PUBLIC MATTER—NOT DESIGNATED FOR PUBLICATION

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

Filed January 24, 2024

In the Matter of	)	SBC-19-O-30228; SBC-21-O-30115; SBC-22-O-30110 (Consolidated)
ROBERT EARL McCANN,	)	
State Bar No. 170286.	)	OPINION

In this disciplinary matter, the Office of Chief Trial Counsel of the State Bar (OCTC) charged Robert Earl McCann with 29 counts of misconduct in five client matters. The hearing judge found culpability on 18 counts and dismissed 11. Finding similarities between McCann's prior discipline in 2005 and the misconduct found after trial in this consolidated matter, the judge recommended, inter alia, an 18-month actual suspension until McCann establishes rehabilitation, along with payment of a small amount in restitution to one client.

McCann concedes culpability on 10 of the 18 counts of misconduct found by the hearing judge. He challenges certain pretrial procedural rulings, and, on the remaining eight counts, he disputes the judge's culpability findings that he sought agreements from three clients to dismiss their State Bar complaints against him, that he violated his obligations to maintain only legal and just actions by filing four mechanic's liens, and that he failed to uphold the laws and constitution of this state and the United States by his filing two of them. He also challenges that he twice made grossly negligent misrepresentations amounting to an act of moral turpitude and that he did

not cooperate in a State Bar investigation. Finally, McCann disputes certain aggravation findings, asserts progressive discipline is not warranted, and argues a 60- to 90-day actual suspension is appropriate. OCTC does not appeal but requests that we assign greater weight to the judge's determination on significant harm. Otherwise, it requests that we affirm the judge's culpability findings and discipline recommendation.

Upon our independent review (Cal. Rules of Court, rule 9.12), we find McCann culpable on all of the counts of misconduct as found by the hearing judge, except one: we do not find McCann culpable on the count of moral turpitude charged in SBC-19-O-30228. Also, we make slightly different findings than the judge on some of the aggravating and mitigating circumstances. Given the overall circumstances in this case, we recommend, inter alia, a 15-month actual suspension and the restitution as recommended by the judge, but we do not recommend that McCann prove rehabilitation. We believe that this recommendation is the appropriate discipline necessary to protect the public, the courts, and the legal profession.

I. PROCEDURAL BACKGROUND

OCTC filed its first Notice of Disciplinary Charges in SBC-19-O-30228 on May 21, 2019 (NDC-1), in which it alleged seven counts of misconduct relating to the filing of four mechanic's liens on behalf of one client. OCTC filed a second set of charges in SBC-21-O-30115 on February 26, 2021, which it amended on May 12, 2022 (NDC-2). NDC-2 alleged seven counts in a single client matter where McCann's improper withdrawal resulted in the dismissal of his client's case. OCTC filed a third set of charges in SBC-22-O-30110 on March 3, 2022 (NDC-3),

which alleged 15 counts in three separate client matters. McCann filed a response to each set of charges,[1] and the three cases were consolidated on September 13, 2022.

On September 21, 2022, the parties filed a Stipulation as to Facts and Admission of Exhibits (stipulation), which was amended on November 7. The next day, McCann filed a motion to dismiss NDC-1 and a related request for judicial notice, both of which the hearing judge denied for lack of good cause on November 15.[2]

Trial was held November 15-18, 2022. The parties thereafter submitted closing briefs and the hearing judge issued her decision on March 7, 2023. McCann timely filed a request for review. Following oral argument on November 2, the matter was taken under submission.

II. FACTS AND CULPABILITY[3]

A. NDC-1 (The Comer Mechanic's Liens)

1. Facts

In April 2018, McCann prepared four mechanic's liens[4] totaling $950,000 against a residence located on Pocket Road in Sacramento, California (Pocket Road property). The same

[1] NDC-1 had been abated on July 1, 2019, because litigation related to NDC-1 was pending in superior court, discussed *infra*. NDC-2 had been abated on April 13, 2021, at which time both NDC-1 and NDC-2 were consolidated. The abatements in both cases were terminated on April 25, 2022.

[2] On review, McCann briefly argues it was error to deny the motion to dismiss and the request for judicial notice. Upon our review of the record, we find McCann failed to show that the hearing judge committed an error of law or abuse of discretion. (*In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, 695; *H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1368 ["appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered"].)

[3] The facts are based on the stipulation, trial testimony, documentary evidence, and the hearing judge's factual and credibility findings, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).)

[4] In California, contractors, laborers, and suppliers have the constitutional and statutory right to file a mechanic's lien against real property "upon which they have bestowed labor or

template was used for each lien.[5] The liens were prepared at the insistence of his friend and client, Michael Comer, the owner of the Pocket Road property.

On April 5, 2018, McCann went, along with Comer, to the Sacramento County recorder's office and recorded three of the four mechanic's liens against the Pocket Road property. First, a $250,000 lien was filed with Comer's sister, Denise Dillard, listed as the claimant and McCann as the requesting party (Dillard mechanic's lien). The description of labor, materials, services, or equipment that Dillard supplied at Comer's request was a "loan for payment of monies" on the Pocket Road property. Dillard had previously loaned $250,000 to Comer as trustee of the Comer Family Trust. Second, a $50,000 lien was filed with McCann listed as both the requesting party and claimant (McCann mechanic's lien). The description of labor, materials, services, or equipment provided by McCann was "legal services" at the request of Comer as trustee of the Comer Family Trust. Third, a $250,000 lien was filed with Comer listed as the requesting party and claimant (Comer mechanic's lien). The description of labor, materials, services, or equipment Comer provided was an "equity interest" in the Pocket Road Property to the Comer Family Trust at the request of Comer. On April 10, McCann filed a fourth mechanic's lien (Comer-Mojonnier mechanic's lien). It was a $400,000 lien with Comer listed as the requesting party and claimant. The description of labor, materials, services, or equipment provided by Comer at the request of Mojonnier was an "equity interest" in the Pocket Road Property.

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furnished material for the value of such labor done and material furnished…." (Cal. Const., art. XIV, § 3; Civ. Code, § 8000 et seq; *RGC Gaslamp, LLC v. Ehmcke Sheet Metal Co., Inc*. (2020) 56 Cal.App.5th 413, 422.)

[5] The mechanic's lien template had "saclaw.org." imprinted on lower left corner. The template's upper right-hand corner had an area entitled "recording requested by" and space for contact information.

McCann and Comer had been friends for decades, and McCann had represented Comer in past legal matters. Comer, a retired real estate developer, had been in a multi-year relationship with Jenifer Mojonnier and they had lived together at the Pocket Road property until their relationship ended in 2017. McCann knew that, at the time he recorded the mechanic's liens in April 2018, Mojonnier was also asserting an ownership interest in the Pocket Road property.

McCann testified that he had never previously filed a mechanic's lien and did little research on the process, but he had read Civil Code section 8400, which describes the classes of people who are allowed to file a mechanic's lien against a property.[6] In filing the four liens, McCann testified that he acted at Comer's insistence, even though McCann was unsure if he was proceeding properly and had suggested alternatives to Comer, including recording a lis pendens. Comer was not a lawyer and had no legal training. When questioned about Comer's motives, McCann acknowledged it was a possibility that Comer wanted to "cloud" the title of the Pocket Road property. When OCTC pressed McCann at trial that Dillard, Comer, or he were not in the enumerated classes of people who could file a mechanic's lien, McCann disputed those assertions and testified that he believed the liens were legally filed.

Even though McCann knew Mojonnier asserted an ownership interest in the Pocket Road property, he did not provide Mojonnier notice prior to filing the mechanic's liens, as required by Civil Code sections 8410 and 8200, subdivision (a)(1).[7] The legal fees that formed

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[6] Civil Code section 8400 states, "A person that provides work authorized for a work of improvement, including, but not limited to, the following persons, has a lien right under this chapter: (a) Direct contractor[;] (b) Subcontractor[;] (c) Material supplier[;] (d) Equipment lessor[;] (e) Laborer[; and] (f) Design professional."

[7] Civil Code section 8410 provides that, "A claimant may enforce a lien only if the claimant has given preliminary notice to the extent required by Chapter 2 (commencing with Section 8200) and made proof of notice." Civil Code section 8200, subdivision (a)(1), provides that a preliminary notice must be provided to either the owner or *reputed* owner of the property against which a mechanic's lien is filed.

the basis of the McCann mechanic's lien were for legal services earned in a 2007 dispute between Comer and Wells Fargo Bank related to the Pocket Road property, as well as for other prior legal services pertaining to family law matters and for legal fees related to the mechanic's liens. The Dillard mechanic's lien was based on his sister loaning money related to the Pocket Road property. As to the Comer mechanic's lien, McCann testified that Comer told him that he had made improvements to the Pocket Road property with those funds. McCann could not recall the basis for the Comer-Mojonnier mechanic's lien.

Once Mojonnier learned of the four mechanic's liens, her attorney, Geoffrey Evers, called McCann twice to resolve the liens. McCann did not return Evers's calls. On May 10, 2018, Evers sent three letters to McCann regarding the four mechanic's liens, and they each stated that McCann had no statutory basis to file the liens and that he failed to comply with Civil Code sections 8400 and 8410. Evers demanded that McCann immediately remove the four liens from the Pocket Road property or McCann would face legal action. McCann did not respond.

Evers subsequently filed a petition in superior court to remove the four liens in an action entitled *Mojonnier v. Comer, et al*. (Super. Ct. Sacramento County, No. 34-2018-00232842.) McCann, as instructed by Comer, did not oppose the petition and did not appear at the June 26, 2018 hearing. The court granted the petition and determined that the failure to give Mojonnier notice prior to the filing of the liens made the liens "unenforceable as a matter of law."[8] In addition, the court stated that Dillard, McCann, and Comer were not entitled to file the liens as

[8] According to the court's order, Mojonnier had filed a verified petition to remove the liens and alleged she was the sole owner of the Pocket Road property. McCann testified that Comer prevailed in a separate action against Mojonnier regarding ownership. Even if later events did not affirm her position, McCann clearly knew Mojonnier was asserting an ownership interest. Ownership was the crux of the dispute between Comer and Mojonnier, and her claim qualified her, at a minimum, under Civil Code section 8200, subdivision (a)(1), to notice as a reputed owner.

they did not fall within any of the professions listed in Civil Code section 8400. McCann, as instructed by Comer, did not appeal the court's order. The court later awarded Mojonnier in excess of $3,000 in attorney's fees. McCann held and continues to hold the position that the court's order is incorrect because Comer was the owner of the Pocket Road property when he filed the liens.

2. Culpability[9]

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

In count one, OCTC charged McCann with a willful violation of Business and Professions Code section 6068, subdivision (c),[10] by filing or causing the filing of the four mechanics liens on the Pocket Road property, in violation of Civil Code sections 8400 and 8410; failing to remove the four liens after being informed the liens were filed in contravention of Civil Code section 8400; and failing to give preliminary notice of the liens as required by Civil Code section 8410. This count also alleges that the liens "were frivolous, without merit and filed for an improper purpose." Section 6068, subdivision (c), provides that an attorney has a duty to "counsel or maintain those actions, proceedings, or defenses only as appear to [the attorney] legal or just, except the defense of a person charged with a public offense." The hearing judge found McCann culpable, and we affirm the judge's culpability determination for this count.

[9] OCTC does not challenge the hearing judge's dismissal of counts three, five, and six. Regarding count three, McCann was charged with failing to cooperate with OCTC in its investigation. (Bus. & Prof. Code, § 6068, subd. (i).) Regarding counts five and six, McCann was charged with failing to support the constitutions and laws of California and the United States (Bus. & Prof. Code, § 6068, subd. (a)) in two of the four mechanic's liens. Upon review of the record, we affirm these dismissals. (*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].)

[10] All further references to "section" are to the Business and Professions Code, unless otherwise noted.

Even though McCann was unfamiliar with the mechanic's lien process and had doubts as to the propriety of the liens, he took almost no steps to learn whether Comer's demands to record the four liens were legally justified. "The purpose of a mechanic['s] lien is to prevent unjust enrichment of a property owner at the expense of laborers or material suppliers." (*Basic Modular Facilities, Inc. v. Ehsanipour* (1999) 70 Cal.App.4th 1480, 1483 [discussion of prior mechanic's lien provisions].) None of the filed liens served such a purpose. Further, McCann knew ownership of the Pocket Road property was in dispute between Comer and Mojonnier and that Comer possibly wanted to cloud the title of the property. Section 6068, subdivision (c), requires more of McCann than acting as a scribe for an insistent and demanding client. McCann was also on notice following Evers's letters that he did not comply with the applicable Civil Code provisions. Yet, McCann took no corrective action. He simply let Mojonnier incur costs for the improvidently and improperly filed liens.

We also note the superior court judge held that the mechanic's liens were unenforceable as a matter of law due to McCann's failure to give Mojonnier the statutorily required preliminary notice. In addition, McCann, Dillard, and Comer did not meet the statutory professions that entitled them to file a lien, as found by the superior court. We give a strong presumption of validity to a superior court's findings when supported by substantial evidence. (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 947.) Here, the evidence on which the superior court relied and on which we rely is essentially the same: the liens themselves. Notably, McCann did not contest Mojonnier's petition and did not appeal the ruling, which indicates to us that both he and Comer understood by the time of the superior court hearing that the liens were not warranted under the law. Finally, contrary to McCann's repeated arguments, the ownership of the Pocket Road property did not insulate him from providing notice, because Civil Code section 8200, subdivision (a)(1), also refers to reputed owners, which would include Mojonnier. The

mechanic's liens McCann recorded simply did not comply with the statutory framework. Clear and convincing evidence[11] exists in the record to conclude that McCann is culpable as charged.[12]

b. Count Two: Moral Turpitude—Misrepresentation (§ 6106)

Count two charged McCann with a violation of section 6106 for the intentional or grossly negligent misrepresentations contained in the four recorded mechanic's liens. Specifically, count two alleged McCann filed or caused to be filed the mechanic's liens on or about April 5 and 10, 2018, knowing that the $950,000[13] claimed for labor, services, equipment, or materials furnished for a work or improvement on the Pocket Road property were false and misleading statements. Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes a cause for suspension or disbarment. Misrepresentation includes affirmative statements as well as omissions of material facts. (*In the Matter of Crane and Depew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 154-155.)

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[11] See *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). All findings discussed in this Opinion are made using this evidentiary standard.

[12] We do not assign full disciplinary weight to count one because McCann's actions in filing two of the four mechanic's liens also violated section 6068, subdivision (a), as pleaded in counts four and seven, discussed *infra*. We do not assign disciplinary weight for multiple counts where culpability is based on the same facts. (See *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127 [no additional disciplinary weight for former rule 4-100(A) violation as it was duplicative of moral turpitude violation].) We give weight to the counts with the most serious presumed sanction, which are counts four and seven, because those counts have a presumed sanction of disbarment or actual suspension, while count one carries a presumption of lesser discipline. (See Rules Proc. of State Bar, tit. 4, Stds. for Atty. Sanctions for Prof. Misconduct, stds. 2.12 (violations of section 6068, subdivision (a)) and 2.9 (violations of section 6068, subdivision (c))).

[13] Count two charged an incorrect combined dollar amount of the liens, $925,000. The correct total was $950,000.

The hearing judge found a lack of clear and convincing evidence to support culpability under count two for the Comer and the Comer-Mojonnier mechanic's liens. The judge's conclusion relied on Comer's status as a former developer and McCann's testimony that Comer told him that he had made improvements to the Pocket Road property and no evidence in the record contradicted his testimony. OCTC did not appeal the judge's findings related to these two mechanic's liens and, upon review of the record, we affirm the judge's conclusions.

The hearing judge did find that McCann violated section 6106 by filing the remaining two liens, the McCann and Dillard mechanic's liens, because "neither [McCann] nor Dillard had provided labor, services, or materials for improvement" for the Pocket Road property and "[s]uch statements made in the liens were clearly false." Noting McCann acted at Comer's direction, along with McCann's lack of experience and insufficient research into the appropriateness of the liens, the judge determined that McCann's misrepresentations in the McCann and Dillard mechanic's liens were grossly negligent and not intentionally dishonest.[14] OCTC supports the judge's findings of gross negligence.

Our review of the record leads us to reverse the hearing judge's culpability determinations that McCann made grossly negligent misrepresentations at the time he filed the McCann and Dillard mechanic's liens. We find the record demonstrates McCann held an honest and sincere, but mistaken and unreasonable, belief that the mechanic's lien process allowed him to claim his attorney fees and the Dillard loan as services because the dollar amounts were related to the Pocket Road property. Thus, his actions do not rise to moral turpitude. (*In the Matter of Isola* (Review Dept. 2022) 5 Cal State Bar Ct. Rptr. 911, 931 [no moral turpitude by

[14] A grossly negligent misrepresentation can amount to moral turpitude. (*In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 91.)

gross negligence where respondent had a sincere belief the conduct was justified]; *In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 9-11 [no moral turpitude where attorney honestly, but unreasonably, believed in justifiability of actions].)

Regarding his general state of mind at the time the two mechanic's liens were filed, McCann testified that he knew Comer was the owner of the Pocket Road property as the property had been transferred to Comer notwithstanding Mojonnier's claims. While McCann believed that there were other ways to protect Comer's interests other than filing the mechanic's liens, he believed that the liens were nonetheless appropriate because Comer was the owner of the Pocket Road property.

As to the McCann mechanic's lien specifically, the evidence supports a finding that McCann had an honest, but mistaken and unreasonable, belief he could file a mechanic's lien for his services. McCann testified that he interpreted the term "services" on the mechanic's lien form to include legal services, which he had provided to Comer in different legal matters and all the matters pertained to the Pocket Road property. Comer testified similarly.[15] Hence, we accept McCann's testimony in this regard. (*In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 749 [reasonable doubts resolved in favor of respondent].) McCann also testified that he did not consider the additional terms that followed "services," specifically that any services he provided had to relate to the Pocket Road property as a "work of improvement." Any concerns that McCann had about the appropriateness of his lien were

[15] We recognize that in June 2019, Comer signed a sworn declaration that McCann included with his response to NDC-1, in which Comer stated the McCann mechanic's lien was for legal services McCann provided to him in prior family law matters. Comer was not questioned about it during his testimony and no evidence exists that McCann understood that this was Comer's reasoning—or believed it himself—at the time he filed the mechanic's liens in April 2018.

unreasonably subjugated to his knowledge that Comer was the owner of the Pocket Road property, who had insisted that the four liens be filed. We again see nothing in the record to indicate his belief on this point is not also honestly held. Therefore, even if we conclude that his failure to consider all the terms together is unreasonable, his honest belief leads to the legal conclusion that his actions do not equate to moral turpitude. (See *In the Matter of Klein*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 9-11.)

Turning to the Dillard mechanic's lien, the record again shows McCann held an honest and mistaken, but unreasonable, belief that the mechanic's lien process allowed him to record a mechanic's lien for Dillard's loan to Comer that was tied to the Pocket Road property. Comer told McCann the loan fell under "services" because the loan was for "the property itself" and provided the dollar amount. McCann also spoke with Dillard and confirmed she made a $250,000 loan to Comer and that the loan was related to the property. No evidence exists in the record that, at the time McCann recorded the Dillard mechanic's lien, McCann knew this loan was not a "service" for a "work of improvement." Moreover, no evidence exists that the Dillard loan was *unrelated* to the property or that McCann knew that. OCTC never questioned McCann or Comer about the purpose of the Dillard loan. Hence, OCTC did not meet its burden of proof in establishing culpability for either a grossly negligent act of moral turpitude by clear and convincing evidence.

Finally, OCTC's oral argument contradicts its brief, and thus, raises a doubt about culpability under count two. Specifically, OCTC acknowledged that while count two alleged that McCann's act of moral turpitude occurred at the time he filed the mechanic's liens, the record supported an inference of mere negligence at the point in time they were filed. Case law establishes, "[m]ere negligence in making a representation does not constitute a violation of section 6106." (*In the Matter of Lingwood* (Review Dept. 2019) 5 Cal. State Bar Ct. Rptr. 660,

673, citing *In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 353.) To the extent OCTC, at oral argument, framed McCann's post-filing actions, such as ignoring Evers's letters and not defending against Mojonnier's petition to remove the mechanic's liens, as circumstantial evidence of gross negligence *at the time he filed the mechanic's liens*, we disagree. McCann credibly testified that the reason he ignored Evers's letters was because he had no doubt that Comer was the true property owner. In essence, he felt no need to respond to letters he viewed as meritless. While a respondent's state of mind can be established by circumstantial evidence, this evidence itself must be clear and convincing. (*In the Matter of Petilla* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 231, 237.) [16] McCann's post-filing conduct, considered with other evidence that we previously discussed, does not establish clear and convincing evidence of moral turpitude by gross negligence at the time he filed the liens.

It is clear McCann used the wrong legal process to seek recovery of his attorney's fees and Dillard's loan when he recorded the two mechanic's liens. This misconduct has been addressed by the appropriate findings that McCann is culpable for a violation of section 6068, subdivision (c), as discussed *ante*, and counts four and seven as discussed *infra.* However, for the misconduct charged in count two, we do not find that his acts constitute moral turpitude and

[16] In *Petilla*, that attorney was found to have committed an act of moral turpitude under section 6106 because we rejected the attorney's testimony that he intended to repay credit card advances. We, instead, relied on a large amount of circumstantial evidence to establish that, by clear and convincing evidence, he had no intent to repay the cash advances at the time he took them. (See *In the Matter of Petilla*, *supra*, 4 Cal. State Bar Ct. Rptr. at pp. 237-245 [number of factors provided circumstantial evidence to establish clear and convincing evidence of intent to not repay cash advances, including sophistication in accounting and financial matters, attorney's legal training and accounting knowledge as Certified Public Accountant that he could avoid repaying debts by filing bankruptcy, along with finding of actual fraud made by bankruptcy court in adversarial proceeding].) Here, the hearing judge did not reject McCann's testimony, McCann had almost no knowledge of mechanic's liens, and the superior court made no finding of fraud.

dismiss this count with prejudice. (*In the Matter of Kroff*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

c. Counts Four and Seven: Failure to Comply with Laws (§ 6068, subd. (a))

Counts four and seven allege violations of section 6068, subdivision (a), specifically that McCann failed to comply with Civil Code sections 8400 and 8410 in filing, respectively, the McCann and Comer-Mojonnier mechanic's liens. Section 6068, subdivision (a), imposes a duty on attorneys to "support the Constitution and laws of the United States and of this state." (*In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 110 [discipline under section 6068, subd. (a), occurs when attorney does not uphold law].)

Counts four and seven used the same charging language, differentiated only by the name of the lien claimant, the lien amount, and the services provided in each lien. The charging language used in each count sets forth two ways McCann violated section 6068, subdivision (a). First, McCann filed liens, although he "was not a person in the specified classifications" of Civil Code section 8400. Second, McCann did not provide preliminary notice prior to filing the liens as required by Civil Code section 8410. The hearing judge found McCann culpable on these two counts and we affirm.

Regarding count four (the McCann lien), the hearing judge reasoned that McCann did not fall within Civil Code section 8400 for his lien for legal services.[17] Regarding count seven (the Comer-Mojonnier lien), the judge found McCann culpable because Mojonnier was entitled to the statutory preliminary notice, but he did not provide it to her. There is no dispute McCann caused the recording of both mechanic's liens. McCann improperly failed to consider Mojonnier a

[17] The judge did not address McCann's failure to give Mojonnier notice for his lien.

purported owner and did not give her the required preliminary notice pursuant to Civil Code section 8410. Hence, culpability has been established.[18]

B. NDC-2 (The Almutairi Matter)

1. Facts

In 2015, Abdullah Almutairi bought a car from Sacramento River Auto, but the car was later stolen from the car lot and damaged. Almutairi wanted to recover his loss from the car dealer and was referred to McCann by his friend, Adam Aldazari, who worked for McCann at the time. Almutairi's native language is Arabic and Aldazari also spoke Arabic. At the time Almutairi was referred to McCann, McCann used Aldazari occasionally as an interpreter in addition to general office duties. McCann shared office space with Akram Chaudhry, a paralegal, and used Chaudry's paralegal services through Chaudry's company "Smart Paralegals."

Almutairi went to McCann's office where he met with Chaudry and Aldazari. On September 23, 2015, Almutairi signed a retainer agreement drafted by Aldazari, which indicated Smart Paralegals, not McCann, as the provider of the legal services and the fees to be charged was $2,500. Chaudry was the other signatory. That same day, a receipt from Smart Paralegals, signed by Chaudry, acknowledged Almutairi paid $625 with a noted balance due of $1,875. Between January and September 2016, Almutairi made three more payments totaling $1,508. Two of the three receipts were issued on McCann's letterhead. Almutairi never met McCann until the disciplinary hearing.

[18] As in count seven where the judge found culpability, McCann did not provide Mojonnier with the required preliminary notice for the liens charged in dismissed counts five and six, discussed *ante*.

In August 2016, McCann filed a civil case entitled *Abdullah Almutairi v. Sacramento River Auto et al.* (*Almutairi* case). (Super. Ct. Yolo County, Aug. 2, 2016, No. CV16-1219.) McCann did not timely file the required case management conference statements. McCann did not appear at the court ordered case management conferences set for December 5, 2016, and March 6, 2017. On March 8, the superior court issued an order to show cause (OSC) regarding why the case should not be dismissed. McCann did not respond to the OSC and did not appear at the August 27, 2018 OSC hearing. The case was dismissed with prejudice on September 13. The orders were sent to McCann's business address, although he does not specifically recall receiving the orders.

In June 2019, Almutairi collected his file from McCann's office and verbally requested a refund of the fees he paid. Soon thereafter, Almutairi requested a fee arbitration against McCann with the Sacramento County Bar Association (SCBA). On July 7, 2019, Almutairi filed a complaint about McCann with the State Bar. On January 27, 2020, McCann paid Almutairi $2,725.[19] McCann admits that he concluded he had not earned any of the fees Almutairi had paid once he read Almutairi's fee arbitration request, but he did not refund the fees earlier as Almutairi never requested a refund.

On March 31, 2020, in response to Almutairi's State Bar complaint, McCann wrote to OCTC and characterized the issues with Almutairi as a "fee dispute." McCann also wrote OCTC that Almutairi "agreed to withdraw his [r]equest for fee arbitration with the [SCBA] and his complaint with the State Bar of California for $2725.00 dollars (disputed)." McCann explained

[19] As detailed *ante,* Almutairi's receipts show payments to McCann totaling $2,133. McCann paid Almutairi $2,725 via four separate checks issued the same day. There is no explanation in the record for the difference between the two amounts.

that he "decided to compromise and resolve the matter based on a cost analysis to defend against his claims[.]"

On April 3, 2020, Almutairi emailed OCTC, writing that he did not agree to withdraw his State Bar complaint. Almutairi also provided OCTC screen captures of a February 8 WhatsApp chat with Walid Kanaan, who McCann used as an interpreter on occasion. Attached to the chat was a letter for Almutairi's signature addressed to the assigned OCTC investigator. The letter purported to withdraw Almutairi's State Bar complaint. Although McCann did not recognize the letter and did not authorize it, McCann testified that he had presented similar letters to other clients. Almutairi refused to sign the letter, but almost a year later, in February 2021, Almutairi emailed OCTC requesting it "drop" his complaint.

2. Culpability[20]

a. Count One: Failure to Perform with Competence (Former Rule 3-110(A))
Count Two: Failure to Inform Client of Significant Developments (§ 6068, subd. (m))
Count Four: Failure to Obey Court Order (§ 6103)
Count Six: Failure to Obtain Court Permission to Withdraw (Former Rule 3-700(A)(1))

Counts one, two, four, and six charged McCann with misconduct regarding how he handled the *Almutairi* case and its ultimate dismissal with prejudice for his failure to prosecute it. Count one charged a violation of former rule 3-110(A)[21] when he intentionally, recklessly, or repeatedly failed to perform with competence in the *Almutairi* case, and count two charged a

[20] The hearing judge dismissed count five that alleged McCann aided Chaudry's unauthorized practice of law in violation of former rule 1-300(A). OCTC does not challenge this dismissal. Based upon our independent review of the record, we affirm the dismissal of the count. (*In the Matter of Kroff*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

[21] A reference to "former rule" is to the California Rules of Professional Conduct that were in effect from September 14, 1992, until October 31, 2018. A reference to "rule" is to the current California Rules of Professional Conduct, effective November 1, 2018.

violation of section 6068, subdivision (m), when he failed to keep Almutairi reasonably informed of significant developments in his case. Specifically, counts one and two both allege the following actions by McCann: his failure to file a case management conference statement and failure to appear at the December 5, 2016 court appearance; his failure to file a case management conference statement and failure to appear at the March 6, 2017 case management conference; his failure to appear at the August 27, 2018 hearing on an OSC regarding dismissal of the *Almutairi* case; and the court's September 13, 2018 dismissal of the *Almutairi* case with prejudice.[22] Count one additionally alleged McCann's filing of the *Almutairi* case was a violation of former rule 3-110(A). Count four charged McCann with failure to comply with the *Almutairi* case court orders dated December 5, 2016, and March 6 and 8, 2017, in violation of section 6103, and essentially pleaded the same underlying facts as in counts one and two, though this charge was structured differently.[23] Finally, count six charged a violation of former rule 3-700(A)(1) by McCann's constructive withdrawal from the *Almutairi* case without the required court permission. The constructive withdrawal theory in count six is premised on McCann taking no action in the matter, which caused the dismissal of the *Almutairi* case with prejudice. In essence, McCann's failure to act and comply with court orders as charged in counts one, two and four, was tantamount to withdrawing as Almutairi's counsel without the required court approval.

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[22] The hearing judge found OCTC did not meet its burden of proof that McCann failed to respond to form interrogatories as alleged in counts one and two. OCTC does not challenge this finding and we affirm based on the record. (*In the Matter of Kroff*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

[23] The December 5, 2016 order required McCann to file a case management conference statement and appear at the next scheduled conference. Both of the March 2017 orders required McCann to appear for the OSC on August 27, 2018. McCann did not file the required case management conference statement or appear at the OSC.

McCann does not challenge the hearing judge's culpability findings on the four counts. McCann's concessions are supported by the record, and we affirm the judge's culpability determinations on the counts. However, we will only assign disciplinary weight to count four as these four counts overlap factually and count four presents the most serious charge among these counts. (*In the Matter of Sampson supra,* 3 Cal. State Bar Ct. Rptr. at p. 127; *In the Matter of Moriarty* (Review Dept. 2017) 5 Cal. State Bar Ct. Rptr. 511, 520 [no disciplinary weight for additional culpability on same facts].)

b. Count Three: Failure to Return Unearned Fees (Former Rule 3-700(D)(2))

McCann concedes culpability for count three, which alleges that his failure to promptly return unearned fees to Almutairi, waiting well over a year, was in violation of former rule 3-700(D)(2). Former rule 3-700(D)(2) required that McCann "promptly refund any part of a fee paid in advance that has not been earned." McCann's concession is supported by the record, and we affirm the hearing judge's culpability determination for this count.

c. Count Seven: Attorney/Client Agreement Not to File Complaint (§ 6090.5, subd. (a)(2))

The only culpability finding McCann challenges on review in NDC-2 is count seven, which alleges a violation of section 6090.5, subdivision (a)(2). This provision states,

> It is cause for suspension, disbarment, or other discipline for any licensee, whether acting on their own behalf or on behalf of someone else, whether or not in the context of litigation to solicit, agree, or seek agreement, that: … (2) A complainant shall withdraw a disciplinary complaint or shall not cooperate with the investigation or prosecution conducted by the State Bar.

The hearing judge found McCann culpable on this count and aptly stated that culpability did not require a quid pro quo between McCann and Almutairi, but only that McCann solicit or seek an agreement for Almutairi to withdraw his disciplinary complaint. McCann's own March 2020 letter to OCTC established that he sought an agreement with Almutairi. McCann wrote he

was resolving the State Bar complaint with Almutairi and that Almutairi agreed to withdraw both the fee dispute with the SCBA *and* his State Bar complaint for $2,725. On review, McCann points to both his and Almutairi's testimonies to establish that their communication regarding settlement only related to the fee dispute with the SCBA and, if McCann never met Almutairi, then there could be no communication to resolve the State Bar complaint. These arguments are not persuasive in light of the wording McCann used in his letter to OCTC and also the drafted withdrawal letter Kanaan sent Almutairi on February 8, 2020. McCann is culpable for his violation of section 6090.5, subdivision (a)(2), under this count.

C. NDC-3 (The Rodriguez-Schultz-Espino Matters)

1. Count Two: Failure to Respond to Client Inquiries (§ 6068, subd. (m))
Count Three: Failure to Refund Unearned Fees (Rule 1.16(e)(2))
Count Four: Attorney/Client Agreement Not to File Complaint (§ 6090.5, subd. (a)(2))
Count Five: Failure to Cooperate in State Bar Investigation (§ 6068, subd. (i))

Counts two through five pertain to Alejandra Rodriguez, who retained McCann to assist her in preparing and filing documents for a divorce. The hearing judge found McCann culpable on these counts.[24] On March 12, 2018, the two signed a retainer agreement and Rodriguez paid McCann $1,000. A few days, later Rodriguez contacted McCann stating, "please send me the electronic forms to complete," though she later found the forms on her own. Rodriguez emailed McCann in January 2019 to advise she had completed the forms and asked to meet with him. McCann emailed Rodriguez on May 21, 2019, asking her to send the forms to him. The next

[24] The hearing judge dismissed count one, which alleged that McCann failed to perform with competence in assisting Rodriguez with the documents. OCTC does not challenge the dismissal. Based upon our independent review of the record, we affirm the dismissal of this count with prejudice. (*In the Matter of Kroff*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

week, Rodriguez emailed McCann. She wanted a reimbursement as Rodriguez had been unable to reach McCann. Rodriguez emailed McCann again in September and October 2019, trying to get her money back and detailing how she was not able to get in contact with McCann.

Another email followed on March 5, 2020. Rodriguez again sought reimbursement and expressed frustration at McCann's unresponsiveness. Rodriguez mentioned that, although reluctant to do so, she would report McCann to the State Bar if he did not respond. In a March 2020 telephone call, McCann agreed to refund Rodriguez's $1,000. In a confirming email, Rodriguez asked how she would get the refund. However, McCann did not respond.

On January 13, 2021, OCTC sent a letter to McCann about Rodriguez's complaint, which included his unfulfilled promise to refund her money and gave him until January 27, 2021, to respond. McCann finally issued a refund to Rodriguez a few months later. After the refund was sent to her, McCann sent an email on May 5 thanking Rodriguez for her agreement to dismiss her State Bar complaint. Attached to McCann's email was a drafted letter for Rodriguez's signature, which was addressed to the assigned OCTC investigator. The letter purported to withdraw her State Bar complaint. Rodriguez emailed the State Bar on May 11, attaching McCann's email and the letter, and she stated she did not sign it and wanted to continue her complaint.

McCann sought and received an extension of time to respond to OCTC's letter. The new date, February 27, 2021, passed with no response. OCTC sent a follow up letter on March 3. McCann received the letter but did not respond. At trial, McCann accepted responsibility for his inaction on Rodriguez's matter and conceded he never provided OCTC a substantive response.

McCann was charged with and concedes he violated section 6068, subdivision (m), in failing communicate with Rodriguez (count two); rule 1.16(e)(2) for not promptly returning unearned fees (count three); and section 6068, subdivision (i) (count five), for failing to

cooperate with OCTC. McCann's concessions regarding these counts are supported by the record and we affirm the hearing judge's culpability determination.

McCann contests the hearing judge's culpability finding in count four, which charged a violation of section 6090.5, subdivision (a)(2). McCann's argument that he simply asked Rodriguez if she would withdraw the complaint and he did not condition the refund of unearned fees on the request is not persuasive. Even if his letter does not demonstrate a quid pro quo, McCann's defense that he only asked her is, in fact, the violation—McCann sought Rodriguez's agreement to drop her complaint. Under the statute, discipline is required for an attorney who "agree[s] or *seek*[s] agreement" to withdraw a State Bar complaint. (Bus. & Prof. § 6090.5, subd. (a)(2), italics added.)

2. Count Eight: Failure to Refund Unearned Fees (Rule 1.16(e)(2))
Count Nine: Attorney/Client Agreement Not to File Complaint (§ 6090.5, subd. (a)(2))
Count Ten: Failure to Cooperate in State Bar Investigation (§ 6068, subd. (i))

Counts eight through ten pertain to Heather Schultz. The hearing judge found McCann culpable of these three counts.[25] In January 2019, McCann agreed to file a bankruptcy petition for Schultz. At the time, Schultz was in debt due to the illness and death of her daughter. McCann allowed Schultz to pay his $1,530 fee in installment payments because she was elderly[26] and had limited financial resources, including that she relied on social security. Based on their agreement, McCann was to file the bankruptcy petition once she completed the

[25] The hearing judge dismissed counts six and seven. These counts charged McCann in the Schultz matter with failure to perform with competence and failure to communicate and respond to client inquiries in violation of, respectively, rule 1.1(a) and section 6068, subdivision (m). OCTC does not challenge these dismissals. Based upon our independent review of the record, we affirm the dismissal of those counts. (*In the Matter of Kroff*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

[26] Schultz was 84 when she testified at trial.

payments. Between January and July 2019, McCann received five payments of $300 and a final $30 payment. Schultz delivered each payment directly to McCann's office.

Starting in July 2019, Schultz had difficulty reaching McCann, which was partly due to McCann moving his office location in October 2019 and not informing Schultz of this. Schultz eventually located McCann and the two met in the spring of 2021. McCann did not perform any bankruptcy services for Schultz at any point in time, and he testified he was unsure whether this was due to his health issues or if he lost her paperwork. McCann stipulated that by March 2020, he constructively terminated his relationship with Schultz. Schultz continued to pay her debts as best she could, but some creditors stopped sending her bills. At the time of trial, she testified that her credit score had improved.

Schultz complained to the State Bar. On April 12, 2021, OCTC sent a letter to McCann about her complaint and requested information. McCann received a second letter from OCTC dated April 29, which warned him that failing to cooperate with the investigation could be a violation of section 6068, subdivision (i). McCann never provided a substantive response to either of OCTC's letters.

At some point between April 19 and May 4, 2021, McCann met with Schultz and paid her a $1,500 refund.[27] On May 4, 2021, McCann emailed OCTC an undated letter he drafted that was signed by Schultz. In that letter, Schultz requested that her complaint be "immediately dismissed" as it had been resolved. Schultz testified that, in her final meeting with McCann, he required that she sign the letter in order to receive her refund. McCann disputes her claim, but acknowledged the exchange of the letter and the check were close in time.

[27] This is $30 less than Schultz actually paid, and McCann had no explanation for the difference. Therefore, we find that McCann still owes Schultz $30.

McCann concedes culpability for count eight, the allegation that he failed to refund unearned fees in violation of rule 1.16(e)(2), and count ten, the allegation that he failed to cooperate with OCTC in violation of 6068, subdivision (i). McCann's concessions are supported by the record. We affirm the hearing judge's culpability determination on these two counts.

The only count McCann challenges on review is count nine, which charged a violation of section 6090.5, subdivision (a)(2). Here, McCann submitted a letter signed by Schultz directly to OCTC wherein Schultz withdrew her complaint. As she testified, Schultz did not send that letter on her own accord. McCann clearly sought her agreement to withdraw her complaint. He is, therefore, culpable of this count.

3. Count 15: Failure to Cooperate in State Bar Investigation (§ 6068, subd. (i))

Count 15 pertains to the State Bar's investigation into McCann regarding his representation of four individuals who were all defendants in the same civil lawsuit. McCann represented Silvia Espino; her husband, Moises Rangel; their real estate agent, Gino Gallegos; and a real estate broker (Espino litigation). In its letter to McCann on December 22, 2021, OCTC stated that McCann was required to respond by January 5, 2022. McCann sought and received a 10-day extension of time to respond by January 15, but he did not respond. On January 18, OCTC wrote McCann and warned him, as it did in the Schultz matter, about the consequences of failing to comply with section 6068, subdivision (i), and requested a response by January 25. On March 3, OCTC filed NDC-3 that included counts 11 through 14 regarding

the Espino litigation,[28] and an allegation that he violated section 6068, subdivision (i). On March 10, McCann responded to the December 2021 letter from OCTC.

The hearing judge found McCann culpable under count 15 because his response was untimely as it was sent after NDC-3 was filed. McCann argues he cooperated, though he was late, and he provided a detailed response to OCTC. We reject McCann's argument. OCTC gave him an extension to respond to its letter, and it sent him a warning letter three days after he failed to respond by the extended deadline. NDC-3 was filed six weeks later, and his response eight days later was simply too late. We affirm the culpability finding of the judge on this count.

III. AGGRAVATION AND MITIGATION

OCTC must establish aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. 4, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.5.)[29] McCann has the same burden to prove mitigation. (Std. 1.6.)

A. Aggravation

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

McCann has one prior discipline resulting from a stipulated disposition. In 2005, the Supreme Court imposed discipline that included a 60-day actual suspension. McCann's prior misconduct was spread across five client matters, including two violations of section 6106 for

[28] The hearing judge dismissed counts 11 through 14. Those counts alleged McCann violated rule 1.7(a) by representing joint defendants without properly advising them of reasonably foreseeable consequences of the joint representation and failing to obtain informed written consent from each client (count 11); violating rule 5.4(a) by sharing legal fees with a non-lawyer relating to the representation of Espino (count 12) and Gallegos (count 13); and violating rule 5.5(a)(2) by aiding Chaudhry in the unauthorized practice of law (count 14). OCTC does not challenge these dismissals. Based upon our independent review of the record, we affirm the dismissal of these counts. (*In the Matter of Kroff*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

[29] All references to standards are to this source.

misrepresentations to a single client; four separate instances of failing to promptly refund unearned fees in violation of former rule 3-700(D)(2); three separate instances of failing to render an accounting in violation of former rule 4-100(B)(3); two separate instances of failure to perform with competence in violation of former rule 3-110(A); and two separate instances of failing to communicate in violation section 6068, subdivision (m). While the discipline regarding his prior misconduct was imposed 11 years before the misconduct began in these matters, it was serious. The prior discipline and the instant case are similar as they both involve instances of failure to return client funds and failures to communicate. McCann's return to mishandling client funds is the most troublesome. We affirm the hearing judge's application of substantial weight and reject McCann's assertion that his prior misconduct is too remote in time to be relevant. (*In the Matter of Burke* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 448, 461 [aggravation warranted where commonality between prior misconduct and current misconduct indicates a lack rehabilitation and unwillingness or inability to conform to ethical requirements]; see also *In the Matter of Hanson* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 703, 713 [diminished weight given to discipline issued 17 years prior for misconduct that was not serious].)

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

The hearing judge found "compelling" weight applied to this standard and OCTC agrees. McCann does not address this circumstance on review. While McCann engaged in well over 20 discrete acts of misconduct, we cannot conclude that such aggravating evidence is compelling, especially as those acts occurred in five client matters. (See *In the Matter of Respondent BB* (Review Dept. 2021) 5 Cal. State Bar Ct. Rptr. 835, 846, 847 [compelling evidence of good character assigned "due to the breadth of the evidence presented," and where evidence is "wide-ranging and extensive"].) We find that substantial weight is appropriate based on the record. (*In*

the Matter of Valinoti (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498, 555 [repeated similar acts of misconduct considered serious aggravation].)

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

Significant harm to the client, the public, or administration of justice is an aggravating circumstance. The hearing judge assigned moderate weight based upon the Almutairi matter because McCann's failure to competently perform legal services led to the dismissal of the client's case.

McCann argues generally that no client was financially harmed by his actions. Specifically, he argues that Almutairi was not financially harmed by his abandonment of the civil case as McCann eventually returned the fees Almutairi paid. We disagree with McCann's narrow focus on harm as merely pecuniary. As for Almutairi specifically, the hearing judge correctly noted that losing a cause of action is itself significant harm. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646.) McCann also argues Schultz was not harmed because she never filed for bankruptcy and is better off than she was in 2019, presumably because Schultz testified that her credit has improved. However, Schultz continued to pay debts that she could have otherwise discharged in bankruptcy if he had done as promised, which we equate to some harm.

Even though it did not appeal, OCTC argues substantial weight is appropriate because of the harm to Almutairi, along with additional harm to Schultz, Espino, and Rangel. We reject OCTC's argument regarding Espino and Rangel as all the allegations of misconduct that could have resulted in a finding of harm were dismissed by the hearing judge and not appealed. McCann's culpability for not cooperating with OCTC cannot be considered a harm to those

clients. On balance, we affirm the judge's finding of moderate weight to this aggravating circumstance.

4. Lack of Insight (Std. 1.5(k))

Indifference toward rectification or atonement for the consequences of misconduct, including lack of insight, is an aggravating circumstance. While the law does not require false penitence, it does require an attorney to accept responsibility for wrongful acts and show some understanding of his culpability. (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) OCTC agrees with the hearing judge's assignment of limited weight here. Though he does not expressly argue it, McCann does point out that he "accepts responsibility" in the Almutairi, Rodriguez, and Schultz matters by his concession to many of the charges made in those three matters.

As the hearing judge noted, McCann has not demonstrated that he understands that his filing of the four mechanic's liens was improper as he insists that he would follow the same course of action because Comer is the rightful owner of the Pocket Road property. (*In the Matter of Duxbury* (Review Dept.1999) 4 Cal. State Bar Ct. Rptr. 61, 68 [aggravation appropriate where attorney shows lack of a "full understanding of the seriousness of his misconduct"].) On the other hand, McCann has conceded culpability on 10 of the 17 counts where we find culpability, some of which he conceded before trial and others that he has conceded on review. His concessions do demonstrate some insight into his misconduct, which OCTC acknowledges. We agree limited weight is appropriate here.

5. High Level of Vulnerability of the Victim (Std. 1.5(n))

The hearing judged assessed moderate weight under this standard due to Schultz's age, her reliance on social security benefits, and that Schultz lacked the funds to hire someone else to file her bankruptcy. We acknowledge that Schultz is elderly and receiving government benefits,

but her testimony was cogent, and she offered clear answers to the questions asked of her. From our review of her testimony, she did not appear infirm or cognitively impaired. Further, our view of Schultz's testimony is that, once she received from McCann the fees she paid to him, she decided to not hire another attorney. We find limited weight to be appropriate under these facts.

B. Mitigation

1. Cooperation (Std. 1.6(e))

The hearing judge gave minimal weight to this standard. McCann points to the numerous instances where he conceded culpability. OCTC agrees with the judge's finding, noting that the stipulations were limited and did not save significant resources.

We agree with OCTC that McCann's factual stipulations were not extensive and involved easily provable facts, with only one admission of culpability within the stipulation. Typically, such a stipulation would result in minimal or limited weight. (*In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 318; *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 567 [limited mitigation for stipulating to easily provable facts].) However, in the parties' stipulation, McCann did stipulate to the admissibility of OCTC's exhibits. Furthermore, almost half of OCTC's charges were dismissed across the three sets of charges. McCann is not required to stipulate to factually weak charges. Finally, McCann conceded culpability to multiple counts at trial and conceded to additional culpability on review. While concessions during and after trial do not conserve judicial resources to the degree a more robust pretrial stipulation would, we disagree with OCTC's argument that McCann's concessions cannot be considered here, specifically that cooperation under standard 1.6(e) only applies to "pre-trial cooperation," which it does not. Accordingly, we find moderate weight appropriate.

IV. 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. The Supreme Court has instructed us to follow the standards "whenever possible." (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) The standards are guidelines for discipline and are not mandatory, however we give the standards great weight to promote consistency. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) We also look to comparable case law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

In analyzing the applicable standards, we first determine which standard specifies the most severe sanction for the at-issue misconduct. (Std. 1.7(a).) The most severe sanction standard to consider is disbarment or actual suspension, which is based on multiple findings of misconduct: standard 2.12(a), based on McCann's two violations of section 6068, subdivision (a); standard 2.18 for his one violation of section 6103; and, regarding his three violations of section 6090.5(a)(2), the statute itself states that any violation "is cause for suspension, disbarment, or other discipline" of an attorney's law license.

Additionally, McCann has a single prior record of discipline, which raises standard 1.8(a). This standard requires that any sanction "must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust." McCann's previous discipline resulted in a 60-day actual suspension. We disagree with McCann that his prior discipline is too remote to warrant progressive discipline as his misconduct in these matters began in the Almutairi matter in 2016, 11 years after his 2005 discipline. Also, as the hearing

judge noted, the 2005 discipline has similar misconduct to some of the misconduct at issue in these matters.

The hearing judge recommended a three-year stayed suspension with an 18-month actual suspension until rehabilitation is established. OCTC agrees with the judge's recommendation. However, that recommendation was made based on misconduct that included a finding of moral turpitude, which we do not find. McCann argues for a 60- or 90-day actual suspension based on his concession on 10 counts of misconduct. After consideration of the entire record, and considering applicable case law, we recommend, inter alia, a 15-month actual suspension, which includes restitution to Schultz for the small amount of funds she is still due.

We begin our case analysis by noting, as the hearing judge did, that McCann's case is unique, and that neither party has been able to present a case that is clearly analogous and would guide us to the most appropriate recommendation to make to the Supreme Court. We also agree with the judge that some guidance on the appropriate discipline to recommend can be found in *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944. The attorney in *Brockway* engaged in multiple counts of misconduct across four client matters, where immigrant clients, who spoke little or no English, sought legal assistance from the attorney. The attorney agreed to perform legal services, accepted thousands of dollars in legal fees, and then failed to perform. We found the attorney was culpable of 14 counts of misconduct, including client abandonment, failure to perform competently, failure to communicate, failure to provide accountings, failure to refund unearned fees, failure to return client files, and improper withdrawal of a State Bar complaint. No mitigation was provided, but aggravation was found due to a prior 90-day actual suspension, multiple acts of misconduct, significant client harm, indifference, and additional uncharged misconduct involving moral turpitude due to

overreaching. We determined in *Brockway* that the appropriate discipline to recommend was two years of actual suspension, continuing until the attorney proved rehabilitation.

We can apply *Brockway* here because of some similarities between the cases, but we rely on this case to establish that McCann's discipline should be less than Brockway's. Important distinctions exist, including that all four of Brockway's clients were considered vulnerable because of their immigrant status and lack of English skills, Brockway's prior discipline was an actual suspension for 90 days, and Brockway had no mitigation but significant aggravation, including an uncharged count of moral turpitude and an "astonishing" degree of indifference towards his clients due to his exploitation of his clients' vulnerabilities. (*In the Matter of Brockway, supra* 4 Cal. State Bar Ct. Rptr. at p. 959.) In McCann's case, we determined limited aggravation for one vulnerable client, his prior actual suspension was for 60 days, and, while his aggravation is greater than his mitigation, it is certainly does not approach Brockway's level.

We also take limited guidance from another case involving multiple client matters and counts: *In the Matter of Lantz* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 126. In *Lantz*, that attorney received a one-year actual suspension for seven counts of misconduct in four client matters, and the misconduct consisted of misappropriating funds through gross neglect, failing to follow a court order, withholding an illegal fee that resulted in moral turpitude, recklessly and incompetently performing legal services, failing to return promptly unearned fees, and failing to render an appropriate accounting. He was also ordered to pay one client $8,000 in restitution. Like McCann, Lantz's aggravation was greater than his mitigation, but Lantz had more mitigation. Unlike McCann, Lantz had no prior discipline though he only had been in practice for seven years before his misconduct started. When comparing the two cases, Lantz committed

fewer acts of misconduct over multiple client matters than McCann did,[30] but many of his acts of misconduct were serious like McCann's. On balance, McCann should receive a discipline that is more than the discipline that Lantz received.

Between the two discipline cases discussed and their respective disciplinary outcomes, we conclude that a 15-month actual suspension, including probation conditions, is appropriate and the minimum necessary to protect the public, the courts, and the legal profession. While McCann's misconduct is serious, we are hopeful that he understands his responsibilities in the future and look to his concessions on 10 counts of misconduct and his testimony that he understands he cannot ask any future client to withdraw a bar complaint as an indication that he does. We also caution McCann to use his independent judgment when considering a client's demand that certain legal actions be undertaken, as it is his responsibility to ensure that those legal actions are supported by law. Because McCann practiced for 11 years between the end of his prior discipline and the beginning of misconduct in the present matters, we also do not see the need for recommending that McCann prove rehabilitation under standard 1.2(c)(1).

V. RECOMMENDATIONS

We recommended that Robert Earl McCann, State Bar Number 170286, be suspended from the practice of law for three years, that execution of that suspension be stayed, and that he be placed on probation for three years with the following conditions:

1. **Actual Suspension and Until Restitution.** McCann must be suspended from the practice of law for a minimum of the first 15 months of his probation, and will remain suspended until McCann makes restitution to Heather Schultz, or to such other recipient as may be designated by the Office of Probation or the State Bar Court, in the amount of $30.00 plus 10 percent interest per year from March 1, 2020 (or reimburses the Client Security Fund, to the extent of any payment from the Fund to such payee, in accordance with Business and Professions

[30] We do note that, while McCann has been found culpable of 17 counts of misconduct, one count has diminished disciplinary weight and three counts have no disciplinary weight, as discussed *ante*.

Code section 6140.5). Reimbursement to the Fund is enforceable as a money judgment and may be collected by the State Bar through any means permitted by law. McCann must furnish satisfactory proof of restitution to the State Bar's Office of Probation in Los Angeles.

2. **Comply with State Bar Act, Rules of Professional Conduct, and Probation Conditions.** McCann must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of probation.

3. **Review Rules of Professional Conduct.** Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, McCann must (1) read the California Rules of Professional Conduct (Rules of Professional Conduct) and Business and Professions Code sections 6067, 6068, and 6103 through 6126, and (2) provide a declaration, under penalty of perjury, attesting to his compliance with this requirement, to the State Bar's Office of Probation in Los Angeles (Office of Probation) with his first quarterly report.

4. **Complete E-Learning Course Reviewing Rules and Statutes on Professional Conduct.** Within 90 days after the effective date of the Supreme Court order imposing discipline in this matter, McCann must complete the e-learning course entitled "California Rules of Professional Conduct and State Bar Act Overview." McCann must provide a declaration, under penalty of perjury, attesting to his compliance with this requirement, to the Office of Probation no later than the deadline for his next quarterly report due immediately after course completion.

5. **Maintain Valid Official State Bar Record Address and Other Required Contact Information.** Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, McCann must make certain that the State Bar Attorney Regulation and Consumer Resources Office (ARCR) has his current office address, email address, and telephone number. If he does not maintain an office, he must provide the mailing address, email address, and telephone number to be used for State Bar purposes. McCann must report, in writing, any change in the above information to ARCR, within 10 days after such change, in the manner required by that office.

6. **Meet and Cooperate with Office of Probation**. Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, McCann must schedule a meeting with his assigned Probation Case Coordinator to discuss the terms and conditions of his discipline and, within 30 days after the effective date of the court's order, must participate in such meeting. Unless otherwise instructed by the Office of Probation, McCann may meet with the Probation Case Coordinator in person or by telephone. During the probation period, must promptly meet with representatives of the Office of Probation as requested by it and, subject to the assertion of applicable privileges, must fully, promptly, and truthfully answer any inquiries by it and provide to it any other information requested by it.

7. **State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court.** During McCann's probation period, the State Bar Court retains jurisdiction over him to address issues concerning compliance with probation conditions. During this period, McCann must appear before the State Bar Court as required by the court or by the Office of Probation after written notice mailed to his official State Bar record address, as provided above. Subject to the assertion of applicable privileges, McCann must fully, promptly, and

truthfully answer any inquiries by the court and must provide any other information the court requests.

8. **Quarterly and Final Reports**.

   a. **Deadlines for Reports.** McCann must submit written quarterly reports to the Office of Probation no later than each January 10 (covering October 1 through December 31 of the prior year), April 10 (covering January 1 through March 31), July 10 (covering April 1 through June 30), and October 10 (covering July 1 through September 30) within the period of probation. If the first report would cover less than 30 days, that report must be submitted on the next quarter date and cover the extended deadline. In addition to all quarterly reports, McCann must submit a final report no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.

   b. **Contents of Reports.** McCann must answer, under penalty of perjury, all inquiries contained in the quarterly report form provided by the Office of Probation, including stating whether he has complied with the State Bar Act and the Rules of Professional Conduct during the applicable quarter or period. All reports must be: (1) submitted on the form provided by the Office of Probation; (2) signed and dated after the completion of the period for which the report is being submitted (except for the final report); (3) filled out completely and signed under penalty of perjury; and (4) submitted to the Office of Probation on or before each report's due date.

   c. **Submission of Reports.** All reports must be submitted by: (1) fax or email to the Office of Probation; (2) personal delivery to the Office of Probation; (3) certified mail, return receipt requested, to the Office of Probation (postmarked on or before the due date); or (4) other tracked-service provider, such as Federal Express or United Parcel Service, etc. (physically delivered to such provider on or before the due date).

   d. **Proof of Compliance.** McCann is directed to maintain proof of compliance with the above requirements for each such report for a minimum of one year after either the period of probation or the period of actual suspension has ended, whichever is longer. McCann is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

9. **State Bar Ethics School.** Within one year after the effective date of the Supreme Court order imposing discipline in this matter, McCann must submit to the Office of Probation satisfactory evidence of completion of the State Bar 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 will not receive MCLE credit for attending this session. If he provides satisfactory evidence of completion of the Ethics School after the date of this opinion but before the effective date of the Supreme Court's order in this matter, McCann will nonetheless receive credit for such evidence toward his duty to comply with this condition.

10. **Commencement of Probation/Compliance with Probation Conditions.** 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 probation period, if McCann has complied

with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

11. **Proof of Compliance with Rule 9.20 Obligation.** McCann is directed to maintain, for a minimum of one year after commencement of probation, proof of compliance with the Supreme Court's order that he comply with the requirements of California Rules of Court, rule 9.20(a) and (c), as recommended below. Such proof must include: the names and addresses of all individuals and entities to whom McCann sent notification pursuant to rule 9.20; a copy of each notification letter sent to each recipient; the original receipt or postal authority tracking document for each notification sent; the originals of all returned receipts and notifications of non-delivery; and a copy of the completed compliance affidavit filed by him with the State Bar Court. He is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

VI. MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommended that Robert Earl McCann be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court order imposing discipline in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation within the same period. Failure to do so may result in suspension. (Cal. Rules of Court, rule 9.10(b).) If McCann provides satisfactory evidence of the taking and passage of the above examination after the date of this opinion but before the effective date of the Supreme Court's order in this matter, he will nonetheless receive credit for such evidence toward his duty to comply with this requirement.

VII. CALIFORNIA RULES OF COURT, RULE 9.20

We further recommend that Robert Earl McCann be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the date the Supreme Court order imposing discipline in

this matter is filed.[31] (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45 [the operative date for identification of clients being represented in pending matters and others to be notified is the filing date of the Supreme Court order imposing discipline].) Failure to do so may result in disbarment or suspension.

VIII. MONETARY SANCTIONS

We further recommend that Robert Earl McCann be ordered to pay monetary sanctions to the State Bar of California Client Security Fund in the amount of $500, in accordance with Business and Professions Code section 6086.13 and rule 5.137 of the Rules of Procedure of the State Bar. The hearing judge found, and the record supports, McCann's inability to pay any amount greater than $500. OCTC does not object. Under these facts, it is an appropriate use of discretion to depart downward from the suggested $2,500 amount. (Rules Proc. of State Bar, rule 5.137(E).) Monetary sanctions are enforceable as a money judgment and may be collected by the State Bar through any means permitted by law. Monetary sanctions must be paid in full as a condition of reinstatement or return to active status, unless time for payment is extended pursuant to rule 5.137 of the Rules of Procedure of the State Bar.

IX. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment, and may be collected by the State Bar through any means permitted by law. Unless the time for payment of discipline

[31] McCann is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or contempt, an attorney's failure to comply with rule 9.20 is, inter alia, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)

costs is extended pursuant to section 6086.10, subdivision (c), costs assessed against an attorney who is actually suspended or disbarred must be paid as a condition of applying for reinstatement or return to active status.

McGILL, J.

WE CONCUR:

HONN, P. J.

RIBAS, J.