PUBLIC MATTER—NOT DESIGNATED FOR PUBLICATION

Filed December 13, 2024

**STATE BAR COURT OF CALIFORNIA**

**REVIEW DEPARTMENT**

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| In the Matter of | ) | SBC-22-O-31036 |
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| PETRO RICHARD KOSTIV, | ) | OPINION |
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| State Bar No. 285859. | ) | |
| | ) | |

Petro Richard Kostiv is an immigration law practitioner who owns and manages a law firm with bicoastal offices in Los Angeles and Miami, employing several attorneys and support staff. In this, his first disciplinary proceeding, Kostiv was charged with eight counts of misconduct based on his representation of multiple clients in Immigration Court proceedings,[1] where the Office of Chief Trial Counsel of the State Bar (OCTC) alleged that he failed to competently represent those clients and committed other ethical violations, including an act of moral turpitude by misrepresentation. A hearing judge found Kostiv culpable on five counts, including culpability for an intentional act of moral turpitude. The judge's recommended discipline included a six-month actual suspension.

Kostiv appeals but admits culpability to one allegation in count four that he did not perform competently and concedes that he engaged in an act of misrepresentation involving

[1] Immigration Court proceedings occur under the jurisdiction of the United States Department of Justice's Executive Office for Immigration Review (EOIR). In this matter, all proceedings occurred at the Los Angeles Immigration Court, unless otherwise noted.

moral turpitude by gross negligence as alleged in count eight. As to the remainder of the hearing judge's findings that Kostiv challenges, Kostiv argues that clear and convincing evidence has not been established in the record to support culpability, along with other legal arguments that require a reversal of the judge's findings. OCTC does not appeal and supports the judge's findings and discipline recommendation.

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we find that OCTC did not prove Kostiv failed to keep a client informed of significant developments as alleged under count five, nor did it establish culpability as to every failure to perform competently found by the hearing judge under counts two and four, and we dismiss specific subparts of those counts as detailed below. We also agree with Kostiv that his act of misrepresentation was grossly negligent and not intentional. Based on these findings and Kostiv's balanced aggravation and mitigation, we conclude the relevant standards and comparable case law support a 60-day actual suspension recommendation.

## I. RELEVANT PROCEDURAL BACKGROUND

On December 8, 2022, OCTC filed an eight-count Notice of Disciplinary Charges (NDC) against Kostiv. He subsequently filed an unsuccessful motion to dismiss and an unsuccessful petition for interlocutory review, after which Kostiv filed a response to the NDC on June 23, 2023. On September 29, the parties filed a Stipulation as to Facts (Stipulation). The hearing judge held a seven-day trial in October and issued a decision on February 9, 2024. Kostiv filed an appeal. Oral argument was heard on September 18, at which time the matter was submitted.

## II. FACTS AND CULPABILITY

On review, our duty is to independently review the record, from which we "may make findings, conclusions, or a decision or recommendation different from those of the hearing judge." (Rules Proc. of State Bar, rule 5.155(A).) In doing so here, the established facts

included in this opinion are based on the parties' Stipulation, trial testimony, documentary evidence, and the hearing judge's factual findings, which are entitled to great weight, unless we have found differently based upon the record. (Rules Proc. of State Bar, rule 5.155(A); *In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737, 748 [while factual and credibility findings by finder of fact are accorded great weight, on independent review of record Review Department may decline to adopt hearing judge's findings if insufficient evidence exists in record to support them].)

In disciplinary proceedings, OCTC has the burden of establishing culpability for each alleged count by clear and convincing evidence. (Rules Proc. of State Bar, rule 5.103; 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].) Moreover, all reasonable doubts in the evidence must be resolved in favor of the attorney. (See, e.g., *In re Rose* (2000) 22 Cal.4th 430, 458.)

Kostiv was admitted to practice law in California on December 5, 2012. He has no history of discipline prior to the misconduct allegations made in this case.

## A. The Maquiz Matter

### 1. Factual Background

On November 16, 2015, Julio Cesar Morales Maquiz hired Kostiv's law firm, Kostiv and Associates, P.C. (K&A), to represent him in Immigration Court proceedings, which included K&A filing an I-589 Application for Asylum and for Withholding of Removal (I-589 Application) and an I-765 Application for Employment Authorization (I-765 Application). Kostiv asked attorney David Bagdasarian to appear on his behalf at Maquiz's Immigration Court hearing on December 4. At that time, Bagdasarian was an attorney with 19 years of immigration law experience. When Bagdasarian first moved to Los Angeles, he began working from an

office suite located at 3850 Wilshire Boulevard, but, in October 2013 he entered into an agreement with Kostiv to work out of K&A's office at 3450 Wilshire Boulevard.[2] Bagdasarian contemplated moving out of K&A's office in December 2015, and, although the exact date is not clear from the record, he moved back into his original office space—3580 Wilshire Boulevard—sometime in April or May 2016.[3]

Bagdasarian appeared at the scheduled December 4, 2015 hearing with Maquiz. The hearing had been continued from an earlier date to allow Maquiz to obtain counsel because his prior attorney was allowed to withdraw in November 2015 due to a breakdown in communication and cooperation; thus, Maquiz was in propria persona prior to the December 2015 hearing. During the disciplinary trial, Bagdasarian testified that two EOIR-28 forms[4] would have needed to be filed with the Immigration Court before the start of the hearing—one on Kostiv's behalf as primary counsel and one for himself to make the special appearance. He

[2] Bagdasarian testified that his role at K&A was equivalent to "of counsel" or akin to an independent contractor because he maintained autonomy to control the scope of his work.

[3] The hearing judge determined that by December 4, 2015, Bagdasarian had already left Kostiv's firm. The judge's conclusion was based, in part, on a misunderstanding of Bagdasarian's sworn declaration from May 2021, which stated that "[s]ometime towards the end of 2015, I *decided to leave* [K&A] to start my own law firm." (Italics added.) The judge also relied on Bagdasarian's character support letter, where he wrote that he "worked at K&A . . . until the end of the 2015," which was not sworn. Bagdasarian testified that he stopped working for Kostiv in April or May 2016 and relocated back to his original office at 3580 Wilshire Boulevard. Resolving all reasonable doubts in Kostiv's favor, Bagdasarian's trial testimony coupled with this documentary record leads us to conclude that Bagdasarian left K&A after December 2015, and, therefore, we do not reach the same conclusion that his testimony was false as the hearing judge concluded.

[4] An EOIR-28 is a form that is required in Immigration Court proceedings to enter an attorney's appearance. (8 C.F.R. § 1003.17(a) (2019).) Pursuant to the Immigration Court Practice Manual (ICPM), when a non-primary attorney makes an appearance on behalf of the attorney of record, he or she must notify the judge on the record that an appearance on behalf of the attorney of record is being made, file an EOIR-28 indicating the special appearance and serve the form on the opposing party, and the attorney's appearance must by authorized by the judge. (ICPM, Chap. 2.3(j) (Nov. 2020).)

testified that he filed both forms, but the hearing judge did not find Bagdasarian's testimony on this point credible; she concluded that he only filed one EOIR-28 for himself as primary counsel based, at least in part, on her review of the transcript from the December 4 hearing, where he stated he was representing Maquiz, but he did not explicitly state that he was appearing on behalf of Kostiv.

We note that the record on review does not contain a copy of either EOIR-28 that Bagdasarian claimed he filed;[5] however, Andrew Nietor[6] and Stacey Tolchin[7] both testified that an attorney could not appear before an immigration judge without submitting an EOIR-28. Nietor testified that prior to the Immigration Court's adoption of its electronic filing system (ECAS), which became mandatory in 2021, practitioners often dealt with frustrations over documents getting lost or misfiled and filings taking a long time to be entered into the record. This testimony was generally corroborated by Kirsten Zittlau,[8] who opined that, prior to ECAS, error and mishandlings were common with Immigration Court filings.

[5] The official Record of Proceedings (ROP) in the Maquiz matter was obtained by OCTC under a Freedom of Information Act (FOIA) request from the United States Department of Justice, but the ROP as provided to OCTC did not contain any EOIR-28 filed in conjunction with the matter, expect for one subsequently filed by Kostiv on February 5, 2019, discussed *infra*.

[6] Nietor, an attorney with 20 years of experience in immigration law, testified as an expert designated by Kostiv. Nietor serves on the board of governors for the American Immigration Lawyers Association (AILA) and on the EOIR Immigration Court's liaison committee on behalf of AILA. He also consults with government officials, including the San Diego County Board of Supervisors and a United States Senate subcommittee on immigration issues, and regularly teaches on panels presented by the AILA.

[7] Tolchin, an attorney with 22 years of experience in immigration law, testified as an expert designated by OCTC. She is a member of AILA and once served as a board member for the National Immigration Project of the National Lawyers Guild and as a member of the Rules Committee of the United States Court of Appeals for the Ninth Circuit.

[8] Zittlau, an attorney with 20 years of legal experience, the last six in immigration law, also testified as an expert designated by Kostiv.

At the end of the December 4, 2015 hearing, the judge issued a new Notice of Hearing (December 2015 Notice), which was printed and handed to Bagdasarian, setting the next hearing for April 28, 2016. While this notice was printed with Maquiz's name and address, that information was physically crossed out and an interlineation, "David Bagdasarian, Esq.," was handwritten on it. Bagdasarian testified that, upon returning to the K&A office after the hearing, he placed the December 2015 Notice into Maquiz's file and provided the file to Kostiv, and he stated he did no further work on the case. Two days after the hearing, K&A staff telephoned Maquiz and sent a letter notifying him of the next hearing date.

Three months later, on March 22, 2016, the Immigration Court issued an updated Notice of Hearing (March 2016 Notice), which rescheduled Maquiz's hearing from April 28, 2016, to November 29, 2019, and Kostiv received it. On review, the record contains two versions of the March 2016 Notice—the proofs of service attached to both documents appear to be written in the same handwriting but have subtle differences between them. One version of the notice is printed with Bagdasarian's 3580 Wilshire Boulevard address, which was a notice that was contained in the ROP. The second version contains another interlineation, this time with Kostiv's name and his K&A office address—3450 Wilshire Boulevard—handwritten on the form.[9] Bagdasarian testified that he never received either version. Kostiv testified that the second version was received at his office around April 22, 2016. In support of Kostiv's testimony, Nietor proffered an explanation regarding the interlineated notice, stating that the court clerk when mailing the notice could have handwritten Kostiv's name on it based on his experience seeing similar

[9] We disagree with the hearing judge that the March 2016 Notice with the interlineation is the same notice as the one without the interlineation and that someone placed the interlineation on the notice after it was served on Bagdasarian. Because the proofs of service are different, we conclude that two separate notices were sent.

notices.[10] At that time, Kostiv did not take any additional steps to investigate and confirm that he was attorney of record in the matter such as reviewing the ROP[11] or contacting Bagdasarian to confirm he had received any court notices in the Maquiz matter.

Kostiv's staff notified Maquiz by mail that his court hearing had been rescheduled to November 29, 2019, and enclosed a copy of the interlineated March 2016 Notice. The Immigration Court served at least three additional communications addressed to Bagdasarian at his 3850 Wilshire Boulevard address: (1) a Case Status Request Order, dated October 12, 2016, requesting the parties' positions on administrative closure by December 12, 2016; (2) a Notice of Hearing, dated October 10, 2017, stating that a master hearing was scheduled on July 18, 2018; and (3) an Order of the Immigration Judge, dated July 18, 2018. Bagdasarian testified he did not recall receiving these communications, which the hearing judge did not find credible, and Kostiv testified that he did not receive any of them from the Immigration Court or Bagdasarian.

The October 12, 2016 Case Status Request Order required the parties to file a response by December 12. As the opposing party, the Department of Homeland Security filed its response on October 27, and included a proof of service to Bagdasarian at his 3850 Wilshire Boulevard office. Kostiv did not file a response. Kostiv also did not appear at the July 18, 2018 hearing, and the immigration judge entered an in-absentia order of removal against Maquiz, finding that he had abandoned his application for relief.

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[10] We disagree with the hearing judge's conclusion to give no weight to Nietor's testimony on this point because it was speculative and he was not qualified to opine on handwriting. To the contrary, Nietor's testimony did not concern the identification of who wrote the interlineation but only that, in his experience, such handwritten interlineations by Immigration Court clerks have occurred.

[11] Nietor and Tolchin both testified it could take six to eight weeks to receive an appointment to physically visit the Immigration Court and review a ROP.

On November 28, 2018, Maquiz visited the K&A office to inquire about the status of his case and he was advised by staff that an in-absentia order of removal had been issued over four months earlier.[12] During his visit, Maquiz agreed to K&A representing him in filing a Motion to Reopen (MTRO), and he gave Kostiv a written statement to support the MTRO.

On February 5, 2019, Kostiv filed the MTRO on the ground that Kostiv had not received notice of the July 18, 2018 hearing. Kostiv also filed an EOIR-28 designating himself as the primary counsel along with K&A's office address. On February 15, the Immigration Court denied the MTRO for, inter alia, failure to comply with *Lozada* requirements.[13] Kostiv received the denial.

On March 12, 2019, Maquiz agreed to K&A filing an appeal of the MTRO's denial with the Board of Immigration Appeals (BIA). On March 25, Kostiv filed a Notice of Appeal with the BIA on behalf of Maquiz. He indicated in the notice that he intended to file a separate, written brief. On July 22, the BIA issued its briefing schedule, which provided that Kostiv had until August 13 to file his brief and indicated that failure to do so may result in summary dismissal of the appeal. The briefing schedule notice was addressed to Kostiv and sent to his office at 3450 Wilshire Boulevard. Kostiv and his two paralegals, Yayza Ramirez and Steve

[12] Kostiv testified that his staff used a toll-free number to ascertain that Maquiz had a removal order issued against him. Tolchin testified the Immigration Court has a toll-free automated number that was very simple to use and that anyone could access it, not just attorneys of record—after dialing the number a caller is prompted to enter an alien number and would then be notified of information related to that case.

[13] The requirements under *Lozada* state that a claim of ineffective assistance of counsel must be supported by an affidavit from the respondent attesting to the agreement between respondent and counsel and actions counsel did or did not undertake in relation to the agreement; evidence that counsel was informed of the allegations underlying the claim of ineffective assistance and allowed an opportunity to respond; and the claim shows that a disciplinary complaint had been filed against counsel or an explanation why none was filed. (*Matter of Lozada* (BIA 1988) 19 I. & N. Dec. 637, 639.)

Munoz, each testified that K&A did not receive the court's briefing schedule notice.[14] Kostiv never filed a brief. On October 25, the BIA dismissed Maquiz's appeal and Maquiz was informed of the dismissal on October 30. Kostiv testified that he never reviewed the ROP in the Maquiz matter between November 28, 2018, through October 25, 2019.

**2. Culpability**

**Count One—Former Rule 3-100(A): Failure to Perform with Competence[15]**

Former rule 3-110(A) provides that an attorney must not "intentionally, recklessly, or repeatedly fail to perform legal services with competence." Under count one, the NDC specifically charged four allegations, asserting that Kostiv willfully violated former rule 3-110(A).[16] The hearing judge found Kostiv culpable on three of the allegations: his failure to enter a notice of appearance in the matter for three years; his failure to respond to the Immigration Court's case status request; and his failure to appear at the July 18, 2018 hearing.

***Subpart 1: Failure to File an EOIR-28 Notice of Entry of Appearance***

Under subpart 1, OCTC alleges that Kostiv violated former rule 3-110(A) by failing to file an EOIR-28 in Maquiz's immigration matter. The hearing judge found culpability for subpart 1 because Kostiv's failure to file an EOIR-28 for three years after the initial appearance

[14] Ramirez testified that, when K&A received a hearing notice, she would document it on the calendar, send a letter to the client, and also notify the client via phone. Munoz testified that, after the filing deadline was added to the firm's calendar, the notification would also get uploaded to Clio, the firm's case management software.

[15] All further references to "former rules" are to the California Rules of Professional Conduct that were in effect from September 14, 1992, until October 31, 2018.

[16] The hearing judge declined to find Kostiv culpable on subpart 2 of count one, which alleged Kostiv failed to file Maquiz's fingerprint biometric results by February 2, 2016, as required by the immigration judge at the Immigration Court's December 4, 2015 hearing. OCTC did not appeal this finding of fact and we affirm the judge's conclusion. (See Rules Proc. of State Bar, rule 5.152(C) [any factual error not raised on review is waived].)

by Bagdasarian in December 2015 was reckless, having known that Bagdasarian was the attorney identified on the December 2015 Notice and the March 2016 Notice. Kostiv offers multiple arguments that center around his main contention that OCTC offered no evidence that clearly and convincingly proved he knew Bagdasarian was the primary counsel who was receiving the communications from the Immigration Court because he reasonably relied on the interlineated March 2016 Notice that reset Maquiz's November 2016 hearing to November 2019 and had Kostiv's name and address handwritten on it. OCTC argues that Kostiv's contentions lack merit and generally agrees with the judge. It points to many aspects of the record that it believes support the judge's conclusion that Kostiv was reckless and that his actions ultimately led to Maquiz's removal order.

From our perspective, the hearing judge came to the correct conclusion but overcomplicated the issue by focusing on a host of facts, such as events related to Bagdasarian that may or may not have occurred, along with credibility and evidentiary determinations about Bagdasarian and which version of the March 2016 Notice that the Immigration Court sent. This discourse led the parties to likewise engage in similarly long discussions in support or opposition of the judge's reasoning that supported culpability under former rule 3-110(A). We find culpability is straightforwardly established upon review of the December 2015 Notice and the interlineated March 2016 Notice, both of which Kostiv admits he received.

As Maquiz's attorney, Kostiv clearly understood that he needed to receive court notices. Thus, reasonable attention on Kostiv's part to review K&A's case file, or have in place proper staff training to follow up on any discrepancy where his name and address was not on a court notice, would have disclosed that the December 2015 Notice was interlineated with Bagdasarian's name and not Kostiv's. This discrepancy should have prompted Kostiv or his staff to ensure that he was instead properly listed as the attorney of record regardless of any

belief that Bagdasarian filed an EOIR-28 indicating Kostiv as Maquiz's counsel. (See generally *Simmons v. State Bar* (1969) 70 Cal.2d 361, 367, fn. 3 [attorney must bear responsibility for events occurring as a result of court filings that the attorney should have supervised and controlled].) Furthermore, the discussion in former rule 3-110(A) states that an attorney has "the duty to supervise the work of subordinate attorney[s] and non-attorney employees or agents." (See also *Crane v. State Bar* (1981) 30 Cal.3d 117, 123 ["An attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority"].)

Kostiv claims that he reasonably relied on the interlineated March 2016 Notice that had his information handwritten on the notice as being mailed by the Immigration Court, which also supported his belief that he was Maquiz's primary attorney. As we have noted *ante*, we disagree with the hearing judge about her conclusion that there was only one March 2016 Notice and that one had been altered at some point with Kostiv's name and address.[17] Given Nietor's expert testimony and resolving reasonable doubts in favor of Kostiv, we find that two March 2016 Notices were sent by the Immigration Court given the subtle differences between the notices' proofs of service and that Kostiv only received the interlineated version, which is the one Kostiv uses to argue he reasonably concluded that Maquiz's next hearing was in November 2019. Yet, Kostiv misses the point about his duty of competence regarding the interlineated notice. His reliance on this notice does not excuse him from culpability, but instead establishes it as he had again received a notice that should have prompted him or his staff to confirm that he was the attorney of record and that his office was the address for service of court notices. When "an attorney has been alerted to problems and does not adequately address them, then such gross neglect may be disciplinable as a failure to perform services competently." (*In the Matter of*

[17] Additionally, our review of the ROP reveals an example of a similarly interlineated notice mailed to Maquiz's counsel before he retained Kostiv.

*Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 682.) This conclusion is underscored by his own and Nietor's observations about the fallibility of the Immigration Court sending out notices correctly. We find the record clearly and convincingly establishes that, after twice having received sufficient notice of potential problems in the December 2015 and March 2016 Notices, Kostiv was grossly negligent in failing to ensure that he filed an EOIR-28 until February 2019, and thus culpable under count one, subpart 1, as charged.

***Subpart 3: Failure to Timely File a Response to the Court's Case Status Request***
***Subpart 4: Failure to Appear at the July 18, 2018 Hearing***

In subparts 3 and 4 of count one, OCTC alleged that Kostiv failed to file a response to the court's case status request by December 12, 2016, and failed to appear at the July 18, 2018 hearing, respectively. To dispute culpability, Kostiv asserts that he relied on the court's March 2016 Notice, which scheduled the hearing for November 29, 2019—three years later and he testified that such a future date was not unusual. He asserts that his staff properly calendared the hearing and waited for further notification from the court. The hearing judge rejected his argument and found that Kostiv's lack of notice was a direct result of his failure to enter his appearance for three years after Maquiz retained him as counsel, resulting in his failures to respond to the case status request and to appear at the July 18, 2018 hearing.

Kostiv claims that the hearing judge's culpability findings are "bereft of clear and convincing evidence." He argues the judge's conclusion that he knew those court communications were being sent to Bagdasarian "side-stepped" his argument that Bagdasarian failed to forward court notices to him. OCTC asserts Kostiv had an obligation to make sure that he was aware of any deadlines in the Maquiz matter, which he recklessly failed to do, and relies on *In the Matter of Brockway* as instructive on this point. The attorney in *Brockway* was hired to obtain legal status for a client who was subject to removal, and this court found the attorney's

"meager and incomplete effort to address the matter after nearly one year constituted a reckless failure to perform." (*In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 949-950.)

As we previously noted, Kostiv's duty to at least investigate the court record was triggered no later than at the time he received the interlineated March 2016 Notice. Kostiv testified that he never reviewed the ROP in the Maquiz matter. Although the record does not indicate that he was served with or received notice of the court's communications regarding the case status request or subsequent July 2018 hearing, as Maquiz's attorney he had an obligation to routinely monitor the case or have office procedures in place to ensure his staff was appropriately monitoring the record for potential notices considering the two interlineated filings his office did receive. We are cognizant that ECAS had not been fully adopted during the timeframe relevant to the allegations under this count and one cannot expect an attorney managing a busy practice to make an appointment, physically go to the courthouse, and manually review the record of each and every matter on his caseload. Yet Kostiv and his staff were aware of the court's toll-free number, which would have revealed that the November 2019 hearing was rescheduled for July 2018. Therefore, as it specifically relates to the circumstances of this matter, Kostiv's lack of diligence in taking *any* steps for three years to monitor Maquiz's case demonstrated inattentiveness to the needs of his client, which showed recklessness on his part. (*In the Matter of Brockway*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 950.) An attorney's acts need not be shown to be willful where there is a repeated failure of the attorney to attend to the needs of the client. (*Kapelus v. State Bar* (1987) 44 Cal.3d 179, 188.) His recklessness in subpart 1 directly led to his failures as alleged in subparts 3 and 4 of count one, and we accordingly affirm the hearing judge's findings.

**Count Two—Prior Rule 1.1: Failure to Perform with Competence[18]**

***Subpart 1: Failure to Comply with the Lozada Requirements when Filing the MTRO with the Immigration Court***

In count two, subpart 1, OCTC alleged that Kostiv violated prior rule 1.1[19] by failing to comply with the *Matter of Lozada* requirements when filing the MTRO on behalf of Maquiz. The hearing judge found him culpable, concluding that the July 18, 2018 hearing notice was properly served on Bagdasarian and therefore a claim of ineffective assistance of counsel pursuant to *Lozada* was required and his failure to make that claim resulted in his submission of an inadequate brief. (See *Matter of N-K- & V-S-* (BIA 1997) 21 I. & N. Dec. 879, 881; *Matter of Lozada*, *supra*, 19 I. & N. Dec. at p. 638.)

As we noted *ante*, the record does not indicate that Kostiv was served or received notice from Bagdasarian of Maquiz's July 18 hearing, which was mailed to Bagdasarian's office. Once Kostiv became aware of the situation on November 28, 2018, when Maquiz visited K&A to check on the status of his case, Kostiv exercised his professional judgment in bringing the MTRO based on lack of notice. (See 8 U.S.C. § 1229a(b)(5)(C).)

Kostiv testified that he did not have to adhere to *Lozada* requirements when filing the motion because his motion was premised on a lack of notice and therefore, in his professional opinion, *Lozada* did not apply. Nietor's testimony also supports Kostiv's, as Nietor stated that *Lozada* requirements were not necessary because the ultimate issue was whether notice was received. Tolchin's testimony also lends some support because she stated that an attorney can file an MTRO based on either ineffective assistance of counsel or lack of notice. Their

[18] All further references to "prior rule 1.1" are to the version of rule 1.1 of the California Rules of Professional Conduct that was in effect from November 1, 2018, through March 21, 2021.

[19] Prior rule 1.1 states that an attorney "shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence."

testimonies are also supported by federal case law. (See, e.g., *Lo v. Ashcroft* (9th Cir. 2003) 341 F.3d 934, 937 [citing cases holding that *Lozada* factors are not rigidly applied especially where other evidence in record clearly demonstrates cause for motion].) Finally, we have held that a difference of opinion on the merits of a legal strategy does not amount to disciplinable conduct. (See *Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 746.) Kostiv made a choice in the moment on which strategy to pursue and that alone does not amount to incompetence under prior rule 1.1. We find that the facts do not support culpability and dismiss count two, subpart 1 with prejudice. (*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].)

***Subpart 2: Failure to File a Written Appeal Brief with the BIA***

Under count two, subpart 2, OCTC charged Kostiv with failing to file a written brief with the BIA by the August 13, 2019 deadline.[20] The hearing judge found Kostiv culpable as charged, concluding that Kostiv should have been "on high alert" about missing deadlines, considering the missed court communications between 2016 and 2018 as a result of his failure to file an EOIR-28. The judge also determined that his failure to check and see if the briefing schedule had been issued for the five months between the filing of the notice of appeal and the brief's deadline was grossly negligent. The judge stated Kostiv had not established proof that the BIA failed to properly send him notice of the briefing schedule, citing Evidence Code sections 606 and 664. (Evid. Code, §§ 606, 664 [in the absence of proof establishing nonexistence of presumed fact, official duties are presumed to have been regularly performed].)

[20] The NDC erroneously states that Kostiv's deadline to file the written brief with the BIA was August 3, 2019, rather than August 13, 2019. This error is immaterial to the arguments raised by Kostiv in his appeal.

Kostiv argues that any presumption is overcome by the testimonies of his paralegals that K&A did not receive BIA's briefing schedule. (*In re Leon S.* (2005) 133 Cal.App.4th 1556, 1562 [holding that presumption was rebutted by contrary evidence of lack of mailing].) He also claims that the judge ignored Nietor's expert testimony altogether, who opined that the BIA prioritized detainee cases, explaining that an appeal for a detained individual would get a briefing schedule within a couple of months, but, for non-detained individuals such as Maquiz, it was common for briefing schedules to be sent out "in six months or so."

Kostiv testified that he did not take any steps to inquire about the briefing schedule between March 25, 2019 (when BIA received his notice of appeal) to July 22, 2019 (the date the court mailed it), because, based on his experience, it often takes "a very long time to receive a briefing schedule." He also stated that his office did not call the BIA because they are "too busy to make the call on each case" and they would not have been on alert that something abnormal was happening because only a short period of time had passed. Contrary to Kostiv's assertion, the fact that K&A maintains a busy office does not negate Kostiv's obligation to ensure that he and his staff are trained to take timely and appropriate action on behalf of clients—which includes utilizing available means to check the status of upcoming case hearings such as calling the court's toll-free automated system. (See *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 554 [attorney obligated to take timely action on client's behalf in continuing representation].) We find that by failing to maintain office procedures, which includes routinely monitoring for a briefing schedule after having filed a notice of appeal and indicating a written brief will be filed, Kostiv failed to perform competently in violation of prior rule 1.1. Thus, we affirm culpability under count two, subpart 2.

## B. The Rosales Matter

### 1. Factual Background

On November 24, 2018, Karen Alice Rodriguez Rosales hired Kostiv and K&A to perform the following legal services on her behalf and her two minor children: file an I-589 Application; request a change of venue to the Los Angeles Immigration Court; and file an I-765 Application. On December 4, the Immigration Court received Kostiv's Notice of Entry of Appearance on behalf of Rosales. On December 6, the San Francisco Immigration Court granted Kostiv's motion to change venue to Los Angeles.

On March 18, 2019, Lance M. Powell, a K&A associate attorney, appeared with Rosales in Immigration Court to file the I-589 Application, which was rejected by the immigration judge because a supporting declaration was not attached. The case was continued to May 13, so that the deficiency could be cured. Powell took a photo of the court's order with the rescheduled hearing date and gave the order to Rosales. After the March 18 hearing, Rosales accompanied Powell to K&A and he drafted her supporting declaration, explaining why she was entitled to asylum. On March 20, K&A sent Rosales written notice of the May 13 hearing date. On May 6, K&A had a follow-up telephone call with Rosales reminding her of the upcoming hearing date.

On May 13, 2019, Rosales went to the Immigration Court for her court hearing. Rosales called K&A and a receptionist incorrectly advised her that her hearing had been rescheduled (the receptionist also misinformed the K&A attorney who was to appear as well). Rosales was confused by the misinformation because she had been reminded twice by K&A of the court date. Due to the misinformation, Rosales left the court. In fact, the court hearing had not been rescheduled and, because neither Rosales nor the attorney was present, the immigration judge entered an in-absentia removal order against her and her two minor children. Consequently, Kostiv did not file the asylum application for Rosales and her two children by May 13, 2019.

On the next day, Rosales was informed by an EOIR immigration case manager that she and her children had been ordered removed for not appearing at the hearing on May 13, 2019. She contacted K&A about the problem. Kostiv agreed to file an appeal and did not charge her an additional fee for the appeal. On May 17, Kostiv filed the first MTRO (MTRO I) on Rosales's behalf—it was supported by her unsworn statement, which explained K&A's error as the cause for her failure to appear at the May 13 hearing. On June 3, the Immigration Court ordered Kostiv to correct deficiencies in the MTRO I within 15 days from the date of service of the order, including both Rosales and Kostiv filing declarations or affidavits under penalty of perjury, setting forth the facts that led to the failure to appear at the May 13 hearing. Kostiv did not submit a filing as ordered, and the immigration judge denied MTRO I on that basis. K&A called Rosales on July 3, informing her of the denial.

On September 6, 2019, Kostiv filed a second MTRO (MTRO II) with the Immigration Court. Kostiv attached a sworn declaration from himself and an unsworn declaration from Rosales. On October 9, the Immigration Court denied MTRO II. The court found that it was numerically barred,[21] and it faulted Kostiv for not complying with the earlier June 28, 2019 order. On October 23, K&A called Rosales but was unable to reach her. Once notified, Rosales agreed to appeal to the BIA.

On November 7, 2019, Kostiv appealed the MTRO II denial. In the notice of appeal, he checked the box indicating that he would file a separate, written brief. On December 10, the BIA issued a briefing schedule, which set Kostiv's deadline to file his brief on December 31. The briefing schedule had K&A's address on it as the service address, but Kostiv and his staff testified that K&A never received it. Kostiv did not file the appeal brief by the December 31

[21] Pursuant to 8 Code of Federal Regulations part 1003.23(b)(1) (2019), a party may only file one motion to reopen absent specific exceptions defined under the statute.

deadline. On January 23, 2020, Kostiv's staff called and checked with the BIA and first learned that the deadline had passed. On January 27, Kostiv filed a late brief along with a request for the BIA to accept the late filing. On June 18, the BIA accepted the motion.

In the meantime, Rosales contacted another attorney, Aaron Morrison, to represent her. Based on Morrison's review of Rosales's immigration file, Morrison determined that Kostiv had rendered ineffective assistance of counsel. On April 3, 2020, while Kostiv's late brief request was pending, Morrison filed a motion to remand with the BIA alleging Kostiv's ineffective assistance. The BIA granted remand on October 16, 2020, finding that Kostiv's representation of Rosales with respect to the motion to reopen was "deficient." On December 9, the Immigration Court granted Rosales's MTRO II filed by Kostiv.

**2. Culpability**

**Count Four—Prior Rule 1.1: Failure to Perform with Competence**

Under count four, OCTC alleged that Kostiv violated prior rule 1.1 by failing to perform with competence as it relates to his handling of the Rosales matter. The NDC included eight specific subpart allegations under this count, and the hearing judge found him culpable as charged. On review, Kostiv contests the judge's culpability findings for each allegation except for subpart 4 as discussed below.[22]

***Subpart 1: Failing to File the I-589 Application***
***Subpart 2: Failing to Appear at the May 13, 2019 Hearing***
***Subpart 3: Incorrectly Telling Rosales the May 13, 2019 Hearing was Rescheduled***

In subpart 1, OCTC alleged that Kostiv failed to file the I-589 Application with the Immigration Court on behalf of Rosales and her children. The hearing judge found Kostiv

[22] In subpart 4, OCTC charged Kostiv with violating prior rule 1.1 based upon his failure to provide sworn declarations from himself and Rosales by June 18, 2019, as prescribed in the Immigration Court's June 3, 2019 order. The hearing judge found Kostiv culpable as charged and neither party contests culpability on review. We affirm.

culpable as charged. She concluded that Kostiv failed to file the applications and determined that he was grossly negligent for not complying with the immigration judge's "local rule" requiring that the I-589 Application be accompanied by an affidavit and also concluded that Kostiv could have filed the applications by mail or with the clerk.

On review, Kostiv raises several arguments. His primary challenge is that the hearing judge's finding was erroneous because no requirement exists that asylum applications must be submitted with a declaration and, therefore, he cannot be found culpable. OCTC claims Kostiv's argument is a red herring because, regardless of if the declaration was required, he still had a duty to file the application.

Powell presented Rosales's I-589 Application for filing to the Immigration Court at the March 18, 2019 hearing, but the judge rejected it because it was not accompanied by a declaration and continued the hearing to May 13 for re-submission with the declaration. Kostiv testified that an advantage is gained by filing a "bare bones" asylum application because it starts the clock for a 150-day period, after which a work permit may be requested. He also stated that this approach was common, and the majority of immigration judges accept applications without the declaration to start the clock for work permit purposes. This testimony was supported by OCTC's expert, Tolchin, who testified that other judges would have accepted it without the declaration, and Kostiv's expert, Zittlau, who testified it was not appropriate for the judge to reject the application.

We find that, but for the judge preventing the filing of the I-589 Application, it would have been filed. Also, after the judge rejected the filing, Rosales went back to the K&A office with Powell to work on preparing the declaration for the May 13 hearing as required by the judge. K&A staff also reminded Rosales of the May 13 hearing by letter on March 20 and a phone call on May 6. These facts strongly imply that Kostiv's firm was planning to attend the

May 13 hearing with Rosales and to submit the requested declaration. We also acknowledge Kostiv's assertion that he could not have filed the application later by mail given the judge's subsequent removal order—Kostiv would not have been permitted to file the application and declaration until the case was reopened. Based on these facts, we do not find that Kostiv failed to perform competently and dismiss count four, subpart 1, with prejudice. (*In the Matter of Kroff*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

Under subparts 2 and 3, OCTC alleged that Kostiv violated prior rule 1.1 by failing to appear for Rosales's May 13, 2019 hearing and incorrectly informed her that the hearing had been rescheduled.[23] On review, Kostiv acknowledges his staff incorrectly advised Rosales about the May 13 hearing, and he asserts it was a calendaring mistake and mere negligence. We agree with Kostiv that his actions here were at most negligent and disagree with the hearing judge's culpability findings of gross negligence upon our review of the record.

Kostiv stipulated that a K&A staff person erroneously advised Rosales that the May 13, 2019 hearing was rescheduled. Kostiv testified that a receptionist inadvertently confused alien numbers with two clients that share the same first name and then misinformed both the K&A attorney and Rosales that they did not have a court hearing on May 13. The receptionist's confusion and subsequent providing of incorrect information resulted in the K&A attorney not attending the hearing for which he, from the record as detailed in subpart 1 *ante*, had prepared and planned to attend. Although we find that the receptionist's error constitutes negligence, it was neither grossly negligent nor reckless and does not support culpability against Kostiv within the meaning of prior rule 1.1. (See *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar

[23] The hearing judge's decision erroneously states that Kostiv "[did] not dispute the allegations" in subparts 2 and 3, and the judge did not specifically find culpability. As noted by Kostiv in his rebuttal brief, he only stipulated to the underlying facts. We reject OCTC's waiver claim, in light that Kostiv raised the issue in his closing brief and he did not admit to culpability.

Ct. Rptr. 752, 757 [where simple calendaring error resulted in failure to timely file interrogatory responses, no basis for charge of failing to competently perform]; *In the Matter of Ward* (Review Dept.1991) 2 Cal. State Bar Ct. Rptr. 47, 57 [attorney not culpable of failing to perform with competence where dismissal of personal injury matter was due to simple error in calculating statute of limitations].) Subparts 2 and 3 of count four are thus dismissed with prejudice. (*In the Matter of Kroff*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

***Subpart 5: Failing to Comply with Matter of Lozada When Filing the First and Second MTROs***

In subpart 5, OCTC alleged that Kostiv failed to comply with *Lozada* requirements, discussed in the Maquiz matter *ante*, when he filed MTRO I and MTRO II in the Rosales matter. The hearing judge found Kostiv culpable and rejected his argument that not all motions to reopen necessarily rise to ineffective assistance of counsel requiring *Lozada*. The judge reasoned that Kostiv testified he was familiar with applicable case law, and therefore his failure to comply with *Lozada* requirements by not submitting sworn declarations amounted to incompetence.

Kostiv contests culpability and asserts no legal authority exists to rebut his argument that *Lozada* is not required in an appeal where the BIA can determine from the motion that the filing party is at fault. Essentially Kostiv is arguing that MTRO I and MTRO II clearly and unequivocally stated that the error leading to K&A's and Rosales's failure to appear at the May 13 hearing was the firm's fault. To support his argument on review, Kostiv cites to case law stating that *Lozada* requirements "are not sacrosanct." (*Castillo-Perez v. I.N.S.* (9th Cir. 2000) 212 F.3d 518, 525; see also *Lo v. Ashcroft*, *supra*, 341 F.3d, at p. 937 [flexibility in applying *Lozada* requirements].) Kostiv maintains that, because both motions unambiguously identified K&A as the cause of error throughout the factual statements in the MTROs (the error was also stated in Rosales's declarations), the standards of *Castillo* and *Lo* were satisfied.

As it pertains to the manner in which Kostiv carried out his duties in drafting the motions, he has, at the least, shown that his decisions and work product were legally based. As stated above in *Lo*, the Ninth Circuit provided exceptions to *Lozada*. However, from the record here we are aware that Kostiv's arguments were not persuasive and did not prevail on appeal; the BIA denied both motions. Kostiv believed his arguments were legally sufficient and supported without including *Lozada* factors, and we conclude his actions here do not constitute a failure to perform competently. (See *Call v. State Bar of Cal.* (1955) 45 Cal.2d 104, 110-111 [isolated mistake in judgment not basis for discipline].) Accordingly, Kostiv's actions in this instance do not support a culpability finding under prior rule 1.1. We dismiss subpart 5 of count four with prejudice. (*In the Matter of Kroff*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

***Subpart 6: Failing to Include the Required Application for Relief with MTRO I and MTRO II***

Under subpart 6, OCTC alleged that Kostiv violated prior rule 1.1 based on his failure to not include a copy of Rosales's I-589 Application when submitting the MTROs. The hearing judge only noted Kostiv's claim that his failure to submit an application was an oversight; the judge stated neither a culpability finding for this allegation nor any analysis, which was erroneous. (See Bus. & Prof. Code, § 6080 [where State Bar Court recommends disbarment or suspension, finding of fact is required].) In its brief on review, OCTC has not presented any legal authority to establish that an asylum application not attached to a MTRO would result in its

dismissal.[24] Accordingly, OCTC failed to carry its burden of proof and count six, subpart 6, is dismissed with prejudice. (*In the Matter of Kroff*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

***Subpart 7: Failing to File a Brief with the BIA by the December 31, 2019 Deadline***

Under count four, subpart 7, OCTC charged Kostiv with failing to file a written brief with the BIA in violation of prior rule 1.1. The hearing judge found Kostiv culpable as charged, rejecting his testimony that he never received the briefing schedule. She found it highly unlikely that the BIA would fail to send him the briefing schedule for two separate client matters within five months in both the Rosales and Maquiz matters. The judge also considered the totality of the circumstances including the timeline of his mishaps in Maquiz in relation to similar occurrences here and determined that Kostiv should have been on high alert regarding office procedures and safeguards, especially pertaining to court communications. The judge also determined that Kostiv's failure to check with the BIA for nearly three months contributed to his incompetence.

On review, Kostiv argues that OCTC introduced no contrary evidence to rebut his or Munoz's testimony, both stating the briefing schedule was never received. He also argues that the hearing judge's reliance on Evidence Code section 664 is misplaced because the issue is not whether the briefing schedule was sent but instead whether Kostiv actually received it. OCTC supports the judge's reasoning and finding, and it emphasizes that Kostiv checked the box on the

[24] Tolchin testified that including an I-589 Application would be "advisable" when filing an MTRO based on exceptional circumstances, which Kostiv claimed in both motions. The language of 8 Code of Federal Regulations part 1003.23(b)(3) (2019), which pertains to MTROs, appears to require that a copy of an application accompany the motion; however, it is unclear how this specific provision applies to Kostiv's filing and if not attaching an application to a MTRO alone would result in dismissal of the motion. Our review of both MTRO denials do not indicate that either denial was based wholly or in part for not filing a copy of the application. OCTC failed to put forward any legal argument under this count and instead relied solely on its position that the hearing judge made a culpability finding for subpart 6.

BIA's notice of appeal form, indicating that he planned to submit a written brief, which also should have heightened his awareness to anticipate filing a brief.

We agree with the hearing judge's finding here. As noted above in the Maquiz matter, expert testimony suggests that BIA briefing schedules can often take several months or even a year to receive. We acknowledge this; however, the expert testimony does not support a conclusion that the briefing schedules are frequently not received at all, which is Kostiv's argument. The judge correctly pointed out that Kostiv should have been on high alert regarding briefing schedules at this point. We cannot condone a law office practice that lacks diligence in attention to matters of importance like the timely filing of a client's appeal in an asylum proceeding, especially considering the repeated mistakes in a short span of time. (See *McMorris v. State Bar* (1981) 29 Cal.3d 96, 99 [repeated inattention to client's needs have long been grounds for discipline].) Regardless of Kostiv's or his staff's testimony that K&A never received a briefing schedule, no plausible reason exists why Kostiv's staff did not routinely call the court's automated system to proactively inquire about case status deadlines under such circumstances that could have prevented the incompetence that occurred in light of earlier missteps. Accordingly, we affirm culpability under count four, subpart 7.

***Subpart 8: Filing an Inadequate Brief to the BIA***

Under subpart 8, OCTC alleges that Kostiv filed an inadequate brief to the BIA when appealing the MTRO denials because it lacked an explanation of why Kostiv did not file the declarations as requested by the Immigration Court on June 3, 2019, and it contained an insufficient legal and factual discussion and failed to discuss applicable law. The hearing judge found Kostiv culpable and concluded that the brief contained "boilerplate" language and failed to address any relevant issues including the claim for ineffective assistance of counsel under *Lozada*. On review, Kostiv argues the judge improperly rejected his assertion that, if the brief

was deficient, he was at most negligent. OCTC maintains that Kostiv's brief did not show mere negligence because, considering the history of the Rosales case, a substantive brief was required, which he failed to provide. We agree with OCTC that the judge's conclusion was correct.

Kostiv's brief alleged exceptional circumstances to argue that Rosales's MTROs should have been granted. Upon review of the brief, we find the analysis lacking sufficiency, as not much depth exists in terms of legal application and Kostiv does not reference *Lo v. Ashcroft*, which is established case law directly on point with the facts in Rosales's case. It is also concerning that Kostiv's MTROs and the brief contain nearly identical arguments and case law. When the BIA denied MTRO II, it stated that Kostiv "essentially reasserted the same arguments." Thus, for Kostiv to use similar unfavorable arguments again when filing the brief, his actions here go beyond negligence and constitute recklessness. (*In the Matter of Hindin*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 682 [attorney's failure to adequately address problems after being alerted evidences gross negligence].) Kostiv did not act diligently in performing his duty as Rosales's attorney because he failed to file a legally substantive brief in support of the appeal. Accordingly, we find he willfully violated prior rule 1.1 and affirm culpability under count four, subpart 8.

**Count Five—Business and Professions Code Section 6068, Subdivision (m): Failure to Inform Client of Significant Developments**[25]

Under count five, OCTC alleged that Kostiv violated section 6068, subdivision (m), by failing to keep Rosales reasonably informed of significant developments in her immigration matter. OCTC specifically charged that Kostiv failed to inform Rosales of the June 3, 2019

[25] Section 6068, subdivision (m), provides, in part, that an attorney must "keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services." All further references to sections are to the Business and Professions Code.

Immigration Court order that required him to provide sworn declarations from himself and Rosales; failed to specify the reasons for MTRO I's denial; and failed to specify the reasons for MTRO II's denial. The hearing judge found Kostiv culpable as charged, determining that Rosales was never informed about the June 3 order based upon her testimony and that the K&A client communication log showed no communication between the office and Rosales from May 2019 (when the removal order was issued) through July 3, 2019.

Kostiv challenges the hearing judge's culpability determination and argues OCTC failed to establish clear and convincing evidence that Rosales was not informed of the June 3, 2019 order because during direct examination she was not asked about the order. A review of Rosales's testimony does not show that OCTC explicitly questioned her about the June 3 order and only asked her if Kostiv discussed the court's requests for sworn declarations and the reasons for the MTRO denials. OCTC broadly questioned Rosales about whether Kostiv requested additional documentation from her after the motion to reopen was denied, but there is no specific reference to the June 3 order. On review, OCTC asserts that the "overwhelming evidence" supports a finding that Kostiv failed to communicate with Rosales regarding the June 3 order based on Kostiv's own records that comport with Rosales's testimony. We disagree with OCTC and do not find its arguments persuasive. While the K&A communication log can be used as corroborating evidence to support a finding that Rosales was not contacted during June 2019 about the order, this evidence alone is insufficient to prove that Kostiv violated section 6068, subdivision (m), as alleged in count five because OCTC never directly asked her about the June 3 order. (See *In the Matter of Khakshooy* (Review Dept. 2019) 5 Cal. State Bar Ct. Rptr. 681, 691 [§ 6068, subd. (m), violation dismissed for lack of proof].) Therefore, we dismiss count five with prejudice. (*In the Matter of Kroff*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 843.)

## C. The Sanabria Matter

### 1. Factual Background

On November 24, 2015, Marta Sorto Sanabria hired Kostiv to represent her and her minor daughter in Immigration Court. Kostiv was hired to prepare and file an I-589 Application as well as an application for a juvenile visa. Kostiv filed the applications on July 20, 2016. On August 14, 2017, he represented Sanabria in Immigration Court at a hearing where the judge denied asylum and determined that Sanabria "was not a credible witness, and her testimony bears no weight." The court's decision was served on Kostiv by mail the following day. Kostiv filed a timely appeal to the BIA.

On May 29, 2018, the BIA sent Kostiv a briefing schedule noting the appellate brief deadline of June 19, which Kostiv received. On June 13, Kostiv and Aaron Chenault, an associate attorney at K&A, filed the appeal on behalf of Sanabria. Chenault submitted his notice of appearance using an EOIR-27 form[26] on June 13, 2018, along with the brief.

On August 28, 2018, the BIA dismissed the appeal and upheld the court's August 14, 2017 decision. The BIA sent the dismissal to Kostiv's office and to Sanabria. Sanabria's copy of the dismissal was returned to the BIA as undeliverable. On September 13, 2018, the BIA forwarded Sanabria's undelivered copy to the K&A office, where it was received. The dismissal was addressed to Chenault as the attorney of record. K&A staff called Sanabria but they were unable to reach her. On September 22, staff mailed Sanabria a letter, noting their inability to contact her by phone and directed her to contact the office because they need "to do preparation work in your BIA appeal/case." Over the next three days, Wendy Garcia, a receptionist at K&A, called Sanabria to inform her about the BIA dismissal. Each time, Sanabria did not answer her

[26] An EOIR-27 is used to make an appearance before the BIA.

phone and Garcia left a voicemail, notifying her about the BIA dismissal. On September 26, Kostiv was copied on an email exchange between his employees. Garcia noted in the email that K&A had received BIA's decision dismissing Sanabria's appeal and Garcia had not been able to contact her by telephone despite multiple attempts.

Kostiv had until September 27, 2018, to file a petition for review with the United States Court of Appeals for the Ninth Circuit pursuant to title 8 United States Code section 1252(b)(1), and this filing deadline was not met because Sanabria failed to respond to K&A's multiple attempts to contact her. Two months later, on November 27, Sanabria visited the K&A office to inquire about her work permit and learned that the BIA denied her appeal three months earlier. She hired Kostiv to file a Motion to Reopen for Reissuance of the BIA's Decision (Motion to Reissue), which was necessary because the time period within which to appeal the BIA's denial to the Ninth Circuit had expired, and the only way to restart the clock was to have the BIA decision reissued.

Kostiv filed the Motion to Reissue on December 14, 2018. In the motion he claimed the reason Sanabria missed the deadline to appeal the BIA decision was because "[Sanabria] and Attorney only found out that said appeal was dismissed, when [Sanabria] came into the office for a status update and a work permit renewal, and only then did [Sanabria] and her Attorney become aware of the issued dismissal . . . ." The motion was supported by an unsworn declaration from Sanabria, stating that she did not appeal to the Ninth Circuit because she was not aware that her appeal with the BIA had been denied. On April 22, 2019, the BIA denied the Motion to Reissue.

**2. Culpability**

**Count Eight—Section 6106: Moral Turpitude - Misrepresentation**

Section 6106 provides that "any act involving moral turpitude, dishonesty, or corruption, whether the act is committed in the course of his relations as an attorney or otherwise . . . constitutes a cause for disbarment or suspension." Kostiv is alleged to have violated section 6106 when he stated in the Motion to Reissue that "[Sanabria] and Attorney only found out that said appeal was dismissed, when [Sanabria] came into the office for a status update and a work permit renewal, and only then did [Sanabria] and her Attorney become aware of the issued dismissal." The hearing judge found Kostiv culpable of intentionally misrepresenting to the BIA that he was unaware of the dismissal until Sanabria visited the office.

On review, Kostiv disputes that his statement to the BIA was knowing and intentional, but he does concede that his statement was grossly negligent. OCTC contends Kostiv's motion to the BIA contained intentionally false misrepresentations and the hearing judge's finding should be affirmed. To support its argument, OCTC relies on (1) a May 2021 response to OCTC's investigative inquiry, which it considers an admission that Kostiv received notice of the BIA decision on September 19, 2018, and (2) a September 26, 2018 email circulated by Garcia that referenced the BIA's decision, which was copied to Kostiv. The hearing judge relied on this evidence to find Kostiv's misrepresentation intentional. The judge determined that K&A staff had received the dismissal when it was issued and concluded the evidence established Kostiv was aware of the dismissal prior to November 2018 when Sanabria went to K&A. In supporting her intentional moral turpitude finding, the judge specifically found that, in the response to OCTC's letter, "[Kostiv] admitted that *he* received the BIA decision around September 19, 2018, . . . [and Kostiv] also admitted that he had to lie in the Motion to Reissue that he had no

notice because if he did not, there would have been no chance of prevailing on the motion." (Original italics.)

We do not reach the same conclusions as the hearing judge. Notably, the response to OCTC's inquiry was not written by Kostiv but by another K&A attorney, Cesar O. Montoya, who specifically defined "Kostiv" as referenced in the letter to mean K&A as a firm and not Kostiv individually. After considering this inartful language that was not written by Kostiv, it is not reasonable to conclude that clear and convincing evidence exists that Kostiv *himself* had made any admission in the response or that he had actual knowledge of receiving the BIA's dismissal *prior to* Sanabria's November 27 office visit, nor does it establish that he knowingly intended to conceal that knowledge when he submitted the brief.

Additionally, the hearing judge did not find credible Kostiv's testimony that he was unaware of the dismissal and had not opened Garcia's email until 2021 when responding to OCTC's inquiry. The judge concluded that his failure to provide corroborating evidence from Chenault—the attorney of record in Sanabria's case—undermined his credibility. We generally give great weight to such findings but are mindful that adverse credibility findings do not reveal the truth or infer that the truth is the converse of the rejected testimony. (*Edmondson v. State Bar* (1981) 29 Cal.3d 339, 343.) More to the point, we find insufficient evidence to support the judge's credibility determination about Kostiv based on his name written on the appellate brief, that he was familiar with Sanabria's case and had represented her in a hearing, or the assumption that Chenault must have informed Kostiv about the dismissal when it arrived in the K&A office because they both worked in the same office.

Although Kostiv challenged culpability for violating section 6106 at trial, on review he concedes that the evidence in the record regarding K&A's receipt of the dismissal proves he had constructive notice, and he agrees that he should have investigated when K&A received the

dismissal to confirm the veracity of his statements in the Motion to Reissue. He acknowledges that he was grossly negligent in making his statements to the BIA without first verifying K&A's receipt of the court's dismissal. (See *In the Matter of Yee* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 330, 334 [attorney's failure to verify Minimum Continuing Legal Education (MCLE) compliance before submitting affidavit constituted gross negligence in violation of § 6106].)

Notwithstanding Kostiv's concession to grossly negligent misconduct, OCTC maintains that, even if Kostiv personally learned of the dismissal in November 2018, he was willfully blind to the facts, which is "tantamount to intentional misconduct." To support its contention, OCTC relies on *In the Matter of Carver* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 427, 430, 432-433, where an attorney's unauthorized practice of law was found to constitute moral turpitude based on his willful blindness, which involved actual knowledge and not gross negligence in relation to his inactive status. We do not find *Carver* analogous here because Carver had purposely avoided receiving notice from the State Bar of any change in his attorney status by changing his membership address to an address that could not receive certified mail in order to avoid service. (*Ibid*.) We also determined that Carver's action demonstrated bad faith. (*Id*. at p. 432, fn. 9.) Unlike in *Carver*, the record here does not support a finding of willful blindness tantamount to moral turpitude for Kostiv's actions.

Kostiv undoubtedly should have been more careful when drafting his Motion to Reissue with the BIA, and we do not condone his gross carelessness to specific details when preparing and drafting the motion on Sanabria's behalf. (See also *Sanchez v. State Bar* (1976) 18 Cal.3d 280, 284-285 [attorney's gross carelessness and negligence involved moral turpitude where attorney inaccurately reported client's case without checking file].) Kostiv should have been more attentive, which could have made him aware of the dismissal, but, considering our higher standard of proof, we cannot find that Kostiv intended to mislead the BIA. (See *Zitny v. State*

*Bar* (1966) 64 Cal.2d 787, 792 [willfulness must be established by proving an attorney had knowledge of his bad act and intended to commit it].) Finally, we note that Kostiv testified he drafted the Motion to Reissue on the same day Sanabria visited his office. A reasonable inference can be drawn that he was not intentionally deceitful but acted hastily, which contributed to his carelessness and inattention to the dismissal order. (*Himmel v. State Bar* (1971) 4 Cal.3d 786, 793-794 [reasonable doubts resulting from evidence are resolved in favor of respondent].) Thus, we find that Kostiv's misconduct constitutes gross negligence in violation of section 6106. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 786 [gross negligence sufficient for § 6106 moral turpitude violation for misrepresentation].)

## III. AGGRAVATION AND MITIGATION

As neither party challenges any of the mitigation findings made by the hearing judge, we affirm mitigation for cooperation (std. 1.6(e), moderate weight),[27] good character (std. 1.6(f), moderate weight), and community service (substantial weight).[28] Regarding aggravation under standard 1.5, where Kostiv has challenged those circumstances,[29] we review them to determine if OCTC proved those circumstances by clear and convincing evidence, which we discuss below.

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

[28] *Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 (community service considered mitigation).

[29] Kostiv does not dispute the hearing judge's finding of aggravation for highly vulnerable victim. (Std. 1.5(n).) The hearing judge concluded that Maquiz, Rosales, and Rosales's two minor children had a high level of vulnerability due to their immigration status, limited English-language skills, and fear of deportation. We agree and, like the hearing judge, assign substantial aggravation. (See *In the Matter of Brockway*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 950 [immigration status is precarious with potential for serious harm].)

**A. Multiple Acts of Misconduct (Std. 1.5(b))**

The hearing judge assigned aggravation under standard 1.5(b) because Kostiv failed to communicate, made a false statement to the BIA, and failed to perform with competence in two client matters. The judge concluded that his unethical acts warranted moderate weight in aggravation. Kostiv argues for less weight in aggravation based on his belief that he is only culpable of a single instance of failing to perform and one act of moral turpitude. Although we dismissed an alleged failure to communicate under count five, we found Kostiv culpable of multiple instances of failing to perform competently in the Maquiz and Rosales matters, in addition to our moral turpitude finding in the Sanabria matter. Therefore, we affirm moderate aggravating weight for this circumstance. (See *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646-647 [three instances of misconduct considered multiple acts].)

**B. Indifference (Std. 1.5(k))**

Indifference toward rectifying or atoning for the consequences of professional misconduct is an aggravating circumstance. An attorney who fails to accept responsibility for his actions and instead seeks to shift responsibility to others demonstrates indifference and lack of remorse. (*In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 14.) The hearing judge assigned substantial weight in aggravation for Kostiv's failure to accept responsibility, repeatedly stating that Kostiv blames others for his misconduct. OCTC requests that we affirm the judge's finding. Kostiv asserts that he is not deflecting responsibility but defending himself by challenging the sufficiency of the evidence. He asserts he does not lack remorse, emphasizing that he apologized to Rosales and took on her appeal pro bono.

While the law does not require false penitence, it does require that an attorney accept responsibility for wrongful acts and show some understanding of his culpability. (See *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) We conclude that

Kostiv has appropriately accepted responsibility here. First, we note that many of the culpability findings made by the hearing judge have not been adopted by us. Further, our review of Kostiv's testimony does not support the judge's repeated findings that he "blamed" the Immigration Court, the BIA, and his staff for his mishandling of client matters. When one examines Kostiv's arguments against culpability, he has repeatedly asserted that OCTC did not meet its burden of proof or other legal arguments, which is within his rights even if we did not ultimately agree with all his assertions. Additionally, his defense was successful on many points. An attorney is permitted to establish a defense to charges against him as stated in *In re Morse* (1995) 11 Cal.4th 184, 209, and, here, expert testimony corroborates Kostiv's frustrations regarding the Immigration Court's antiquated systems prior to the adoption of electronic filing. Finally, Kostiv admits to performing one act incompetently, committing moral turpitude, and that his clients, where misconduct has been found, were vulnerable victims. Based on these considerations, we do not find clear and convincing evidence of indifference.

**C. Significant Client Harm (Std. 1.5(j))**

The hearing judge found that Kostiv caused significant harm to Maquiz and Rosales, as well as Rosales's two minor children, by failing to properly handle their cases, which caused orders of removal to be issued against them. The judge assigned substantial weight, but Kostiv argues that modest or no weight is warranted. OCTC requests we affirm the judge's finding, arguing Kostiv harmed Rosales, her children, and Maquiz. We find that OCTC did not prove by clear and convincing evidence that Kostiv's misconduct actually caused Maquiz significant harm either financially or based on the removal notices. Further, we have already considered Kostiv's failure to perform competently in the Maquiz matter in our culpability analysis, so we do not consider this for aggravation purposes. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 133.) Maquiz did not testify and the record is devoid of evidence from

him to establish harm beyond the culpability finding. For Rosales, she had to hire another attorney, and it was the new attorney's work that resulted in the MTRO being granted. She also testified that she was distressed and feared deportation for herself and her children based on Kostiv's failures and that she experienced some financial burden with hiring her new attorney. (See *In the Matter of Casey* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 117, 126 [significant harm where client hired new attorney, incurred fees, and suffered for three years due to attorney's misconduct].) Given that significant harm is established in one client matter, we assign moderate weight under this circumstance.

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

Based on the culpability that we have found, the standards provide for a range of discipline, and, in making our discipline recommendation, we are required to utilize the standard that imposes the most severe sanction (std. 1.7(a)), which here is established by Kostiv's grossly negligent misrepresentation under section 6106. The statute's language provides for discipline ranging from suspension to disbarment. Standard 2.11 also applies, which states that disbarment or actual suspension is the presumed sanction for an act of moral turpitude and "[t]he degree of sanction depends on the magnitude of the misconduct; the extent to which the misconduct

harmed or misled the victim, which may include the adjudicator; the impact on the administration of justice, if any; and the extent to which the misconduct related to the practice of law."[30] Kostiv's grossly negligent misrepresentation involved Sanabria, but she was not harmed by it. Therefore, the limited magnitude of Kostiv's act of moral turpitude supports a suspension recommendation toward the lower end of the spectrum.

Kostiv requests that we recommend a stayed suspension based on one act of misconduct under prior rule 1.1 and his grossly negligent misrepresentation, which, we note, is less than that recommended in standard 2.11. OCTC supports the hearing judge's discipline recommendation of six months' actual suspension, although the judge's recommendation is based on more misconduct than we have found. Additionally, the judge found Kostiv's misconduct involved indifference and we do not. Looking to the case law, we find some guidance. In *In the Matter of Yee*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 334, the attorney was found culpable for one act of grossly negligent misrepresentation under section 6106 when she provided a false affidavit to the State Bar regarding her compliance with MCLE requirements. Yee had no aggravation and had many mitigating circumstances, including circumstances that were given significant and compelling weight. Her mitigating circumstances established that a public reproval, which is discipline less than that recommended in the standards, was appropriate (*id*. at p. 337), and we do not find similar circumstances here in the matter before us.

*Wren v. State Bar* (1983) 34 Cal.3d 81 also guides us, though this case was decided before the discipline standards existed. In *Wren*, the attorney was found culpable under section 6106 for one count of knowingly misrepresenting the status of the case to his client,

[30] Under standard 1.2(c)(1), the range of discipline for an actual suspension is generally for thirty days, sixty days, ninety days, six months, one year, eighteen months, two years, or three years.

along with failing to perform with competence and failing to communicate. The California Supreme Court acknowledged Wren's 22 years of discipline-free practice but also found Wren submitted misleading testimony to the hearing panel. Ultimately, the Supreme Court imposed a 45-day actual suspension for his wrongdoing.

Next, we consider *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, where that attorney filed a complaint and signed a verification on behalf of his clients attesting they were absent from Los Angeles County, when the attorney knew this assertion was not true. We found that this was a grossly negligent misrepresentation under section 6106. We also found a violation of section 6068, subdivision (j), for his 27-month delay in filing a change of address with the State Bar. Downey's mitigation for good character evidence and cooperation were both given limited weight, and his aggravating circumstances were serious: he had a prior disciplinary record resulting in a four-month actual suspension, and he twice concealed the inaccurate verification through legal semantics with the superior court and opposing counsel. Following progressive discipline, we found that a 150-day actual suspension was appropriate discipline. (*Id*. at pp. 157-158.) In comparing Kostiv's culpability findings and his mitigation and aggravation findings with Downey's, a discipline recommendation for Kostiv less than 150 days is appropriate.

Finally, we consider *In the Matter of Mitchell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332. Mitchell was found culpable under section 6106 for knowingly misrepresenting his educational background on his resume and in subsequent job interviews over a period of three years. Although there was minimal harm to the victims, his misconduct was aggravated by his deceit to OCTC in discovery interrogatories. Mitchell stipulated to culpability and established mitigation for extreme emotional difficulties. This court found that a 60-day actual suspension

was appropriate because of the seriousness of misconduct involving moral turpitude. (*Id*. at pp. 341-342.)

On balance, the *Wren* and *Mitchell* matters are most similar to the case at bar. Wren's misconduct findings are slightly more extensive in comparison to Kostiv's, because of Wren's culpability for failing to communicate and his dishonesty to the hearing panel. However, unlike Kostiv's few years of misconduct-free practice, Wren established over 20 years of practice without prior discipline. Both Kostiv and Mitchell acknowledged that their misconduct involved moral turpitude, although Mitchell's actions were intentional and involved other dishonesty. Kostiv engaged in more misconduct than Mitchell, considering his repeated instances of incompetence, yet he also presented more favorable mitigation considering his moderately weighed cooperation and good character evidence, along with his substantially weighed community service.

Overall, from the record we have reviewed, we consider Kostiv to be running an effective large-scale legal practice. His practice is staffed with a number of attorneys and other personnel to provide legal assistance to his many clients, and the firm has policies and procedures to adequately handle predictable and unexceptional matters. However, the record also demonstrates that when a problem arises, especially where the problem occurs due to his own law firm's missteps, Kostiv is not adept at attending to those issues promptly or completely, which could eventually cause harm, as shown in the Rosales matter. His misrepresentation to the BIA, even though not intentional, also causes us concern and arose because of his carelessness.

In sum, we find that a short actual suspension is appropriate in this matter. Discipline on the lower end of the spectrum is in accordance with the standards and case law and should impress on Kostiv that he needs to bring a determined focus on each and every case his law firm

undertakes. Accordingly, we conclude that an actual suspension of 60 days is sufficient to protect the public, the courts, and the legal profession.[31]

## V. RECOMMENDATIONS

We recommend that Petro Richard Kostiv, State Bar Number 285859, be suspended from the practice of law for one year, execution of that suspension is stayed, and Kostiv is placed on probation for one year, with the following conditions:

1. **Actual Suspension.** Kostiv must be suspended from the practice of law for the first 60 days of the probation period.

2. **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. Kostiv must complete all court-ordered probation conditions as directed by the State Bar's Office of Case Management & Supervision (OCMS) and at Kostiv's expense. At the expiration of the probation period, if Kostiv has complied with all probation conditions, the period of stayed suspension will be satisfied and that suspension will be terminated**.**

3. **Comply with State Bar Act, Rules of Professional Conduct, and Probation Conditions.** Kostiv must comply with the provisions of the California Rules of Professional Conduct, the State Bar Act (Business and Professions Code sections 6000 et seq.), and all probation conditions.

4. **Review Rules and Statutes on Professional Conduct.** Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Kostiv must read the California Rules of Professional Conduct and Business and Professions Code sections 6067, 6068, and 6103 through 6126. Kostiv must provide a declaration, under penalty of perjury, attesting to Kostiv's compliance with this requirement, to the OCMS no later than the deadline for Kostiv's first quarterly report.

5. **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, Kostiv must complete the e-learning course entitled "California Rules of Professional Conduct and State Bar Act Overview." Kostiv must provide a declaration, under penalty of perjury, attesting to Kostiv's compliance with this requirement, to the OCMS no later than

[31] The hearing judge recommended monetary sanctions of $2,500. Neither party challenges this on review. After considering the facts and circumstances of the case, we determine that a $2,500 sanction is appropriate due to Kostiv's repeat failures to perform competently on behalf of vulnerable victims and an act of moral turpitude through gross negligence based on his misrepresentation to BIA. (See Rules Proc. of State Bar, rule 5.137 [$2,500 sanction appropriate for actual suspension].)

the deadline for Kostiv's quarterly report due immediately after the 90-day period for course completion.

6. **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, Kostiv must make certain that the State Bar Office of Licensee Records and Compliance (LR&C) has Kostiv's (1) current office address and telephone number, or if none, an alternative address and telephone number; and (2) a current email address (unless granted an exemption by the State Bar by using the form approved by LR&C, pursuant to California Rules of Court, rule 9.9(d)), not to be disclosed on the State Bar's website or otherwise to the public without the licensee's consent. Kostiv must report, in writing, any change in the above information to LR&C within 10 days after such change, in the manner required by LR&C.

7. **Meet and Cooperate with the OCMS.**

   **a**. Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Kostiv **must schedule**, with the assigned OCMS Probation Case Coordinator, a meeting or meetings either in-person, by telephone, or by remote video (at the OCMS Probation Case Coordinator's discretion) to review the terms and conditions of probation. The intake **meeting must occur** within 30 days after the effective date of the Supreme Court order imposing discipline in this matter.

   **b**. During the period of probation, Kostiv must (1) meet with representatives of the OCMS as directed by the OCMS; (2) subject to the assertion of applicable privileges, fully, promptly, and truthfully answer any inquiries by the OCMS and provide any other information requested by the OCMS; and (3) meaningfully participate in the intake meeting and in the supervision and support process, which may include exploring the circumstances that caused the misconduct and assisting in the identification of resources and interventions to promote an ethical, competent practice.

   **c.** If at any time the OCMS determines that additional probation conditions are required, the OCMS may file a motion with the State Bar Court to request that additional conditions be attached pursuant to rule 5.300 of the Rules of Procedure of the State Bar and California Rules of Court, rule 9.10(c).

8. **State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court.** During the probation period, the State Bar Court retains jurisdiction over Kostiv to address issues concerning compliance with probation conditions. During probation, Kostiv must appear before the State Bar Court as required by the court or by the OCMS after written notice to Kostiv's official State Bar record address and e-mail address (unless granted an exemption from providing one by the State Bar as provided pursuant to condition 6, above). Subject to the assertion of applicable privileges, Kostiv must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

9. **Quarterly and Final Reports.**

   a. **Deadlines for Reports.**

      i. **Quarterly Reports.** Kostiv must submit quarterly reports to the OCMS 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 45 days, that report must be submitted on the next quarter due date and cover the extended deadline.

      ii. **Final Report.** In addition to all quarterly reports, Kostiv 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 probation.

   b. **Contents of Reports.** Kostiv must answer, under penalty of perjury, all inquiries contained in the report form provided by the OCMS, including stating whether Kostiv has complied with the State Bar Act and the California Rules of Professional Conduct during the applicable period. All reports must be: (1) submitted on the written or electronic form provided by the OCMS; (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 in a manner that meets the requirements set forth in the Rules of Procedure of the State Bar and the Rules of Practice of the State Bar Court; and (4) submitted to the OCMS on or before each report's due date.

   c. **Submission of Reports.** All reports must be submitted to the OCMS. The preferred method of submission is via the portal on Kostiv's "My State Bar Profile" account that is accessed through the State Bar website. If unable to use the portal, reports may be submitted via (1) email; (2) certified mail, return receipt requested (postmarked on or before the due date); (3) other tracked-service provider, such as Federal Express or United Parcel Service, etc. (physically delivered to such provider on or before the due date); (4) fax; or (5) personal delivery.

   d. **Proof of Compliance.** Kostiv must maintain proof of compliance with the above requirements for each submitted report for a minimum of one year after the probation period has ended. Kostiv is required to present such proof upon request by the State Bar, the OCMS, or the State Bar Court.

10. **State Bar of California Ethics School.** Within nine months after the effective date of the Supreme Court order imposing discipline in this matter, Kostiv must submit to the OCMS satisfactory evidence of completion of the State Bar of California 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 Kostiv will not receive MCLE credit for attending Ethics School.

    Kostiv is encouraged to register for and complete Ethics School at the earliest opportunity. If Kostiv provides satisfactory evidence of completion of Ethics School and passage of the test given at the end of the session prior to the effective date of the Supreme Court order

imposing discipline in this matter but after the date this Opinion is filed, Kostiv will receive credit for completing this condition.

11. **Proof of Compliance with Rule 9.20 Obligation.** Kostiv is directed to maintain, for a minimum of one year after commencement of probation, proof of compliance with the Supreme Court's order that Kostiv comply with the requirements of California Rules of Court, rule 9.20 (a) and (c), as recommended below. Such proof must include: the name(s) and address(es) of all individuals and entities to whom Kostiv 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 Kostiv with the State Bar Court. Kostiv is required to present such proof upon request by the State Bar, the OCMS, or the State Bar Court.

## VI. MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION (MPRE)

We recommend that Kostiv be ordered to do the following within one year after the effective date of the Supreme Court order imposing discipline in this matter or during the period of Kostiv's actual suspension in this matter, whichever is longer:

1. Take and pass the MPRE administered by the National Conference of Bar Examiners;
2. During registration select California as the jurisdiction to receive Kostiv's score report; and
3. Provide satisfactory proof of such passage directly to the OCMS.

Kostiv is encouraged to register for and pass the MPRE at the earliest opportunity. If Kostiv provides satisfactory evidence Kostiv passed the MPRE prior to the effective date of the Supreme Court order imposing discipline in this matter but after the date this Opinion is filed, Kostiv will receive credit for completing this requirement. Failure to comply with this requirement may result in suspension. (Cal. Rules of Court, rule 9.10(b).)

## VII. CALIFORNIA RULES OF COURT, RULE 9.20

We recommend that Kostiv 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.[32] (*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 recommend that Kostiv be ordered to pay monetary sanctions to the State Bar of California Client Security Fund in the amount of $2,500 in accordance with Business and Professions Code section 6086.13 and rule 5.137 of the Rules of Procedure of the State Bar.[33] 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 costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against an

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[32] Kostiv is required to file a rule 9.20(c) affidavit even if Kostiv 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).) The court-approved Rule 9.20 Compliance Declaration form is available on the State Bar Court website: https://www.statebarcourt.ca.gov/Forms.

[33] Monetary sanctions are payable through Kostiv's "My State Bar Profile" account. Further inquiries related to payment of sanctions should be directed to the State Bar's Division of Regulation.

attorney who is actually suspended or disbarred must be paid as a condition of applying for reinstatement or return to active status.[34]

## X. MONETARY REQUIREMENTS

Any monetary requirements imposed in this matter shall be considered satisfied or waived when authorized by applicable law or orders of any court.

McGILL, J.

WE CONCUR:

HONN, P. J.

STOVITZ, J.

[34] Costs are payable through Kostiv's "My State Bar Profile" account. Further inquiries related to payment of costs should be directed to the State Bar's Division of Regulation.