PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

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STATE BAR COURT
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STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of PATRICIA JOAN BARRY, A Member of the State Bar, No. 59116.	))))))	Case Nos. 14-O-02579; 14-O-03165 (Cons.) OPINION AND ORDER

This is Patricia Joan Barry's third disciplinary proceeding since her 1974 admission to the State Bar of California. In 2005, she received a private reproval, with conditions, based on misconduct resulting in multiple contempt and sanctions orders, including failing to maintain respect due to the court and failing to obey a court order (*Barry I*). In 2011, she received discipline that included a 60-day actual suspension after stipulating to misconduct in two matters that involved pursuing frivolous litigation and failing to comply with the terms of her earlier private reproval (*Barry II*).

In the present case, a hearing judge found Barry culpable of four counts of misconduct in two matters, including failing to comply with disciplinary probation conditions in one matter, and failing to obey court orders and report sanctions to the State Bar in another. After weighing factors in aggravation and mitigation, the hearing judge considered standard 1.8(b),[1] which provides for disbarment, under certain circumstances, when an attorney has two or more prior disciplines. However, the judge declined to apply it, deeming it excessive due to "the limited nature of the present misconduct." Instead, the judge recommended discipline that included a

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

six-month actual suspension to continue until Barry pays specified court-ordered sanctions in full.

Barry appeals. She accepts none of the hearing judge's findings against her, raises a number of meritless arguments, and requests a dismissal of the charges. The Office of Chief Trial Counsel of the State Bar (OCTC) does not appeal, and requests that we affirm the judge's findings of fact, culpability, aggravation, and mitigation. Regarding discipline, OCTC initially requested on review that we affirm "at the very minimum" the hearing judge's disciplinary recommendation. However, in response to our request for supplemental briefing regarding the appropriate level of discipline, and following "further consideration, and in light of [Barry's] truculence on review," OCTC now contends that standard 1.8(b) should be applied and disbarment recommended.

Upon our independent review of the record (Cal. Rules of Court, rule 9.12), we affirm the hearing judge's findings of fact, culpability determinations, and mitigation findings. We also uphold the judge's aggravation findings with some modifications. We disagree, however, with the judge's departure from the presumptive discipline of disbarment under standard 1.8(b). Barry's misconduct over several years, resulting in three disciplinary proceedings, demonstrates that she is unable or unwilling to follow ethical rules. Further, she failed to prove compelling mitigation. As a result, we lack sufficient assurance that a sanction less than disbarment will prevent future violations. Thus, we recommend that Barry be disbarred.

I. PROCEDURAL BACKGROUND

On September 17, 2014, OCTC filed a one-count Notice of Disciplinary Charges (NDC) in case no. 14-O-03165 (probation violation matter). On April 24, 2015, OCTC filed a three-count NDC in case no. 14-O-02579 (Fotinos matter). The hearing judge consolidated the two

matters on May 4, 2015, and held a three-day trial on August 6, 7, and 11, 2015.[2] On October 20, 2015, the judge issued her decision and found Barry culpable on all four counts.

On November 4, 2015, Barry filed a motion for a new trial, which OCTC opposed. The hearing judge denied the motion on November 20, 2015.

Barry filed a request for review on December 21, 2015. After requesting and receiving two extensions of time, she filed her opening brief on May 18, 2016, and attached three exhibits.[3] On June 1, 2016, OCTC filed a motion to strike the attachments, to which Barry did not respond. Three weeks later, this court granted OCTC's motion because the attachments were outside the record and Barry failed to follow the proper procedure to augment the record under rule 5.156 of the Rules of Procedure of the State Bar.[4]

At oral argument on September 15, 2016, we informed the parties that, under our duty to conduct independent review (Cal. Rules of Court, rule 9.12), we were considering whether greater discipline, including disbarment, was appropriate under standard 1.8(b). Because OCTC had not sought disbarment, and neither party had addressed it on review prior to oral argument, we requested supplemental briefing. We invited the parties to address two issues: (1) whether increased discipline, including disbarment, was appropriate; and (2) whether this matter should be remanded to the Hearing Department to receive further evidence discussing this issue.[5] OCTC filed a supplemental brief in which it argued that disbarment was appropriate and remand

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[2] At the end of trial, the hearing judge permitted Barry to submit two exhibits by the close of business on August 12, 2015, which the judge ultimately accepted and admitted into evidence.

[3] Barry did not file or serve OCTC with a request for judicial notice regarding the three exhibits attached to her opening brief.

[4] All further references to rules are to this source unless otherwise noted.

[5] Supplemental briefing is permitted for issues not raised in a request for review or in the briefs of any party. (Rule 5.155(C).) We also issued an order on September 15, 2016, memorializing our invitation to the parties to submit supplemental briefing.

was unnecessary. Barry did not file a supplemental brief. On October 4, 2016, we submitted the case for decision.

II. THE PROBATION VIOLATION MATTER (CASE NO. 14-O-03165)[6]

A. Background

Barry has two prior records of discipline. In *Barry I*,[7] she stipulated to failing to maintain respect due to the court and failing to obey court orders.[8] On June 22, 2005, the Hearing Department issued a private reproval with conditions. In *Barry II*,[9] Barry stipulated to accepting and continuing employment that she knew or should have known presented a claim or defense that was not warranted under existing law. She also stipulated to failing to comply with the terms of her *Barry I* private reproval by not timely passing the Multistate Professional Responsibility Examination (MPRE). As a result, on July 29, 2011, the Supreme Court imposed discipline that included a 60-day actual suspension, a two-year stayed suspension, and a two-year probationary period with conditions, including, that Barry must submit written quarterly reports and a final report certifying compliance with all conditions, and provide proof of completion of Ethics School and of an additional four hours of in-person minimum continuing legal education (MCLE) on ethics. In addition, the Supreme Court ordered Barry to provide the State Bar's Office of Probation (Probation) with proof of passage of the MPRE, within one year of the effective date of discipline.

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[6] The facts are based on the trial testimony, the documentary evidence, and the hearing judge's factual findings, which are entitled to great weight. (Rule 5.155(A).)

[7] State Bar Court Case No. 00-O-13850.

[8] Among other acts of misconduct in the underlying litigation, Barry referred to a superior court judge and a deputy district attorney on the record as "whore[s]," and she also told the superior court judge that the judge had "sold [her] soul to the devil."

[9] Supreme Court Case No. S187076; State Bar Court Case Nos. 06-O-12210 and 07-H-12920.

On July 18, 2011, Probation sent Barry a letter reminding her of the terms and conditions of her *Barry II* probation and provided her with supporting documents, including an MCLE information sheet. Barry received the letter and supporting materials.

B. Barry Failed to Comply with Her Probation Conditions

Business and Professions Code section 6068, subdivision (k),[10] requires attorneys "[t]o comply with all conditions attached to any disciplinary probation." OCTC charged that Barry violated this requirement when she failed to comply with the following conditions attached to her probation in *Barry II*: (a) submit three quarterly reports by their due dates of January 10, 2012, October 10, 2012, and April 10, 2013; (b) submit her quarterly report due on January 10, 2013; (c) provide proof of completing Ethics School by July 29, 2012; (d) provide proof of passage of the MPRE by July 29, 2012; (e) provide proof of taking four hours of in-person ethics MCLE by July 29, 2012; and (f) submit her final report by July 29, 2013. Barry's multiple failures to comply with her probation conditions are not in dispute.[11] The record clearly and convincingly[12] supports the hearing judge's factual and culpability findings, which we affirm and summarize below.

Barry failed to timely file three quarterly reports by their due dates of January 10, 2012, October 10, 2012, and April 10, 2013, but she ultimately filed them on January 11, 2012,[13]

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[10] All further references to sections are to this source unless otherwise noted.

[11] OCTC does not challenge the hearing judge's culpability findings. Although Barry seeks a dismissal of the present charges against her and raises a "defense of necessity" (as we discuss *post*), she waived any claim of factual error because she failed to challenge any of the judge's findings regarding her probation violations. (Rule 5.152(C) ["Any factual error that is not raised on review is waived by the parties."].)

[12] 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.)

[13] Barry called Probation on January 10, 2012, and informed it that her January 10, 2012 report would be late. The next day, she hand-delivered it to Probation.

October 15, 2012, and April 12, 2013, respectively. In addition, she failed to timely file her final report by its due date of July 29, 2013, and, instead, filed it on July 30, 2013. OCTC also alleged that Barry failed to submit her quarterly report due on January 10, 2013. Barry, however, did timely submit that report on January 8, 2013, but mistakenly dated it with the previous year (i.e., 2012). Due to this minor typographical error, Probation did not accept the report for filing. We affirm the hearing judge's finding that such conduct does not demonstrate a willful probation violation, which OCTC does not challenge on review.

Barry also failed to attend and provide proof of completion of Ethics School by July 29, 2012, as required. On August 1, 2012 (more than three months after Probation informed her that a request for an extension of time to comply had to be filed with the State Bar Court), Barry served on Probation, but failed to properly file, a motion requesting an extension of time to complete her Ethics School and MCLE requirements. Barry stated in her declaration in support of her motion that she "forgot to sign up" for "the ethics classes" earlier because she was occupied with and feared for the safety of clients who were victims of domestic violence. Barry ultimately attended Ethics School, and provided proof of completion to Probation on September 6, 2012.

In addition, Barry failed to provide proof of taking four hours of live ethics MCLE by July 29, 2012, as required. On September 6, 2012, Barry submitted to Probation proof of purchase of four online ethics MCLE courses and a certificate of completion of one of them. On September 10, 2012, however, Probation informed her that it could not give her credit for any MCLE courses completed online because she was required to attend them in person. On December 5, 2012, Probation emailed Barry and informed her that she still had not complied with her MCLE requirements. That same day, Probation suggested that Barry attend the State Bar's Client Trust Accounting School (CTA School) on December 14, 2012 to obtain three hours

of live ethics MCLE. Barry did so, and provided proof of completion on January 8, 2013. She later provided proof of completion of the remaining one hour of live ethics MCLE on April 30, 2013—approximately nine months late.

Although Barry passed the MPRE, as required, she did not do so in a timely manner. Nevertheless, the hearing judge found that the Supreme Court's order that Barry comply with the *Barry II* probation conditions was separate from its order that she pass the MPRE. Under these circumstances, the judge concluded that it could not be construed as a "condition of probation." OCTC does not challenge this finding on review, and we affirm it.

On review, Barry raised a "defense of necessity," arguing that she "was late on reports and other requirements of probation like the invalid and unreliable MPRE because she put the safety of [her clients] ahead of meeting the Bar probation deadlines." We reject this argument as meritless for several reasons. First, Barry cites no authority for the argument that the representation of a client provides a "defense of necessity" for the attorney's failure to comply with reproval or probation conditions, or a Supreme Court or Review Department order. Second, Barry failed to prove that the purported "necessity" of representing her clients precluded her compliance with her probation conditions. Third, the hearing judge did *not* find Barry culpable for failing to timely pass the MPRE. Fourth, if Barry was unable to comply with the conditions ordered by the Supreme Court in *Barry II*, she should have sought relief by properly filing a request for an extension of time to comply, which she failed to do.

III. THE FOTINOS MATTER (CASE NO. 14-O-02579)

A. Facts

On March 2, 2012, Barry filed a legal malpractice and fraud lawsuit on behalf of Michele Fotinos against her former divorce lawyer, Stephen Montalvo, in San Mateo County Superior Court. Montalvo subsequently served certain discovery requests on Fotinos.

On May 29, 2013, Montalvo filed two motions to compel compliance with discovery and sought sanctions solely against Barry. On June 24, 2013, Montalvo filed a third motion to compel Fotinos's compliance with discovery. Despite receiving all of them, Barry did not oppose any of these three discovery motions.

The court heard the three motions on July 24, 2013, and Barry appeared with Fotinos. The judge granted all three motions and, based on two of them, awarded sanctions to Montalvo for $1,725 and for $2,500. Barry did not file any objections to the two sanctions orders, which the judge assessed solely against her and entered on August 7, 2013. On August 13, 2013, Montalvo's counsel served Barry with notices of entry of orders with the attached signed court orders, which Barry received. The record contains no evidence that Barry has paid any of the sanctions imposed on August 7, 2013.

On August 23, 2013, Montalvo filed, inter alia, a motion for sanctions against Barry due to her violation of the court's order that she pay the imposed discovery sanctions. The court scheduled the hearing for October 1, 2013. Barry received the motion, but did not file an opposition. She also did not appear at the October 1, 2013 hearing, at which the court reset the hearing for November 7, 2013, and ordered Barry to be present.

Barry appeared at the hearing on November 7, 2013, and the parties reached a stipulation regarding discovery. However, the court reserved the motion for sanctions, and reset the hearing for December 20, 2013, which was thereafter rescheduled multiple times. Eventually, after Barry confirmed she was available on March 14, 2014, the court clerk served notice on her and Montalvo's counsel that the sanctions motion hearing date was March 14, 2014. Barry did not appear despite receiving notice of the hearing date.

At the March 14 hearing, the court imposed sanctions of $1,500 on Barry, payable to the court, pursuant to Code of Civil Procedure section 177.5. The court ordered these sanctions due

to Barry's failure to obey its prior orders to pay previous court-ordered sanctions to Montalvo. The court further ordered that Barry must timely lodge objections to the proposed order, if she had any, and so notify Montalvo's counsel, and both counsel were to personally appear at a hearing on March 27, 2014.

Montalvo's counsel properly served the notice and proposed order on Barry, who did not lodge any objections. Neither she nor Montalvo's counsel appeared at the March 27, 2014 hearing. However, after considering a letter faxed from Barry, the court continued the hearing to April 3, 2014, and again ordered counsel to be personally present at the hearing.

On April 3, 2014, the court held the continued hearing on the proposed order imposing sanctions. The court clerk contacted Barry and was informed that she would not be appearing. The court signed and entered the sanctions order on April 3, 2014, and a copy was properly served on Barry on April 9, 2014. Barry was thus aware of the April 3, 2014 sanctions order shortly after it was issued, but did not report it to the State Bar.

On May 19, 2014, the court entered a judgment of dismissal with prejudice of Fotinos's case.[14] Barry has not been granted relief from any of the aforementioned sanctions, yet has not paid any of them, nor indicated that she intends to do so.

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[14] The court had previously granted Montalvo's motion for summary judgment, and, in the alternative, had ordered a discretionary dismissal of Fotinos's lawsuit due to her failure to bring the case to trial within two years.

B. Culpability

1. Counts One and Two: Failure to Obey Court Orders (§ 6103)[15]

OCTC charged Barry with two counts of willfully violating section 6103 by disobeying the sanctions orders of August 7, 2013 (Count One) and April 3, 2014 (Count Two). The hearing judge found Barry culpable of both counts, and we agree.

To prove a willful violation of section 6103, OCTC must establish that the attorney knew the order was final and binding. (*In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774, 787 [attorney's knowledge of final, binding order is essential element of § 6103 violation].) Barry knew the sanctions orders were valid, final, and binding. She received Montalvo's motions, the proposed orders, and the notices of entry of all three orders, and she appeared at the hearing when the court imposed the initial sanctions against her. She was also properly served with the April 3, 2014 order. Nevertheless, Barry failed to pay any of the sanctions or seek relief, and, thus, she is culpable of willfully violating court orders, as charged in both counts.

2. Count Three: Failure to Report Judicial Sanctions (§ 6068, subd. (o)(3))[16]

OCTC charged that Barry failed to report the April 3, 2014[17] sanctions to the State Bar within 30 days, as required. The hearing judge agreed and found culpability. We affirm.

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[15] Section 6103 provides that an attorney's "willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney, constitute causes for disbarment or suspension."

[16] Section 6068, subdivision (o)(3), requires an attorney "[t]o report to the [State Bar], in writing, within 30 days of the time the attorney has knowledge of . . . [¶] . . . [¶] . . . [t]he imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000)."

[17] The NDC contained a typographical error identifying this date as "April 3, 3014."

C. Barry's Arguments Against Culpability Lack Merit

1. Subject Matter Jurisdiction

Barry argues that we lack subject matter jurisdiction over the Fotinos matter because we have jurisdiction only over misconduct related to client complaints. This argument lacks merit. Jurisdiction is not dependent on the source of the complaint. We have express statutory jurisdiction over disciplinary proceedings stemming from a complaint of possible attorney misconduct made by a judicial officer or court staff. (See, e.g., §§ 6068, subd. (o)(3), 6086.5, 6086.7, 6100, 6103.) Moreover, discovery sanctions orders may be addressed in disciplinary proceedings if a member fails to comply with such orders. (§ 6103 ["willful disobedience or violation of an order of the court . . . constitute causes for disbarment or suspension"].) Therefore, because the Supreme Court has empowered the State Bar Court to "conduct the preliminary investigation, hearing, and determination of complaints" in disciplinary matters subject to its review (§ 6087), we have subject matter jurisdiction to recommend discipline in this proceeding. (See *Obrien v. Jones* (2000) 23 Cal.4th 40, 49-50; *In re Rose* (2000) 22 Cal.4th 430, 442; Cal. Rules of Court, rule 9.10; §§ 6040, 6043, 6048, 6078, 6079.1, 6081.)

2. Sanctions Orders

Barry argues that the sanctions orders are void because they were not reduced to a judgment and Fotinos's case was ultimately dismissed. We disagree and find that Barry had a duty to comply with the sanctions orders because she did not seek to stay their enforcement or seek appellate relief. (See *Newland v. Superior Court* (1995) 40 Cal.App.4th 608, 615 [prejudgment orders for monetary sanctions have force and effect of money judgment, and are immediately enforceable through execution, except to extent trial court may order stay of sanction]; *Caldwell v. Samuels Jewelers* (1990) 222 Cal.App.3d 970, 975-976 [order imposing sanctions on attorney pursuant to Code Civ. Proc., § 177.5 for unjustified violation of court order

is appealable as final order on collateral matter directing payment of money]; Code Civ. Proc., § 904.1, subd. (b).) Furthermore, we find that Barry knew about the sanctions orders and chose to disobey them. (See *In the Matter of Maloney and Virsik*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 787.)

Barry appears to contest whether the sanctions orders were properly issued. She contends that the superior court judge dismissed the underlying litigation because the case raised the issue of whether the superior court and the State Bar Court had subject matter jurisdiction "to enforce interim orders of sanctions." These contentions lack merit. First, Barry cites no authority to support her claim that no subject matter jurisdiction exists for either court "to enforce interim orders of sanctions." Second, despite having the opportunity to do so, she failed to dispute the validity of these orders and whether the superior court had subject matter jurisdiction. We find no reason to disturb these orders now (see *In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 605), and Barry may not disregard them even if she still believes they are erroneous. (*In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar. Ct. Rptr. 1, 9 [attorney required to obey court order unless attorney takes steps to have it modified or vacated, regardless of belief that order is invalid]; *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 951-952 ["no plausible belief in the right to ignore final, unchallengeable orders one personally considers invalid"].) Third, Barry confuses the *imposition* of sanctions—which is relevant to these disciplinary proceedings, and regarding which this court has subject matter jurisdiction, as discussed *ante*—with the *enforcement* of sanctions, which is a separate civil matter.

3. Financial Problems

Barry asserts that "she cannot afford to pay sanctions to a corrupt attorney," but does not offer any supporting evidence. Her claim of financial hardship, even if true, is no defense to nonpayment of sanctions; she knew about the orders yet failed to seek relief. (*In the Matter of*

Respondent Y (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 868 [despite financial hardship, attorney culpable of misconduct for failure to pay court-ordered sanctions when attorney fails to seek relief from order in civil courts because of inability to pay].)

IV. BARRY'S OTHER ARGUMENTS ON REVIEW LACK MERIT[18]

On review, Barry makes several other "points," which, although not entirely clear, appear to raise various procedural, evidentiary, or substantive arguments. Having independently reviewed each argument, we find them all unavailing and reject them.

First, contrary to Barry's argument, we find no error of law or abuse of discretion in the hearing judge's denial of her request for a continuance. Barry did not file her motion until the morning of the first day of trial, did not submit medical evidence that she was too ill to proceed, and failed to provide good cause to continue the trial. (See State Bar Ct. Rules of Prac., rule 1131(c) ["continuance will be granted only upon an affirmative showing of good cause requiring the continuance"]; *Jones v. State Bar* (1989) 49 Cal.3d 273, 287 ["[c]ontinuances are generally disfavored in disciplinary proceedings, and the [judge] has discretion to exercise reasonable control over the proceedings in order to avoid unnecessary delay. [Citations.]"].)

Second, we reject Barry's argument that we should consider her motion for a new trial, as well as her contention that "[h]er rights to a fair hearing and due process were denied because she was too sick to go forward full bore." We find no error of law or abuse of discretion in the judge's ruling, and also find insufficient grounds to justify a new trial. (See rule 5.114; Code Civ. Proc., § 657.) Moreover, the Supreme Court has made clear that a respondent's "only due process entitlement is to a fair hearing overall. [Citations.]"

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[18] Having independently reviewed all arguments Barry raised, those not specifically addressed herein have been considered and are rejected as lacking merit.

(*Dahlman v. State Bar* (1990) 50 Cal.3d 1088, 1094-1095.) Here, the hearing judge provided Barry with a fair hearing, as required.[19]

Third, we reject Barry's contention that the hearing judge or OCTC should have asked Montalvo's counsel to provide a copy of the July 24, 2013 hearing transcript. To the extent Barry wanted the hearing judge or this court to consider this transcript, she should have obtained it during the *two years* between the date of that hearing and the trial in this disciplinary proceeding. For the same reasons, we also reject Barry's assertion that OCTC should have obtained a voicemail message (and corresponding transcript) that Barry left for the San Mateo County Superior Court judge who ultimately dismissed Fotinos's case.

Fourth, we reject Barry's claims that an OCTC senior trial counsel committed prosecutorial misconduct when he allegedly, inter alia, made Barry stipulate to taking four hours of live ethics MCLE as part of her *Barry II* discipline and failed to notify her that attending CTA School would provide three hours of live ethics MCLE. Other than her unsupported assertions, however, Barry presented no evidence of prosecutorial misconduct, and was unable to prove that she was treated differently than other State Bar members in disciplinary proceedings.

Fifth, we reject Barry's claims that "four or five interrogatories" served by Montalvo, asking about the vexatious litigant[20] status of Fotinos and Barry, were "harassment and therefore unconstitutional," and, thus, the related "sanctions should be unenforceable." To the extent Barry wanted to challenge the constitutionality of the interrogatories or the enforceability of the resulting sanctions, she failed to seek appropriate relief in the civil courts.

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[19] We also reject Barry's claims of retaliation by the State Bar and others, which are unsupported by any evidence in the record.

[20] We assume the term "VL" used by Barry refers to "vexatious litigant."

V. SIGNIFICANT AGGRAVATION OUTWEIGHS LIMITED MITIGATION

Standard 1.5 requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Barry to meet the same burden to prove mitigation.

A. Aggravation

1. Prior Record of Discipline

Standard 1.5(a) provides that a prior record of discipline may be an aggravating factor. The hearing judge assigned significant weight to Barry's two prior discipline records. Notably, Barry's present misconduct is similar to her wrongdoing in *Barry I*—where she was culpable of, inter alia, violating court orders—and *Barry II*—where she was culpable of, inter alia, violating the private reproval condition to timely take and pass the MPRE.

We note that Barry's disciplinary history includes a somewhat unusual element in that the misconduct underlying one of the two matters in *Barry II* (i.e., pursuing frivolous litigation) occurred between February 2002 and March 2004, which was *before* the Hearing Department issued its June 2005 order imposing discipline in *Barry I*. Nevertheless, the misconduct underlying the second matter in *Barry II* (i.e., failing to comply with a term of her *Barry I* private reproval) occurred in approximately March 2007, which was *after* Barry was disciplined in *Barry I*. We thus find no reason to diminish the aggravating force of either of Barry's prior discipline records. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619 ["part of the rationale for considering prior discipline as having an aggravating impact is that it is indicative of a recidivist attorney's inability to conform his or her conduct to ethical norms [citation]"].)

Accordingly, we ascribe significant aggravation to Barry's prior discipline records because, inter alia, she has repeatedly disregarded important conditions designed to monitor her compliance with orders from the State Bar Court (issued in *Barry I*) and the Supreme Court

(issued in *Barry II*). (See *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443-444 [similarities between prior and current misconduct render previous discipline more serious, as they indicate prior discipline did not rehabilitate].)

2. Multiple Acts of Wrongdoing

The hearing judge found that Barry's multiple acts of misconduct constitute an aggravating factor. (Std. 1.5(b) [multiple acts of wrongdoing constitute circumstance in aggravation].) We agree, and assign significant weight given Barry's culpability on four counts of misconduct.

We further note that Barry committed several violations of distinct probation conditions, rendering her misconduct more severe than might otherwise be encompassed within a single charge under section 6068, subdivision (k). Such discrete and repeated breaches constitute multiple acts of wrongdoing and, in and of themselves, properly warrant moderate weight in aggravation. (See *In the Matter of Song* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 273, 279 [significant aggravation for 65 improper client trust account withdrawals charged as one count of moral turpitude].)

3. Lack of Insight

Notably, the hearing judge found that Barry demonstrated little insight or understanding of her own misconduct, and assigned this factor some consideration in aggravation. (Std. 1.5(k) [indifference toward rectification or atonement for consequences of misconduct is aggravating].) Barry justified her actions by asserting that she is the champion of battered women and abused children, and insisting that her work on their behalf should confer on her a "special status" that excuses her repeated failures to comply with ethical and procedural requirements. The hearing judge correctly noted, however, that it remains unclear how failing to respond to discovery and ignoring court-ordered sanctions championed Barry's clients' causes.

Barry also repeatedly attempted to shift blame to others. At trial, Barry proclaimed that San Mateo County was corrupt and that the San Mateo County Superior Court was "picking on" her. On review, she levied accusations against many individuals, including San Mateo County Superior Court judges, the San Mateo County Sheriff, the State Bar President, and Montalvo's counsel. Similarly, Barry contended that the State Bar brought charges against her because she sued them, and accused an OCTC senior trial counsel of prosecutorial misconduct. (See *Gadda v. State Bar* (1990) 50 Cal.3d 344, 356 [aggravation based on lack of insight shown by attempts to blame another attorney for misconduct and "reluctance to recognize the seriousness of his misconduct"].)

Barry takes little to no personal responsibility for her present misconduct, appears to view her probation violations as mere technicalities, and does not understand or appreciate the extent to which they evidence disrespect for the legal system as well as reflect negatively on her ability to practice law. Indeed, at trial and on review, Barry challenged whether she should be disciplined for just being late on probation conditions, and, with respect to her failure to timely take and pass the MPRE, she testified, "So what? I made it within 13 days. Who cares, in the scheme of things?" She also denied culpability to which she stipulated in *Barry II.*

Barry's continued refusal to acknowledge her wrongdoing causes us serious concern because it indicates that she has not been rehabilitated and is likely to commit additional misconduct. Her "unwillingness even to consider the appropriateness" of her behavior has gone "beyond tenacity to truculence." (*In re Morse* (1995) 11 Cal.4th 184, 209.) "The law does not require false penitence. [Citation.] Nonetheless, it does require that the respondent accept responsibility for [her] acts and come to grips with [her] culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Barry has not done this. We thus assign significant aggravating weight to her lack of insight.

B. Mitigation

1. Good Character

The hearing judge correctly assigned nominal weight in mitigation for Barry's good character evidence. (Std. 1.6(f) [mitigation credit for extraordinary good character attested to by wide range of references in legal and general communities who are aware of full extent of misconduct].) Barry presented testimony from two character witnesses, Michele Fotinos and her daughter, Rachel Fotinos. While they praised Barry's good character and competence, and characterized her as a champion of abused women, the two witnesses did not represent a broad spectrum of the legal and general communities. (See *In the Matter of Kittrell* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 615, 624 [assigning little weight in mitigation for character evidence from two witnesses who were social friends of respondent].) Moreover, Rachel Fotinos demonstrated a limited understanding of the present charges. (See *In re Aquino* (1989) 49 Cal.3d 1122, 1131 [testimony of witnesses unfamiliar with details of misconduct not given significant weight in mitigation].)

VI. DISBARMENT IS THE APPROPRIATE DISCIPLINE[21]

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.) Importantly, the Supreme Court has instructed us to follow the standards "whenever possible" (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11), and also to look to comparable case law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

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[21] 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.)

At the outset, we note that only Barry sought review, and requested a reduction in the discipline recommended (i.e., a dismissal). We have the authority and obligation, however, to conduct independent review and to increase the discipline if we deem it appropriate to do so whether or not OCTC has appealed (see, e.g., *In re Morse*, *supra*, 11 Cal.4th at p. 207; *In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, affd. S022164 (Oct. 29, 1991) [Review Department's disbarment recommendation adopted by Supreme Court following respondent's appeal of lengthy suspension recommendation by hearing judge]), and whether or not OCTC has appealed, but urged a lesser sanction (see, e.g., *In the Matter of Snyder* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 593, affd. S038422 (May 18, 1994) [although OCTC and hearing judge recommended suspension, Review Department recommended, and Supreme Court adopted, disbarment order]).

We use a three-step approach to analyze the standards applicable here. (*In the Matter of Carver* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 427, 435.) First, we determine which standard (or standards) specifies the most severe sanction for the at-issue misconduct. (Std. 1.7(a) [most severe sanction shall be imposed where multiple sanctions apply].) Here, that standard is 1.8(b), as it addresses Barry's extensive disciplinary history and it calls for disbarment, which is the most severe of the applicable sanctions.[22] Standard 1.8(b) provides that disbarment is appropriate where an attorney has two or more prior records of discipline if: (1) an actual suspension was ordered in any of the prior disciplinary matters; or (2) the prior and current disciplinary matters demonstrate a pattern of misconduct; or (3) the prior and current disciplinary

[22] The following standards also apply: 2.12(a) (disbarment or actual suspension is presumed sanction for disobedience or violation of court order related to a member's practice of law); 2.12(b) (reproval is presumed sanction for violation of duties required of an attorney under section 6068, subdivision (o); and 2.14 (actual suspension is presumed sanction for failing to comply with a condition of discipline).

matters demonstrate the attorney's unwillingness or inability to conform to ethical responsibilities.

Barry's case meets two criteria: a prior actual suspension and an inability to conform to ethical duties. In *Barry II*, the Supreme Court imposed a 60-day actual suspension. Moreover, her past and current misconduct, including her repeated violations of probation and reproval conditions and her multiple failures to obey court orders, demonstrate her unwillingness or inability to conform to her ethical responsibilities. (Std. 1.8(b); see *Barnum v. State Bar* (1990) 52 Cal.3d 104, 111.) Even absent any bad faith, Barry's repeated failures constitute willful, habitual, and serious ethical violations.[23] (See *Potack v. State Bar* (1991) 54 Cal.3d 132, 139 [failure to abide by probation terms and conditions is serious violation]; *In the Matter of Tiernan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 523, 530-531 [multiple violations of same probation condition warrant more severe discipline].)

Second, we analyze whether Barry's case falls within an exception to standard 1.8(b), which permits us to deviate from recommending disbarment where "the most compelling mitigating circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current misconduct." Barry does not qualify for either exception. Her present misconduct did not occur at the same time as the misconduct underlying her two prior discipline cases, and her nominal mitigation for good character is neither compelling nor does it predominate over the significant aggravation for two prior discipline records, multiple acts of wrongdoing, and lack of insight.

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[23] Timely filing quarterly reports is significant to rehabilitation "because it requires the attorney, four times a year, to review and reflect upon [her] professional conduct" and "to review [her] conduct to ensure that [she] complies with all of the conditions of [her] disciplinary probation." (*In the Matter of Weiner* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759, 763.) Timely reporting completion of Ethics School similarly serves an important function—assuring the State Bar that an attorney has reviewed and considered anew his or her professional responsibilities.

Third, we consider whether any reason exists to depart from the discipline called for by standard 1.8(b). We acknowledge that disbarment is not mandatory as a third discipline under this standard, even where compelling mitigating circumstances do not clearly predominate. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-507 [disbarment is not mandatory in every case of two or more prior disciplines, even where no compelling mitigating circumstances clearly predominate (analysis under former std. 1.7(b))]; *In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136 [to fulfill "purposes of lawyer discipline, we must examine the nature and chronology of respondent's record of discipline"].) However, if we deviate from recommending the presumptive discipline of disbarment, we must articulate reasons for doing so. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons for departure from standards]; see also stds. 1.2(i), 1.7(c).) Since Barry has neither addressed the issue in her opening brief nor filed a supplemental brief, she has not identified a reason for us to depart from applying standard 1.8(b). Further, we cannot glean from the existing record any reason to do so. Instead, the record shows multiple instances of wrongdoing dating back to 2000, blatant violation of court orders and probation conditions in the instant matter, and the troubling similarity between Barry's present misconduct and her prior discipline records.

The State Bar Court has been required to intervene three times to ensure that Barry adheres to the professional standards required of those who are licensed to practice law in California. Clearly, further probation and suspension would be inadequate to prevent her from committing future misconduct that would endanger the public and the profession. (See *Barnum v. State Bar*, *supra*, 52 Cal.3d at pp. 112-113 [disbarment imposed where attorney's probation violations left court no reason to believe he would comply with lesser discipline]; *In the Matter of Marsh* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 291, 300 ["respondent should not be admitted to disciplinary probation where there is clear evidence that he or she will not comply

with its conditions"].) Standard 1.8(b) and the decisional law support our conclusion that the public and the profession are best protected if Barry is disbarred.[24]

VII. RECOMMENDATION

We recommend that Patricia Joan Barry be disbarred from the practice of law and that her name be stricken from the roll of attorneys admitted to practice in California.

We further recommend that she must comply with rule 9.20 of the California Rules of Court and 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 in this matter.

Finally, we recommend that costs be awarded to the State Bar in accordance with section 6086.10, such costs being enforceable as provided in section 6140.7 and as a money judgment.

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[24] Compare *Barnum v. State Bar*, *supra*, 52 Cal.3d at p. 113 (disbarment where three prior disciplines existed and depression was not "most compelling" mitigation when weighed against risk of recurrence of misconduct), and *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 80 (disbarment where two prior disciplines existed, attorney was unable to conform conduct to ethical norms, and no mitigation), with *In the Matter of Lawrence* (Review Dept. 2013) 5 Cal. State Bar Ct. Rptr. 239, 246-248 (three-year actual suspension where three prior disciplines existed, attorney suffered extreme physical disabilities that caused or contributed to misconduct for 30 years, and mitigation outweighed aggravation).

VIII. ORDER OF INACTIVE ENROLLMENT

Pursuant to section 6007, subdivision (c)(4), and rule 5.111(D)(1), Patricia Joan Barry is ordered enrolled inactive. The order of inactive enrollment is effective three days after service of this opinion. (Rule 5.111(D)(1).)

McGILL, J.*

WE CONCUR:

PURCELL, P. J.

STOVITZ, J.**

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*Hearing Judge of the State Bar Court, assigned by the Presiding Judge pursuant to rule 5.155(F).

**Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on October 31, 2016, I deposited a true copy of the following document(s):

OPINION AND ORDER FILED OCTOBER 31, 2016

in a sealed envelope for collection and mailing on that date as follows:

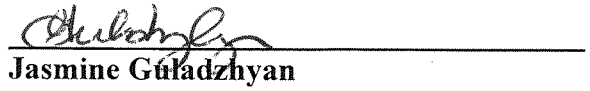
[X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

PATRICIA J. BARRY
634 S SPRING ST STE 823
LOS ANGELES, CA 90014

[X] by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

CYDNEY T. BATCHELOR, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on October 31, 2016.



Jasmine Gúladzhyan
Case Administrator
State Bar Court