APPENDIX

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APPENDIX A

CALIFORNIA SUPREME COURT

No. S263210

IN THE MATTER OF
SCOTTLYNN J. HUBBARD IV,
ON DISCIPLINE MEMBER NO. 212970

Filed October 21, 2020

ORDER REGARDING PETITION FOR REVIEW

The petition for review is denied. The court orders that Scottlynn J. Hubbard IV (Respondent), State Bar Number 212970, is suspended from the practice of law in California for two years, execution of that period of suspension is stayed, and Respondent is placed on probation for two years subject to the following conditions: 1. Respondent is suspended from the practice of law for a minimum of the first year of probation, and Respondent will remain suspended until he provides proof to the State Bar Court of

rehabilitation, fitness to practice and present learning and ability in the general law before the suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).) 2. Respondent must also comply with the other conditions of probation recommended by the Review Department of the State Bar Court in its Opinion filed on May 13, 2020 and modified on June 3, 2020. 3. At the expiration of the period of probation, if Respondent has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated. Respondent must provide to the State Bar's Office of Probation proof of taking and passing the Multistate Professional Responsibility Examination as recommended by the Review Department in its Opinion filed on May 13, 2020 and modified on June 3, 2020. Failure to do so may result in suspension. (Cal. Rules of Court, rule 9.10(b).) Respondent must also comply with California Rules of Court, rule 9.20, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of this order. Failure to do so may result in disbarment or suspension. Respondent must also maintain the records of compliance as required by the conditions of probation. Costs are 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.

APPENDIX B

STATE BAR COURT OF CALIFORNIA
REVIEW DEPARTMENT
EN BANC

Nos. 16-O-10871 (16-O-14863)

IN THE MATTER OF
SCOTTLYNN J. HUBBARD IV
STATE BAR NO. 212970

Filed June 3, 2020

ORDER MODIFYING OPINION
[NO CHANGE IN JUDGMENT]

It is ordered that the opinion filed herein on May 13, 2020, which was not certified for publication, be modified as follows:

On page 28, the opinion erroneously included an inapplicable probation condition. The opinion is corrected to remove probation condition number 9 on page 28.

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].)

Catherine D. Purcell
Presiding Judge

APPENDIX C

STATE BAR COURT OF CALIFORNIA
REVIEW DEPARTMENT
EN BANC

Nos. 16-O-10871 (16-O-14863)

IN THE MATTER OF
SCOTTLYNN J. HUBBARD IV
STATE BAR NO. 212970

Filed May 13, 2020

OPINION
[As Modified on June 3, 2020]

In his first disciplinary case, Scottlynn J. Hubbard IV is charged with ten counts of misconduct stemming from statements he made in two separate appeal proceedings concerning actions his father, Lynn Hubbard III,[1] undertook as an attorney representing

[1] Further references to Lynn Hubbard are to his first name

clients in those two matters. A hearing judge found Hubbard culpable on three counts of moral turpitude, in which he made misleading statements to the United States Supreme Court (U.S. Supreme Court) and the Ninth Circuit Court of Appeals (Ninth Circuit). The judge dismissed six of the charges as duplicative of the three moral turpitude charges found, and she dismissed a charge because the Office of Chief Trial Counsel of the State Bar (OCTC) failed to sustain its burden in proving culpability. The judge's recommended discipline included an actual suspension of one year, continuing until Hubbard provides proof of his rehabilitation, fitness, and present learning and ability to practice law.

Both Hubbard and OCTC appeal. Hubbard argues that he should be exonerated of all charges or, if culpability is found, he should receive more credit in mitigation, the aggravation findings should be dismissed, and the discipline recommendation should be less. OCTC accepts the hearing judge's recommended discipline; however, it seeks reinstatement of the seven dismissed charges.

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we affirm the hearing judge's culpability findings, along with most of the aggravation and mitigation findings. We also find Hubbard culpable of the seven charges that were dismissed. After reviewing the record, the relevant standards, and comparable law, we agree with the

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only to differentiate him from his son; no disrespect is intended.

judge's disciplinary recommendation.

I. PROCEDURAL HISTORY

OCTC filed a Notice of Disciplinary Charges (NDC) on August 7, 2018, alleging ten counts of misconduct: three counts (one, four, and seven) of violating section 6106 of the Business and Professions Code[2] (moral turpitude—misrepresentation); three counts (two, five, and eight) of violating section 6068, subdivision (d) (seeking to mislead a judge); and four counts (three, six, nine, and ten) of violating section 6068, subdivision (b) (failure to maintain respect due to courts and judicial officers). On March 19, 2019, the parties filed a Stipulation as to Facts and Admission of Documents (Stipulation), and a three-day trial took place on March 19, 20, and 21. Posttrial briefing followed and the hearing judge issued her decision on June 27, 2019.

II. BACKGROUND FACTS[3]

Hubbard was admitted to practice law in California on May 31, 2001. Until his father's disciplinary suspension in 2016, Hubbard worked in his father's law office, which represented plaintiffs who alleged violations of the Americans with

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[2] Further references to sections are to this source unless otherwise noted.

[3] The facts included in this opinion are based on the Stipulation, 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).)

Disabilities Act (ADA). The allegations of Hubbard's misconduct in this case arise from his defense of Lynn's actions in appeal proceedings in two separate cases.

A. *Plaza Bonita* Matter

In 2009, Lynn filed an ADA action, *Hubbard v. Plaza Bonita, LP et al.* (*Plaza Bonita* matter), on behalf of his mother, Barbara Hubbard,[4] against several defendants in the United States District Court for the Southern District of California (Case No. 09-CV-1581). During the litigation, Barbara passed away on November 13, 2009. Lynn did not disclose that Barbara had died and, approximately one month later, he sent two of the defendants a settlement agreement containing a signature written as "Barbara Hubbard," which was not, in fact, Barbara's.

On June 13, 2011, a magistrate judge issued an order finding that Lynn, or someone at his direction, signed Barbara's name on the settlement agreement. The judge also found Lynn intentionally deceived and concealed facts from the parties and the court regarding Barbara's death and the origin of her signature. Pursuant to that order, the magistrate judge also ordered that Lynn pay opposing counsel $55,224.05 in sanctions. Hubbard, now representing his father, objected to the sanctions order on June 23, 2011. On July 25, 2013, the district court sustained in

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[4] Further references to Barbara Hubbard are to her first name only to differentiate her from her son and grandson; no disrespect is intended.

part and overruled in part Hubbard's objections to the order, ultimately reducing the sanctions to $49,056.05.

Hubbard appealed the order of monetary sanctions against Lynn to the Ninth Circuit, which affirmed the district court's order on November 12, 2015, and also described Lynn's actions as an intentional deception. Hubbard then petitioned the Ninth Circuit for a rehearing en banc, which was denied. On June 14, 2016, Hubbard filed a petition for writ of certiorari (writ petition) to the U.S. Supreme Court, which also denied Hubbard's appeal.

B. *Vogel* Matter

On January 23, 2013, Lynn filed an ADA complaint in *Vogel v. Tulaphorn, Inc. et al*. (*Vogel* matter) in the United States District Court for the Central District of California (Case No. 13-CV-00464) on behalf of his client, who alleged that he encountered barriers to access at a McDonald's restaurant. Subsequently, Lynn filed a motion for summary judgment (MSJ). Attached to the MSJ was a receipt, photographs documenting the visit, and a declaration from Lynn's client affirming that he had personally received the receipt when he made a purchase from the restaurant on January 8, 2013.

Shortly after the MSJ was filed, Tulaphorn's attorneys disclosed to Lynn that videotape evidence showed it was not the plaintiff who visited the restaurant on the relevant date, but, instead, Lynn and a female companion. The videotape further showed the female companion, and not the plaintiff, purchasing a drink and receiving the receipt. As a

result, Tulaphorn's attorneys filed a motion for terminating sanctions and a request for attorney fees. On November 4, 2013, District Court Judge Phillip Gutierrez held a hearing on the motion and the request, and the next day he granted both. The judge determined Vogel and Lynn engaged in a pattern of falsifying evidence, which amounted to bad faith, given that Vogel never produced any evidence of a different visit to the restaurant nor a sworn statement explaining why he described detailed facts about a visit he later acknowledged did not occur.

Hubbard, acting as counsel for *Vogel*, appealed the order to the Ninth Circuit. On February 4, 2016, a Ninth Circuit panel conducted oral arguments on the matter. On February 17, the Ninth Circuit panel dismissed Hubbard's appeal. On March 2, Hubbard filed a petition for a rehearing en banc with the Ninth Circuit, which was denied on April 1.

III. HUBBARD IS CULPABLE ON ALL COUNTS CHARGED, INCLUDING THOSE COUNTS DISMISSED AS DUPLICATIVE BY THE HEARING JUDGE

A. Count One: Moral Turpitude—Misrepresentation (Bus. & Prof. Code § 6106)[5]

Count Two: Seeking to Mislead Judge (§ 6068,

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[5] Section 6106 provides, "The commission of any act involving moral turpitude, dishonesty, or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment and suspension."

subd. (d))[6]

Count Three: Failure to Maintain Respect Due to Courts and Judicial Officers (§ 6068, subd. (b))[7]

In count one, OCTC charged Hubbard with violating section 6106 by making two misrepresentations in his writ petition to the U.S. Supreme Court in the *Plaza Bonita* matter by stating that, "[t]hroughout [Lynn's] forty-year career [he] has never . . . never . . . been found to have committed professional misconduct . . . " and also that,

> Everything that [Lynn] said in this matter was 100% true, 100% of the time; and there is absolutely no evidence that he fraudulently concealed anything from anyone. [Citation omitted.] More importantly . . . [Lynn] did not come close to (much less cross) the line of professional misconduct, unethical behavior, bad faith, or even recklessness. [Citation omitted.] In fact, after eight years of persecution no one—not [opposing counsel], not the magistrate, not two district [court] judges, not the State Bar of California, not even the Ninth Circuit panel—has identified what

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6 Section 6068, subdivision (d), provides that an attorney has a duty "[t]o employ . . . those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."

7 Section 6068, subdivision (b), provides that an attorney has a duty "[t]o maintain the respect due to the courts of justice and judicial officers."

duty [Lynn] supposedly violated.

The hearing judge found Hubbard culpable as charged and determined both statements to be willful misrepresentations in violation of section 6106.

Hubbard argues that his statements were only introductory arguments and thus not material to the issues before the tribunal, and are, in fact, true when understood in context. We find no merit to these arguments. From OCTC's allegations, we find that Hubbard made misrepresentations when he stated that Lynn never committed professional misconduct throughout his 40-year career, and that no one, including Lynn's opposing counsel, OCTC, or any judge in the case had identified any ethical duty Lynn violated.

Regardless of where Hubbard's statements were made in the writ petition, they are material. He made them for the relevant purpose of securing an advantageous outcome, namely to obtain a reversal by the U.S. Supreme Court of the order issued against Lynn by the district court. (*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].)

We also disagree with Hubbard's argument that his statements are true in context. Simply put, the statements found to be material are also untrue factual assertions. It is clear from Hubbard's first statement that he meant to convey Lynn had never been disciplined from his 1976 admission to practice law until the 2016 filing of the writ petition. This statement leaves out the relevant facts that Lynn had

been disciplined by the district court and the Ninth Circuit in 2013,[8] and also was found culpable of professional misconduct by a State Bar Court hearing judge in 2015.[9] His other statement—that no one involved in the *Plaza Bonita* matter had identified any duty Lynn had violated—is also an intentional misrepresentation of fact. Both the district court and the Ninth Circuit expressly determined that Lynn intentionally deceived his opposing parties when he failed to inform them that the signature on the settlement agreement was not Barbara's. The hearing judge also found intentional deception based on the

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[8] In the Vogel matter, the magistrate judge referred the matter to the Southern District Standing Committee for Discipline. In December 2012, a disciplinary bench trial was held in district court and Hubbard represented his father. On February 4, 2013, the district court suspended Lynn from the practice of law for one year. Hubbard appealed his father's suspension to the Ninth Circuit, which dismissed the appeal and reciprocally suspended Lynn for one year on December 10, 2013.

[9] In 2014, OCTC filed an NDC against Lynn alleging misconduct in the *Plaza Bonita* matter and a second NDC against him and his associate, Kushprett Mehton, alleging misconduct in the *Vogel* matter. At trial, during the conclusion of OCTC's case-in-chief, it dismissed its case against Mehton. OCTC did not dismiss any charges against Lynn and he was found culpable of professional misconduct in both the *Plaza Bonita* and *Vogel* matters. The hearing judge recommended a one-year actual suspension. Lynn appealed and, on August 4, 2016, we recommended a one-year actual suspension to continue until he proves his rehabilitation, fitness, and present learning and ability to practice law, which the Supreme Court ordered on November 29, 2016.

district court's reasons for issuing the terminating sanctions against Lynn in 2013.

Case law is well established that moral turpitude includes an attorney's false or misleading statements to a court or tribunal. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 786.) We agree with the hearing judge that clear and convincing evidence exists[10] in the record to find that Hubbard made two misrepresentations in his writ petition to the U.S. Supreme Court in willful violation of section 6106.

The hearing judge dismissed count two (§ 6068, subd. (d), seeking to mislead a judge) and count three (§ 6068, subd. (b), failing to maintain respect due to courts and judicial officers) as duplicative of count one. We disagree and reverse. We agree with OCTC's argument that an attorney should be found culpable for all misconduct committed, in order to maintain both the highest professional standards and the public's confidence in the legal profession. (*See In the Matter of Moriarty* (Review Dept. 2017) 5 Cal. State Bar Ct. Rptr. 511, 520 [no dismissal of charge where same misconduct proves culpability for another charge].)[11]

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[10] Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

[11] We note that Hubbard cited the California Supreme Court's decision in *Bates v. State Bar* (1990) 51 Cal.3d 1056 to

The evidence, as discussed above, clearly shows that Hubbard's statements were material and intentionally false misrepresentations of fact. We find him culpable of seeking to mislead the U.S. Supreme Court, as alleged in count two, and of failing to maintain respect due it, as alleged in count three, for the same statements that established culpability in count one. (*In the Matter of Moriarty*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 520 [same intentional misrepresentation that violates § 6106 also violates § 6068, subd. (d); *see In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 282 [attorney has responsibility under § 6068, subd. (b), to not withhold material information from court].) Because these findings of culpability for counts two and three are based on the same facts that establish culpability under count one, we assign no additional disciplinary weight. (In the Matter of Moriarty, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 520 [no disciplinary weight assigned for additional culpability findings based on same facts].)

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support his argument that dismissal of duplicative charges is the "rule of law." Our reading of Bates does not lead us to conclude it would be improper to find additional counts of culpability, with no additional disciplinary weight, where the same facts prove that more than one act of professional misconduct occurred. The court in Bates concluded it did not need to "definitely answer" the question of dismissing duplicative allegations of misconduct because the State Bar considered the question moot as a practical matter in determining the discipline for that case. (*Id*. at p. 1060.)

B. Count Four: Moral Turpitude—Misrepresentation (§ 6106)

Count Five: Seeking to Mislead Judge (§ 6068, subd. (d))

Count Six: Failure to Maintain Respect Due to Courts and Judicial Officers (§ 6068, subd. (b))

In count four, OCTC alleged Hubbard violated section 6106 when he concealed from the Ninth Circuit panel during oral argument for the *Vogel* matter that the hearing judge in Lynn's disciplinary case found Lynn culpable of acts involving moral turpitude, and that his appeal of that finding was pending before the Review Department. Further, OCTC alleged Hubbard created the false impression that only Lynn's associate Mehton had been charged for misconduct in the *Vogel* matter even though Lynn had also been charged.

At the February 4, 2016 oral argument, the following exchange took place between Hubbard and Judge Milan Smith:

Judge Smith:	Has the State Bar taken any action in connection with the attorneys in this matter?
Hubbard:	With respect to the attorney responsible for the deposition . . . uh . . . the discovery-related abuses, as I indicated in our reply brief . . .

Judge Smith:	What happened?[12]
Hubbard:	While it happened, all of this . . .
Judge Smith:	No, I mean, what did the State Bar do?
Hubbard:	Oh, the State Bar dismissed in the interests of justice, their words. Dismissed all the charges against him.
Judge Smith:	Any of the other attorneys?
Hubbard:	That was the only attorney.
Judge Smith:	The only one?
Hubbard:	Yes.

The hearing judge found that Hubbard's exchange with the Ninth Circuit judge was intentionally misleading and constituted an act of moral turpitude in willful violation of section 6106.

Hubbard argues he was "completely truthful" in his responses to Judge Smith's questions about the State Bar proceedings. Hubbard's contentions are not credible when reviewing the questions Judge Smith

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[12] Hubbard and OCTC stipulated to the above testimony, but disagreed as to whether Judge Smith's question was "What happened?" or "While it happened?" The hearing judge found the distinction irrelevant in the context of the exchange, and we agree.

asked. The judge's initial question, whether the State Bar took action against the attorneys in the *Vogel* matter, was clearly not limited to those who had been dismissed from the State Bar disciplinary proceedings. Further, as the hearing judge properly concluded, after Hubbard declared, "the State Bar dismissed [the charges] in the interest of justice," Judge Smith then followed up by asking about anybody else Hubbard may have failed to mention: "any of the other attorneys?" to which Hubbard responded, "That was the only attorney," meaning Lynn's associate Mehton. By responding as he did, Hubbard presented a false narrative to the judges because he failed to disclose that Lynn had been found culpable of moral turpitude by the hearing judge in February 2015 based on his conduct in the *Vogel* matter and that an appeal of that finding was pending. These statements are misleading because he gave the clear impression that the State Bar took action only against Mehton, whom it later let go.

Hubbard also asserts that he was not required to further explain because "Judge Smith then stopped asking questions about the State Bar proceeding, and Hubbard moved on." This argument is also not credible. Hubbard had a duty to render complete and candid disclosures to the court once it asked a question; it is not the judge's duty to ensure such disclosures, as he implies. Hubbard's intentional failure to disclose material and relevant information to the Ninth Circuit panel is a dishonest act in violation of section 6106, and we thus find him culpable as charged in count four. (*In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171, 177.)

We also find Hubbard culpable of violating section 6068, subdivision (d) (count five), and section 6068, subdivision (b) (count six), based on the same facts that established moral turpitude in count four.[13] (*See In the Matter of Chesnut*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 174 [concealment of material fact misleads judge just as effectively as false statement and violates § 6068, subd. (d); *In the Matter of Field*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 176 [attorney's failure to disclose material information to court related to subject of court hearing is violation of § 6068, subd. (b)].)

C. Count Seven: Moral Turpitude—Misrepresentation (§ 6106)

Count Eight: Seeking to Mislead Judge (§ 6068, subd. (d))

Count Nine: Failure to Maintain Respect Due to Courts and Judicial Officers (§ 6068, subd. (b))

In count seven, the NDC alleged that Hubbard engaged in five acts, each constituting moral turpitude in violation of section 6106 by making false and misleading statements to the Ninth Circuit in his petition for a rehearing en banc in the *Vogel* matter.

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[13] We reverse the hearing judge's dismissal of counts five and six as duplicative of count four for the same reasons we reversed her dismissals regarding counts two and three as duplicative of count one. We assign no additional disciplinary weight to these culpability findings. (*In the Matter of Moriarty*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 520.)

OCTC also alleged that the same five acts violate section 6068, subdivision (d) (count eight), and section 6068, subdivision (b) (count nine).[14] We discuss each of the five alleged acts separately to determine culpability under the three counts charged.[15]

1. Hubbard Concealed that Lynn Had Been Found Culpable of Misconduct by the State Bar Court

In count seven, OCTC alleges Hubbard concealed from the Ninth Circuit in the petition for rehearing en banc that the hearing judge had found Lynn culpable of professional misconduct and that an appeal of that finding was pending in the Review Department. In the petition, Hubbard first stated, "The State Bar of California . . . prosecuted [Lynn] and Mehton for professional misconduct and ethics violations." However, in the following sentence he claimed, "The results of *that* prosecution was [*sic*] . . . the prosecutor dismissed all of the charges based on . . . accusations of discovery abuse and manufacturing evidence." The judge found Hubbard's statements deliberate and misleading because he "oscillated" between the

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[14] As before, we reverse the hearing judge's dismissal of counts eight and nine as duplicative of count seven for the same reasons we reversed her dismissals regarding counts two and three as duplicative of count one.

[15] Where we find an act establishes culpability for one count, no additional disciplinary weight is added to any subsequent count where culpability is also established for the same act. (*In the Matter of Moriarty*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 520.)

charges against Lynn and Mehton, and Mehton's dismissal. The judge also found Hubbard was deceptive by stating in the petition that "[Lynn's] success was so overwhelming that the State Bar actually appealed the judge's ruling" because Lynn had also *appealed* the judge's decision. She found these statements to be a willful violation of section 6106.

We agree with the hearing judge's analysis that Hubbard's statements were intentionally misleading and violated section 6106 because they concealed and were deceptive about Lynn's disciplinary hearing and appeal. Though his argument is not entirely clear to us, Hubbard claims the judge ignored certain documents admitted into the Ninth Circuit record in coming to her conclusions: his January 30, 2015 Motion for Judicial Notice (providing a copy of the NDC, an excerpt of the transcript from Lynn's disciplinary hearing, and a copy of the order dismissing Mehton); Tulaphorn's June 12, 2015 Request for Judicial Notice (providing a copy of the hearing judge's decision); and his June 22, 2015 response to Tulaphorn's request. These documents were not referenced in the rehearing en banc petition and Hubbard cannot now rely on the evidence in the record not brought to the court's attention by him as a path for him to avoid culpability for his otherwise misleading statements.[16] An attorney is required to

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[16] We note that Hubbard argues that he cited to Tulaphorn's request in the rehearing petition as evidence of his disclosure of the Review Department proceedings. His reference to a docket entry as evidence of his disclosure is not sufficient.

render complete and candid disclosures and never seek to mislead. (*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.) Consequently, we find Hubbard's statements violate section 6106.

We also find that Hubbard's concealment and deceptive statements also sought to mislead the Ninth Circuit, thus violating section 6068, subdivision (d) (count eight). (*Di Sabatino v. State Bar* (1980) 27 Cal.3d 159, 162–163 [attorney's contention that his failure to disclose material information is irrelevant, when court should have known undisclosed information, is "untenable" and supports violation of § 6068, subd. (d)].) These same statements also failed to maintain the respect due the Ninth Circuit under section 6068, subdivision (b) (count nine). (*Mosesian v. State Bar*, *supra*, 8 Cal.3d at p. 66.)

2. Hubbard Misrepresented to the Ninth Circuit OCTC's Statements Made at Mehton and Lynn's Disciplinary Trial

Also in count seven, OCTC alleges that Hubbard misrepresented to the Ninth Circuit that OCTC admitted during Mehton's and Lynn's disciplinary trial that charges would never have been brought if Lynn had been given an opportunity to provide "a response" at an evidentiary hearing by the district court judge in the *Vogel* matter.[17] When OCTC

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[17] Hubbard argues that this allegation, because it does not contain any quote of his from the petition for rehearing en

dismissed the charges against Mehton at the disciplinary trial, it stated, "those counts are dismissed in the interest of justice . . . the reasoning behind the dismissal of [Mehton's] cases is that the State Bar did not have information prior to . . . where the State Bar might have chosen not to go forward on those charges, had [the State Bar received] a response." The hearing judge found it was clear OCTC's statement regarding "a response" that had not been received referred to the investigation of Lynn and Mehton by the State Bar, and not an opportunity for a response in an evidentiary hearing before the federal district court, as Hubbard stated in the rehearing en banc petition. We agree.

We need not go into detail about Hubbard's argument on this issue because the parties clearly stipulated that OCTC used the word "response" to mean the lack of one to the letters the OCTC investigator sent to Lynn and Mehton, and it did not

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banc, should be dismissed for failure to provide adequate notice of the misconduct he had actually done. We decline to dismiss it. From our reading, this allegation adequately describes the event at Lynn's disciplinary hearing, specifically one statement of the OCTC prosecutor, and OCTC's belief that Hubbard used this statement in a dishonest manner in the petition. In fact, his detailed argument regarding this allegation belies his argument for dismissal. Hubbard's statement from the petition that underlies OCTC's allegation is, "The Court must grant this Petition for Rehearing En Banc, as even the State Bar [p]rosecutor admitted that . . . the district court's charges of professional misconduct and ethics violations would never have been brought if [Lynn and Mehton] had had a chance to respond."

refer to Hubbard and Vogel's opportunity to have an evidentiary hearing in district court. With such stipulations in place, we find Hubbard's statement in the rehearing en banc petition intentional and misleading and find him culpable of an act of moral turpitude pursuant to section 6106. (*In the Matter of Maloney and Virsik*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 786.)

We also find that the same misrepresentation by Hubbard to the Ninth Circuit in the rehearing en banc petition establishes culpability under section 6068, subdivision (d) (count eight, seeking to mislead a judge) and section 6068, subdivision (b) (count nine, failure to maintain respect due to courts and judicial officers). (*In the Matter of Moriarty*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 520; *Mosesian v. State Bar*, *supra*, 8 Cal.3d at p. 66.)

3. Hubbard Misrepresented that OCTC Dismissed Charges Immediately after Brenden Brownfield's[18] "Unbelievable" Testimony

Count seven additionally alleges that Hubbard misrepresented to the Ninth Circuit in the petition for rehearing en banc by stating "[Brenden] Brownfield's testimony was so unbelievable that, after he finished, [OCTC] dismissed all of the charges based on his outlandish accusations of discovery abuse and manufacturing evidence!" The hearing judge found

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[18] Brendan Brownfield was an opposing counsel in the *Vogel* matter who testified at Mehton and Lynn's disciplinary trial.

Hubbard's statement to be a deliberate misrepresentation. We agree.

Hubbard's claim that his statement was not one of fact, but instead of argument, is baseless. OCTC did not state it was dismissing charges against Mehton due to Brownfield's testimony and, in fact, OCTC did not "[dismiss] all of the charges." The disciplinary charges against Lynn were fully litigated and he was found culpable of moral turpitude. Hubbard's omission of these relevant facts created a false narrative. We find that his misrepresentation was both material and intentional because he sought to mislead the court and secure an advantage by not unequivocally disclosing Lynn's misconduct, which constitutes moral turpitude and violates section 6106. (*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"].) This same misconduct also supports culpability findings that Hubbard sought to mislead the Ninth Circuit under section 6068, subdivision (d) (count eight) and that he did not maintain the respect due the court under section 6068, subdivision (b) (count nine).

4. OCTC Did Not Prove Hubbard Misrepresented that the Terminating Sanctions in the *Vogel* Matter Were Solely Based on Discovery Violations

Count seven further alleges that Hubbard violated section 6106 by falsely suggesting to the Ninth Circuit that the terminating sanctions in the *Vogel* matter were solely for discovery violations, when he knew

that the sanctions were based on Lynn's misrepresentations in the MSJ. The district court's sanctions order was based on a finding that Lynn "acted recklessly and in bad faith . . . and the most logical conclusion to be drawn is that he intended to deceive the defendant." The hearing judge found Hubbard culpable as charged. Upon our review of the record, we determine that Hubbard did partially disclose in the rehearing petition that the district court found Lynn "participated in a pattern of falsification of evidence that amounted to bad faith[.]" Accordingly, we do not find that OCTC's allegation is supported by clear and convincing evidence in the record. (*Conservatorship of Wendland*, *supra*, 26 Cal.4th at p. 552; *See Ballard v. State Bar* (1983) 35 Cal.3d 274, 291 [all reasonable doubts resolved in favor of attorney].) For the same reasons, we decline to assign culpability under section 6068, subdivision (d) (count eight) or section 6068, subdivision (b) (count nine).

5. Hubbard Misrepresented that Lynn Had a Discipline-Free Record

The final allegation in count seven states that Hubbard violated section 6106 by falsely suggesting to the Ninth Circuit in the petition for rehearing en banc that Lynn did not have a record of professional discipline when, in fact, he had a final record of discipline in the Southern District of California that occurred in 2013. In the petition, Hubbard stated, "[Lynn] has practiced law in California for more than thirty-two years without any record of discipline." The hearing judge found Hubbard committed an act of moral turpitude when he "spuriously suggested" that

Lynn had no record of discipline at the time he wrote the statement to the Ninth Circuit in 2016. We agree with her finding. Hubbard argues his reference to a docket entry following his statement, which points to the hearing judge's decision in 2015 that found Lynn had committed professional misconduct, provides sufficient notice for the Ninth Circuit to evaluate the meaning of his statement. This argument is not credible. As stated earlier, Hubbard has a duty to render complete and candid disclosures to the court. (*In the Matter of Field*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 177.) Hubbard's improper implication and failure to clearly disclose relevant information to the Ninth Circuit in the petition is a dishonest act of moral turpitude in violation of section 6106.

For the same reasons, we also find Hubbard culpable of seeking to mislead the Ninth Circuit, thus violating section 6068, subdivision (d) (count eight), and failing to maintain the respect due the court, thus violating section 6068, subdivision (b) (count nine). (*In the Matter of Chesnut*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 174; *In the Matter of Field*, *supra*, 5 Cal. State Bar Ct. Rptr. at p. 176.)

D. Count Ten: Failing to Maintain Respect Due to Courts and Judicial Officers (§ 6068, subd. (b))

In count ten of the NDC, OCTC charged that Hubbard violated section 6068, subdivision (b), when he attacked the integrity, fairness, and character of United States District Court Judge Philip S. Gutierrez in the petition for rehearing en banc "by falsely claiming that Judge Gutierrez made rulings and

findings that Judge Gutierrez knew were incorrect and contrary to the evidence . . . .” In the petition, Hubbard remarked on the district court judge’s decision:

> This isn’t a case where Judge Gutierrez did not know we were innocent of the charges . . . he did. The record shows that he *knew* that our positions were firmly rooted in binding Ninth Circuit precedent; *knew* that we had never manufactured constitutional standing in an ADA lawsuit (ever); . . . *knew* that Vogel had visited Tulaphorn’s restaurant, which is located next to his brother’s house, before the filing of the lawsuit and had first-hand knowledge of the facility; *knew* that Vogel’s confusion regarding the *actual* date of that visit was traced directly to a clerical error by his lawyers (who not only took full responsibility for their mistake, but worked diligently to correct the record once the mistake was discovered); and *knew* that, given an opportunity, we could have proven all these facts at an evidentiary hearing. It did not matter! The district judge was determined to find that appellants had a history of mendacity, a pattern of deception, and willfully suborned perjury regardless of what the evidence showed; and that is precisely what he did.

The hearing judge dismissed count ten by finding Hubbard’s statements were not “directly disrespectful of the district court judge” and insufficient evidence supported the charge.

OCTC argues the hearing judge's dismissal should be reversed, relying, in large part, on our prior opinion in *In the Matter of Anderson* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 775 and the Supreme Court's decision in Ramirez v. State Bar (1980) 28 Cal.3d 402. In Anderson, we adopted the Ninth Circuit's approach to this issue, as expressed in Standing Committee v. Yagman (9th Cir. 1995) 55 F.3d 1430. As stated in Anderson, in determining an attorney's culpability under section 6068, subdivision (b), for statements made that may impugn the integrity of judicial officers, we are required to first establish that the statement is capable of being proved true or false, such that it cannot be considered a statement of opinion. (*In the Matter of Anderson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 786). Having determined the statement is factual and not opinion, we then determine if it is false, and, finally, if the false statement was made knowingly or with a reckless disregard of the truth. (*Id*. at p. 782.)

First, we find that these statements are considered factual and not opinion, as they assert Hubbard's knowledge of what Judge Gutierrez thought and did. Next, we determine if the statements were false. At a minimum, we find that the first sentence and the last sentence of OCTC's excerpt from Hubbard's petition, as set forth in count ten, are false statements. At oral argument, Hubbard asserted that OCTC did not prove any of the statements false. We disagree and find that OCTC did prove these sentences false. At trial, in response to OCTC's question regarding the evidence he had to prove that his statements about the district court judge were true, Hubbard stated that he had his "personal knowledge." We determine that Hubbard's

response reveals that he had only conjecture without factual substantiation, which is sufficient to establish that the statements were false and at a minimum made with a reckless disregard of the truth. (*See In the Matter of Ramirez*, *supra*, 28 Cal.3d at pp. 411–412 ["conjecture without factual substantiation" demonstrates false statement "made with reckless disregard of the truth" sufficient to find culpability under § 6068, subd. (b)].)[19] We therefore find culpability on this count, as the Supreme Court did in Ramirez. We reverse the hearing judge and find Hubbard culpable of violating section 6068, subdivision (b).

IV. AGGRAVATION AND MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct[20] requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Hubbard to meet the same burden to prove mitigation.

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[19] Regardless of her conclusion on this count, the hearing judge found that Hubbard's statements were "specious because they purport to set forth the [district court] judge's knowledge, when instead they are . . . merely [by] his 'personal knowledge,' and also 'patently misleading.'" (*See McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1032 [judge's factual findings afforded great weight]; Rules Proc. of State Bar, rule 5.155(A).)

[20] Further references to standards are to this source.

A. Aggravation

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

The hearing judge found this standard satisfied by Hubbard's eight misleading statements to different courts and assigned significant weight. We agree the standard applies, but assign moderate weight. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal State Bar Ct. Rptr. 631, 646–647 [three instances of misconduct considered multiple acts].)

2. Uncharged Misconduct (Std. 1.5(h))

Uncharged misconduct cannot serve as an independent basis for discipline, but may be used as an aggravating circumstance. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35–36.) The hearing judge did not find Hubbard culpable under count ten. Instead, the judge found uncharged moral turpitude because Hubbard's statements were patently misleading. However, we found Hubbard culpable of violating section 6068, subdivision (b), as alleged in count ten. Accordingly, we do not adopt the judge's finding of uncharged misconduct.

3. Significant Harm to the Administration of Justice (Std. 1.5(j))

The hearing judge found that Hubbard's misconduct harmed the administration of justice through his repeated misrepresentations to multiple courts and assigned significant weight. We disagree and find that this circumstance has not been established. While Hubbard made multiple misrepresentations and a statement impugning the

integrity of a federal judge, the record does not reveal specific evidence that court time or resources were expended as a result. (*Cf. In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 75, 79 [harm to administration of justice where attorney committed multiple acts of misconduct resulting in considerable court resources wasted].)

4. 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 "great weight" in aggravation for Hubbard's failure to appreciate the wrongfulness of his misconduct. Rather than acknowledging any wrongdoing, Hubbard insists on being exonerated, maintaining that his statements made to the U.S. Supreme Court and to the Ninth Circuit were honest, accurate, and "completely truthful." However, the record makes it clear he engaged in multiple acts of misconduct.[21] While the law does not require false penitence, it does require that an attorney accept responsibility for acts and come to grips with culpability. (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Hubbard has not

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[21] We are also troubled that Hubbard told one witness, in asking him to be a character witness, that "political interests . . . want to see him discredited."

done this, which demonstrates his lack of insight. We assign substantial weight to his indifference.

5. Lack of Candor (Std. 1.5(l))

The hearing judge found that Hubbard's lack of candor during his testimony and in the documentary evidence at trial was a significant aggravating circumstance. However, pursuant to the wording of standard 1.5(l), lack of candor can only be established from statements or acts that occur "during disciplinary investigations or proceedings." Here, the judge identified only one instance where Hubbard displayed a lack of candor in response to her asking why, at the Ninth Circuit oral argument in the *Vogel* matter, he did not mention any other attorneys against whom the State Bar had taken action but only discussed Mehton and the dismissal of his charges. His response, that the judges would not let him, is clearly not accurate when one reviews the video of the Ninth Circuit argument. However, while we assign aggravation for his lack of candor to the judge, we instead assign moderate weight as it occurred only once.

B. Mitigation

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

Mitigation is available where no prior record of discipline exists over many years of practice, coupled with present misconduct that is not likely to recur. The hearing judge gave no mitigation credit for Hubbard's nearly 15 years of discipline-free practice. Given Hubbard's indifference, the multiple misrepresentations in two different courts during

2016, and his lack of candor in 2019, we cannot conclude that his misconduct is aberrational or unlikely to recur. (*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].) In fact, we agree with the judge that future misconduct is "highly likely to recur." Nonetheless, given his years of discipline-free practice, we assign limited mitigating weight for Hubbard's lack of prior discipline. (*Cf. In the Matter of Reiss* (Review Dept. 2012) 5 Cal. State Bar Ct. Rptr. 206, 218 [no mitigation for 13-year discipline-free record where attorney engaged in ten-year pattern of dishonesty and serious misconduct and failed to accept responsibility for wrongdoing].)

2. Candor and Cooperation with State Bar (Std. 1.6(e))

Hubbard's Stipulation with OCTC is a mitigating circumstance to which the hearing judge assigned moderate weight. We agree because, although the Stipulation was comprehensive, Hubbard did not admit culpability, and "more extensive weight in mitigation is accorded those who, where appropriate, willingly admit their culpability as well as the facts." (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190.)

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

Hubbard 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." The hearing judge determined that Hubbard was entitled

to nominal mitigation for his good character. Upon our review of the record, we disagree.

Nine witnesses, including five attorneys, testified at trial regarding Hubbard's good character. (*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"].) The other four witnesses included two former clients, and two friends, one of whom works for a Hubbard family-owned business. Each of the witnesses, representing a broad spectrum of the community, had a basic understanding of the charges against Hubbard, except one person who was not an attorney. (*In re Brown* (1995) 12 Cal.4th 205, 223 [mitigation considered for attorney's good character when witnesses aware of misconduct].) The witnesses attested to Hubbard's intelligence, excellent skills as an attorney, and his integrity, including his kindness and trustworthiness. Further, several of the witnesses have known him for lengthy periods of ten years or more. Accordingly, we assign substantial mitigating weight.

4. Community Service

Under Calvert v. State Bar (1991) 54 Cal.3d 765, 785, community service is a mitigating factor. The hearing judge gave limited weight to Hubbard's volunteer efforts at his children's school and pro bono work he has done for five families affected by the wildfires in Paradise, California. We also note that one of the attorney character witnesses testified that Hubbard recently has been an MCLE presenter. We

therefore assign some mitigating weight to this circumstance.

V. A ONE-YEAR ACTUAL SUSPENSION THAT REQUIRES HUBBARD TO PROVE HIS REHABILITATION AND FITNESS TO PRACTICE LAW IS APPROPRIATE DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to preserve public confidence in the profession; and to maintain high professional standards for attorneys. (Std. 1.1.) Our disciplinary analysis begins with the standards. While they are guidelines for discipline and are not mandatory, we give them great weight to promote consistency. (*In re Silverton* (2005) 36 Cal.4th 81, 91–92.) The Supreme Court has instructed us to follow the standards "whenever possible." (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) We also look to comparable case law for guidance. (*See Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.)

Standard 2.11 applies as it specifically deals with acts of moral turpitude.[22] The hearing judge recommended discipline that included a one-year actual suspension, which is in the range provided in standard 2.11. In reaching this recommendation, the judge relied on three cases: *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269; *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456; and *In the Matter of Chesnut*, *supra*, 4 Cal. State Bar Ct. Rptr. 166.

In *Dahlz*, the attorney received a one-year actual suspension for failing to perform, failing to communicate with a client, improperly withdrawing from representation, and committing an act of moral turpitude by misrepresenting a material fact to an insurance adjuster. The attorney's misconduct was aggravated by multiple acts, one prior discipline, client harm, and lack of candor on several occasions to a State Bar investigator and the hearing judge. His

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[22] Standard 2.11 provides, "Disbarment 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 depends on the magnitude of the misconduct; the extent to which the misconduct harmed or misled the victim, which may include the adjudicator; the impact on the administration of justice, if any; and the extent to which the misconduct related to the member's practice of law." Because we found Hubbard culpable for violating his duties as an attorney under section 6068, subdivisions (b) and (d), standard 2.12(a) applies and also provides that disbarment or actual suspension is the presumed sanction for those violations.

misconduct was mitigated by pro bono activities.

In *Hertz*, the court recommended a two-year actual suspension, along with a recommendation that the attorney not be reinstated until he proved his rehabilitation, fitness, and present learning and ability to practice law under former standard 1.4(c)(ii) (now standard 1.2(c)(1)). The attorney was found culpable of trust account violations under former Rule of Professional Conduct, rule 8-101[23] and also for deceiving a superior court judge related to trust account violations, thus violating section 6106, section 6068, subdivision (d), and former rule 7-105(1). In aggravation, the attorney's misconduct included multiple acts; bad faith, dishonesty, and a persistent refusal to account for trust funds; significant harm to his client who incurred considerable attorney fees and had to file a separate lawsuit to get recompense; harm to the administration of justice; and lack of candor and a pattern of engaging in "prolonged deceit" over a five-year period for nine misrepresentations to the superior court, the Court of Appeal, a State Bar investigator, and the opposing counsel and her client. The attorney's conduct was mitigated by significant good character evidence and substantial pro bono and community service.

Finally, in *Chesnut*, a case that recommended a six-month actual suspension, an attorney was found culpable of making misrepresentations to two judges in a single matter, thus violating section 6068,

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[23] Further reference to rules are to this source.

subdivision (d).[24] Aggravating weight was assigned for lack of candor because he made an untruthful statement during the Hearing Department trial, and also for a prior record of discipline, which included a violation of section 6068, subdivision (d).

While the hearing judge concluded that Hubbard's misconduct was narrower in range than in *Dahlz* or *Hertz*, she determined that a recommendation of a one-year actual suspension, along with the requirement that Hubbard satisfy standard 1.2(c)(1), was necessary given the aggravating factors and the likelihood of future misconduct. OCTC agrees with this analysis and urges us to affirm the judge's recommendation.

Hubbard argues that, if found culpable, *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211 or Drociak v. State Bar (1991) 52 Cal.3d 1085 should guide us in recommending discipline no greater than that given to those attorneys.25[25] We find both cases easily distinguishable as each was found culpable of substantially less misconduct than Hubbard's multiple misrepresentations to two different courts and impugning the integrity of a federal judge. In *Jeffers*, the attorney received probation with no actual suspension for making a

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[24] The same misconduct in *Chesnut* was also found to violate section 6106, but no additional disciplinary weight was given to that culpability finding.

[25] Hubbard has also argued for exoneration; however, because we have found culpability, dismissal is not appropriate.

misrepresentation to a superior court judge and for not attending a hearing to which he was ordered. *In Drociak*, the attorney received 30 days' actual suspension for making misrepresentations to the opposing party by twice attaching a dead client's presigned verification to discovery documents, which was aggravated by his admission that he had other clients sign blank verifications.

After considering the case law, we determine *Chesnut* and *Hertz* are similar to Hubbard's record of misconduct and establish the low and high ends of the appropriate discipline range to recommend. *Dahlz* is insufficiently analogous to guide us as the facts and misconduct underlying the discipline recommendation in *Dahlz* are very different than in this case. Hubbard's misconduct is more serious than that of the attorney in *Chesnut*. He is culpable of three separate instances of moral turpitude for misrepresentation along with an additional act of failing to maintain respect due to courts and judicial officers, which, under the discipline standards, is at the same level of seriousness as moral turpitude. Hubbard seems to argue his misconduct is not as serious as in *Chesnut* because that attorney had a prior discipline for engaging in the same misconduct a second time. We disagree.

We agree with the hearing judge that the extent of the misconduct in *Hertz* is greater than Hubbard's. While only culpable for one violation of both sections 6106 and 6068, subdivision (d), along with a rule violation, the gravamen of *Hertz*'s case was the nine acts of deceit over five years. Those circumstances established the need to recommend a two-year actual

suspension, along with a requirement that the attorney prove his rehabilitation, fitness, and present learning and ability to practice law.

Zealous advocacy is a hallmark of our legal system. However, we find Hubbard's actions went beyond zealous advocacy and fell short of his ultimate duty to be truthful and respectful to the courts. A substantial period of discipline in this case is called for, as, under the factors described in standard 2.11 to determine the degree of discipline to recommend, the magnitude of his misconduct is serious and his acts of misconduct occurred in the practice of law. We determine his aggravation is slightly greater than his mitigation given the circumstances established. Thus, we recommend a one-year actual suspension, as the hearing judge did, which is in the middle of the disciplinary range set forth in standard 2.11.

Even though this is his first disciplinary matter, we also recommend that Hubbard be required to prove his rehabilitation, fitness, and present learning and ability to practice law in a State Bar Court proceeding pursuant to standard 1.2(c)(1). While his acts of misconduct occurred in 2016, his lack of candor in 2019[26] and his complete indifference now make this additional requirement necessary. This further condition will impress upon Hubbard the seriousness of his actions, and it will protect the public, the courts, and the legal profession by providing him the

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[26] The Supreme Court has said that lack of candor may be considered more serious than the misconduct itself. (*In the Matter of Dahlz*, *supra*, 4 Cal State Bar Ct. Rptr at p. 282.)

opportunity to prove that he has gained insight into his misconduct before he returns to the practice of law.

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Scottlynn J. Hubbard IV be suspended from the practice of law for two years, that execution of that suspension be stayed, and that Hubbard be placed on probation for two years on the following conditions:

1. He must be suspended from the practice of law for a minimum of the first year of his probation and until he provides proof to the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, he 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 his first quarterly report.

4. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, he 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. He must report, in writing, any change in the above information to ARCR, within ten days after such change, in the manner required by that office.

5. Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, he 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, he may meet with the probation case specialist in person or by telephone. During the probation period, he 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. During his probation period, the State Bar Court retains jurisdiction over him to address issues concerning compliance with probation conditions. During this period, he 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 membership address, as provided above. Subject to the assertion of applicable privileges, he 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. He 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, he must submit a final report no earlier than ten days before the last day of the probation period and no later than the last day of the probation period.

b. Contents of Reports. He 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. He is directed to maintain proof of his 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 his actual suspension has ended, whichever is longer. He is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

8. Within one year after the effective date of the Supreme Court order imposing discipline in this matter, he 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, he will nonetheless receive credit for such evidence toward his duty to comply with this condition.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Hubbard be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter, or during the period of his actual suspension, whichever is longer, and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).) If he 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.

VIII. RULE 9.20

We further recommend that Hubbard be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivision (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. Failure to do so may result in disbarment or suspension.

IX. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment. 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 reinstatement or return to active status.

McGILL, J.

WE CONCUR:

PURCELL, P. J.

HONN, J.

APPENDIX D

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT
SAN FRANCISCO

Nos. 16-O-10871-MC (16-O-14863)

IN THE MATTER OF
SCOTTLYNN J. HUBBARD IV
STATE BAR NO. 212970

Filed June 27, 2019

DECISION

Introduction

Respondent Scottlynn J. Hubbard IV is charged in two matters with making misrepresentations to several courts and attacking the integrity of a judge. The court finds, by clear and convincing evidence, that Respondent is culpable of three counts involving moral turpitude by making misleading statements to courts, plus an additional uncharged act of making a misleading statement to a court. In view of

Respondent's serious misconduct and the evidence in aggravation and mitigation, the court recommends that Respondent be suspended for two years, execution of that suspension be stayed, he be placed on probation for two years, and he be actually suspended for one year and until he shows proof of his rehabilitation, fitness to practice, and present learning and ability in the general law.

Significant Procedural History

The Office of Chief Trial Counsel of the State Bar (OCTC) filed a notice of disciplinary charges (NDC) in this matter on August 7, 2018. On September 5, Respondent filed a response. On March 19, 2019, the parties filed a comprehensive stipulation as to facts. The trial in this matter was held on March 19, 20, and 21. Both parties filed closing briefs on April 2 and the matter was submitted for decision that same date.

Findings of Fact and Conclusions of Law

Jurisdiction

Respondent was admitted to the practice of law on May 31, 2001, and has since been a licensed attorney of the State Bar of California at all times.

In general, the court does not find Respondent to be a credible witness. As set forth in the aggravation section, Respondent failed to be truthful with this court while defending his misrepresentations to other courts.

Background Facts

The facts in this case arise from Respondent's defense of his father, Lynn Hubbard III (Hubbard), an attorney licensed in California, in Hubbard's disciplinary proceedings before the U.S. District Court for the Southern District of California and the State Bar of California. Since Respondent was admitted to practice law, he has shared a law office with his father and their practice is focused on representing plaintiffs alleging violations of the Americans with Disabilities Act (ADA). Because Respondent's actions arose from defending Hubbard's misconduct, it is necessary to recite the facts surrounding Hubbard's disciplinary proceedings.

***Plaza Bonita* Matter**

In 2009, Hubbard filed an ADA action, *Hubbard v. Plaza Bonita, LP et al.,* case No. 09-CV-1581 *(Plaza Bonita),* in the Southern District of California on behalf of his mother, Barbara Hubbard, against several defendants. Respondent was named in the caption of the complaint and was also listed as a lead attorney on the case. The matter settled and shortly after, plaintiff Barbara Hubbard passed away. Hubbard did not disclose this fact to the defendants. Approximately a month after his mother passed, Hubbard presented defendants with settlement agreements with signatures written as "Barbara Hubbard," which were not the plaintiff's signature.

On June 13, 2011, the magistrate judge issued an order finding that Hubbard, or someone at his direction, signed his mother's name on the settlement agreements. The court also found that Hubbard,

recklessly and in bad faith, misled and concealed facts regarding his mother's death and the origin of the signatures from the parties and the court. The magistrate judge ordered Hubbard to pay monetary sanctions to opposing counsel. The court also referred the matter to the Southern District's Standing Committee for Discipline (Discipline Committee)[1] and ordered that Hubbard's conduct be reported to the State Bar of California.

It is undisputed that Respondent was aware of the magistrate judge's June 13, 2011 order. On behalf of Hubbard, Respondent filed an objection to this order. The district judge overruled the objection on November 29, 2011. A year later, the magistrate judge ordered Hubbard to pay a specified amount to opposing counsel as sanctions for his misconduct.[2]

Respondent appealed the order of monetary sanctions to the Ninth Circuit. On November 12, 2015, the Ninth Circuit affirmed the sanctions and held: "On this record, the district court's finding that Hubbard acted recklessly and in bad faith was not clearly erroneous. Any rational attorney representing a plaintiff in an ADA access case would know that if his client died, the defendants would want to know about it, especially before signing a settlement agreement that promised prospective relief. And by sending the defendant an agreement after his mother's death that

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[1] Members of the Discipline Committee are appointed by the Southern District to investigate disciplinary matters.

[2] The district judge later reduced the amount.

purported to contain her signature when it was not in fact her signature, Hubbard created the impression that she was still alive. Hubbard provides no coherent innocent explanation for this conduct, and the most logical conclusion to be drawn is that he intended to deceive the defendant. Such conduct rises to the level of recklessness and bad faith."

Respondent received a copy of this decision and subsequently petitioned the Ninth Circuit for a rehearing *en bane* on the sanctions against Hubbard. Respondent ultimately appealed the sanctions to the United States Supreme Court in June 2016. In his petition for writ of certiorari (petition for writ) to the Supreme Court, Respondent stated that "[t]hroughout [his] forty-year career, Hubbard has never . . . *never* ... been found to have committed professional misconduct . . . . " (Italics in original.) At the time Respondent submitted this petition, he knew that in February 2013, the Southern District of California had disciplined Hubbard for professional misconduct, as discussed below. Respondent also stated in the petition for writ that "[e]verything that Hubbard said in this matter was 100% true, 100% of the time; and there is absolutely no evidence that he fraudulently concealed anything from anyone."

In August 2012, the Discipline Committee began disciplinary proceedings alleging professional misconduct against Hubbard. In December 2012, the district court held a disciplinary bench trial and Respondent was present. On February 4, 2013, the district judge issued the Findings of Fact and Conclusions of Law and a copy was served on Respondent that same day. Hubbard was suspended

from the practice of law in the Southern District for one year. Respondent appealed the finding of professional misconduct to the Ninth Circuit, which dismissed the appeal. The Ninth Circuit also reciprocally suspended Hubbard.

***Vogel* Matter**

On January 23, 2013, Hubbard filed an ADA complaint in *Vogel v. Tulaphorn, Inc. dba McDonald's# 10746; McDonald's Corp.,* case No. 13-CV-00464 *(Vogel)* in the U.S. District Court for the Central District of California on behalf of a disabled person who alleged that he encountered barriers at a restaurant. In discovery, Hubbard's office provided the defendant with a receipt of a purchase and five photographs taken on plaintiff's purported visit to the restaurant. In June 2013, the defendant deposed the plaintiff who confirmed that the receipt and the photographs were from his own visit to the restaurant.

In August 2013, Hubbard filed a motion for summary judgement (MSJ) on behalf of the plaintiff. Attached to the MSJ was a declaration from the plaintiff in which he again swore under penalty of perjury, that he personally received the receipt when he made a purchase from the restaurant on the date in question. Hubbard attached the receipt and the photographs to the MSJ.

Shortly after the MSJ was filed, the defendant disclosed to Hubbard that there was videotape evidence that it was not the plaintiff who had visited the restaurant on the relevant date, but Hubbard and a female companion. The videotape further showed that it was the female companion, and not the

plaintiff, who purchased a drink and obtained the receipt. The defendant filed a motion for terminating sanctions and attorney's fees.

On November 4, 2013, District Judge Phillip Gutierrez held a hearing on the motion. The judge denied the plaintiff's request for an evidentiary hearing, explaining in his findings, "[a]t hearing, Counsel requested an evidentiary hearing to allow Plaintiff to appear before the Court. However, the Court sees no merit in conducting an additional hearing because Counsel conceded that Plaintiff would merely reiterate facts and arguments already contained in the Opposition brief currently before the Court." The judge granted the motion for terminating sanctions and ultimately awarded attorney's fees for over $75,000.

Respondent appealed the order to the Ninth Circuit. On February 4, 2016, oral argument was held before the Ninth Circuit and the following exchange took place:

> Judge Milan Smith: Has the State Bar taken any action in connection with the attorneys in this matter?
>
> Scott Hubbard: With respect to the attorney responsible for the deposition ... uh ... the discovery-related abuses, as I indicated in our reply brief…

Judge Smith: What happened?[3]

Scott Hubbard: While it happened, all of this ...

Judge Smith: No, I mean, what did the State Bar do?

Scott Hubbard: Oh, the State Bar dismissed in the interests of justice, their words. Dismissed all the charges against him.

Judge Smith: Any of the other attorneys?

Scott Hubbard: That was the only attorney.

Judge Smith: The only one?

Scott Hubbard: Yes.

On March 2, 2016, Respondent filed a petition for rehearing *en bane* with the Ninth Circuit (petition for rehearing.) As discussed below, OCTC prosecuted Hubbard for alleged misconduct in the *Plaza Bonita* and *Vogel* matters. OCTC also charged Hubbard's associate, Khushpreet Mehton, for alleged misconduct in the *Vogel* matter. In the petition for rehearing, Respondent stated: "The State Bar of California ... prosecuted Hubbard and Mehton for professional misconduct and ethics violations." In the very next

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[3] OCTC and Respondent stipulated to the above testimony with the exception of one portion. The parties disagree whether Judge Smith said: "While it happened?" or "What happened?" The court does not find this distinction relevant in the context of the exchange.

sentence, Respondent stated: "The results of *that* prosecution [were] ... the prosecutor dismissed all of the charges based on ... accusations of discovery abuse and manufacturing evidence." (Italics in original.)

Respondent never stated that Hubbard had been found culpable of professional misconduct and disciplined by the hearing judge of the State Bar Court. Respondent also stated in the petition for rehearing that (1) OCTC admitted that the charges would never have been brought if Hubbard and Mehton had a chance to respond to the *Vogel* district court's concerns in an evidentiary hearing; (2) OCTC dismissed charges against Mehton immediately after Brendan Brownfield, opposing counsel in the *Vogel* matter, testified because his testimony was so unbelievable; (3) the monetary sanctions in *Vogel* were imposed solely for discovery violations; and (4) Hubbard "has practiced law in California for more than thirty-two years without any record of discipline."

Hubbard's State Bar Discipline

In May 2014, OCTC filed three separate Notices of Disciplinary Charges against Hubbard regarding the finding of professional misconduct in the *Plaza Bonita* matter, failure to report judicial sanctions in a separate case, and the misconduct in the *Vogel* matter. OCTC also filed an NDC against Hubbard's associate, Mehton, for actions in the *Vogel* matter. The matters were consolidated for trial. On the first day of trial, Hubbard stipulated that he was culpable of willfully violating Business and Professions Code section 6068(o)(3) for failing to timely notify the State Bar of

judicial sanctions.[4]

At trial, a former OCTC investigator testified that, during the investigation, he sent letters to Mehton and Hubbard regarding allegations of misconduct, but never received a formal response from their attorney. Mehton and Hubbard testified that they did not know whether their counsel had provided a formal response.

During trial on October 1, 2014, Brownfield, opposing counsel in the *Vogel* matter, testified. On October 3, OCTC recalled Mehton. With Mehton as its last witness, OCTC concluded its case-in-chief. After a break, OCTC dismissed the case against Mehton. OCTC referenced a "response" when moving for dismissal against Mehton which was a reference to Hubbard and Mehton's response to the letters the OCTC investigator sent. "Response" did not refer to an opportunity for Hubbard to respond to the motion for terminating sanctions through an evidentiary hearing in the district court. OCTC did not dismiss any charges against Hubbard.

On February 18, 2015, the State Bar Court Hearing Department issued a decision and recommendations, finding Hubbard culpable of professional misconduct. Pursuant to his stipulation, the court found that Hubbard's failure to timely report a sanctions order constituted a willful violation of section 6068(o)(3). With respect to the *Plaza Bonita* matter, the court found that Hubbard's "conduct

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[4] All further statutory references are to the Business and Professions Code unless otherwise indicated.

violated, at a minimum, the prohibitions of section 6106; section 6068 subsection (d); and [California Rules of Professional Conduct] rules 5-200 and 5-220." Finally, the court found that Hubbard's conduct in the *Vogel* matter "constituted an act of moral turpitude and a willful violation of section 6106."

The court recommended that Hubbard be suspended from the practice of law for two years; execution of that suspension stayed; and Hubbard be placed on probation for three years, with a one-year actual suspension, among other recommendations. Respondent received a copy of this decision and both Hubbard and the State Bar appealed to the Review Department. On December 22, 2015, at Hubbard's request, the Review Department abated the appeal pending the Ninth Circuit's decision on Hubbard's appeal of the terminating sanctions in the *Vogel* matter.

Conclusions

Count One - Moral Turpitude - False Statements to United States Supreme Court (§6106)

Section 6106 provides that "[t]he commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." The NDC alleges that Respondent engaged in acts involving moral turpitude by making two misleading statements in his June 2016 petition for writ to the United States Supreme Court.

Count One (a)

Count One first alleges that Respondent sought to mislead the Court through his statement: "Throughout this forty-year career, [Respondent's father Lynn] Hubbard has never ... *never* … been found to have committed professional misconduct … ." (Italics in original.)

Respondent, who emphatically stands by the statement above, argues that this was merely an introduction to a discussion of misconduct. Respondent states that he meant to convey that Hubbard was not found guilty of misconduct until opposing counsel made accusations. The court squarely rejects this argument. The court has carefully reviewed Respondent's petition for writ and there is no mention of the multiple, conclusive findings of professional misconduct by Hubbard. Respondent merely states that an opposing party had "accused" Hubbard of misrepresentation and breaching his professional duties. He also includes a cursory footnote, stating that the *Plaza Bonita* district court judge found Hubbard *"may have"* violated various statutes and rules. (Italics in original.) The inclusion of this footnote, but the *omission* of all the other disciplinary findings, can only have been done to mislead the Supreme Court.

Importantly, at the time he submitted this petition, there is no doubt that Respondent was *fully* aware that in February 2013, the Southern District of California had disciplined Hubbard for professional misconduct. Hubbard was suspended for one year for his "intentionally deceptive and misleading" conduct.

The Ninth Circuit also reciprocally suspended Hubbard.

There is no doubt that Respondent *was fully* aware that in 2014, Hubbard had admitted to professional misconduct in the State Bar Court by stipulating to culpability for failure to report judicial sanctions. There is no doubt that Respondent was *fully* aware that in 2015, the State Bar Court found Hubbard culpable of professional misconduct, including moral turpitude, in the *Plaza Bonita* and *Vogel* matters.

As OCTC points out, at the time Respondent made this statement in 2016, Hubbard, who was admitted to practice in 1976, had been practicing law for 40 years. Each judicial determination of misconduct detailed above was made in previous years. Moreover, Respondent wrote in the present tense. The petition begins with "Lynn Hubbard III *has* been practicing law for almost forty years. He *has* filed thousands of ADA lawsuits … ." (Italics added.) Respondent continues in the present tense, "Throughout *this* forty-year career, Hubbard *has* never . . . been found to have committed professional misconduct … ." (Italics added.) There is no conclusion other than Respondent wanted to deceive the Supreme Court into believing that, up to the point of filing the petition for writ, Hubbard had never been found to have committed professional misconduct.

Count One (b)

Second, Count One alleges that Respondent sought to mislead the Supreme Court in the petition for writ through the following statement: "Everything that Hubbard said in this matter was 100% true, 100% of

the time; and there is absolutely no evidence that he fraudulently concealed anything from anyone. *Pet.App. 112a-128a, & 161a-178a.* More importantly, … he did not come close to (much less cross) the line of professional misconduct, unethical behavior, bad faith, or even recklessness. *Ibid.* In fact, after eight years of persecution, *no one* - not Peters [opposing counsel], not the magistrate, not two district judges, not the State Bar of California, not even the Ninth Circuit panel - has identified what duty Hubbard supposedly violated." (Italics in original.)

Respondent contends that these statements were merely arguments and were not intended to be considered statements of fact. However, after reviewing the record, the court concludes that the statements as set forth are deceptive as *multiple* courts had *specifically* identified the professional duties violated by Hubbard. As early as 2011, the Southern District found that Hubbard had violated his duty of candor. In 2013, Hubbard was disciplined and suspended by the Southern District of California for "unprofessional conduct that violates ABA model rules 3.3, 4.l (a), 7.1, and 8.; California Rules of Professional Conduct 5-200 and 5-220; and State Bar Act sections 6101, 6068(b), and 6068(d) ... [and] Civil Local Rule 83.4." In 2014, Hubbard admitted to professional misconduct by stipulating to culpability for failure to report judicial sanctions in willful violation of section 6068(0)(3). In 2015, the State Bar Court found that Hubbard had violated multiple provisions of the Business and Professions Code as well as the former Rules of Professional Conduct.

The court concludes OCTC has met its burden as to all of the alleged misleading statements in this count by clear and convincing evidence. Respondent intentionally committed acts involving moral turpitude by making the misrepresentations in the petition for writ in willful violation of section 6106.

Counts Two and Three - Seeking to Mislead a Court (§6068(d)) and Failing to Maintain Respect Due to Courts (§ 6068(h))

The facts alleged to support the violations in Counts Two and Three are the same as those alleged in Count One, and therefore the charges in these two counts are duplicative. The court dismisses Counts Two and Three with prejudice. *(Bates v. State Bar* (1990) 51 Cal.3d 1056, 1059-1060 [Little, if any, purpose is served by duplicative allegations of misconduct]; *In the Matter of Romano* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 391, 397.)

Count Four - Moral Turpitude - False Statements to Ninth Circuit During Oral Argument in Vogel Case (§6106)

In Count Four, OCTC alleges that Respondent committed acts involving moral turpitude by concealing from the Ninth Circuit during oral argument that (1) after a disciplinary trial in the State Bar Court, a hearing judge had found Hubbard culpable of acts involving moral turpitude for his conduct in the *Vogel* case; and (2) Hubbard's appeal of the hearing judge's finding was pending before the State Bar Court Review Department. The NDC alleges that Respondent created the false impression in response to questioning at oral argument that

OCTC had charged only one attorney with misconduct in the *Vogel* case and that the charges against that one attorney had been dismissed. Respondent contends that he responded to the Ninth Circuit judge's questions truthfully at all times.

It is clear from the exchange set forth in the recitation of facts that the Ninth Circuit judge was inquiring at the oral argument about *all* attorneys subject to discipline. The judge asked Respondent: "Has the State Bar taken any action in connection with the attorneys in this matter?" Respondent only answered with respect to Mehton and not Hubbard. Even if the court gives Respondent the benefit of the doubt, that he was beginning by answering about Mehton and was then intending to discuss Hubbard, Respondent never clarified, despite having multiple opportunities. In reviewing the transcript, the admission of which Respondent stipulated to, and the video of the oral argument, the Ninth Circuit judge next asked Respondent "[a]ny of the other attorneys?" and then again "[t]he only one?"

When examined by this court at trial, Respondent was not truthful in his testimony. When this court asked Respondent if he discussed the second attorney, Hubbard, at the oral argument, Respondent stated that the Ninth Circuit would not allow him to do so. As shown above, this is not true.

The court finds that Respondent intentionally allowed the Ninth Circuit panel to conclude that OCTC had dismissed proceedings against the one and only attorney being disciplined. Respondent also failed to make clear that Hubbard was appealing the State

Bar Court hearing judge's decision, which found him culpable of multiple counts of misconduct. Under these circumstances, Respondent is culpable of engaging in an act of moral turpitude by intentionally misleading the Ninth Circuit during oral argument in willful violation of section 6106.

Counts Five and Six - Seeking to Mislead a Court (§6068(d)) and Failing to Maintain Respect Due to Courts (§ 6068(b))

As with Counts Two and Three, the court determines that the charges set forth in Counts Five and Six are duplicative of Count Four. These charges are dismissed with prejudice. *(Bates v. State Bar, supra,* 5 1 Cal.3d at pp. 1059-1 060; *In the Matter of Romano, supra,* 5 Cal. State Bar Ct. Rptr. at p. 397.)

Count Seven - Moral Turpitude - False Statements to Ninth Circuit in Petition for Rehearing in Vogel Case (§61 06)

In Count Seven, Respondent is charged with engaging in acts involving moral turpitude by making several misleading statements to the Ninth Circuit in his *Vogel* petition for rehearing.

Count Seven (a)

First, Count Seven alleges that Respondent concealed in the petition for rehearing that Hubbard had been found culpable of professional misconduct and disciplined by the hearing judge of the State Bar Court. As noted previously, Respondent stated in the petition for rehearing: "The State Bar of California . . . prosecuted Hubbard and Mehton for professional

misconduct and ethics violations." In the very next sentence, Respondent stated: "The results of *that* prosecution [were] . . . the prosecutor dismissed all of the charges based on . . . accusations of discovery abuse and manufacturing evidence." (Italics in original.) In the first sentence, Respondent discussed Hubbard and Mehton. In the second sentence, he only discussed Mehton and only the outcome of the case as to him. Throughout the petition, Respondent oscillated between discussions of charges against Hubbard and the outcome of the disciplinary proceeding as to Mehton. The court concludes that this play of words is deliberate and misleading, constituting a willful violation of section 6106.

In another instance of deception, Respondent stated in his petition for rehearing that "Hubbard's success was so overwhelming that the State Bar actually *appealed* the judge's ruling." (Italics in original.) Yet Hubbard, through Respondent, also filed an appeal because he was found culpable of multiple acts of misconduct. As Respondent admits at trial, at times in the petition he only talked about Mehton, at times his father, and at times his law firm. This creates a record that is misleading to an objective reader.

Although Respondent asserts that the hearing judge's decision was on appeal and therefore not final, that fact does not change Respondent's concealment of the hearing judge's determination that Hubbard was culpable of misconduct. Respondent could easily have disclosed the culpability determination and then stated that it was on appeal.

Respondent also argues that accusations regarding discovery abuse were dismissed by State Bar Court, but that is untrue. The hearing judge found Hubbard culpable of acts involving moral turpitude for his filing of the MSJ, which included the false discovery information.

Count Seven (b)

Second, Count Seven alleges that Respondent misrepresented to the Ninth Circuit that, in the Hubbard matter, OCTC admitted that disciplinary charges would never have been brought if Hubbard had an evidentiary in *Vogel*. Respondent contends that his interpretation of OCTC's statements was correct, or at least reasonable. However, it is clear that OCTC was referring there to a response to the investigation of the State Bar matter, and not an evidentiary hearing before the district court. Respondent's deceptive statement willfully violates section 6106.

Count Seven (c)

Third, this count alleges that Respondent misrepresented to the Ninth Circuit that, in the Hubbard matter, OCTC dismissed charges immediately after Brownfield testified because his testimony was so unbelievable. Upon the court's review of the record, however, it is evident that OCTC dismissed its charges against Mehton after it recalled Mehton to testify. Brownfield had testified two days earlier, and there were six witnesses who testified after Brownfield on that day. At trial, Respondent admitted that OCTC never stated it was dismissing because of Brownfield's testimony. Accordingly, it was

misleading for Respondent to state in the petition for rehearing: "Brownfield's testimony was so unbelievable that, after he finished, the prosecutor dismissed all the charges based on this outlandish accusations of discovery abuse and manufacturing evidence!" Respondent's specious statement is a further willful violation of section 6106.

Count Seven (d)

Fourth, Count Seven alleges that Respondent misrepresented to the Ninth Circuit that the monetary sanctions in *Vogel* were solely for discovery violations, when he knew that these sanctions were also based on Hubbard's misrepresentations in the MSJ. Respondent argues that he attached the Hubbard State Bar Court decision to the petition for rehearing. Moreover, he asserts this was merely an opinion and not a statement of fact. However, the court has reviewed the record and concludes that Respondent did intend to convey that the monetary sanctions in *Vogel* were imposed solely for discovery violations. As stated previously, the hearing judge found Hubbard culpable of committing acts involving moral turpitude for filing the MSJ, which included the false discovery information. Further, the district court's order specifies that the sanctions were imposed for bad faith litigation tactics, specifically including misrepresentations, not simply for discovery violations. This also constitutes a willful violation of section 6106.

Count Seven (e)

Finally, this count alleges that Respondent falsely suggested to the Ninth Circuit in the *Vogel* petition for rehearing that Hubbard "has practiced law in California for more than thirty-two years without any record of discipline."[5] Again, Respondent used the present tense, "has" practiced law, which spuriously suggests that the lack of discipline is current. Respondent argues that, immediately after this quote, he cited to a docket entry that refers to the Hearing Department decision in which Hubbard was found to have practiced for 32 years before discipline was imposed. Respondent would expect a court to view the docket reference. This argument is not convincing. Upon examination of the petition, the court finds that Respondent citation is a mere cursory docket and page number. Without an explanation, this leaves the reader with the impression that Hubbard has no record of discipline. Here, again, Respondent willfully violated section 6106.

At the point Respondent drafted the petition, Hubbard had been practicing for 40 years. Notably the number of years Respondent claimed Hubbard had been practicing without prior misconduct (32 years) was inconsistent with the number he claimed in the petition for writ filed with the Supreme Court three

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[5] Respondent claims that he took this statement from the Hearing Department decision. However, the court actually stated: "[Hubbard] had practiced law in California for more than 32 years prior to his earliest misconduct set forth above."

months later (40 years). The inconsistency demonstrates Respondent's intentional deception.

In view of the foregoing, the court concludes that Respondent is culpable of intentionally and repeatedly engaging in acts involving moral turpitude through his several misleading statements in the *Vogel* petition for rehearing in willful violation of section 6106.

Counts Eight and Nine - Seeking to Mislead a Court (§6068(d)) and Failing to Maintain Respect Due to Courts (§ 6068(b))

As with Counts Two, Three, Five, and Six, the court determines that the charges set forth in Counts Eight and Nine are duplicative of those set forth in Count Seven, and they are dismissed with prejudice. *(Bates v. State Bar, supra,* 51 Cal.3d at pp. 1059-1060; *In the Matter of Romano, supra,* 5 Cal. State Bar Ct. Rptr. at p. 397.)

Count Ten - Failing to Maintain Respect Due to Courts and Judicial Officers by Attacking Integrity, Fairness, and Character of U.S. District Judge in Statements to Ninth Circuit in Petition/or Rehearing (§ 6068(b))

This count charges that, in the *Vogel* petition for rehearing, Respondent attacked the integrity, fairness, and character of U.S. District Judge Philip S. Gutierrez by falsely claiming that the judge made rulings and findings that he knew were incorrect and contrary to the evidence. The NDC specifically charges that Respondent made this attack by stating: "This isn't a case where Judge Gutierrez did not know we

were innocent of the charges . . . he did. The record shows that he *knew* that our positions were firmly rooted in binding Ninth Circuit precedent; *knew* that we had never manufactured constitutional standing in an ADA lawsuit (ever); *knew* that Brownfield [opposing counsel] had misrepresented the holdings of *ln-N-Out Burgers, knew* that Vogel had visited Tulaphorn's restaurant, which is located next to his brother's house, before the filing of the lawsuit and had first-hand knowledge of the facility; *knew* that Vogel's confusion regarding the *actual* date of that visit was traced directly to a clerical error by his lawyers (who not only took full responsibility for their mistake, but worked diligently to correct the record once the mistake was discovered); and *knew* that, given an opportunity, we could have proven all these facts at an evidentiary hearing. It did not matter! The district judge was determined to find that appellants had a history of mendacity, a pattern of deception, and willfully suborned perjury regardless of what the evidence showed; and that is precisely what he did." (Italics in original.)

As Respondent stated at trial, the only way the judge "knew" these assertions is because they were representations made by Respondent. Thus, these statements are specious because they purport to set forth the judge's knowledge, when instead they are, as Respondent stated at trial, merely his "personal knowledge." While these statements are misleading, the court does not find that they are directly disrespectful of the district court judge. As Respondent was only charged in this count with failure to maintain respect due to courts and judicial officers, the court does not find that OCTC sustained

its burden to prove culpability.

Aggravation

OCTC must establish aggravating circumstances by clear and convincing evidence . (Std. 1.5.)[6]

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

The court has found Respondent to be culpable of three counts of intentionally engaging in acts of moral turpitude by making eight misleading statements to different courts. This constitutes significant aggravation. (Cf. *In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 279 [65 improper client trust account withdrawals considered as multiple acts of misconduct notwithstanding that attorney was found culpable of only two charged violations].)

Uncharged Violations (Std. 1.5(h))

As noted above, although there was insufficient evidence that Respondent attacked the integrity, fairness, and character of the district judge as alleged in Count Ten, Respondent's statements were patently misleading. He repeatedly stated in the *Vogel* petition for rehearing to the Ninth Circuit that the district court made certain rulings, notwithstanding that it "knew" its rulings were contrary to the law and the evidence. As Respondent admits at trial, the district

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[6] All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

court made rulings solely contrary to Respondent's opinions. Due to this additional, intentional misleading statement made to the Ninth Circuit, the court concludes that Respondent is culpable of an additional uncharged act involving moral turpitude in willful violation of section 6106. *(In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 791 [where record contains clear and convincing evidence of uncharged but proven misconduct, court may consider it for purposes of aggravation].)

Significant Harm to the Administration of Justice (Std. 1.50))

Respondent's repeated misrepresentations to multiple courts "undermine the ability of a tribunal to rely on an attorney's word" and therefore constitute a factor in aggravation. *(In the Matter of Moriarty* (Review Dept. 2017) 5 Cal. State Bar Ct. Rptr. 511, 526.) "Offenses concerning the administration of justice have been considered as very serious by the Supreme Court." *(In the Matter of Wyshak* (Review Dept. 1999) 4 Cal . State Bar Ct . Rptr. 70, citing *Sands v. State Bar* (1989) 49 Cal.3d 9 19, 930.) Because Respondent here repeatedly made misrepresentations to multiple courts, the court gives the harm to the administration of justice significant weight.

Lack of Remorse/Indifference to Rectification of or Atonement for the Consequences of Misconduct (Std. 1.5(k))

Respondent demonstrates no remorse for his conduct. As shown from his stipulation and his trial testimony, he stands by every misleading statement that he is accused of making in the NDC. He argues that his statements to the Supreme Court and to the Ninth Circuit are "absolutely" "honest and accurate" and that "[t]here were no omissions." The court finds this lack of insight to be troubling and to demonstrate a greater likelihood that the misconduct will repeat in the future. The court gives great weight to this aggravating factor . (Cf. *In the Matter of Song, supra,* 5 Cal. State Bar Ct. Rptr. at p. 279 [significant weight given to lack of remorse and lack of insight despite occasional utterances at trial of remorse for actions because attorney testified throughout trial that he did not commit misconduct and that any misconduct was not willful or volitional].)

Lack of Candor (Std. 1.5(1))

Throughout his testimony and in the documentary evidence presented at trial, the court has found Respondent to be untruthful. Respondent equivocates when he testifies and equivocates when he writes. As discussed in Count Four, Respondent was dishonest in his testimony at trial regarding whether the Ninth Circuit would allow him to address the outcome of State Bar proceedings against Hubbard at oral argument. The court finds this lack of candor in Respondent's trial testimony to be a strong factor in aggravation. (Cf. *In the Matter of Maloney and Virsik, supra,* 4 Cal. State Bar Ct. Rptr. at pp. 791-792 [where testimony was evasive, inconsistent, and dishonest, court gave respondents' lack of candor strong mitigating weight].)

Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.6.)

No Prior Discipline (Std. l. 6(a))

Standard 1.6(a) provides that mitigating credit is afforded when an attorney has no prior disciplinary record over many years of practice and his or her present misconduct is not likely to recur. Although Respondent had nearly 15 years of discipline-free practice at the time of his misconduct, because his wrongdoing was serious and highly likely to recur, the court gives it no mitigating weight. (Cf. *In the Matter of Kinney* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 360, 368 [where attorney's misconduct was serious, part of a pattern, and highly likely to recur, 31 years of discipline-free practice given no weight in mitigation].)

Cooperation with State Bar (Std. 1.6(e))

Respondent entered into a comprehensive pretrial stipulation of facts with the State Bar. This stipulation, although it did not include any stipulation as to culpability, merits moderate weight in mitigation. *(In the Matter of Lenard* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 250, 260 [reduced mitigating credit given where attorney stipulates to facts and admission of documents but does not stipulate to culpability].)

Good Character Evidence (Std. 1.6(f))

Respondent presented brief testimony regarding community service, which the court does not find compelling. While Respondent has periodically volunteered at his children's school for many years, this work is performed to help his children and not the community at large.

Respondent also mentioned that he has helped with fire victims in Paradise, California. He has only been doing this since November and he presented no details regarding his efforts. The court gives Respondent's community service evidence little weight in mitigation.

Respondent also presented the character testimony of nine live witnesses, five of them attorneys. Four of the attorneys solely have a professional relationship with Respondent. They think highly of Respondent's ADA practice and his reputation in this field. Two of them have co-counseled with Respondent. Their testimony as to Respondent's character was brief and subdued. Given their narrow dealings with Respondent and their limited knowledge of his character, the court gives their testimonies nominal weight.

The fifth attorney, Susan Hearn, attended law school with Respondent and they are neighbors. Hearn finds Respondent to be kind and honest. Hearn has also loaned Respondent and his brother money. The court gives her testimony moderate weight as she sees Respondent regularly, though usually in passing, and trusts him enough to loan him money. A friend and an employee of a business that Respondent and

his brother own also testified briefly. The court did not find their testimony persuasive.[7] Sheri Abel and Brenda Pickern are plaintiffs that Respondent has represented in ADA cases. They have known Respondent for many years and think highly of his legal skills. They believe he has good moral character. Both Abel and Pickern were evasive about how many cases Respondent represented them in, although when pressed, Pickern said it was likely more than 50 but not more than 100. They were also evasive in how much money they have received as plaintiffs in these cases. On the whole, their testimonies were not compelling.

In view of the foregoing, the court gives Respondent minimal weight for good character evidence. (Cf. *In the Matter of Nassar* (Review Dept. 2018) 5 Cal. State Bar Ct. Rptr. 564, 575 [good character testimony from attorneys, judges, and employees of district attorney's office, though impressive, given reduced weight because not from a wide range of references in the general community].)

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney but to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal

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[7] The employee did not reveal that he worked at a business owned by Respondent until pressed at cross examination, which undermines his credibility.

profession. (Std. 1.1; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. *(Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. *(In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. *(Bates v. State Bar, supra,* 51 Cal.3d at p. 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Standard 2.11 provides 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 depends on the magnitude of the misconduct; the extent to which the misconduct harmed or misled the victim, which may include the adjudicator; the impact on the administration of justice, if any; and the extent to which the misconduct related to the [attorney's] practice of law." In addition, standard 1. 7(b) states, "If aggravating circumstances are found, they should be considered alone and in balance with any mitigating circumstances, and if the net effect demonstrates that a greater sanction is needed to fulfill the primary purposes of discipline, it is

appropriate to impose or recommend a greater sanction than what is otherwise specified in a given standard. On balance, a greater sanction is appropriate in cases where there is serious harm to the client, the public, the legal system, or the profession and where the record demonstrates that the [attorney] is unwilling or unable to conform to ethical responsibilities."

OCTC relies on *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166 in arguing that Respondent should be actually suspended for at least one year. There, the attorney was found culpable of misrepresenting to two courts that he had served an opposing party. In aggravation, he had a prior record of discipline, and his testimony in the State Bar Court lacked candor. In mitigation, he presented evidence of good character and *pro bono* activities. The court recommended that Chesnut be placed on a two-year stayed suspension and a three-year probation on condition, among other things, that he be actually suspended for six months.

Here, Respondent was found culpable of a third charge of making a misrepresentation to a court, plus another uncharged misrepresentation to a court. Although Respondent does not have a prior record of discipline, he has more aggravating evidence overall, making Respondent's case worthy of a higher level of discipline than recommended in *Chesnut.*

In *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, the respondent was found culpable, in one client matter, of failing to perform and communicate, improperly withdrawing from

representation, and committing an act of moral turpitude by misrepresenting to an insurance adjuster that his client no longer wanted to pursue her claim. In aggravation, the court found multiple acts of misconduct, one prior instance of discipline, client harm, and lack of candor toward the court and the State Bar investigator. The lack of candor included presenting a false telephone log entry prepared for purposes of trial; presenting to the State Bar investigator a falsified stipulation purporting to resolve his client's underlying case; and misrepresenting to the State Bar investigator that he appeared before a judge at the time his client's claim was settled. In mitigation, the court afforded slight weight to *pro bono* services rendered because his involvement was not great and was remote in time. Discipline consisted of stayed suspension for four years and until he complied with standard 1.4(c)(ii) and four years of probation on conditions, including one year of actual suspension.

In *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, the court recommended a two-year actual suspension in a case where the attorney was found culpable of trust account violations and making misrepresentations to courts, opposing counsel, and the opposing party. Hertz presented good character evidence and stipulated to misconduct prior to trial, but he was practicing for only four years prior to his misconduct. In aggravation, Hertz harmed the administration of justice, opposing counsel, and her client, and continued to conceal the truth to a State Bar investigator.

Here, Respondent has been found culpable of a narrower range of misconduct than in *Dahlz* and *Hertz*. Nevertheless, the court concludes that nothing less than strong discipline will send the message to Respondent that an attorney's duty of candor is of utmost importance. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 315 [attempt to mislead probate court was reprehensible].) Respondent's lack of insight into his misconduct, demonstrated by his absence of remorse and candor at trial, indicates to the court that there is a likelihood that the misconduct may recur. Under these circumstances, the court concludes that a one-year actual suspension will serve the goals of attorney disciplinary proceedings in this case.

Further, the court recommends that Respondent remain actually suspended until he provides proof of his rehabilitation, fitness to practice, and present learning and ability in the general law. Respondent's numerous misrepresentations to several courts are alarming, particularly as he was dishonest to the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit - two of the most important federal courts. As he was well aware of his father's disciplinary proceedings, in which he was an active participant, Respondent was on notice about the importance of veracity for an attorney in dealing with a court. That he has engaged in repeated mendacity, without repentance, only underscores that he should not be allowed to return to the practice of law until he proves his competency. While the court recognizes that this requirement is normally imposed with a two-year actual suspension (std. l.2(c)(l)), it is important in this case that Respondent show that he has changed his ways. Such a requirement will best

serve the goals of attorney disciplinary proceedings in this case. (Cf. *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 157-158 [court imposed one year actual suspension and until attorney made showing required under former version of standard 1.2(c)(1) to ensure attorney could not return to practice of law until he proved he could practice competently].)

Recommendations

Discipline - Actual Suspension "And Until" Rehabilitation

It is recommended that SCOTTLYNN J. HUBBARD IV, State Bar Number 212970, be suspended from the practice of law for two years, that execution of that suspension be stayed, and that Respondent be placed on probation for two years with the following conditions.

Conditions of Probation

1. Actual Suspension

Respondent must be suspended from the practice of law for a minimum of the first year of his probation and until Respondent provides proof to the State Bar Court of his rehabilitation, fitness to practice, and present learning and ability in the general law. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. l.2(c)(l).)

2. Review Rules of Professional Conduct

Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent 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 Respondent's compliance with this requirement, to the State Bar's Office of Probation in Los Angeles (Office of Probation) with Respondent's first quarterly report.

3. Comply with State Bar Act, Rules of Professional Conduct, and Probation Conditions

Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of Respondent's 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, Respondent must make certain that the State Bar Attorney Regulation and Consumer Resources Office (ARCR) has Respondent's current office address, email address, and telephone number. If Respondent does not maintain an office, he or she must provide the mailing address, email address, and telephone number to be used for State Bar purposes. Respondent must report, in writing, any change in the above information to ARCR, within ten 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, Respondent must schedule a meeting with Respondent's assigned probation court specialist to discuss the terms and conditions of Respondent's 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, Respondent may meet with the probation court specialist in person or by telephone. During the probation period, Respondent 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 Respondent's probation period, the State Bar Court retains jurisdiction over Respondent to address issues concerning compliance with probation conditions. During this period, Respondent must appear before the State Bar Court as required by the court or by the Office of Probation after written notice mailed to Respondent's official State Bar record address, as provided above. Subject to the assertion of applicable privileges, Respondent 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. Respondent 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, Respondent must submit a final report no earlier than ten days before the last day of the probation period and no later than the last day of the probation period.

b. Contents of Reports. Respondent must answer, under penalty of perjury, all inquiries contained in the quarterly report form provided by the Office of Probation, including stating whether Respondent 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. Respondent is directed to maintain proof of Respondent's 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 Respondent's actual suspension has ended, whichever is longer. Respondent 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, Respondent 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 Respondent will not receive MCLE credit for attending this session. If Respondent 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, Respondent will

nonetheless receive credit for such evidence toward his duty to comply with this condition.

9. Proof of Compliance with Rule 9.20 Obligations

Respondent is directed to maintain, for a minimum of one year after commencement of probation, proof of compliance with the Supreme Court's order that Respondent comply with the requirements of California Rules of Court, rule 9.20, subdivisions (a) and (c). Such proof must include: the names and addresses of all individuals and entities to whom Respondent 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 Respondent with the State Bar Court. Respondent is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

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 Respondent has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

Multistate Professional Responsibility Examination Within One Year

It is recommended that Respondent 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 Respondent 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, Respondent 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 Respondent 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.[8] Failure to do so may result in disbarment or

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[8] 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

suspension.

Costs

It is further recommended 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. Unless the time for payment of discipline costs is extended pursuant to section 6086.10(c), costs assessed against a lawyer who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

Dated: June 27, 2019

MANJARI CHAWLA
Judge of the State Bar Court

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the order. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45.) Further, Respondent is required to file a rule 9.20(c), affidavit even if Respondent 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).)

APPENDIX E

CALIFORNIA SUPREME COURT

No. S263210

IN THE MATTER OF
SCOTTLYNN J. HUBBARD IV,
ON DISCIPLINE MEMBER NO. 212970

August 14, 2020

PETITION FOR REVIEW

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PRELIMINARY STATEMENT

The State Bar Court recommends Petitioner be disciplined for statements he made to two federal courts while defending his father and law partner against the vendetta of an opposing counsel. Petitioner's material statements of fact were true in context, and not a single one of the supposedly misled or maligned judges complained. The State Bar—spurred to act by that same vengeful opposing counsel, now entering the second decade of this crusade—has nevertheless chosen to take vicarious offense. It would like this Court to shutter Petitioner's civil rights practice for at least a year, and perhaps indefinitely, to the benefit of the crusader's scofflaw clients.

This is an unprecedented disciplinary matter resulting in an unprecedented sanctions recommendation. On this, and this alone, Petitioner and the Office of Chief Trial Counsel agree. (Motion to Publish, p. 2 [alleged misconduct "significantly different" and discipline "materially different" from prior cases].) Conflicting Review Department opinions on important questions concerning the appropriate test for materiality and the propriety of charge stacking give more reason to grant review. (Cal. Rules of Ct., rule 9.16, subd. (a)(1).) The chilling effect the proposed discipline will have on civil rights advocacy, a consequence described by *amici* below, catapults those reasons from sufficient to necessary. Particularly today.

Nor are they the only reasons to review this extraordinary matter. By adopting a rule of partially deferential review in direct contravention of the

"independent review" standard commanded by this Court's rules, the State Bar Court's Review Department is routinely acting "without or in excess of [its] jurisdiction." (*Id.*, rule 9.16, subd. (a)(2).) By assigning "substantial [aggravating] weight" to Petitioner's insistence on his innocence, the State Bar Court has deprived Petitioner of "a fair hearing." (*Id.*, rule 9.16, subd. (a)(3).) Neither can the "weight of the evidence" support the charges, nor the "record as a whole" support the sanction. (*Id.*, rule 9.16, subd. (a)(4)-(5).)

But there is, finally, one very practical consideration counseling review. So far as Petitioner can determine, this Court has granted review from a recommendation of discipline by the State Bar Court just four times since 2000—and two of those grants were in 2001.[1] The constitutionality of the State Bar Court has depended on the notion that it "is simply an administrative arm of this court and exercises none of our inherent authority over attorney discipline, [so] 'the judicial power in disciplinary matters remains with this court, and was not delegated to the State

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[1] Petitioner searched the titles of this Court's opinions for "On Discipline," the phrasing called for in California Style Manual (4th ed. 2000) § 6.25 for disciplinary matters before this Court, which returned: *In re Grant* (2014) 58 Cal.4th 269; *In re Silverton* (2005) 36 Cal.4th 81; *In re Lesansky* (2001) 25 Cal.4th 11; *In re Paguirigan* (2001) 25 Cal.4th 1. Although the Court has issued a handful of opinions over the same period on issues collateral to discipline and mentioning the State Bar Court, such as ineffective assistance of counsel, contempt, and attorneys' fees, those did not require or involve supervision of the State Bar Court's Review Department.

Bar.'" (*In re Rose* (2000) 22 Cal.4th 430, 442 [quoting *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 599-600].). That can no longer be said to be true if this Court allows the State Bar Court to develop and enforce its own law, a law diverging in many respects from this Court's own teachings, without granting review—even merely to consider or ratify that law—more than once or twice a decade.

Recent events have evinced the Legislature's dissatisfaction with the legal community, including the courts, for behaving more like a trade association than a public protection body in the regulation and management of the profession. Repeated inaction in the face of renegade Review Department decisions will eventually be seen as guildishness. And that will invite the Legislature and the federal courts to do what this Court will be judged as refusing to do for itself: rein in an entity badly in need of restraint. Such intrusion by institutions with lesser subject matter competence but the fair perception that no one else is minding the store is in no one's interest, least of all that of the entity claiming "expressly reserved, primary and inherent authority" in such matters. (*Ibid.*)

ISSUES PRESENTED

1. Is the State Bar Court free to disagree with this Court's disapproval of disciplinary charge stacking in *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060, *Heavey v. State Bar* (1976) 17 Cal.3d 553, 560?

2. For disciplinary purposes, is every statement in every court pleading or hearing material?

3. Does the United States Supreme Court's First Amendment jurisprudence require *actual* harm in speech-based disciplinary charges initiated by persons not the subject or recipient of the speech?

4. May the State Bar Court apply a rule requiring the Review Department to defer in part to Hearing Department decisions, in contravention of the standard of review provided in California Rule of Court 9.12?

5. May the State Bar Court assign significant aggravating weight to a licensee's insistence on his innocence?

6. Does the weight of the evidence clearly and convincingly prove that Petitioner made material misstatements when the records of the relevant proceedings are considered as a whole?

7. Can the sanction of suspension ever be appropriate where there is "substantial mitigati[on]," little aggravation, and an obvious, far-less-restrictive means for protecting the public?

GROUNDS FOR REVIEW

Petitioner seeks review of a recommendation of suspension under California Rule of Court 9.13(a). Review within the State Bar Court was exhausted upon issuance of the attached Modified Opinion by the Review Department on June 3, 2020, which was transmitted to this Court on June 17, 2020. Pursuant to California Rule of Court 9.13(e)(1), Petitioner alleges all five grounds for review under California Rule of Court 9.16(a).

FACTUAL AND PROCEDURAL STATEMENT

The parties agreed to an extensive pre-hearing stipulation that conveniently recites almost all relevant matters in chronological order and presents the various issues on a crisp, clean record. (Stipulation as to Facts & Admission of Documents, pp. 1-12.) Petitioner Scottlynn J Hubbard IV (Scott) and his father Lynn Hubbard III (Lynn) were law partners for many years in a practice focused on protecting the rights of the disabled. (*Id.* at p. 2.) Lynn's mother Barbara (Scott's grandmother) was a plaintiff in an Americans with Disabilities Act case brought by Lynn and termed throughout the proceedings below "the *Plaza Bonita* matter." (*Ibid.*) Barbara settled with many of the *Plaza Bonita* defendants but died before settling with two of them. (*Ibid.*) Lynn instructed a non-attorney staff member to sign the final two settlement agreements on Barbara's behalf and to fax them to opposing counsel without disclosing that Barbara had died. (*Id.* at p. 3.) Scott is not alleged to have approved, ratified, or even been aware of these actions by Lynn before they

occurred.

Lynn's failure to reveal Barbara's death was subsequently found to be misconduct and, in addition to causing federal bar discipline that became final October 24, 2013, and being one of the grounds for state bar discipline that became final December 29, 2016, the federal court awarded sanctions against Lynn in the *Plaza Bonita* matter itself. (*Id.* at pp. 4-6.) Scott unwisely represented his father in appealing that sanctions award to the Ninth Circuit. (*Ibid.*; Modified Opinion, p. 3.) Lynn lost. (*Ibid.*)

There are good reasons surgeons don't operate on family members; it's hard to maintain objectivity when your own flesh and blood is in jeopardy. Driven to clear his father's name, Scott pressed on and petitioned the United States Supreme Court for certiorari. (*Ibid.*) It denied relief on October 3, 2016, or more than two months before the omnibus state disciplinary proceedings against Lynn became final. (*Ibid.*) Out of the hundreds of pages of pleadings in the *Plaza Bonita* matter, the Review Department opinion at issue relies entirely on the following four sentences from the June 14, 2016, certiorari petition to support disciplining Scott:

> Throughout [Lynn's] forty-year career [he] has never . . . *never* . . . been found to have committed professional misconduct . . . ; ("*Plaza Bonita* statement #1")
>
> and

> Everything that [Lynn] said in this matter was 100% true, 100% of the time; and there is absolutely no evidence that he fraudulently concealed anything from anyone. [Citation omitted.] More importantly . . . [Lynn] did not come close to (much less cross) the line of professional misconduct, unethical behavior, bad faith, or even recklessness. [Citation omitted.] In fact, after eight years of persecution *no one*—not [opposing counsel], not the magistrate, not two district [court] judges, not the State Bar of California, not even the Ninth Circuit panel—has identified what duty [Lynn] supposedly violated. ("*Plaza Bonita* statement #2")

(Modified Opinion, p. 5 [modifications in original]; Stipulation, p. 6.)

In another ADA case, termed "the *Vogel* matter," Lynn represented that the plaintiff had standing to sue based on a particular sales receipt from the defendant's place of business. (Stipulation, p. 7.) That was incorrect. (*Ibid.*) In fact, the receipt and photographs purporting to be from the plaintiff's visit were from a visit made by Lynn and another person. (*Ibid.*) Opposing counsel filed for terminating sanctions, which the district judge granted on November 5, 2013. (*Id.* at p. 8.) Again, Scott is not alleged to have played any role in this misconduct.

OCTC filed charges against Lynn for both the *Plaza Bonita* and *Vogel* matters on May 15, 2014, and July 11, 2014, respectively, and the matters were eventually consolidated. (*In the Matter of Hubbard*

(Review Dept. 2016, Nos. 11-0-14081+) 2016 WL 4184002, at *1; Stipulation, p. 5.) Those proceedings culminated in a recommendation that Lynn be suspended from practice for two years, with one-year of actual suspension imposed, in addition to the condition that he prove rehabilitation, fitness, and present learning and ability before being eligible to resume practice. (Stipulation at pp. 5-6.; Modified Opinion, p. 6, fn. 9.) That discipline became final on December 29, 2016. (Exh. 68.) Disciplinary charges that had been brought against Lynn's associate in the *Vogel* matter were dismissed in the interest of justice. (Stipulation, p. 10; Modified Opinion, pp. 12-13.)

In the meantime, Scott was again representing his father, this time in an appeal of the *Vogel* order granting attorneys' fees to the defendants. OCTC has initiated discipline against Scott in the second of the two subject disciplinary matters for making the following statements ("the *Vogel* colloquy") on February 4, 2016—more than ten months before the state discipline against Lynn became final—during oral argument before the Ninth Circuit:

> Judge M. Smith: Has the State Bar taken any action in connection with the attorneys in this matter?
>
> Scott: With respect to the attorney responsible for the deposition . . . uh . . . the discovery-related abuses, as I indicated in our reply brief . . .
>
> Judge M. Smith: What happened?
>
> Scott: While it happened, all of this . . .

> Judge M. Smith: No, I mean, what did the State Bar do?
>
> Scott: Oh, the State Bar dismissed in the interests of justice, their words. Dismissed all the charges against him.
>
> Judge M. Smith: Any of the other attorneys?
>
> Scott: That was the only attorney.
>
> Judge M. Smith: The only one?
>
> Scott: Yes.

(Stipulation, p. 11; Modified Opinion, pp. 8-9.) After oral argument, the Ninth Circuit panel affirmed the district court's sanctions order.

On March 2, 2016, or more than nine months before Lynn's state discipline became final, Scott petitioned for rehearing *en banc* of that affirmance. (*Ibid.*) OCTC has charged Scott with misconduct based on the following statements in that petition:

- "The State Bar of California . . . prosecuted [Lynn] and ([his associate]) for professional misconduct and ethics violations. The results of *that* prosecution was [*sic*] . . . the prosecutor dismissed all of the charges based on . . . accusations of discovery abuse and manufacturing evidence." (Modified Opinion, p. 11.) ("*Vogel* statement #1")

- "[Lynn's] success was so overwhelming that the State Bar actually *appealed* the judge's ruling." (*Ibid.*) ("*Vogel* statement #2")

- "The Court must grant this Petition for Rehearing En Banc, as even the State Bar [p]rosecutor admitted that . . . the district court's charges of professional misconduct and ethics violations would never have been brought if [Lynn and (his associate)] had had a chance to respond." (*Id*. at p. 12, fn. 17 [noting but excusing that OCTC failed to include this quote in its notice of charges against Scott].) ("*Vogel* statement #3")

- "[Brenden] Brownfield's testimony was so unbelievable that, after he finished, [OCTC] dismissed all of the charges based on his outlandish accusations of discovery abuse and manufacturing evidence!" (*Id.* at pp. 13-14.) ("*Vogel* statement #4")

- An allegation with no accompanying quote in either the Hearing Department or Review Department opinions that the petition for rehearing *en banc* sought to convince the Ninth Circuit the terminating sanctions were purely for discovery abuses (*Id.* at pp. 14-15.) ("*Vogel* statement #5")

- "[Lynn] has practiced law in California for more than thirty-two years without any record of discipline." (*Id.* at p. 15.) ("*Vogel* statement #6")

Finally, in connection with the same *en banc* petition, OCTC has charged Scott with failing to maintain the respect due to courts and judicial officers based on the following passage:

> This isn't a case where Judge Gutierrez did not know we were innocent of the charges . . . he did. The record shows that he *knew* that our positions were firmly rooted in binding Ninth Circuit precedent; *knew* that we had never manufactured constitutional standing in an ADA lawsuit (ever); . . . *knew* that Vogel had visited Tulaphorn's restaurant, which is located next to his brother's house, before the filing of the lawsuit and had first-hand knowledge of the facility, *knew* that Vogel's confusion regarding the *actual* date of that visit was traced directly to a clerical error by his lawyers (who not only took full responsibility for their mistake, but worked diligently to correct the record once the mistake was discovered); and *knew* that, given an opportunity, we could have proven all these facts at an evidentiary hearing. It did not matter! The district judge was determined to find that appellants had a history of mendacity, a pattern of deception, and willfully suborned perjury regardless of what the evidence showed; and that is precisely what he did. ("Judge Gutierrez comments")

(Modified Opinion, p. 16.)

This case thus concerns Scott's speech-based advocacy in two appeals from sanctions orders entered against his father. None of the judges and justices allegedly offended-against complained to the State Bar. But one of the two relevant opposing counsels in the *Plaza Bonita* matter filed a complaint, and OCTC initiated its own proceedings on the *Vogel* matter. Out of those two complaints, OCTC fashioned 10 charges with numerous counts.

For each statement listed above (excepting the last concerning Judge Gutierrez) OCTC charged Scott with a violation of Section 6106 of the Business and Professions Code for moral turpitude; a violation of Section 6068(d) of the same for seeking to mislead a court or judge; and a violation of Section 6068(b) for failing to maintain the respect due to courts and judicial officers. (*Id.* at pp. 5, 8, 10.) The tenth charge alleged only a violation of Section 6068(b) based on the passage concerning Judge Gutierrez in the *en banc* petition. (*Id.* at p. 16.)

Scott, who has never been the subject of disciplinary proceedings in any of the three states and several federal courts where he is admitted, consistently maintained his innocence throughout the lengthy proceedings below. (E.g., Respondent's Closing Brief, pp. 1-17.) He noted that prior to the *Plaza Bonita* and *Vogel* matters, it was in fact true that his father had enjoyed decades of blemish-free practice. (*In the Matter of Hubbard*, *supra*, 2016 WL 4184002, at *10.) He observed that what his father actually *said* (in contrast to what he was disciplined for *failing* to say) in the *Plaza Bonita* matter was true. He highlighted that he joined a motion in the *Vogel* appeal for judicial notice of the State Bar's non-final disciplinary order against Lynn, which one might think would negate any suggestion he was trying to conceal Lynn's discipline. (Exh. 36.) And so on.

The Hearing Department was persuaded at least in part and dismissed some charges as duplicative and the charge based on statements concerning Judge Gutierrez as unsupported by the evidence. (Hearing Dept. Opinion, pp. 11-13, 17-18.) Nine character

witnesses, including five attorneys, testified to Scott's exceptional character. (Modified Opinion, p. 21.) Nevertheless, the Hearing Department sided with OCTC and gave exactly the bottom-line discipline it asked for: a recommendation that Scott be suspended for two years, with one year's actual suspension, and the condition to prove rehabilitation, fitness, and present learning and ability before being allowed to resume practice. (Hearing Dept. Opinion, pp. 26-30; OCTC Pre-Trial Statement, p. 21.) The Hearing Department gave "great weight" in aggravation to Scott's insistence on his innocence. (Hearing Dept. Opinion, pp. 19-20.)

The parties cross-appealed to the Review Department. Two *amicus* briefs, including one from ADA defendants whom Scott has sued—pause to consider this, companies Scott has sued—and another from a colleague with nearly 50 years' experience, urged the Review Department to reverse. (*Amicus* of Russell Handy, p. 2; *Amicus* of James Crawford, pp. 1-2.) After conducting a deferential rather than independent review (Modified Opinion, p. 2, fn. 3, p. 17, fn. 19), the Review Department did the opposite: it (1) reinstated all charges dismissed as duplicative (*id.* at pp. 7, 10, fns. 13-14); and (2) reversed the Hearing Department's dismissal of the charge based on the passage concerning Judge Gutierrez (*id.* at pp. 16-17); but concluded that (3) Scott did *not* misrepresent the nature of the terminating sanctions in the *Vogel* matter because the petition for rehearing disclosed that Lynn had been found to have "participated in a pattern of falsification of evidence that amounted to bad faith" (*id.* at pp. 14-15). The Review Department then downgraded the severity of

four of the five aggravating factors cited by the Hearing Department and substantially increased the weight of two of the four mitigating factors—and then affirmed the recommended sanction anyhow. (*Id.* at pp. 18-22.)

After correcting the erroneous inclusion of an inapplicable probation condition by issuing the Modified Opinion on June 3, 2020, the Review Department transmitted its recommendation to this Court on June 17, 2020. OCTC sought publication of the Modified Opinion in a long letter motion originally submitted June 19, 2020, which was denied July 17, 2020. This timely petition for review follows.

REASONS REVIEW IS APPROPRIATE

I. This Court's Intervention Is Necessary to Settle Important Questions of Law.

a. Review Department opinions conflict with each other and this Court's teachings on the propriety of disciplinary charge stacking.[2]

The moral turpitude (1, 4, and 7) and failure-to-respect (3, 6, and 9) charges against Petitioner are based on the exact same statements used to support the seeking-to-mislead charges (2, 5, and 8). California law is clear that one cannot seek to mislead a court in violation of Section 6068(d) without simultaneously committing an act of moral turpitude,

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[2] This ground for review pertains to the first nine of the ten disciplinary charges but does not pertain to the tenth charge.

in violation of Section 6106, and failing to maintain the respect due a court, in violation of Section 6068. (*In the Matter of Maloney* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 786 ["It is well established that acts of moral turpitude include an attorney's false or misleading statements to a court or tribunal"]; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 282 [violation of Section 6068(b) when attorney "misled the court"].) The moral turpitude and failure-to-respect counts are therefore entirely duplicative, or as the Court used to say "redundant," of the seeking-to-mislead charges.

This Court has repeatedly suggested that such charge stacking is inappropriate. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 502 ["[S]ince Conroy's inaction on his client's matter also violated [another rule], there was no need to make duplicative allegations of misconduct"]; *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060 ["If, as in this case, misconduct violates a specific Rule of Professional Conduct, there is no need for the State Bar to allege the same misconduct as a violation of [multiple provisions of the Business and Professions Code]"]; *Heavey v. State Bar* (1976) 17 Cal.3d 553, 559-60 [alleged violation of Section 6068 attorney duties "redundant to" charge of violating Rules of Professional Conduct based on same statements to judge].) The Hearing Department recognized as much and so dismissed six of the charges. (Modified Opinion, p. 7 & fn. 11.)[3] As

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[3] It did, however, err by dismissing the seeking-to-mislead and failure-to-respect charges and retaining the moral turpitude charges. The seeking-to-mislead charge was, from the

authority, it cited *In the Matter of Romano* (Review Dept. 2015) 5 Cal. State Bar Ct. Rptr. 391, 397, which dismissed a seeking-to-mislead charge as duplicative of a moral turpitude charge "because the same misconduct underlies both violations." *Romano*, in turn, cited *In the Matter of Maloney* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 786-87, which relied upon *In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148, which referenced this Court's opinions in *Bates*, *supra*, 51 Cal.3d at 1060, and *Heavy*, *supra*, 17 Cal.3d at 559-60.

A separate set of Review Department opinions conflicts with those cases and this Court's position. In addition to the subject opinion, there is *In the Matter of Moriarty* (Review Dept. 2017) 5 Cal. State Bar Ct. Rptr. 511, 520, which cited the following cases as authority for allowing duplicative charges: *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480, 489; *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 497; and *In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 469-70. These utterly irreconcilable lines of cases, which do not acknowledge, far less attempt to distinguish, each other detract from the orderly administration of discipline in this state.

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perspective of remedying charge stacking, the sole correct charge to retain.

Although the Review Department purported to give the duplicative charges no additional weight in fashioning its sanction, one cannot take this seriously. (Modified Opinion, pp. 8, 10 fn. 13.) The entire reason OCTC engages in charge stacking, and the only reason the Review Department might bother to revive dismissed duplicative charges, is to press for or justify imposing more serious discipline. If the prohibited charges were entirely superfluous, if they carried no additional weight, caused no additional stigma, resulted in no additional collateral consequences, neither OCTC nor the Review Department would waste time and ink—particularly not when doing so requires them to defy this Court's teachings in *Conroy*, *Bates*, and *Heavy*.

For a concrete example of the difference duplicative charges can make, consider possible collateral consequences. Under federal immigration rules, "any alien . . . committing actions which constitute the essential elements of a crime involving moral turpitude . . . is inadmissible." (8 U.S.C. § 1182, subd. (a)(2)(A)(i).) It thus can matter a great deal whether a licensee's conduct is adjudged morally turpitudinous *in haec verba* or whether some other charge, one leaving more ambiguity, is used. And a duplicative charge of "moral turpitude" is the one OCTC seems most frequently to make, as in, for example, *Romano*, *Maloney*, and *Torres*, *supra*.

b. Review Department opinions conflict with one another and this Court on whether there is a requirement that any misrepresentation be "material."

One hundred and thirty-five years ago this Court limited speech-based attorney disciplinary action to statements deemed material, lest the minutiae of every case become grist for the disciplinary mill. (*In re Houghton* (1885) 67 Cal. 511, 517.) Thirty years ago, the Review Department invited briefing on whether this remained the law, asking "[w]hether a misrepresentation must be 'material' in order to support" discipline. (*In the Matter of Conroy* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 86, 87, fn.4.) In response, OCTC's predecessor "concede[d] that the misrepresentations must be material," and the Review Department went on to reject OCTC's charges of misrepresentation in part for the statements' "questionable materiality." (*Id.* at p. 97, fn.10.) This Court expanded upon the eventual recommendation of the Review Department that the licensee be suspended for other misconduct, but it affirmed the finding of no misrepresentation. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 502, fns. 4-5.)

A Review Department opinion immediately following *Conroy* applied a meaningful materiality standard, ruling that a licensee's lie—that he had served a subpoena on a non-appearing witness he had not in fact served—was "material both because it affected the court's scheduling of the daily calendar to accommodate the witness and because it wrongfully caused the witness . . . to be initially considered by the court in disobedience of a subpoena which had not yet

in fact been served upon him." (*In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 497.) This objective standard sensibly put arguments, opinions, and the flotsam and jetsam of every argument and hearing outside the reach of the petty, the vindictive, and the picayune personalities that can crop up in legal practice.

But a few years later something went awry, and more service-related shenanigans started the Review Department on a path culminating in the challenged opinion's complete evisceration of any meaningful materiality requirement. One of the parties to the case underlying *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, commenced divorce proceedings in Texas while the other party filed in California. Which proceeding had priority and so which law would control appeared, for a time, to depend upon who served whom first. (*Id.* at 170-74.) The licensee, representing the wife, chose to lie and told the judges in both Texas and California that he had served the husband in California before the husband sued in Texas. (*Id.* at 169-70.) But neither court ultimately decided the issue of service because there was no doubt the wife and children had moved back to California, making it the appropriate forum for custody and support issues regardless of who won the service race. (*Id.* at 174.) The licensee argued that since his lie had no "impact" on the proceedings, the lie was not material.

The Review Department quite sensibly disagreed, noting that the relevant misconduct is *seeking* to mislead a court; success is not required. (*Ibid.*) The licensee clearly sought to mislead on a potentially

dispositive issue by telling an unvarnished lie about a naked historical fact concerning the licensee's own conduct and in no way subject to dispute. The Review Department didn't use that logic, though. Instead, it held: "[R]espondent's statements to the two courts that he had served [the husband] were in fact untrue and he knew they were untrue. Thus, it is *presumed* that the statements were made with an intent to secure an advantage," which "by its very nature, [is] material to the person making the statement." (*Id.* at 175 & fn. 11 [emphasis added].)

This approach eviscerates the differences between falsity, intent, and materiality. What is worse, it conflates the intent to mislead, which is the "subjective aspect" of a lie for disciplinary purposes (*Siegel v. Committee of Bar Examiners* (1973) 10 Cal.3d 156, 174), with the materiality of the statement, which every area of the law defines objectively. (E.g., *People v. Hagen* (1998) 19 Cal.4th 652, 667-68 ["Whatever the precise standard, materiality clearly requires some *objective* potential for [causing the relevant harm]"]; *Lynch v. Cook* (1983) 148 Cal.App.3d 1072, 1081-82 ["[T]he question of materiality, it is universally agreed, is an objective one . . . "]. See, e.g., *Amgen Inc. v. Conn. Retirement Plans & Trust Funds* (2013) 568 U.S. 455, 467 ["[T]he question of materiality is an objective one, involving the significance of an omitted or represented fact . . . "].)[4] The application of this collapsed, subjective

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[4] See also *Omnicare, Inc. v. Laborers Dist. Council Const. Industry Pension Fund* (2015) 575 U.S. 175, 186-87 [same]; *TSC Indus., Inc. v. Northway, Inc.* (1976) 426 U.S. 438, 445

approach in the subject matter also creates a split within the Review Department, which has elsewhere—and like every other court—defined materiality objectively. (*In the Matter of Pasyanos* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 746, 753 [defining materiality as a "substantial likelihood that a reasonable person would consider it important in evaluating" the matter].)

The Court would do well to consider the consequences of the approach the Review Department took on page 6 of the Modified Opinion, which cements the one-step, entirely subjective test of *Chestnut*, *supra*, 4 Cal. State Bar Ct. Rptr. 166, as the controlling law. Answering out of politeness to a judge that, yes, you had a nice flight when it was bumpy is now actionable misconduct, because every false statement is presumed to be meant with intent to secure an advantage and therefore material. Telling a court that your client is pleased to comply with an inconvenient discovery order he'll later complain about can now get you suspended. Responding that you need 30 days to prepare a brief you really could get done in 20 if you gave up golfing for two weekends now qualifies as moral turpitude.

So too do three sets of isolated statements, ripped from context, that had no objective chance of success at convincing judges of the following: that appeals focused almost exclusively on allegations of attorney

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[same]. Cf. *Burlington Northern & Santa Fe Ry. Co. v. White* (2006) 548 U.S. 53, 68 [materiality requirement for Title VII retaliation claim requires objective inquiry].

misconduct did not in fact involve an attorney accused of misconduct. Puffery is universally viewed as vitiating a showing of materiality (see, e.g., *Reilly v. Pinkus* (1949) 338 U.S. 269, 274; *Williams v. Lowenthal* (1932) 124 Cal.App. 179, 183-84), and clearer puffery than in this last example is hard to imagine. One might as well disbar O.J. Simpson's lawyers in the wrongful death matter for defending their client's innocence.[5] Or every attorney who hails the intellectual prowess of a bumbling doctor or a slumlord's heart of gold or the integrity of a used car salesman. None of these is an attractive or sympathetic client to be sure. But each is entitled to a lawyer free to do more than concede liability rather than risk suspension. One side's bumbling doctor might, after all, just be another's highly respected physician who did nothing wrong. (E.g., *Bro v. Glaser* (1994) 22 Cal.App.4th 1398, 1442.)

No reasonable person, far less any reasonable judge, who read the district courts' opinions and the parties' briefs in the *Plaza Bonita* and *Vogel* appeals would come away with the misimpression that Petitioner's overly impassioned defense of his father meant there was no arguable basis for concluding Lynn engaged in misconduct. Lower court findings that Lynn had engaged in misconduct were, in fact,

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[5] Although attorneys conducting "the defense of a person charged with a public offense" enjoy a sliver of protection (and not against the actual charges here), that protection does not by its terms extend to attorneys defending those charged with misconduct in civil or quasi-criminal proceedings. (Bus. & Prof. Code § 6068, subd. (c.)

the entire point of the appeals. In the *Vogel* matter, Petitioner went so far as to join in a motion for judicial notice of the state bar's disciplinary order against Lynn (Exh. 36), and the Review Department itself concluded that the petition for rehearing *en banc* revealed Lynn to have "participated in a pattern of falsification of evidence that amounted to bad faith." (Modified Opinion, at pp. 14-15). Thus, even assuming every single statement by Petitioner was factual and misleading—and that is far, far from the case as will be demonstrated in Part IV below—there were no *material* misstatements here. Advocacy, even if it be overly zealous in parts, cannot be actionable if the record read as a whole reveals the truth.

c. United States Supreme Court jurisprudence requires a showing of actual harm before imposing discipline for speech-based charges initiated by persons not the subject or recipient of that speech.

The Review Department noted in its discussion of aggravation that this case involves no actual harm. (Modified Opinion, pp. 18-19.) Several principles already present in the law applicable in California, along with the United States Supreme Court's recent enhancement of protections for false speech in *United States v. Alvarez* (2012) 567 U.S. 709, 722, combine to compel the conclusion that this absence of actual harm precludes discipline under both the First Amendment to the United States Constitution and Article I, Sections 2, 3, and 7 of the California Constitution.

The California principles include this Court's long-held view that disciplinary matters initiated out of spite, like those commenced here by opposing counsel, should be viewed with extreme skepticism.[6] This Court has also long believed that a purportedly misled court is in a better position than a disciplinary body to decide whether a statement is misleading. (See *In the Matter of Hansen* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 464, 473 [citing *Lee v. State Bar* (1970) 2 Cal.3d 927, 940].) As is true elsewhere, California actively discourages litigation by bar complaint, of which this matter is a prime example. (E.g., Rules Prof. Conduct, rule 3.10, subd. (a).)

The federal constitutional concerns implicated by speech-based attorney discipline are well established too. "Even statements that at first blush appear to be factual are protected by the First Amendment if they cannot reasonably be interpreted as stating actual facts about their target." (*Standing Committee on Discipline v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1438.) Statements of "'rhetorical hyperbole' aren't sanctionable, nor are statements that use language in a 'loose figurative sense.'" (*Ibid.*)

Those constitutional concerns have undergone an upgrade since the last time this Court addressed allegedly false attorney speech. In 2012, a plurality of the Supreme Court "reject[ed] the notion that false

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[6] See, e.g., *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 431; *Pickering v. State Bar* (1944) 24 Cal.2d 141, 145; *Peck v. State Bar* (1932) 217 Cal. 47, 51; *In the Matter of Lapin* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 279, 292-93.

speech should be in a general category that is presumptively unprotected." (*Alvarez*, *supra*, 567 U.S. at 722. Like the Stolen Valor Act struck down there, the disciplinary action here "targets falsity and nothing more." (*Id.* at 719.)

Taken together, these principles establish that, without a showing of actual harm or at least a complaint by a person who *could* have been actually harmed—in this case, one of the judges or perhaps one of the defendants in the underlying actions—it is unconstitutional under the First Amendment to punish attorney speech based on pure falsity alone.

This approach accommodates the government's heightened interest in regulating attorney speech by not requiring actual harm in every case, or even the great majority of cases, as *Alvarez* suggests must be true to regulate garden-variety false speech. It accommodates First Amendment principles by barring the most problematic kinds of prosecutions that, as in this case, allow members of a powerful interest group (the corporate defense bar) to weaponize quasi-criminal administrative proceedings against a disfavored group (disability rights lawyers).

It is worth noting that if a determined member of the defense bar succeeds in felling a top plaintiff-side ADA lawyer based solely on overly exuberant and, indeed, not even material in-court statements that no judge or party found objectionable, there will surely be copycats. The lesson will be that any member of the wider world—read: a legion of low-paid paralegals employed by the corporate community—can comb through, line by line, every pleading any targeted

attorney has ever filed, tie the attorney up in disciplinary proceedings for years, and maybe even eventually rid themselves of that meddlesome advocate, certainly for a time and perhaps forever. Limiting the class of persons eligible to seek discipline based on an attorney's harm-free speech prevents incentivizing this behavior while ensuring attorneys are still amenable to discipline by those with a good-faith basis for complaining about unsuccessful false statements.

Government is too poor a judge of truth and falsity, of separating opinion from fact, to entrust its coercive powers to any private party that has the money and the influence to command, and the ax to grind to make it want to command, governmental attention. The obsequiousness to power evident in the Hearing Department's assignment of "particular[]" weight to Petitioner's alleged misconduct because it involved "two of the most important federal courts" is a glaring, concrete example of the danger bureaucrats pose when given the power to regulate speech willy-nilly. Surely it is just as morally objectionable, and arguably more likely to cause harm, to lie to a little court in the California "where it is possible to live and die without ever eating an artichoke." Or do only fancy courts matter?

II. This Court's Intervention Is Necessary To Prevent the State Bar Court Acting Without or in Excess of Its Jurisdiction by Routinely Refusing To Conduct the Independent Review Mandated by California Rule of Court 9.12.

The law could not be clearer:

> In reviewing the decisions, orders, or rulings of a hearing judge under rule 301 of the Rules of Procedure of the State Bar of California *or such other rule as may be adopted governing the review of any decisions*, orders, or rulings by a hearing judge that fully disposes of an entire proceeding, the Review Department of the State Bar Court *must independently review* the record and may adopt findings, conclusions, and a decision or recommendation different from those of the hearing judge.

(Cal. Rules of Ct., rule 9.12 [emphases added].)

The Review Department does not do that and instead gives "great weight" to the "hearing judge's factual findings." (Modified Opinion, p. 2, fn. 3, p. 17, fn. 19.) As authority, it cites Rule of Procedure of the State Bar of California 5.155(A), which does indeed state: "The findings of fact of the hearing judge are entitled to great weight." But as the Rules of Court expressly state, it doesn't matter what the Rules of Procedure of the State Bar of California say. Review must be independent, not deferential.

The State Bar Court has jurisdiction to recommend discipline to this Court "[a]fter a hearing for any of the causes set forth in the laws of the State of California."

(Bus. & Prof. Code § 6078.) A hearing conducted under rules out of conformity with the supervening California Rules of Court is not a "hearing . . . of [a] cause[] set forth in the laws of the State of California."[7] It is *ultra vires*.

It is, in fact, open defiance. This Court has authoritatively interpreted the phrase "independent review" to mean that "review of constitutionally relevant facts" must be "de novo." (*In re George T.* (2004) 33 Cal.4th 620, 634.) In deferring to the Hearing Department's findings of fact, including ultimate facts and not just credibility determinations, on issues directly implicating the First Amendment under *Standing Committee on Discipline v. Yagman* (9th Cir. 1995) 55 F.3d 1430, the Review Department erred—and is erring in every similar case.[8]

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[7] "Rules of Court have the force of positive law; they are as binding on this court as procedural statutes unless they transcend legislative enactments or constitutional guarantees." (*Oats v. Oats* (1983) 148 Cal.App.3d 416, 420; accord *Fidelity National Home Warranty Company Cases* (2020) 46 Cal.App.5th 812, 842, fn. 41. See also *Hollingsworth v. Perry* (2010) 558 U.S. 183, 196-97.)

[8] In this case, the Review Department "afforded great weight" to a factual finding of "specious[ness]" in re-instating the disciplinary charge based on statements about Judge Gutierrez because the statements "purport to set forth [Judge Gutierrez's] knowledge, when they are . . . merely [by] [Petitioner's] 'personal knowledge,' and also 'patently misleading.'" (Modified Opinion, p. 17, fn. 19.) Those are not credibility determinations, but findings of ultimate facts.

III. This Court's Intervention Is Necessary to Prevent the State Bar Court Routinely Depriving Attorneys of a Fair Hearing by Treating Any Contest of the Charges as an Aggravating Factor.

The Hearing Department assigned "great weight" and the Review Department "substantial weight" in aggravation to Petitioner's decision to contest these allegations, an assignment apparently authorized by State Bar Court cases. (Modified Opinion, p. 19 [citing *In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511]; Hearing Department Opinion, p. 19.) It is one thing to upgrade the culpability of an attorney who "seeks to shift responsibility to others" by denying provable historical facts. (Modified Opinion, p. 19.) Petitioner is not alleged to have done that.

When instead the government faults an attorney for a "lack of insight," (*ibid*) based on the legal conclusions—the opinions—he draws from a set of established facts, significant free speech concerns arise. Both Section 6079.4 of the Business and Professions Code, which bars sanctioning attorneys for exercising their statutory or constitutional rights in connection with a disciplinary proceeding, and California's litigation privilege, which insulates litigation-related speech "irrespective of the communication's maliciousness or untruthfulness" (*People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 958), provide important additional background principles counseling against this approach.

Petitioner and OCTC entered into an extensive stipulation as to the historical facts in this matter. That was already more than required of Petitioner. To fault him for advancing legal arguments based on those undisputed facts, arguments the Review Department did not accept, is not punishing him for a "lack of insight." It's punishing him for fighting the charges. This is more George Orwell than Roger Traynor, more Chairman Mao than Stanley Mosk.

IV. This Court's Intervention Is Necessary Because the Weight of the Evidence Does Not Clearly and Convincingly Show Misconduct.

Consider the following statement from the *Plaza Bonita* matter for which Petitioner stands to lose his livelihood for at least a year: "Throughout [my father's] forty-year career [he] has never . . . *never* . . . been found to have committed professional misconduct . . ." (Modified Opinion, p. 5.) OCTC presumably considers that actionable because Petitioner's father was earlier the subject of final federal bar discipline arising out the *Plaza Bonita* matter itself. It would, on OCTC's reading, not be sanctionable only if Petitioner had prepended "Before the misconduct here . . ." to the sentence.

Now consider this statement from the Modified Opinion: "The hearing judge gave no mitigation credit for Hubbard's nearly 15 years of discipline-free practice." (*Id.* at p. 20.) Likewise ripped from context, that statement is just as untrue according to OCTC's exacting standards; the notice of disciplinary charges was not filed until August 7, 2018, and discipline was not actually recommended until June 27, 2019,

meaning Petitioner had either more than 17 years or more than 18 years of "discipline-free practice."[9] In context, of course, it is clear that the Review Department was measuring the time back from the date of the charged conduct, but it omitted the obvious and unnecessary qualifier "before the misconduct here." Fair enough. Yet should that sentence expose the author of the Review Department's opinion to the risk of discipline? And are there any lawyers or judges who have never written a sentence that, plucked from context, is misleading?

This is the problem with OCTC's and the State Bar Court's conduct of this case. With enough scrutiny, anyone can find a statement that could be phrased more precisely. Intelligible briefs simply cannot be written where every sentence, standing alone, is unimpeachably 100% true. That is not, and cannot become, sufficient to impose discipline.

The *Vogel* colloquy, *Vogel* statement #1, *Vogel* statement #6, and *Plaza Bonita* statement #1 are all literally, if narrowly, true when "considering their nature and the context in which they were made." (*Standing Committee on Discipline v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1437.) "With respect to the attorney responsible for the deposition . . . uh . . . the

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[9] Then consider the Review Department's assessment of the "multiple acts of wrongdoing" standard, which can fairly be read to suggest Petitioner made "eight misleading statements" when only seven statements charged as misleading were left standing. (*Id.* at p. 18; see *id.* at pp. 14-15.)

discovery-related abuses," OCTC did dismiss the charges against Lynn's associate. Lynn did have a blemish-free career before *Plaza Bonita* and *Vogel*. Could Petitioner have been clearer? Certainly. But that is the reason we have an adversarial system of justice. It is not the reason we have a disciplinary system.

To whatever extent the rest of the statements might be considered misleading (excepting *Vogel* #5, which even the Review Department threw out), they represent at worst misleading *opinions*. This precise kind of overreach is exactly the reason *Yagman*, *supra*, 55 F.3d 1430, which has been the governing framework in this state since *In the Matter of Anderson* (Review Dept. 1997) 4 Cal. State Bar Ct. Rptr. 775, 786, crafted such strong First Amendment protections.

Thus, *Plaza Bonita* statement #2 and *Vogel* statement #3 cannot be actionable because "it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts." (*Yagman*, *supra*, 55 F.3d at 1441 [internal quotation marks omitted].) For example, "Everything that [Lynn] said in this matter was 100% true," from *Plaza Bonita* statement #2, is obviously an opinion: that it matters more what (if anything) Lynn actually said about Barbara in signing the settlement agreements than what he *failed* to say. That argument may not be a winner, but it is still an argument.

Further, Petitioner's Judge Gutierrez statements cannot constitutionally form the basis for discipline because OCTC did not put Judge Gutierrez on the stand to prove that he did not, in fact, "know" those things Petitioner alleged him to know. (*Id.* at 1441-42 ["While we share the district court's inclination to presume in the absence of supporting evidence that [the judge was not drunk on the bench, as the attorney had alleged without proof], the fact remains that the [disciplinary body] bore the burden . . . .].) The same is true of *Vogel* statement #2 and #4—no testimony was introduced from the OCTC counsel who appealed or who dismissed. Whatever Petitioner said about the others involved here, he did not call one of them "dishonest," "ignorant," "ill-tempered," "buffoon," "sub-standard human," "right-wing fanatic," "a bully," or "one of the worst judges in the United States," each of which is more than a titch worse than "knowingly wrong," yet each of which individually and collectively will be protected. (*Id.* at 1140.) *Yagman* controls, and disposes of, the charges here.

V. This Court's Intervention Is Necessary Because the Harsh Recommended Discipline Is Not Appropriate in Light of Significant Mitigation, Little Aggravation, and an Obvious Alternative.

Assume everything above is wrong. To grasp the continued strangeness of this case, consider the following aggravating and mitigating circumstances, the first by the Hearing Department and the second by the now controlling opinion of the Review Department:

Factor	Hearing Dept. Weight	Review Dept. Weight
Agg: Multiple Acts	"Significant" (3)	"Moderate" (2) ↓
Agg: Uncharged Acts	Present (1)	Absent (0) ↓
Agg: Significant Harm	"Significant" (3)	Absent (0) ↓
Agg: Indifference	"Great" (3)	"Substantial" (3) ↔
Agg: No Candor	"Significant" (3)	"Moderate" (2) ↓
Mit: No prior discipline	None (0)	"Limited" (1) ↑
Mit: Cooperation	"Moderate" (2)	"Moderate" (2) ↔
Mit: Good Character	"Nominal" (1)	"Substantial" (3) ↑
Mit: Community Serv.	"Limited" (1)	"Some" (1) ↔

Thus, the Review Department downgraded the severity of four of the five aggravating factors considered and upgraded the significance of two mitigating factors. Yet there was no change in the bottom-line disciplinary recommendation. The point is all the starker when one takes a more quantitative approach.[10] Treating the aggravating factors as plus points and the mitigating factors as negative points, the Hearing Department sanctioned Petitioner with a net adverse score of 9. The Review Department recommends the exact same sanction for a net score of 0. This cannot be right.

Finally, "the aim of attorney discipline is not punishment or retribution; rather attorney discipline is imposed to protect the public, to promote confidence in the legal system, and to maintain high professional standards." (*In re Brown* (1995) 12 Cal.4th 205, 217.) There is an obvious, far less punitive sanction that would achieve those stated aims in this case.

Petitioner has had an exemplary, utterly unblemished career except for these matters involving his defense of his father, whose own misconduct (doubtless far more serious than Petitioner's yet punished the same) began in the immediate aftermath of his own mother's death. If Petitioner is guilty of

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[10] For example, mapping the various (and unhelpfully so) different terms used by the Hearing and Review Departments to a standard scale of: 0 = absent/none, 1 = limited/some/nominal, 2 = moderate, 3 = significant/great/substantial.

anything, it is excessive zeal defending a family member's honor and livelihood. And the burden of barring petitioner from practice for a year will be borne in large degree by his impecunious disabled clients—members of a shunned minority whose access to life activities the rest of us take for granted depends on finding experienced counsel willing to be paid, if at all, by fee awards in successful cases. (Wall, *The A.D.A. at 30: Beyond the Law's Promise*, N.Y. Times (Jul. 26, 2020) <https://www.nytimes.com/interactive/2020/us/disability-ADA-30-anniversary.html>.)

Public reproval and an extended practice restriction barring Petitioner from representing family members would prevent the only arguable danger Petitioner has ever posed to the public or the profession. More is neither necessary nor appropriate.

CONCLUSION

For the reasons set forth, the recommendation of the State Bar Court should be summarily rejected and the charges dismissed, or this Court should grant review and order full briefing on the important, and recurring, questions this case presents.

Respectfully submitted,

Russell Handy
POTTER HANDY
8033 Linda Vista Road, Suite 200
San Diego, California 92111

Alex Kozinski
719 Yarmouth Rd, Ste 101
Pls Vrds Est, California 90274-2671

VERIFICATION

I, Scottlynn J. Hubbard IV, Petitioner in this matter, declare that I have read the foregoing Petition for Review and know the contents thereof. I certify that the same, and all the facts based upon the record of this matter in the State Bar Court, are true of my own knowledge, except as to those matters stated on information and belief such as legal arguments made herein, and as to those matters I believe them to be true.

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

Done this thirteenth day of August 2020, at Chico, California.

Scottlynn J. Hubbard IV

APPENDIX F

STATE BAR COURT OF CALIFORNIA
OFFICE OF CHIEF COUNSEL
ENFORCEMENT UNIT

Nos. 16-O-10871-MC (16-O-14863)

IN THE MATTER OF
SCOTTLYNN J. HUBBARD IV
STATE BAR NO. 212970

May 5, 2016

Dear Mr. Hubbard:

This letter is sent to you based upon information that you are not currently represented by counsel in this matter. If this is incorrect, please advise me within five days so that future communications may be directed to your counsel.

Recent information received by the State Bar indicates you deceived the Ninth Circuit Court of Appeal by denying the existence of a State Bar Court proceeding pending against your father,

Lynn Hubbard. Specifically, on February 4, 2016, you presented oral argument to the Ninth Circuit Court of Appeal in an ADA case in which the USDC imposed monetary sanctions against your father, Lynn Hubbard III, in *Vogel v. Tulaphorn. Inc. dba McDonalds #10746; McDonald's Corporation*, USDC Case No. CV 13-00464. During oral arguments, you engaged Justice Smith as follows:

> J. Smith: *"Has the State Bar taken any actions in connection with the attorneys in this matter?"*
>
> You: *"With respect to the attorney responsible for the deposition ... uh ... the discovery-related abuses. as I indicated in our reply brief …"*
>
> J. Smith: *"What happened?"*
>
> You: *"While it happened, all of this …"*
>
> J. Smith: *"No, I mean. what did the State Bar do?"*
>
> You: *"Oh, the State Bar dismissed in the interests of Justice, their words. Dismissed all the charges against him."*
>
> J. Smith: *"Any of the other attorneys?"*
>
> You: *"Uh, that was the only attorney."*
>
> J. Smith: *"The only one?"*
>
> You: *"Yes."*

Your response to the Court was incomplete and misleading because Hubbard III (whom you

defended) and Kushpreet Mehton were co-respondents in State Bar investigations 13-0-17118 and 13-0-17119. During trial, the Office of Chief Trial Counsel dismissed the case only against Mr. Mehton. On February 18, 2015, a year before you argued before the Ninth Circuit, the Hearing Department filed its decision against Hubbard III, finding culpability of a variety of B&P violations in three matters, including the Vogel matter, and recommended Hubbard III be actually suspended for a year. You appealed this matter to the Review Department, and briefing was completed September 10, 2015. The State Bar Review Department abated the case against Hubbard III on December 22, 2015, pending the Ninth Circuit's decision on Hubbard III's appeal in Vogel. Thus, the State Bar case against Hubbard III remained pending at the time you made the misleading response(s) to Justice Smith's questions.

Your written response to these allegations along with any supporting documentation is requested. All documents that you send to the State Bar, whether **copies or originals**, become State Bar property and are subject to destruction.

FAILURE TO PROVIDE THE DOCUMENTS REQUESTED IN THIS LETTER MAY RESULT IN THE ISSUANCE OF A SUBPOENA DUCES TECUM.

In addition, pursuant to Business and Professions Code section 6086.10, you may be subject to a cost assessment for the expenses incurred by the State Bar

if this matter results in public discipline.

We must receive your written response and the documents requested, if any, by **May 19, 2016**. Section 6068(i) of the Business and Professions Code states that it is the duty of an attorney to cooperate with and participate in any State Bar Investigation.

Upon request, the Office of Chief Trial Counsel will consider granting you additional time within which to submit a written response to the allegations and the requested information and documents. A request for an extension of time must be in writing and state good cause as to the specific constraints on your practice which are claimed to necessitate the additional time. Any request for extension of time must be received by the undersigned on or before **May 19, 2016.**

Please feel free to call me at (415) 538-2271 if you have any questions.

Very truly yours,

Wesley Hester Jr

Investigator

July 14, 2017

Dear Mr. Bellicini:

This letter is sent to you based upon information that you are currently representing the respondent in the above-noted matter. If this is incorrect, please advise me within five days so that future communications may be directed to the respondent personally.

I was recently reassigned to investigate the State Bar initiated complaint against Scottlynn Hubbard. Thank you for your June 17, 2016 to the letter from former State Bar investigator Wesley Hester Jr.

I have some additional questions that pertain to statements your client made in the petition for rehearing en banc in *Vogel v. McDonalds Corp. and Tulaphorn Inc.*, Case No. 14-55176, submitted to the 9th Circuit Court of Appeals on March 2, 2016.

On page 11 of the petition, your client wrote:

> "The State Bar of California- thanks in no small part to the district judge's referral -prosecuted Hubbard and Mehton for professional misconduct and ethics violations. The results of that prosecution was also a surprise to no one . Brownfield's testimony was so unbelievable that, after he finished the prosecutor dismissed all of the charges based on his outlandish accusations of discovery abuse and manufacturing evidence!"

Please explain why your client wrote that disciplinary charges against Lynn Hubbard III had been dismissed when the State Bar Court issued a decision on Feb. 18,

2015 finding Mr. Hubbard had committed misconduct and recommending a one-year actual suspension.

On page 16 of the petition, your client also wrote:

> "Hubbard has practiced law in California for more than thirty-two years without any record of discipline."

Please explain why your client stated that Lynn Hubbard III had no record of discipline when 1) on Feb. 4, 2013, the U.S. District Court disciplined him by suspending him for one year and 2) on Feb. 18, 2015 the State Bar Court issued a decision recommending a one-year actual suspension.

Pursuant to Business and Professions Code section 6086.10, the respondent may be subject to a cost assessment for the expenses incurred by the State Bar if this matter results in public discipline.

We must receive a written response to the allegations and the requested information and documents by **July 31, 2017**. Business and Professions Code Section 6068(i) states that it is the duty of an attorney to cooperate with and participate in any State Bar Investigation.

Upon request, the Office of Chief Trial Counsel will consider granting your client additional time within which to submit a written response to the allegations and the requested information and documents. A request for an extension of time must be in writing and state good cause as to the specific constraints on your client's practice which are claimed to necessitate the additional time. Any request for extension of the time

must be received by the undersigned on or before **July 31, 2017**.

Please feel free to call me at (415) 538-2041 if you have any questions .

Very truly yours,

Amy Yarbrough

Investigator

July 2, 2018

Dear Mr. Bellicini,

In reviewing discovery and preparing the ENE Statement, I realized that Mr. Hubbard had not been given a formal opportunity to respond to additional allegations, beyond those made in Investigator Amy Yarbrough's TR letters dated July 14, 2017 and August 31, 2017.

First, there appears to be additional misrepresentations in the Petition for Rehearing En Banc Mr. Hubbard filed with the Ninth Circuit in the Vogel matter as follows:

> 1. Respondent falsely suggested that the State Bar prosecutor, in dismissing charges against Kushpreet Mehton, "admitted" that had Lynn Hubbard and Mr. Mehton been allowed to respond to the motion for terminating sanctions in the district court with an evidentiary hearing, that the

State Bar would have never brought charges in the first place. In fact, respondent knew the lack of an evidentiary hearing in the district court had no bearing on the State Bar's decision to prosecute Lynn Hubbard or Mr. Mehton. Respondent knew that the State Bar prosecutor's use of the word "response" in explaining the dismissal of charges against Mr. Mehton had nothing to do with the district court proceedings, but instead referred to the lack of a formal response by Mr. Mehton and Mr. Hubbard to State Bar charges during the investigation of their conduct.

2. Respondent falsely suggested the State Bar prosecutor dismissed charges immediately after witness Brendan Brownfield testified because his testimony was so unbelievable by stating to the court: "Brownfield's testimony was so unbelievable that, after he finished, the prosecutor dismissed all the charges based on his outlandish accusations of discovery abuse and manufactured evidence!" In fact, respondent knew that the State Bar did not dismiss any charges immediately after Brownfield's testimony, and that the eventual dismissal of charges against Mr. Mehton was not because Mr. Brownfield's testimony was "so unbelievable."

3. Respondent falsely suggested that the sanctions in the Vogel matter were for discovery violations alone, when respondent knew that the sanctions were also based on Lynn Hubbard's misconduct in filing a motion for summary judgment which contained false representations. Respondent also knew that, almost a year before he filed the

> Petition for Rehearing, Judge Donald Miles of the State Bar Court Hearing Department had found Lynn Hubbard culpable of moral turpitude and a willful violation of Business and Professions Code, section 6106 for filing a motion for summary judgment containing false representations.

Second, it appears Mr. Hubbard made an additional misrepresentations to the U.S. Supreme Court in his Petition for Writ of Certiorari in the Plaza Bonita matter (attached)as follows:

> 4. Respondent stated, "Everything that [Lynn] Hubbard said in this matter was 100% true, 100% of the time; and there is absolutely no evidence that he fraudulently concealed anything from anyone. Pet.App 112a-128a&161a-178a. More importantly,… he [Lynn Hubbard] did not come close to (much less cross) the line of professional misconduct, unethical behavior, bad faith, or even recklessness. Ibid. In fact, after eight years of persecution no one – not Peters [opposing counsel] not the magistrate, not two district persecution no one – not Peters [opposing counsel] not the magistrate, not two district judges, not the State Bar of California, not even the Ninth Circuit panel – has identified what duty [Lynn] Hubbard supposedly violated." (emphasis in original).
>
> > a. In fact, respondent knew that on June 13, 2011, U.S. Magistrate Judge William Gallo found that Lynn Hubbard's actions in the Plaza Bonita case "constitute[d]recklessness and were done in bad faith."
> >
> > b. In fact, respondent knew that on February 4,

2013, Judge M. James Lorenz found that Lynn Hubbard's "intentionally deceptive and misleading conduct in the underlying action [Plaza Bonita] constitutes unprofessional conduct that violated ABA Model Rules 3.3, 4.1(a), 7.1 and 8.4; California Rules of Professional Conduct 5-200 and 5-220; State Bar Act sections 6101 [meaning 6106], 6068(b), and 6068(d). Through these violations, Mr. [Lynn] Hubbard's conduct also constitutes unprofessional conduct in violation of this district's Civil Local Rule 83.4."

c. In fact, respondent knew that as a result of Judge Lorenz finding of professional misconduct, his father, Lynn Hubbard had been suspended from the practice of law for one year in the Southern District of California, and that Lynn Hubbard's one-year suspension became effective on or about October 29, 2013.

d. In fact, respondent knew that on February 18, 2015, State Bar Court Judge Miles found Lynn Hubbard culpable of professional misconduct, and with respect to the Plaza Bonita matter stated, "… [Lynn Hubbard's] conduct violated, at minimum, the prohibitions of section 6106; section 6068, subdivision (d); and rules 5-200 and 5-220."

e. In fact, respondent knew that on November 12, 2015, the Ninth Circuit panel, in affirming the Plaza Bonita sanctions, found that "[a]ny rational attorney representing a plaintiff in an ADA access case would know that if his client

> died, the defendants would want to know about it, especially before signing a settlement agreement that promised prospective relief. And by sending the defendant an agreement after his mother's death that purported to contain her signature when it was not in fact her signature, [Lynn] Hubbard created the impression that she was still alive. [Lynn Hubbard] provides no coherent innocent explanation for this conduct, and the most logical conclusion to be drawn is that he intended to deceive the defendant. Such conduct rises to the level of recklessness and bad faith."

We can proceed one of two ways: (1) We can take the ENEC off the calendar for July 9th and reschedule the ENEC for some time after July 23rd, after you have had 20 days to respond to the additional allegations or (2) if you wish, you can waive submitting a TR response to these allegations and we can proceed with the ENEC on July 9th as scheduled.

I apologize for this development, but wanted to bring these additional allegations to your attention and allow you an opportunity to respond. If you wish to go forward with the ENEC on July 9th please advise me at your earliest convenience as I will need to submit my ENE Statement to the court. Please let me know how you would like to proceed.

Melissa G. Murphy
Deputy Trial Counsel
Office of Chief Trial Counsel
The State Bar of California

180 Howard Street
San Francisco, CA 94105

July 2, 2018

Dear Mr. Bellicini,

With respect to the Petition for Rehearing En Banc, one final allegation requiring a response from Mr. Hubbard is that he attacked the integrity, fairness and character of U.S. District Court Judge Philip S. Gutierrez by falsely claiming that Judge Gutierrez made rulings and findings that Judge Gutierrez knew were incorrect and contrary to the evidence by stating the following:

> This isn't a case where Judge Gutierrez did not know that we were innocent of the charges…he did. The record shows he knew that our positions were firmly rooted in binding Ninth Circuit precedent; knew that we had never manufactured constitutional standing in an ADA lawsuit (ever) [Footnote 9: Any court can take judicial notice of that fact – i.e., appellants had never been accused of (much less found to have) manufacturing constitutional standing in an ADA lawsuit – via a cursory search of Westlaw and Lexis]; knew that Brownfield had misrepresented the holdings of In-N-Out Burgers, knew that Vogel had visited Tulaphorn's restaurant, which is located next to his brother's house, before the filing of the lawsuit and had first-hand knowledge of the facility; knew that Vogel's confusion regarding the actual date of that visit was traced directly to a clerical error by

> his lawyers (who not only took full responsibility for their mistake, but worked diligently to correct the record once the mistake was discovered); and knew that, given an opportunity, we could have proven all these facts at an evidentiary hearing. It did not matter! The district judge was determined to find that appellants had a history of mendacity, a pattern of deception, and willfully suborned perjury regardless of what the evidence showed; and that is precisely what he did (emphasis in original).

Please include this in your response due July 23, 2018. Thank you.

Melissa G. Murphy
Deputy Trial Counsel
Office of Chief Trial Counsel
The State Bar of California
180 Howard Street
San Francisco, CA 94105