PUBLIC MATTER—DESIGNATED FOR PUBLICATION

Filed June 3, 2016

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of GREGORY MOLINA BURKE, A Member of the State Bar, No. 188891.	)	Case Nos. 12-O-17622 (12-O-18037; 13-O-11787; 13-O-12643) OPINION AND ORDER

This is Gregory Molina Burke's third disciplinary proceeding since his admission to the California State Bar in 1997. In the present case, a hearing judge found Burke culpable of misconduct in three client matters, including failing to obey court orders, engaging in the unauthorized practice of law (UPL), and violating his duty to maintain a just action. The judge further found some mitigation for his cooperation and two circumstances in aggravation, including Burke's prior discipline record. However, the hearing judge declined to apply disciplinary standard 1.8(b),[1] which presumptively provides for disbarment when an attorney has two or more prior disciplines, because she concluded that the misconduct that was the subject of Burke's second State Bar Court proceeding occurred during the same period as the misconduct that presently is before us. The hearing judge accordingly recommended a one-year actual suspension to continue until Burke satisfies the unpaid sanctions orders.

The Office of the Chief Trial Counsel of the State Bar (OCTC) appeals. It argues that Burke is culpable of additional counts of misconduct that the hearing judge dismissed involving

[1] Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. The standards were revised and renumbered effective July 1, 2015. Because this request for review was submitted for ruling after that date, we apply the revised version of the standards, and all further references to standards are to this source.

additional UPL, moral turpitude arising from the UPL, and another failure to obey a court order. OCTC asserts that the evidence in mitigation is not compelling and does not clearly predominate over the evidence in aggravation, which it maintains is serious because it involves multiple acts, harm to clients, and, most significantly, a history of two prior disciplines that warrants the application of standard 1.8(b). OCTC accordingly is seeking disbarment.

Because Burke did not request review or file a responsive brief on appeal, he waived any claim of factual error in the record. (Rules Proc. of State Bar, rule 5.152(C) [factual error not raised on review is waived].) For the same reason, he was precluded from appearing at oral argument. (Rules Proc. of State Bar, rule 5.153(A) [failure to file responsive brief precludes appearance at oral argument absent authorization from Presiding Judge].)

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we adopt the hearing judge's culpability findings, but we find additional charged misconduct for UPL, moral turpitude arising from the UPL, and failing to obey a court order. We give more weight in aggravation, including significant weight to Burke's prior discipline. After the filing of a notice of disciplinary charges in his second disciplinary matter for the same or similar misconduct as that which is before us now, Burke was on notice that his present misconduct was ethically questionable. Yet he continued to commit wrongdoing that lasted at least until the time of the hearing below.

In fact, Burke has continually committed misconduct since 2008, some of which echoes the misconduct before us. Based on this record, we are unable to justify a departure from standard 1.8(b), which provides for disbarment as the appropriate discipline. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons for departure from standards].) Accordingly, we recommend that Burke be disbarred to protect the public, the profession, and the administration of justice.

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 29, 2011, the California State Bar Member Services Department (Member Services) sent Burke a Notice of Intent to Suspend Bar Membership (Notice of Intent) for his failure to pay court-ordered child support. On December 1, 2011, the California Supreme Court filed an order suspending Burke from the practice of law, commencing on December 29, 2011, pursuant to rule 9.22 of the California Rules of Court, which authorizes suspension of State Bar members for failure to comply with a judgment or order for child or family support. The Supreme Court's order provided that Burke's suspension would continue until terminated by further order of the Court.

The Supreme Court did not serve the order on Burke. Instead, on December 29, 2011, a Member Services employee prepared a letter to be sent to Burke with a copy of the order (Suspension Notice). Although the employee placed the Suspension Notice in the internal mail outbox on December 29, 2011, it was not postmarked until January 3, 2012. Burke testified that he never received the Notice of Intent and did not receive the Suspension Notice until January 10, 2012**.** The hearing judge found this testimony to be credible, and we give this finding great weight. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 [hearing judge best suited to resolve credibility questions due to first-person observations of witnesses' demeanor]; Rules Proc. of State Bar, rule 5.155(A).) Moreover, OCTC does not contest this credibility finding on appeal.

After Member Services notified the Supreme Court on January 6, 2012 that Burke had satisfied his child support obligation, the Court issued an order on January 23, 2012 terminating Burke's suspension. As we discuss below, between January 3, 2012 and January 23, 2012, Burke engaged in the practice of law while on suspension.

On October 28, 2013, OCTC filed a 17-count NDC, alleging five counts of UPL, five counts of moral turpitude arising from UPL, five counts of failing to obey court orders, one count of charging an illegal fee, and one count of maintaining an unjust action. The parties entered

into a pretrial stipulation and supplemental stipulation of facts. During the three-day trial in January 2015, OCTC presented the testimony of two State Bar employees and three attorneys who were opposing counsel in separate litigation matters involving Burke's clients. Burke represented himself, and offered his own testimony and documentary evidence. The hearing judge found Burke culpable of four counts of failing to obey a court order, one count of engaging in UPL, and one count of violating his duty to maintain a just or legal action. The judge dismissed the remaining counts for lack of clear and convincing evidence.[2]

II. ANALYSIS

A. The Herman Norris Matter (Case No. 12-O-17622)

Burke represented plaintiff Herman Norris in a medical malpractice lawsuit, *Norris v. St. Bernardine's Medical Center, et al.* (the Norris case). On January 3, 2012, Burke prepared and served the defendant with responses to requests for admissions and to interrogatories (collectively, the Responses). Burke signed the Responses as "counsel for the Plaintiff." In addition, he appeared telephonically at a case management conference (CMC) on January 4, 2012, and stated he was "appearing on behalf of the plaintiff Herman Norris."

Two-thirds of the way through the three-minute CMC, opposing counsel informed the judge that the State Bar website indicated that Burke was not eligible to practice law. While on the telephonic CMC, Burke immediately checked the State Bar website and confirmed his suspension. He told the court, "I'm not understanding why it states that. I'm going to have to

[2] 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.) OCTC does not contest the hearing judge's dismissals of Count Two (moral turpitude arising from UPL), Count Ten (UPL), Count Eleven (moral turpitude arising from UPL), and Count Twelve (illegal fee). We have reviewed the record regarding these counts and affirm their dismissals. Accordingly, we shall not address them further.

call the bar today and figure this out."[3] The judge did not acknowledge Burke's comment about his suspension, nor did she terminate the CMC. Instead, she scheduled another CMC in 90 days, and instructed the parties that she would be setting trial dates in September or October. Burke responded: "Very good, your Honor." The judge then set April 3rd for the next CMC, to which Burke responded: "Fine." The court concluded by asking: "Parties waive notice?" to which Burke responded: "Yes, your Honor." At that point, the hearing was adjourned.

1. Counts One and Three: Burke's UPL Violated Business and Professions Code Sections 6068, Subdivision (a), 6125, and 6126

The NDC charged Burke with holding himself out as entitled to practice law and practicing law by signing and serving the Responses in the Norris case on January 3, 2012 (Count One) and by appearing telephonically at the CMC on January 4, 2012 (Count Three), thereby willful violating Business and Professions Code, section 6068, subdivision (a).[4] The hearing judge found that OCTC did not establish that Burke's conduct was knowing or willful since he credibly testified he had not received either the Notice of Intent or the Suspension Notice until after he took those actions. She therefore dismissed the charges.

We reverse the hearing judge's dismissal of Counts One and Three. In order to prove that Burke violated sections 6125 and 6126, it is not necessary for OCTC to establish that Burke knowingly committed UPL. Such knowledge is simply a factor in determining the degree of sanction under standard 2.10(b), which provides for discipline whether or not a member had

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[3] Burke testified that he knew he was overdue on his child support prior to November 29, 2011, but was unaware that the Department of Social Services had notified the State Bar of his delinquency.

[4] All further references to sections are to the Business and Professions Code unless otherwise noted. Section 6068, subdivision (a), requires an attorney "[t]o support the Constitution and laws of the United States and of this state." A violation of section 6068, subdivision (a), is established when an attorney violates sections 6125 and 6126. (*In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 236-237.) Section 6125 provides: "No person shall practice law in California unless the person is an active member of the State Bar." Section 6126 prohibits holding oneself out as entitled to practice law while on suspension.

knowledge he or she was committing UPL.[5] (*In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 318-319 [violations of §§ 6125, 6126, and 6068, subd. (a), established by single court appearance by attorney who did not know of his involuntary inactive enrollment].) It is sufficient that OCTC merely prove Burke's conduct was willful. (*In the Matter of Thomson* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966, 975.) That is to say, OCTC need not show that Burke "intended the consequences of his acts or omissions, it simply requires proof that he intended the act or omission itself." (*In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, 309.) By signing and serving documents on January 3, 2012, and making a court appearance on January 4, 2012 on Norris's behalf, Burke "acted purposefully when he created the impression he was entitled to represent [Norris] as [his] attorney." (*In the Matter of Thomson, supra*, 4 Cal. State Bar Ct. Rptr. at p. 975.) Since Burke willfully practiced law while suspended, we find him culpable as charged.

2. Count Four: Burke Did Not Commit Acts of Moral Turpitude (Section 6106)

In Count Four, Burke was charged with knowingly or with gross negligence practicing law because he appeared telephonically at the Norris CMC on January 4, 2012, while on suspension. OCTC concedes that Burke did not have notice of his suspension when he initially appeared at the CMC, but it argues that Burke is nevertheless culpable of moral turpitude in violation of section 6106[6] because he did not immediately withdraw from the telephonic hearing once he was made aware of his suspension. The concurring and dissenting opinion is in agreement with OCTC's position.

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[5] Because Burke was suspended for non-payment of child support, we look to standard 2.10(b), which provides: "Suspension to reproval is the presumed sanction when a member engages in the practice of law or holds himself or herself out as entitled to practice law when he or she is on inactive status or actual suspension for non-disciplinary reasons. . . . The degree of sanction depends on whether the member knowingly engaged in the unauthorized practice of law."

[6] Section 6106 provides in relevant part: "The commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension."

We disagree, and instead adopt the hearing judge's dismissal of Count Four because we find insufficient evidence of moral turpitude. A close reading of the transcript of the CMC discloses that Burke learned of his suspension during the last minute of a three-minute telephonic conference. (A copy of the CMC transcript is attached as Appendix A, *post.*) And indeed, during that last minute, the superior court judge immediately took the initiative and instructed the attorneys as to how she intended to proceed with a follow-up CMC and trial date. At that point Burke merely replied to her instructions with the following statements: "Very good, your Honor," "Fine," and "Yes, your Honor." Thereafter, the proceeding immediately terminated.

The concurring and dissenting opinion concludes that Burke committed UPL because he knew he was suspended when he gave these three responses during the last minute of the CMC. However, the issue here is not whether he had knowledge of his suspension, but whether, in responding to the court's final instructions, Burke practiced law with the requisite level of intent, guilty knowledge, or, at a minimum, gross negligence to prove moral turpitude. (*In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 241.) We do not find this conduct to be clear and convincing evidence of moral turpitude. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 620 [no clear and convincing evidence of knowing UPL when suspended attorney appeared at proceeding solely to advise court he followed its instructions about resolving client's case].) "Although the term 'moral turpitude' found in section 6106 has been defined very broadly by the Court (e.g., *Chadwick* v. *State Bar* (1989) 49 Cal.3d 103, 110), the Supreme Court has always required a certain level of intent, guilty knowledge or wilfulness before placing the serious label of moral turpitude on the attorney's conduct. [Citations.] At the very least, gross negligence has been required. [Citations.]." (*In the Matter of Respondent H*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 241.)

In this case, the hearing judge was in the best position to assess the issues of Burke's actions, intent, state of mind, and reasonable beliefs bearing on whether moral turpitude was

involved in this matter. She concluded that the proof fell short of moral turpitude. We are obligated to give great weight to the hearing judge's finding. (Rules Proc. of State Bar, rule 5.155(A).) Moreover, her finding is supported by uncontradicted evidence that: (1) Burke appeared at the CMC without any knowledge of his suspension; (2) he was not deceptive or dishonest to the court and counsel about his status; (3) he was merely the recipient of instructions from the court; and (4) the colloquy with the superior court occurred during a very brief period of no more than one minute and under circumstances where he did not have a reasonable opportunity to withdraw.

It is well settled that all reasonable doubts must be resolved in favor of the respondent. (*In the Matter of Respondent H*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 240.) On this record, it would be manifestly unjust to find that Burke is culpable of moral turpitude. (Compare *In the Matter of Tishgart* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 338, 343-344 [intentional concealment of suspension is act of moral turpitude]; *In the Matter of Mason* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 639, 641-642 [moral turpitude found where attorney knew of his suspension one month prior to appearing in court to obtain continuance]; *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 91[moral turpitude found where attorney had knowledge of suspension but was grossly negligent by omitting status from job application].)

B. The Topa Matter (Case No. 12-O-18037)

Burke represented Robert Castaneda, Raj Champaneri, and 1st American Warehouse Mortgage Inc. as co-plaintiffs in a civil suit against Topa Insurance Co. to obtain coverage for, among other things, litigation expenses incurred in an underlying lawsuit, including Burke's legal fees (the Topa case).

On May 4, 2011, the Los Angeles County Superior Court ordered Champaneri to provide documents and responses to Topa's discovery requests. The court further ordered Burke and

Champaneri to pay Topa sanctions of $1,000 by May 26, 2011 for their discovery delay. Champaneri eventually paid the sanctions on April 10, 2013, nearly two years later.

In the meantime, Burke's 60-day suspension arising from *Burke I* became effective on August 7, 2011. He informed defendant's counsel, James Henshall and Alan Yuter, of his suspension on August 15, 2011. Three days later, Burke attempted to negotiate a settlement of the Topa case during a call with Henshall and Yuter. In an email to Yuter the next day, Burke stated, "It is my understanding that your client is willing to pay my outstanding fees incurred in the underlying matter at its panel counsel rate to resolve the matter." Burke signed this communication, "Gregory M. Burke, Esq." Yuter and Henshall testified that they believed Burke was seeking to settle the entire case.

On January 6, 2012, Burke appeared on behalf of Champaneri at a deposition in the Topa case, two days after he learned that he had been suspended for failure to pay child support. When Henshall advised him that he was not eligible to practice law, Burke expressed surprise, after which he and his client left the deposition.

Henshall sought sanctions for the aborted deposition, and on March 9, 2012, the court ordered Burke to pay sanctions of $2,255. He had not paid these sanctions at the time of his disciplinary trial. On March 28, 2012, the court also ordered Castaneda, Champaneri, and Burke to pay sanctions of $2,340 for failure to timely respond to discovery. Burke's client eventually paid the sanctions 11 months later in February 2013.

1. Counts Five, Six, and Seven: Burke Failed to Obey Court Orders (Section 6103)

OCTC charged Burke with three counts of willfully violating section 6103[7] for disobeying the superior court's sanctions orders of May 4, 2011 (Count Five), March 9, 2012

[7] Section 6103 provides that an attorney's "willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his

(Count Six), and March 28, 2012 (Count Seven). The hearing judge found Burke culpable of Counts Five and Six, but dismissed Count Seven. We conclude Burke is culpable of all three counts.

To prove failure to obey a court order under section 6103, OCTC must establish that the attorney " 'knew what he was doing or not doing and that he intended either to commit the act or to abstain from committing it.' [Citations.]" (*King v. State Bar* (1990) 52 Cal.3d 307, 314.) It is undisputed that Burke was aware of the three sanctions orders, yet he failed to timely pay any of the sanctions or seek relief. (*In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 868 [despite financial hardship, attorney culpable of misconduct for failure to pay court-ordered sanctions when attorney fails to seek relief from order].)

The May 4, 2011 sanctions order required payment by May 26, 2011, but it was not paid by Burke or his client until almost two years later. The March 9, 2012 order did not specify a deadline for payment, but the sanctions had not been paid at the time of Burke's disciplinary trial in January of 2015—almost three years after issuance of the order. On this record, the hearing judge correctly found Burke culpable of violating section 6103, as charged in Counts Five and Six, by disobeying the May 4, 2011 and March 9, 2012 orders. (*In the Matter of Respondent Y*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 867-868 [attorney must comply with sanctions order within reasonable time].)

The hearing judge found Burke was not culpable of violating section 6103 as alleged in Count Seven because the March 28, 2012 sanctions were paid on February 10, 2013. Since the order did not provide a specific time for payment, she concluded that a ten-and-a-half-month delay was not unreasonable. In so concluding, the hearing judge relied on *In the Matter of*

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profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension."

Respondent Y, *supra*, 3 Cal. State Bar Ct. Rptr. 862, noting that our opinion in that case "alludes to the fact that payment of a sanctions order within one year is not inherently unreasonable."

This interpretation is erroneous. In *Respondent Y*, we did not establish a temporal measurement as the sole criterion for what may or may not be deemed reasonable compliance with a sanctions order. Rather, we found under the facts of that case that "whatever a reasonable amount of time would have been for respondent to have paid the sanction ordered, much more than a year elapsed during which he failed to comply [and] it appears that respondent still has not yet paid the sanctions." (*Id*. at p. 868.) To be clear, when a sanctions order does not specify a due date, there is no bright-line test for "reasonableness" that applies to the elapsed time of payment after the issuance of the order. Instead, the timing of the payment is but one factor among others to be considered.

In this case, OCTC points to the considerable efforts required by opposing counsel to collect the sanctions over the ten-and-a-half-month period. Opposing counsel testified that he was "constantly sending letters and emails to Mr. Burke, requesting payment of the sanctions." He also called Burke to seek payment and to communicate that Topa wanted to avoid placing liens on the property of Burke or his clients. After several unsuccessful requests, opposing counsel felt compelled to file liens, and only then were the sanctions paid.[8] Under these circumstances, Burke's failure to pay the sanctions for nearly 11 months was not reasonable, and he is culpable of violating section 6103 as charged in Count Seven.

2. Counts Eight and Thirteen: Burke's UPL Violated Sections 6068, Subdivision (a), 6125, and 6126

Count Eight of the NDC charged Burke with UPL by attempting to negotiate a settlement for his clients in the Topa case on August 18, 2011, while he was on suspension. We adopt the

[8] Opposing counsel testified that the sanctions were paid after he received a call from a finance company attempting to arrange a real estate deal involving Castaneda that could not go forward until the liens were removed.

hearing judge's finding that Burke violated section 6068, subdivision (a): "Without question, the communications by respondent on his letterhead stationery, while he was suspended from practice, attempting to settle two matters constituted the unauthorized practice of law." (*In the Matter of Thomson*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 975.)

The hearing judge properly rejected Burke's testimony that he was merely trying to satisfy a lien for his fees, not settle the entire case. Burke presented no evidence of any lien and his emails merely referred to "resolving the matter." Opposing counsel testified that he construed Burke's email as an offer to settle the case, and therefore, he obtained his clients' authorization to settle the litigation. Although we find Burke culpable of UPL as alleged in Count Eight, we assign no weight to this misconduct since, as discussed below, we also find a violation of section 6106 based on the same facts alleged in Count Nine, which supports the same or greater discipline. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127 [declining to assign additional disciplinary weight for lesser-included violation].)

Count Thirteen of the NDC charged Burke with UPL for appearing on behalf of his client, Champaneri, at a deposition on January 6, 2012 while he was suspended, in violation of sections 6125 and 6126, thereby willfully violating section 6068, subdivision (a). The hearing judge concluded Burke was not culpable, finding he was unaware of his suspension because he had not received the Suspension Notice by mail. As noted, Burke learned of his suspension during the CMC for the Norris case, which was two days before the deposition in the Topa case. Accordingly, we find Burke knowingly engaged in UPL. Again, we assign no weight for this violation, as it is based on the same facts that underlie our culpability finding under section 6106, discussed below in Count Fourteen, which supports the same or greater discipline.

3. Counts Nine and Fourteen: Burke's UPL Involved Moral Turpitude (Section 6106)

Count Nine charged Burke with knowingly or with gross negligence holding himself out as entitled to practice law and actually practicing law while suspended when he negotiated a settlement for his clients in the Topa case, thereby committing an act of moral turpitude. The hearing judge dismissed Count Nine because Burke advised opposing counsel of his suspension and contacted the State Bar's Ethics Department prior to attempting to settle the case. However, contacting a State Bar employee for advice is not a defense to a violation of the rules or statutes governing an attorney's professional responsibilities. (*Sheffield v. State Bar* (1943) 22 Cal.2d 627, 632 ["no employee of The State Bar can give an attorney permission to violate the Business and Professions Code or the Rules of Professional Conduct"].) We thus reverse the hearing judge's dismissal and find Burke culpable as alleged in Count Nine of an act of moral turpitude in violation of section 6106 since he knew he was suspended at the time he entered into settlement negotiations in the Topa case.

Similarly, we find Burke culpable of moral turpitude under Count Fourteen for knowingly or with gross negligence holding himself out as entitled to practice law when he appeared at Champaneri's deposition The hearing judge erred in dismissing this count because, as noted above, Burke appeared at the deposition two days after he learned of his suspension. Such knowing UPL constitutes an act of moral turpitude.[9] (*In the Matter of Mason*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 641-642 [attorney sought continuance while suspended; misconduct involved moral turpitude because attorney appeared in court knowing he was suspended].)

C. The Amended Topa Matter (Case No. 13-O-12643)

[9] Like the hearing judge, we find Burke's testimony unpersuasive that he believed he was entitled to appear at the deposition with Champaneri because he had learned the day before that Member Services had received a release from DCSS showing he was current with his child support. Burke could not reasonably rely on this information to establish he was reinstated since he was well aware that his status could be confirmed on the State Bar's website.

On May 4, 2012, Burke filed amendments to the Topa complaint, substituting Superior Claims Services (SCS) and CRES Insurance Services (CRES) for Doe defendants. Counsel for SCS and CRES requested that Burke dismiss his clients because they were not parties to the contract at issue, and therefore the breach of contract claim lacked legal and evidentiary support. Burke did not respond to this request. CRES and SCS thus were required to file answers and motions for summary judgment. Subsequently, their counsel again requested that they be dismissed, and advised Burke he would seek sanctions if they were not. Burke again failed to respond.

In October 2012, CRES and SCS filed motions for sanctions pursuant to Code of Civil Procedure section 128.7.[10] On January 8, 2013, the superior court granted the motions, and ordered Burke to pay $27,334 to SCS and CRES. The order was affirmed by the California Court of Appeal, which found that Burke did not have a colorable claim for breach of contract against SCS and CRES. Burke had not paid the sanctions at the time of the disciplinary trial.

1. Count Sixteen: Burke Violated His Duty to Maintain Only Just Actions (Section 6068, Subdivision (c))

OCTC charged that Burke violated section 6068, subdivision (c),[11] because he failed to maintain a legal or just action when he amended the Topa complaint to add defendants SCS and CRES, and then refused to dismiss them when he knew they were not involved. The Court of

[10] Section 128.7 authorizes a court to impose sanctions against a party or its attorney if a pleading is presented for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and which contains allegations and other factual contentions that lack evidentiary support.

[11] Section 6068, subdivision (c), provides that it is the duty of an attorney "[t]o counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense."

Appeal's finding that Burke's action was frivolous is entitled to a strong presumption of validity. (*In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 118 [finding of Court of Appeal re frivolous appeal as violating § 6068, subd. (c), entitled to strong presumption of validity].)

We accordingly adopt the hearing judge's determination that Burke willfully violated section 6068, subdivision (c), by refusing to dismiss defendants SCS and CRES from the Topa case. (*In the Matter of Scott* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 446, 457 [violation of § 6068, subd. (c), arising from pursuit of action in civil proceeding based on factual allegations attorney knew he could not prove].)

2. Count Seventeen: Burke Failed to Obey a Court Order (Section 6103)

OCTC charged Burke with disobeying the court order of January 8, 2013, requiring him to pay the $27,334 monetary sanctions, in willful violation of section 6103. The hearing judge found him culpable as charged. We agree. Burke stipulated that he was aware of the order. Although the sanctions order did not designate a deadline for payment, it was filed over two years before Burke's disciplinary trial and had not been paid or set aside at the time of the trial. (*In the Matter of Respondent Y*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 867-868 [sanctions not paid at time of disciplinary hearing, more than one year after issuance of order].)

D. The Valley Matter (Case No. 13-O-11787)

Count Fifteen: Burke Failed to Obey a Court Order (Section 6103)

Count Fifteen charged Burke with disobeying the superior court's sanctions order, in willful violation of section 6103. Burke represented John and Lynette Valley in civil litigation against National Title Company. On July 25, 2012, the Alameda County Superior Court issued an order compelling the Valleys to serve verified amended responses to National Title's discovery requests and to produce responsive documents. The court further ordered Burke to

pay sanctions of $2,150 to the defendant. Burke stipulated that he was aware of the order but had not paid the sanctions at the time of the disciplinary trial. The hearing judge found him culpable of willfully violating section 6103. We agree.

III. SIGNIFICANT AGGRAVATION OUTWEIGHS LIMITED MITIGATION[12]

The hearing judge found two factors in aggravation and one in mitigation. We adopt those findings, but assign more weight in aggravation.

A. Aggravating Circumstances

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

Standard 1.5(a) provides that a prior record of discipline may be an aggravating circumstance. Citing *In the Matter of Sklar*, *supra*, Cal. State Bar Ct. Rptr. 602, the hearing judge gave diminished weight to Burke's two prior disciplines because she found the prior misconduct overlapped with the present misconduct. As we explain below, we give full weight in aggravation to Burke's two prior disciplines.

Burke I

In 2008 and 2009, eight electronic debits and checks from Burke's client trust account (CTA) were returned for insufficient funds because Burke did not properly supervise his wife, who acted as his secretary and bookkeeper. In 2011, Burke stipulated to culpability for commingling funds, in violation of the California Rules of Professional Conduct, rule 4-100(A),[13] and for failing to perform with competence, in violation of rule 3-110(A). He also stipulated to discipline including a 60-day actual suspension and a two-year probation for CTA violations, which the Supreme Court thereafter ordered, effective August 7, 2011. Burke sent

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

[13] All further references to rules are to the California Rules of Professional Conduct unless otherwise noted.

certified letters to his clients advising them that he would be suspended from August 8, 2011 to October 8, 2011.

Burke II

Almost immediately after the Supreme Court ordered the discipline in *Burke I*, he again engaged in misconduct. In early August 2011, after the issuance of the Court's discipline order, but prior to its effective date, Burke concealed his impending suspension from opposing counsel in a single matter. And while on actual suspension, Burke committed UPL in mid-August 2011. Then in October of 2011, Burke misrepresented that he had not committed UPL on his quarterly probation report.

Thereafter, on June 28, 2012, OCTC filed an NDC in *Burke II*, charging him with 13 counts of misconduct, including disobeying two separate sanctions orders that had been issued in May and August 2010, engaging in UPL while suspended as the result of discipline imposed in *Burke I*, and moral turpitude by reason of his misrepresentations.

In our opinion filed on October 3, 2014, we found Burke culpable of knowingly engaging in UPL involving moral turpitude, disobeying the two 2010 sanctions orders, and moral turpitude due to misrepresentations on his quarterly probation reports, concealing his suspension from opposing counsel, and knowingly engaging in UPL. We recommended that he be actually suspended for nine months and until he paid the court-ordered sanctions. The Supreme Court ordered the imposition of the recommended discipline on March 3, 2015.

For purposes of analyzing Burke's prior record as aggravation, we consider most relevant the date OCTC filed the NDC in *Burke II*, which was June 28, 2012. In that NDC, Burke was charged, inter alia, with failing to obey two sanctions orders in 2010. Therefore, as of late June 2012, he was put on notice that his failure to pay sanctions was disciplinable misconduct. (*In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 283 [filing of formal charges puts attorney on notice charged conduct is ethically questionable]; see also *In the Matter*

of Kaplan (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 564.) Yet, after that date, Burke continued to fail to timely pay five sanctions orders, three of which remained unpaid at the time of the trial below.

We conclude that Burke's current misconduct is significantly aggravated by his two prior discipline records as they demonstrate a continuing unwillingness or inability to conform his conduct to ethical norms. (*In the Matter of Sklar, supra,* 2 Cal. State Bar Ct. Rptr. at p. 619 ["part of the rationale for considering prior discipline as having an aggravating impact is that it is indicative of a recidivist attorney's inability to conform his or her conduct to ethical norms [citation]"].) We further note that his prior and present misconduct involve both UPL and repeated violations of sanctions orders. This commonality renders Burke's prior records particularly serious. (*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]; see also *Barnum v. State Bar* (1990) 52 Cal.3d 104, 112 ["Other than outright deceit, it is difficult to imagine conduct in the court of legal representation more unbefitting an attorney" than willful violation of court orders].)

2. Multiple Acts of Misconduct

We adopt the hearing judge's conclusion that Burke's misconduct is aggravated by multiple acts of wrongdoing. (Std. 1.5(b) [multiple acts of wrongdoing are aggravating circumstance].) Burke is culpable of 12 acts of misconduct in four client matters. (*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. No Additional Aggravation

We are not persuaded by OCTC's argument that additional aggravation is warranted because Burke demonstrated lack of insight by blaming others for his misconduct. We found

Burke's assertions unavailing that: (1) his clients had agreed to pay the sanctions and therefore were responsible for the non-payment; and (2) he relied on statements by State Bar employees as to his status. Although these statements did not aid in his defense, we do not think this testimony clearly and convincingly establishes his "indifference toward rectification or atonement for the consequences of the misconduct." (Std. 1.5(k).)

Likewise, we reject OCTC's contention Burke caused significant harm to Topa because the company had to pay attorney fees in defending itself against the lawsuit brought by Burke's clients. The record does not establish that the case against Topa was unjust or unjustified or that the litigation caused "significant harm to the client, the public, or the administration of justice." (Std. 1.5(j).)

B. One Mitigating Circumstance

Burke is entitled to some mitigation credit for cooperating with OCTC by stipulating to certain facts prior to trial. (Std. 1.6(e).) Because the facts were easily provable, however, the weight of the mitigation is limited. (*In the Matter of Kaplan*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 567.)

IV. DISBARMENT IS APPROPRIATE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession. (Std. 1.1.) We balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.) We begin with the standards. (*In re Silverton* (2005) 36 Cal.4th 81, 91.)

Standard 1.7(a) directs that when, as here, multiple sanctions apply, the most severe shall be imposed.[14] Thus, we focus on standard 1.8(b) because it provides for disbarment as the

[14] In addition to standard 1.8, other applicable standards include: 2.10, which provides for suspension to disbarment for UPL, depending on whether the member acted knowingly and

appropriate discipline when a member has two or more prior records of discipline, and if: (1) an actual suspension was ordered in any of the prior disciplinary matters; or (2) the prior and current disciplinary matters demonstrate a pattern of misconduct; or (3) the prior and current disciplinary matters demonstrate the attorney's unwillingness or inability to conform to ethical norms.

Burke's case meets two of these criteria—he received a 60-day actual suspension in *Burke I* and a nine-month suspension in *Burke II*. Moreover, his past and current misconduct demonstrate his unwillingness or inability to fulfill his ethical responsibilities. His misconduct began in 2008 with trust account violations, and has continued ever since. He received a 60-day suspension in *Burke I* yet committed additional wrongdoing in *Burke II* while he was on probation in *Burke I*. He then committed the same misconduct again in the present case as that for which he had been charged in *Burke II*. His repeated acts of UPL and his multiple failures to obey court orders are even further evidence that he is unwilling or unable to conform to the professional responsibilities expected of attorneys who practice law in California.

We acknowledge that standard 1.8 allows for a departure from the presumptive discipline of disbarment where "the most compelling mitigating circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current misconduct." Such is not the case here. Burke's nominal mitigation for stipulating to facts is not compelling, nor does it predominate over the significant aggravation of his two prior discipline records and his multiple acts of misconduct in four client matters. While standard 1.8(b) is not inflexible (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-507 [applying former std. 1.7(b)]), we can discern no reason to depart from it here, particularly given Burke's present misconduct and

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whether it is predicated on a suspension for non-disciplinary reasons; 2.11, which provides for disbarment or actual suspension for moral turpitude, with the degree of sanction depending on the magnitude of the misconduct, the extent to which it harmed or misled the victim, its impact on the administration of justice, and the extent to which it related to the member's practice of law; and 2.18, which provides for disbarment or actual suspension for any violation of a provision of Article 6 of the Business and Professions Code not otherwise specified therein.

its similarity to his past discipline record (*Blair v. State Bar*, *supra*, 49 Cal.3d at p. 776, fn. 5 [requiring clear reasons for departure from standards]). We accordingly conclude that Burke's disbarment is appropriate and necessary to protect the public, the courts, and the legal profession.

V. RECOMMENDATION

We recommend that Gregory Molina Burke be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys admitted to practice in this state.

We also recommend that Burke be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

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

VI. ORDER

Pursuant to section 6007, subdivision (c)(4), and rule 5.111(D)(1) of the Rules of Procedure of the State Bar, Gregory Molina Burke is ordered enrolled inactive, effective three days after service of this opinion. (Rules Proc. of State Bar, rule 5.111(D)(1).)

EPSTEIN, J.

I CONCUR:

STOVITZ, J.*

*Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

Concurring and Dissenting Opinion of PURCELL, P. J.

I concur with the recommendation that Burke be disbarred under standard 1.8(b). But I respectfully dissent from the majority's dismissal of Count Four on grounds that Burke's UPL did not constitute moral turpitude. I would find him culpable because he knowingly, or with gross negligence, committed UPL.

During a brief telephonic CMC, Burke discovered and acknowledged on the record that the State Bar website showed he was suspended. Yet he continued to represent his client at the hearing, ultimately agreeing to the judge's suggested timeframe for a continued trial, to a new CMC date, and to the judge's request for notice waiver for the scheduled CMC. Burke's continued appearance at the hearing after he learned of his suspension clearly constitutes the practice of law.

I disagree with the majority that Burke did not have "a reasonable opportunity to withdraw" due to the short duration of the CMC. The duration of the UPL is not dispositive; Burke's knowledge of his suspension is. Once he discovered it, he had both an affirmative duty to immediately withdraw and a reasonable opportunity to do so simply by informing the judge that he could not proceed due to his suspended status. And while the majority identified Burke's limited participation at the hearing and the judge's affirmative questioning to support its conclusion, I conclude that the burden is on the attorney, not the judge, to react appropriately should the attorney learn that he or she is suspended from the practice of law.

Acknowledging that not every act of UPL equates to moral turpitude, yet guided by case law, I would find Burke culpable of moral turpitude because he either knowingly, or at least through gross negligence, practiced law without a license by representing his client at a court hearing after he discovered his suspension. (*In the Matter of Mason*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 641–642 [attorney sought continuance while suspended; misconduct involved moral turpitude because attorney appeared in court knowing he was suspended]; see also *In the Matter*

of Wyrick, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 91 [attorney was culpable of moral turpitude by gross negligence for representing to judicial arbitrator he was entitled to practice law while he was suspended]; compare authority cited by the majority with *In the Matter of Heiner*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 319 [holding only that "[e]vidence that an attorney made a single court appearance *while ignorant of his or her inactive status* is insufficient to establish . . . the attorney acted with moral turpitude" (italics added).]

Finally, the majority in citing to *In the Matter of Sklar*, *supra*, 2 Cal. State Bar Ct. Rptr. 602, 620 observed that there was no knowing UPL where the suspended attorney appeared in court solely to advise the court that he had followed instructions about resolving his client's case. But the majority did not take note that the judge indicated on the record that the client in that proceeding was without counsel and then continued the trial to permit the client to hire new counsel.