No. S283172
California State Bar case SBC-19-O-30700

Supreme Court
of the **State of California**

In the Matter of Thomas John Spielbauer, SBN #78281 On Discipline

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PETITION FOR REVIEW

Petition for Review from the State Bar Court,
Review Department
Case No. SBC-19-O-30700
Honorable Manjari Chawla, Hearing Department

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Petitioner in Pro Per

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TO THE HONORABLE PATRICIA GUERRERO, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to California Business and Professions Code § 6082 and the California Rules of Court, Rule 9.16(a), Petitioner Thomas Spielbauer respectfully requests this Court to review the Opinion of the State Bar Trial Court of December 2, 2022 and the Opinion of the Review Department of the State Bar Court of October 25, 2023.

Thomas Spielbauer

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GROUNDS FOR REVIEW

Supreme Court Grounds for review: Petitioner brings this petition for review before the Supreme Court on the following grounds:

1. Review of this case is necessary to settle important questions of law;

2. Petitioner did not receive a fair hearing; and

3. the decision is not supported by the evidence; and

4. The recommended discipline is not appropriate in light of the record as a whole. [California Rules of Court, Rule 9.16(a); *In re Rose* (2000) 22 Cal.4th 430, 459, 93 CR2d 298, 319]

DE NOVO IS THE STANDARD OF REVIEW

Much of this case revolves around the impropriety of the State Bar Court and the Review Court findings that collateral estoppel applied to this proceeding. As such, Petitioner was precluded from presenting evidence and introducing documentation establishing his intentions, his state of mind, and his understanding of the law governing the state trial court proceedings in the State Bar Court trial.

The State Bar and the Review Court's application of collateral estoppel is typically reviewed de novo. (*Transport Ins.*

Co. v. Superior Court (2014) 222 Cal.App.4th 1216, 1224.) This Supreme Court independently reviews the record and may adopt findings, conclusions, and a decision or recommendation different from those of the State Bar hearing judge and the Review Court. [California Rules Court., Rule 9.12; *In re Potac*k (1991) 1 California State Bar Ct. Rptr. 525, 1991 Calif. Op. Lexis 125, *20.]

THIS PETITION IS TIMELY

The decision of the State Bar Review Court was filed on October 25, 2022. An attorney whose suspension has been recommended by the State Bar Court may petition the Supreme Court for review within 60 days after filing of the State Bar Court decision in the Supreme Court. (See California Business and Professions Code § 6083(a); California Rules of Court, Rule 9.13(a).)

Sixty days after October 25, 2023 falls on Monday, December 25, 2023, Christmas Day. Christmas Day is a California Court holiday.

California Code of Civil Procedure §12 comes into play as does California Code of Civil Procedure § 12a and California Code of Civil Procedure § 12b, which contain elaborating though

the same provisions.

Thus, the filing due date for this Petition for Review is Tuesday, December 26, 2023. This Petition is therefore timely.

FACTUAL ISSUES ON REVIEW

1. The Expert Witness Testimony of Glen Moss should not have been precluded by the Collateral Estoppel Order;

2. The Expert Witness Testimony of Glen Moss should have been permitted;

3. The Expert Witness Testimony of Harry Lee Jones should not have been precluded by the Collateral Estoppel Order;

4. The Expert Witness Testimony of Harry Lee Jones should have been permitted;

5. The State Bar Court improperly found that Collateral Estoppel precluded Petitioner from presenting evidence to rebut Counts 1 and 2 of the NDC. The Review Court did dismiss Count 2 of the NDC.

6. The State Bar Court and the Review Court improperly found Substantial weight for the Aggravation of indifference (std. 1.5(k));

7. The State Bar Court and the Review Court improperly

found Substantial aggravation for failure to make restitution (std. 1.5 (m));

8. The State Bar Court and the Review Court improperly granted Limited weight for extraordinary good character of Petitioner (std. 1.6 (f));

9. The State Bar Court and the Review Court improperly made a finding of Collateral Estoppel to Charge 3 of the NDC (Notice of Disciplinary Charges, Exhibit 1);

10. The State Bar Court and the Review Court improperly made a finding of Collateral Estoppel to Charge 4 of the NDC;

11. The State Bar Review Court improperly reinstated Count 5 of the NDC.

12. The State Bar Court and the Review Court improperly restricted, and discarded, the evidence submitted by the Petitioner of his state of mind;

13. There was insufficient evidence to sustain Count 3 of the NDC;

14. There was insufficient evidence to sustain Count 4 of the NDC;

15. There is insufficient evidence to have reinstated Count 5 of the NDC after dismissal of that Count by the State Bar Trial

Court;

16. The State Bar Court and the Review Court improperly excluded Petitioner's exhibits as evidence. These were Exhibits 1007, 1021, 1033-1036, 1038-1039, and 1043. Exhibit 1017 was admitted but not considered as a result of the collateral estoppel order;

17. The State Bar Court and the Review Court improperly struck portions of Petitioner's closing argument;

18. The recommended imposition of costs and fees is improper and unconstitutional.

COLLATERAL ESTOPPEL

The State Bar Court tentatively sustained a finding of culpability to NDC Charges 1 and 2 (Exhibit 1) during the course of the trial. [TX 8/30, 046:01–046:04.] It sustained these findings as well as to Charges 3 and 4 in its final order. [2022-12-02 ORDER, pp. 8-10.]

The State Bar Court had set forth the criteria for the application of collateral estoppel. It wrote:

> Application of collateral estoppel is appropriate when (1) the issue sought to be precluded for relitigation is substantially identical to the issue in the State Bar Court; (2) the issue was

> actually litigated and decided in the prior proceeding, under the same burden of proof applicable in the State Bar Court (i.e., clear and convincing evidence); (3) the respondent was a party to the prior proceeding; (4) there is a final judgment on the merits in the prior proceeding; (5) the respondent does not show that precluding relitigation would be unfair. (Id., at p. 205; see also *Lucido v. Superior Court*, supra, 51 Cal.3d at p. 341.) [Exhibit 2022-05-12, Coll. Estop. Order]

Petitioner will focus on element 5 of the *Lucido* conditions, that precluding litigation would be unfair to the Petitioner. Petitioner has clearly demonstrated the unfairness of a finding of collateral estoppel.

The fact is that all of the relevant issues were not litigated in the state trial court. This was made clear through the testimony of Glen Moss on May 3, 2022.

Mr. Moss' testimony reflects and corroborates the fact that, pursuant to paragraphs 1, 8, 21 of the deed of trust and page 11 of the rider to the deed of trust, these costs WERE warranted. It is just that this evidence was not argued, nor presented to, nor considered by, the state trial court. [2022-07-07 Expert Witness Statement, p. 8; Exhibit 1038, page 5; Exhibit 1039, page 57, 057:11–058:14; Exhibit 1039, page 62, 062:05 – 062:20.] The only

justification presented to the state trial court was paragraph 1 of the deed of trust. Left out were paragraphs 8, 21, and page 11 of the rider to the deed of trust. However, during his deposition prior to trial, Hansen had testified that the payoff demand would be determined by multiple paragraphs of the deed of trust. Those paragraphs are 8, 21, and page 11 of the rider. [Exhibit 1038, page 5; Exhibit 1039, page 57, 057:11 – 058:14; Exhibit 1039, page 62, 062:05 – 062:20.]

Counsel for Petitioner in the state trial court never cross-examined Hansen on this discrepancy, nor undertook any action to impeach Hansen's testimony. Thus, the state trial court was left with the erroneous perspective that only one paragraph of the deed of trust dictated the payoff amount, and that was paragraph 1. [Exhibit 1038 and 1039, pages 52, 53, 57-58, 62 and 64; Exhibit 1038, page 5; Exhibit 1039, page 57, 057:11–058:14.] Mr. Moss opined that state trial counsel, Mr. Allen, did a lousy job of failing to cross-examine Mr. Hansen. [Exhibit 1039, page 62, 062:19–062:20.] This fatally compromised Petitioner in the state trial court.

The State Bar Court, however, went much further than ignoring this unfairness.

The State Bar Court ruled that: “As to these specific determinations - that Spielberg (sic) committed fraud under Section 3294 by intentionally presenting an inaccurate payoff demand to deprive the civil plaintiff a property or legal rights - the requirements of collateral estoppel are satisfied, and OCTC's motion is granted. Spielbauer may not relitigate these issues in this court.” [2022-05-12 Coll. Estop. Order, p. 5; TX 8/30, 064:01–064:10.]

The State Bar Court, however, went on to further rule: “This does not preclude Spielbauer from introducing evidence to contradict, tamper (sic) or explain the record or evidence from the civil proceedings as to any element of a disciplinary violation or an aggravating circumstance independent of the application of collateral estoppel.” [2022-05-12 Coll. Estop. Order, p. 6; TX 8/30, 064:12–064:20.]

Yet preclude Petitioner from presenting evidence to temper or explain the record is exactly what the State Bar Court did and the Review Court sanctioned. It did this by forbidding the expert testimony of Glen Moss. It did this by denying the admission into evidence of Petitioner’s Exhibits 1033-1036, 1038-1039, and 1043. It did this by denying the movement of the Moss deposition

transcripts into evidence. [TX 8/30, 074:12–074-20; Exhibits 1038 and 1039.]

It did this by restricting the testimony of Petitioner at trial concerning any thing remotely touching the collateral estoppel issues. The State Bar Court ruled, "I want to be really, really clear about this, Mr. Spielbauer. There is an issue -- or I've issued an order granting collateral estoppel on this issue. So there's absolutely no reason to even bring that up in this proceeding." [TX 8-30, 019:19-019:23; TX 8-30, 062:14-062:21; TX 8-30, 072:08-072:31.] It also did this by its rulings concerning Petitioner's state of mind and his reasons responses to the five counts of the NDC (Exhibit 1) and specifically to Counts 3 and 4 of the NDC.

EXPERT WITNESS TESTIMONY

The State Bar Court denied the presentation of evidence by expert witness Glen Moss and Harry Lee Jones. This amounted to a constitutional denial of due process and equal protection of law to Petitioner.

On May 31, 2022, the State Bar Court had ordered, "2. Motion to exclude Respondent's expert witness by OCTC is denied Without prejudice. Before July 11, 2022, parties are ordered to meet and confer on the need for Respondent's expert

testimony at trial." This Court further ordered that, "5. If Respondent intends to call an expert witness, he must set forth in detail the scope of the expert's testimony. If OCTC opposes the testimony of the expert witness, it must file a written opposition by July 13, 2022." [Trial Order of 5/31/2022, pp. 1 and 2.]

Petitioner **did** file a detailed explanation of why the Expert Witness testimony of Glen Moss, and Harry Lee Jones was necessary. On July 7, 2022, Petitioner submitted a detailed Expert Witness Statement. [2022-07-07 Expert Witness Statement, pp. 1-147.] In this Expert Witness Statement, he demonstrated the need to call Glen Moss [p.5 et seq.] and Harry Lee Jones [p. 13 et seq.] Glen Moss was previously disclosed, and the OCTC deposed him on May 3, 2022. [2022-05-03 Depo Notice; Exhibits 1038-1039.]

RELEVANCY OF THE TESTIMONY OF GLEN MOSS

In regards to the deposition of Glen Moss, his testimony was necessary and relevant for the following issues:

Mr. Moss testified at his deposition about the provisions of paragraphs 1, 8, 21 of the deed of trust and page 11 of the rider to the deed of trust.

Glen Moss testified in the course of his deposition

conducted on May 3, 2022 that the state trial court relied on the testimony of Plaintiff's (167 E. William LLC) expert witness Charles Hansen. 167LLC expert witness Mr. Hansen testified at the state court trial that the justification for the payoff demand rested solely in paragraph 1 of the deed of trust. However, during his deposition prior to trial, Hansen had testified that the payoff demand would be determined by multiple paragraphs of the deed of trust. Those paragraphs are additionally 8, 21, and page 11 of the rider. [2022-07-07 Expert Witness Statement, pp. 5-6; Moss Deposition TX, Exhibit 1038, page 5; Exhibit 1039, page 57; 057:11–058:14.]

Counsel for Petitioner in the trial court never cross-examined Hansen on this discrepancy, nor undertook any action to impeach Hansen's testimony. Thus, the trial court was left with the erroneous perspective that only one paragraph of the deed of trust dictated the payoff amount, and that was paragraph 1. [Moss Deposition TX, Exhibit 1038, page 5; Exhibit 1039, page 57; 057:11–058:14.]

Mr. Moss also testified as to the standards of the Court of Appeal in deciding a matter. [2022-05-03 Deposition TX, Exhibit 1038, p. 5; Exhibit 1039, p. 57; 057:11–058:14; page 62; 062:05 –

062:20; 2022-07-07 Expert Witness Statement, pp. 9-12.]

The Court of Appeal depends on the state trial court record in the rendering of its decision. It also grants the benefit of every reasonable inference to the trial court. Furthermore, findings of fact not presented to the trial court are deemed waived. [2022-05-03 Deposition TX, Exhibit 1038, p. 5; Exhibit 1039, p. 57; 057:11 – 058:14; page 62; 062:05 – 062:20.]

The determinations made by the trial court must be accepted by the Court of Appeal if they are supported by substantial evidence. The appellate court is obligated to consider the evidence in the light most favorable to the trial court, giving to the judgment the benefit of every reasonable inference and resolving all conflicts in its favor. [*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429 [45 P.2d 183]; *Manning v. Watson* (1952) 108 Cal.App.2d 705, 712 [239 P.2d 688].] Findings of fact and conclusions of law not requested of the trial court are therefore waived. [Cal. Rules of Court, rule 232(c); *Small v. Smith* (1971) 16 Cal.App.3d 450, 455.]

The Court of Appeal did not make any findings of fraud. It simply affirmed the trial court's decision as being supported by substantial evidence. The state trial court's decision will be

upheld if supported by substantial evidence. [*Jones T. v. Superior Court* (1989) 215 Cal.App.3d 240, 250; see also *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.]

Mr. Moss made this clear in his testimony at the May 3rd deposition. [2022-05-03 Deposition TX, Exhibit 1038, p. 5; Exhibit 1039, p. 57; 057:11 – 058:14; page 62; 062:05 – 062:20.]

RELEVANCY OF THE TESTIMONY OF HARRY LEE JONES

Harry Lee Jones is a real estate broker and was to have been called on the issue of damages, i.e., the value of the property located at 167 East William Street, San Jose, CA 95112 and 476 South Fifth Street, San Jose, CA 95112. The OCTC has promised to put on evidence of damages or harm to 167 East William LLC. [2022-07-07 Expert Witness Statement, pp. 13-14.]

Mr. Jones was prepared to submit a broker's price opinion establishing that the value of 167 East William Street is $1.6 million, over three times its value in 2010. Thus there are no damages and no harm. He would also have testified that the property of 476 South Fifth Street, foreclosed upon by Faramarz Yazdani, is worth $1.5 million, well over three times its value in 2010. These were properties that Mr. Yazdani foreclosed upon with peppercorn bids and which had previously belonged to

Dennis Spielbauer.

THE EXPERT WITNESS TESTIMONY WAS NECESSARY

Petitioner should not be bound by the omissions of prior counsel, particularly by his raising of these objections. Additionally, the State Bar Court relieved Samuel Bellicini of his representation of the Petitioner on May 31, 2022. [Trial Order of 5/31/2022, pp. 1.] This was after a sparse, if non-existent, showing of a conflict of interest. [Withdrawal Mo., pp. 1-2, TX 5/31, pp. 1-6; Exhibit 2022-05-31 Trial Order, p. 1.]

Samuel Bellicini's withdrawal was prejudicial to the Petitioner. Bellicini never obtained nor tried to obtain a copy of the deposition transcript of Glen Moss, which deposition occurred on May 3, 2022. [TX 5-31, 10:21-11:11.] As a result, Petitioner received a copy of the Moss Deposition on or about June 1, 2022, after Bellicini's withdrawal. [Exhibit 2022-06-07, p. 2, lines 6-7; p. 8, lines 10-11.] Any Motion for Reconsideration of the Collateral Estoppel order of May 12, 2022 was made untimely by the date of Bellicini's withdrawal. The State Bar Court denied Petitioner's Pro Per motion for reconsideration on July 11, 2022 on the basis of untimeliness.

A client is not bound by the actions of his attorney if "he

raises objections to the acts or omissions of his counsel at the time of trial." [*People v. Morales* (1967) 254 Cal.App.2d 194, 199.] Petitioner cannot and should not be penalized for his counsel's failure to act on his behalf, particularly if counsel moves to withdraw as a cover of his failure to prepare. This rule applies to state trial counsel, Douglas Allen, Esq., and to State Bar Counsel, Samuel Bellicini, Esq..

Additionally, it must be remembered that State Bar disciplinary proceedings are quasi-criminal in nature. The United States Supreme Court held in *In re Ruffalo* (1968) 390 U.S. 544, 550-551, that where administrative proceedings contemplate the deprivation of a license to practice one's profession they are adversary proceedings of a quasi-criminal nature and procedural due process must be afforded the licensee.

THE RULE OF COMPLETENESS

The State Bar Court is incorrect in ruling that Petitioner was not entitled to move into evidence Exhibits 1021, (March 20, 2010 modification agreement between Devine Blessings and Dennis Spielbauer), 1033 (appellate opening brief), 1034 (appellate reply brief), 1035 (petition for rehearing), 1036 (petition for review), and 1043 (motion for new trial). The fact is

that the OCTC moved into evidence Exhibit 63 and Exhibit 65.

Among other documents, OCTC Exhibit 65 specifically referred to the following documents: -Appellants Opening Brief; -Appellants Reply Brief; -Appendix to Appellants Opening Brief; -Petition for Rehearing; -Petition for Review to the California Supreme Court.

OCTC Exhibit 63 specifically referred to Exhibit 1043 (motion for a new trial). The Court did permit into evidence the UCLA Law Review but apparently did not give it any weight.

These documents established from the very beginning the state of mind of the Petitioner. They go directly to his state of mind, his intent, and his belief.

However, the California Evidence Code required their admission into evidence, something refused by the State Bar Court. California Evidence Code § 356 encapsulates the "Rule of Completeness." California Evidence Code § 356 provides:

"Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act,

declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

Whatever the motive of the OCTC to have moved OCTC Exhibits 63 and 65 into evidence, the entire declaration of those letters, with supporting exhibits, became admissible into evidence.

Section 356 is sometimes referred to as the statutory version of the common law rule of completeness. (See, e.g., *People v. Samuels* (2005) 36 Cal.4th 96, 130 [30 Cal.Rptr.3d 105, 113 P.3d 1125].) According to the common law rule: "'[T]he opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance.' [Citation.]" (*Beech Aircraft Corp. v. Rainey* (1988) 488 U.S. 153, 171 [102 L.Ed.2d 445, 109 S.Ct. 439] (*Beech*).) *People v. Parrish* (2007) 152 Cal.App.4th 263, 269 fn. 3

Thus, there are two reasons that the documents should have been allowed into evidence. One is the state of mind, intent and belief of Petitioner. The second is Evidence Code § 356, the Rule of Completeness.

PROHIBITED EXHIBITS

The State Bar Court denied the admission into evidence during trial of critical documents which established the state of mind and good faith of Petitioner. This constituted a denial of Petitioner's right to due process and equal protection.

OCTC Exhibit 65 provides a foundation for many points raised by the Petitioner. OCTC moved its Exhibit 65 into evidence, which was not opposed by Petitioner, and which was received into evidence. [TX 8/30, p. 38, 38:07-38:17.] Exhibit 65 refers to many documents submitted by the Petitioner to the Court of Appeal and the Supreme Court. Copies of these documents were provided on or about February 14, 2017 to the State Bar investigator, Ben Charney, and are explicitly mentioned in the letter. [See OCTC Exhibit 65, page 2.]

The relevancy of these documents is that they demonstrate from the very beginning and reiterate the belief Petitioner held that the costs and legal proceedings were brought in good faith. They also are an inherent part of OCTC Exhibit 65.

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DOCUMENTS ERRONEOUSLY DENIED ADMISSION

Exhibit	Document Identification
1007	Modification of Note (Denied)
1017	UCLA Law Review I-95 (Sort of Admitted)
1021	Modification of Note Document (Denied)
1033	Opening brief to 6th District Court (Denied)
1034	Reply brief to the 6th District (Denied)
1035	Petition for Rehearing to the 6th District (Denied)
1036	Petition for Review to the California Supreme Court (Denied)
1038	Partial Transcript of Moss Testimony (Denied)
1039	Full Transcript of Moss Testimony (Denied)
1043	Motion for New Trial in the State Trial Court (Denied)

FACTUAL BACKGROUND UNDERLYING THIS CASE

The litigation arose from a disputed payoff demand. Petitioner created the entity of Devine Blessings, Inc. (DBI) in March 2010 which thereafter bought two second notes from a hard money lender by the name of Curtis Mitchell. [7/11/2014 Letter, 63.] Mr. Mitchell held notes on one property he was foreclosing on and which was the home of Dennis Spielbauer. [7/11/2014 Letter, 63.] That property was 486 South Fifth Street, San Jose, CA 95112. The other property was located at 167 East William Street, San Jose, CA 95112 and is the property which is the subject matter of the litigation in 110cv176152 and the subject matter of the judgments which were entered in this case.

[7/11/2014 Letter, 63.] A condition of this purchase was the dismissal of litigation against Curtis Mitchell which had been brought by Dennis Spielbauer, which dismissal was effected as a part of the purchase of the notes and deeds of trust. [7/11/2014 Letter, 63.] The trust deeds and promissory notes were purchased on March 12, 2010. [7/11/2014 Letter, 63.]

The attorney fees which Thomas Spielbauer, Esq. had generated as a result of the legal representation pertaining to multiple foreclosures were assigned by agreement to DBI. [7/11/2014 Letter.] The language of the deed of trust permitted both a modification of the note as well as a recovery for all fees and costs related to the protection of the security. [7/11/2014 Letter, 63; 2/14/2017 Letter; 65.] These were Paragraph 1, Paragraph 8, Paragraph 21, and the Rider to the deed of trust. [2/14/2017 Letter, 65; 2022-07-07 Expert Witness Statement, pp. 5-6; Deposition TX, Exhibit 1038, page 5; Exhibit 1039, page 57; 057:11–058:14.]

While these fees were justified by several provisions of the deeds of trust, only one provision was argued at the state court trial to the neglect of the others. That provision was paragraph 1 only. [Exhibit 1039, page 57, 057:11–058:14; Exhibit 1039, page

62, 062:05 – 062:20.] This was significant error on the part of DBI's and Petitioner's state court trial counsel. [2022-07-07 Expert Witness Statement, p. 8; Exhibit 1039, page 57, 057:11–058:14; Exhibit 1039, page 62, 062:05 – 062:20.]

After Mitchell's sale of the second note to DBI, the parties to this second deed of trust (i.e., the trustor Dennis Spielbauer and the new beneficiary, DBI) agreed to this assignment and modification. [7/11/2014 Letter, Exhibit 63; 1007; Exhibit 1021.] These actions were and are specifically permitted and without notice to junior lienholders by *Friery v. Sutter Buttes Savings Bank* (1998) 61 Cal.App.4th 869. [7/11/2014 Letter, 63.] This modification is permitted without notice to the junior lienholders as long as the amount of the modification does not exceed the amount of the original loan. If it does, the amount of the excess is subordinated to the junior loans. [Closing argument, *Friery v. Sutter Buttes Savings Bank* (1998) 61 Cal.App.4th 869; UCLA Article, "Subrogation of Mortgages in California: A Comparison with the Restatement and Proposals for Change," (2001) 48 UCLA Law Review 1633; Exhibit TX 08-30, 062:07-62:13; 063:05-063:17; 065:03-065:14.]

It was after these events that Faramarz Yazdani foreclosed

upon the property of 167 East William Street, San Jose, with his third position note and deed of trust. [7/11/2014 Letter, Exhibit 63; 2/14/2017 Letter, Exhibit 65.]

Plaintiff 167LLC filed suit against Petitioner and DBI on July 6, 2010. The plaintiff 167 East William LLC (167LLC) filed an order to show cause in July 2010, which was heard on September 24, 2010. In that order to show cause, 167LLC requested that the Court find that the payoff demand was in the amount of $4,389.16 with interest in contrast to the amount of the payoff demand which was approximately $269,500. [7/11/2014 Letter, 63.] The Trial Court, the Honorable Kevin Murphy, ruled concerning the probability of success on the part of the plaintiff, "Additionally, I am not persuading [sic] of the likelihood of success on the merits. There seems to be a tremendous amount of disagreement between the parties concerning the amount of the payoff. So I am going to deny the request for preliminary injunction. If I issued a TRO, that is set aside." [7/11/2014 Letter; 63; 1012.] Another way of describing what Judge Murphy ruled is that he found sufficient merit to DBI's payoff demand so as to deny 167 LLC's requested relief in September 2010. The state trial court eventually awarded Petitioner $7,152.03, twice

the amount initially proposed by 167LLC. [Exhibit 32, p.1, line 22.]

The damages which the state trial court eventually awarded consisted solely of attorney fees and punitive damages, and $300 against DBI pursuant to California Civil Code § 2943(e). It found NO actual damages from the alleged misrepresentation beyond a midtrial amendment in the state court. The state trial court permitted an amendment to allege slander of title in its statement of decision post trial and thus awarded punitive damages.

INACCURACIES IN THE COURT OF REVIEW OPINION

The Court or Review is incorrect when it writes on page 5 of its opinion that Slander of Title was originally alleged in the several iterations of the complaint. It came as a midtrial amendment which was ruled upon in the statement of decision post state court trial.

The Court of Review is also inaccurate in stating that the trial was a 2 day bench trial on page 6 of its opinion. It was a four day bench trial.

The Court of Review is also inaccurate in writing, on pages 9 and 10, that Petitioner "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." During the relevant period of time in which the trial occurred, Petitioner was represented by Douglas Allen, Esq.. The state trial court did not permit any active advocacy by Petitioner, but only through his counsel.

The Review Court does not differentiate in its statement on page 21 of its opinion, "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." Petitioner's good faith belief was based on *Friery* and the UCLA Article, as well as the testimony of Glen Moss.

It is well settled that a court may not "punish a person for exercising a constitutional right." (*In re Lewallen* (1979) 23 Cal.3d 274, 278, citing *Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363.) Punishment of a person for exercising a constitutional right is "'a due process violation of the most basic sort.' [Citation.]" (*In re Lewallen* (1979) 23 Cal.3d 274, 278.) Yet the negation and dismissal of Petitioner's good faith belief is indeed a perspective which punishes the Petitioner.

TO REPORT OR NOT TO REPORT

The State Bar Trial Court got it right in its determination that "OCTC has not met its burden of proving that Spielbauer is culpable of charge 5 of the NDC." NDC Count 5 deals with the self reporting requirement of California Business and Professions Code § 6068(O).

The State Bar Trial Court found that preliminarily, the phrase " 'committed in a professional capacity' is ambiguous." The State Bar Trial Court reviewed the issue in pages 11-13 of its opinion. The State Bar Trial Court dismissed NDC Count 5. The Court of Review errored in reversing the State Bar Trial Court.

The State Bar Trial Court reviewed the case of *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, finding that it "suggests that the reporting obligation is limited to misconduct committed while acting as an attorney." (2022-12-02 Order, page 12.) It also referred to *In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195 and *In re Peavey* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 483. However, *Kittrell* and *Peavy* involved an attorney client relationship, which does not exist in this matter.

After the judgments were entered, Petitioner pondered the question as to whether this was a judgment reportable to the State Bar. He also sought legal advice on this matter. Petitioner's conclusion was that it was not reportable as his conduct did not occur in a professional or attorney capacity.

RELEVANT STATE BAR PROCEDURAL HISTORY

12/19/2019	State Bar (OCTC) Files Notice of Disciplinary Charges
1/10/2020	Petitioner Files Response to NDC
5/2/2022	OCTC files Collateral Estoppel Motion
5/3/2022	Deposition of Glen Moss, Esq. Occurs
5/6/2022	Petitioner Files Opposition to Collateral Estoppel Motion
5/12/2022	State Bar Court Grants OCTC's Collateral Estoppel Motion
5/13/2023	OCTC Files Motion to Exclude Evidence
5/16/2023	Petitioner Files Response to Motion to Exclude Evidence
5/31/2022	Petitioner's Counsel Moves to Withdraw. State Bar Court Grants Withdrawal
6/1/2022	Petitioner, now in Pro Per, Orders Copy of Moss Deposition Transcript. Prior Counsel, Bellicini, failed to obtain or even order a copy of the Moss Deposition transcript.
6/6/2022	Petitioner, now in Pro Per, Files Motion for Re-Consideration of Collateral Estoppel Motion after Obtaining Moss Deposition Transcript
7/7/2022	Statement of Respondent's Expert Testimony at Trial Filed.
7/11/2022	State Bar Court Denies Motion to Reconsider
7/11/2022 & 7/12/2022	Respondent Files Updated Witness List
7/12/2022	OCTC Files Motion to Exclude Expert Witness Testimony
7/18/2022	State Bar Court Grants OCTC's Motion to Exclude Expert Witness Testimony
8/29/2022	Petitioner Files Updated Witness List
8/30/2022	State Bar Court Trial Commences
9/1/2022	State Bar Court Trial Concludes
9/15/2022	Petitioner Files Closing Argument
9/15/2022	OCTC Files Closing Argument

9/23/2022	OCTC Files Motion to Strike Portions of Petitioner's Closing Argument
9/26/2022	Petitioner Files Response to OCTC's Motion to Strike Portions of Petitioner's Closing Argument
12/2/2022	State Bar Court Grants Motion to Strike Portions of Petitioner's Closing Argument (Footnote 2 of Decision)
12/2/2022	State Bar Court Renders Decision Sustaining NDC 1-4 and Dismissing NDC 5
12/9/2022	Petitioner Orders Transcripts for the dates of 5/16, 5/31, 7/18, 8/30 & 9/1/22
12/14/2022	Petitioner Files Request for Review
12/19/2022	Petitioner Files Objection to Notice of Intent to Dispose of Exhibits and Requests Their Preservation
12/29/2022	OCTC Files Request for Review
1/18/2023	Transcripts for 5/16, 5/31, 7/18, 8/30 and 9/1/2023 Furnished
3/7/2023	Petitioner Files Opening Brief with the California State Bar Review Court
3/17/2023	OCTC Files Opening Brief to Its Appeal
3/30/2023	Petitioner Files Responding Brief to OCTC's Opening Brief
4/20/2023	OCTC Files Responding Brief to Petitioner's Opening Brief
4/26/2023	OCTC Files Reply (Rebuttal) Brief to Its Opening Brief
5/4/2023	Petitioner Files Reply (Rebuttal) Brief with the California State Bar Review Court
8/17/2023	Oral Argument Held Before the State Bar Review Court
10/25/2023	State Bar Review Court Issues Its Decision
10/27/2023	State Bar Review Court Modifies Its Order/Decision
11/13/2023	OCTC Files Motion for Reconsideration
11/29/2023	Petitioner Files Opposition to Motion for Reconsideration
12/6/2023	Petitioner's Opposition to Motion for Reconsideration Filed
12/8/2023	State Bar Review Court Denies OCTC's Motion for Reconsideration

TRANSCRIPTS

2022-05-16	Transcript of Court Proceedings	TX 5/16
2022-05-31	Transcript of Court Proceedings	TX 5/31
2022-07-18	Transcript of Court Proceedings	TX 7/18
2022-08-30	Transcript of Court Proceedings	TX 8/30
2022-09-01	Transcript of Court Proceedings	TX 9/01

COUNT 3 OF THE NDC

Count three of the NDC pleads in part, "On or about April 27, 2010, Petitioner stated in writing to LLC that the outstanding principal balance on the note was $126,000, and $143,000 for other, in total requesting the sum of $269,500, when Petitioner knew that the amount outstanding on the note was $7,152,…"

Count three pleads as to the knowledge that the Petitioner had concerning the payoff demand and the promissory notes and deeds of trust. The key issue is KNOWLEDGE. Petitioner testified at trial on his belief that the proper payoff amount was $269,500. He included the two deeds of trust, promissory notes, and a dismissal of the lawsuit which had been filed against Curtis Mitchell. The fact is that the sale by Curtis Mitchell was a package deal. Mitchell would not piecemeal the sale. Petitioner itemized the costs which totaled $269,500. [TX 8/30, 37:01–37:24.]

Paragraphs of the deed of trust permitted Petitioner full compensation of those amounts as the bundle of rights and charges which would inure to his benefit. He was entitled, for example, to the total amount of attorney fees spent by Mitchell in Dennis Spielbauer's 2006 and 2009 bankruptcy proceedings,

regardless of whether that was a part of the purchase price of the deeds of trust and note.

Petitioner also testified that he believed that he could modify the note with Dennis Spielbauer in light of the case law which permitted him to do so. Petitioner believed that he was justified in modifying the promissory note and deed of trust pursuant to the authority of *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. [UCLA; Exhibit 1017; and UCLA p. 1653 and 1655.]

The law review article maintained throughout the very same position argued by Petitioner. That position was that the senior lien does not lose priority (and notice is not required to junior lien holders) if the increase of the amount does not exceed the principal amount of the loan, in this case $350,000 from Mitchell. The senior lien holder and the borrower are free to modify the loan as long as this principal amount is not exceeded. Any excess of the $350,000 would be enforced as a junior lien. [See entire UCLA Law Review (Exhibit 1017), and particularly at

1653 and 1655.]

There is no evidence to sustain the argument that $7,152 was the amount which Petitioner KNEW was due. There are the findings of the state trial court and its affirmation by the Sixth District. OCTC Exhibit 11 (the Mitchell payoff demand to Dennis Spielbauer of January 2010) was admitted into evidence at the State Bar trial over objection and despite a lack of foundation. The KNOWLEDGE of the Petitioner is critical in this matter.

OCTC has alleged in Count 3, "A violation of section 6106 may result from intentional conduct or grossly negligent conduct. Petitioner is charged with committing intentional misrepresentation. However, should the evidence at trial demonstrate that Petitioner committed misrepresentation as a result of gross negligence, Petitioner must still be found culpable of violating section 6106 because misrepresentation through gross negligence is a lesser included offense of intentional misrepresentation."

The OCTC did not present evidence establishing intentional conduct, or even gross negligence. It relied upon the collateral estoppel order, its several exhibits, and Petitioner's testimony to prove its case at trial. The testimony of Petitioner

provided justification for his conduct. Again, whether the Petitioner was correct or incorrect is not at issue. It is the INTENT and ACTUAL KNOWLEDGE of Petitioner that is critical.

In order to sustain Count 3, the State Bar Court had to disregard the testimony of Petitioner. However, if it were to do so, the evidence without the testimony of Petitioner is not sufficient to establish count three by clear and convincing evidence.

CHARGE 4 OF THE NDC

In Count 4, paragraph 30, the OCTC alleged in its NDC:

"Respondent knew that the payoff demand was not accurate, in that it included attorney fees that were not recoverable, that it did not properly state the amount owing on the note for 167 E. William Street, and that it included the sum he paid for the two notes purchased by Devine Blessings, Respondent knew that the statements were false and misleading when he made them. Respondent thereby committed an act involving moral turpitude, dishonesty or corruption in willful violation of Business and Professions Code, section 6106."
[Exhibit 1, pp. 6-7.]

PERJURY

In other words, Count 4 of the charging document (NDC, OCTC Exhibit 1, p. 6-7] alleges that Petitioner committed perjury in violation of California Penal Code § 118. Contrast the allegations of Count 4, paragraph 30 of the OCTC charging document with California Penal Code § 118(a). [2022-07-07 Expert Witness Statement, pp. 4-8.]

Count 4 alleges that Petitioner submitted a false declaration to the Court, knowing that it was false. Moss' deposition testimony impeaches this.

However, there is one more unique problem with Count 4. That problem is the verification submitted with this declaration, which was not objected to. The verification states in two places. "The payoff demand is an accurate payoff demand to the best of my knowledge, information and belief." [See OCTC Exhibit 25, page 1.] "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge, information and belief." ([See OCTC Exhibit 25, page 3.]

The significant aspect to the verification is the word

"**belief**." There has been no evidence submitted at trial to impeach the belief of Petitioner, even if that belief were unreasonable.

Petitioner attempted to move into evidence Exhibits 1033-1036 (Appellate Briefs) and 1043 (Motion for a New Trial). The State Bar Court denied their admission into evidence. [TX 8-30, 072:14-073:06; TX 8-30, 094:06-094:24.] The relevancy of these documents is that they document from the very beginning and reiterate the **belief** Petitioner held that the costs, charges and legal proceedings were brought in good faith.

PETITIONER'S STATE OF MIND

Mr. Moss' testimony goes directly to and corroborates the intent and state of mind of Petitioner, i.e., that Petitioner believed in good faith that the charges were warranted. In fact, Mr. Moss' testimony reflects and corroborates the fact that, pursuant to paragraphs 8, 21 of the deed of trust and page 11 of the rider to the deed of trust, these costs WERE warranted. It is just that this evidence was not argued, nor presented to, nor considered by, the State Bar Trial Court. [2022-07-07 Expert Witness Statement, p. 8; Exhibit 1038, page 5; Exhibit 1039, page 57, 057:11 – 058:14; Exhibit 1039, page 62, 062:05 – 062:20.]

In regard to his state of mind, Petitioner testified, "I did state in my declaration that the payoff demand is an accurate payoff demand to the best of my knowledge, information, and ***belief***. And for the State Bar to prove culpability, it has to establish that it was not to my knowledge, information, or belief. And the information and belief that I had, be it that I was correct or incorrect, was based on *Friery vs. Sutter Buttes Savings Bank*, which is at 61 Cal. App. 4th 869, and also the law review, which is at 48 UCLA Law Review 1633, and also by the ruling of Judge Murphy on September 24 of 2010. So I submit that the evidence that will be produced, even in light of the collateral estoppel order, is not probative of count four. [Emphasis added.]" [TX 8/30, 20:09–20:21; 62:07–65.18.]

Petitioner explained how he calculated the payoff demand. [TX 8/30, 37:01-37:24.] DBI was entitled the fees incurred by Mitchell but not included in his figures. Petitioner believed he was entitled to modify the note with Dennis Spielbauer pursuant to *Friery v. Sutter Savings Bank* and the UCLA Law Review and Judge Murphy's order. These modifications were permitted by the Dragnet or Anaconda clauses. The ***only*** evidence presented at the trial supported the modification, which the state trial court

rejected pursuant to California Evidence Code § 412. [Exhibit 32, p.11, lines 03-10.] The state trial court ignored the fact that performance constitutes a defense to a statute of frauds objection. The state trial court ignored the fact that plaintiff 167LLC conducted no cross-examination on this issue during the state court trial. [TX 9/01, LL 06:21-06:23.]

The State Bar Court, however, was improperly disturbed by the fact that the modification document (Exhibit 1007) was not moved into evidence in the state court trial despite the explanation of justification concerning the declined mental status of Dennis Spielbauer, the failure of any cross-examination in the state court proceeding, and relevancy to this State Bar disciplinary proceeding. [TX 9/01, Lines 07:04-08:25; TX 9/01, Lines 08:16-08:25; TX 9/01, Lines 10:04-11-10.]

AGGRAVATING FACTORS

4) Substantial weight for indifference (std. 1.5(k))

The State Bar Court and the Review Court found that because Petitioner testified that he believed his actions were proper and justified by *Friery v. Sutter Buttes Savings Bank* (1998) 61 Cal.App.4th 869 and the UCLA Law Review Article [Exhibit UCLA], that this constitutes "fails to recognize the

magnitude of his transgressions or accept responsibility for them." [Exhibit 2022-12-02, ORDER, p. 16.] Petitioner also testified that having traveled the road he traversed, he would be far more circumspect in the future.

This finding by the State Bar Court and the Review Court is plain wrong.   The evidence presented at the State Bar Trial established that Petitioner has been an attorney for over 44 years and has a blemish-free record. [Exhibit 2022-12-02, ORDER, p. 18; Exhibit 2022-09-15, Closing Statement, p. 17, lines 10-13.] There have been no issues of misconduct on the part of Petitioner for the 13 years since that time (or before). [Exhibit 2022-12-02, ORDER, p. 18; Exhibit 2022-09-15, Closing Statement, p. 17, lines 14-28, p. 18, line 1.] "Here, Spielbauer was admitted to the practice of law in California on December 21, 1977, and he has had no prior discipline for over 30 years." [Exhibit 2022-12-02, ORDER, p. 18.]

There is no factual basis for the conclusion that Petitioner's "lack of insight as it makes him an ongoing danger to the public and legal profession."

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5) Substantial aggravation for failure to make restitution (std. 1.5 (m))

The State Bar Court found aggravation for the fact that Petitioner has not paid the judgment of $869,276.55. [Exhibit 2022-12-02, ORDER, p. 17.]

Here the State Bar Court confused, and conflated, the concept of restitution to a client with the payment of a judgment. The State Bar of California is not a collection agency for private parties, nor are attorney disciplinary proceedings debt collection mechanisms.

Attorney disciplinary proceedings are not designed or intended to be debt collection mechanisms for private parties, even where attorneys are ordered to pay money. (See *Bach v. State Bar* (1991) 52 Cal. 3d 1201, 1207.)

The case of *Bach v. State Bar* (1991) 52 Cal.3d 1201 dealt with ***restitution*** of unearned fees to a former client. No attorney-client relationship existed or exists between 167LLC and Petitioner. An attorney-client relationship is key to *Bach*.

The *Bach* court noted that it does not “sit in disciplinary matters as a collection board….” The State Bar does not qualify as a debt collector under either the federal or state statutes. [*Id.*]

For these reasons, the aggravation of Rule 1.5k and Rule 1.5m should be struck.

MITIGATION

3) Limited weight for extraordinary good character (std. 1.6 (f))

The State Bar of California Rules of Procedure, Rule 1.6(f) permits mitigating evidence of "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;"

In this matter, "Spielbauer offered character testimony from a total of nine witnesses, seven former clients and two attorneys. He also submitted a character letter from a former staff member of a Catholic organization." [Exhibit 2022-12-02, ORDER, p. 19.] "While the witnesses generally attested that Spielbauer is honest, skilled, and possesses integrity, none of the witnesses were fully aware of the charges faced by him." [Exhibit 2022-12-02, ORDER, p. 19.]

The problem with this rule is that it places the cart before the horse. It requires character witnesses to conclude that the charges against the Petitioner are completely true and correct, and that they be fully informed of these allegations, before they

can provide character testimony. Whether the NDC allegations are eventually proven false or true is of no consequence. This requires the character witnesses presume the NDC allegations are true in perspective during the evidence taking portion of the trial, and long before the decision of the State Bar Court is rendered.

In fact, all of the character witnesses for the Petitioner testified that they were vaguely aware of the allegations of an inflated payoff demand. [(Pantoja – TX 8/30, 118:21-119:07); (Mohammed Danesh Bahreini - TX 8/30, 129:13-129:22); (Zlotoff – TX 8/30, 137:17-137:23); (Bhargava – TX 8/30, 150:05-150:09); (Tang – TX 8/30, 158:12-158:18); (Rezapour – TX 9/01, LL 15:07-15:11; TX 9/01, LL 17:06-17:13); (Montoya - TX 9/01, LL 24:15-24:19; LL 25:25-26:14); (Rico Gutierrez – TX 9/01, LL 36:11-36:22; 38:09-38:23).]

They passed no judgment, nor were they interested in the NDC allegations. However, they were testifying as to the personal experience they had with Petitioner, and his honesty and integrity. [(Pantoja TX 8/30, 120:08-120:12); (Mohammed Danesh TX 8/30, 130:07-130:16; 133:17-133:22); (Zlotoff TX 8/30, 138:03-138:22); (Bhargava – TX 8/30, 150:10-150:14); (Vincent

Tang - TX 8/30, 159:19-160:02); (Rezapour - TX 9/01, LL 15:12-15:22; TX 9/01, LL 17:06-17:13); (Montoya - TX 9/01, LL 24:20-25:10); (Rico Gutierrez TX 9/01, LL 36:23-37:06.)]

For these reasons, great weight should be accorded to Petitioner for his good character.

COSTS AND FEES

In its concluding arguments to the Court of Review, Petitioner argued against the imposition of disciplinary costs. He argued that California Business and Professions Code § 6086.10 is constitutionally invalid, illegal. Petitioner further raised additional challenges based on OCTC's ability to determine "reasonable costs" in disciplinary proceedings.

The Court of Review noted that the Review Department *In the Matter of Langfus* (Review Dept. 1994) 3 Cal.State Bar Ct. Rptr. 161, 168 held, "No provision is made for challenging the cost award prior to the Supreme Court's order." [Page 37 of Order, footnote 19.]

The Review Court further opined on page 37:

> 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.) [Page 37 of Order, footnote 19.]

Petitioner raises this issue of costs and fees in this Petition for Review in order to preserve these issues.

CONCLUSION

Petitioner prays that this Supreme Court review de novo the trial and review proceedings before the State Bar Court and the Court of Review and then enter an order dismissing in full the 5 counts of the NDC.

Alternatively, Petitioner prays that this Court reverse the State Bar Trial Court finding that collateral estoppel applies as to these proceedings. He also prays that this Supreme Court remand this matter for trial with instructions that the expert witness testimony of Glen Moss, Esq. and Harry Lee Jones be received into evidence.

Petitioner further prays that this Court order the State Bar Trial Court receive into evidence Petitioner's Exhibits 1007, 1017,

1021, 1033-1036, 1038-1039, and 1043 upon remand.

Petitioner further prays that this Supreme Court reverse the finding of Substantial weight for the Aggravation of indifference (std. 1.5(k)).

Petitioner further prays that this Supreme Court reverse the finding of Substantial aggravation for failure to make restitution (std. 1.5 (m)).

Petitioner further prays that this Supreme Court grant substantial weight for extraordinary good character of Petitioner (std. 1.6 (f)).

Petitioner further prays that this Supreme Court reverse the Court of Review decision and reinstate the State Bar Trial Court's dismissal of Count 5 of the NDC.

Petitioner further prays that this Supreme Court find that the State Bar Trial Court improperly restricted, and discarded, the evidence which was attempted to be submitted by the Petitioner of his state of mind.

Petitioner further prays that this Supreme Court find that there was insufficient evidence to sustain Counts 1, 2, 3, 4 and 5 of the NDC;

Petitioner further prays that this Supreme Court find that

the State Bar Court and the Review Court improperly struck portions of Petitioner's closing argument. The State Bar Court struck Petitioner's references to documents not received into evidence.

Petitioner further prays that this Supreme Court find that the suspension suggested by the Review Court is excessive. Any suspension is unnecessary.

Petitioner requests that Judge Manjari Chawla be recused from further hearings in this matter and that this case be assigned to the Hearing Judge in San Francisco, Phong Wang, in the event that this matter is remanded for further proceedings.

Petitioner further prays that this Supreme Court find that the recommended imposition of costs and fees is improper and unconstitutional. Alternatively, that these issues are preserved for future adjudication.

Dated: December 25, 2023

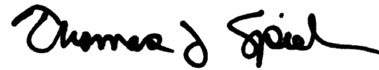
Respectfully submitted,

/s/ Thomas Spielbauer
Thomas Spielbauer, Esq.
Petitioner in Pro Per

VERIFICATION

I, Thomas Spielbauer, have reviewed the foregoing Petition for Review. To the best of my knowledge and recollection, the facts as recited in the above petition are true and correct and the documents included are true and correct copies of their originals.

I hereby declare under penalty of perjury under the laws of the State of California that to the best of my knowledge, information and belief, the foregoing is true and correct. Executed in Northern California this December 26, 2023.

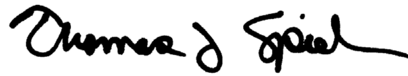


/s/ Thomas Spielbauer
Thomas Spielbauer, Esq.

WORD COUNT CERTIFICATE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the total word count of this Petition for Review, excluding covers, table of contents, table of authorities, certificate of compliance, and certificate of service is 8,234 as calculated by Microsoft Word 365.

Dated: December 26, 2023



/s/ Thomas Spielbauer
Thomas Spielbauer, Esq.

In re Thomas Spielbauer, Respondent
California Supreme Court case
California State Bar Case SBC-19-O-30700

CERTIFICATE OF SERVICE

I, Thomas Spielbauer, declare:

I am now, and at all times herein mentioned was, over the age of eighteen years. My business address is the Spielbauer Law Office, 3130 Balfour Road D #231, Brentwood, CA 94513. My electronic email addresses are thomas@spielbauer.com and thomas.spielbauer@aol.com.

On December 26, 2023, I caused to be served a copy of the following documents: Petition for Review. This was done through electronic service by True Filing and at the time that these documents were uploaded to TrueFiling for filing with this Court, and as permitted by California Rule of Court, Rule 2.251.

True Filing reflects that a true and accurate copy of this Petition was electronically sent to the following individuals at their respective email addresses:

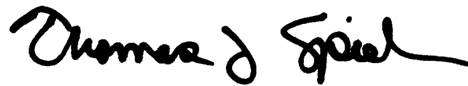
Senior OCTC Trial Counsel Alex J. Hackert
alex.hackert@calbar.ca.gov

Honorable Manjari Chawla
ctroom1@statebarcourt.ca.gov

Review Department
ctroomA@statebarcourt.ca.gov

I also emailed separately, beyond TrueFiling, a copy of this Petition for Review to the above designated individuals. I did not receive any bounce back of the emails.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct to the best of my knowledge. Executed in Northern California on December 26, 2023.



/s/ Thomas Spielbauer
Thomas Spielbauer, Esq.

Exhibit 1

Review Court Opinion of October 25, 2023

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

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[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

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[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.

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[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

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[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).)

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[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.

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[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

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Exhibit 2

Review Court Modification of October 27, 2023

FILED
10/27/2023
STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

En Banc

In the Matter of THOMAS JOHN SPIELBAUER, State Bar No. 78281.	))))))	SBC-19-O-30700 ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]

It is ordered that the Opinion filed on October 25, 2023, which is for publication is modified as follows due to an error related to a computer software malfunction:

On page 2, "IV" is changed to "I"; on page 3, "V" is changed to "II"; on page 7, "D" is changed to "B" and "VI" is changed to "III"; on page 17, "VII" is changed to "IV" and "C" is changed to "A"; on page 19, "D" is changed to "C"; on page 20, "VIII" is changed to "V"; on page 25, "IX" is changed to "VI"; on page 26, "C" is changed to "A"; on page 29, "D" is changed to "B"; on page 33, "X" is changed to "VII"; on page 35, "XI" is changed to "VIII"; on page 36, "XII" is changed to "IX" and "XIII" is changed to "X"; and on page 37, "XIV" is changed to "XI[.]"

This modification does not alter any of the factual findings or legal conclusions set forth in the opinion, and it does not extend any deadlines. (Cal. Rules of Court, rule 8.264(c) [modification of reviewing court that does not change appellate judgment does not extend finality date of decision].)

Presiding Judge

Exhibit 3

State Bar Trial Court Order of December 2, 2022

The discipline trial was held on August 30 and September 1, 2022.[1] Trial was initially set as in-person but was ultimately conducted by Zoom at the request of each party, specifically Spielbauer, and pursuant to rule 5.18 of the Rules of Procedure of the State Bar of California. The parties filed closing argument briefs[2] on September 15, 2022, the date this matter was submitted for decision.

II. Jurisdiction

Spielbauer has been a licensed attorney since his admission to practice law in California on December 21, 1977.[3]

III. Findings of Fact

By 2010, Spielbauer had been practicing law in California for over 30 years. Since 2005, Spielbauer's practice has included a specialty in foreclosures and he offers "comprehensive foreclosure defense." (Exh. 32, p. 8.)

On March 5, 2010, Spielbauer incorporated Devine Blessings, of which he was president and sole shareholder. The purpose of creating Devine Blessings was to "secure financing and purchase lien position note, particularly on the properties of Dennis Spielbauer" which were facing foreclosure. (Exh. 65, p. 10.) Dennis Spielbauer (Dennis) is Spielbauer's brother, who filed for bankruptcy relief around that time.

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[1] The court denies admission of Exhibit 1007, identical to Exhibit 1021, which the court denied during trial. Admission is denied because (1) the document was produced astonishingly late, even though Spielbauer was aware of and had possession of it since the underlying civil litigation; and (2) the sole purpose of the exhibit is to undermine an issue decided by the superior court, on which this court has granted collateral estoppel.

[2] OCTC's motion to strike portions of Spielbauer's closing argument brief is granted. Parts of Spielbauer's brief that make arguments or assert facts based on documents not admitted into evidence are improper and disregarded by the court.

[3] Spielbauer's admission date was judicially noticed by the court sua sponte.

A. State court proceedings

An entity named 167 E. William, LLC (LLC) brought civil action against Spielbauer and Devine Blessings (Defendants) in the *167 E. William* matter. In relevant part, LLC alleged that Defendants proffered an inaccurate payoff demand statement with respect to a property located at 167 E. William Street (Property).

On September 14, 2010, Spielbauer 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 . . .. (Exh. 25, p. 1.)

Spielbauer also represented in his declaration that he was the attorney for defendant Devine Blessings and had personal knowledge of the facts in the declaration.

On August 27, 2013, the superior court issued a Statement of Decision and Decision Concerning Amount of Punitive Damages (2013 Decision). The court held that Defendants violated California Civil Code section 2943, pertaining to a lienholder's obligation to provide an accurate payoff demand statement to the purchaser of real property.[4] Further, the court found by clear and convincing evidence that Spielbauer intentionally presented an inaccurate payoff demand to deprive LLC of property or legal rights, committing "fraud" under Civil Code section 3294, subdivision (a).[5] Civil Code section 3294, subdivision (c)(3), defines fraud as "an

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[4] Civil Code section 2943, subdivision (a)(5) defines a payoff demand statement as "a written statement, prepared in response to a written demand made by an entitled person [. . .] 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 [. . .]."

[5] This provision provides, "[i]n 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

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."

In reaching these conclusions, the superior court made the following factual findings:

1) In 2003, a real estate investor named Curtis Mitchell loaned $350,000 to Dennis, who signed a promissory note secured by the Property and two other parcels of land (2003 Mitchell Loan). By 2010, there was a balance of $7,152.03 on the 2003 Mitchell Loan. Mitchell was in second position on the Property.

2) In 2007, Mitchell made a second loan to Dennis for $585,000 (2007 Mitchell Loan), secured by a different set of properties, including Dennis's residence. There were no properties in common between the 2003 and 2007 Mitchell Loans, and the two notes were not cross-collateralized.

3) In 2008, Faramarz Yazdani and his wife loaned Dennis $210,000, which was secured by a deed of trust on five parcels, including the Property. By March 2010, the Property was the only security remaining, and the Yazdanis were in third position on the Property.

4) Dennis subsequently defaulted on his loans. Mitchell issued a notice of default and implemented foreclosure proceedings on Dennis's residence. Dennis filed for bankruptcy relief.

5) On March 12, 2010, Spielbauer or Devine Blessings purchased the 2003 and 2007 Mitchell Loans from Mitchell for $126,000. During the negotiation of this agreement,

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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."

Mitchell repeatedly asked Spielbauer to acknowledge, in writing, that of the $126,000, only $7,152.03 related to the Property (outstanding balance on the 2003 Mitchell Loan) whereas the remaining balance related to the 2007 Loan secured by Dennis's residence. Spielbauer repeatedly 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." (Exh. 32, p. 9.) Mitchell documented Spielbauer's statements and had the documentation witnessed by an escrow officer.

6) On March 25, 2010, the Yazdanis implemented a foreclosure sale of the Property. Yazdani purchased the Property and transferred title to LLC.

7) LLC undertook to resell the Property and requested from Defendants a payoff demand statement pursuant to Civil Code section 2943, subdivision (b). Rather than disclosing that the remaining balance owed on the Property was $7,152.03, Spielbauer claimed in his demand statement that the balance owed was $126,000 and that an additional $143,500 was owed for an unspecified obligation, amounting to a total demand of $269,500.

8) LLC contacted Spielbauer to ask why the demand was so high and requested an accounting. Receiving no response, LLC contacted Spielbauer again through counsel. However, Spielbauer never provided an accounting of the demand. Nor did he ever modify or explain his demand to LLC. As a result, LLC decided not to pay the excessive demand, refunded the third-party buyer's deposit, and reimbursed the buyers for additional costs incurred.

In making these findings, the superior court observed that the goal of Spielbauer's false demand statement on the eve of foreclosure was to shift to LLC the burden of paying the

mortgage on Dennis's residence. The superior court concluded that Spielbauer knew that the payoff demand for $269,500 on the Property was false because he knew that of the $126,000 listed on his demand as "principal balance owed," only $7,152 was secured by the Property. The other $118,000 related to the 2007 Mitchell Loan which did not include the Property, but did include Dennis's residence. The court also determined that the demand represented Spielbauer's attempt to force LLC to pay for his own attorney's fees for his work on Dennis's bankruptcy. The court highlighted that Spielbauer failed to clarify the $143,500 included in the payoff demand, despite LLC's request for an explanation.

On February 20, 2014, the superior court entered judgment against Devine Blessings and Spielbauer, requiring him to pay LLC $869,276.55, including $332,550 in punitive damages. On May 10, 2016, the appellate court upheld the judgment. The California Supreme Court denied review.

B. Involvement of OCTC

On June 20, 2014, OCTC notified Spielbauer that it learned that a judgment was issued against him in the *167 E. William* matter. OCTC had no record of Spielbauer reporting this judgment to the State Bar of California, as required under Business and Professions Code section 6068, subdivision (o)(2).[6] Spielbauer responded on July 11, stating that he did not report the judgment because it did not arise from his practice of law or his actions as an attorney, but instead, occurred in his capacity as the president of Devine Blessing.

IV. Conclusions of Law

A. Collateral Estoppel Ruling

This court granted OCTC's motion to apply collateral estoppel, precluding relitigation of

[6] Unless otherwise noted, statutory references are to the Business and Professions Code.

specific topics argued and decided in prior proceedings. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341). In its motion, OCTC argued that the following issues relevant to Spielbauer's disciplinary charges were substantially identical to those litigated in the final judgment in the *167 E. William* matter: (1) whether Spielbauer intentionally submitted a false payoff demand to another party; (2) in doing so, he violated Civil Code sections 2943 and 3294 and acted with moral turpitude; and (3) whether Spielbauer employed moral turpitude by stating to the superior court that the payoff demand was accurate.

This court found that all requirements of collateral estoppel were satisfied: (1) the issues sought to be precluded for relitigation were substantially identical to those in the State Bar Court;[7] (2) the issues were actually litigated and decided in the *167 E. William* matter, under the same burden of proof applicable in the State Bar Court (i.e., clear and convincing evidence); (3) Spielbauer was a party to the *167 E. William* matter; (4) there is a final judgment on the merits in that case; and (5) Spielbauer did not show that precluding relitigation would be unfair. (*In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 205; see also *Lucido v. Superior Court*, *supra*, 51 Cal.3d at p. 341.) This court concluded that Spielbauer may not relitigate the superior court's determinations that (1) he presented an inaccurate payoff demand to LLC in breach of Civil Code section 2943; and (2) that he did so intentionally to deprive LLC of property or legal rights, committing fraud under Civil Code section 3294. However, the court did not preclude Spielbauer from introducing evidence to contradict, temper, or explain the record or evidence from the civil proceeding as to any "element of a disciplinary violation or an

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[7] Specifically, the court noted that the civil and discipline matters both require determinations of whether Spielbauer violated Civil Code section 2943 and committed fraud under Civil Code section 3294, subdivision (a). The court observed that the fraud determination is also relevant to OCTC's moral turpitude charges.

aggravating circumstance *independent* of the application of collateral estoppel." (See May 12, 2022 order, fn. 7 [emphasis in original]; *In the Matter of Kittrell*, *supra*, 4 Cal State Bar Ct. Rptr. at p. 206.)

B. Count One: Failure to Comply with Civil Code section 2943 (§ 6068, subd. (a))

Count one charges Spielbauer with violating section 6068, subdivision (a), which provides that an attorney must "support the Constitution and laws of the United States and of this state." OCTC alleges that Spielbauer violated this provision by running afoul of Civil Code section 2943, as held by the superior court in its 2013 Decision in the *167 E. William* matter. The superior court found that Spielbauer violated section 2943 by failing to submit a true and correct payoff demand statement to LLC. Thus, Spielbauer is culpable of count one on collateral estoppel grounds. However, no additional weight in determining discipline is afforded as the same misconduct establishes Spielbauer's violation of section 6106 in count three. (*In the Matter of Lingwood* (Review Dept. 2019) 5 Cal. State Bar Ct. Rptr. 660 [duplicative violation given no additional weight in determining discipline].)

C. Count Two: Failure to Comply with Civil Code section 3294 (§ 6068, subd. (a))

OCTC avers that Spielbauer breached section 6068, subdivision (a), by violating Civil Code section 3294, as held by the superior court in its 2013 Decision. Specifically, the superior court found that Spielbauer committed fraud under Civil Code section 3294, subdivision (c)(3) by intentionally misrepresenting the amount owed on the Property and submitting a false payoff demand, depriving LLC of its legal rights, property and causing injury. As previously, given the superior court's determination that Spielbauer committed fraud under section 3294, subdivision (a), he is culpable of count two on collateral estoppel grounds. Again, the court assigns no additional disciplinary weight because the same misconduct supports culpability in count three.

D. Count Three: Moral Turpitude—Misrepresentation to a Third Party (§ 6106)

Count three charges Spielbauer with violating section 6106, by intentionally providing a false payoff demand to LLC, despite knowing that the statements included therein concerning the outstanding balance on the Property were false and misleading. Under section 6106, the commission of an act involving dishonesty, moral turpitude, or corruption is cause for suspension or disbarment.

The superior court in the *167 E. William* matter determined by clear and convincing evidence that Spielbauer was liable of fraud under Civil Code section 3294, subdivision (a). It is well established that an attorney's guilt with respect to the commission of fraud involves moral turpitude as a matter of law. (*In re Kittrell*, *supra*, 4 Cal State Bar Ct. Rptr. at 208.) Spielbauer is culpable of moral turpitude as charged. As to the nature and extent of the section 6106 violation, the superior court's fraud finding was based on the definition in Civil Code section 3294, subdivision (c)(3): "'Fraud' means 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." (*Ibid*., emphasis added.) Thus, this court further finds that Spielbauer's misrepresentation to LLC was intentional.

In sum, Spielbauer is culpable of count three because all elements of the 6106 violation have been established on collateral estoppel grounds.[8] (See also *In the Matter of Kroff* (Review

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[8] The circumstances here are distinguishable from *In the Matter of Kittrell*, *supra*, 4 Cal. State Bar Ct. Rptr. 195. There, the court applied collateral estoppel to issues decided by a jury in a civil action. The jury found that the plaintiff was harmed by Kittrell's "breach of fiduciary duty *or* fraud" and then answered "yes" when asked whether there was clear and convincing evidence of "oppression, malice *or* fraud." (*Id*. at pp. 208-209, emphasis added.) Noting the disjunctive conjunction "or" used in these two phrases, the Review Department was unable to determine the factual basis for the jury's responses, and therefore, could not assess the nature and extent of Kittrell's acts involving moral turpitude under collateral estoppel principles. In other words, it

Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 845 [attorney's misrepresentations to third parties constituted moral turpitude in violation of section 6106].)

E. Count Four: Moral Turpitude—Misrepresentation to a Court (§ 6106)

OCTC asserts that Spielbauer violated section 6106 by intentionally making false and misleading statements to the superior court. Count four alleges that Spielbauer erroneously claimed in his September 14, 2010 declaration that the payoff demand was accurate to the best of his knowledge, information and belief, despite knowing that the demand was not correct.

In its 2013 Decision, the superior court found by clear and convincing evidence that Spielbauer intentionally provided an inaccurate payoff demand to LLC, committing fraud under Civil Code section 2943, subdivision (a) and as defined in Civil Code section 2943, subdivision (c)(3). And this court has applied collateral estoppel to the superior court's finding of fraud. As follows, Spielbauer's September 14, 2010 declaration, which represented to the superior court under penalty of perjury that his payoff demand statement was in fact accurate, constituted an intentional misrepresentation to the court. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 786 [moral turpitude includes attorney's false or misleading statements to court]; *Bach v. State Bar* (1987) 43 Cal.3d 848, 855 [seeking to mislead judge constitutes moral turpitude and warrants discipline].) Spielbauer is culpable of count four.

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was unclear based on the jury verdict whether Kittrell was liable of breach of fiduciary duty or fraud and whether his conduct involved oppression, malice, or fraud. Hence, while the Review Department held that Kittrell's violation of section 6106 was properly found based on collateral estoppel, it remanded, in part, for the limited purpose of determining the nature and extent of Kittrell's acts involving moral turpitude.

In contrast, there is no such ambiguity here because the superior court explicitly found in its 2013 Decision that Spielbauer was liable of "fraud" under Civil Code section 3294, subdivision (a) and within the meaning of "fraud" as defined in Civil Code section 3294, subdivision (c). The 2013 Decision also laid out the facts on which the superior court made its finding of fraud.

F. Count Five: Failure to Report Judgment (§ 6068, subd. (o)(2))

Count five charges Spielbauer with violating section 6068, subdivision (o)(2) by failing to timely report to the State Bar the February 14, 2014 judgment entered against him in *167 E. William*. Under this provision, an attorney must report to the State Bar within 30 days of the time the attorney has knowledge of judgment entered against the attorney in a civil action for fraud that was "committed in a professional capacity."

Spielbauer does not dispute that he was aware of the February 14, 2014 judgment against him and Devine Blessings on. Instead, after reviewing section 6068, subdivision (o)(2), he concluded that he need not report the judgment because his conduct occurred in his capacity as a trustee or the president of Devine Blessings, not from his practice of law or his actions as an attorney. He highlights that section 6068, subdivision (o)(2) expressly requires that the conduct must occur in a professional capacity.

OCTC has not met its burden of proving that Spielbauer is culpable of this charge. Preliminarily, the phrase "committed in a professional capacity" is ambiguous. It is not clear that this language only refers to misconduct committed in one's capacity as an attorney as opposed to in *any* professional capacity. There is no definition of this phrase in the relevant section of the Business and Professions Code. Despite this ambiguity, OCTC failed to provide any case law or argument that the phrase "committed in a professional capacity" encompasses acts outside the legal profession. Instead, OCTC conclusorily states that Spielbauer was obligated to report his judgment to the State Bar: "Respondent was acting in his professional capacity when he submitted the false payoff demand to LLC . . . ." (OCTC closing brief, p. 6.)

As neither party provided case law explaining the proper application of section 6068, subdivision (o)(2), this court conducted its own research. Although sparse, there appears to be a

split in authority. On the one hand, *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179, suggests that the reporting obligation is limited to misconduct committed while acting as an attorney. In examining section 6068, subdivision (o)(3) [attorney's duty to report *sanctions*], the court noted the Legislature's omission of the phrase "committed in a professional capacity," concluding that an attorney had a duty to report sanctions that were imposed even where the attorney was a party. *Varakin* contrasted this with "the Legislature's explicit limitation of other reporting requirements to events involving the conduct of an attorney in a professional capacity. (See, e.g., §§ 6068(o)(1) [filing of three or more lawsuits in twelve months against an attorney for malpractice or other wrongful conduct committed in a professional capacity], 6068(o)(2) [entry of judgment against an attorney in any civil action for fraud, [. . .] committed in a professional capacity].)." (*Id.*, p. 188.)

On the other hand, *In re Kittrell*, *supra*, 4 Cal. State Bar Ct. Rptr. 195 and *In re Peavey* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 483, the court held that an attorney was obligated to report civil judgment of fraud under section 6068, subdivision (o)(2), even though the judgment resulted from conduct unrelated to the attorney's practice of law. In *Kittrell*, the attorney induced his unsophisticated client to invest her life savings into his business. He failed to disclose important information and risks, assuring her that the investment was solid and that she could not lose money. Kittrell stopped making interest payments and failed to return the client's funds. The jury found that Kittrell's conduct involved malice, oppression or fraud and judgment was entered against him, on which the section 6068, subdivision (o)(2) duty to report was triggered.

In *Peavey*, the attorney cajoled his former clients to loan him money to publish his book. He made false promises that the book sales would return a profit, that the clients would not have

to work anymore, and that they would be paid in full in six months. When these promises were not met, the clients brought suit against Peavey for failure to pay on the note, failure to account, fraud and breach of fiduciary duty. They obtained a civil fraud judgment against Peavey, on which the duty to report under section 6068, subdivision (o)(2) arose.

Aside from lack of clarity around the case law, the evidence here is also inconclusive. OCTC did not refute or point to any evidence to undermine Spielbauer's testimony that he was not acting as an attorney for Devine Blessings at the time he submitted the payoff demand statement to LLC. And that Spielbauer represented Devine Blessings and himself in the *167 E. William* matter does not establish that he also acted in his capacity as an attorney for Devine Blessings when he issued the false payoff demand statement to LLC months prior to the commencement of that lawsuit. The court's independent review of the record reveals some indication that Spielbauer was acting in his capacity as an attorney (exh. 25, pp. 38-40 [Spielbauer's letters responding to LLC's counsel concerning unpaid balance in demand statement, which are signed by "Thomas Spielbauer, Esq." and written on letterhead of Spielbauer's law firm"]) and other evidence that he was not (exh. 25, p. 24 [payoff demand statement indicating that Spielbauer was acting as the "Beneficiary" of record for Devine Blessings]).

OCTC carries the burden to prove culpability by clear and convincing evidence. Given the ambiguous language in section 6068, subdivision (o)(2), the split in authority concerning the application of this provision, the inconclusive evidence in the record, and OCTC's dearth of meaningful argument or analysis on this issue, the court declines to find culpability. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 438 [reasonable doubt resolved in favor of attorney].) Count five is dismissed with prejudice.

V. Aggravation and Mitigation

Standard 1.5[9] requires OCTC to establish aggravating circumstances by clear and convincing evidence. Spielbauer has the same burden to prove mitigation. (Std. 1.6.)

A. Aggravation

1) Nominal weight for multiple acts of wrongdoing (std. 1.5(b))

Spielbauer is culpable of two acts of misconduct, including misrepresentations to a third party and a court. The court assigns nominal weight in aggravation for this factor. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646 [two matters of misconduct may or may not be considered multiple acts]; *Matter of Amponsah* (Review Dept. 2019) 5 Cal. State Bar Ct. Rptr. 646, 653 [modest aggravation for three acts of wrongdoing].)

2) No aggravation for uncharged misconduct (std. 1.5(h))

Under standard 1.5(h), the court may assign aggravation for uncharged violations of the Business and Professions Code or Rules of Professional Conduct. Evidence of uncharged misconduct must originate from the attorney's own trial testimony and be "elicited for the relevant purpose of inquiring into the cause of the charged misconduct." (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 36.)

OCTC argues that the court should assign aggravation because Spielbauer admitted during trial that he purposely withheld the "modification agreement" (exh. 1007) and evidence of its existence during the civil trial and appeal for the *167 E. William* matter—even though he had the document in his possession. OCTC claims it just discovered this transgression from Spielbauer's testimony and that he raised this issue himself while attempting to move Exhibit 1007 into evidence.

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

OCTC asserts that aggravation for uncharged misconduct is warranted because Spielbauer admitted to violating Evidence Code section 110, which defines "[b]urden of producing evidence" as the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue.

OCTC's argument is defective in failing to identify the statute or rule in the *Business and Professions Code* or the *Rules of Professional Conduct* that Spielbauer allegedly violated, as explicitly required by standard 1.5(h). (See also Rules Proc. of State Bar, rule 5.41(B)(1) [NDC must cite statutes or rules that attorney allegedly violated.) Instead, OCTC claims that Spielbauer violated Evidence Code 110, the purpose of which is to define a phrase rather than to prohibit conduct warranting discipline. No aggravation is warranted for this factor.

3) No aggravation for significant harm (std. 1.5(j))

Aggravating circumstances may be found where an attorney's misconduct caused significant harm to a client, the public, or the administration of justice. OCTC contends that Spielbauer's intentional failure to provide an accurate payoff demand statement caused significant harm to LLC because it was forced to choose between paying the inflated payoff demand or refraining from selling the Property. Further, LLC was harmed because Spielbauer sought to discharge the judgment in bankruptcy court, forcing LLC to defend the judgment and incur additional attorney's fees and costs.

OCTC fell short of establishing this factor by clear and convincing evidence. To start, OCTC has not explained whether LLC qualifies as a "client" or the "public" under standard 1.5(j). While OCTC summarily claims that LLC suffered significant harm as a victim of Spielbauer's wrongdoing, it fails to provide any legal authority or analysis that suggests the court may find aggravation under standard 1.5(j) for significant harm caused on a third-party.

Even assuming that the standards permit a finding of aggravation for harm to a third-party, the court is not convinced that aggravation is warranted solely for Spielbauer's decision to

seek discharge of his judgment in bankruptcy. Spielbauer is legally entitled to do so, and OCTC does not argue that his attempt was made in bad faith. (*In the Matter of Jensen* (Review Dept. 2013) 5 Cal. State Bar Ct. Rtpr. 283, 290 [finding of harm cannot be based on speculation].) There is also no evidence in the record that would support such an inference. And, while this court agrees that LLC was harmed by Spielbauer's misconduct in that it had to refund the buyer's deposit and reimburse the buyer for additional costs incurred, this harm was already factored into the superior court's findings that Spielbauer violated Civil Code sections 2943 and 3294. Finally, for purposes of this proceeding, OCTC presented no evidence—such as testimony from a representative of LLC—to support the claim that LLC suffered *significant* harm.

4) Substantial weight for indifference (std. 1.5(k))

Spielbauer fails to recognize the magnitude of his transgressions or accept responsibility for them, continuing to insist at the disciplinary trial that his payoff demand statement was accurate and "justified."[10] He made the same arguments and cited to identical sources here as he did in civil court, even though (1) they were unequivocally rejected by the superior and appellate courts in the *167 E. William* matter; and (2) this court granted collateral estoppel on the very issue of whether Spielbauer intentionally proffered an inaccurate payoff demand statement. (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591 [attorneys have duty to judicial system to assert only legal claims or defenses warranted by law or supported by good faith belief in their correctness]; *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511 [law does not require false penitence, but does require attorney to accept responsibility for acts].) Despite this court's collateral estoppel order, Spielbauer insists that the superior court's findings were wrong because the court never saw the modification agreement

[10] All quotations without citation reference trial testimony.

(Exhibit 1007),[11] which he claims is exculpatory evidence establishing that his payoff demand amount was justified. But as admitted by Spielbauer, it was his choice to withhold that document from the courts for his own purposes.

Spielbauer's attitude during this disciplinary proceeding reveals an absence of remorse and understanding of his ethical responsibilities as an attorney. Substantial weight is assigned to his lack of insight as it makes him an ongoing danger to the public and legal profession. (*In the Matter of Layton* (Review Dept.1993) 2 Cal. State Bar Ct. Rptr. 366, 380 [lack of insight causes concern attorney will repeat misconduct].)

5) Substantial aggravation for failure to make restitution (std. 1.5 (m))

The court assigns substantial weight in aggravation for Spielbauer's failure to pay *any* portion of the $869,276.55 judgment to LLC. (*In the Matter of DeClue* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 437, 445 [failure to pay $10,000 in restitution is significantly aggravating].) The judgment became final in 2016. On November 8, 2019, the Ninth Circuit Court of Appeal affirmed that the judgment was not dischargeable. Spielbauer testified that shortly after the Ninth Circuit's decision, he reached out to LLC to negotiate a settlement but his efforts were unsuccessful.

Nearly three years have passed since, and Spielbauer has still not paid any part of the sizeable judgement. Although he made a bare remark at trial that he was unable to make this payment, the record contains no documentary evidence to justify his failure to pay even a modest amount. (*In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 935, fn. 13 [attorney's unexplained failure to substantiate testimony with evidence expected to be produced

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[11] This modification agreement (Exhibit 1007) is not part of the evidentiary record here. (See fn. 1.)

is strong indication testimony not credible].)

B. Mitigation

1) Moderate weight for no prior record of discipline (std. 1.6(a))

Standard 1.6(a) permits mitigation for the "absence of any prior record of discipline over many years of practice coupled with present misconduct, which is not likely to recur." Here, Spielbauer was admitted to the practice of law in California on December 21, 1977, and he has had no prior discipline for over 30 years. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 245 [more than 20 years of practice with unblemished record highly significant mitigation].) While there is no evidence he has been charged of subsequent wrongdoing since his misdeeds here, which occurred over 10 years ago, the court is not assured that his misconduct is not likely to recur given his distinct showing of indifference and lack of remorse. On balance, moderate mitigating weight is warranted for this factor.

2) No mitigation for good faith belief (std. 1.6(b))

To establish good faith as a mitigating circumstance, an attorney must prove that his beliefs were both honestly held and reasonable. (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50-51.) To conclude otherwise would reward an attorney for his unreasonable beliefs and "for his ignorance of his ethical responsibilities." (*In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. 420, 427.)

Spielbauer urges that mitigation is supported because he held a good faith belief that the payoff demand was justified. He admits that the superior and appellate courts in the *167 E. William* matter disagreed with him but contends that this does not undermine his good faith belief. In his closing argument brief, he delves into various arguments that the superior court's conclusions were incorrect.

This court is unpersuaded. In addition to finding that Spielbauer's payoff demand was inaccurate, the superior court found by clear and convincing evidence that he *intentionally* proffered the false demand to LLC, a fraudulent act under Civil Code section 3294. Such a finding directly contradicts Spielbauer's claim that he held a good faith belief. Further, in light of this court's collateral estoppel order, Spielbauer may not dispute the superior court's finding of bad faith. Lastly, Spielbauer also makes no argument that his belief was objectively reasonable. No mitigation is supported here.

3) Limited weight for extraordinary good character (std. 1.6 (f))

To receive mitigation under standard 1.6(f), Spielbauer must establish that he possesses "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." Spielbauer offered character testimony from a total of nine witnesses, seven former clients and two attorneys. He also submitted a character letter from a former staff member of a Catholic organization.

While the witnesses generally attested that Spielbauer is honest, skilled, and possesses integrity, none of the witnesses were fully aware of the charges faced by him. For example, one former client testified that he did not read the NDC and has "zero knowledge of this case." One attorney testified that he did not read the NDC and merely has a general understanding of the charges. The author of the character letter did not indicate any awareness of the allegations. (*In re Brown* (1995) 12 Cal.4th 205, 223 [mitigation considered for good character when witnesses are aware of misconduct]; cf. *In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 476-477 [limited mitigation where declarants not fully aware of misconduct]; *In re Aquino* (1989) 49 Cal.3d 1122, 1130-1131 [testimony of seven witnesses plus 20 letters affirming good character not entitled to significant weight because most unaware of details of

misconduct].)

Limited mitigating credit is assigned for Spielbauer's good character evidence.

4) No credit for remoteness and subsequent rehabilitation (std. 1.6(h))

Standard 1.6(h) requires a showing of remoteness in time of misconduct and subsequent rehabilitation. Spielbauer argues that mitigation is supported because his misdeeds occurred over ten years ago in 2010. He claims he has since been rehabilitated because he has not engaged in further misconduct.

The court does not find that Spielbauer proved this factor by clear and convincing evidence. It is true that more than a decade has passed since the misconduct and that there is no showing of further wrongdoing. However, Spielbauer was also on notice that he was being investigated by the State Bar since June 2014. (See *In re Gossage* (2000) 23 Cal. 4th 1080, 1099 [time period during which attorney being investigated not entitled to much consideration as proof of rehabilitation and good character.]) Thus, for the last several years, Spielbauer knew that his conduct was being monitored, providing motivation to steer clear of any misdeeds.

Further, this court has found substantial aggravation for Spielbauer's indifference and lack of remorse, displayed throughout this disciplinary proceeding. That finding greatly undermines Spielbauer's claim that he has been rehabilitated. Lastly, Spielbauer has not paid any portion of the judgment to LLC. Without supporting evidence, he asserts that he lacks the financial means to pay all of it. However, the fact that he has failed to pay *any* portion detracts from his claim of rehabilitation. (*In the Matter of Taggart*, 4 Cal. State Bar Ct. Rptr. 302, 310-311 [restitution important indicator of rehabilitation].)

5) No mitigation for excessive delay by State Bar (std. 1.6(i))

Excessive delay by the State Bar in conducting disciplinary proceedings and causing

prejudice to the attorney is a mitigating circumstance. (Std. 1.6(i).) An "attorney must demonstrate that the delay impeded the preparation or presentation of an effective defense." (*In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 361.) Spielbauer claims that mitigation is warranted because he last responded to OCTC's inquiry letter in February 2017, and yet the NDC was not filed until December 2019.

The court does not find that Spielbauer established this factor by clear and convincing evidence. Initially, Spielbauer was on notice regarding potential disciplinary proceedings as early as June 20, 2014, when OCTC sent him a letter inquiring about the judgment, only four months after the judgment was entered. Moreover, Spielbauer replied the following month, stating that the judgment was pending appeal. As he knew that OCTC was investigating this case and because he was appealing the judgment, Spielbauer had no reason to discard any relevant evidence. Indeed, Spielbauer does not even argue that he was prejudiced. (*In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 749 [delay not mitigating where respondent failed to show specific, legally cognizable prejudice].)

In May 2016, the appellate court affirmed the judgement and the Supreme Court denied review. On October 25, 2016, OCTC sent a follow-up email to Spielbauer, noting that the remittitur was issued in August 2016, and asking whether he had paid the monetary judgment issued against him. Spielbauer responded that he had filed for bankruptcy protection and those cases were still pending.

OCTC followed up again and Spielbauer responded on February 14, 2017. OCTC filed the NDC on December 16, 2019. Spielbauer did not supply any case law indicating that a delay of two years and ten months is "excessive." (Cf. *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. at p.12, [over four-year delay in filing charges excessive]; *In the Matter*

of Klein (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 12 [five-year delay excessive]; and *In the Matter of Respondent K*, *supra*, 2 Cal. State Bar Ct. Rptr. at p. 361 [seven-year delay excessive].) At no point did OCTC inform Spielbauer that the investigation was closed and he was well aware that OCTC was concerned about his lack of payment of the judgement—a judgment that he never paid. Thus, he should have reasonably concluded that this matter was still open.

In sum, the court does not find any case law or evidence to suggest that OCTC's delay was extreme or that it affected Spielbauer's ability to present a proper defense. No mitigation is granted under this standard.

VI. Discussion

Given the nature of Spielbauer's transgressions—particularly his misrepresentation to a court, amounting to moral turpitude—and his marked lack of remorse, suspension of 90 days is well-founded.

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. (Std. 1.1.) The discipline analysis begins with the standards, which promote the consistent and uniform application of disciplinary measures and are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 91 [Supreme Court will not reject recommendation arising from standards unless grave doubts as to propriety of recommended discipline].) The court also looks to comparable case law. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) If aggravating or mitigating circumstances are found, they should be considered alone and in balance with each other. (Std. 1.7.)

Standard 1.7(a) provides that if a lawyer is culpable of two or more acts of misconduct

and the standards specify different sanctions for each, the most severe is to be imposed. Here, the strictest sanction is found in standard 2.11 (committing act of moral turpitude), providing that disbarment or actual suspension is presumed. Spielbauer seeks a private or public reproval, which departs from the putative sanction. He offers no case law to support his proffered discipline. OCTC argues that an actual suspension ranging from 90 days to 6 months and until restitution is paid is appropriate.

OCTC cites to *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, in which the attorney was suspended for six months. Farrell was culpable of violating section 6106 because he falsely stated to a judge that a witness had been subpoenaed. He also failed to cooperate with the State Bar investigation, in violation of section 6068, subdivision (i). In aggravation, Farrell had a prior discipline in two client matters resulting in 90 days' actual suspension. In mitigation, he held a good faith belief that the subpoena had actually been sent by his staff. No weight was specified for the aggravating and mitigating factors.

Also helpful in this court's analysis was *In the Matter of Maloney and Virsik*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 787, in which Maloney was actually suspended for 90 days for his intentional misrepresentations to a court, amounting to moral turpitude.[12] The *Maloney* court found numerous factors in aggravation, consisting of (1) uncharged misconduct for additional misrepresentations to the court; (2) overreaching; (3) lack of candor; (4) harm to the administration of justice; (5) multiple acts of misconduct; (6) indifference; and (7) engaging conflicts of interest. Significant weight was given for Maloney's (1) 31 years of discipline-free practice; (2) good character evidence; and (3) community service.

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[12] While this case involved two attorneys, this court focuses on Maloney because he was the partner in charge of litigation tactics who, like Spielbauer, had practiced law for more than 30 years whereas the other attorney was a relatively inexperienced associate.

Although both *Farrell* and *Maloney* are instructive, the court finds that the latter is more fitting to the case at hand. A notable difference in *Farrell* is that the attorney had a prior discipline which resulted in a 90-day suspension. Under the standard mandating progressive discipline, his subsequent suspension had to be greater, unless exceptions applied. Thus, the *Farrell* court observed that discipline must exceed the previous three months suspension.

Maloney's misdeeds were more severe and prolonged than found here. Maloney made repeated misrepresentations to the court for over three months. He submitted numerous pleadings, signed under penalty of perjury, "permeated with half-truths, omissions, and outright misstatements of fact and law." (*In the Matter of Maloney and Virsik*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 786.) Maloney was also culpable of failing to obey a court order. The Review Department found far more aggravating circumstances, including multiple acts of uncharged but proven misconduct, than present in the instant matter.

However, Maloney's transgressions were greatly tempered by his mitigation. Like Spielbauer, Maloney had no prior discipline for over 30 years. But in contrast to Spielbauer, Maloney received significant mitigation for good character and community service from ten witnesses who were aware of his misconduct. They explained that Maloney was motivated by social justice—he had a sincere and substantial commitment to using his professional skills on behalf of the under-served and to do good works within the community, including extensive pro bono. The Review Department emphasized that severe discipline was unnecessary because Maloney's wrongdoing was the result of over-zealous representation of his client and not for personal gain. Spielbauer's misconduct, however, was clearly for personal gain. This court assigned him moderate mitigation as his lengthy period of discipline-free practice was muted by his clear indifference. On balance, given the greater wrongdoing in *Maloney* but also the greater

mitigation, the court finds that similar discipline is appropriate here.

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. Finally, Spielbauer's conduct merits a modest level of discipline—a 90-day suspension. If this court were to impose a requirement that he pay restitution of nearly one million dollars prior to returning to active status, it would undoubtedly have a far greater impact on his ability to practice law than intended.

The court recommends that Spielbauer be suspended from the practice of law for two years, stayed, and placed on probation for two years, including an actual suspension of 90 days.

Monetary sanctions are not applicable

As the NDC was filed before April 1, 2020, and did not provide Spielbauer with notice that he could be subject to monetary sanctions, the rule on monetary sanctions is not applicable. (See Rules Proc. of State Bar, rule 5.137(H).)

RECOMMENDATIONS

It is recommended 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 90 days of his probation.

2) **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.

3) **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.

4) **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.

5) **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 specialist 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 specialist 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.

6) **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 is 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.

7) **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.

8) **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 decision 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.

9) **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.

10) **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, subdivisions (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.

MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION

It is further recommended that 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 decision 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.

CALIFORNIA RULES OF COURT, RULE 9.20

It is further recommended that Spielbauer be ordered to comply with the requirements of California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order imposing discipline in this matter.[13] Failure to do so may result in disbarment or suspension.

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[13] For purposes of compliance with rule 9.20(a), 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, not any later "effective" date of the order. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45.) Further, Thomas John 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 filed 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).)

CERTIFICATE OF ELECTRONIC SERVICE
(Rules Proc. of State Bar, rule 5.27.1.)

I, the undersigned, certify that I am a Court Specialist of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, on December 2, 2022, I transmitted a true copy of the following document(s):

DECISION

by electronic service to **MARIA J. OROPEZA (Office of Chief Trial Counsel)** at the following electronic service address(es) as defined in rule 5.4(29) and as provided in rule 5.26.1 of the Rules of Procedure of the State Bar:

maria.oropeza@calbar.ca.gov

by electronic service to **THOMAS JOHN SPIELBAUER (Respondent)** at the following electronic service address(es) as defined in rule 5.4(29) and as provided in rule 5.26.1 of the Rules of Procedure of the State Bar:

thomas@spielbauer.com, thomas.spielbauer@aol.com

The above document(s) was/were served electronically. My electronic service address is CTROOM1@statebarcourt.ca.gov, and my business address is 180 Howard Street, Floor 6, San Francisco, California, 94105.

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: December 2, 2022

____
Nicholas Lewis
Court Specialist, State Bar Court