PUBLIC MATTER—NOT DESIGNATED FOR PUBLICATION

Filed April 5, 2021

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	SBC-19-O-30284
	)	
JEFFREY STEPHAN BENICE,	)	OPINION AND ORDER
	)	
State Bar No. 81583	)	
	)	

This is Jeffrey Stephan Benice's first discipline case in more than 40 years of practice. The Office of Chief Trial Counsel of the State Bar (OCTC) filed a Notice of Disciplinary Charges (NDC) alleging that, in one client matter, Benice (1) maintained an unjust action, (2) sought to mislead a judge, (3) committed moral turpitude by misrepresentation, and (4) failed to timely report sanctions to the State Bar. The hearing judge found Benice culpable of all counts and recommended discipline, including a 30-day actual suspension.

Benice appeals. He argues he is not culpable of the first three counts of the NDC, but concedes he did not timely report sanctions, as alleged in count four. He requests an admonition. OCTC did not appeal.

Upon independent review of the record (Cal. Rules of Court, rule 9.12), we find that OCTC did not prove Benice is culpable of counts one, two, and three. He is, however, culpable of count four. Given Benice's substantial mitigation and no aggravating circumstances, we conclude that discipline is not necessary to protect the public, the courts, and the legal profession. An admonition is the appropriate disposition.

I. PROCEDURAL HISTORY

Benice was admitted to practice law in California on November 29, 1978. On June 13, 2019, OCTC filed the NDC. On July 8, Benice filed his response. On January 6, 2020, the parties entered into a detailed Stipulation as to Facts, Conclusions of Law, and Admission of Documents (Stipulation). A one-day trial took place on January 15, and the hearing judge issued her decision on April 24. Benice filed a request for review on May 26.

II. SUMMARY

Benice is an experienced civil practitioner who has represented clients in over 100 trials, including 75 by jury. At the heart of the disciplinary charges is an allegation that he improperly filed a motion for relief from default judgment entered against his client, Juliette Rappaport, in a civil case, along with a false declaration. OCTC cites a superior court's denial of Benice's motion for relief as frivolous and in bad faith in arguing that Benice is culpable as charged.

Our duty is to independently review the record from which we "may make findings, conclusions, or a decision or recommendation different from those of the hearing judge." (Rules Proc. of State Bar, rule 5.155(A).) We do so here. Portions of the record (including the superior court docket) are ambiguous as to whether and when Benice represented Rappaport, and the parties' Stipulation supports several of Benice's arguments. Thus, OCTC did not establish by clear and convincing evidence[1] that Benice maintained an unjust action, sought to mislead a judge, or made a misrepresentation about his status as Rappaport's attorney as charged in counts one, two, and three, respectively. Any mistakes Benice made in representing Rappaport as to these charges were, at most, negligent and are not disciplinable offenses.[2]

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

[2] The hearing judge rejected much of Benice's testimony that explained his actions as not credible. We generally give great weight to such findings but are mindful that adverse credibility

III. FACTS

A. Lawsuit Is Filed Against Rappaport

In December 2015, Freid and Goldsman APLC (the Goldsman firm) filed a civil complaint against Rappaport (Civil Case) for its attorney fees in her marital dissolution proceeding.[3] Attorney Sheldon Lytton represented Rappaport and Laurence Goldman represented the Goldsman firm.[4] On August 23, 2016, the superior court granted Lytton's motion to be relieved as counsel for Rappaport due to a lack of communication between the client and counsel.

1. Rappaport Retained Benice for Fee Arbitration Matter

On September 20, 2016, Rappaport retained Benice to represent her in a fee arbitration in the Civil Case and as a plaintiff in a related legal malpractice action.[5] On October 6, the arbitrator notified Benice that the arbitration hearing would be held on November 10, 2016. The superior court set a Case Management Conference (CMC) for January 17, 2017, and required Goldman to give notice. Goldman served only Rappaport.

The arbitration was held on November 10, 2016, before the Los Angeles County Bar Association Committee. Benice sent Glenn M. Horan, an attorney who shares office space and is of-counsel at Benice's law firm, to specially appear at the arbitration.[6] Goldman appeared on behalf of the Goldsman firm. On November 18, a non-binding award was issued in favor of the

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findings do not reveal the truth or infer that the truth is the converse of the rejected testimony. (*Edmondson v. State Bar* (1981) 29 Cal.3d 339, 343.) This principle applies here because, notwithstanding the hearing judge's findings, we properly rely on the parties' Stipulation and/or the documentary record that is consistent with or corroborates some of Benice's testimony.

[3] *Freid and Goldsman APLC v. Rappaport* (Super. Ct. L.A. County, No. BC602819).

[4] The similar names are spelled correctly: Goldman is an attorney in the Goldsman firm.

[5] On September 20, 2016, as Rappaport's attorney, Benice filed *Juliette Rappaport v. Melvin S. Goldsman, et al.* (Super. Ct. L.A. County, No. BC634399). The complaint was not served and was ultimately dismissed on March 7, 2017.

[6] The arbitration decision stated his appearance as, "Petitioner [Rappaport] appeared in person with Glenn M. Horan, as Petitioner's legal representative."

Goldsman firm and against Rappaport for $360,680.77, plus interest. The decision was served on Rappaport by mail and sent to Horan at Benice's office.

2. Rappaport Retained Benice in Civil Case

Benice testified that Rappaport retained him after the fee arbitration to represent her in the underlying Civil Case. On December 21, 2016, Benice filed in superior court a Rejection of Award and Request for Trial After Attorney-Client Fee Arbitration (Request for Trial). He was identified as Rappaport's attorney in the caption of the pleading. On January 11, 2017, Benice filed a CMC statement that also stated in the caption he was Rappaport's attorney and in the pleading that he would represent her at a jury trial. The CMC statement listed the pending associated malpractice action Benice filed on behalf of Rappaport in September 2016, which involved the same parties before the same judge. The Stipulation in this discipline proceeding stated that the Request for Trial and the CMC filings were made "on behalf of Ms. Rappaport in the Civil Case." Benice filed and served both pleadings on Goldman and neither Goldman nor the superior court objected.

The January 17, 2017 CMC was conducted by a superior court judicial assistant because the judge was unavailable. Goldman appeared in person on behalf of the Goldsman firm. Benice appeared specially by telephone on behalf of Rappaport, who was not present. The CMC was continued to February 2. The court docket stated that Benice specially appeared for Rappaport but also that Rappaport was in pro per and did not appear. Goldman was required to provide notice of the continued CMC; he served Rappaport but not Benice.

Benice testified that the reason he made a special appearance at the CMC was because he and Rappaport had not communicated since mid-December. He had been unable to obtain her signature on a substitution of attorney form and the lack of communication made him unsure about continuing as her attorney. Benice also testified he could not reveal other particulars about

communication problems with Rappaport due to attorney-client privilege but confirmed that she had not terminated his representation.

3. Goldman Requested Default Judgment Against Rappaport

On January 17, 2017, the same day as the CMC, Goldman filed a Request for Entry of Default and Court Judgment because no answer to the complaint had been filed. Goldman served only Rappaport. The superior court entered Rappaport's default the following day.[7]

At the February 2 CMC, Goldman appeared on behalf of the plaintiff. Benice, who knew about the hearing from the January 17 CMC, arranged for an appearance attorney to cover the CMC via CourtCall. Due to a problem in connecting to CourtCall, the attorney did not appear and Benice did not receive notice of the non-appearance nor did he timely follow up. In the February 2 minute order, the superior court judge reviewed the case, noting that the plaintiff prevailed in arbitration and that Rappaport filed an objection "through an attorney who has still not substituted into the case." The judge noted that no answer had been filed and the plaintiff had obtained an entry of default. The judge set a default prove-up hearing for February 17, 2017.

On February 7, 2017, Goldman filed and served on Rappaport a notice of entry of default, including the January 17 request for default and the superior court's January 18 entry of default. Goldman filed a second request for default, based on his declaration to support the plaintiff's position in the fee dispute with Rappaport. On March 29, 2017, the superior court entered a default judgment in favor of the Goldsman firm for $409,103.03. On March 30, Goldman filed and served on Rappaport a Notice of Entry of Judgment or Order, with a copy of the superior court's March 29 judgment. Goldman did not serve Benice or provide courtesy copies of the default filings or rulings.

[7] Benice testified he learned at the CMC that Rappaport's prior counsel had not filed an answer. Benice prepared one and instructed his staff to file it, but the default was entered before the staff could do so.

B. Two Motions to Set Aside Default Filed

1. Rappaport Filed Pro Per Motion to Set Aside Default

On August 7, 2017, Rappaport filed a pro per Motion Pursuant to Code of Civil Procedure section 473, subdivision (b) to Set Aside Default Judgment (First Default Motion). She argued that the default should be set aside because the plaintiff did not properly serve her with notice. In her declaration, she stated that she first learned about the default judgment in July 2017 after searching the court's docket. The motion also included a declaration from Benice stating that he "was counsel of record for [Rappaport's] arbitration in this matter" and that his office "was never served nor received any court notices or courtesy notices from Plaintiff regarding the notice of entry of default or related hearings."

Benice testified that he first learned of the default judgment around March or April of 2017 when his office staff checked the court's docket. His office unsuccessfully attempted to reach Rappaport by email and phone. Eventually, Rappaport called Benice while he was on vacation in August. Although they had not been in contact, he was aware of the urgent timeline for seeking relief under Code of Civil Procedure section 473. He instructed his office staff to check the court's docket, which indicated Rappaport's status as pro per.

Benice testified that he believed it was appropriate for Rappaport to caption the motion as an in pro per filing because she was listed in the docket as such, the default was entered and served directly on her, and she was requesting relief due to improper service on her. Benice's office helped Rappaport prepare the pro per filing and serve and file the motion. Benice testified that he could not divulge more specific details regarding Rappaport's filing of her in pro per motion due to attorney-client privileged information.

On September 19, 2017, the superior court denied Rappaport's motion on the merits and held that it was untimely. The court found that the motion was frivolous and filed in bad faith and issued sanctions against Rappaport in the amount of $2,850 for the plaintiff's attorney fees.

2. Benice Filed a Motion to Set Aside Default

On September 27, 2017, Benice filed a substitution of attorney and contemporaneously filed and served on behalf of Rappaport a Notice of Motion and Motion to Set Aside Default Judgment Pursuant to the Mandatory Provision of Code of Civil Procedure, section 473, subdivision (b) (Second Default Motion).[8] He sought this mandatory relief based on his own mistake as an attorney because his office did not timely file an answer to the complaint on behalf of Rappaport. He stated in his declaration that he represented Rappaport since December 2016 and argued that the default judgment was void because the plaintiff never served him with the February 7, 2017 Notice of Entry of Default or the March 29, 2017 Default Judgment. Benice attached a proposed answer and his declaration.

Benice contended that the First Default Motion incorrectly identified Rappaport as being in pro per because, according to his legal research, his earlier filings (Request for Trial in December 2016 and CMC statement in January 2107) constituted a general appearance.[9] He filed the

[8] Code of Civil Procedure section 473, subdivision (b), in pertinent part, states "Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect."

[9] Benice relied on *Creed v. Schultz* (1983) 148 Cal.App.3d 733, 740, which contained a lengthy discussion about general appearances related to jurisdiction but did not precisely address his situation. We note, however, that a defendant may make a general appearance by filing an answer, demurrer, motion to strike, or participating in a proceeding in a manner that seeks affirmative relief (Code Civ. Proc., § 1014; see 6 Witkin, Cal. Procedure (5th ed. 2020) Proceedings Without Trial, § 330). A general appearance "does not require any formal or technical act." (*Mansour v. Superior Court* (1995) 38 Cal.App.4th 1750, 1756.)

substitution of attorney out of an abundance of caution to clarify his position as Rappaport's attorney in the Civil Case and to be sure the court would accept his Second Default Motion.

On October 25, 2017, plaintiff's counsel filed an opposition to Benice's motion, and requested sanctions. On November 8, 2017, the superior court denied Benice's Second Default Motion. The court found that Rappaport's failure to file an answer was not due to attorney neglect but was the result of Rappaport's inaction since service of the notice of default entry was made to Rappaport's home address and "she was a self-represented litigant with no attorney of record." The court held that Benice was not identified as Rappaport's attorney until he filed a substitution of attorney on September 27, 2017. The court found that Benice's motion was frivolous and filed in bad faith and ordered joint and several sanctions of $2,500 against Rappaport and Benice.

Benice testified that he filed the Second Default Motion because he believed it was proper and he owed Rappaport an ethical obligation to protect her interest as her attorney. He decided to exhaust all reasonable and permissible avenues to set aside the default for over $400,000 due to his failure to file an answer, concluding that not doing so was tantamount to legal malpractice.

On January 11, 2018, Benice sent a check for $2,500 to the plaintiff's counsel pursuant to the sanctions order. On January 25, he mailed a letter to the State Bar of California, giving notice of the sanctions. Since the court's sanctions order was dated November 8, 2017, Benice's notification was beyond the 30-day deadline. Benice noted in his letter to the Bar that he reported the sanctions late because he miscalculated the due date by counting from the last day to file an appeal, rather than from the date the sanctions were ordered. He concedes culpability for this late reporting, as charged in count four of the NDC.

IV. CULPABILITY[10]

A. Count One: Maintaining an Unjust Action (Bus. & Prof. Code, § 6068, subd. (c))

Count one alleged that Benice failed to maintain a legal or just action when he filed the Second Default Motion on September 27, 2017.[11] The superior court found the motion was frivolous and filed in bad faith, in violation of Business and Professions Code section 6068, subdivision (c).[12] The NDC did not specify the conduct supporting this allegation other than the superior court's ruling on the Second Default Motion. We therefore examine that ruling. The superior court judge found the motion was frivolous and filed in bad faith because Benice's actions before he filed the substitution of attorney on September 27, 2017 were not consistent with his declaration in the Second Motion for Default wherein he stated he had represented Rappaport since December 2016. The superior court judge concluded that it was inconsistent for Benice to state he was Rappaport's attorney in the Civil Case since December 2016 because, among other things, he had no communication with her from January 2017 to June 2017.[13]

We generally give a strong presumption of validity to the superior court's findings if supported by substantial evidence. (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 947.) Here, however, the hearing judge did not rely on those findings as a prima facie determination that Benice's motion was frivolous and filed in bad faith. Instead, the hearing judge made an independent determination that Benice misrepresented his relationship with Rappaport and falsely stated under oath that he had "represented Ms. Rappaport in the Civil Case since late

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[10] Having independently reviewed all arguments set forth by the parties, we note that several are factual arguments that are not outcome determinative as to culpability. Any arguments not specifically addressed have been considered and are rejected as without merit.

[11] The NDC incorrectly referred to this motion as a "Motion for Reconsideration of Motion to Set Aside Default" when it was actually filed as a "Motion to Set Aside Default."

[12] All further references to sections are to this source.

[13] As noted *infra*, the hearing judge found no clear and convincing proof that Benice made a misrepresentation when he stated that he had not communicated with Rappaport between January 2017 and June 2017.

December 2016." The judge reasoned that Benice's special appearance at the January 2017 CMC and Rappaport's later pro per filing of the First Default Motion proved Benice did not represent Rappaport since December 2016. The judge rejected Benice's explanations for his actions as implausible and unsupported by corroborating evidence and found him culpable of maintaining an unjust action as charged in count one. Benice argues on review that the status of Rappaport's legal representation was confusing in the court docket. The superior court accepted pleadings captioning him as Rappaport's attorney and he specially appeared at the CMC despite the lack of a formal substitution of attorney—yet Rappaport was identified as in pro per in docket entries. Upon our independent review, we find the record does not support Benice's culpability by clear and convincing evidence.

The documentary evidence and the Stipulation—even without Benice's testimony—establish that he represented Rappaport in the Civil Case during the relevant times. Benice filed two pleadings that identified him as Rappaport's attorney in the Civil Case. On December 21, 2016, he filed a Request for Trial and on January 11, 2017, he filed a CMC statement. Neither Goldman nor the court objected to these filings. Moreover, the Stipulation in this disciplinary matter confirms these pleadings were filed "on behalf of Rappaport in the Civil Case." Stipulated facts are binding on the parties and evidence to disprove a stipulated fact is inadmissible. (Rules Proc. of State Bar, rule 5.54(B).)

Benice's failure to formally substitute into the Civil Case until September 2017 does not establish that he had no attorney-client relationship with Rappaport before then. Our research has revealed at least one California case that suggests an exception to the formal substitution requirement where the new attorney appeared to have actual authority to act on behalf of a party and no prejudice resulted. (*Baker v. Boxx* (1991) 226 Cal.App.3d 1303, 1309 ["courts regularly excuse the absence of record of a formal substitution and validate the attorney's acts, particularly

where the adverse party has not been misled or otherwise prejudiced"].) Here, Benice was retained to represented Rapaport in September 2016 in the fee arbitration matter, was also retained for the Civil Case and filed pleadings on her behalf in December 2016 and January 2017, and participated in a January 2017 CMC in the Civil Case—all facts supporting the conclusion that Benice represented Rappaport since December 2016. (See *Lister v. State Bar* (1990) 51 Cal.3d 1117, 1126 [attorney-client relationship can arise by inference from conduct of parties].)

We find that the actions Benice took to represent his client did not amount to maintaining an unjust action, as charged in count one. Rappaport faced a default judgment that had significant financial consequences. As her attorney, Benice attempted to cure the default judgment through court processes. (See *People v. McKenzie* (1983) 34 Cal.3d 616, 631 [duty of lawyer, both to his client and to legal system, is to represent his client zealously within bounds of law].) He assisted Rappaport to file her in pro per First Default Motion because the court docket identified her status in the case as in pro per, even though he filed documents as her attorney and made a special appearance on her behalf. When Rappaport's motion failed, Benice researched the law and decided he was obligated to file the Second Default Motion based on his own attorney error—an effort for his client that we do not find unreasonable under the circumstances in this case.

Further, Benice's filing of a single motion for relief from default does not compare with other cases where a violation of section 6068, subdivision (c) has been found. (See, e.g., *Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1042–1043 [violation of § 6068, subd. (c) where attorney filed fraud case for $14,000 to resolve $45 billing dispute when court found no evidence fraud claim existed and attorney motivated by spite and vindictiveness]; *In the Matter of Kinney* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 360, 367 [violations of § 6068, subd. (c) for

multiple frivolous appeals, recycling previously rejected arguments, and resubmitting essentially the same complaint as amended, which filings supported vexatious litigant designation in superior court]; *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 648 [appeal frivolous when prosecuted for improper motive, e.g., to harass opposing party, delay effect of adverse judgment, or when indisputably has no merit].) For these reasons, we dismiss count one with prejudice for lack of proof. (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 843.)[14]

B. Count Two: Seeking to Mislead a Judge (§ 6068, subd. (d))[15]
Count Three: Moral Turpitude—Misrepresentation (§ 6106)[16]

Count two alleged that Benice sought to mislead the superior court judge by making two false statements in his September 27, 2017 declaration in the Second Default Motion: (1) that he represented Rappaport since December 2016; and (2) that he had no communication with his client between mid-January to approximately June 2017. Similarly, count three alleged that these two misrepresentations constitute moral turpitude.

Benice is not culpable of counts two and three. As we discussed in count one, OCTC did not establish the first statement—that Benice represented Rappaport since December 2016—was false. Regarding the second statement, the hearing judge found no evidence to establish that Benice's statement was false. We adopt the hearing judge's finding as supported by the record.

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[14] We base our conclusion on the record before us, which has evidence beyond what was available to the superior court, particularly Benice's testimony regarding why he took certain actions in Rappaport's case and the parties' Stipulation, as discussed above. In disciplinary proceedings, an attorney has the right to introduce evidence to controvert, temper, or explain prior civil findings (*In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 206) and all reasonable doubts are resolved in the attorney's favor (*Galardi v. State Bar* (1987) 43 Cal.3d 683, 689).

[15] Section 6068, subdivision (d), provides that it is the duty of an attorney "never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."

[16] Section 6106 provides, "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension."

Given our findings above, we dismiss counts two and three with prejudice for lack of proof. (*In the Matter of Kroff, supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

C. Count Four: Failure to Report Sanctions (§ 6068, subd. (o)(3))

Section 6068, subdivision (o)(3), provides that it is the duty of an attorney to report to the State Bar, in writing, within 30 days of the time the attorney has knowledge of the imposition of judicial sanctions against the attorney. Benice stipulated, and the hearing judge found, that Benice willfully violated the statute by failing to report the sanctions to the State Bar within 30 days after they were imposed against him. We agree. The superior court ordered sanctions on November 8, 2017, and Benice did not notify the State Bar in writing until January 25, 2018. Benice is culpable as charged in count four.

V. THREE MITIGATING FACTORS AND NO AGGRAVATION[17]

First, the hearing judge assigned "very significant consideration in mitigation" for Benice's four decades of discipline-free practice. (Std. 1.6(a); *Friedman v. State Bar* (1990) 50 Cal.3d 235, 245 [more than 20 years of practice with unblemished record is highly significant mitigation].) OCTC does not challenge this finding and we agree with it.

Second, the judge assigned significant mitigation for Benice's cooperation with OCTC for entering into the pretrial Stipulation. (Std. 1.6(e).) The Stipulation was detailed and conserved time and resources for the court and OCTC. (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50 [stipulation to relevant facts assists prosecution and is mitigating].) Benice also stipulated to culpability for the only charge for which we found culpability, that is, late reporting a sanctions order to the State Bar. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 ["more extensive weight in mitigation is

[17] Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Benice to meet the same burden for mitigation. All further references to standards are to this source.

accorded those who . . . willingly admit their culpability as well as the facts"].) OCTC does not challenge the judge's mitigation finding. We agree and assign substantial weight to cooperation.

Third, the judge afforded limited mitigation credit for Benice's extraordinary good character because the witnesses did not represent a wide range of references in the legal and general communities who were aware of the full extent of his misconduct, as the standard requires. (Std. 1.6(f).) We assign substantial weight in mitigation, as analyzed below.

Benice presented six witnesses—three attorneys and three business associates and former clients. Two witnesses testified and four submitted declarations; all knew Benice for years and attested to his honesty, professionalism, integrity, and upstanding citizenship. An attorney with whom Benice has shared office space for 30 years testified he has never known Benice to "do anything that was illegal or immoral or in violation of any law or any State Bar rules." A mortgage consultant who knew Benice since the 1980s testified he is a brilliant and hard-working attorney who prioritizes his clients' interest and puts his "heart into his work." The witnesses were aware of the charges against Benice yet maintained their high opinion of him. Notably, we give great weight to the testimony of the three attorneys because they have a "strong interest in maintaining the honest administration of justice." (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319.) We also find that the witnesses represented a wide range of legal and general references given their diverse backgrounds and familiarity with Benice's work and personal traits. (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591–592 [significant mitigation for two attorneys and fire chief, who had long-standing familiarity with attorney and broad knowledge of good character, work habits, and professional skills].)

As to indifference and lack of insight in aggravation (std. 1.5(k)), the hearing judge's decision states inconsistent findings: first, that "OCTC failed to establish any aggravating circumstances," and later, that Benice demonstrated indifference and lack of insight because, as an

experienced practitioner, he should have known to file a substitution of attorney. Benice argues this inconsistency amounts to no finding. He is correct as we cannot discern from the decision, without speculating, which of the two findings the judge intended. The conflicting findings create a record that cannot sustain OCTC's burden of proof on this issue on appeal.

On independent review of the record, we do not find indifference or lack of insight. Benice testified that he was not culpable of the first three counts as he represented Rappaport since December 2016. He provided reasons why he (1) did not file the substitution of attorney sooner in the Civil Case, (2) permitted the First Default Motion to go forward by Rappaport in pro per, and (3) filed the Second Default Motion. OCTC asserts that Benice's justifications should be rejected as an attempt to shift blame. We disagree. Benice has a right to present his arguments to defend against culpability.[18] We decline to assign aggravation.

VI. ADMONITION SERVES PRIMARY PURPOSE OF DISCIPLINE[19]

Our disciplinary analysis begins with the standards, which are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.) Benice is culpable of violating section 6068, subdivision (o)(3)—failing to timely report sanctions to the State Bar. Standard 2.12(b) applies and provides that reproval is the presumed sanction for a violation of the duties required of an attorney under section 6068, subdivision (o). We also look to standard 1.7(c), which directs that, where the net effect of mitigating and aggravating circumstances demonstrates that a lesser sanction will fulfill the primary purposes of discipline, it is appropriate to impose that lesser sanction. "On balance, a lesser sanction is appropriate in cases of minor misconduct, where there

[18] See *In re Morse* (1995) 11 Cal.4th 184, 209 (attorney has right to defend himself vigorously); *In the Marriage of Flaherty*, *supra*, 31 Cal.3d at p. 650 (counsel has "a right to present issues that are arguably correct, even if it is extremely unlikely that they will win").

[19] 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.)

is little or no injury to a client, the public, the legal system, or the profession and where the record demonstrates that the [attorney] is willing and has the ability to conform to ethical responsibilities in the future." (Std. 1.7(c).)

This case meets the requirements of standard 1.7(c). Benice has been practicing law for four decades without discipline. He stipulated to the only charge for which we found culpability. He paid the $2,500 sanctions award and reported it to the State Bar late, for which he admitted culpability. In these circumstances, discipline is unnecessary and would be punitive given the net result of Benice's mitigation and lack of aggravation, the limited scope of his violation, and the lack of harm. These are clear reasons for departure from standard 2.12(b) under *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 (requiring clear reasons to deviate from standards).

Rule 5.126 allows us to resolve a matter by admonition if (1) it does not involve a Client Security Fund matter or serious offense; (2) the violation either was not intentional or occurred under mitigating circumstances; and (3) no significant harm resulted. (Rules Proc. of State Bar, rule 5.126(A), (B) [serious offense involves dishonesty, moral turpitude, or corruption].) Each requirement is satisfied here. Benice's failure to timely report the sanctions order did not involve the Client Security Fund, was not serious misconduct, was not done intentionally, occurred after 40 years of discipline-free practice, and is unlikely to recur. We find that an admonition is appropriate and supported by comparable case law. (See *In the Matter of Respondent V* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 442, 445 [admonition appropriate where single violation of permitting improper solicitation letter to be mailed was not intentional and no harm resulted]; *In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439, 444, 455 [admonition appropriate for single violation of failing to communicate with client where no harm resulted, and misconduct mitigated by lengthy discipline-free record]; cf. *In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862 [conditional private reproval

for failing to timely report sanctions for three months and failing to pay sanctions within reasonable time].)[20]

VII. ORDER OF ADMONITION

Jeffrey Stephan Benice, State Bar Number 81583, is admonished upon the filing of this Opinion. (Rules Proc. of State Bar, rule 5.126(A).) Because an admonition does not constitute the imposition of discipline (Rules Proc. of State Bar, rule 5.126(D)), the State Bar is not entitled to an award of costs under Business and Professions Code section 6086.10, subdivision (a). In addition, because Jeffrey Stephan Benice has not been exonerated of all charges, he is not entitled to an award of costs under Business and Professions Code section 6086.10, subdivision (d).

PURCELL, P. J.

WE CONCUR:

HONN, J.

McGILL, J.

[20] Rule 5.126(F) of the Rules of Procedure permits OCTC to file a motion to reopen this proceeding if, within two years after the effective date of this admonition, Benice allegedly commits misconduct that results in another disciplinary proceeding.