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Supreme Court Case No. _____
State Bar Court Case No. SBC-22-O-30217

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In the Matter of Respondent CC
A Licensee of the State Bar

PETITION OF THE OFFICE OF CHIEF TRIAL COUNSEL OF THE STATE BAR OF CALIFORNIA FOR REVIEW OF THE DECISION OF THE STATE BAR COURT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

By this Petition, the State Bar's Office of Chief Trial Counsel ("OCTC") seeks review of a published interlocutory opinion of the Review Department of the State Bar Court ("Review Department") that erroneously narrows the grounds for finding certain attorneys with serious misconduct ineligible to participate in the State Bar's Alternative Dispute Program ("ADP"). ADP allows attorneys with impairment due to drugs or alcohol or mental illness who are in disciplinary proceedings to participate in an alternative disciplinary track that, if completed, would afford them a lesser punishment than they would have if subject to normal disciplinary proceedings.

In particular, this Petition concerns Rules of Procedure of the State Bar, rule 5.382(C)(1).[1] This rule provides that an attorney is not eligible to participate in the ADP if the stipulated facts and conclusions of law in their proceeding, including aggravating factors, show that the attorney's disbarment "is warranted," despite the presence of any mitigating circumstances.

[1] All references to "rule" or "rules" are to the Rules of Procedure of the State Bar of California, unless otherwise noted.

In its published opinion, the Review Department did not apply the commonsense, plain meaning of "is warranted"—i.e., "is justified"—but rather held that "is warranted" means "is required." This holding was erroneous. In addition to being contrary to the phrase's plain meaning and unsupported by any dictionary definition, it nullifies the Board of Trustee's adoption of Rule 5.382(C)(1), which amended the prior version of the ADP rules, under which the only class of attorneys ineligible for ADP were those who were convicted of crimes subjecting them to summary disbarment pursuant to Business and Professions Code section 6102, subdivision (c). As this is the only category of cases for which disbarment is truly "required," the Review Department's holding impermissibly overrules the Board of Trustees's determination that certain attorneys not necessarily subject to summary disbarment—those whose disbarment "is warranted"—should also not be eligible to participate in the ADP. The error in the Review Department's interpretation of "is warranted" as meaning "is required" is also demonstrated by the fact that when the Board of Trustees has wanted to say "is required," it has done so, using the phrase 12 times in the Rules; by contrast, the only other two uses of the phrase "is warranted" in the Rules are not consistent with interpreting the phrase to mean "is required."

The Review Department also erred by holding that the Standards for Attorney Sanctions for Professional Misconduct ("Standards") should not be considered in making a Rule 5.382 eligibility determination. This holding was in error because Rule 5.382(C)(1) requires the State Bar Court to determine whether an attorney's disbarment "is warranted" based on consideration of the attorney's stipulated misconduct, including aggravating and mitigating circumstances. The Standards are the part of the Rules that define what disciplinary sanctions are warranted in a given case, and what aggravating and mitigating circumstances should be considered. It makes no sense to disallow consideration of the Standards when they address the very questions Rule 5.382(C)(1) commands must be answered in determining eligibility, yet this is the result the Review Department's published opinion would compel.

Using its legally erroneous interpretation of Rule 5.382(C)(1), the Review Department held that Respondent here—a lawyer who has committed repeated and serious misconduct in multiple client matters over several years, amounting to client abandonment and habitual disregard of clients' interests—is eligible for ADP because his disbarment would not be "required." This Petition should be granted both so that the State Bar Court can address Respondent's ADP

eligibility under the correct standards—and, as OCTC will argue it should, deny his eligibility and disbar him to protect the public, leaving him the opportunity to demonstrate any rehabilitation (though the record indicates none so far) through a future reinstatement process—but more importantly so that future ADP applicants may be evaluated for eligibility under an interpretation of Rule 5.382(C)(1) supported by its plain language and common sense.

For these reasons and as set forth in detail below, the State Bar respectfully requests that this Court grant this Petition, order the Review Department's opinion depublished, issue an opinion clarifying that under rule 5.382(C)(1), an attorney is ineligible for ADP if the attorney's disbarment would be justified under the stipulated facts and conclusions of law, including mitigating and aggravating circumstances, and that such determination should be made considering the Standards for Attorney Sanctions for Professional Misconduct, and remand the matter to the State Bar Court for further proceedings consistent with the correct interpretation of the rule.

II. ISSUES PRESENTED FOR REVIEW

1. Does the provision of the Rules of Procedure of the State Bar of California, rule 5.382(C)(1), stating that an attorney whose stipulation of facts and conclusions of law shows that the attorney's disbarment "is

warranted" is ineligible to participate in the Alternative Discipline Program mean that the attorney is ineligible if their disbarment "is justified," or that the attorney is ineligible only if their disbarment "is required"?

2. In determining ineligibility for participation in the Alternative Dispute Resolution program pursuant to Rules of Procedure of the State Bar of California, rule 5.382(C)(1), and in particular whether an attorney's disbarment "is warranted," should the State Bar Court consider the Standards for Attorney Sanctions for Professional Misconduct?

III. WHY REVIEW SHOULD BE GRANTED

Review is appropriate because the Supreme Court may review Petitions by OCTC challenging interlocutory decisions under the Court's inherent power to control the attorney discipline process. (*In re Rose* (2000) 22 Cal.4th 430, 439; see also Cal. Rules of Ct., rule 9.3(c) [permitting petitions by review by licensees of interlocutory decisions of the State Bar Court).

Review is necessary to settle important questions of law. (Cal. Rules of Ct., rule 9.16(a)(1).)

This petition is about more than one respondent, or one case. The Review Department opinion of which the State Bar now seeks

review was designated for publication. If review is not granted, the two legal errors that are the subject of this Petition will have the force of law in State Bar Court proceedings, resulting in allowing licensees whose misconduct warrants disbarment to escape that sanction by participating in the ADP—risking harm to the public and to the profession—notwithstanding the Board of Trustees's express determination that such attorneys should not be permitted to participate in the ADP.

IV. STATEMENT OF THE CASE

A. The Lawyer Assistance Program and Alternative Discipline Program

The California Legislature passed the Attorney Diversion and Assistance Act establishing the Lawyer Assistance Program ("LAP") to have the State Bar "seek ways and means to identify and rehabilitate attorneys with impairment due to abuse of drugs or alcohol, or due to mental illness, affecting competency so that attorneys so afflicted may be treated and returned to the practice of law in a manner that will not endanger the public health and safety." (Bus. & Prof. Code, § 6230.) The LAP is a treatment program only, and an attorney's participation in LAP does not relieve the attorney of obligations required by agreements or stipulations with OCTC, court orders, or applicable

statutes regarding attorney discipline. (Bus. & Prof. Code, § 6232, subd. (c).) The LAP does not curtail jurisdiction over attorney discipline. (Bus. & Prof. Code, § 6237.)

Pursuant to Business and Professions Code section 6233, if an attorney is referred to LAP by the State Bar Court, and successfully completes LAP, the attorney is eligible for a dismissal of charges, or a reduction in the recommended discipline. (Bus. & Prof. Code, § 6233.)

Pursuant to Business and Professions Code section 6233, the State Bar Board of Trustees ("Board")[2] enacted Rules of Procedure establishing an alternative disciplinary track for attorneys referred to the LAP by the State Bar Court after the initiation of a disciplinary proceeding, currently known as the Alternative Discipline Program ("ADP").

Previously, the rules governing admission to the alternative disciplinary track did not restrict eligibility for participating in the

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[2] The Board is the State Bar's governing body. (Bus. & Prof. Code, § 6010.) The Board is authorized to enact rules and regulations to carry out State Bar purposes. (Bus. & Prof. Code, § 6025.) The Board may formulate and enforce rules of professional conduct for State Bar members admitted to practice, subject to the Supreme Court's approval. (Bus. & Prof. Code, § 6076.) The Board may also enact rules of procedure to govern disciplinary proceedings in the State Bar Court. (Bus. & Prof. Code, § 6086.5.)

program. In 2004, this alternative disciplinary track was known as the Pilot Program for Respondents with Substance Abuse and/or Mental Health Issues and was governed by then rules 800-807. Pursuant to then rule 802(a), acceptance into the program was at the discretion of the Pilot Program Judge. (See Request for Judicial Notice in Support of State Bar's Petition for Review ("RJN"), at Exhibit 1.)

The rules governing the alternative disciplinary track were revised effective January 1, 2007; the revisions included adding section (b) to then rule 802, which excluded attorneys with convictions warranting summary disbarment under section 6102, subdivision (c) from eligibility for the program. (RJN, Exh. 2.)[3]

By 2008, the alternative disciplinary track had been renamed to become the ADP. Effective July 1, 2008, the Board revised then rule 802 to include, inter alia, a provision that excluded attorneys from being accepted into the ADP if the stipulation of facts and conclusions of law, including factors in aggravation, executed by the respondent and OCTC demonstrated that respondent's disbarment was warranted, despite mitigating circumstances, and a provision that excluded an

[3] At this point, the alternative disciplinary track was known as the State Bar Court's Program for Respondents with Substance Abuse and/or Mental Issues. (RJN, Exh. 2.)

attorney from participation if the attorney's misconduct involved acts of moral turpitude, dishonesty or corruption, that resulted in significant harm to one or more clients or to the administration of justice. (RJN, Exh. 3.)

The current ADP program rules are contained in rules 5.380 through 5.389.[4] ADP is for attorneys who have substance abuse or mental health issues. (Rule 5.380.) The Program Judge issues a Statement of Decision outlining the disposition that will be implemented or recommended to the California Supreme Court if that attorney successfully completes the ADP, and the disposition if the attorney does not complete the program. (Rule 5.384(A)(1)-(2).) Pursuant to rule 5.384(B), if an attorney successfully completes ADP, the disposition may be as low as dismissal. If the attorney does not complete the program, the disposition may be as high as disbarment.[5] (Rule 5.384(B).)

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[4] The Rules of Procedure of the State Bar of California were renumbered in approximately 2011.

[5] For instance, an attorney with serious misconduct that would warrant disbarment if they failed to complete ADP could still be eligible to participate in ADP because their disbarment would not be warranted at the time of the eligibility determination due to mitigating circumstances including their cooperation with the State Bar in making the required stipulation and pursuing ADP.

The current rules set forth specific instances when an attorney is ineligible to participate in ADP. (Rule 5.382(C).) Germane to this case, an attorney is ineligible for ADP if the stipulation of facts and conclusions of law, including aggravating factors, signed by the attorney and OCTC shows that the attorney's disbarment is warranted, despite mitigating circumstances. (Rule 5.382(C)(1).)

B. Respondent CC's Serious Disciplinary History and Current Misconduct

The Review Department's opinion well summarizes Respondent's prior and current misconduct. (RD at pp. 2-8.)

In the first matter, Respondent, who had an immigration practice, stipulated in 2020 to professional misconduct between 2015 and 2017 involving 31 clients. Respondent failed to perform competently in 31 matters by filing perfunctory petitions, failing to pay a filing fee in 27 matters, failing to file a required opening brief in 12 matters, and failing to attach an underling order to the petition in four matters. (RD at p. 3.) Respondent further stipulated that he violated Business and Professions Code section 6103 thirteen times by failing to follow court orders to correct errors in his filings, and that he violated

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These mitigating circumstances would no longer exist if they failed to complete ADP. (See Standards 1.6(e), 1.6 (g).)

former Rule of Professional Conduct 3-700(A)(2) four times by constructively withdrawing from employment without taking reasonable steps to avoid foreseeable prejudice to his client. (*Id.*) Respondent was disbarred by the Board of Immigration Appeals on January 25, 2018, and further stipulated that he violated Business and Professions Code section 6068, subdivision (o)(6) by failing to inform the State Bar of that disbarment within 30 days. (*Id.*) For this misconduct, this Court ordered Respondent actually suspended for 30 months and until he proved rehabilitation; that suspension was effective in May 2021. (RD at p. 4.)

In Respondent's second disciplinary matter, Respondent stipulated in June 2021 to misconduct between October 2017 and June 2018 in one matter involving two clients. (RD at pp. 4-5.) Respondent allowed his paralegal to accept fees and provide legal services to his clients in violation of former Rule of Professional Conduct 1-300(A), failed to refund his clients' fees after he terminated representation in violation of former rule 3-700(D)(2); failed to inform them that he had withdrawn from representation in violation of Business and Professions Code section 6068, subdivision (m); and violated former Rule of Professional Conduct 3-700(A)(2) by not taking reasonable steps to avoid foreseeable prejudice to his clients upon termination. (RD at p.

5.) Among other things, Respondent stipulated, as he did in the first matter, to a habitual disregard of his clients' interests. (*Id*.) The Court ordered a stayed suspension, along with a one-year stayed probation subject to conditions. (*Id*.)

In the third disciplinary matter—the instant matter and the matter which Respondent seeks to address through the ADP—Respondent stipulated to professional misconduct from March 2017 through January 2022 in three immigration matters, two criminal defense matters, and two probation violation matters. (RD at p. 5). The immigration misconduct occurred in 2017 and involved three clients. The stipulated immigration misconduct included failing to inform his client in two matters about his suspension in violation of Business and Professions Code section 6068, subdivision (m) and former Rule of Professional Conduct 3-700(A)(2); failing to perform competently by failing to file a motion to reopen an immigration matter; failure to provide an accounting in two matters in violation of former Rule of Professional Conduct 3-700(D)(2); failing to provide a refund in two matters violation of former Rule of Professional Conduct 3-700(D)(2); accepting fees from a third party without informed written client consent in violation of former Rule of Professional Conduct 3-310(F); failing to perform competently by failing to substitute a new

attorney to his client's case, to reacquire a client's confiscated property, to file an appellate brief, and to respond to an appellate order; violating Business and Professions Code section 6106 by making false statements to his former employee; and failing to respond to State Bar communications regarding the investigations of all three matters in violation of Business and Professions Code section 6068, subdivision (i). (RD at p. 6.)

In the instant disciplinary proceeding, Respondent also stipulated to misconduct in two criminal defense matters, including failing to inform his client of his suspension in both matters in violation of Business and Professions Code section 6068, subdivision (m) and Rule of Professional Conduct 1.16(d); failing to provide an accounting in both matters in violation of Rule of Professional Conduct 1.15(d)(4); failing to respond to State Bar communications regarding the investigations of both matters in violation of Business and Professions Code section 6068, subdivision (i); and, in one of the matters, failing to perform competently in violation of Rule of Professional Conduct 1.1(a) by failing to appear at a hearing in March 2021 to address a bench warrant. (RD at p. 7.)

Finally, in the instant disciplinary matter, Respondent also stipulated to failing to comply with probationary conditions required

from his two prior disciplines, in violation of subsection 6068, subdivision (k), including failing to timely submit five quarterly reports and to file a rule 9.20 compliance declaration in the first matter, and failing to timely schedule a meeting with his probation case specialist and to timely provide proof of restitution in the second matter. (RD at pp. 6-8.)

Taken together, this stipulated misconduct shows that Respondent habitually disregarded his clients and his professional duties, essentially abandoning his clients, and that he continued this pattern after disbarment by the Bureau of Immigration Appeals and State Bar disciplinary proceedings, failing even to meet his probation requirements of his first two discipline matters.

C. The Review Department Decision as Relevant to This Petition

In the instant matter, OCTC filed a notice of disciplinary charges against Respondent in April 2022. (RD at p. 1.) In June 2022, Respondent filed a request for participation in the ADP pursuant to rule 5.381(B). (*Id.*) The Hearing Department issued an order that month accepting Respondent into the ADP. (*Id.*)

OCTC filed a petition for interlocutory review of that order, asserting, as relevant here, that Respondent is ineligible for the ADP under rule 5.382(C)(1). (RD at pp. 1-2.) That rule provides as follows:

> An attorney will not be accepted to participate in the Program if … the stipulation of facts and conclusions of law, including aggravating factors, signed by the attorney and the Office of Chief Trial Counsel shows that the attorney's disbarment is warranted, despite mitigating circumstances ….

(Rule 5.382(C)(1).)

On October 2, 2023, the Review Department issued an opinion and order affirming the Hearing Department's order accepting Respondent into the ADP and denying OCTC's requested interlocutory relief. (RD at p. 16.) That opinion, which was designated for publication, is the subject of this Petition.

In its opinion, the Review Department made two conclusions of law with respect to rule 5.382(C)(1) that OCTC contends in this petition were erroneous and should be reversed.

First, the Review Department held that the phrase "disbarment is warranted" in rule 5.282(C)(1) means "is required." (RD at pp. 8-10.) As shown below, this holding was legally incorrect because it is not consistent with the plain meaning of the word "warranted," would improperly render rule 5.282(C)(1) a nullity, and is not consistent with

the other uses of the words "required" and "warranted" in the Rules of Procedure of the State Bar of California (and inconsistent with the use of "warranted" elsewhere in the State Bar Act).

Second, the Review Department held that, in determining whether the disbarment of an attorney who applies for ADP "is warranted"—as required to determine the attorney's eligibility for ADP—the State Bar Court should not consider the Standards for Attorney Sanctions for Professional Misconduct set forth in Title IV of the Rules of Procedure of the State Bar of California. (RD at pp. 10-11.) As set forth below, this holding was erroneous, as it conflicts with the plain language of rule 5.382(C)(1).

After making the legal conclusions that ineligibility under rule 5.382(C)(1) can only be established if disbarment is "required," and that such determination cannot be made by reference to the Standards for Attorney Sanctions for Professional Misconduct, the Review Department considered Respondent's current and past discipline and determined that disbarment is not required and therefore that Respondent is not ineligible for ADP under rule 5.382(C)(1). (RD at pp. 11-15.) Because, as set forth below, the Review Department's initial interpretation of rule 5.382(C)(1) was legally erroneous, this Court should grant this Petition, order the Review Department's opinion

depublished, issue an opinion clarifying that under rule 5.382(C)(1), an attorney is ineligible for ADP if the attorney's disbarment would be justified under the stipulated facts and conclusions of law, including consideration of aggravating and mitigating circumstances, and that such determination should consider the Standards for Attorney Sanctions for Professional Misconduct, and remand the matter to the State Bar Court for further proceedings consistent with the correct interpretation of the rule.

V. ARGUMENT

A. Under Rule 5.382(C)(1), an Attorney is Ineligible for ADP if the Stipulated Facts Demonstrate that the Attorney's Disbarment is Justified

The Review Department erred in holding that the phrase "disbarment is warranted" in Rule 5.382(C)(1) means "disbarment is required."

First, this interpretation is inconsistent with the "plain, commonsense meaning" of the word, which the Review Department correctly observed should govern the interpretation of the phrase in rule 5.382(C)(1). (RD at pp. 8-9 (citing *Berkeley Hills Watershed Coalition v. City of Berkeley* (2019) 31 Cal.App.5th 880, 890).)

The commonsense plain meaning of the word "warranted" as used in this rule is "justified." This definition is supported by the dictionary definition of the word:

> warranted
> *adjective*
> 1. justified or well-founded: *There is thus no cause for uncertainty here, and no warranted basis for any speculation.*
> 2. backed or covered by a warranty or guarantee: *If you don't distance the turbines from each other, the turbulence from their wakes may reduce their warranted life.*
> 3. authorized: *Every significant business decision made by a warranted contracting officer must be reviewed by an independent board.*
>
> *verb*
> 4. the simple past tense and past participle of warrant.

Dictionary.com (based on The Random House Unabridged Dictionary (Random House, Inc. 2023), *available at* https://www.dictionary.com/browse/warranted (last visited October 15, 2023) (emphasis added).

Rather than apply the plain language meaning of "is warranted," however, the Review Department chose to interpret it as "is required," notwithstanding that this definition does not appear to be supported by any dictionary definition. The Review Department asserted that its interpretation of the phrase is consistent with the definition in Black's Law Dictionary (RD at p. 9), but Black's does not define "warranted," and even its definitions of "warrant" do not include the definition

proposed by the Review Department. Rather, Black's provides the following definitions of "warrant" as a verb:

> 1. To guarantee the security of (realty or personalty, or a person) <the store warranted the safety of the customer's jewelry>.
> 2. To give warranty of (title); to give warranty of title to (a person) <the seller warrants the property's title to the buyer>.
> 3. To promise or guarantee <warrant payment>. "Even today lawyers use the verb 'to warrant' meaning to promise without necessarily indicating that the promise is a warranty." P.S. Atiyah, An Introduction to the Law of Contract 145 n.1 (3d ed. 1981).
> 4. To justify <the conduct warrants a presumption of negligence>.
> 5. To authorize <the manager warranted the search of the premises>.

(Black's Law Dict. (11th ed. 2019).)

Of these definitions of "warrant" provided in Black's, only two—the synonyms "to justify" and "to authorize"—make sense in the context of Rule 5.382(C)(1) (i.e., "disbarment is justified" or "disbarment is authorized"). Yet, rather than utilizing these commonsense, plain language meanings of the phrase, the Review Department erroneously assigned the phrase "is warranted" a definition unsupported by commonsense or any dictionary: "is required."

Further, interpreting "is warranted" to mean "is required" would render rule 3.582(C)(1) a nullity, violating the principle of statutory

construction that statutes should be interpreted to give each part effect. (See *Piazza Properties, Ltd. v. Dep't of Motor Vehicles* (1977) 71 Cal. App. 3d 622, 633 [Statute should be "interpreted in relation to other statutes on the same subject so as to harmonize the whole law and give effect to each part."]; see also *Pulliam v. HNL Auto. Inc.* (2021) 60 Cal. App. 5th 396, 412 ["Generally, we apply the same rules governing statutory interpretation to the interpretation of administrative regulations."].) As discussed *supra* at Part IV.A, when the ADP program first launched, the governing rules did not restrict eligibility at all. Rule amendments effective January 1, 2007 first narrowed eligibility by providing that attorneys subject to summary disbarment pursuant to Business and Professions Code section 6102, subdivision (c), are not eligible for ADP. Later amendments, effective January 1, 2008, added as an additional ground of ineligibility the ground set forth in rule 5.382(C)(1): stipulated facts and conclusions of law demonstrating that an attorney's disbarment "is warranted." By interpreting "is warranted" as "is required," the Review Department nullified this amendment, as the *only* time disbarment is *required* by law is when summary disbarment is mandated pursuant to Business and Professions Code section 6102, subdivision (c) (providing that the Supreme Court "shall summarily disbar the attorney" after conviction

of certain felony or moral turpitude crimes). In other words, by interpreting "is warranted" as "is required," the Review Department improperly negated the Board of Trustees's determination in the 2008 amendments that ADP ineligibility occurs not just for summary disbarment, but for additional misconduct where disbarment "is warranted." The Board of Trustees's enactment of the ineligibility ground set forth in Rule 5.382(C)(1) should be given effect, not disregarded.

Finally, the Review Department's interpretation of "is warranted" to mean "is required" is also inconsistent with other uses of these terms in the Rules of Procedure of the State Bar of California. If the Board of Trustees intended Rule 5.382(C)(1) to make an attorney ineligible for ADP only if their disbarment were required, it could have and would have said so. Indeed, the phrase "is required" occurs 12 times in the Rules of Procedure of the State Bar of California. (See Rules 5.261(C), 5.58(A), 5.122(B), 5.130(D), 5.133(D), 5.138(C), 5.150(E), 5.252, 5.302, 5.311, 3201). This makes clear that when the Board wants to say something "is required," it can and does say so expressly; the fact that the Board chose to say "is warranted" rather than "is required" strongly suggests the Board did not mean "is required." (Cf. *Nat. Res. Def. Council v. Fish & Game Com.* (1994) 28

Cal. App. 4th 1104, 1123 [noting that where a phrase has a history of use and settled meaning, the choice not to use that phrase suggests something else is meant].)[6] By contrast, the Rules of Procedure of the State Bar of California use the phrase "is warranted" in just two other places, and in both of these instances the "is required" definition advanced by the Review Department would not be workable. Rather, in those instances, "is warranted" means "is justified."[7]

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[6] The Review Department's opinion cites *Natural Resources Defense Council*'s interpretation of the phrase "may be warranted" as support for its view that Rule 5.382(C)(1)'s use of the phrase "is warranted" must mean more than a "substantial possibility" of disbarment. (RD at 9.) However, this case does not support the Review Department's decision that "is warranted" means "is required." As an initial matter, the context of that case, where a determination that the listing of a species as endangered "is warranted" would automatically result in the listing of the species as endangered (*Nat. Res. Def. Council*, *supra*, 28 Cal. App. 4th at pp. 114-115), is inapplicable in the disbarment context, where disbarment may be "warranted" or "justified" under the State Bar Act, but may not actually occur given this Court's "inherent judicial authority to disbar or suspend attorneys." (*In re Rose* (2000) 22 Cal. 4th 430, 438 [internal quotations omitted].) Further, even if that case's reasoning did apply, it does not support interpreting "is warranted" as "is required," as the more restrictive meaning the court considered and rejected for "may be warranted" was not "is required," but "is reasonably probable." (*Nat. Res. Def. Council*, *supra,* 28 Cal. App. 4th at p. 1122.)

[7] Rule 5.4(11) states: "'Inquiry' means an evaluation to decide whether any action is warranted by the State Bar based on information relating to the conduct of a State Bar attorney and

Similarly, the State Bar Act uses the phrase "is warranted" only twice, in both instances describing the situations in which a court may assume jurisdiction of a legal practice as those where "supervision of the courts is warranted." (Bus. & Prof. Code §§ 6180.3, subd. (a), 6180.5.) Here, the phrase must mean "is justified," not "is required," because these provisions do not require a court to assume jurisdiction, but merely permit it to. (See Bus. & Prof. Code § 6180.5 ["it may make an order assuming jurisdiction"].)

Thus, not only does the Review Department's interpretation of the phrase "is warranted" contravene the plain, commonsense meaning of the phrase, but it impermissibly nullifies the Board of Trustee's

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received by the Office of Chief Trial Counsel." The phrase "is warranted" here clearly means "is justified" as, given the prosecutorial discretion granted to OCTC by Rule 2601, it would make no sense to characterize an "inquiry" as deciding whether OCTC action is "required."

Similarly, Rule 5.255(D) provides that "[w]hen involuntary inactive enrollment is warranted [under Business and Professions Code section 6007, subdivisions (b)(3) or (c)(2)], the [State Bar] Court will not order interim remedies." It would not make sense to interpret "is warranted" as meaning "is required" here, as the State Bar Court has discretion to order involuntary enrolment under Business and Professions Code section 6007, subdivision (c)(2), which provides that the State Bar Court "may" order involuntary inactive enrollment if certain conditions are met.

enactment of Rule 5.382(C)(1), and is inconsistent with the Board's use of the phrases "is required" and "is warranted" elsewhere in the Rules, as well as with the State Bar Act's use of the phrase. For all of these reasons, the Review Department's interpretation of the phrase "is warranted" in its published opinion is legally erroneous, and review should be granted to correct the error.

B. The Review Department Erred By Holding that the Standards for Attorney Sanctions for Professional Misconduct Should Not Be Considered in Determining Eligibility Under Rule 5.382(C)(1)

In arguing that Respondent is ineligible for ADP under Rule 5.382(C)(1), OCTC argued that Respondent's disbarment is warranted under the Standards for Attorney Sanctions for Professional Misconduct, in particular Standard 1.8(a) (providing for progressive discipline, which supports disbarment here, where the Respondent's prior discipline was a 30-month actual suspension), and Standard 2.7(a) (providing that disbarment is the "presumed sanction for performance, communication, or withdrawal violations demonstrating habitual disregard of client interests"). (RD at p. 10.)

The Review Department held, however, that "utilizing the disciplinary standards under rule 5.382 of the Rules of Procedure of the State Bar is inappropriate because tandard 1.1 states that the

disciplinary standards are a 'means for determining the appropriate disciplinary sanction in a particular case.'" (RD at pp. 10-11.) This refusal to consider the Standards is erroneous, and the stated rationale does not support the holding.

That the Standards "set forth a means for determining the appropriate disciplinary sanction in a particular case" does not at all suggest that they should not be consulted in making an ineligibility determination under Rule 5.382(C)(1); rather, this express purpose of the Standards is served by using the Standards in determining ineligibility under Rule 5.382(C)(1) *because* Rule 5.382(C)(1) requires the State Bar Court to determine whether "disbarment is warranted" *in a particular case*.

Rule 5.382(C)(1) provides as follows:

> An attorney will not be accepted to participate in the Program if … the stipulation of facts and conclusions of law, including aggravating factors, signed by the attorney and the Office of Chief Trial Counsel shows that the attorney's disbarment is warranted, despite mitigating circumstances ….

(Rule 5.382(C)(1).)

If the State Bar Court cannot look to the Standards—the purpose of which is informing what disciplinary sanctions are warranted in a given case—to make the expressly required determination whether

disbarment is warranted in a given case, then it is left without any basis for determining whether disbarment is warranted. This would be an absurd result.

The rule's language is clear—if, after considering all aggravating circumstances and mitigating circumstances, an attorney's disbarment "is warranted," then the attorney will not be accepted into the ADP. Moreover, by expressly stating that aggravating and mitigating circumstances[8] must be considered, Rule 5.382(C)(1) implies that the Standards must be consulted, as the Standards are where aggravating and mitigating circumstances are defined. (See Standards 1.5 and 1.6.)

The Review Department's published holding that the Standards should not be utilized in determining ineligibility under Rule 5.382 is thus inconsistent both with Standard 1.1 and Rule 5.382—upholding the Review Department opinion would leave the State Bar Court with

[8] We note that Rule 5.382(C)(3) refers to "aggravating factors" rather than "aggravating circumstances." This is a distinction without a difference. Indeed, "aggravating circumstances" are defined by the Standards as "factors surrounding a lawyer's misconduct that demonstrate that the primary purposes of discipline warrant a greater sanction than what is otherwise specified in a given Standard." (Standard 1.1(h).)

no clear means by which to determine if disbarment "is warranted."[9] Review should be granted to correct this error as well.

VI. CONCLUSION

For the reasons set forth above, the State Bar respectfully requests that this Court grant this Petition, order the Review Department's opinion depublished, issue an opinion clarifying that under rule 5.382(C)(1), an attorney is ineligible for ADP if the attorney's disbarment would be justified under the stipulated facts and conclusions of law, including mitigating and aggravating circumstances, and that such determination should consider the Standards for Attorney Sanctions for Professional Misconduct, and

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[9] Notably, even in its opinion, the Review Department did not actually follow its unworkable holding that utilizing the Standards is inappropriate. In applying its incorrect interpretation of "is warranted," and concluding that Respondent was not ineligible for ADP under Rule 5.382(C)(1) because his disbarment would not be "required," the Review Department cited various cases that themselves based their discipline determinations on the Standards. (See RD at pp. 12-15 [citing *Twohy v. State Bar* (1989) 48 Cal. 3d 502 [citing Standards 2.3 and 2.4, among other]; *Hawes v. State Bar* (1990) 51 Cal.3d 587 [citing Standards 2.4(a) and 2.6(a)]; *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944 [citing Standards 1.6, 1.7(a), 2.2(b), 2.3, 2.4(b), 2.6, and 2.10]; *In the Matter of Wolf* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1 [citing Standards 1.2 and 1.3].)

remand the matter to the State Bar Court for further proceedings consistent with the correct interpretation of the rule.

Dated: October 17, 2023

Respectfully submitted,

ELLIN DAVTYAN
ROBERT G. RETANA
BRADY R. DEWAR

By: */s/ BRADY R. DEWAR*
BRADY R. DEWAR

Attorneys for
The State Bar of California

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

Pursuant to rule 8.520(c)(1) of the California Rules of Court, I hereby certify that this brief contains 5,630 words. I have relied on the word count of the computer program used to prepare the brief.

Dated: October 17, 2023

/S/ BRADY R. DEWAR
BRADY R. DEWAR

PUBLIC MATTER – DESIGNATED FOR PUBLICATION

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	SBC-22-O-XXXXX
	)	
Respondent CC,	)	OPINION AND ORDER
	)	
	)	
	)	

In April 2022, the Office of Chief Trial Counsel of the State Bar (OCTC) filed a notice of disciplinary charges against respondent CC in the instant matter.[1] In June 2022, respondent filed a request for participation in the Alternative Discipline Program (ADP)[2] pursuant to rule 5.381(B) of the Rules of Procedure of the State Bar. Pursuant to rule 5.382, the Hearing Department issued an order later that month accepting respondent into ADP.[3] OCTC then filed a petition for interlocutory review of the order, asserting that respondent is ineligible for the ADP

[1] We do not identify respondent by name because we rely on certain confidential information. (Rules Proc. of State Bar, rule 5.388.)

[2] Both "ADP" and "Program" are used in the Rules of Procedure of the State Bar to refer to the State Bar Court's Alternative Discipline Program.

[3] As part of respondent's acceptance into ADP three months ago, respondent agreed to a high and a low level of discipline as set forth in the Confidential Statement of Alternative Dispositions by the Program Judge. In 2014, respondent established a solo practice that caused significant stress for him, resulting in his abuse of alcohol beginning in 2017 and his use of cocaine in 2018. Respondent entered the State Bar's Lawyer Assistance Program (LAP) in 2022. The Program Judge found a nexus between respondent's substance abuse issues and the charged misconduct as required pursuant to rule 5.382(A)(3).

under rule 5.382(C)(1) and (C)(3).[4] Respondent filed a response to the petition, and OCTC later filed its reply.

In undertaking a review of the Hearing Department order, we are required to follow rule 5.389 of the Rules of Procedure of the State Bar. Unlike the abuse of discretion or error of law standard of review that generally applies for rule 5.150 petitions,[5] we must "independently review the record and may adopt findings, conclusions, and a decision or recommendation different from those of the Program Judge." (Rules Proc. of State Bar, rule 5.389(B)(1).) Pursuant to rule 5.150(C) and (G), we review the record as provided to us by OCTC in its appendix, along with a confidential appendix filed the same date.[6]

I. RESPONDENT'S STIPULATED MISCONDUCT

Under rule 5.382(C)(1) of the Rules of Procedure of the State Bar, an attorney will not be accepted to participate in the ADP if "the stipulation of facts and conclusions of law, including aggravating factors . . . shows that the attorney's disbarment is warranted, despite mitigating circumstances." As part of the ADP evaluation process by the Program Judge in the instant matter and pursuant to rule 5.382(A)(2), the parties filed a Stipulation Regarding Facts and Conclusions of Law (ADP Stipulation), which states respondent engaged in professional

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[4] As OCTC has limited its appeal of the Hearing Department order to respondent's ineligibility under rule 5.382(C)(1) and (C)(3), we presume that all other conditions for respondent's participation in ADP under rule 5.382(A) have been satisfied.

[5] See rule 5.150(K) of the Rules of Procedure of the State Bar.

[6] We previously struck the filing of the confidential appendix. OCTC then filed a motion to seal the confidential appendix and a motion for reconsideration of our order. Respondent did not file a response to these motions. As OCTC has now requested the confidential appendix be sealed and explained that the documents contained therein were mentioned in OCTC's petition, we find them necessary to be included in the appended record under rule 5.150 of the Rules of Procedure of the State Bar. Therefore, we vacate the portion of our previous order striking the confidential appendix from the record. We grant OCTC's motion for reconsideration and its request to seal the confidential appendix.

misconduct in five client matters and two probation violation matters (*Respondent CC III*). The ADP Stipulation also referenced respondent's two prior discipline matters (*Respondent CC I* and *Respondent CC II*), in which respondent stipulated to misconduct and the Supreme Court ordered discipline. We summarize the stipulations in this section to explain respondent's misconduct and evaluate that misconduct in light of the issues raised by OCTC's appeal.

A. *Respondent CC I*

Respondent's first discipline matter began with charges filed against him in July 2020, and was resolved with a stipulation signed in November and approved by the court in December (2020 Stipulation). Respondent admitted to professional misconduct spanning from 2015 to 2017 and involving 31 clients. Respondent stipulated that he violated former rule 3-110 of the California Rules of Professional Conduct (failure to perform competently)[7] by filing perfunctory petitions that failed to identify the issues of each case in 31 matters, failing to file motions for a stay in 31 matters, failing to pay a filing fee in 27 matters, failing to file a required opening brief in 12 matters, and failing to attach an underlying order to the petition in four matters. He also stipulated that he violated Business and Professions Code section 6103[8] 13 times by failing to follow orders issued to correct errors in his filings and violated former rule 3-700(A)(2) four times by constructively withdrawing from employment without taking reasonable steps to avoid foreseeable prejudice to his client. Respondent also agreed that he failed to inform the State Bar within 30 days of being disbarred by the Board of Immigration Appeals on January 25, 2018, in violation of section 6068, subdivision (o)(6).[9]

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[7] The former California Rules of Professional Conduct were in effect until November 1, 2018, and we refer to them as "former rules."

[8] All further references to sections are to the Business and Professions Code.

[9] The January 25, 2018 order also disbarred respondent from practicing before the Department of Homeland Security and the United States Immigration Courts.

As part of the 2020 Stipulation, the parties agreed to a number of aggravating circumstances as provided under standard 1.5:[10] multiple acts; a pattern of misconduct, including that he had "completely abandoned" three clients; significant harm, including that several of his clients had their cases dismissed because they could not obtain new representation; and all 31 clients were immigrants and thus vulnerable victims. As for mitigating circumstances under standard 1.6, the parties stipulated to a number of those: credit for extraordinary good character; entering into the stipulation; payment of restitution to at least 24 clients; remorse and recognition of wrongdoing; and severe family and emotional stress.

The 2020 Stipulation recognized that respondent's misconduct "demonstrated a habitual disregard of his clients' interests," but the presumption of disbarment under standard 2.7(a)[11] was not "necessary or warranted" due to respondent's highly significant mitigating circumstances. Consequently, the Supreme Court ordered respondent actually suspended for 30 months and until he proves rehabilitation; the suspension was effective in May 2021.[12]

B. *Respondent CC II*

Respondent's second discipline matter was resolved with a stipulation signed and accepted by the court in June 2021 (2021 Stipulation). He admitted to professional misconduct

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[10] 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, unless otherwise noted.

[11] Standard 2.7(a) provides for disbarment when performance, communication, or withdrawal violations demonstrate "habitual disregard of client interests."

[12] The parties relied on *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498 to support this level of discipline. In *Valinoti*, that attorney received a three-year actual suspension when he engaged in a "habitual failure to give reasonable attention to the handling of the affairs" of his nine clients over two and a half years. His misconduct was very similar to respondent's misconduct, but Valinoti additionally engaged in acts of moral turpitude that included aiding the unauthorized practice of law and intentional misrepresentations to an immigration judge, along with serious aggravating circumstances that included, inter alia, a lack of candor to the State Bar.

in one matter involving two clients, which occurred from October 2017 through June 2018. Respondent allowed his paralegal to accept fees and provide legal services to his clients in violation of former rule 1-300(A). He also failed to refund his clients' fees after he terminated the representation in violation of former rule 3-700(D)(2); failed to inform them that he had withdrawn from their case in violation of section 6068, subdivision (m); and failed to avoid reasonably foreseeable prejudice to those clients upon termination of the employment in violation of former rule 3-700(A)(2).

The parties stipulated to aggravating circumstances including prior record of discipline, though reduced due to the overlapping misconduct from the 2020 Stipulation; multiple acts; vulnerable victims; and pattern of misconduct from the 2020 Stipulation. The parties stipulated to mitigating circumstances including credit for entering into the 2021 Stipulation and incorporated the mitigation from the 2020 Stipulation given the overlapping time period.

As for discipline, the 2021 Stipulation again referred to a "habitual disregard of [respondent's] clients' interests," and his "significant mitigating circumstances." The 2021 Stipulation concluded that disbarment was not necessary or warranted, and no progressive discipline was needed, such that only a stayed suspension was necessary. Consequently, the Supreme Court ordered respondent be placed on a stayed suspension, effective in November 2021, along with a one-year stayed probation subject to conditions, including that respondent pay his clients $500 in restitution within the first 30 days of his probation.

C. *Respondent CC III* (Instant Matter)

In the ADP Stipulation, respondent stipulated to professional misconduct in three immigration matters, two criminal defense matters, and two probation violation matters related to *Respondent CC I* and *Respondent CC II*. The ADP Stipulation covers misconduct from March 2017 through January 2022.

1. Immigration Matters

Respondent stipulated to misconduct related to three immigration clients, all occurring in 2017.[13] In the first matter, respondent agreed he failed to inform his client about his suspension in violation of section 6068, subdivision (m), and former rule 3-700(A)(2); failed to perform competently in violation of former rule 3-110(A) by failing to file a motion to reopen an immigration matter; failed to provide an accounting in violation of former rule 4-100(B)(3); failed to provide a refund of unearned fees in violation of former rule 3-700(D)(2); and failed to respond to State Bar communications regarding the investigation of this matter in August 2021 in violation of section 6068, subdivision (i). In the second matter, respondent agreed he again failed to provide an accounting, issue a refund, and respond to the State Bar between March 2021 and July 2021 regarding the investigation. In the third matter, respondent accepted an attorney's fee from a third party without informed written consent from his client in violation of former rule 3-310(F). Also, he again failed to inform the client about his suspension and other significant developments in the case;[14] failed to perform competently by failing to substitute a new attorney to his client's case, reacquire the client's confiscated property, file an appellate brief in March 2018, and respond to an appellate order; and failed to respond to the State Bar in September 2021 and January 2022 regarding the investigation. In addition, he agreed he violated section 6106 by making false statements to his former employee regarding her responsibilities to the client and the status of the client's case.

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[13] The first and third matters occurred during respondent's representation of two clients from March to November 2017; the second matter was for representation around October and November 2017.

[14] He did not tell his client that the attorney handling the case had left respondent's firm, that he had not filed a brief in the client's petition for review in March 2018, and that the appellate court had issued an order in August 2018 requiring the client to move for voluntary dismissal or show cause otherwise.

2. Criminal Defense Matters

Respondent stipulated to misconduct in two criminal defense matters. The first matter involved respondent's representation from January 2020 to May 2021, and the second matter involved representation from June 2020 to May 2021. In the first matter, he failed to inform his client of his suspension in violation of section 6068, subdivision (m), and rule 1.16(d);[15] failed to provide an accounting in violation of rule 1.15(d)(4); and failed to respond to State Bar communications regarding the investigation of this matter in July and August 2021 in violation of section 6068, subdivision (i). In the second matter, respondent failed to perform competently by failing to appear at a hearing in March 2021 to address a bench warrant issued against his client in violation of rule 1.1(a). He again failed to inform his client of his suspension, to provide an accounting, and to respond to State Bar communications in August 2021 regarding the investigation.

3. Probation Violations

Respondent stipulated he did not comply with certain probationary conditions as required from his two prior disciplines, thus violating section 6068, subdivision (k). Regarding *Respondent CC I*, respondent did not submit quarterly reports from October 2021 to October 2022 (five times) and did not file a rule 9.20 compliance declaration by the June 2021 deadline. His first attempt to file his compliance declaration was timely but rejected, and he correctly submitted it again about one month later, which was past the deadline. Regarding

[15] All further references to rules are to the Rules of Professional Conduct, effective November 1, 2018, unless otherwise noted.

Respondent CC II, respondent did not schedule a meeting with his probation case specialist by November 2021, and he failed to provide proof of restitution by December 2021.[16]

4. Aggravation and Mitigation in the ADP Stipulation

Regarding aggravation, the parties stipulated that respondent's two prior records were of significant weight because he was on notice to his misconduct following the filing of charges in July 2020. The parties also stipulated that these acts indicated a common pattern spanning across all three stipulations, along with aggravation for multiple acts, significant harm, failure to make restitution, and vulnerable victims. As for mitigation, the parties stipulated that the ADP Stipulation entitled respondent to mitigation. While the parties also stipulated that other mitigating factors applied (evidence of extraordinary good character, remorse and recognition of wrongdoing, and severe family and financial stress), the mitigation applied to only the immigration matters because they overlapped with the prior discipline, and did not apply to the criminal defense and probationary matters.

II. RESPONDENT'S MISCONDUCT DOES NOT WARRANT DISBARMENT

We have not previously decided a matter that applies rule 5.382(C)(1) of the Rules of Procedure of the State Bar.[17] Therefore, we begin with the pertinent language from that rule: "An attorney will not be accepted to participate in the [ADP] if (1) the stipulation of facts and conclusions of law, including aggravating factors . . . shows that the attorney's disbarment is warranted, despite mitigating circumstances." In interpreting this rule, we look to its "plain, commonsense meaning" in its application. (*Berkeley Hills Watershed Coalition v. City of*

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[16] Regarding *Respondent CC II*, the ADP Stipulation also states he failed to submit four quarterly reports from January 2022 to October 2022, but this misconduct appears to overlap with *Respondent CC I*.

[17] As a rule of procedure promulgated by the State Bar, rule 5.382(C)(1) is an administrative regulation.

Berkeley (2019) 31 Cal.App.5th 880, 890 [administrative regulations interpreted like statutes].) Employing this principle, we focus on the operative phrase, "is warranted," and conclude that this phrase does not have a plain meaning as it has a wide range of meanings when used as a verb.[18]

When a plain meaning or intent "'cannot be discerned directly from the language of the regulation, we may look to a variety of extrinsic aids, including the purpose of the regulation, the legislative history, public policy, and the regulatory scheme of which the regulation is a part.' [Citation.]" (*Berkeley Hills Watershed Coalition v. City of Berkeley*, *supra*, 31 Cal.App.5th at p. 891.) While we have limited extrinsic aids to guide us here,[19] we can also turn to case law. In *Natural Resources Defense Council v. Fish & Game Com.*, 28 Cal.App.4th 1104, the definition of the phrase "may be warranted" is discussed as part of an evidentiary standard under the California Endangered Species Act. The court found that the word "may" in that phrase describes a "substantial possibility" because "may" is "an auxiliary verb qualifying the meaning of another verb by expressing ability, competency, liberty, permission, possibility, probability or contingency." (*Id.* at p. 1119.) From that discussion, we discern that the phrase "disbarment is warranted" would require more than a "substantial possibility" of disbarment because our rule does not use "may." Using that definition, we interpret rule 5.382(C)(1) of the Rules of Procedure of the State Bar to convey that disbarment is conclusive or guaranteed, which is also consistent with the way "warrant" is defined in Black's Law Dictionary. In other words, under

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[18] According to Black's Law Dictionary, "warrant" as a verb has many meanings, including (1) "[t]o guarantee the security of"; (2) "to give warranty of"; (3) "[t]o promise or guarantee"; (4) "to justify"; or (5) "to authorize." (Black's Law Dict. (11th ed. 2019) p. 1902, col. 1.)

[19] On July 14, 2023, OCTC filed a request for judicial notice of the prior versions of the Rules of Procedure of the State Bar governing ADP eligibility. Respondent did not object to the request. We find good cause and grant OCTC's request. Over the years, the eligibility rules have changed, narrowing who is eligible for ADP.

rule 5.382(C)(1), we conclude that an attorney is ineligible for ADP when disbarment is required by his misconduct and the aggravating circumstances.

The narrowing of ADP eligibility under the Rules of Procedure of the State Bar also supports such an interpretation. In 2004, there were no limitations on eligibility; in 2007, attorneys who were subject to summary disbarment were ineligible; and, since 2009, attorneys are ineligible if "disbarment is warranted," which we interpret as disbarment is *required.* OCTC's arguments in the petition also support this interpretation at times: "Attorneys who have committed serious misconduct warranting disbarment should in fact be disbarred and required to submit to a full reinstatement proceeding to show rehabilitation from their substance or mental health issues, and not through an abbreviated ADP proceeding."[20] Such a statement supports the conclusion that only those attorneys who would otherwise *necessarily* be disbarred should be prohibited from acceptance into ADP, not just those attorneys who have a substantial possibility of disbarment.[21]

In its appeal, OCTC mainly argues that the disciplinary standards, particularly standards 1.8(a) and 2.7(a), along with relevant case law and section 6001.1, "compel" respondent's disbarment. First, we conclude that utilizing the disciplinary standards in evaluating ineligibility under rule 5.382 of the Rules of Procedure of the State Bar is inappropriate because standard 1.1 states that the disciplinary standards are "a means for determining the appropriate disciplinary sanction in a particular case." While using the standards

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[20] We disagree with OCTC's other description for ineligibility, that "attorneys who engage in serious misconduct [are] ineligible for participation [in ADP]." We find the word "serious" to be too vague and would disqualify more attorneys than the current grounds for ineligibility under rule 5.382(C) are intended to do. There are many attorney discipline cases involving serious misconduct that do not result in disbarment.

[21] This appears to be consistent with both OCTC's and respondent's briefs regarding the appropriate level of discipline given respondent's participation in ADP, which state that disbarment should be the outcome if respondent fails to successfully complete ADP.

would be appropriate in determining potential dispositions for discipline by the Program Judge pursuant to rule 5.384, an evaluation by the Program Judge does not, in itself, result in a disciplinary sanction. Second, while we agree that "protection of the public shall be paramount" concerning the disciplinary functions of the State Bar as stated in section 6001.1, we are also reminded that section 6230 declares the Legislature's intent to have the State Bar establish "ways and means to identify and rehabilitate attorneys with impairments due to substance use or a mental health disorder affecting competency so that attorneys so afflicted may be treated and returned to the practice of law in a manner that will not endanger the public health and safety."[22] The State Bar has specifically established the ADP to accomplish this goal, which includes giving attorneys, like respondent with substance abuse problems who have become unable to practice law competently, the opportunity to rehabilitate and return to the practice of law.

As to OCTC's argument that relevant case law compels respondent's disbarment, it cites to a number of disbarment cases to support its conclusion that respondent is ineligible for the ADP under rule 5.382(C)(1) of the Rules of Procedure of the State Bar:[23] *Twohy v. State Bar* (1989) 48 Cal.3d 502; *In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547; *In the Matter of Lenard* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 250; *In the Matter of Dixon* (Review Dept 1999) 4 Cal. State Bar Ct. Rptr. 23; and *In the Matter of Berg* (Review

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[22] Pursuant to section 6230, the State Bar subsequently established LAP to implement the intent of the Legislature.

[23] OCTC also argues that rule 5.382(C)(3) makes respondent ineligible because "respondent committed an act of moral turpitude that resulted in harm to a client . . . ." OCTC misreads the rule, which clearly states that an attorney is ineligible for ADP if "the attorney's current misconduct involves acts of moral turpitude, dishonesty, or corruption that has resulted in *significant* harm to one or more clients or to the administration of justice." (Italics added.) In the ADP Stipulation, regarding the third immigration matter, the parties stipulated that his misconduct "harmed one set of clients because his lack of communication allowed the client to be misled by respondent's former employee into thinking that their case was still being handled appropriately by respondent and his staff." Because the stipulation does not provide for significant harm, rule 5.382(C)(3) does not apply.

Dept. 1997) 3 Cal. State Bar Ct. Rptr. 725. Upon review, we conclude that the misconduct in these cases exceeds that of respondent's and does not support a conclusion that respondent's conduct would necessitate or require disbarment.

For instance, in *Twohy*, the Supreme Court disbarred an attorney who had been already disciplined twice and additionally had probation revoked in those matters for failing to comply with the terms of probation.[24] Twohy committed additional misconduct that occurred after the misconduct that was the subject of his earlier disciplines. The misconduct included moral turpitude and failure to communicate with another client, failure to take timely action and to appear at scheduled court appearances on his client's behalf, a failure to return an advance fee, and failure to cooperate with the State Bar investigation. (*Twohy v. State Bar*, *supra*, 48 Cal.3d at p. 510.) Twohy's misconduct resulted in a habitual disregard of his clients' interests, but the Supreme Court did not base disbarment solely on that determination. Important to the recommendation was that Twohy's actions constituted several acts of moral turpitude, occurring over two to three years, resulting in significant detriments to his client including having a bench warrant issued against him and having no ability to contact Twohy to obtain a refund of unearned fees. (See *id.* at p. 512.)

In the instant matter, respondent also stipulated to a habitual disregard of his clients' interests and misconduct involving moral turpitude. However, the moral turpitude to which

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[24] The misconduct in Twohy's first discipline included failure to use reasonable diligence in representing clients' interests, failure to communicate with clients, failure to return unearned fees and client funds, failure to return client files and documents, commingling client funds, and making misrepresentations to clients regarding settlement (moral turpitude). (*Twohy v. State Bar*, *supra*, 48 Cal.3d at p. 513.) He had another discipline later that year resulting in a stayed suspension and probation, which ran concurrently with the first discipline. Twohy was then suspended for failing to pass the professional responsibility examination related to his probation. While suspended, he continued to practice law, resulting in a conviction for the unlawful practice of law and another State Bar disciplinary matter for misrepresenting his status to the court, which we determined was misconduct involving moral turpitude. (*Id.* at pp. 506-507.)

respondent stipulated is less serious than the misconduct in *Twohy*.[25] OCTC's argument that respondent should be ineligible for the ADP due to a pattern or habitual disregard of client interest overlooks the role of moral turpitude in the disbarment cases it cites and the moral turpitude stated in the ADP Stipulation.[26] We find it relevant that OCTC agreed in *Respondent CC I* and *Respondent CC II* that disbarment was not "necessary or warranted" despite involving 32 client matters that demonstrated a habitual disregard of client interests.[27] However, OCTC now argues that the misrepresentations in March and April 2018 require respondent's disbarment. *Twohy* is not sufficiently analogous to the instant matter to come to

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[25] Respondent stipulated to one violation of section 6106 for telling an attorney, his former employee, in March and April 2018 false and misleading statements regarding representation of clients with his firm, including that an appellate brief had been filed and was being handled by the firm.

[26] OCTC also argues that respondent has failed to comply with his disciplinary probation conditions and case law warrants his disbarment because he is not a candidate for any new or further probation, citing to cases including *Barnum v. State Bar* (1990) 52 Cal.3d 104. In *Barnum*, the Supreme Court stated that disbarment was supported by the attorney's "poor performance on probation," but that attorney had no evidence for his claimed clinical depression, and the court emphasized such evidence was "critical to determining whether we risk exposing the public to additional harm by departing from the disbarment recommendation." (*Id.* at p. 113.) Here, we have a completely different situation, specifically the psychiatric examination used to establish the required nexus that diagnoses respondent's clinical syndromes and the LAP that provides treatment for his substance use disorders. Successful completion of LAP would be evidence that would justify the risk that the Supreme Court could not justify in *Barnum*.

[27] OCTC states in its brief that respondent's misconduct in the three immigration matters as described in the ADP Stipulation "can [be treated] . . . as part of respondent's prior discipline[s] because they overlap . . . ." (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619 [aggravating weight of prior discipline reduced if prior misconduct occurred during same time period as instant misconduct].) We interpret this statement to mean that OCTC considers the three immigration matters to not be sufficient additional misconduct to necessitate or warrant disbarment as that is the conclusion stated in both the prior disciplines, but that consideration of the two criminal defense matters and the two probationary matters thus makes respondent ineligible under rule 5.382(C)(1) of the Rules of Procedure of the State Bar. However, we see no reason to not consider all of respondent's misconduct as one extended period for the purpose of evaluating him for the ADP. We do not see *Sklar* as limiting here, as *Sklar* applies in determining the weight to give to an aggravating circumstance, a different task than the one we are called to do here.

such a conclusion.[28] Likewise, our reading of the remainder of the disbarment cases cited by OCTC reveals acts that are or equate to moral turpitude and appear to be far more serious than respondent's: bad faith, dishonesty, and breach of fiduciary duties (*Lenard*); misrepresentations to courts (*Dixon*); fraudulent billing of client (*Berg*); or the pattern of misconduct itself is moral turpitude (*Kaplan*).

We have also found cases where the Supreme Court ordered discipline less than disbarment, even where that attorney's acts demonstrated a pattern of willfully disregarding professional obligations or where the attorney had abandoned clients. First, in *Hawes v. State Bar* (1990) 51 Cal.3d 587, the attorney failed in multiple matters, to act competently, improperly withdrew from employment, failed to return unearned fees, demonstrated a lack of support of state law, showed disrespect to the courts, and failed to cooperate in a State Bar investigation. While we acknowledge that respondent's misconduct is more extensive than the misconduct in *Hawes*, we also observe that the Supreme Court's discipline order was only one year of actual

[28] We also conclude that *Twohy* has limited application as disbarment was predicated on that attorney's substance abuse issues due to stress, which the Supreme Court indicated it was "hesitant to consider . . . as a mitigating factor." (*Twohy v. State Bar*, *supra*, 48 Cal.3d at p. 514.) *Twohy* was decided in 1989, prior to the establishment of a diversion program in 2002 by the Legislature or the ADP that was later established by the State Bar. The ADP is specifically designed to address substance abuse issues such as respondent's. (Rules Proc. of State Bar, rule 5.380.) Further, the Supreme Court determined that Twohy was unable to show that he recovered from his addiction, which also lead to the conclusion of disbarment. (*Id.* at p. 515.) Under ADP, an attorney participates over an 18- to 36-month period and is successful only when LAP certifies that the attorney has been substance-free for at least one year.

discipline, far less than disbarment.[29] The *Valinoti* case, discussed *ante*, is another case where a habitual disregard was found but the discipline ordered was less than disbarment, even though serious acts of moral turpitude greater than respondent's were established. Finally, *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944 [two years' actual suspension for abandonment of clients and overreaching] and *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1 [18-month actual suspension for abandoning over 300 indigent dependency clients and failing to appear in 39 matters] demonstrate that respondent's misconduct resulting in client abandonment, while serious, does not require disbarment.

III. CONCLUSION

We acknowledge that respondent's professional misconduct for the approximately seven years that lead to his request to participate in the ADP is considerable. However, we believe that the ADP should be provided to attorneys such as respondent, even when their misconduct is considerable. In accordance with rule 5.384(B) of the Rules of Procedure of the State Bar, the ADP provides incentives for attorneys to overcome substance abuse or mental issues. If they successfully complete the program, they receive a lesser disposition than if they did not complete the program. Failure to complete ADP may result in disbarment, which is a potential risk respondent faces, and one that he has acknowledged would be appropriate if he does not complete the program.

[29] The Supreme Court's discipline order was based on mitigating evidence, which, in part, demonstrated Hawes's rehabilitation for slightly less than a year from his substance addiction and bipolar disorder issues. While we do not use mitigation here to evaluate respondent's ineligibility for ADP, we conclude that this case is sufficiently applicable to show that respondent's misconduct would not require disbarment.

Therefore, upon consideration of the evidence provided in the record, along with the applicable case law, we conclude that the ADP Stipulation, including aggravating circumstances, does not require respondent's disbarment, despite mitigating circumstances. We do not find that respondent is ineligible to participate in the ADP under rule 5.382(C)(1) or (C)(3). Consequently, we affirm the Hearing Department's order accepting respondent into the ADP and deny the relief requested in OCTC's petition.

McGILL, J.

WE CONCUR:

HONN, P. J.

RIBAS, J.

No. SBC-22-O-XXXXX

In the Matter of

RESPONDENT CC

Hearing Judge

Hon. Yvette D. Roland

Counsel for the Parties

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PROOF OF SERVICE

I, Joan Randolph, hereby certify that I electronically filed and served the attached **PETITION OF THE OFFICE OF CHIEF TRIAL COUNSEL OF THE STATE BAR OF CALIFORNIA FOR REVIEW OF THE DECISION OF THE STATE BAR COURT** with the Clerk of the California Supreme Court and to Respondent (jhidalgo1984@yahoo.com), with Respondent's agreement to accept electronic service, by transmitting a true copy via this Court's TrueFiling system on October 17, 2023.

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed in San Francisco, California this 17th day of October, 2023.

/s/ *Joan Randolph*
JOAN RANDOLPH

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **In the Matter of Respondent CC**
Case Number: **TEMP-C8EJ0GLC**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **brady.dewar@calbar.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
ISI_CASE_INIT_FORM_DT	Case Initiation Form
PETITION FOR REVIEW	1_In the Matter of CC _Petition for Review
REQUEST FOR JUDICIAL NOTICE	2_In the Matter of CC_RJN
ADDITIONAL DOCUMENTS	3_In the Matter of CC_Appendix

Service Recipients:

Person Served	Email Address	Type	Date / Time
Jonathan Hidalgo	jhidalgo1984@yahoo.com	e-Serve	10/17/2023 2:46:28 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

10/17/2023
Date

/s/Joan Randolph
Signature

Dewar, Brady (252776)
Last Name, First Name (PNum)

State Bar of California
Law Firm