PUBLIC MATTER—NOT DESIGNATED FOR PUBLICATION

Filed April 9, 2018

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

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| In the Matter of | ) | Case Nos. 15-O-10294 (15-O-11631; 15-O-12316; 15-O-12317; 15-O-12596) |
| | ) | |
| ROBERT NORIK KITAY, | ) | |
| | ) | OPINION |
| A Member of the State Bar, No. 229966. | ) | |
| | ) | |

A hearing judge found Robert Norik Kitay culpable of 10 counts of misconduct: three counts of holding himself out as entitled to practice law while he was suspended, two counts of misrepresentation constituting moral turpitude, and one each of commingling, failure to report sanctions to the State Bar, failure to report malpractice lawsuits to the State Bar, failure to obey a sanctions order, and failure to timely file a compliance declaration required by California Rules of Court, rule 9.20 (rule 9.20). The judge found that the rule 9.20 violation was the most serious misconduct, deserving of significant discipline. She also found aggravation for Kitay's prior record of discipline and his multiple acts of misconduct, along with mitigation for good faith, emotional difficulties relating to the illness and death of his father, and remorse and recognition of wrongdoing. Weighing all the circumstances and applying relevant case law, the hearing judge recommended an actual suspension of 18 months.

The Office of Chief Trial Counsel of the State Bar (OCTC) appeals, but does not challenge the hearing judge's culpability findings. While it requests that we reweigh factors in aggravation and mitigation and recommend an actual suspension of two years, it emphasizes that we recommend that Kitay demonstrate his rehabilitation, fitness to practice, and present learning and ability in the general law before his suspension ends, as required by standard 1.2(c)(1) of the

Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.[1] Kitay does not appeal, but nonetheless challenges some of the hearing judge's culpability findings, requesting that the recommended discipline be lessened to the extent allowed by the applicable law.[2]

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we affirm most of the hearing judge's culpability findings, but find that two counts that charge Kitay with holding himself out as entitled to practice while suspended are duplicative. We also find that Kitay is culpable of misrepresenting on his rule 9.20 declaration that he had properly notified all necessary parties of his suspension, but not culpable for the late filing of his declaration. We affirm the judge's aggravation and mitigation findings and the recommended 18-month actual suspension, and additionally find that Kitay's suspension should continue until he demonstrates his rehabilitation, fitness to practice, and present learning and ability in the general law.

## I. PROCEDURAL BACKGROUND

On April 1, 2016, OCTC filed a 12-count Notice of Disciplinary Charges against Kitay, alleging misconduct in five cases. Specifically, OCTC alleged that Kitay: (1) issued checks from his client trust account (CTA), when he knew, or was grossly negligent in not knowing, that the CTA had insufficient funds to pay them, an act involving moral turpitude, in violation of Business and Professions Code section 6106;[3] (2) deposited or commingled his personal funds in

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

[2] Having independently reviewed all arguments set forth by Kitay, those not specifically addressed have been considered and are rejected as having no merit.

[3] All further references to sections are to the Business and Professions Code unless otherwise noted. Under section 6106, "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise . . . constitutes a cause for disbarment or suspension."

his CTA, in violation of rule 4-100(A) of the Rules of Professional Conduct;[4] (3) held himself out as entitled to practice law and actually practiced law on three occasions when he was not an active State Bar member, each separately charged in violation of section 6068, subdivision (a);[5] (4) failed to report to the State Bar that three or more malpractice lawsuits were filed against him in a 12-month period, in violation of section 6068, subdivision (o)(1);[6] (5) failed to report to the State Bar $2,200 in sanctions issued by the superior court, in violation of section 6068, subdivision (o)(3);[7] (6) disobeyed a court order by failing to pay sanctions, in violation of section 6103;[8] (7) made a misrepresentation to the State Bar during his disciplinary investigation, an act involving moral turpitude under section 6106; (8) made a misrepresentation to the bankruptcy court in connection with his bankruptcy petition, an act involving moral turpitude under section 6106; (9) failed to file a declaration of compliance required by rule 9.20;[9] and

[4] All further references to rules are to the Rules of Professional Conduct unless otherwise noted. Under rule 4-100(A), funds received or held by a member for the benefit of clients "must be deposited in one or more identifiable bank accounts labeled 'Trust Account,' 'Client's Funds Account' or words of similar import . . . . No funds belonging to the member . . . shall be deposited therein or otherwise commingled therewith . . . ."

[5] Under section 6068, subdivision (a), it is the duty of an attorney to "support the Constitution and laws of the United States and of this state."

[6] Under section 6068, subdivision (o)(1), it is the duty of an attorney to report to the State Bar within 30 days of the time he or she has knowledge of "[t]he filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity."

[7] Under section 6068, subdivision (o)(3), it is the duty of an attorney to report to the State Bar within 30 days of the time he or she has knowledge of "[t]he imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than [$1,000]."

[8] Under section 6103, willful disobedience or violation of a court order requiring an attorney to do or forbear an act connected with or in the course of the attorney's profession, which an attorney ought in good faith to do or forbear, constitutes cause for suspension or disbarment.

[9] Rule 9.20(a) requires an attorney to notify clients, cocounsel, opposing counsel, and the court in pending matters of his or her suspension and consequent disqualification to act as an attorney. Rule 9.20(c) requires an attorney to file an affidavit with the Clerk of the State Bar Court certifying compliance with the requirements of rule 9.20(a).

(10) misrepresented in an affidavit to the Clerk of the State Bar Court that he had complied with rule 9.20, an act involving moral turpitude, in violation of section 6106.

A three-day trial was held on January 12 and 13, and February 23, 2017. The hearing judge issued her decision on May 25, 2017.

## II. FACTUAL BACKGROUND AND CULPABILITY[10]

The hearing judge found Kitay[11] culpable of 10 of the 12 counts of charged misconduct, finding that he was not culpable of moral turpitude for knowing that he had insufficient funds in his CTA (count 1), or for making misrepresentations to the bankruptcy court (count 8). Overall, we find that the hearing judge's culpability findings are supported by the record, with the exceptions discussed below.

### A. Facts Supporting Uncontested Culpability

#### 1. Case No. 15-O-12316 (Counts 9 and 10—Rule 9.20 and Misrepresentation)

On October 29, 2014, the Supreme Court filed an order in Case No. S202084, suspending Kitay from the practice of law for two years, stayed, with two years' probation, including a six-month actual suspension. The order was effective November 28, and directed Kitay to comply with rule 9.20 (a) and (c), within 30 and 40 days, respectively, after the effective date.

On November 13, 2014, the Office of Probation of the State Bar (Probation) sent Kitay a letter enclosing a copy of the order, a copy of rule 9.20, a rule 9.20 compliance declaration, and other related documents. The letter also informed Kitay that his declaration of compliance was required to be filed no later than January 7, 2015. Kitay sent a rule 9.20 declaration with his first quarterly report, which was received by Probation on January 6, 2015. However, the declaration

[10] We base the factual background on trial testimony, documentary evidence, and the hearing judge's factual findings, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).) We also give great weight to the judge's credibility findings. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 [hearing judge best suited to resolve credibility questions].)

[11] Kitay was admitted to the practice of law in California on January 29, 2004.

was rejected solely because he did not date it. Kitay admitted that, although he sent the completed declaration before the deadline, it was not filed until January 12, when he resubmitted it with a date. Additionally, the declaration stated that he had complied with rule 9.20(b) by giving notice to clients, cocounsel, opposing counsel, and adverse parties by registered or certified mail, return receipt requested. However, this statement was not accurate because he actually only sent notice to his clients by certified mail; the others received notice by regular first-class mail.

Kitay admitted that he did not initially read rule 9.20's requirements carefully because his father was hospitalized and very ill. He died just after Kitay's suspension became effective. Kitay relied on his office staff to satisfy the rule 9.20 requirements without ensuring that they had correctly complied with the rule. Kitay discovered and self-reported his noncompliance with rule 9.20 requirements in his subsequent quarterly reports. Specifically, in his April 10, 2015 quarterly report, he disclosed that he had not returned files to some clients. In his July 10 report, he stated that he was still unable to return a file to a client. Finally, in his October 15 report, he explained that his previous representation, that he had refunded unearned fees, was not accurate because he had not refunded all fees to his clients. We agree that these facts establish Kitay's culpability for failure to comply with rule 9.20 (count 9).[12]

We also affirm the hearing judge's unchallenged finding that Kitay is culpable of moral turpitude by gross negligence under section 6106 for misrepresenting to the State Bar in his compliance declaration that he had met all rule 9.20 requirements (count 10). While Kitay testified that he did not know he had failed to properly comply with rule 9.20 when he filed his declaration, we find that his failure to oversee his staff's efforts to comply with the rule shows a

[12] However, we do not find him culpable for failing to timely file his rule 9.20 declaration because he submitted it before the deadline, it was rejected only because it was not dated, and he cured this defect on January 12, five days after the due date.

lack of sufficient care and does not constitute an excuse. (*In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 155 [gross negligence amounting to moral turpitude where attorney filed verification without first confirming underlying facts].)

**2. Case Nos. 15-O-10294 and 15-O-12596 (Counts 3 and 12—Unauthorized Practice of Law (UPL))**

Elizabeth Upton hired Kitay on October 14, 2014, to perform legal services in a marital dissolution matter. At that time, Kitay did not inform her that he would be facing a disciplinary suspension. On December 3, he sent Upton an email from his law firm account, showing his law office address in the signature block, notifying her that he was suspended, and updating her on the status of her case, including details regarding completion of a settlement agreement. Since the dissolution still required considerable work, Upton testified that she felt harmed by not knowing about Kitay's upcoming suspension when she hired him.

In addition, Kitay represented Kathleen Baccellia in a marital dissolution matter in Sacramento County Superior Court (*Forsyth v. Baccellia aka Forsyth*, Case No. 10FL07561). In its resolution, Gordon Forsyth was ordered to pay Baccellia's reasonable attorney fees. On November 19, 2014, Kitay sent Forsyth an email stating that his client would accept $4,000 to dismiss the attorney fee claim. On December 23, Kitay sent Forsyth another email, instructing him to deliver the $4,000 check to Kitay's office and to direct future emails to "Lora Grevious (new counsel)."

Each of these emails was sent using Kitay's email address, "rnkitay@rnkitaylaw.com," and ended with the signature block, "Robert N. Kitay, Law Office of Robert N. Kitay," along with his law office address. Additionally, the December email to Forsyth did not mention

Kitay's suspension.[13] Under section 6125, Kitay could only practice law if he was an active member of the State Bar; likewise, under section 6126, subdivision (b), an attorney who is suspended and holds himself or herself out as practicing or entitled to practice law is guilty of a crime. We affirm the hearing judge's unchallenged findings that Kitay is culpable of willfully violating section 6068, subdivision (a), in both the Upton (count 3) and Baccellia (count 12) matters for failing to comply with the law by holding himself out as entitled to practice law when he was suspended. (*In the Matter of Thomson* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966, 975 ["Without question, the communications by respondent on his letterhead stationery, while he was suspended from practice, attempting to settle two matters constituted [UPL]"]; see also *Bluestein v. State Bar* (1974) 13 Cal.3d 162, 175, fn. 13 [use of term "Of Counsel" on letterhead to describe an unlicensed person constitutes UPL]; *In re Naney* (1990) 51 Cal.3d 186, 195 [both express and implied representations of ability to practice prohibited—suspended attorney improperly implied he was entitled to practice by using his bar admission date on a resume].)

**B. Facts Supporting Culpability Challenged by Kitay**

**1. Case No. 15-O-10294 (Count 2—Commingling)**

On February 25, 2015, Kitay deposited into his CTA settlement proceeds of $5,199.85 from an insurance claim on his personal car. The hearing judge found that this constituted commingling, in violation of rule 4-100(A). Kitay argues that he was selling his car to a friend who had an accident while driving it, and Kitay was representing the friend regarding the insurance settlement. He maintains that the money was not commingled, but properly deposited into his CTA as client settlement funds. However, we note that the settlement check was made

[13] Kitay testified that he sent Forsyth a letter dated December 9, 2014, advising him about his suspension. But Forsyth testified he never received the letter, which Kitay admits was not sent by certified mail. Forsyth testified that the December 23 email did not alert him to Kitay's suspension and he did not understand the unexplained reference to "new counsel."

out to Kitay personally. We find insufficient evidence in the record to support his assertion that he had an attorney-client relationship with the friend who had purchased his car. We affirm the judge's culpability finding, although we acknowledge that Kitay believed he was properly safeguarding the money. (*Vaughn v. State Bar* (1972) 6 Cal.3d 847, 858–859 [rule violated merely by attorney's commingling of client's money with his own or by failure to deposit and manage such money in manner designated by rule, and any violation of rule's mandate is subject to appropriate discipline].)

**2. Case No. 15-O-11631 (Counts 4, 5, 6, and 7—Failure to Report Malpractice Lawsuits and Judicial Sanctions, Failure to Obey Court Order, and Misrepresentation)**

The hearing judge found Kitay culpable of violating section 6068, subdivision (o)(1), because he failed to report three malpractice lawsuits filed against him in Sacramento County Superior Court in a 12-month period: *Peter Stanzler v. Kitay*, Case No. 34-2012-00118766, filed February 15, 2012; *Daniel Gonzalez v. Kitay*, Case No. 34-2012-00134527, filed October 29, 2012; and *Pao Saechao v. Kitay*, Case No. 34-2012-00134639, filed October 31, 2012. The judge also found Kitay culpable of moral turpitude for the grossly negligent misrepresentations he made to the State Bar about these lawsuits during its investigation. Specifically, on May 18, 2015, in response to a letter from the State Bar's investigator, Kitay stated that he did not know when the *Stanzler* case was filed until he researched it after receiving the State Bar's letter, that he did not become aware of the *Gonzalez* case until late 2013, and that he did not realize that *Saechao* was the third malpractice case filed against him within 12 months.

On review, Kitay insists that he is not culpable because he was not aware of the *Stanzler* and *Gonzalez* filing dates and asserts that no evidence supports a finding that he was. To the

contrary, the record clearly and convincingly[14] shows that all three cases (with their related case numbers, including the dates in 2012 when each was filed) were listed on a Chapter 7 voluntary bankruptcy petition that Kitay filed on January 17, 2013. We agree with the hearing judge that Kitay had knowledge of these cases in January 2013, and is culpable for failing to report them to the State Bar (count 4). Given that he knew of them in January 2013, he was grossly negligent when he made his May 18, 2015 misrepresentations to the State Bar. Thus, Kitay is culpable for this charge of moral turpitude (count 7). (*In the Matter of Yee* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 330, 334 [attorney who files inaccurate Minimum Continuing Legal Education compliance declaration by affirmation without verifying contents is culpable of moral turpitude by gross negligence].)

On February 8, 2011, a court imposed $2,200 in sanctions against Kitay and his counsel in *Martin v. Kitay*, Sacramento County Superior Court, Case No. 34-2010-00067795, for a frivolous motion to strike. The sanctions were ordered to be paid on or before March 8, 2011. Kitay neither paid them nor reported them to the State Bar. The hearing judge found him culpable of violating section 6103 (count 6) for failing to pay the sanctions, and of violating section 6068, subdivision (o)(3) (count 5) for failing to report them to the State Bar. Kitay contends that he did not have to pay the sanctions because they were discharged in his bankruptcy petition. He further states that he did not know he had to report sanctions against him as a party to a lawsuit. We affirm the hearing judge's ruling rejecting each of these arguments and her findings of culpability on both counts. (*In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, 188 [provisions of § 6068, subd. (o)(3), apply to sanctions imposed against attorney as party to action]; *Papadakis v. Zelis* (1991) 230 Cal.App.3d

[14] 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.)

1385, 1389 [attorney who sought bankruptcy court relief could not thereby obviate payment of court sanctions order for filing frivolous appeal]; *Keitel v. Heubel* (2002) 103 Cal.App.4th 324, 332–334 [automatic bankruptcy stay does not extend to court's regulatory power to impose sanctions for abuse of appellate process].)

**3. Case No. 15-O-12317 (Count 11—UPL)**

On April 3, 2012, Genevieve Lawson hired Kitay to represent her in a marital dissolution matter in Sacramento County Superior Court. A judgment of dissolution and a Qualified Domestic Relations Order (QDRO) were entered in the case on September 27, 2014, and the court retained jurisdiction to amend the QDRO. On December 23, Lawson received an email from Kitay advising her of his suspension and requesting payment on her account balance. Kitay sent this email in the same manner as he had sent emails in the *Forsyth* matter, using his law office email address and his name and law office name and address in the signature block. This was the first time Lawson learned of Kitay's suspension. She testified that she did not understand that he was suspended and believed he was still her attorney since the QDRO was not yet final.

The hearing judge found that Kitay was culpable of willfully violating section 6068, subdivision (a), because he held himself out as entitled to practice law by using his law office email account and law office signature on emails to Lawson after he was suspended.[15] While we affirm the judge's finding that Kitay is culpable of violating section 6068, subdivision (a), we do not afford this misconduct any additional weight. Using his law firm email address is the same misconduct alleged in count three, which charged that Kitay used "rnkitay@rnkitaylaw.com as his email address in correspondence with clients." (*Bates v. State Bar* (1990) 51 Cal.3d 1056,

[15] Kitay argues that he had no obligation to inform Lawson of his suspension because his work on her matter was complete as of November 12, 2014. However, this does not address the judge's finding that he held himself out to practice when he was not entitled—rather, it appears to address his responsibility to provide notice under rule 9.20.

1060 ["little, if any, purpose is served by duplicative allegations of misconduct" in State Bar proceedings].)

## III. AGGRAVATION AND MITIGATION[16]

OCTC argues that the record supports more aggravation and less mitigation than assigned by the hearing judge and also requests that we assign additional aggravation for indifference. Kitay submits that the hearing judge gave appropriate credit for mitigation and the record does not support additional aggravation.

### A. Aggravation

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

The hearing judge assigned aggravation for Kitay's prior record of discipline, but did not determine its weight. On October 29, 2014, the Supreme Court issued an order in Case No. S202084 (State Bar Court Case Nos. 11-O-11276 and 11-O-15541) that Kitay be suspended from the practice of law for two years, stayed, and placed on probation for two years, with an actual suspension of six months. Kitay stipulated to several acts of misconduct in two client matters, including committing three acts of moral turpitude (making two misrepresentations of fact and not transferring assigned settlement funds to a third party) and failing to perform legal services for his clients with competence. The judge found mitigation for no prior record of discipline, candor and cooperation with the State Bar, good character, financial difficulties, and limited weight for remorse. The judge also found aggravation for significant harm and multiple acts of wrongdoing.

OCTC argues that Kitay's prior discipline should be given significant weight because it involved serious misconduct, including acts of dishonesty constituting moral turpitude, that is similar to his present misconduct. We agree and find that his prior misconduct's similarity to his

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

culpability here supports significant weight in aggravation. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443–444 [similarities between prior and current misconduct render previous discipline more serious as they indicate prior discipline did not rehabilitate attorney].) Further, the aggravation is magnified because Kitay committed the current misconduct during the probationary period for his prior discipline. (*In the Matter of Katz* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 430, 438.)

**2. Multiple Acts (Std. 1.5(b))**

The hearing judge assigned aggravation, without specifying its weight, for multiple acts of misconduct. OCTC requests that we assign significant weight. We agree with OCTC, affirm the judge's finding of aggravation, and assign it significant weight because Kitay is culpable of 10 counts of varied misconduct. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646–647 [three instances of misconduct considered multiple acts].)

**3. OCTC's Request for Additional Aggravation for Indifference**

OCTC asserts that additional aggravation should be assigned for Kitay's indifference and lack of insight because he did not admit culpability, mischaracterized the evidence, downplayed his conduct as mistakes, and failed to recognize, understand, or acknowledge the scope of his serious misconduct. Kitay submits that he admitted operative facts and only argued as to whether he acted willfully. He maintains that he has the right to defend himself, and that his opposition to the charges, based on his honest belief that he did nothing wrong, cannot form the basis for a finding of indifference. We decline to find the additional aggravation OCTC seeks because Kitay's conduct appears to be a good faith attempt to defend himself, which does not support a finding of indifference. (*Harris v. State Bar* (1990) 51 Cal.3d 1082, 1088; *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 932–933 [indifference finding not justified where attorney's attitude is based on honest, although mistaken, belief in his innocence].)

## B. Mitigation

### 1. Good Faith (Std. 1.6(b))

The hearing judge found mitigation under standard 1.6(b) for Kitay's "good faith belief that is honestly held and objectively reasonable," but did not assign weight. The judge found that Kitay believed he had complied properly with rule 9.20, and promptly self-reported his errors to the State Bar when he discovered them. The judge also found that Kitay reasonably believed that he was not required to report a sanction against him as a party in a lawsuit, and that he did not realize that he was holding himself out as entitled to practice law by using his law office email.

OCTC submits that Kitay should not be credited with good faith for his belief that he did not have to report sanctions issued against him as a party. We agree. His belief was not objectively reasonable when section 6068, subdivision (o)(3), clearly makes no distinction between an attorney disclosing sanctions imposed as a party to an action and those imposed for conduct while representing a party. (*In the Matter of Varakin*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 188.) Ignorance of the applicable law cannot constitute a reasonable good faith belief. (*In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420, 427 ["it is [not] appropriate to reward respondent for his ignorance of his ethical responsibilities"].) For the same reason, we reject the hearing judge's finding that Kitay had a good faith belief that using his law firm email and signature block to communicate with clients and opposing counsel after he was suspended did not constitute holding himself out to practice law. However, we affirm the judge's finding that Kitay had a good faith belief that he complied with rule 9.20, and thus assign moderate weight in mitigation.

**2. Extreme Emotional Difficulties (Std. 1.6(d))**

The hearing judge assigned significant weight in mitigation under standard 1.6(d) for emotional difficulties Kitay suffered around the time of his suspension. Standard 1.6(d) provides that mitigation may be afforded for extreme emotional difficulties 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 of future misconduct. When Kitay received his notice of suspension, his father was in the hospital with end-stage lung cancer. His father died one day after Kitay's suspension began. Kitay testified that it was an extremely difficult time for him because he was very close to his father. He did little to no work for over six weeks during his father's illness, death, and funeral. When he returned to his office in late December, he had about a week to wind down his practice of 250 cases and file his rule 9.20 declaration. Kitay was overwhelmed by the amount of work he had to do. He petitioned for a temporary stay of his suspension, which was denied. OCTC submits that the mitigation weight for emotional difficulties should be limited because Kitay should have been able to accurately complete his rule 9.20 declaration in the week between the end of December and the filing deadline. Further, OCTC asserts that this mitigating factor cannot apply to the misconduct that occurred outside this time frame, and we agree.

We affirm the hearing judge's finding of mitigation for emotional difficulties, but assign only moderate weight. While Kitay did not provide expert testimony to establish that they were directly responsible for his misconduct, he did convincingly testify that the emotional difficulties caused by his father's illness and death contributed to his misconduct during that period. (*In the Matter of Ward* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 47, 59–60 ["some mitigating weight" assigned to personal stress factors established by lay testimony].) Also, due to his and

his wife's unique medical circumstances, we find this emotional difficulty unlikely to recur and cause Kitay to commit future misconduct.

**3. Remorse and Recognition of Wrongdoing (Std. 1.6(g))**

We affirm the hearing judge's finding of mitigation for Kitay's remorse and recognition of wrongdoing under standard 1.6(g). This standard provides that mitigation can be assigned for an attorney's "prompt objective steps, demonstrating spontaneous remorse and recognition of the wrongdoing and timely atonement." Kitay did express remorse during his testimony and promptly reported mistakes he made on his rule 9.20 declaration in subsequent quarterly reports submitted to the State Bar. He testified that he understood that "whatever mistakes are made in [his] office, [he's] responsible for," but emphasized that he should be able to offer defenses against the charges filed by OCTC without being perceived as lacking remorse. On review, he clarified that he was mistaken in thinking that he did not have to comply with a sanction issued against him as a party, but emphasized that his misguided belief was not willful or held in bad faith. OCTC argues that Kitay did not show remorse and his "failure to recognize, understand or acknowledge the scope of his significant and serious misconduct" does not support a mitigation finding, but instead constitutes indifference. We have already denied OCTC's request for additional aggravation for indifference, as analyzed above. We find that Kitay did express remorse and assign moderate weight in mitigation.

## IV. DISCIPLINE[17]

OCTC appeals the hearing judge's recommendation of an 18-month actual suspension, asserting that Kitay's serious misconduct warrants a two-year actual suspension, and emphasizing that any recommendation include "proof, satisfactory to the State Bar Court, of

[17] 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.)

rehabilitation, fitness to practice, and present learning and ability in the general law" before reinstatement, pursuant to standard 1.2(c)(1). Kitay, who did not appeal, argues that his misconduct did not harm the public, and each count for which he was found culpable was not serious. He asks that the recommended discipline be minimized to the extent possible.

Our discipline analysis begins with the standards, which promote the uniform and consistent application of disciplinary measures and are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 91–92.) The Supreme Court "will not reject a recommendation arising from application of the Standards unless [it has] grave doubts as to the propriety of the recommended discipline." (*Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1366.) The hearing judge considered standard 1.7(a), which provides that the most severe sanction must be imposed when a member commits two or more acts of misconduct and the standards specify different sanctions for each act. We agree with the judge that Kitay's failure to comply with rule 9.20 is serious misconduct and that willful violations of that rule are "by definition, deserving of strong disciplinary measures. [Citation.]" (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187.). However, we disagree with the hearing judge that Kitay's rule 9.20 violation was his most egregious misconduct. We note that three other discipline standards also apply, each of which independently provides for disbarment or actual suspension.[18] Given the range of discipline recommended by these four standards, we also look to the decisional law to determine the appropriate discipline to be recommended.

Regarding Kitay's rule 9.20 violation, the hearing judge considered misconduct in cases that recommended discipline less than disbarment where the misconduct was not intentional and

[18] Standards 2.10(a) (disbarment or actual suspension for holding oneself out as entitled to practice when suspended where degree of sanction depends on whether member knowingly engaged in UPL); 2.11 (disbarment or actual suspension for act of moral turpitude); and 2.18 (disbarment or actual suspension for any violation of a provision of Article 6 of the Business and Professions Code not otherwise specified in standards (e.g., violation of court order not related to member's practice of law).

where the member actively attempted to properly comply with the rule. (*In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527 [30-day suspension where declaration was filed two weeks late, but respondent otherwise complied with requirements of rule (i.e., former rule 955)]; *In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192 [nine-month actual suspension where attempt to file declaration late was rejected].) Though cited by the hearing judge for other reasons, we find *Shapiro v. State Bar* (1990) 51 Cal.3d 251 to be better suited for consideration. The Supreme Court in that case imposed a one-year actual suspension when it found that respondent engaged in a diligent, if ultimately unsuccessful, attempt to comply with the former rule, and promptly worked on correcting errors when he learned that his declaration was noncompliant. Additionally, Shapiro had multiple findings of other culpability and substantial evidence in mitigation. (*Id*. at pp. 259–261.)

As for the appropriate discipline in matters involving UPL, we note the wide range of cases, but focus on those that also involve multiple counts of misconduct including misrepresentations constituting moral turpitude.[19] In *Arm v. State Bar* (1990) 50 Cal.3d 763, the Supreme Court imposed discipline, including an 18-month actual suspension, on an attorney who misled a court about his impending disciplinary suspension and commingled funds. The Supreme Court rejected the disbarment recommended by the Hearing and Review Departments

[19] See *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896 (six-month actual suspension where attorney engaged in UPL in another jurisdiction in two client matters and was also culpable of collecting unconscionable fees, failing to refund unearned fees, trust account violation, and moral turpitude involving dishonesty with State Bar and out-of-state authority investigating her UPL, and where there were aggravating factors of prior discipline involving trust account violations, multiple acts of wrongdoing, significant harm, and indifference, and mitigating factors of extreme emotional distress, good character, and cooperation with State Bar); *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83 (six-month actual suspension where suspended attorney held himself out to superior court arbitration program as entitled to practice and concealed prior suspension on two job applications for attorney positions, and where there was aggravation for prior discipline that involved misuse of legal process in multiple cases against same defendant and two convictions for attempting to receive stolen property and illegally recording conversation without consent, respectively, and little evidence in mitigation).

as excessive as it found compelling mitigating circumstances clearly predominated due to the lack of significant harm and absence of bad faith, despite the attorney having three prior disciplinary records. (*Id.* at pp. 779–781.) In *In the Matter of Hansen* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 464, we recommended an actual suspension of 18 months and until proof of rehabilitation for misconduct including two misrepresentations that constituted moral turpitude. We found that significant aggravation for prior discipline, harm, and indifference outweighed mitigation for cooperation and good character. (*Id.* at pp. 473–475.)

Separate from consideration of standard 1.7(a) is standard 1.8(a), which requires us to impose greater discipline than Kitay's previous six-month actual suspension unless the prior discipline was remote and the prior misconduct was not serious. Given that Kitay committed the current misconduct during the probationary period for his prior misconduct and his prior disciplinary matter included acts of moral turpitude, the hearing judge properly applied the standard here.

Each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059.) Considering all the factors in this case, including the serious acts of misconduct found, and weighing significant aggravation and moderate mitigation, along with relevant case law, we affirm the hearing judge's recommended discipline of an 18-month actual suspension. "[W]e must bear in mind . . . the overriding principle that the purpose of these proceedings is not to punish an attorney but to inquire into the moral fitness of an officer of the court to continue in that capacity and to afford protection to the public, the courts, and the legal profession. [Citation.]" (*Shapiro v. State Bar, supra,* 51 Cal.3d at p. 260.) However, the similarity between Kitay's prior disciplinary history and his current misconduct, where both involve acts of moral turpitude, prompt concerns about his ability to conform to his ethical responsibilities. As a result, we also find that the recommended

suspension should continue until Kitay demonstrates his rehabilitation, fitness to practice, and present learning and ability in the general law, in satisfaction of standard 1.2(c)(1). (*In the Matter of Hansen*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 477.)

## V. RECOMMENDATION

For the foregoing reasons, we recommend that Robert Norik Kitay be suspended from the practice of law for two years, that execution of that suspension be stayed, and that he be placed on probation for two years on the following conditions:

1. He must be suspended from the practice of law for a minimum of the first 18 months of his probation and until he provides proof to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

4. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation case specialist to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation case specialist either in person or by telephone. During the period of probation, he must promptly meet with the probation case specialist as directed and upon request.

5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if he has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

**PROFESSIONAL RESPONSIBILITY EXAMINATION**

We further recommend that Robert Norik Kitay be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of his actual suspension in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

**RULE 9.20**

We further recommend that Robert Norik Kitay be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

## COSTS

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

McGILL, J.

WE CONCUR:

PURCELL, P. J.

HONN, J.