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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of	)	Case No. S283172
THOMAS JOHN SPIELBAUER,	)	State Bar Case No.: SBC-19-30700
State Bar No. 78281.	)	

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Business and Professions Code

Code of Civil Procedure

I. INTRODUCTION

The Office of Chief Trial Counsel of the State Bar of California ("State Bar") seeks review because the Review Department of the State Bar Court incorrectly interpreted Supreme Court precedent[1] and imposed inappropriate categorical limits on the availability of restitution in attorney discipline cases in a published Opinion that will negatively impact future discipline cases.

Respondent Thomas John Spielbauer ("Respondent"), while representing himself and his corporation, engaged in intentional acts of fraud in a real property transaction by submitting a false and inflated payoff demand, which forced the seller of the property to either pay the false amount "as ransom" or lose the sale of the house. When the seller initiated civil proceedings to eliminate the cloud on the title caused by Respondent's fraudulent payoff demand, Respondent lied to the superior court and claimed the payoff demand was accurate. In 2013, the seller obtained a $869,276.55 civil judgment against Respondent for: (1) compensatory damages of $332,547; (2) punitive damages of

[1] *Sorensen v. State Bar* (1991) 52 Cal.3d 1036.

$332,550; (3) attorney fees of $163,597.12; and (4) costs of $40,582.37. The judgment was upheld by the Court of Appeal in 2016. To date, eight years later, there is no evidence that Respondent has paid any money whatsoever toward satisfaction of the judgment.

The Review Department of the State Bar Court found Respondent culpable of four counts of misconduct—engaging in moral turpitude by making intentional misrepresentations (two counts), violating the law, and failing to report a civil fraud judgment to the State Bar—and recommended that Respondent be actually suspended from the practice of law for six months. The Review Department declined to include restitution as part of its disciplinary recommendation to this Court. In its Opinion, which it designated for publication, the Review Department broadly opined on the "limitations to ordering restitution, particularly to non-clients, as a condition of probation," and concluded that "a civil judgment in tort … cannot serve as the basis for restitution." (Review Dept. Opinion, pp. 1, 32.) In doing so, the Review Department took an overly restrictive view of Supreme Court precedent on this topic, including *Sorensen v.*

State Bar (1991) 52 Cal.3d 1036,[2] and imposed inappropriate categorical limits on the availability of restitution in attorney discipline cases.

Under *Sorenson*, restitution should be available whenever a person, whether a client or not, has "incurred specific out-of-pocket losses directly resulting from attorney misconduct" and the order of restitution serves to accomplish protective and rehabilitative principles of discipline, including "emphasiz[ing] the professional responsibility of lawyers to account for their misconduct." This standard appropriately ensures that the imposition of restitution in any given disciplinary case will be based on the nature of the attorney's misconduct and the primary purposes of discipline.

Importantly, this case is not about ordering restitution for ordinary tort damages as framed by the Review Department. Rather, this case involves intentional acts of dishonesty. Respondent breached his duty of good faith and fair dealing to those with whom he was transacting business, causing an

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[2] In *Sorenson*, this Court imposed a restitution order to compensate a court reporter for legal fees and costs incurred to defend an unjust lawsuit initiated by an attorney over a minor billing dispute.

innocent victim to suffer a tangible pecuniary loss; and, when the victim was forced to seek judicial intervention to clear the slander of title caused by Respondent's fraudulently inflated payoff demand, Respondent dragged out the litigation, submitted a false declaration stating that the payoff demand was accurate, and breached his duty of candor to the court. There is no question that this type of egregious behavior involving serious acts of moral turpitude and cognizable economic harm would have resulted in a restitution requirement had the victim been a client. That the victim was a non-client should not render restitution unavailable. Attorneys owe duties not only to clients, but also to the general public, the legal system, and the administration of justice. When an attorney's misconduct directly causes a non-client to incur specific costs, restitution should be permitted.

Restitution is not just a means to address fiduciary breaches resulting in unjust takings or enrichments, but it is also intended to discourage unprofessional and dishonest conduct and to rehabilitate errant attorneys by forcing them to confront, in concrete terms, the harm their actions have caused. (See *Brookman v. State Bar* (1988) 46 Cal.3d 1004, 1009.) While compensation to the victim of wrongdoing should not be the

principal purpose of restitution, it can be a factor, and is appropriate as incidental to the primary purposes of attorney discipline and regulation. (See *Sorensen, supra,* 52 Cal.3d at p. 1044, citing *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 374 [compensating victim as incidental to "a proper, primary regulatory purpose" permitted]; see also *Coppock v. State Bar* (1988) 44 Cal.3d 665, 685 ["Although part of the rationale for requiring restitution may be to prevent an attorney from profiting from his wrongdoing, restitution is also intended to compensate the victim of the wrongdoing, and to discourage dishonest and unprofessional conduct."].)

Here, a restitution order would require Respondent—who has shown no remorse, and has yet to pay a single cent in redress—to confront, in concrete terms, the harm he has caused. Restitution would also serve as a deterrent to future similar misconduct and emphasize accountability for unethical acts of this nature—thereby fulfilling the critically important goals of discipline: to protect the public, to ensure that practitioners are held to the highest professional standards, and to instill public confidence in the legal profession. (*Sorensen, supra,* 52 Cal.3d at p. 1044; *In re Morse* (1995) 11 Cal.4th 184, 205.)

Accordingly, the State Bar requests that this Court grant its petition, impose the six-month disciplinary suspension recommended by the Review Department, **and** order that Respondent remain suspended until he pays restitution for specific, out-of-pocket losses (compensatory damages, attorney fees and costs) in the amount of $536,726.49, plus interest. Further, because the Review Department designated its Opinion for publication, making it binding authority in State Bar Court for future cases involving restitution, the State Bar also requests that this Court take the opportunity to correct the Review Department's analysis, which imposes incorrect categorical limits on the permissibility of restitution in disciplinary matters involving non-clients.

II. ISSUE PRESENTED FOR REVIEW

In attorney disciplinary cases involving harm to a non-client, should restitution be precluded simply because the attorney's misconduct is grounded in tort? And, in this attorney disciplinary case, should Respondent be ordered to pay restitution to a non-client for specific out-of-pocket losses incurred as a direct result of Respondent's intentional and fraudulent misconduct?

III. RELEVANT FACTUAL BACKGROUND

On March 5, 2010, Respondent incorporated Devine Blessings, Inc. ("Devine Blessings"). Respondent served as the president and sole shareholder of the company, which was created with a specific purpose to "secure financing and purchase lien position notes, particularly on the properties of Dennis Spielbauer" that were subject to foreclosure. Dennis Spielbauer ("Dennis"), Respondent's brother, was facing bankruptcy at the time Devine Blessings was formed. (Review Dept. Opinion, p. 3.)

A. The Underlying Civil Litigation

1. *Loans To Dennis And Subsequent Purchase By Devine Blessings*

In 2003 and 2007, Dennis received two loans from real estate investor Curtis Mitchell, in the amounts of $350,000 and $585,000, respectively. The 2003 loan was secured by three properties owned by Dennis, including a property located at 167 E. William Street in San Jose, California ("167 Property"), placing Mitchell in second position on the 167 Property. The 2007 loan was secured by three different properties, one of which was Dennis's personal residence. By 2010, the balance on the 2003 loan was $7,152.03. In 2008, Faramarz and Afsaneh Yazdani, as

trustees of their family trust (Yazdani Trust), loaned Dennis $210,000, secured by a deed of trust on five parcels, including the 167 Property. By March 2010, the 167 Property was the only property remaining in Dennis's ownership, and the Yazdani Trust was in third position on the 167 Property. Dennis ultimately defaulted on his loans, and Mitchell pursued foreclosure proceedings on Dennis's residence and the 167 Property, which resulted in Dennis filing for bankruptcy. (Review Dept. Opinion, pp. 3–4.)

Just prior to the foreclosure sales, on March 12, 2010, Respondent, on behalf of Devine Blessings, agreed to purchase the 2003 and 2007 loans from Mitchell for $126,000, and Mitchell agreed to stop the foreclosure proceeding on Dennis's residence. The purchase agreement, which was drafted by Respondent, stated that the transaction was between Mitchell and "[Respondent] or the business entity he is an officer, director, or managing member of [sic]." During negotiation of the agreement, Mitchell repeatedly asked Respondent to acknowledge in writing that of the $126,000, only $7,152.03 related to the 167 Property (the outstanding balance on the 2003 loan), and the remainder related to the 2007 loan secured by Dennis's residence.

Respondent refused, stating, "I'm not signing them. I have my own reasons for not signing them. I can't tell you what they are, but they do not involve you." Mitchell, believing Respondent's behavior was very odd, documented Respondent's statements and had the documentation witnessed by an escrow officer. (Review Dept. Opinion, pp. 3–4.)

2. *The Payoff Demand*

On March 25, 2010, the Yazdani Trust foreclosed on the 167 Property and then transferred title to a newly formed company, 167 E. William, LLC ("William LLC"). William LLC sought to resell the 167 Property to a third party, and in order to clear title, requested a payoff demand statement from Respondent pursuant to Civil Code section 2943, subdivision (b). Respondent provided William LLC with a written payoff demand, stating that the balance owed on the 167 Property was $126,000, and that an additional $143,500 was owed for "other" (which was unspecified), amounting to a total demand of $269,500. Respondent did not disclose that the actual balance owed on the loan secured by the 167 Property was only $7,152.03. (Review Dept. Opinion, pp. 4–5.)

William LLC contacted Respondent to inquire why the payoff demand was so high and requested an accounting, but Respondent did not respond. William LLC then attempted to contact Respondent through counsel and warned that it would pursue a civil action for tortious interference, because the payoff demand was inflated and was jeopardizing the sale of the 167 Property. In response to this second communication, Respondent asserted that he did not have time to investigate the accuracy of the payoff demand submitted. Ultimately, Respondent never produced an accounting or explanation of the payoff demand. As a result, William LLC canceled the sale, refunded the third-party buyer's deposit, and reimbursed the buyer for additional costs incurred. (Review Dept. Opinion, pp. 4–5.)

3. *William LLC Initiates A Civil Lawsuit*

On July 6, 2010, William LLC filed a civil action against Respondent and Devine Blessings in the Santa Clara County Superior Court. William LLC brought several causes of action, including tort causes of action for intentional interference with economic advantage, negligent interference with economic relations, slander of title, and violations of Civil Code section 2943. William LLC alleged, in part, that Respondent proffered an

inaccurate payoff demand statement with respect to the 167 Property, and it sought damages. (Review Dept. Opinion, p. 5.) On September 14, 2010, Respondent provided the superior court with a signed declaration under penalty of perjury stating:

> The payoff demand is an accurate payoff demand to the best of my knowledge, information and belief. This payoff demand reflects the principal amounts due on the package purchase of the notes and security instruments which occurred on or about March 12, 2010 and which payoff demand includes attorney's fees and costs incurred in the protection of the securities . . . .

(Ex. 25, p. 1.)

Respondent also represented in his declaration that he was the attorney for defendant Devine Blessings and had personal knowledge of the facts in the declaration. (Ex. 25.)

Following a two-day bench trial in April 2013, and a separate trial phase on the issue of punitive damages in May 2013, on August 27, 2013, the superior court issued a Statement of Decision and Decision Concerning Amount of Punitive Damages. (Ex. 32 ["2013 Decision"]). The court held that Respondent and his corporation violated Civil Code section 2943, pertaining to a lienholder's obligation to provide an accurate

payoff demand statement to the purchaser of real property.[3] Further, the court found by clear and convincing evidence that Respondent intentionally presented an inaccurate payoff demand to deprive William LLC of property or legal rights, thereby committing "fraud" under Civil Code section 3294.[4] The court

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[3] All references to Civil Code section 2943 are to the operative version of the code in effect January 1, 2010 through December 31, 2013. (Review Dept. Opinion, p. 2, fn. 3.) "Payoff demand" means a written statement prepared in response to a written demand made by an entitled person or authorized agent, setting forth the amounts required as of the date of preparation by the beneficiary, to fully satisfy all obligations secured by the loan that is the subject of the payoff demand. (Civ. Code § 2943, subd. (a)(5).) Civil Code section 2943, subdivision (c) states in pertinent part: "A beneficiary, or his or her authorized agent, shall, on the written demand of an entitled person, or his or her authorized agent, prepare and deliver a payoff demand statement to the person demanding it within 21 days of the receipt of the demand." The section respondent was found to have violated—Civil Code section 2943, subdivision (e)(4)—provides in part: "If a beneficiary for a period of 21 days after receipt of the written demand willfully fails to prepare and deliver the statement, he or she is liable to the entitled person for all damages which he or she may sustain by reason of the refusal . . . ."

[4] Civil Code section 3294, subdivision (a) provides: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Civil Code section 3294, subdivision (c)(3), defines fraud as: "[A] n intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the

reasoned that Respondent presented the false payoff demand because he intended to seek payment from William LLC to cover his attorney fees for working on Dennis's bankruptcy and to shift the burden of paying the remaining mortgage on Dennis's residence to William LLC. The court further found that Respondent knew William LLC would be forced to pay the false payoff demand "as ransom" or lose the sale of the house to the third-party buyer. (Ex. 32; Review Dept. Opinion, p. 6.)

On February 20, 2014, the superior court entered judgment against Respondent and Devine Blessings. Respondent was ordered to pay William LLC $869,276.55, composed of: (1) $332,547.06 in compensatory damages; (2) $163,597.12 in attorney fees; (3) $40,582.37 in costs; (4) and $332,550 in punitive damages. (See Ex. 35, p. 2 [Judgment], see also Ex. 32, pp. 15–22 [for discussion of how superior court arrived at these amounts].)[5]

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part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."

[5] As to the compensatory damages, the court itemized and analyzed plaintiff's claims for damages, allowed some, disallowed others, and calculated pecuniary losses as follows:

> Plaintiff has asserted several categories of damages which, of course, must be offset against the $7,152.03 admittedly owing to Defendants. First, Plaintiff proved that it paid

After losing post-trial motions, Respondent appealed. The Court of Appeal issued an unpublished opinion on May 10, 2016, affirming the superior court's judgment and finding no merit to Respondent's claims. (Ex. 36.) Respondent sought review with the California Supreme Court, but his petition was denied. (Review Dept. Opinion, pp. 6–7.) Respondent has not made any payment

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> $3,215 to the buyers to resolve their claim that they had incurred expenses in connection with the canceled sale. Plaintiff argued that it should recover interest on the purchase price it did not receive from the buyers, but Plaintiff owned the Property in the meantime and received rents as benefit of that ownership. Plaintiff seeks damages for Mr. Yazdani's lost time litigating this case, estimating 450 hours valued at $295 per hour (his consulting billing rate); however, on cross examination, Mr. Yazdani conceded that he currently has only one consulting client for whom he is doing very little work, thus, the evidence does not credibly support the claim that this sum was lost to Plaintiff as cost of clearing title. Finally, Plaintiff submits proof that it spent $336,484.09 on fees in this case to eliminate the cloud on the title caused by the false payoff demand (Exhibit 40). *Appel v. Burman* (1984) 159 Cal.App.3d 1209 (affirming award of fees as proper item of damages). Thus, Plaintiff has proved that it suffered damages in the amount of $339,699.09. Deducting the offset, the damages total $332,547.06."

(Ex. 32, pp. 15:13–16:2.) As this makes clear, the overwhelming majority of the compensatory damages were fees (including legal fees) and costs incurred by the plaintiff in its attempt to clear title from the false payoff demand submitted by Respondent.

toward satisfying the $869,276.55 civil judgment. (Review Dept. Opinion, p. 7.)

IV. PROCEDURAL BACKGROUND

The State Bar filed a Notice of Disciplinary Charges ("NDC") against Respondent on December 16, 2019, charging him with five counts of misconduct: two counts of failing to obey laws under Business and Professions Code section 6068, subdivision (a),[6] for violations Civil Code sections 2943 and 3294; two counts of moral turpitude under section 6106 for misrepresentations to William LLC and to the superior court; and failure to report a civil fraud judgment to the State Bar in violation of section 6068, subdivision (o)(2). Respondent filed a response to the NDC on January 10, 2020. The matter was abated from March 2020 through April 4, 2022, due to complications related to the COVID-19 pandemic.

On May 12, 2022, the hearing judge granted the State Bar's motion to apply collateral estoppel to the fraud findings against Respondent reached by the Santa Clara County Superior Court

[6] All further references to sections are to the Business and Professions Code unless otherwise specific.

in *167 E. William LLC v. Devine Blessings, et al.* (Case Number 1-10-CV-176152) and upheld by the Court of Appeal.

Following trial on August 30 and September 1, 2022, and post-trial briefing, the hearing judge issued a decision on December 2, 2022, finding Respondent culpable of all but failing to report the fraud judgment under section 6068, subdivision (o)(2). The judge recommended a 90-day actual suspension, but declined to recommend restitution. As to restitution, the hearing judge found:

> After careful consideration, the court declines to order that Spielbauer's suspension continue until he pays restitution to LLC. OCTC has provided no case law nor rule that restitution should be required under these particular circumstances. At the outset, it has not been established that Spielbauer's wrongdoing occurred in the practice of law. Further, LLC is not a client and, as it has a civil judgement against Spielbauer, it has other mechanisms available to satisfy that judgement.

(Hearing Dept. Decision, p. 25.)

Both parties sought review. Following full briefing and oral argument on August 17, 2023, the Review Department issued its Opinion on October 25, 2023, as modified on October 27, 2023, and designated it for publication. The Review Department found Respondent culpable of failing to report the civil fraud judgment under section 6068, subdivision (o)(2), but

reversed culpability as to the Civil Code section 3294 violation (finding this statute to be a remedy for fraud, and not a statute that Respondent violated). After weighing all factors in aggravation and mitigation, the Review Department increased discipline to a six-month actual suspension. Despite assigning full aggravating weight to Respondent's indifference[7] and his failure to make any effort whatsoever toward payment of the $869,276.55 civil judgment (Review Dept. Opinion, pp. 21–22), the Review Department declined to recommend restitution, distinguishing Supreme Court precedent and sweepingly concluding that tort damages cannot serve as the basis for restitution. (Review Dept. Opinion, pp. 29–32.)

On November 13, 2023, the State Bar filed a request for reconsideration on the restitution issue. Respondent filed a response on November 19, 2023. On December 8, 2023, the Review Department issued a written order denying the request for reconsideration, stating in part:

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[7] Specifically, the Review Department found that respondent was "unable to recognize the wrongfulness of his misconduct," and pointed out that "[d]espite the superior court's civil fraud judgment, [respondent] maintains that his actions were supported under the law, and [that] he has done nothing wrong." (Review Dept. Opinion p. 20.)

> The restitution OCTC seeks in this case constitutes a damages award based in tort, with a substantial portion of the award—the punitive damages portion—exceeding out-of-pocket losses, to a business entity to whom respondent had no fiduciary duty. This is beyond the scope of every disciplinary case in which restitution has been imposed and that involved parties outside the attorney-client relationship, as the Opinion discussed.
>
> OCTC contends that because this case does not involve an ordinary tort, but rather, a tort in fraud, restitution must be imposed as part of discipline, overlooking that the fraud respondent committed was the basis for the punitive damages award, which is clearly beyond the reach of *Sorensen's* restitution for out-of-pocket losses in a limited situation. (See *Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1044–1045.)

On December 26, 2023, Respondent filed a petition for review with this Court. This Court accepted Respondent's petition for filing, although the record of discipline was not transmitted to this Court until January 10, 2024, and thereafter granted the State Bar's request to file its response to Respondent's petition on or before February 16, 2024. That response has been filed separately. The State Bar herein files this affirmative petition for review on the issue of restitution.

V. ARGUMENT

A. Restitution Is Appropriate When It Serves The Purposes of Discipline

A restitution order is proper when it serves the fundamental goals of discipline—the protection of the public, maintenance of the highest ethical standards, the preservation of confidence in the legal profession, and, where fitting, the rehabilitation of an errant attorney. (*Sorensen, supra,* 52 Cal.3d at p. 1044; *In re Morse, supra,* 11 Cal.4th at p. 205.) As this Court noted in *Alberton v. State Bar* (1984) 37 Cal.3d 1, 6, fn. 4, the power to discipline attorneys should include the power to encourage attorneys to act honestly and with integrity—and a restitution requirement does just that. "Although part of the rationale for requiring restitution may be to prevent an attorney from profiting from his wrongdoing, restitution is also intended to compensate the victim of the wrongdoing, and to discourage dishonest and unprofessional conduct." (*Coppock, supra,* 44 Cal.3d at p. 685.) The Review Department misses this vital point with its blanket statement that "a civil judgment in tort cannot serve as the basis for restitution" (Review Dept. Opinion, p. 32),

creating a categorical rule that improperly limits the availability of restitution to non-clients.

Ordering restitution in cases of financial injury is a rehabilitative measure designed to further the state's disciplinary objectives "by forcing the attorney to 'confront, in concrete terms, the harm his actions has caused.' [Citation.]" (*Brookman v. State Bar, supra,* 46 Cal.3d at p. 1009.) And, because the responsibilities of a lawyer differ from those of a layman, a lawyer may be required to make restitution as a moral obligation, independent of whether there is any separate legal obligation to do so. (See *In the Matter of Distefano* (Review Dept.1991) 1 Cal. State Bar Ct. Rptr. 668, 674.) Efforts and conduct in satisfying financial obligations are also relevant to assessing rehabilitation and fitness to practice law. (See e.g., *In re Application of Gahan* (Minn. 1979) 279 N.W.2d 826, 830 [conduct of bar applicant in satisfying financial obligations has been widely recognized by jurisdictions around the country as relevant factor in assessing good moral character; failure to honor such commitments adversely reflects on ability to practice law and evidences disregard for the rights of others]; see also *In re Menna* (1995) 11 Cal.4th 975, 990 [court may properly consider relative absence of

any serious effort to make even partial restitution as indicator of rehabilitation]; *Hippard v. State Bar* (1989) 49 Cal.3d 1084 [in reinstatement case, State Bar may properly look at restitution efforts as indication of rehabilitation]; accord *In the Matter of Miller* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 423, 429; *Resner v. State Bar* (1967) 67 Cal.2d 799, 802, 810 [attitude, as evidenced by spirit of willingness, earnestness, and sincerity is relevant to issue of rehabilitation].)

Respondent's significant indifference and failure to pay a single cent toward payment of the $869,276.55 civil judgment bear on his fitness to practice law and demonstrate the need for a restitution requirement. The restitution requirement would not just be a means of compensating the victim for out-of-pocket losses suffered as a direct result of Respondent's intentionally dishonest and fraudulent misconduct, but would force Respondent, in no uncertain terms, to accept responsibility for his ethical transgressions (something he has yet to do) and deter future similar misconduct.

B. The Review Department Misconstrued Controlling Case Law And Unduly Limited Application Of Restitution

The Review Department took an overly restrictive view of Supreme Court precedent on the topic of restitution to non-clients in attorney disciplinary matters, including *Sorensen v. State Bar*. In doing so, it inappropriately viewed restitution as a "damages award" and improperly limited the availability of restitution here and in future cases.

1. *Sorensen v. State Bar Is Controlling*

Sorensen involved an attorney who filed a frivolous and unjust lawsuit against a court reporter over a $45 billing dispute. (*Sorensen, supra,* 52 Cal.3d 1036.) The court reporter was forced to incur over $4,000 in unnecessary legal fees and expenses in defending the litigation. Although the Review Department had found Sorensen culpable of violations of section 6068, subdivisions (c) and (g) (maintaining an unjust action and continuing action out of corrupt motive), it declined to recommend restitution as a condition of discipline. This Court, however, ordered restitution, explaining:

> Unlike the review department, we do not view restitution in this context as a 'damage award.' Nor do we approve imposition of restitution as a means of compensating the

> victim of wrongdoing. Rather, we consider restitution a necessary condition of probation designed to effectuate petitioner's rehabilitation and to protect the public from similar future misconduct."

(*Id.* at p. 1044.)[8]

While recognizing that prior cases authorizing restitution involved misuse of client funds, this Court found that:

> [T]he same protective and rehabilitative principles [that apply in cases involving misuse of client funds] apply in the case of a party who has been forced to incur legal fees as a result of an attorney's violation of section 6068, subdivisions (c) and (g). **In both instances, private persons have incurred specific out-of-pocket losses directly resulting from attorney misconduct. Restitution of these amounts emphasizes the professional responsibility of lawyers to account for their misconduct, and thereby serves to both protect the public and instill public confidence in the bar.**

(*Sorensen, supra,* 52 Cal.3d at pp. 1044–1045 [emphasis added].)

In Respondent's case, as in *Sorensen*, the Review Department viewed restitution too narrowly as the equivalent of a tort damage award. It also misread *Sorensen* as maintaining a general prohibition on restitution for damages grounded in tort

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[8]Of note, in discussing and affirming that Sorensen acted with a corrupt motive, this Court highlighted, among other things, that "[a] reasonable attorney who was truly interested in simply resolving a billing dispute could and would have taken a number of lesser measures that petitioner apparently either failed to consider, or worse, considered and rejected." (*Sorensen, supra,* 52 Cal.3d at p. 1043.)

and creating only a narrow exception for legal fees incurred as the result of the specific cited code violations. This reading is entirely backward. *Sorensen* establishes a general rule permitting restitution when private persons have incurred specific out-of-pocket losses directly resulting from attorney misconduct and the restitution order will serve the purposes of discipline. Legal fees incurred as a result of a violation of section 6068, subdivision (c) and (g), are merely one example, not the universe, of situations where application of this general rule permits restitution to non-clients. The nature of the misconduct and the purpose and rationale for restitution are controlling, not the specific charged violation.

To this point, section 6068, subdivision (g), provides that an attorney has a duty, "[n]ot to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest." This concept of committing an act from a "corrupt" motive is also captured under section 6106, which provides that: "[t]he commission of any act involving moral turpitude, dishonesty or **corruption**, whether the act is committed in the course of his relations as an attorney or otherwise ... constitutes a cause for disbarment or suspension.

[Emphasis added.]" Thus, the section 6068, subdivision (g) offense, in *Sorensen* could have also been charged as a section 6106 offense.

The Review Department was simply wrong when it said in its December 8, 2023 order denying the State Bar's motion for reconsideration, that:

> The restitution OCTC seeks in this case constitutes a damages award based in tort, with a substantial portion of the award—the punitive damages portion—exceeding out-of-pocket losses, to a business entity to whom respondent had no fiduciary duty. This is beyond the scope of every disciplinary case in which restitution has been imposed and that involved parties outside the attorney-client relationship, as the Opinion discussed.
>
> OCTC contends that because this case does not involve an ordinary tort, but rather, a tort in fraud, restitution must be imposed as part of discipline, overlooking that the fraud respondent committed was the basis for the punitive damages award, which is clearly beyond the reach of *Sorensen's* restitution for out-of-pocket losses in a limited situation. (See *Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1044–1045.)

An order of restitution here is not beyond the pale of authority but rather falls squarely within the general criteria established by *Sorensen*. Like the court reporter in *Sorensen*, William LLC was forced to incur legal fees and expenses to clear title to its property, which Respondent intentionally and fraudulently disparaged with his false payoff demand. Also as in

Sorensen, had Respondent been "[a] reasonable attorney who was truly interested in simply resolving [the matter,] [he] could and would have taken a number of lesser measures that apparently either [he] failed to consider, or worse, considered and rejected." (*Sorensen, supra,* 52 Cal.3d at p. 1043.) Instead, Respondent lied to the superior court in a declaration submitted under penalty of perjury and falsely insisted that his inflated payoff demand amount was accurate.

It is a distinction without a difference that here William LLC initiated litigation, whereas in *Sorensen* the errant attorney brought the lawsuit. In both cases, innocent parties were forced to defend against corrupt acts by an attorney and "incurred specific out-of-pocket losses directly resulting from attorney misconduct."

Additionally, it is clear that the Review Department misunderstood the nature of the compensatory damage award here. The out-of-pocket losses in this case—totaling $536,726.49 (comprised of (1) compensatory damages of $332,547; (2) attorney fees of $163,597.12; and (4) costs of $40,582.37)—actually far exceeded the punitive damages of $332,550. Moreover, the superior court made clear that the $332,547 in compensatory

damages was based on reasonable and justifiable attorney fees that the plaintiff had to expend "to eliminate the cloud on the title caused by the false payoff demand." (Ex. 32, pp. 15.) And, as duly noted by the Court of Appeal, such attorney fees in a slander of title action are considered a tangible pecuniary loss:

> [T]he law is … clear that the expense of legal proceedings necessary to remove the doubt cast by the disparagement and to clear title is a recognized form of pecuniary damage in such cases [citations]. Since California law expressly recognizes that attorney fees and costs are a form of pecuniary damages in slander of title cases, it would seem that in the absence of legal authority to the contrary, such damages are presumptively sufficient to satisfy the pecuniary damage element of the cause of action. (*Sumner Hill, supra,* 205 Cal.App.4th at p. 1032, fn. omitted.) Accordingly, [William] LLC sufficiently demonstrated that it suffered pecuniary loss from the payoff demand.

(Ex 37, p. 26.)

There is no question that William LLC incurred significant out-of-pocket losses—primarily, as in *Sorensen*, legal fees and costs, as a direct result of Respondent's acts of dishonesty.

2. *Sorensen v. State Bar Is But One Of Several Examples Where The Supreme Court Has Ordered Restitution To A Non-Client*

In addition to *Sorensen*, this Court has approved restitution to non-clients in other settings. For example, restitution was ordered in *Coppock v. State Bar* (1988) 44 Cal.3d 665 to a

husband and wife who were defrauded out of money by an attorney's client. The attorney had relinquished control of his trust account to the client, who then used the account to fleece the husband and wife out of $10,000. The attorney was ordered to repay the $10,000 as a condition of probation, despite his argument that restitution was improper since he did not profit or benefit from the misconduct. This Court held that: "[a]lthough part of the rationale for requiring restitution may be to prevent an attorney from profiting from his wrongdoing, restitution is also intended to compensate the victim of the wrongdoing." (*Id.* at p. 685.) This Court went on to explain:

> Petitioner also argues restitution in inappropriate because he did not profit from his wrongful conduct. Restitution is routinely required, usually without discussion, in cases of misappropriation of client funds. [Citations omitted.] It does not follow, however, that restitution is appropriate only in such cases, or that, because petitioner in this case did not misappropriate client funds, he should not be required to pay restitution to the victims of his culpable acts.

(*Coppock, supra,* 44 Cal.3d at pp. 684–685.)

In *Galardi v. State Bar* (1987) 43 Cal.3d 683, 687, this Court ordered an attorney to pay $186,000 in restitution to an attorney's joint venturers in a business deal gone awry, notwithstanding the lack of any attorney-client relationship.

There, the attorney entered into two joint-venture agreements to improve and sell two parcels of real estate, and eventually both properties were foreclosed and the coventurers lost their investments; the attorney then filed for bankruptcy. (*Id.* at pp. 687–689.) This Court concluded that the attorney had, without his coventurers' knowledge or consent, encumbered property and then used the proceeds from his loans for non-venture purposes, including paying his living expenses. (*Id.* at pp. 689–694.) While no attorney-client relationships existed, this Court found that the attorney willfully engaged in misconduct and breached fiduciary duties owed to his coventurers and imposed a 30-day actual suspension with restitution to the joint venturers in the amount of $186,000. (*Id.* at pp. 694–695.)

In *In re Morse* (1995) 11 Cal.4th 184, 210–211, this Court ordered restitution to a consumer protection trust fund as a condition of discipline in accordance with specific terms set forth in a civil judgment. Morse, over a five-year period, had mailed to four million people solicitations offering assistance in filing homestead declarations, which generated approximately $1.9 million in revenue for him. (*Id.* at pp. 191–192.) The California Attorney General and the Alameda County District Attorney filed

an action against Morse for a violation of section 17537.6—a consumer protection statute that imposes disclosure and other requirements on homestead exemption advertising, which resulted in the superior court enjoining him and ordering him to pay civil penalties and restitution in *cy près* to the Consumer Protection Prosecution Trust Fund. (*Id.* at p. 193.) In Morse's disciplinary proceeding, he was found culpable of violating section 6068, subdivision (a) (failing to obey laws) and former rule 1-400(D) (prohibiting misleading advertisements). (*Id.* at pp. 194–197.) This Court determined that, as part of his discipline, Morse was required to pay the civil penalties and restitution order, in part, so that if he timely made payment, his actual suspension would be reduced from three years to two years. (*Id.* at pp. 210–211.)

The Review Department attempted to distinguish *Morse* from Respondent's case based on the rationale that a violation of section 17537.6 is not based in tort, and that unlike civil tort damages, the civil money penalties and *cy près* restitution imposed in *Morse* were primarily to secure obedience to statutes and regulations and to benefit the public generally. (Review Dept. Opinion, pp. 31–32.) In doing so, the Review Department

again disregarded this Court's language making clear that its ruling was based on application of a much more general standard, namely: "What is the discipline most likely to protect the public, the courts, and the profession, or stated conversely, to deter Morse from future wrongdoing?" (*In re Morse, supra,* 11 Cal.4th at p. 210.) In short, *Morse* did not reverse or alter *Sorensen*, which permitted, and continues to permit, restitution to non-clients for specific out-of-pocket losses directly resulting from an attorney's misconduct when restitution serves the purposes of attorney discipline. Moreover, in *Morse*, this Court made clear that restitution for disciplinary purposes is not precluded simply because there may be redundancies in a parallel superior court judgment. (*Id.* at pp. 210–211.)

3. *In the Matter of Torres Is Not Biding Precedent On This Court And Does Not Support The Review Department's Decision That Restitution Is Inappropriate Here; In Fact Other Review Department Opinions And Out-Of-State Case Law Lend Support For Restitution*

The Review Department relied on *In the Matter of the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138 (published Review Department authority) as supporting its improper conclusion that *Sorensen* bars restitution for tort

damages. (Review Dept. Opinion, pp. 30–31.) In *Torres*, however, the tort liability and resulting damages (for malpractice, harassment, intentional infliction of emotional distress, and punitive damages) did not fall within the ambit of restitution set forth in *Sorensen*—that is, "specific out-of-pocket" losses incurred as a direct result of an attorney's violation of ethical duties. (*Torres, supra,* 4 Cal. State Bar Ct. Rptr. at pp. 153–154.) Here, specific out-of-pocket losses were incurred as the direct result of Respondent's misconduct rendering restitution appropriate.[9]

In *Torres*, the Review Department discussed *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 650, where it had held that it was inappropriate to use restitution as a means of awarding tort damages for legal malpractice, citing to *King v. State Bar* (1990) 52 Cal.3d 307, 312, 315–316. As with *Torres*, neither *Bach* nor *King* applies here, as Respondent's case

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[9] As discussed above, *Sorensen* cannot be read, as the Review Department did, to apply only to the duties found in section 6068 subdivision (c) and (g) (bringing and maintaining unjust actions from a corrupt motive). Respondent's violations are just as serious, if not more so—he breached his duties to the public and to the judiciary by intentionally and fraudulently slandering William LLC's property and then falsely asserting to the superior court that the amount of his payoff demand was accurate.

does not involve damages for attorney malpractice. Rather, Respondent engaged in intentional acts of professional misconduct involving manifest dishonesty that directly caused specific out-of-pocket losses for which restitution is appropriate. Indeed, the crux of Respondent's misconduct is that he attempted to obtain funds that he was not entitled to through false pretenses and when the victim was forced to seek judicial intervention, instead of doing the right thing and withdrawing the slanderous payoff demand, he lied to the court and insisted it was accurate, forcing the victim to incur significant out-of-pocket costs to address the effects of Respondent's misconduct. As found by the superior court, Respondent's actions constituted fraud, and that finding was given collateral estoppel effect in these proceedings.

Other Review Department case law actually supports the imposition of restitution here. In *In the Matter of Katz* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 430, Katz helped his client defraud a third party to a business transaction—similar to Respondent's conduct in attempting to defraud William LLC to benefit his corporation and his brother. Katz received a two-year suspension for committing acts of moral turpitude, violating two

bankruptcy court orders, filing a bad faith bankruptcy petition, and endorsing his client's false financial statement. Notably, Katz's misconduct was aggravated by lack of remorse and significant harm to the public and the administration of justice. The Review Department ordered Katz to make restitution of $16,538 ($8,038.04 in satisfaction of the judgment and non-dischargeable debt to the third party, and court-ordered sanctions of $7,500 and $1,000) as a condition to resuming active law practice. Citing *Sorensen* and other Supreme Court precedent, the Review Department held:

> It has long been held that "[r]estitution is fundamental to the goal of rehabilitation." (*Hippard v. State Bar* (1989) 49 Cal.3d 1084, 1094.) Restitution is a method of protecting the public and rehabilitating errant attorneys because it forces an attorney to confront the harm caused by his misconduct in real, concrete terms. (*Id.* at p. 1093; *Brookman v. State Bar* (1988) 46 Cal.3d 1004, 1009, quoting *Kelly v. Robinson* (1986) 479 U.S. 36, 49, fn. 10.) Without question, sanction orders are for specific out-of-pocket losses directly resulting from respondent's misconduct and, therefore, proper subjects of a restitution order. (*Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1045.)

(*In the Matter of Katz, supra,* 3 Cal. State Bar Ct. Rptr. at p. 440.)

Also, in *In the Matter of Petill*a (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 231, the Review Department ordered an attorney to make restitution to a credit card company where the

attorney took out cash advances to use for gambling without intending to repay them. (*Id.* at p. 241.) The Review Department found that "the act of borrowing money without intending to repay it involves dishonesty and moral turpitude as a matter of law." (*Ibid.*) The court also noted that the debt was nondischargeable, and that the banks had to have proven the five elements of common law fraud in order to obtain the order of nondischargeability. (*Ibid.*) Similar to *Katz*, in requiring restitution the Review Department cited *Sorensen* and other applicable case law:

> In California, it is well established that restitution in attorney disciplinary proceedings is not a form of debt collection. (Cf. *Brookman v. State Bar* (1988) 46 Cal.3d 1004, 1008–1009 [restitution is not imposed solely because the attorney has not paid a debt discharged in bankruptcy].) Nor is it used as a means of compensating the victim of wrongdoing. (*Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1044.) However, restitution is an important part of rehabilitation and public protection because it forces errant attorneys to confront, in concrete terms, the harm that their misconduct has caused. (*Brookman v. State Bar, supra,* 46 Cal.3d at p. 1009.) Because the responsibilities of a lawyer differ from those of a layman, a lawyer may be required to make restitution as a moral obligation even when there is no legal obligation to do so. (*In the Matter of Distefano* (Review Dept.1991) 1 Cal. State Bar Ct. Rptr. 668, 674.)
>
> In sum, we not only conclude that the hearing judge's recommendation that respondent be required to make restitution to Bank One is legal, we also conclude that it is

> appropriate and necessary to respondent's rehabilitation and for protection of the public. Accordingly, we too shall recommend that respondent be ordered to make restitution to Bank One.

(*In the Matter of Petilla, supra,* 4 Cal. State Bar Ct. Rptr. at p. 248.)

Finally, the out-of-state case of *Florida Bar v. Schultz* (1998) 712 So.2d 386 also supports a restitution requirement here. There, the Florida Supreme Court held that an attorney's failure to repay a travel agent for airplane tickets warranted a 90-day disciplinary suspension and a restitution order. The court found that the manner in which the attorney immediately stopped payment on the check demonstrated that the attorney intended to deceive the travel agency, who had already extended the time for payment on a bill of over $2000 for 120 days. (*Id.* at pp. 387–388.) In fashioning this remedy, the court was mindful that "[a] bar discipline action must serve three purposes: the judgment must be fair to society; it must be fair to the attorney; and it must be severe enough to deter other attorneys from similar misconduct." (*Id.* at p. 388.)

VI. CONCLUSION

The fundamental goals of attorney discipline are to protect the public and the public's confidence in the legal profession, as well as to effect general and specific deterrence of future violations. There is no question that restitution serves those goals here, where Respondent engaged in intentional and fraudulent acts, including lies to the court, and has yet to show any remorse, acknowledgment of wrongdoing, or any effort whatsoever to pay the significant out-of-pocket expenses incurred by the victim as a direct result of his misconduct. The public and the profession, and in fact, Respondent, will best be served through the rehabilitative steps of requiring him, in no uncertain terms, to confront, in concrete terms, the harm he has caused before he is able to return to the active practice of law.

For the foregoing reasons, the State Bar requests that this Court grant its petition, impose the six-month disciplinary suspension recommended by the Review Department, and order that Respondent remain suspended until he pays restitution for specific, out-of-pocket losses (compensatory damages, attorney fees and costs) to William LLC in the amount of $536,726.49, plus interest.

Dated: February 16, 2024

Respectfully submitted,

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WORD COUNT CERTIFICATE PURSUANT TO CALIFORNIA RULE OF COURT 8.520(C)(1)

Pursuant to rule 8.520(c)(1) of the California Rules of Court, I hereby certify that this brief contains 7,664 words. I have relied on the word count of the computer program used to prepare the brief.

Dated: February 16, 2024

/S/ BRADY R. DEWAR
BRADY R. DEWAR

PUBLIC MATTER—DESIGNATED FOR PUBLICATION

Filed October 25, 2023

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	SBC-19-O-30700
	)	
THOMAS JOHN SPIELBAUER,	)	OPINION
	)	[As Modified on October 27, 2023]
State Bar No. 78281.	)	
	)	

This case provides an opportunity to clarify Business and Professions Code section 6068, subdivision (o)(2),[1] and the limitations to ordering restitution, particularly to non-clients, as a condition of probation. In this contested disciplinary matter, Thomas John Spielbauer is charged with five counts of misconduct primarily concerning his actions in connection with his corporation, Devine Blessings Inc., and an underlying civil lawsuit in Santa Clara County, *167 E. William LLC v. Devine Blessings, et al*.[2] The hearing judge found Spielbauer culpable of four of the five counts and recommended a 90-day actual suspension.

Both Spielbauer and the Office of Chief Trial Counsel of the State Bar (OCTC) appeal. OCTC requests we find Spielbauer culpable under each of the five counts and argues that six months' actual suspension until restitution is paid is the appropriate discipline. Spielbauer argues the hearing judge unfairly applied the doctrine of collateral estoppel to the underlying

[1] All further references to sections are to the Business and Professions Code unless otherwise noted.

[2] *167 E. William LLC v. Devine Blessings, et al*. (Super. Ct. Santa Clara County, No. 1-10-CV176152) (William matter).

state court proceedings, which he claims denied him due process in this disciplinary matter. He asserts all counts should be dismissed, or in the alternative, the case should be remanded to the Hearing Department. He also challenges the imposition of disciplinary costs and the restitution order, and he disputes certain evidentiary and procedural rulings made by the judge.

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we find Spielbauer culpable of four counts—including failing to comply with Civil Code section 2943,[3] moral turpitude for making two misrepresentations, and failing to report a civil fraud judgment to the State Bar. We also affirm most of the hearing judge's aggravation and mitigation findings. Given Spielbauer's serious misconduct, which involves two counts of moral turpitude, the applicable disciplinary standards and case law support an actual suspension of six months to protect the public, the courts, and the legal profession.

I. PROCEDURAL BACKGROUND

OCTC filed a Notice of Disciplinary Charges (NDC) on December 16, 2019, alleging five counts of misconduct including violations of (1) Section 6068, subdivision (a) (failure to comply with Civil Code section 2943); (2) section 6068, subdivision (a) (failure to comply with Civil Code Section 3294); (3) section 6106 (moral turpitude—misrepresentation); (4) section 6106 (moral turpitude—misrepresentation); and (5) section 6068, subdivision (o)(2) (failure to report civil fraud judgment). Spielbauer filed a response on January 10, 2020. The matter was abated from March 2020 through April 4, 2022, due to scheduling complications arising from the COVID-19 pandemic.

[3] At all times relevant to Spielbauer's misconduct in the William matter, discussed *post*, former Civil Code section 2943, enacted January 1, 2010, and effective through December 31, 2013, was in effect. All references to Civil Code section 2943 in this opinion are to the former version of the statute.

A two-day disciplinary trial was held by video on August 30 and September 1, 2022. Posttrial briefing followed, and the hearing judge issued her decision on December 2. Spielbauer filed his request for review on December 14. Oral arguments were heard on August 17, 2023, and the matter was submitted that day.

II. RELEVANT FACTUAL BACKGROUND[4]

Spielbauer was admitted to practice law in California on December 21, 1977. He practiced criminal law for 20 years prior to starting a civil practice in 2005, with a focus on foreclosure law.

On March 5, 2010, Spielbauer incorporated Devine Blessings, Inc. (Devine Blessings), and he served as the president and sole shareholder of the company. Devine Blessings was created with a specific purpose to "secure financing and purchase lien position notes, particularly on the properties of Dennis Spielbauer" that were subject to foreclosure. Dennis, Spielbauer's brother, was facing bankruptcy at the time the corporation was formed.[5]

A. The Underlying Civil Litigation

1. Loans to Dennis and Subsequent Purchase by Devine Blessings

In 2003 and 2007, Dennis received two loans from real estate investor Curtis Mitchell, in the amounts of $350,000 and $585,000, respectively. The 2003 loan was secured by three properties owned by Dennis, including a property located at 167 E. William Street in San Jose, California (167 Property), placing Mitchell in second position on the 167 Property. The 2007

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

[5] Further references to Dennis Spielbauer are to his first name only to differentiate him from his brother to whom we refer to by their shared surname.

loan was secured by three different properties, one of which was Dennis's personal residence. By 2010, the balance on the 2003 loan was $7,152.03. In 2008, Faramarz and Afsaneh Yazdani, as trustees of their family trust (Yazdani Trust), loaned Dennis $210,000, secured by a deed of trust on five parcels, including the 167 Property. By March 2010, the 167 Property was the only property remaining in Dennis's ownership, and the Yazdani Trust was in third position on the 167 Property. Dennis ultimately defaulted on his loans, and Mitchell sought foreclosure proceedings on Dennis's residence and the 167 Property, which resulted in Dennis filing for bankruptcy.

Just prior to the foreclosure sales, on March 12, 2010, Spielbauer, on behalf of Devine Blessings, agreed to purchase the 2003 and 2007 loans from Mitchell for $126,000, and Mitchell agreed to stop the foreclosure proceeding on Dennis's residence. The purchase agreement was drafted by Spielbauer, and pursuant to the language of the agreement, the transaction was between Mitchell and "Spielbauer or the business entity he is an officer, director, or managing member of [sic]." During negotiation of the agreement, Mitchell repeatedly asked Spielbauer to acknowledge in writing that of the $126,000, only $7,152.03 related to the 167 Property (the outstanding balance on the 2003 loan), and the remainder related to the 2007 loan secured by Dennis's residence. Spielbauer refused, stating, "I'm not signing them. I have my own reasons for not signing them. I can't tell you what they are, but they do not involve you." Mitchell, believing Spielbauer's behavior was very odd, documented Spielbauer's statements and had the documentation witnessed by an escrow officer.

2. The Payoff Demand

On March 25, 2010, the Yazdani Trust foreclosed on the sale of the 167 Property and then transferred title to a newly formed company, 167 E. William, LLC (William LLC). William

LLC sought to resell the 167 Property to a third party, and in order to clear title, requested a payoff demand statement from Spielbauer pursuant to Civil Code section 2943, subdivision (b).[6] Spielbauer provided William LLC with a written payoff demand, stating that the balance owed on the 167 Property was $126,000, and that an additional $143,500 was owed for "other" (which was unspecified), amounting to a total demand of $269,500. Spielbauer did not disclose that the actual balance owed on the loan secured by the 167 Property was $7,152.03.

William LLC contacted Spielbauer inquiring why the payoff demand was so high and requested an accounting, but Spielbauer did not respond. William LLC then attempted to contact Spielbauer through counsel and warned that it would pursue a civil action for tortious interference, because the payoff demand was inflated and was jeopardizing the sale of the 167 Property. Spielbauer responded to the second communication and asserted that he did not have time to investigate the accuracy of the payoff demand submitted. Ultimately, Spielbauer never produced an accounting or explanation of the payoff demand. As a result, William LLC canceled the sale, refunded the third-party buyer's deposit, and reimbursed the buyer for additional costs incurred.

3. William LLC Initiates a Civil Lawsuit

On July 6, 2010, William LLC filed a civil action against Spielbauer and Devine Blessings in the Santa Clara County Superior Court. William LLC brought several causes of action, including tort causes of action for intentional interference with economic advantage, negligent interference with economic relations, slander of title, and violations of Civil Code section 2943. William LLC alleged,

[6] "'Payoff demand statement' means a written statement, prepared in response to a written demand made by an entitled person or authorized agent, setting forth the amounts required as of the date of preparation by the beneficiary, to fully satisfy all obligations secured by the loan that is the subject of the payoff demand statement." (Civ. Code § 2943, subd. (a)(5).)

in part, that Spielbauer proffered an inaccurate payoff demand statement with respect to the 167 Property, and it sought damages. In April 2013, after the superior court held a two-day bench trial, the court concluded that Spielbauer's payoff demand was inaccurate and violated Civil Code section 2943.[7] Subsequently, on the issue of punitive damages, the court concluded that Spielbauer intentionally presented an inaccurate payoff demand to deprive William LLC of property or legal rights, committing fraud within the meaning of Civil Code section 3294, subdivision (a).[8] The court reasoned that Spielbauer presented the false payoff demand, because he intended to seek payment from William LLC to cover his attorney fees for working on Dennis's bankruptcy and to shift the burden of paying the remaining mortgage on Dennis's residence to William LLC. The court further found that Spielbauer knew it would force William LLC to pay the false payoff demand "as ransom" or lose the sale of the house to the third-party buyer.

On February 20, 2014, the superior court entered judgment against Spielbauer and Devine Blessings. Spielbauer was ordered to pay William LLC $869,276.55, which included $332,550 in punitive damages. Spielbauer appealed. The Court of Appeal issued an unpublished opinion on May 10, 2016, affirming the superior court's judgment and finding no

[7] Civil Code section 2943, subdivision (c), states in pertinent part: "A beneficiary, or his or her authorized agent, shall, on the written demand of an entitled person, or his or her authorized agent, prepare and deliver a payoff demand statement to the person demanding it within 21 days of the receipt of the demand." The section the superior court found Spielbauer violated—Civil Code section 2943, subdivision (e)(4)—provides in part, "[i]f a beneficiary for a period of 21 days after receipt of the written demand willfully fails to prepare and deliver the statement, he or she is liable to the entitled person for all damages which he or she may sustain by reason of the refusal . . . ."

[8] Civil Code section 3294, subdivision (a) provides, "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

merit to Spielbauer's claims. Spielbauer sought review by the California Supreme Court, but his petition was denied.

B. OCTC Investigation

On June 20, 2014, an OCTC investigator wrote to Spielbauer inquiring about the civil judgment the superior court issued against him in the William matter. The investigator stated OCTC did not have a record of Spielbauer reporting the fraud judgment as required under section 6068, subdivision (o)(2). On July 11, Spielbauer responded to the OCTC investigator's inquiry. In his written response, Spielbauer stated that because the civil judgment was entered against him in his capacity as the president of Devine Blessings and did not arise from his practice of law, he did not deem it reportable under section 6068, subdivision (o)(2). To date, Spielbauer has not made any payment toward satisfying the $869,276.55 civil judgment.

III. CULPABILITY[9]

A. Doctrine of Collateral Estoppel

Over Spielbauer's objection, the hearing judge granted OCTC's pretrial motion to apply collateral estoppel, thereby excluding the relitigation of specific topics argued and decided in the underlying superior court proceedings. On review, Spielbauer contends that the judge should not have applied collateral estoppel to counts one through four in the disciplinary proceeding, claiming it resulted in unfairness. He asserts that all relevant issues were not litigated in the superior court, due to his counsel's alleged inadequate representation, which Spielbauer claims caused the court to make erroneous findings. As analyzed below, we find that the judge properly

[9] All culpability findings in this opinion are established by clear and convincing evidence. (*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].)

applied the doctrine of collateral estoppel in finding respondent culpable in counts one, three, and four.[10]

The doctrine of collateral estoppel precludes a party from relitigating a matter in a subsequent proceeding that has been fully litigated and determined in a prior proceeding. (*Wright v. Ripley* (1998) 65 Cal.App.4th 1189, 1193.) Collateral estoppel may be applied to State Bar Court proceedings in order to prevent an attorney from relitigating an issue resolved adversely to the attorney in a prior civil proceeding. (*In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 205.)

In order for collateral estoppel to apply in State Bar Court proceedings, the following requirements must be established: (1) the issues that resulted in the civil court findings are substantially identical to the issues before the State Bar Court; (2) the findings were decided under the same burden of proof applicable to the State Bar Court—clear and convincing evidence; (3) the attorney was a party to the civil proceeding; (4) there was a final judgment on the merits in the civil case; and (5) no unfairness in precluding relitigation was proven by the attorney. (*In the Matter of Kittrell*, *supra*, 4 Cal State Bar Ct. Rptr. at p. 205.) There is no dispute that requirements one through four in applying collateral estoppel were established here.

Turning to the fifth and final requirement, a party may demonstrate it would be unfair to bind him or her to the superior court findings if he or she shows "among other things, (1) that he or she had less incentive or motive to litigate the issue in the civil proceeding, (2) that the civil finding or judgment is itself inconsistent with some other finding or judgment, or (3) that he or she was required to litigate under different and less advantageous procedures in the civil

[10] As discussed below, unlike the hearing judge, we do not find culpability under count two.

proceeding. [Citation.]" (*In the Matter of Applicant A* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 318, 329.)

Spielbauer's unfairness argument is rooted in his belief that the superior court's finding—that he presented an inaccurate payoff demand amounting to fraud—was erroneous because the court relied on a misinterpretation of the deed of trust. He maintains that the payoff demand was not falsified and claims there is additional evidence to support his belief that was never argued or considered by the superior court. This argument does not satisfy any of the above scenarios constituting unfairness. And the existence of additional evidence that was not considered by the superior court does not prohibit the application of collateral estoppel. (*Roos v. Red* (2005) 130 Cal.App.4th 870, 888 [claim of new evidence will not defeat collateral estoppel where evidence available at first hearing].) In its decision, the superior court stated Spielbauer "testified that he believed he had entered into a modification of the note . . . [yet he] had the opportunity to present the written document itself . . . but he failed to do so." Spielbauer also provided no explanation to the superior court as to how the note was modified.[11] We find Spielbauer has failed to demonstrate unfairness in precluding relitigation.

As OCTC points out in its brief, Spielbauer had a "full and fair" opportunity to litigate the issues and raise his arguments in the superior court as well as the opportunity for appellate review. (See *Roos v. Red*, *supra*, 130 Cal.App.4th at p. 880.) Although Spielbauer claims his counsel "fatally compromised" his case in superior court, this is belied by the fact that Spielbauer

[11] Spielbauer also asserts the hearing judge unfairly precluded him from proffering expert testimony to support his position regarding the underlying deed of trust. As discussed below, the hearing judge's denial of his request to proffer expert testimony and exhibits on issues fully litigated and barred by collateral estoppel was proper.

participated in the litigation for a period of time as counsel for Devine Blessings, and he actively advocated for himself when dissatisfied with his counsel's objections. We find the doctrine of collateral estoppel was correctly applied by the hearing judge to establish culpability for Spielbauer's misconduct as detailed below.

B. Count One: Section 6068(a)—Failure to Comply with Civil Code section 2943

Section 6068, subdivision (a), requires an attorney to "support the Constitution and laws of the United States and of this state." In count one, OCTC charged Spielbauer with violating section 6068, subdivision (a), based upon the superior court's findings that he violated Civil Code section 2943 by failing to submit an accurate payoff demand statement to William LLC. Based upon the hearing judge's collateral estoppel ruling, she found Spielbauer culpable as charged. We agree.

Under Civil Code section 2943, subdivision (e)(4), Spielbauer was required to provide a payoff demand statement setting forth the financial obligations of the loan to William LLC within 21 days of its request. The superior court found that Spielbauer knew the $269,500 payoff demand he submitted to William LLC was false and should have been $7,152. By ultimately providing a false statement claiming the outstanding balance was considerably more than the amount due, Spielbauer violated Civil Code section 2943, subdivision (e)(4). This violation resulted in liability for his tortious interference by preventing William LLC from closing a prospective transaction, as the superior court found by clear and convincing evidence.

On review, Spielbauer attempts to relitigate the merits of the superior court case to contest culpability under count one. He cannot do so, because he is collaterally estopped from challenging the superior court's findings that he intentionally violated Civil Code sections 2943. As discussed above, based upon our independent review of the evidence, we find that the issues

pertinent to count one are properly disposed under collateral estoppel. Accordingly, we affirm the hearing judge's findings and conclude that the record fully supports culpability for Spielbauer's failure to comply with the laws of California in violation of section 6068, subdivision (a), as charged under count one. We assign no additional disciplinary weight for this violation because the misconduct underlying the section 6106 violation in counts three and four supports the same or greater discipline. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 127.)

C. Count Two: Section 6068(a)—Failure to Comply with Civil Code section 3294

In count two, OCTC charged Spielbauer with violating section 6068, subdivision (a), based upon the superior court's findings that his actions were fraudulent within the meaning of Civil Code section 3294. Similar to count one, the hearing judge found culpability for count two on collateral estoppel grounds. Specifically, the hearing judge determined Spielbauer violated 6068, subdivision (a), because he was found to have committed fraud within the meaning of Civil Code section 3294, subdivision (c)(3), by intentionally misrepresenting the amount owed on the 167 Property and submitting a false payoff demand, which deprived William LLC of its legal rights and assets. OCTC requests that we affirm culpability under count two.

Civil Code section 3294 is a punitive damages statute which allows a court to award punitive damages in addition to compensatory damages in cases where a defendant acted with oppression, fraud, or malice. Although the superior court determined Spielbauer committed fraud within the meaning of Civil Code section 3294, subdivision (c)(3), we conclude that assigning culpability under section 6068, subdivision (a), is not appropriate, because Civil Code section 3294 itself does not prescribe a legal obligation amounting to a disciplinable offense. (*In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 111 [effect of § 6068,

subd. (a), is to make it a disciplinable offense when an attorney does not uphold the law unless the result of negligent good faith mistake].) Section 6068, subdivision (a), is "a conduit by which attorneys may be charged and disciplined for violations of other specific laws which are not otherwise made disciplinable under the State Bar Act." (*In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 487.) Here, there can be no finding that Spielbauer failed to "support" Civil Code section 3294, within the meaning of section 6068, subdivision (a), because that Civil Code section is not an actionable statute; it is solely a mechanism to award damages.

Further, the charged misconduct under count two is premised on the same facts that we consider in supporting a culpability finding for the section 6106 moral turpitude violation in count three, which we believe more appropriately defines Spielbauer's misconduct for the purpose of attorney discipline. Accordingly, we dismiss count two 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].)

D. Counts Three and Four: 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. In count three, OCTC alleged that Spielbauer committed an act of moral turpitude by intentionally providing a false payoff demand to William LLC for $269,500, which he knew was false and misleading. Similarly, in count four, Spielbauer was charged with violating section 6106 by submitting a declaration in superior court, which contained a payoff demand statement that he knew was inaccurate. The hearing judge found Spielbauer culpable under both counts and determined that his misrepresentations were willful.

By applying collateral estoppel, the hearing judge determined the superior court's finding that Spielbauer committed fraud within the meaning of Civil Code section 3294, subdivision (a), established his culpability under count three. We agree. Civil Code section 3294, subdivision (c)(3), defines fraud as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury." The superior court expressly determined that Spielbauer intentionally presented an inaccurate payoff demand, knowing it was false, to deprive William LLC of its property and legal rights, thereby committing fraud, in violation of Civil Code section 3294, which the Court of Appeal later affirmed.

On review, Spielbauer argues that, even if the payoff demand was inaccurate, he had a good faith belief that it was true when submitted. He also claims that he was permitted to modify the promissory note under relevant legal authorities.[12] We find Spielbauer's arguments are an impermissible attempt to relitigate the findings of the superior court, which are binding upon this court by collateral estoppel. Accordingly, Spielbauer is culpable of violating section 6106 as charged in count three.

Under count four, the hearing judge concluded, after applying collateral estoppel, that Spielbauer committed an intentional misrepresentation in violation of section 6106, when he submitted his September 14, 2010 declaration to the superior court, stating under penalty of perjury that the payoff demand was "an accurate payoff demand to the best of [his] knowledge, information and belief," when, in fact, Spielbauer knew it was not. We affirm this finding.

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[12] Spielbauer relied on *Friery v. Sutter Buttes Savings Bank* (1998) 61 Cal.App.4th 869 and the arguments in the law review article, *Subrogation of Mortgages in California: A Comparison with the Restatement and Proposals for Change*, (2001) 48 UCLA Law Review 1633, to support his position that he was permitted to modify the note.

Spielbauer claims that to be found culpable for a violation of section 6106, OCTC must prove he committed perjury in violation of Penal Code section 118. He is incorrect. An attorney is required to render complete and candid disclosures to the court. (*Mosesian v. State Bar* (1972) 8 Cal.3d 60, 66.) Acting otherwise constitutes moral turpitude and warrants discipline. (*Bach v. State Bar* (1987) 43 Cal.3d 848, 855.) The declaration Spielbauer submitted to the superior court contained a misrepresentation regarding the payoff demand that was both material and intentional because he sought to mislead the court and secure an advantage in litigation, which constitutes moral turpitude. (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315 [moral turpitude includes concealment as well as affirmative misrepresentations with no distinction to be drawn between "concealment, half-truth, and false statement of fact"]; see also *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174-175 [false statement made to tribunal is material when used to secure advantage in forum].) Accordingly, culpability is established by clear and convincing evidence under count four.

E. Count Five: Section 6068(o)(2)—Failure to Report Fraud Judgment

Section 6068, subdivision (o)(2), requires an attorney to report to the State Bar in writing within 30 days of the time the attorney has knowledge of "[t]he entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity." Spielbauer was charged with violating section 6068, subdivision (o)(2), for failing to report to the State Bar, the superior court's judgment against him, finding that he committed fraud within the meaning of Civil Code section 3294. The hearing judge determined there was no culpability and dismissed this count. She found that section 6068, subdivision (o)(2), requires that a judgment entered against an attorney in a civil action for fraud must be "committed in a professional capacity." The judge

also viewed the phrase, "committed in a professional capacity," to be ambiguous and concluded there was insufficient evidence in the record to support culpability because OCTC did not establish that Spielbauer was acting "in a professional capacity" when he presented the inaccurate payoff demand to William LLC and the superior court.

OCTC appeals the dismissal and argues that *any* judgment against an attorney for fraud, misrepresentation, and breach of fiduciary duty must be reported regardless of whether the attorney was engaged in the practice of law during the commission of the misconduct. It further maintains that, as the president of Devine Blessings and by representing the corporation in the William matter at certain periods during the litigation, Spielbauer acted "in a professional capacity." Spielbauer requests we affirm the hearing judge's dismissal and claims that OCTC's interpretation of the statute is an overreach.

In support of its position, OCTC asserts that the phrase, "committed in a professional capacity," should be read to modify only the phrase that immediately precedes it, "gross negligence." Its argument, raised for the first time on review, relies on the last antecedent rule of statutory construction, which generally provides that "'qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote.' [Citations.]" (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 680.) Reliance on the last antecedent rule dates back at least a century in California, and "is often applied where there is a list of terms, and the qualifying word or phrases follow the last item on the list. [Citations]." (*Yahoo Inc. v. National Union Fire Ins. Co. etc.* (2022) 14 Cal.5th 58, 73-74.) That is, "a restrictive relative clause usually modifies the noun immediately preceding it." (*Id.* at p. 74.)

Applying the last antecedent rule to subdivision (o)(2) of section 6068, the phrase, "committed in a professional capacity," modifies only the immediately preceding phrase, "or gross negligence." And the statute's use of the word "or" "indicates an intention to use it disjunctively to designate alternative or separate categories." (*White v. County of Sacramento, supra*, 31 Cal.3d at p. 680.) We find this provides the more accurate and natural construction of the statute and is in consonance with well-established canons of statutory construction:

> The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.] In order to determine this intent, we begin by examining the language of the statute. [Citations.] But '[i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.' [Citations.] Thus, '[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.' [Citation.]

(*People v. Pieters* (1991) 52 Cal.3d 894, 898-899.)

The interpretation advanced by Spielbauer would limit reporting of adverse judgments only if the attorney's fraud, misrepresentation, or breach of fiduciary duties was "committed in a professional capacity." We find that this conclusion is contrary to the broader purpose of attorney discipline. The Supreme Court has held that attorneys must conform to professional standards in whatever capacity they are acting in a particular matter. (*Crawford v. State Bar* (1960) 54 Cal. 2d 659, 668; see also *Mitton v. State Bar* (1958) 49 Cal.2d 686, 688-689.) And as OCTC points out, under section 6106, the Legislature makes an attorney's commission of any act involving moral turpitude, dishonesty, or corruption a cause for disbarment or suspension "whether the act is committed in the course of his relations as an attorney *or otherwise*." (Italics added.) The civil judgment against Spielbauer involved an inaccurate payoff statement that the court found fraudulent; therefore, the State Bar has an interest in being made aware of the adverse judgment.

Contrary to Spielbauer's argument stating otherwise, he had a duty to report the superior court's civil judgment to the State Bar within 30 days and failed to do so. Accordingly, we reverse the hearing judge's dismissal of count five and find Spielbauer culpable of violating section 6068, subdivision (o)(2).

IV. EVIDENTIARY AND PROCEDURAL CHALLENGES

Spielbauer challenges the fairness of various aspects of his disciplinary proceeding. The standard of review we generally apply to procedural and evidentiary rulings is abuse of discretion. (*In the Matter of Aulakh* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 690, 695.) "[T]he appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered. [Citations.]" (*H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1368.) Having considered each of his arguments, we find them meritless.

A. Evidentiary Rulings

Spielbauer argues the hearing judge erred by denying the admission of various exhibits, including a modification agreement on the promissory note between Dennis and Devine Blessings, several pleadings submitted in the state court proceedings, and the deposition transcripts of Glen Moss, a proposed expert witness. He asserts that the judge's refusal to admit the evidence was prejudicial to him because the documents were relevant to demonstrate his alleged good faith as it relates to his submission of the payoff demand. He also argues these documents should have been admitted because they are referenced in his response to OCTC's investigative letter, which is a part of the record. We are not persuaded.

A hearing judge is afforded broad discretion to determine the admissibility and relevance of evidence. (*In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 499.)

To prevail on a claim of error, abuse of discretion and actual prejudice resulting from the ruling must be established. (*In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 241 [absent actual prejudice, party not entitled to relief from hearing judge's evidentiary ruling].) We agree with the judge's determination that the documentary evidence pertaining to the state court proceedings was irrelevant.

The hearing judge properly denied the admission of these documents due to her collateral estoppel rulings that we have upheld. The superior court's factual findings are well supported by the record. And as set forth above, the excluded deposition testimony would not mitigate or excuse Spielbauer's misconduct, which was established by clear and convincing evidence in the superior court. The judge acted within her discretion in denying the proffered evidence and we discern no error.

B. Counsel's Motion to Withdraw

Spielbauer's argument that the hearing judge improperly granted his prior counsel's request to withdraw is equally unavailing. Spielbauer claims he was denied due process and prejudiced by the withdrawal. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." (*Matthews v. Eldridge* (1976) 424 U.S. 319, 333.) Procedural due process generally includes an individual's right to be adequately notified of charges or proceedings, the opportunity to be heard at these proceedings, and that the person or panel making the final decision in the proceedings be impartial. (*Id*. at pp. 332-333; *Goldberg v. Kelly* (1970) 397 U.S. 254, 267, 271.) When the judge granted counsel's withdrawal motion, the case had been fully briefed and pretrial statements were submitted. The judge provided Spielbauer with a continuance of the May 24, 2022, disciplinary trial to July 19, so that he could obtain new counsel. During the two-day trial, Spielbauer actively participated

and presented witnesses and evidence. Accordingly, we find that Spielbauer received due process and has not demonstrated the specific prejudice he allegedly suffered. (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 469 [attorney must show specific prejudicial effect].)

C. The Hearing Judge Did Not Exhibit Bias

Spielbauer, without citing supporting authority, requests dismissal or alternatively seeks for the matter to be remanded to the Hearing Department with the hearing judge recused from the proceedings. As discussed above, he argues that the judge made several adverse rulings against him and demonstrated an inability to adjudicate fairly and neutrally. He also asserts that the judge significantly favored OCTC. We disagree with Spielbauer's contention that the judge was biased based on her evidentiary rulings against him. (*In the Matter of Johnson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 241 [hearing judges have wide latitude in making evidentiary rulings and relief will not be granted without showing of actual prejudice]; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 688-689 [rejecting overbroad bias claim].) Spielbauer has failed to establish that the judge exhibited bias or that he was specifically prejudiced. (*In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 592 [respondent has burden to clearly establish bias and to show how he was specifically prejudiced].) We find through our independent review of the record that the judge acted properly and that Spielbauer received a fair trial. His request for a remand and recusal of the judge is denied.

V. AGGRAVATION AND MITIGATION

Standard 1.5[13] requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Spielbauer to meet the same burden to prove mitigating circumstances.

A. Aggravation

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

The hearing judge found Spielbauer's multiple acts of misconduct to be an aggravating circumstance. She assigned nominal weight in aggravation based on Spielbauer's culpability for the two moral turpitude misrepresentation violations.[14] Spielbauer does not challenge this finding. OCTC argues modest weight is warranted based on its assertion that Spielbauer is culpable under count five for his failure to report the fraud judgment entered against him.

Spielbauer is culpable of three ethical violations, which include attempting to defraud a third party by creating an inaccurate payoff demand, presenting the false payoff demand to the superior court in the underlying civil action, and failing to report the fraud judgment to the State Bar; therefore standard 1.5(b) applies. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646–647 [three instances of misconduct considered multiple acts].) Since all of Spielbauer's misconduct stemmed from one litigation matter and occurred over a relatively short period of time, limited weight is appropriate. (See *In the Matter of*

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

[14] Under standard 1.5(b), the hearing judge's decision states Spielbauer was found culpable of two acts of misconduct. In fact, she found him culpable of four counts of misconduct, although the judge correctly concluded that his culpability under counts one and two would not be assigned any additional disciplinary weight. (See *In the Matter of Moriarty* (Review Dept. 2017) 5 Cal. State Bar Ct. Rptr. 511, 520 [no disciplinary weight assigned for additional culpability findings based on same facts].)

Riordan (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 48 [little weight assigned to multiple acts for three counts involving similar misconduct].)

2. Indifference (Std. 1.5(k))

Indifference toward rectification or atonement for the consequences of 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 Spielbauer's failure to appreciate the wrongfulness of his misconduct. OCTC requests that we affirm the judge's aggravation under this circumstance. On review, Spielbauer appears to argue that indifference cannot be established because the present misconduct occurred in 2010 and he practiced for decades with a discipline-free record.

We agree that Spielbauer is unable to recognize the wrongfulness of his misconduct. While the law does not require false penitence, it does require that an attorney accept responsibility for wrongful acts and come to grips with culpability. (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Spielbauer has not done this, which demonstrates his lack of insight. Despite the superior court's civil fraud judgment, Spielbauer maintains that his actions were supported under the law, and he has done nothing wrong. While Spielbauer is entitled to defend himself, his conduct goes beyond this, revealing a complete failure to understand the wrongfulness of his actions regarding the fraudulent payoff demand. Particularly troubling is his continued attempt in these proceedings to relitigate the findings of the superior court, which were affirmed by the Court of Appeal and are fully supported by the record. (*In re Morse* (1995) 11 Cal.4th 184, 209 [unwillingness to consider appropriateness of

legal challenge or acknowledge its lack of merit is aggravating].) Spielbauer's actions show indifference to the nature and consequences of his misconduct, and we agree with the hearing judge and assign substantial weight in aggravation. (*In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 380 [ongoing failure to acknowledge wrongdoing instills concern that attorney may commit future misconduct].)

3. Failure to Make Restitution (Std. 1.5(m))

The hearing judge assigned substantial weight in aggravation because Spielbauer has not paid any portion the $869,276.55 civil judgment to William LLC, as ordered by the superior court. OCTC supports this finding. Spielbauer asserts he should not receive aggravation under this circumstance because attorney disciplinary proceedings are not "debt collection mechanisms." He also relies on *Bach v. State Bar* (1991) 52 Cal.3d 1201 to support his position that an attorney-client relationship is key for a restitution order. The attorney in *Bach* challenged a restitution order claiming that the State Bar and Supreme Court lacked jurisdiction to enforce restitution based on an outstanding arbitrator's fee award to his prior client. (*Id*. at p. 1206.) However, the Supreme Court rejected Bach's arguments and ordered restitution. (*Id*. at p. 1207.)

We also note that in *Galardi v. State Bar* (1987) 43 Cal.3d 683, the Supreme Court ordered an attorney to pay $186,000 in restitution owed to coventurers in real estate investment projects, despite the lack of any attorney-client relationship. Additionally, the Supreme Court has emphasized that part of the rationale for ordering restitution is to discourage dishonest and unprofessional conduct and to further the integrity of the profession. (*Coppock v. State Bar* (1988) 44 Cal.3d 665, 685.) Accordingly, we agree with the hearing judge's finding and affirm substantial aggravation under this circumstance. (See *In the Matter of DeClue* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 437, 445 [significant aggravation for failure to repay over

$10,000].) Although we find Spielbauer's failure to pay any portion of the civil judgment to date to be an aggravating factor, we decline to order restitution, as discussed below.

B. Mitigation

1. No Prior Record of Discipline (Std. 1.6(a))

Standard 1.6(a) provides that "absence of any prior record of discipline over many years of practice coupled with present misconduct, which is not likely to recur" is a mitigating circumstance. The hearing judge assigned moderate weight in mitigation for Spielbauer's 30 years of discipline-free practice because she did not find that Spielbauer was unlikely to commit similar misconduct again. We agree.

While we acknowledge Spielbauer's 30 years of discipline-free practice, his present misconduct was serious and consisted of fraud and moral turpitude based on his misrepresentations to the superior court and William LLC. It was also coupled with Spielbauer's failure to make payment toward the civil judgment of $869,276.55. We cannot make a finding that such misconduct was aberrational or not likely to recur. Therefore, we assign moderate mitigation credit for Spielbauer's lack of prior discipline. (See *Cooper v. State Bar* (1987) 43 Cal. 3d 1016, 1029 [when misconduct is serious, long record without discipline is most relevant when misconduct is aberrational].)

2. Extraordinary Good Character (Std. 1.6(f))

Spielbauer may obtain mitigation for "extraordinary good character attested to by a wide range of references in the legal and general communities, who are aware of the full extent of the misconduct." (Std. 1.6(f).) The hearing judge assigned limited weight in mitigation, finding that Spielbauer's witnesses did not demonstrate they were aware of the full extent of the misconduct. OCTC supports the hearing judge's findings. Spielbauer argues on review that the judge

erroneously disregarded his good character evidence and asserts it is improper to require witnesses to presume that the allegations of the NDC are true. He further claims the witnesses were "vaguely aware of the allegations of an inflated payoff demand" and requests great weight in mitigation for good character.

Testimonial evidence was taken from two attorneys and seven former clients. A letter was written by a former major gifts officer of a Catholic organization to which Spielbauer had made donations. We agree with the hearing's judge's determination that none of the witnesses were sufficiently aware of the conduct charged by OCTC.

We begin with the letter written by the former gifts officer. This individual has known Spielbauer for 20 years as a "generous donor." She stated that Spielbauer "expressed the ideals" of the organization and "acted with integrity." While generally positive, this letter does not demonstrate an awareness of the charges that were pending against Spielbauer.

Seven witnesses testifying on Spielbauer's behalf were former clients, and they were all very satisfied with the legal services Spielbauer provided, trusted him, and believed he was honest. At most, three witnesses understood the charges against Spielbauer generally involved an "inflated payoff demand" with one of those witnesses testifying they involved "fraudulent charges." None of the witnesses had read the charges, and Spielbauer had not sufficiently explained the allegations of misconduct to them.

Two other witnesses were attorneys. (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [serious consideration given to attorneys' testimony due to their "strong interest in maintaining the honest administration of justice"].) One attorney, John Montoya, worked for many years in Monterey County and Los Angeles County and has known Spielbauer for 48 years, since law school. He testified that he was aware that a superior court

judge found Spielbauer submitted a false payoff demand but thought Spielbauer would have acted in good faith and did not inquire further about the superior court judgment. Montoya acknowledged that he did not understand the State Bar charges, thought it would make Spielbauer uncomfortable to discuss them, and did not think it was "any of [his] business."

The other attorney who testified was Stanley Zlotoff, who was previously Spielbauer's bankruptcy attorney and has since referred clients to Spielbauer. They have known each other 20 years. Zlotoff testified that Spielbauer is an aggressive yet ethical attorney. Because he represented him in the bankruptcy matter, Zlotoff testified he would have read the decision of the superior court and the opinion of the Court of Appeal at the time of his representation, but he could not recall details during his testimony and did not have an understanding of Spielbauer's misconduct.

We find Spielbauer's character references do not demonstrate awareness of the *full* extent of his misconduct, as the standard requires. (*In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 508–509 [no mitigation for testimony of two attorneys who did not know scope of charges].) Not only did witnesses fail to have a meaningful understanding of Spielbauer's false payoff demand, but they also did not show they were informed that Spielbauer made a misrepresentation to the superior court and that he failed to report the fraud judgment to the State Bar. Based on this, we believe nominal mitigating weight is appropriate.

VI. LEVEL OF 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.)

In analyzing the applicable standards, we first determine which standard specifies the most severe sanction for the misconduct at issue. (Std. 1.7(a) [most severe sanction must be imposed where multiple sanctions apply].) Here, standard 2.11 is most apt as it addresses Spielbauer's acts of moral turpitude, resulting in more serious sanctions than set forth in standard 2.12(b).[15] It states that "[d]isbarment or actual suspension is the presumed sanction for an act of moral turpitude, dishonesty, fraud, corruption, intentional or grossly negligent misrepresentation, or concealment of a material fact." The degree of sanction under standard 2.11 is based on several factors, including "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 member's practice of law."

A. Discipline Greater Than That Imposed by the Hearing Judge Is Recommended

Unquestionably, Spielbauer's misconduct was serious. His misrepresentation to William LLC jeopardized its right to sell the 167 Property and was an attempt to defraud the company out of $262,347.97. Also concerning is Spielbauer's misconduct in the superior court during the William matter, which we consider to be related to the practice of law since his declaration containing the misrepresentation regarding the payoff demand was submitted to the judge, even though Spielbauer was not the primary attorney litigating the case.

[15] Standard 2.12(b) provides that reproval is the presumed sanction for a violation of the duties required of an attorney under section 6068, subdivision (o).

Given the broad range of discipline provided in standard 2.11 (disbarment or actual suspension), we consult case law. The hearing judge's analysis focused on two cases: *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490 (six-month actual suspension where attorney with a prior record of discipline, made false statements to a judge and failed to cooperate with OCTC) and *In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 787 (90-day actual suspension for attorney Maloney's intentional misrepresentations to the court and failure to obey a court order). The judge found Spielbauer's misconduct to be more closely related to the findings in *In the Matter of Maloney and Virsik* and recommended a 90-day actual suspension.

OCTC requests a six-month actual suspension and urges us to consider cases involving extortion and misrepresentations, including *Librarian v. State Bar* (1952) 38 Cal.2d 328 (six-month actual suspension where attorney extorted $41.50 by threatening to file a criminal complaint for perjury against a witness), *Bluestein v. State Bar* (1974) 13 Cal.3d 162 (six-month actual suspension where attorney extorted client's husband to pay $1,000 in attorney's fee based on agreement to "drop" charges in a criminal matter), *In the Matter of Harney* (1991) 3 Cal. State Bar Ct. Rptr. 266 (six-month actual suspension where attorney deceived client through acts of gross negligence and improperly collected a $266,850 illegal fee, significantly harming client), and *In the Matter of Shikolnikov* (Review Dept. 2021) 5 Cal. State Bar Ct. Rptr. 852 (six-month actual suspension where attorney made an intentional misrepresentation to a client as well as other performance and communication violations in two matters).

The cases OCTC urges us to follow do not primarily involve the misconduct at issue in the present case; therefore, we have reviewed other cases with facts more similar to Spielbauer's misconduct to assist with our discipline determination. We consider *In the Matter of Chesnut*,

supra, 4 Cal. State Bar. Ct. Rptr. at pp. 177-178, in which this court recommended a six-month actual suspension for an attorney found culpable under section 6068, subdivision (d), and section 6106 for making misrepresentations to two judges in a single matter. The case is comparable to the present matter because both attorneys were dishonest and committed acts of moral turpitude. Spielbauer's misconduct is greater than Chesnut's because he is also culpable of failing to report the civil fraud judgment entered against him to the State Bar. However, Chesnut's misconduct was more aggravated based on his lack of candor and prior record of discipline.

We find even more germane guidance from *In the Matter of Gillis* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 387, where an attorney was actually suspended for six months after being found culpable of committing three counts of moral turpitude, maintaining an improper business transaction with a client, and revealing client confidences. He received mitigation for practicing law for 26 years without prior discipline and aggravation for significant harm and multiple acts. (*Id.* at pp. 400-402.) Gillis's misconduct is comparable to Spielbauer's because both attorneys willfully violated section 6106, although Spielbauer had less instances of moral turpitude. Spielbauer's multiple acts of misconduct involve more aggravation based on his substantial indifference and failure to pay the civil judgment. His failure to understand the wrongfulness of his misconduct, underscored by his attempts to relitigate a fully adjudicated proceeding, is of particular concern that similar misconduct may recur and calls for strong preventive measures. (See *In the Matter of Layton*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 380 [indifference a substantial factor in discipline imposed].) As in *Gillis*, we are mindful this is Spielbauer's first disciplinary proceeding after decades of a discipline-free practice, and we acknowledge the nominal mitigating weight Spielbauer established for extraordinary good

character. Considering the above, we find the comparable case law supports a six-month actual suspension.

B. Restitution As a Condition of Probation Is Not Warranted

OCTC argues that Spielbauer should be held accountable for his fraud judgment by conditioning his actual suspension on making restitution to William LLC, in light of the superior court's $869,276.55 civil judgment. The hearing judge refused to order restitution, reasoning that William LLC was not Spielbauer's client and that there are other mechanisms available to satisfy the judgement. Spielbauer strongly opposes restitution and claims OCTC has conflated the issue of restitution with that of enforcement of a civil judgment.

The civil judgment against Spielbauer was itemized as follows: (1) compensatory damages of $332,547 for slander of title; (2) punitive damages of $332,550 based on intentional interference with economic advantage and slander of title; (3) attorney fees of $163,597; and (4) costs of $40,582.

We decline to recommend Spielbauer be ordered to make restitution to William LLC, a non-client entity, in connection with his disciplinary suspension. OCTC relies on several cases in which we or the California Supreme Court ordered that restitution be made to a non-client as part of discipline, but as discussed, they are all distinguishable from the instant case.[16]

The Supreme Court has explicitly stated that restitution in the disciplinary context is not a "damage award," and it does not "approve imposition of restitution as a means of compensating the victim of wrongdoing. [Citation]." (*Sorensen v. State Bar* (1991) 52 Cal.3d 1036, 1044.) In

[16] We also find dissimilar situations where an attorney was found to have breached his or her fiduciary duty and diverted funds or misappropriated money owed to a non-client and restitution was ordered. (See, e.g., *Galardi v. State Bar*, *supra*, 43 Cal.3d at pp. 694-695; *In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, 373.)

Sorensen, the Supreme Court ordered a 30-day actual suspension and restitution in the amount of $4,375 based on Sorensen violating section 6068, subdivisions (c) and (g)—to counsel or maintain only legal or just actions, proceedings, or defenses, and to not commence or continue an action or proceeding for a corrupt motive, respectively—when Sorensen sued a court reporter contending her fee of $94.05 was excessive. Initially, the court reporter sued Sorensen in small claims court; Sorensen allowed the court reporter to obtain a default judgment, and then he sued the court reporter in superior court alleging fraud and deceit and sought actual and punitive damages. As a result, the court reporter was forced to pay over $4,000 in legal fees and costs to defeat the superior court lawsuit, which formed the basis of the restitution amount ordered in *Sorensen*. Considering the unique facts of the case, the Supreme Court provided a limited exception and extended the "protective measures and rehabilitative principles" of restitution to compensate the court reporter "when a party has been forced to incur legal fees as a result of an attorney's violation of section 6068, subdivisions (c) and (g)." (*Id*. at pp. 1044-1045.)

Here, Spielbauer was not found culpable of violating section 6068, subdivisions (c) and (g), and the restitution amount comprising attorney fees and costs arose from William LLC successfully suing Spielbauer, rather than from William LLC defending itself in a lawsuit. Moreover, we declined to extend *Sorensen* to impose restitution to cover tort damages that a client obtained against an attorney for harassment and intentional infliction of emotional distress in *In re Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138. The damages that constitute most of the civil judgment against Spielbauer arose due to causes of action based in tort, and the punitive damages portion of the judgment relates to count two, in which we did not find culpability.

Notwithstanding *Sorensen*'s limitations, the Supreme Court has imposed a restitution requirement on a disciplined attorney to a non-client in another context involving court ordered civil penalties and restitution in *cy près*. In *In re Morse*, *supra*, 11 Cal.4th at p. 190, the attorney had, in violation of section 17537.6—a consumer protection statute that imposes disclosure and other requirements on homestead exemption advertising—mailed over a five-year period to four million people solicitations offering assistance in filing homestead declarations. This generated approximately $1.9 million in revenue for Morse. (*Id*. at pp. 191-192.) The California Attorney General and the Alameda County District Attorney (collectively, government agencies) filed an action against Morse resulting in the superior court enjoining Morse and ordering him to pay civil penalties and restitution in *cy près* to the Consumer Protection Prosecution Trust Fund (CPPTF), which was upheld on appeal. (*Id.* at p. 193.) In Morse's disciplinary proceeding, he was found culpable of violating section 6068, subdivision (a), requiring an attorney to support the law, and former rule 1-400(D), prohibiting misleading advertisements. (*Id*. at pp. 194-197.) The Supreme Court determined that, as part of his discipline, Morse was required to pay the civil penalties and restitution order, in part, so that if he timely made payment, his actual suspension would be reduced from three years to two years. (*Id.* at 211.)

What distinguishes *In re Morse* from the instant case is that the action charging Morse with a violation of section 17537.6 was not one based in tort. Unlike tort damages, civil money penalties' "primary purpose is to secure obedience to statutes and regulations." (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147-148.) Similarly, the government agencies' use of restitution in *cy près* to the CPPTF was not meant to directly compensate victims of Morse's misconduct; it would instead be used to benefit the public generally. (*Ibid.)* Thus, restitution in *cy près* was a form of equitable relief as opposed to damages based on the individual harm to

each victim. In the instant case, Spielbauer's civil judgment was primarily driven by tort damages, which we cannot use as a justification to impose restitution per *Sorensen* and *Torres*.

Another case relied on by OCTC is *In the Matter of Taggart* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 302, a probation revocation case. Taggart committed various violations of the Rules of Professional Conduct, including ethical violations relating to a former client who sued him for malpractice and to his failure to pay court-ordered discovery sanctions to his former client's attorney. As a condition of probation, Taggart was required to pay restitution to the attorney representing Taggart's former client in the malpractice action. In *Taggart*, this court enforced that condition in a probation revocation action after Taggart unsuccessfully attempted to have the restitution requirement discharged by filing for bankruptcy. The reasons for imposing restitution in the original disciplinary case were not discussed in *Taggart*, but the sanctions were the direct result of Taggart's non-compliance with discovery, which forced his former client to incur attorney fees that she would have had to pay had the court not ordered sanctions.[17] (*Id*. at p. 307.) With Spielbauer, a request for restitution concerning a court-ordered sanction is not before us; rather, the matter involves a civil judgment in tort, which cannot serve as the basis for restitution.

Based on the above, we decline to order $869,276.55 in restitution for Spielbauer's failure to satisfy the outstanding civil fraud judgment owed to William LLC. Guided by the case law, all relevant factors, and the range of discipline suggested by standard 2.11, we recommend

[17] The Supreme Court has previously ordered restitution as part of a disciplinary matter when it covers a court-ordered sanction. (See *Hunniecutt v. State Bar* (1988) 44 Cal.3d 362, 374 [restitution required to be paid to former client where former client received court sanction due to attorney's failure to timely respond to complaint].)

that Spielbauer be suspended for two years with the imposition of a six-month period of actual suspension.

VII. RECOMMENDATIONS

We recommend that Thomas John Spielbauer, State Bar Number 78281, be suspended from the practice of law for two years, that execution of that suspension be stayed, and that he be placed on probation for two years with the following conditions:

1. **Actual Suspension.** Spielbauer must be suspended from the practice of law for the first six months of his probation.

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

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

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

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

6. **Meet and Cooperate with Office of Probation**. Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Spielbauer must schedule a

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

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

8. **Quarterly and Final Reports**.

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

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

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

   d. **Proof of Compliance.** Spielbauer is directed to maintain proof of compliance with the above requirements for each such report for a minimum of one year after either the period

of probation or the period of actual suspension has ended, whichever is longer. Spielbauer is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

9. **State Bar Ethics School.** Within one year after the effective date of the Supreme Court order imposing discipline in this matter, Spielbauer must submit to the Office of Probation satisfactory evidence of completion of the State Bar Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he will not receive MCLE credit for attending this session. If he provides satisfactory evidence of completion of the Ethics School after the date of this opinion but before the effective date of the Supreme Court's order in this matter, Spielbauer will nonetheless receive credit for such evidence toward his duty to comply with this condition.

10. **Commencement of Probation/Compliance with Probation Conditions.** The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the probation period, if Spielbauer has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

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

VIII. MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Thomas John Spielbauer be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court order imposing discipline in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation within the same period. Failure to do so may result in suspension. (Cal. Rules of Court, rule 9.10(b).) If Spielbauer provides satisfactory evidence of the taking and

passage of the above examination after the date of this opinion but before the effective date of the Supreme Court's order in this matter, he will nonetheless receive credit for such evidence toward his duty to comply with this requirement.

IX. CALIFORNIA RULES OF COURT, RULE 9.20

We further recommend that Thomas John Spielbauer 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.[18] (*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.

X. MONETARY SANCTIONS

We do not recommend the imposition of monetary sanctions in this matter as this disciplinary proceeding commenced prior to April 1, 2020. (Rules Proc. of State Bar, rule 5.137(H).)

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

XI. COSTS[19]

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

RIBAS, J.

WE CONCUR:

HONN, P. J.

McGILL, J.

[19] In his briefs on review, Spielbauer argues against the imposition of disciplinary costs. He claims that awarding costs pursuant to section 6086.10 is constitutionally invalid, illegal, and he raises additional challenges based on OCTC's ability to determine "reasonable costs" in disciplinary proceedings. As this court held in *In the Matter of Langfus* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 161, 168, "No provision is made for challenging the cost award prior to the Supreme Court's order." Yet the statutory scheme allows Spielbauer to seek relief "*after* authorization for costs is included in a Supreme Court order of suspension or disbarment." (*Ibid*.) Therefore, Spielbauer may seek relief from an order that imposes costs. This court does not have the authority to determine the constitutionality of the disciplinary cost structure; however, the Supreme Court's plenary jurisdiction over attorney discipline includes jurisdiction to review an attorney's constitutional challenges to the discipline process. (*In re Attorney Discipline System* (1998) 19 Cal.4th 582, 592.)

No. SBC-19-O-30700

In the Matter of

THOMAS JOHN SPIELBAUER

Hearing Judge
Hon. Manjari Chawla

Counsel for the Parties

For Office of Chief Trial Counsel:	Alex James Hackert Office of Chief Trial Counsel The State Bar of California 845 S. Figueroa Street Los Angeles, CA 90017-2515
For Respondent, In pro. per.	Thomas John Spielbauer Spielbauer Law Office 3130 Balfour Road, D #231 Brentwood, CA 94513

PROOF OF SERVICE

I, Jenny Batdorj, hereby declare: that I am over the age of eighteen years and am not a party to the within above-entitled action, that I am employed in Los Angeles, that my business address is The State Bar of California, 845 South Figueroa Street, Los Angeles, California 90017.

On February 16, 2024, following ordinary business practice, I served a copy of the

PETITION FOR REVIEW

via email via the Court's Truefiling system, and by U.S. Mail on the party listed as follows:

Thomas Spielbauer, Esq.
Spielbauer Law Office,
3130 Balfour Road D #231
Brentwood, CA 94513

I also served copies of this document electronically (with permission) upon the Clerk of the State Bar Court (michelle.cramton@statebarcourt.ca.gov).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in Los Angeles, California this 16th day of February, 2024.

/s/ Jenny Batdorj
JENNY BATDORJ