

Filed March 4, 2011

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of)	Case No. 05-O-03782 (06-O-13490)
)	
WILLIE ED PHILLIPS,)	OPINION AND ORDER
)	
A Member of the State Bar, No. 56009.)	
_____)	

I. STATEMENT OF THE CASE

From 1994 to 2004, Willie Ed Phillips committed misconduct in several cases before the U. S. Bankruptcy Court, Northern District of California, Oakland Division (Oakland Court). Shortly after his misconduct began, the bankruptcy judges formally warned him that future wrongdoing would not be tolerated. Despite this warning, Phillips persisted in violating the rules of practice and the court’s orders. Finally, in 2005, the U. S. Trustee for the Oakland Court (Trustee)¹ wrote a letter reporting Phillips’s misconduct to the Office of the Chief Trial Counsel of the State Bar (State Bar). The letter referenced specific cases in which Phillips had acted improperly. Based on information from those court files and a separate client complaint arising from a 2006 civil case, the State Bar filed a Notice of Disciplinary Charges (NDC) on September 30, 2008, which is Phillips’s fourth discipline case.

¹ The Office of the U. S. Trustee, an agency of the U.S. Department of Justice, monitors bankruptcy cases for fraud and abuse. (See 28 U.S.C. § 586(a)(3); *In re Castillo* (9th Cir. 2002) 297 F.3d 940, 950.)

Before trial, Phillips failed to adequately respond to pre-trial discovery requests, prompting the hearing judge to order issue preclusion sanctions, including that most factual allegations in the NDC's 23 counts of misconduct be deemed admitted. Based largely on these admissions, the hearing judge found Phillips culpable of 21 counts of misconduct – 14 arising from the bankruptcy cases (case no. 05-O-03782) and seven in the unrelated civil case (case no. 06-O-13490). Phillips's unethical conduct included: (1) charging or collecting illegal fees; (2) misappropriating client funds; (3) failing to obey court orders; (4) committing acts of moral turpitude; (5) misleading a judge; (6) performing incompetently; (7) failing to communicate with clients; and (8) violating the Federal Rules of Bankruptcy Procedure.

With five factors in aggravation and none in mitigation, the hearing judge recommended that Phillips be disbarred, noting his "complete lack of insight, recognition and remorse." Phillips seeks review.

II. ISSUES ON REVIEW

Phillips requests that we reverse the hearing judge's decision. He contends he is not culpable of any misconduct for four primary reasons: (1) the hearing judge abused her discretion by ordering issue preclusion sanctions; (2) the five-year limitations rule and the doctrine of res judicata bar prosecution of certain charges; (3) the State Bar did not prove any misconduct by clear and convincing evidence; and (4) the bankruptcy court's findings and orders are based on the court's bias against him and are therefore punitive. In response, the State Bar asserts that Phillips's contentions are without merit and urges his disbarment. After considering the record and the parties' briefs on review, the issues before us are:

1. Did the hearing judge abuse her discretion by imposing the issue preclusion sanctions?
2. Do the five-year limitations rule and the doctrine of res judicata bar prosecution of any misconduct charges?

3. Did the State Bar prove by clear and convincing evidence that Phillips is culpable of 21 counts of misconduct?
4. If Phillips is culpable, is disbarment the appropriate discipline to recommend?

III. SUMMARY OF DECISION²

We agree with the hearing judge's decision recommending Phillips's disbarment. As to procedural issues raised by Phillips, we find the hearing judge's rulings to be correct. First, the judge properly imposed issue preclusion sanctions as a final resort when Phillips repeatedly failed to respond to discovery. Second, she correctly ruled that neither the rule of limitations nor the doctrine of res judicata bars prosecution of any charges. We further conclude the State Bar proved, primarily through deemed admitted allegations in the NDC, that Phillips committed 18 acts of misconduct. Given his lack of mitigation, record of three prior disciplines and lack of insight and remorse, Phillips must be disbarred to protect the public, the courts and the legal profession.³

IV. GENERAL FACTUAL BACKGROUND

Phillips was admitted to the California Bar in 1973, and has focused his solo practice on bankruptcy law, appearing primarily before the Oakland Court. On January 23, 1992, the three Oakland bankruptcy judges called a meeting with Phillips to advise him that he had repeatedly violated the rules of practice and procedure related to his employment and fees. The judges told him they were troubled by his ethical lapses and cautioned that they would not tolerate future

² We independently review the record to reach our recommendation in this opinion. (Cal. Rules of Court, rule 9.12.) Each finding of fact and conclusion of law has been established by clear and convincing evidence which "requires a finding of high probability, based on evidence so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind." (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552, internal quotation marks omitted.)

³ Phillips's Supplement to Appellant's Opening Brief, filed November 24, 2010, is stricken as untimely under the Rules of Procedure of the State Bar of California and the Rules of Practice of the State Bar Court.

violations. Despite this warning, Phillips persisted in his misconduct. As a result, the chief bankruptcy judge notified Phillips on November 20, 1997 that the Oakland judges would no longer grant his applications to appear in Chapter 11 cases.⁴

V. PROCEDURAL ISSUES

A. THE HEARING JUDGE DID NOT ABUSE HER DISCRETION BY ORDERING ISSUE PRECLUSION SANCTIONS

Discovery began on November 18, 2008, when the State Bar served Phillips with two sets of interrogatories. The first set was about culpability (Nos. 1 - 69) and the second concerned mitigation (Nos. 70 - 72). Phillips did not file his response by the December 23, 2008 statutory deadline. On December 30, 2008, the State Bar sent Phillips a “meet and confer” letter, and ultimately agreed to two extensions of time, making Phillips’s responses due on January 7, 2009. After Phillips failed to meet that deadline, the State Bar filed a motion to compel on January 15, 2009. Phillips filed no opposition.

At a February 23, 2009 status conference, the hearing judge extended Phillips’s deadline to March 10, 2009 to “fully and completely respond without objection, limitation, or qualification to the State Bar’s interrogatories” Phillips again failed to meet the deadline. On March 20, 2009, the State Bar filed a motion for sanctions. Phillips did not respond. Three days later, on March 23, 2009, Phillips filed a late response to the *first set* of interrogatories but failed to properly state facts and identify documents or witnesses. On April 7, 2009, the hearing judge denied the State Bar’s motion for sanctions but ordered the State Bar to submit a pleading specifying how each of Phillips’s interrogatory answers was inadequate and why sanctions were justified.

⁴ This order was designed to prevent Phillips from appearing on matters where his clients were fiduciaries. In Chapter 11 cases, the debtors rather than a trustee often remain in possession of assets and in charge of affairs. This vests the debtor-in-possession with the fiduciary rights and powers of a trustee to account for property, examine claims and file reports. (11 U.S.C. § 1107.)

At a pretrial conference on April 13, 2009, the hearing judge gave Phillips a final opportunity to fully respond and extended the due date for interrogatory responses to April 23rd. On April 22, 2009, *for the first time*, Phillips served his response to the three questions in the second set of interrogatories, but provided no further answers to the 69 questions in the first set. On May 4, 2009, the State Bar filed its 195-page pleading detailing the interrogatories, Phillips's responses and the reasons for sanctions. The hearing judge found that Phillips had willfully disobeyed her initial February 23, 2009 order to fully answer both sets of interrogatories. She imposed the following sanctions: (1) the NDC's factual allegations were deemed admitted; (2) no evidence contradicting the deemed admitted evidence would be admitted at trial; and (3) no documentary evidence related to mitigation would be admitted at trial.

We review the hearing judge's sanctions order under an abuse of discretion standard. (*In the Matter of Navarro* (1990) 1 Cal. State Bar Ct. Rptr. 192, 198 [Supreme Court applies abuse of discretion standard for procedural motions in State Bar proceedings].) In doing so, we are mindful that sanctions orders are "subject to reversal only for arbitrary, capricious or whimsical action." (*Sauer v. Superior Court* (1987) 195 Cal.App.3d 213, 228.) Indeed, a judge has broad discretion to choose among the possible sanctions, including an issue sanction when a party disobeys an order compelling interrogatory responses. (Code Civ. Proc., § 2030.290, subd. (c);⁵ see *Liberty Mut. Fire Ins. Co. v. LcL Adm'rs, Inc.*, (2008) 163 Cal.App.4th 1093, 1105-1106 [question not whether court should have imposed lesser sanction but whether it abused discretion by imposing sanction chosen].)

Applying these principles, the hearing judge did not err by imposing sanctions. Instead, she simply exercised her broad authority to levy the ultimate issue preclusion sanction when

⁵ This section of the Code of Civil Procedure is incorporated into State Bar practice by rule 180(a) of the Rules of Procedure of the State Bar. Since the request for review was filed prior to January 1, 2011, we do not apply the amended rules approved on September 22, 2010.

other efforts produced no results. Most importantly, the hearing judge correctly addressed the prerequisite for imposing sanctions: a willful failure to comply. (*Villbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545.) In doing so, she carefully detailed Phillips's history of willfully failing to fully and timely respond to interrogatories and chronicled her efforts to avoid sanctions. At trial, the hearing judge repeatedly explained to Phillips her reasons for imposing the sanctions. On one occasion, she told him directly: "It's a matter of, you didn't comply with discovery. You were given three months. There were motions upon motions filed. And I displayed extreme patience, in terms of just do what you're supposed to do in terms of discovery. At some point, you left this Court with no choice." Under these circumstances, the hearing judge's order was not arbitrary, capricious or whimsical.⁶

B. THE RULE OF LIMITATIONS DOES NOT BAR THESE PROCEEDINGS

On August 11, 2005, the Trustee sent the State Bar a letter referencing Phillips's misconduct from 1988 to 1998. Consequently, the State Bar investigated the bankruptcy court's files and, based on information obtained, filed the NDC on September 30, 2008, alleging misconduct in five bankruptcy cases and in an unrelated 2006 civil case where the client complained directly to the State Bar.

Rule 51(a) of the Rules of Procedure of the State Bar governs the time for the State Bar to file discipline cases. This rule provides for a five-year period of limitations from the date of the alleged violation if the proceedings are based *solely* on a third-party complainant's allegation of misconduct. But rule 51 does not limit the authority of the State Bar to file charges based on information "from a source independent of a time-barred complainant." (Rules Proc. of State Bar, rule 51(e).) Phillips contends that the Trustee is a third-party complainant. He argues that

⁶ Phillips failed to seek interlocutory review of the sanctions order although the hearing judge postponed the trial to permit Phillips time to do so. (Rules Proc. of State Bar, rule 300 [interlocutory review available for significant issue requiring pretrial intervention if not readily remediable after trial].)

four of the five bankruptcy cases are therefore untimely under rule 51 since they were concluded more than five years before the NDC was filed. We disagree because the Trustee in this case is *not* a time-barred complainant.⁷

The Trustee referred this matter in her official capacity, not because she suffered harm as an individual. A Trustee is charged with monitoring and supervising the administration of bankruptcy cases. (See 28 U.S.C. § 586(a)(3).) Indeed, a Trustee is duty-bound to carefully examine cases in an effort to protect and preserve the integrity of the bankruptcy system. (See *In re Castillo, supra*, 297 F.3d at p. 950 [U.S. Trustee, appointed by Attorney General, serves as watchdog of bankruptcy system to prevent fraud and abuse].) And a Trustee may perform a wide variety of functions according to legislative and judicial directives. (*Ibid.*) Here, the Trustee specifically told the State Bar in her letter that she was providing the information about Phillips as a “discharge of her statutory duties.”

In this proceeding, the Trustee is not a complainant under rule 51 because she merely provided the State Bar with a narrative overview referencing court files which documented Phillips’s misconduct. No individual bankruptcy clients filed any complaints with the State Bar. We find that Rule 51(a) does not apply as a matter of law since the State Bar based the NDC on information gained from its review of the court files and not *solely* on a complaint made by a third party. (See *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 9 [rule 51 did not bar State Bar’s filing based on superior court’s sanction order].)⁸

⁷ On October 24, 2008, Phillips filed a Motion to Dismiss the charges on the same grounds. On November 21, 2009, the hearing judge denied the motion, finding that rule 51(a) did not apply since the State Bar, rather than a third-party complainant, initiated the proceeding. On January 7, 2009, we denied Phillips’s petition for interlocutory review.

⁸ Rule 51 may also be tolled since the bankruptcy court imposed its own administrative discipline by making disgorgement orders, providing verbal warnings and imposing a limitation on Phillips’s court appearances. (Rules Proc. of State Bar, rule 51(c)(3) [tolling where “[c]ivil,

C. THE DOCTRINE OF RES JUDICATA DOES NOT BAR THESE PROCEEDINGS

Phillips contends that res judicata bars prosecution of the five bankruptcy matters. He argues that local rules of court permitted the bankruptcy judges to impose discipline or refer him to the State Bar *at the time of his misconduct* in the bankruptcy cases. Because those judges did not impose discipline or refer him, Phillips asserts that the discipline issues in those cases are final. His analysis is incorrect, however, because it ignores the two basic requirements of res judicata: (1) a final judgment on the merits, (2) which involves the same parties. (See *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 897.)

Regarding the first requirement, the bankruptcy court's failure to take disciplinary action against Phillips does not constitute a final judgment on the merits. As to the second requirement, the parties are not the same in each proceeding since the State Bar was not a party to the bankruptcy court action or any prior litigation in that court. (See *In the Matter of Respondent V* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 442, 447-448 [Louisiana State Bar dismissal of complaint about identical misconduct not barred under res judicata since California State Bar not party to Louisiana proceeding].)⁹ Thus, res judicata does not bar this proceeding.

VI. GENERAL BANKRUPTCY LAW BACKGROUND

Bankruptcy cases are strictly controlled by the court. In Chapter 11 matters, debtors-in-possession, rather than trustees, may continue to possess their assets and be in charge of their affairs. (11 U.S.C. § 1107.) However, to retain counsel, a debtor-in-possession must file an

criminal, or administrative investigations or proceedings arising out of substantially the same acts or circumstances that provide the basis for the alleged violations are pending with any governmental agency, court or tribunal”].)

⁹ Phillips's final procedural contention is that the case no. 05-O-03782 (the bankruptcy cases) and case no. 06-O-13490 (the civil case) should not have been “consolidated.” This contention is without merit because the two cases were never filed separately and then consolidated. Instead, they were filed together as correlated cases in one NDC, which is appropriate.

application with the court. (11 U.S.C. § 327(a).) This application shall include a verified statement by counsel setting forth any connections he or she has with the debtor, creditor, and any party in interest. (Fed.R.Bankr.P. 2014(a).) Counsel for a debtor-in-possession must be a disinterested person who does not hold an interest adverse to the estate. (11 U.S.C. § 327(a).) Only the bankruptcy court may approve counsel's application to be retained and authorize fee payments. (11 U.S.C. § 330(a)(1); Fed.R.Bankr.P. 2016(a).) Counsel for the debtor-in-possession must also disclose to the court any payments received for legal fees. (Fed.R.Bankr.P. 2016(b).)

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING MISCONDUCT¹⁰

A. THE MOUALEM MATTER (05-O-03782 - BANKRUPTCY CASE)

In 1994, Phillips filed proceedings with the bankruptcy court on behalf of Nadeem Moualem. Moualem paid Phillips \$9,750 in attorney fees without the court's approval. Phillips also paid himself \$35,957.94 in fees out of escrow funds of \$53,920.63, which were received on behalf of Moualem's estate. Neither payment was authorized by or reported to the bankruptcy court. The trustee for the estate filed an adversary proceeding against Phillips for an accounting and refund (disgorgement) of the \$35,957.94. Phillips stipulated to return that amount, plus interest, which the bankruptcy court approved. The court also ordered Phillips to disgorge the \$9,750 he received as his initial fee. Phillips complied, the creditors were paid and the Moualem case was closed in June 1998.

¹⁰ The factual allegations that were deemed admitted establish the 21 counts of misconduct for which the hearing judge found Phillips culpable. The following is a summary of these findings and conclusions.

Count One (A) – Charging Illegal Fee (Rules Prof. Conduct, rule 4-200(A))¹¹

Rule 4-200(A) prohibits an attorney from entering into an agreement for an illegal fee. Without the bankruptcy court’s authorization, Phillips should not have accepted \$9,750 in fees from Moualem nor taken \$35,957.94 from the escrow account. He was required to obtain approval from the bankruptcy court for all fee payments and to notify the court about any payments he did receive. (See 11 U.S.C. § 330(a)(1); Fed.R.Bankr.P. 2016(a) and (b).) Phillips, an experienced bankruptcy practitioner, failed to comply with these fundamental requirements, making the fee he collected illegal under rule 4-200(A).

Count One (B) – Committing Act of Moral Turpitude (Bus. & Prof. Code § 6106)¹²

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption. For purposes of State Bar disciplinary proceedings, moral turpitude is “[a]ny crime or misconduct reflecting dishonesty, particularly when committed in the course of practice” (*Read v. State Bar* (1991) 53 Cal.3d 394, 412.) Phillips misappropriated Moualem’s escrow funds when he paid his fees out of them without consent from his client or the court. “An attorney may not unilaterally determine his own fee and withhold trust funds to satisfy it even though he may be entitled to reimbursement for his services. [Citation.]” (*Crooks v. State Bar* (1970) 3 Cal.3d 346, 358.) Moreover, “an attorney’s failure to use entrusted funds for the purpose for which they were entrusted constitutes misappropriation. [Citation.]” (*Baca v. State Bar* (1990) 52 Cal.3d 294, 304.) We find Phillips culpable of committing an act of moral turpitude by misappropriating the escrow funds.

¹¹ Unless otherwise noted, all further references to “rule(s)” are to the Rules of Professional Conduct of the State Bar.

¹² Unless otherwise noted, all further references to “section(s)” are to the Business and Professions Code.

B. THE HEARN MATTER (05-O-03782 - BANKRUPTCY CASE)

In 1988, Phillips represented William Hearn in a Chapter 11 proceeding. Hearn paid Phillips a retainer of \$11,500. In 1989, Hearn and Phillips submitted an application to the bankruptcy court disclosing the retainer payment, seeking approval for Phillips to represent Hearn and acknowledging that any additional fees “shall be subject to court approval.” Phillips filed a supporting declaration and the bankruptcy court approved the application. In 1993, the court finalized the bankruptcy plan, which included paying Phillips an additional \$21,000 out of the proceeds of the sale from the first property, subject to court approval.

Less than a year later, in 1994, and without bankruptcy court authorization, Phillips took \$35,997.50 from a loan escrow account Hearn had established. After three years passed without any action on the case, the court clerk reviewed the file in 1997 and requested that Phillips provide a status report. Phillips then filed an application for fees showing he had already billed and received fees without court approval. The bankruptcy court ordered him to disgorge \$35,192.50 of the funds he took, but permitted him to retain the initial \$11,500 retainer. The court found that Phillips had violated its plan for paying his fees and cited his conduct as inexcusable.¹³ The bankruptcy court issued an Order to Show Cause (OSC) as to why Phillips should not be held in civil contempt for failing to disgorge the fees for three years.

Phillips stipulated to pay the \$35,192.50 directly to Hearn in \$500 monthly installments, with the entire balance becoming due if he defaulted on any payment. From February 2002 to

¹³ The bankruptcy court’s November 17, 1997 order stated: “There can be no doubt that Phillips was not entitled to receive any fees in excess of \$11,500 for his preconfirmation services. . . . [T]he terms of the debtor’s confirmed chapter 11 plan all required Phillips to apply to the court for any compensation, in excess of the \$11,500 retainer. Phillips did not do so. Rather, he collected payment from the proceeds of a loan escrow in an obvious attempt to circumvent the requirement of a fee application. [¶] Phillips’ violation was willful, and without just cause or excuse. Phillips has been repeatedly warned by this court that abuses regarding attorneys’ fees would not be tolerated” Three days later, on November 20, 1997, the bankruptcy judges informed Phillips they would no longer approve future applications to represent Chapter 11 clients.

July 2002, Phillips made only five installment payments totaling \$2,500, and still owes Hearn the remainder. At trial, Phillips claimed he did not have adequate income to refund the fees because he could not earn money after the bankruptcy court stopped appointing him on Chapter 11 cases.

Count Two (A) – Charging Illegal Fee (Rule 4-200(A))

Phillips is culpable of charging an illegal fee, in violation of rule 4-200(A), because he took the \$35,997.50 from the escrow account without the bankruptcy court’s approval, and then failed to provide notice of payment. (See 11 U.S.C. § 330(a)(1); Fed.R.Bankr.P. 2016(a) [bankruptcy court must order payment of attorney fees]; Fed.R.Bankr.P. 2016(b) [attorney must disclose payments received for legal services].)

Count Two (B) – Failing to Obey Court Order (§ 6103)

Section 6103 provides for suspension or disbarment if an attorney willfully disobeys a court order. Phillips violated two bankruptcy court orders. First, he received \$35,997.50 from Hearn’s loan escrow account in violation of the court’s 1989 and 1993 orders requiring approval of all attorney fees. Second, Phillips failed to fully refund the fees to Hearn in violation of the court’s order to disgorge.

The bankruptcy court found that Phillips’s motive for not seeking court authorization was to “willfully circumvent the fee application process.” We agree with the bankruptcy court’s finding, which is entitled to a strong presumption of validity. (*In the Matter of Scott* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 446, 455 [civil verdicts, judgments and findings entitled to strong presumption of validity].)

Count Two (C) Moral Turpitude (§ 6106) - Receiving Fees Without Court Approval
Count Two (D) Moral Turpitude (§ 6106) - Misappropriation

Phillips is culpable of violating section 6106 because: (1) he improperly received \$35,997.50 from Hearn's loan escrow account for his fees without court approval; and (2) he unilaterally took Hearn's escrow funds for his own use that he was obligated to hold in trust. These acts constitute moral turpitude.¹⁴

Count Two (E) – Failing to Return Unearned Fees (Rule 3-700(D)(2))

Rule 3-700 (D)(2) requires that, *upon termination of employment*, an attorney must “[p]romptly refund any part of a fee paid in advance that has not been earned.” Although Phillips never refunded \$32,692.50 (\$35,192.50 minus \$2,500 in payment plus interest) in fees he wrongfully obtained, the record does not establish that he was terminated or withdrew from employment. He therefore is not culpable.

C. THE RILEY MATTER (05-O-03782 - BANKRUPTCY CASE)

In 1995, the bankruptcy court approved Phillips's request to be the attorney for Riley and Sons Construction in a Chapter 11 case. The matter was ultimately converted to a Chapter 7 case and a trustee was appointed. Phillips accepted \$16,900 in fees from Riley without obtaining court authorization, and he did not disclose to the court that he had received any money. The trustee for the case discovered the payments and filed an adversary proceeding against Phillips to recover the fees. Phillips admitted receiving the payments from Riley without court approval but claimed that the fee checks were cashed and Riley used the money to buy supplies for the company. Riley corroborated Phillips's claim in a declaration presented at an evidentiary hearing. However, Riley's declaration contradicted his previous statement to the attorney for the

¹⁴ The same facts (taking escrow funds) support both Count Two (C) and (D). In *Bates v. State Bar* (1999) 51 Cal.3d 1056, 1060, the Supreme Court instructed that little, if any, purpose is served by duplicate allegations of misconduct in State Bar proceedings. We therefore dismiss Count Two (D) with prejudice as duplicative.

trustee – that he paid the fees for Phillips to continue to represent him. The bankruptcy court concluded that Phillips and Riley did not tell the truth and that Riley had paid the money to Phillips for legal fees. The court entered a judgment against Phillips for \$16,900, plus pre- and post-judgment interest.¹⁵

Count Three (A) – Charging an Illegal Fee (Rule 4-200(A))

Phillips is culpable of charging an illegal fee because he collected \$16,900 as fees without obtaining bankruptcy court approval or providing notice he had received the payment.

Count Three (B) –Moral Turpitude (§ 6106) – Lying Under Oath

Phillips committed an act of moral turpitude when he submitted Riley’s false declaration and testified falsely at the evidentiary hearing. Like the bankruptcy court, the hearing judge rejected Phillips’s testimony that Riley gave him the money for company expenses as self-serving and contrary to the judicially noticed bank records. We give great weight to the hearing judge’s credibility findings in concluding that Phillips testified dishonestly at the bankruptcy hearing. (Rules Proc. of State Bar, rule 305(a); *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1055).

Count Three (C) – Advising Violation of Law (Rule 3-210)

Rule 3-210 prohibits an attorney from advising the violation of any law unless it is believed that the law is invalid. The hearing judge properly dismissed this charge since the State Bar did not prove that Phillips actually persuaded his client to lie under oath in his declaration and at the evidentiary hearing, as charged in the NDC.¹⁶

¹⁵ The record contains some evidence that Phillips still owed Riley \$6,000 at the time of trial, but the State Bar failed to prove this by clear and convincing evidence.

¹⁶ Count 6 alleges that Phillips’s illegal fee in the Moualem, Hearn and Riley matters establish a pattern amounting to moral turpitude, in violation of section 6106. The hearing judge dismissed this count with prejudice because these three incidents (spanning 1996-1998) do not clearly and convincingly establish that Phillips was “systematically engaging in a pattern of

D. THE COYOTE CONSTRUCTION MATTER (05-O-03782 - BANKRUPTCY CASE)

In 2004, Coyote Construction sought to retain Phillips and another attorney, Sharon Ceasar, to represent the company in a Chapter 11 case. Phillips told the court in his application to be retained that he had no connection with Coyote. However, Phillips had at least four undisclosed connections: (1) Coyote Construction had paid Phillips's health insurance premiums; (2) Phillips had represented Coyote in at least eight other legal matters; (3) Coyote employed Phillips's son before and after it filed bankruptcy; and (4) Coyote provided free office space to Phillips in exchange for a lower hourly legal fee. The Trustee discovered the connections and filed an objection to the application. The bankruptcy court denied Coyote's application to retain Phillips.

Count Four (A) – Failing to Comply with Law (§ 6068, subd. (a))

Count Four (B) – Seeking to Mislead Judge (§ 6068, subd. (d))

Count Four (C) – Committing Act of Moral Turpitude (§ 6106)

By failing to disclose his connections with Coyote and filing the false declaration in court, Phillips is culpable of the three violations alleged in Count Four. We find that he intentionally failed to disclose his connections in order to mislead the bankruptcy judge, a dishonest act of moral turpitude. However, since the misconduct underlying the three charges in Count Four is the same, we treat Phillips's misrepresentation to the court as a single violation of moral turpitude in determining discipline. (See *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar. Ct. Rptr. 211, 221.)

E. THE JACKSON MATTER (05-O-03782 - BANKRUPTCY CASE)

In 1998, Josia Jackson hired Phillips to represent her in bankruptcy court. She paid a \$400 initial fee with a check, which was not honored by her bank. Over the next three weeks,

charging and collecting illegal fees," as the State Bar charged. We agree and affirm the dismissal.

she paid Phillips additional fees. Several weeks later, Phillips presented the original \$400 check to the bank for payment, which was then honored. The next day, Phillips filed the petition but did not include the required bankruptcy schedules, nor did he file them within the 15-day grace period. (Fed.R.Bankr.P. 1007(c).)

Phillips also did not provide the schedule forms to Jackson until after the deadline. The court issued an order warning that the case would be dismissed if the schedules were not filed by August 3, 1998. On July 23, 1998, Jackson sent a letter to the court requesting an extension of time, and Phillips made his own request to the court on July 28. The court issued a sanctions OSC against Phillips for failing to properly represent Jackson and both testified at the hearing. Ultimately, the court found that Phillips had performed no services of value and ordered him to disgorge \$300 of the fees that Jackson had paid. For two and a half years, Phillips failed to pay, claiming that he simply forgot about the order. He finally paid \$390 (\$300 plus \$90 interest) to Jackson when the issue was raised at a hearing on the Hearn matter.

Count Five (A) – Failing to Obey Court Order (§ 6103)

Count Five (B) – Failing to Perform with Competence (Rule 3-110(A))¹⁷

Phillips is culpable of violating section 6103 because he failed to obey the court's disgorgement order to refund \$300 to Jackson for two and one half years. Phillips also failed to perform competently by not providing Jackson blank schedule forms until *after* the deadline to submit them, in violation of rule 3-100(A).

F. THE HUTSON MATTER (06-O-13490 - CIVIL CASE)

On December 1, 2004, Albert and Christine Hutson hired Phillips to substitute in for another attorney in a superior court civil action (*Phoenix v. Hutson*). The Hutsons paid \$10,000 in advanced fees. When Phillips requested another \$5,000 from them, they didn't have it and

¹⁷ Rule 3-100(A) provides that an attorney "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

asked Phillips to accept payment from the sale of their home. Phillips said he would find someone to loan the money in exchange for a security interest in the Hutsons' property. To obtain the \$5,000 fee payment, Phillips arranged a loan from Cherie Ivey, another of his clients, and sent the Hutsons a \$15,000 promissory note and deed of trust securing an interest in their property. He never explained the transaction to them, never advised them in writing that they could seek independent counsel from a lawyer of their choice, never gave them a reasonable opportunity to seek that advice and never obtained their written consent to the transaction. On August 27, 2005, the Hutsons signed the promissory note and deed of trust. From that date to February 7, 2006, Mr. Hutson left voicemail messages and sent e-mails and a letter to Phillips requesting an update on the case. Phillips did not respond. Finally, on March 21, 2006, the Hutsons filed a complaint with the State Bar.

After the State Bar contacted Phillips about the complaint on June 27, 2006, he told the Hutsons that he would not be able to represent them "because we are now adversaries." Phillips requested that the Hutsons sign a substitution of attorney and agreed to assist the new attorney in continuing the scheduled trial date of July 10, 2006. The Hutsons would not sign the substitution because it was too close to the trial date to retain another attorney. After Phillips discovered this, he filed a motion to withdraw as attorney in superior court and included a declaration that falsely stated: "I am legally obligated to Withdraw [sic] because I have been terminated by my two (2) clients [Albert and Christine Hutson] and because I am now in an Adversary [sic] legal dispute with my own clients. . . . The Hutsons have informed me that they are seeking new legal counsel." When Phillips filed this declaration, he knew that the Hutsons had not terminated his services and were not seeking new legal counsel.

Count Seven (A) – Failing to Respond to Client Inquiries (§ 6068, subd. (m))

Section 6068, subdivision (m) provides that an attorney must promptly respond to clients' reasonable status inquiries and keep them informed of significant developments in the case. Phillips is culpable since he failed to respond to the Hutsons' attempts to communicate with him from August 27, 2005 to February 7, 2006.

Count Seven (B) – Avoiding Representation of Potentially Conflicting Interests (Rule 3-310(C)(1))

According to rule 3-310(C)(1), an attorney must not represent more than one client whose interests potentially conflict without the written consent of each client. Phillips violated this rule by arranging for his client, Ivey, to loan funds to the Hutsons. Since Phillips secured the loan by a deed of trust on the Hutsons' property, he acted as a trustee for Ivey. Each client clearly had potentially conflicting interests and Phillips never obtained written consent from his clients to this dual representation.

Count Seven (C) – Avoiding Interests Adverse to Client (Rule 3-300)

Rule 3-300 prohibits an attorney from entering into a business transaction with a client unless it is fair and reasonable and certain disclosures are made. Phillips violated this section when he secured a \$15,000 deed of trust for the Hutsons. The amount was not fair and reasonable since it was triple the \$5,000 in fees that it secured. And Phillips concluded the transaction without providing the necessary prophylactic disclosures set out in the rule, including: (1) disclosing the transaction to the clients in an understandable manner; (2) advising the clients in writing they may seek the advice of an independent lawyer of their choice; (3) giving the clients a reasonable opportunity to seek that advice; and (4) obtaining the clients' written consent to the terms of the transaction.

Count Seven (D) – Failing to Render Accounts of Client Funds (Rule 4-100(B)(3))

Rule 4-100(B)(3) requires an attorney to maintain records of client funds and property and to render accountings. Phillips failed to provide an itemized billing statement to the Hutsons during and after he represented them. He also failed to render appropriate accounts of all client funds in his possession. Phillips is culpable of violating this rule.

Count Seven (E) – Improper Withdrawal from Employment (Rule 3-700(A)(2))

Rule 3-700(A)(2) prohibits an attorney from withdrawing from employment until his clients' rights have been reasonably protected. Phillips improperly withdrew as counsel in *Phoenix v. Hutson* since it was less than two weeks prior to trial and before the Hutsons could retain new counsel. Phillips failed to avoid prejudice to the Hutsons before withdrawing as their attorney.

Count Seven (F) – Misleading Judge (§ 6068, subd. (d))

Phillips violated section 6068, subdivision (d), when he filed his July 3, 2006 motion to withdraw as attorney in *Phoenix v. Hutson*. By including a false declaration stating that his clients terminated his services and were seeking new counsel, he misled the superior court judge in an effort to win his motion to withdraw.¹⁸

VIII. AGGRAVATION AND MITIGATION

The offering party bears the burden of proof for aggravating and mitigating circumstances. The State Bar must establish circumstances in aggravation by clear and convincing evidence while Phillips has the same burden to prove those in mitigation. (Std. 1.2(b) and (e).)

¹⁸ Count Seven (G) charges Phillips with moral turpitude (§ 6106) for submitting the same false declaration. Since this misconduct formed the basis for Count Seven (F) (Misleading a Judge), we treat Phillips's misrepresentation to the civil court as a single violation. (*In the Matter of Jeffers, supra*, 3 Cal. State Bar Ct. Rptr. at p. 221.)

A. MITIGATING CIRCUMSTANCES

The hearing judge correctly found that Phillips did not prove any mitigating circumstances. In fact, Phillips presented two character witnesses – an attorney and a bankruptcy court clerk who had only limited contact with Phillips over the past 12 years, and were not fully aware of the allegations or Phillips’s prior record. These witnesses do not establish meaningful mitigation, particularly since they do not represent an extraordinary demonstration of good character attested to by a wide range of references in the legal and general communities, as required by standard 1.2(e)(vi). (See *In the Matter of Kittrell* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 615, 624 [two character witnesses insufficient].)

B. AGGRAVATING CIRCUMSTANCES

We adopt four of the five aggravating circumstances the hearing judge found – prior discipline record, multiple acts of misconduct, significant client harm and indifference to rectification. We do not, however, adopt a fifth factor the hearing judge found as aggravation - that Phillips’s failure to comply with the discovery orders on November 17, 2008 and February 23, 2009, constitutes an uncharged violation of law under section 6103. The hearing judge properly considered and relied on this evidence in ordering the issue preclusion sanctions. Considering the same evidence to prove an uncharged act in aggravation is duplicative.

1. Three Prior Discipline Records (Std. 1.2(b)(i))

Phillips has an extensive discipline record. In the early 1990s, he was disciplined three times for failing to perform competently, communicate with clients and follow court orders. Phillips testified that he did not believe the cases involved misconduct and “they were nothing cases,” so he stipulated to culpability in “all three of these little private reprovals.” Unlike Phillips, we assign great aggravating weight to these matters. (*In the Matter of Bouyer* (Review

Dept. 1998) 3 Cal. State Bar Ct. Rptr. 888, 892-893 [record of three prior disciplines was serious aggravating factor].)

The First Discipline – April 17, 1991 (State Bar Court Case 89-O-17584)

This discipline covers misconduct from 1987 to 1990 in two client matters. Phillips failed to competently perform legal services and communicate with clients. In mitigation, he had no record of discipline, had been candid and cooperative with the State Bar, caused no client harm and held a good faith belief in his conduct as to one client. No aggravating factors were present. By stipulation, the State Bar Court issued a private reproof with conditions.

The Second Discipline – February 5, 1992 (State Bar Court Case 90-O-17924)

This discipline covers misconduct from 1987 to 1988 in one client matter. Phillips failed to competently perform legal services, improperly withdrew from employment, and failed to communicate. In mitigation, Phillips had been candid and cooperative with the State Bar and competently performed for the client after his misconduct occurred. In aggravation, Phillips had a prior record of discipline. By stipulation, the State Bar Court issued a private reproof with conditions.

The Third Discipline – April 26, 1993 (State Bar Court Case 92-H-16663)

This discipline covers misconduct in 1992. Phillips failed to timely file a quarterly report as required by the terms of his February 5, 1992 reproof. In mitigation, he had been candid and cooperative with the State Bar and promptly took steps to demonstrate recognition of wrongdoing. In aggravation, Phillips had a prior record of two disciplines. By stipulation, the State Bar Court issued a private reproof and imposed six months' probation with conditions.

2. Multiple Acts of Misconduct (Std. 1.2(b)(ii))

Phillips committed multiple acts of misconduct when he collected illegal fees, misappropriated client funds and failed to obey court orders. Due to the repetitive nature of his 20 acts of misconduct, we assign great weight to this aggravating factor.

3. Significant Client Harm (Std. 1.2(b)(iv))

Phillips's misconduct significantly harmed his clients. He misappropriated over \$35,000 from Hearn and has not refunded the remaining \$32,692.50 plus interest, even though he stipulated to do so and the bankruptcy court ordered him to make \$500 monthly installments. He also delayed paying \$300 to Jackson for over three years.

4. Indifference to Rectification (Std. 1.2(b)(v))

Phillips has demonstrated indifference to rectification, which aggravates this case. Phillips did not acknowledge any misconduct in his trial testimony. For example, without any persuasive evidence, he blamed the bankruptcy judges for "nitpicking" his cases and refusing to appoint him in Chapter 11 cases because they held a bias against him. Phillips's attorney argued at trial that "[t]he only person harmed in any of these cases has been Mr. Phillips, by failure to be able to a [sic] keep or retain or be paid fees earned." We conclude that Phillips's belief that *he* is the victim demonstrates his lack of insight and indifference to rectification.

IX. LEVEL OF DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts and the legal profession. (Std. 1.3.) No fixed formula exists for determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Ultimately, we "balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis" to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.)

Our analysis begins with the standards. While we recognize that they are not binding on us in every case, the Supreme Court has instructed us to follow them “whenever possible.” (*In re Young, supra*, 49 Cal.3d at p. 267, fn. 11.) In fact, the standards should be given great weight to promote “the consistent and uniform application of disciplinary measures.” (*In re Silvertown* (2005) 36 Cal.4th 81, 91.)

When multiple acts of misconduct call for different sanctions, standard 1.6(a) directs that the most severe sanction must apply. Here that sanction is disbarment, which is found in two applicable standards. Standard 1.7(b) provides for disbarment when an attorney has a record of two prior discipline records “unless the most compelling mitigating circumstances clearly predominate.” However, because Phillips’s prior discipline records involve three reprovls and probation from 20 years ago, we believe standard 2.2(a) is more apt as it also calls for disbarment for misappropriation unless the amount taken is insignificant or “the most compelling mitigation circumstances clearly predominate.”

Applying standard 2.2(a), we conclude that Phillips should be disbarred. He misappropriated over \$30,000 in client funds from Hearn’s escrow fund. (*Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367-1368 [misappropriation of \$1,355.75 considered significant].) And he failed to establish compelling mitigation that clearly predominates to avoid disbarment. In fact, he presented no mitigation in the face of four aggravating factors. Here, the standard properly calls for his disbarment.

In addition to the standards, however, we look to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) We find that Phillips’s misappropriation falls well within the parameters of case law warranting disbarment under standard 2.2(a). (See, e.g., *Kaplan v. State Bar* (1991) 52 Cal.3d 1067 [disbarment where attorney with 10 years of discipline-free practice

misappropriated \$29,000 from law firm and lied about it]; *Weber v. State Bar* (1988) 47 Cal.3d 492 [disbarment where attorney with 13 years of discipline-free practice misappropriated over \$24,000 and attempted to conceal theft, displayed contempt for State Bar Proceeding and lack of remorse]; *In the Matter of Spaith* (Review Dept. 1996) 3 Cal .State Bar Ct. Rptr. 511 [disbarment where attorney with 15 years of discipline-free practice misappropriated \$40,000].).

Overall, Phillips has engaged in serious misconduct for over 12 years. He willfully violated court orders, misconduct about which the Supreme Court has voiced great concern: “Other than outright deceit, it is difficult to imagine conduct in the course of legal representation [violating a court order] more unbecoming an attorney.” (*Barnum v. State Bar* (1990) 52 Cal.3d 104, 112.) And considering his prior disciplines and the bankruptcy court’s warning, Phillips had many opportunities to reform his behavior to the ethical demands of the profession. Yet, his continued misconduct and failure to obey court orders “sadly indicate[] either his unwillingness or inability to do so.” (*Arden v. State Bar* (1987) 43 Cal.3d 713, 728 [disbarment for prior records of discipline].) We conclude that given Phillips’s discipline record and his repeated disregard for the bankruptcy court’s orders, imposing a suspension and a probationary period will not adequately protect the public and the legal profession. (*Ibid.*; *In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646 [attorney disbarred where prior discipline coupled with probation did not rehabilitate attorney].)

X. RECOMMENDATION

We recommend that Willie Ed Phillips, bar number 56009, be disbarred from the practice of law in California and that his name be stricken from the roll of attorneys.

XI. RESTITUTION

Within 30 days of the effective date of the discipline herein, Phillips must make restitution to William Hearn in the amount of \$32,692.50, plus 10 per cent per annum from the

date of his last installment payment (or reimburse the Client Security Fund to the extent of any payment from the Fund to Hearn, in accordance with Business and Professions Code, section 6140.5) and must provide satisfactory proof to the State Bar.

XII. RULE 9.20

We further recommend that Phillips be required to comply with the provisions 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 calendar days, respectively, after the effective date of the Supreme Court's order in this case.

XIII. COSTS

We further recommend that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10 and that such costs are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

IX. ORDER OF INACTIVE ENROLLMENT

Because the hearing judge recommended disbarment, she properly ordered that Phillips be involuntarily enrolled as an inactive member of the State Bar as required by section 6007, subdivision (c)(4), and rule 220(c) of the Rules of Procedure of the State Bar. The hearing judge's order of involuntary inactive enrollment became effective on January 29, 2010, and Phillips has remained on involuntary inactive enrollment since that time and will remain on involuntary inactive enrollment pending the final disposition of this proceeding.

PURCELL, J.

WE CONCUR:

REMKE, P. J.

EPSTEIN, J.