and failing to promptly pay funds in the 1990s, he committed those same violations again, in addition to misappropriation. His second round of misconduct started just three years after his probation ended. He stipulated to moral turpitude by misrepresentation in his second disciplinary proceeding but repeated that same misconduct in this third disciplinary matter. These actions are deeply concerning. (See *Lebbos v. State Bar* (1991) 53 Cal.3d 37, 45 [multiple acts of misconduct involving moral turpitude and dishonesty warrant disbarment because they show attorney "has no appreciation that [his] method of practicing law is totally at odds with the professional standards of this state"]; see also *In the Matter of Downey*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 157 [misleading statements are troubling and oppose fundamental rules of ethics—common honesty—without which profession is "worse than valueless" in administration of justice].) We do not recommend a more lenient sanction than disbarment. We conclude from this record that further probation and suspension would be inadequate to prevent Schwartz from committing future misconduct that would endanger the public, clients, and courts. (*Barnum v. State Bar* (1990) 52 Cal.3d 104, 112–113

[disbarment imposed where attorney repeatedly failed to comply with probation conditions since further probation unlikely to prevent future misconduct].) Accordingly, the public, the courts, and the profession are best protected if Schwartz is disbarred

VI. RECOMMENDATION

We recommend that Ivan Barry Schwartz be disbarred from the practice of law and that his name be stricken from the roll of attorneys admitted to practice law in California.

We further recommend that Schwartz 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. 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.

VII. 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 of the Rules of Procedure of the State Bar, 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].)

VIII. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

The order that Ivan Barry Schwartz be involuntarily enrolled as an inactive attorney of the State Bar pursuant to section 6007, subdivision (c)(4), effective July 25, 2019, will remain in effect pending consideration and decision of the Supreme Court on this recommendation.

HONN, J.

WE CONCUR:

PURCELL, P. J.

McGILL, J.