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STATE BAR COURT
CLERK'S OFFICE
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STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of)	Case No. 17-O-00668
)	
SPENCER FREEMAN SMITH,)	OPINION
)	
A Member of the State Bar, No. 236587.)	
_____)	

Spencer Freeman Smith is charged with failure to obey a court order, under Business and Professions Code section 6103.¹ Specifically, the Office of Chief Trial Counsel of the State Bar (OCTC) alleges that Smith failed to obey our February 1, 2016 interim suspension order in his criminal conviction matter, which required him to timely comply with the terms of California Rules of Court, rule 9.20(a) and (c).²

The hearing judge found Smith culpable of the charge and recommended, inter alia, that he be actually suspended for one year. Smith appeals the judge's discipline recommendation, maintaining that he is not culpable as charged, or, in the alternative, that a lesser discipline should be imposed. He also seeks more mitigation than the judge found. OCTC does not appeal, and requests that we uphold the judge's recommendation.

Upon our independent review of the record pursuant to rule 9.12, we reject Smith's arguments and affirm the hearing judge's culpability finding, but not her disciplinary

¹ All further references to sections are to the Business and Professions Code unless otherwise noted.

² All further references to rules are to the California Rules of Court unless otherwise noted.

recommendation. Instead, we recommend an actual suspension of six months for Smith's first disciplinary offense, which is sufficient to protect the public, the courts, and the legal profession.

I. PROCEDURAL BACKGROUND

On July 17, 2017, OCTC filed a Notice of Disciplinary Charges (NDC) charging Smith with one count of violating section 6103 (failure to obey court order). Trial was held on November 16, and posttrial briefing followed. On February 27, 2018, the hearing judge issued her decision.

II. FACTUAL BACKGROUND³

Smith was admitted to the practice of law on June 3, 2005. On February 1, 2016, we ordered that he be placed on interim suspension pursuant to rule 9.10(a) (February Order), after receiving notice of a Second Supplemental Transmittal of Records of Conviction that Smith had been convicted, inter alia, of a felony that may have involved moral turpitude.⁴ The February Order required Smith to comply with rule 9.20 and to perform the acts specified in (a) and (c) of that rule within 30 and 40 days, respectively, after the date of suspension. On February 1, the order was served by mail on Smith at his San Francisco office, which was his membership address on file with the State Bar at the time. The February Order became effective February 22, 2016.

Smith claims he did not receive the February Order until after the disciplinary process in this matter had begun. When our order was issued on February 1, he was incarcerated for a failure to appear at a hearing in his criminal matter,⁵ but he testified that he was in regular communication with his law office during his incarceration. Smith also testified that, even though he did not receive the February Order contemporaneously at the time it was issued, he

³ The factual background is based on the trial testimony, documentary evidence, and factual findings by the hearing judge, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).)

⁴ *In the Matter of Smith*, State Bar Court No. 12-C-14836.

⁵ Smith was incarcerated from January 25 to April 25, 2016.

learned in February 2016 from his criminal counsel that he was placed on interim suspension again.⁶ He also knew from his experience with the first interim suspension order that he was required to inform his clients of his suspension and file a declaration pursuant to rule 9.20, but he was not aware of the deadline for doing so.⁷

Smith relied on another attorney, whom he had additionally retained in September 2015, for assistance in complying with the rule's requirements, and Smith's office staff communicated with that attorney regarding compliance with the State Bar. When Smith was released from custody on April 25, 2016, he began to work with that attorney to notify clients and cocounsel of his suspension. On July 27, Smith filed a rule 9.20 declaration with the court (July Declaration). In the July Declaration, he stated that he had contacted all but two of his clients within 30 days after his release. Due to a clerical error, Smith did not contact the two clients until June 20 and July 27, 2016, respectively.

Sometime before October 28, 2016, Smith received notice that the July Declaration was noncompliant because it did not bear his original signature. He testified that the Office of Probation (Probation) had incorrectly sent the notice to his previous office address in San Francisco rather than to his current office address in Los Angeles, thus causing his delay in filing a second declaration. Smith also testified that, "Our office is right across the street. If [Probation was] really concerned about me practicing without a license, [it] could walk it over. [It] could come over every day and say 'Hey, You going to submit the declaration or what?'" On October 28, 2016, Smith filed his second rule 9.20 declaration with the court (October

⁶ We originally placed Smith on interim suspension on April 3, 2015, for the same circumstances in our February Order. On April 17, 2015, we vacated the first order upon request of OCTC when the superior court, which had accepted his no contest plea, allowed him to withdraw it. While not a part of the record in this matter, we take judicial notice of our earlier orders. (Rules Proc. of State Bar, rule 5.156(B).)

⁷ Pursuant to the February Order, Smith was required to comply with rule 9.20(a) and (c) no later than March 23 and April 2, 2016, respectively.

Declaration). Aside from containing an original signature, the October Declaration was the same as the July Declaration.

Upon receiving the October Declaration, the State Bar Court forwarded it to Probation and included a proof of service. On November 21, 2016, after Probation reviewed the October Declaration, it sent Smith a letter stating that the October Declaration was noncompliant, and specifying the reasons why.

III. SMITH IS CULPABLE OF VIOLATING SECTION 6103⁸

OCTC alleges that Smith violated section 6103 by failing to obey the February Order, specifically that he failed to timely provide two clients with the notices required by rule 9.20(a) and also to timely file a declaration of compliance in conformity with rule 9.20(c). The hearing judge found that Smith knew of the February Order and was aware of its requirements. The judge concluded that Smith willfully violated section 6103 by failing to strictly comply with rule 9.20(a) because he failed to timely notify the two clients of his suspension, and with rule 9.20(c) because he failed to timely file the required declaration. She also found that Smith had yet to file a compliant declaration.

In his opening brief, Smith argued that the wording of rule 9.20 makes it clear that only the California Supreme Court has the authority to order compliance. However, at oral argument, Smith conceded that our order was valid. By the express terms of rule 9.10(a)⁹, the Supreme Court has delegated to the State Bar Court the authority to exercise its statutory powers under

⁸ Section 6103 provides that, “A wilful 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, . . . [constitutes cause] for disbarment or suspension.”

⁹ Rule 9.10(a), provides, in relevant part, that “The State Bar Court exercises statutory powers under Business and Professions Code sections 6101 and 6102 with respect to the discipline of attorneys convicted of crimes. . . . The power conferred upon the State Bar Court by this rule includes the power to place attorneys on interim suspension under subdivisions (a) and (b) of section 6102, and the power to vacate, delay the effective date of, and temporarily stay the effect of such orders.”

section 6102¹⁰ regarding the discipline of attorneys convicted of crimes, which includes placing the attorney on interim suspension until final disposition of the criminal proceeding. This delegation permits the State Bar Court to require compliance with rule 9.20(a) and (c) to ensure that the attorney has obeyed the interim suspension order. (*In the Matter of Lynch* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 287, 291.) Additionally, Smith had the opportunity to contest the validity of the February Order to the California Supreme Court by appealing the order. Because he did not do so, the February Order is final and enforceable. (§ 6084, subd. (a); *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 951–952 [arguments regarding validity of order are waived when order becomes final without appropriate challenge].)

The hearing judge found that Smith willfully violated section 6103 because the record contained clear and convincing evidence¹¹ that he knew about the February Order, knew what he was required to do, and failed to comply. On appeal, Smith argues he did not willfully violate section 6103 because he did not willfully violate rule 9.20. As detailed below, we find that Smith willfully violated section 6103 as charged in the NDC.

To discipline an attorney under section 6103, OCTC must prove two elements by clear and convincing evidence: (1) the attorney willfully disobeyed a court's order, and (2) the court order required the attorney to act or not act, in good faith, in connection with or in the course of his profession. (*In Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 603.) An attorney willfully violates section 6103 when the attorney, despite being aware of a final, binding court order, knowingly takes no action in response to the order or chooses to

¹⁰ Section 6102, subdivision (a), provides suspension and disbarment procedures for the California Supreme Court involving attorneys who have been convicted of a felony or of a crime where probable cause exists to believe that the crime involved moral turpitude. The Supreme Court may refer these proceedings, “including the nature or extent of discipline, to the State Bar for hearing, report, and recommendation.” (§ 6102, subd. (f).)

¹¹ 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.)

violate it. (*In the Matter of Maloney and Virsik* (2005) 4 Cal. State Bar Ct. Rptr. 774, 787.) An attorney may face discipline even if the attorney did not intentionally act in bad faith in violating section 6103. (*In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 47.)

“A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail.” (Evid. Code, § 641.) According to the proof of service for the February Order, it was mailed to Smith’s San Francisco membership address (which was his work address at the time) by first-class mail. At trial, Smith offered no objection to the proof of service becoming part of the record, and the burden is upon him to show that he did not receive the February Order. Other than Smith’s own testimony that he did not receive it until the time for compliance had passed, he has produced no evidence that the February Order was improperly served or that it was not received. Thus, we find that Smith received notice of the February Order. (See *In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, 522 [notice was presumed where no objection to proof of service was made and record lacked indication that attorney’s staff acted improperly regarding order].)

Further, notwithstanding our finding that he received the February Order, Smith had sufficient personal knowledge of the duties that rule 9.20 required of him at the time his performance was due. First, he testified at trial that he knew the February Order existed in February 2016. Even though he testified that he had not seen the February Order, he also testified that he knew the rule required him “to take action” because he had seen the rule’s requirements in the order that was previously issued at the time of his first interim suspension. Even though he knew these two things, he did not obtain a copy of the February Order or instruct anyone on his staff to do so in order to ensure that he knew specifically what to do and when to do it. (See *Call v. State Bar* (1955) 45 Cal.2d 104, 110 [inattention to duty which has been

willful is grounds for discipline]; *Spindell v. State Bar* (1975) 13 Cal.3d 253, 259–260 [attorney is responsible for reasonable supervision of office staff].)

As officers of the court, obedience to court orders is intrinsic to the respect attorneys must accord the judicial system. Smith willfully violated section 6103¹² when he knew of the February Order, and failed to exercise his responsibility to the judicial system by ensuring that he timely complied with rule 9.20(a) and (c), as the order required. (*In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 404 [ignorance of order’s contents no defense where attorney aware that order existed].)

IV. AGGRAVATION AND MITIGATION

Standard 1.5¹³ requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Smith to meet the same burden to prove mitigation.

A. AGGRAVATION

Indifference Toward Rectification of Misconduct (Std. 1.5(k))

An attorney is required to “accept responsibility for his acts and come to grips with his culpability.” (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Thus, lack of remorse and failure to acknowledge the wrongfulness of misconduct are aggravating circumstances. (*Weber v. State Bar* (1988) 47 Cal.3d 492, 506.) The hearing judge found that Smith’s indifference was an aggravating circumstance, and assigned it significant weight because Smith blamed others for his misconduct, has yet to file a compliant declaration, and referred to the proceedings as a “game.”

¹² Smith also argues his conduct was grossly negligent, and not willful. However, even gross negligence can lead to a violation of section 6103. (See *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 149 [attorney “heedless in his reporting obligation” and thus grossly negligent].)

¹³ Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. All further references to standards are to this source.

While we agree that Smith has displayed some indifference, we do not completely agree with all of the judge's analysis. We conclude that this aggravating circumstance warrants only some, not significant, weight.

First, the hearing judge found that Smith displayed indifference toward rectification of his misconduct because he blamed his prior attorney, OCTC, and Probation for his failure to comply with rule 9.20. However, we only find evidence in the record that Smith attempted at one point to shift responsibility to Probation for his failure to correctly file a timely affidavit. Thus, while not as pervasive as the judge concluded, this instance shows that Smith has not accepted full responsibility for his own misconduct. Further, we disagree with the hearing judge and OCTC that Smith's failure to timely comply with rule 9.20(a) and (c) provides additional evidence of indifference. Because we have found Smith's failure to timely comply with rule 9.20 as disciplinable misconduct, we afford no aggravation for it as that would be inappropriately duplicative. (*In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119, 132–133.) Finally, we construe Smith's labeling the proceedings a "game" as his retort to what appears to be confusing questioning by OCTC. Since this occurred only once, we do not consider it evidence of indifference.

B. MITIGATION

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

Smith requests mitigation for almost 11 years of discipline-free practice. Substantial mitigation is assigned where an attorney has practiced "law for over ten years before the first act of misconduct" and the misconduct is not likely to recur. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596.) The hearing judge, however, declined to find this a mitigating factor because she concluded that he failed to file a compliant declaration, which constituted "a continuing violation." (See *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029 [where misconduct is serious,

long discipline-free practice is most relevant where misconduct is aberrational and unlikely to recur].) However, we find that Smith satisfied the substantive requirements of our interim order to comply with rule 9.20(a) and (c), but was not timely compliant. We see no evidence that his misconduct is likely to recur. Thus, we conclude that this mitigating circumstance is appropriate and entitled to substantial weight due to Smith's almost 11 years of discipline-free practice.

2. Lack of Harm Not Established (Std. 1.6(c))

In his appeal, Smith requests that we assign him mitigating weight for this circumstance. OCTC argues that Smith did not offer any evidence that his two clients had not been harmed by his failure to timely act. We agree, and thus do not afford mitigation for lack of harm.

3. Cooperation (Std. 1.6.(e))

Mitigation is assigned where an attorney has cooperated during a disciplinary investigation and proceeding. However, that mitigation may be limited where an attorney enters into a belated stipulation regarding easily provable facts. (*In the Matter of Kaplan* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 547, 567 [limited mitigating weight for stipulation submitted one week before trial, and related to documents admitted as exhibits].) Smith's amended stipulation was filed on the day of trial, and contained facts that were easily provable. The hearing judge assigned minimal weight to this factor, and we agree.

V. DISCIPLINE

At oral argument, Smith argued that the hearing judge's recommendation of a one-year actual suspension was too harsh; instead, he requested a six-month actual suspension. OCTC agreed with the judge's recommendation. In determining the appropriate level of discipline, we first look to the standards for guidance. Although not binding, they are entitled to great weight (std. 1.1; *In re Silvertown* (2005) 36 Cal.4th 81, 91-92), and should be followed whenever possible (std. 1.1; *In re Young* (1989) 49 Cal.3d 257, 267, fn. 11). 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; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

Because Smith violated our order, we look for guidance from standard 2.12(a), which states that disbarment or actual suspension is the presumed sanction for this misconduct. As OCTC is not seeking disbarment, we focus on comparable case law to guide us in determining the appropriate period of actual suspension to recommend. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.)

Smith has provided three cases for us to consider.¹⁴ In *Durbin v. State Bar* (1979) 23 Cal.3d 461, an attorney, who had been previously disciplined with a two-year actual suspension, timely notified his clients of his suspension as required by former rule 955(a), but did not file the mandatory affidavit pursuant to former rule 955(c). Notwithstanding Durbin’s continuing failure in reporting his compliance, the California Supreme Court reduced the recommended discipline for the former rule 955 violation from a one-year actual suspension to six months, or until the affidavit was filed, whichever was greater. (*Id.* at p. 469.)

In *In the Matter of Rose* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 192, an attorney received a nine-month actual suspension for his failure to timely file a declaration of compliance pursuant to former rule 955(c). His prior record and multiple acts were aggravating circumstances, and his recognition of wrongdoing, pro bono activities, and lack of harm were mitigating circumstances. In deciding that nine months was appropriate, we noted that, while Rose attempted to file his affidavit shortly after it was due, his record of two prior discipline

¹⁴ One of those cases, *In the Matter of Friedman* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 527, cannot factually be considered a comparable case, as Friedman’s 30-day actual suspension occurred because he filed his rule 955 (predecessor to rule 9.20) affidavit only 14 days late and established “compelling mitigating circumstances.”

cases and probation violations in the pending matter were extensive and a factor in arriving at our recommendation. (*Id.* at p. 207.)

OCTC submits that *Shapiro v. State Bar* (1990) 51 Cal.3d 251 is most apt in this matter. In *Shapiro*, an attorney timely notified his clients of his suspension, but filed his affidavit, pursuant to former rule 955(c), five months late. In considering the appropriate discipline to impose, the Supreme Court noted that Shapiro had initially received incorrect guidance as to the filing deadline for the affidavit, but not as to another requirement of the rule that also contributed to Shapiro's late filing. Further, Shapiro had a prior discipline for two client matters,¹⁵ and concurrently with the former rule 955 violation, he also was culpable of multiple violations in a third client matter. The Court determined that Shapiro's 16 years of discipline-free practice warranted mitigation since all his misconduct had occurred in a narrow timeframe. He also received mitigation credit for his physical and psychological problems and for good character. Based on a "totality" of all the circumstances, the Court imposed a second actual suspension of one year. (*Id.* at p. 260.)

While all three cases discussed have relevance based on their particular facts, none is sufficiently analogous to the facts in this matter to suggest a clear disciplinary recommendation. Smith was almost seven months late in filing a substantively correct affidavit. However, he was incarcerated for more than two months prior to and three weeks after the filing deadline. He did file a first affidavit that was deficient by lacking an original signature, which he cured one month later. He had also retained an attorney to assist him in complying with the rule. Knowing that he had obligations under the rule, Smith's primary fault was not obtaining a copy of the order to ascertain his specific deadlines, as was his obligation as an officer of the court. His failure to do so, however, should not overshadow his attempts to comply with rule 9.20 itself.

¹⁵ In this prior discipline, the Supreme Court imposed an actual suspension of one year, which became effective on October 1, 1986.

We consider other factors in making our recommendation. As the NDC pled, and we consequently found, two of Smith's clients did not receive timely notice of his suspension, as required by the rule. More importantly, this is Smith's first finding of professional misconduct, which is unlike all three cases discussed above. Finally, as Smith's mitigation outweighs his aggravation, an actual suspension in the lower end of the range specified in standard 1.2(c)(1) is appropriate.¹⁶

Balancing all relevant factors, the evidence, and case law, a six-month actual suspension will carry out the policy underlying rule 9.20, and will protect the public, the courts, and the legal profession. A six-month actual suspension should also convey to Smith the gravity and consequences of his actions.

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Spencer Freeman Smith be suspended from the practice of law in the State of California for one year, that execution of that suspension be stayed, and that he be placed on probation for two years subject to the following conditions:

1. Smith must be suspended from the practice of law for the first six months of his probation.
2. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Smith must (1) read the California Rules of Professional Conduct (Rules of Professional Conduct) and Business and Professions Code sections 6067, 6068, and 6103 through 6126, and (2) provide a declaration, under penalty of perjury, attesting to his compliance with this requirement, to the State Bar's Office of Probation in Los Angeles (Office of Probation) with his first quarterly report.
3. Smith must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of his probation conditions.
4. Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Smith must make certain that the State Bar Attorney Regulation and Consumer Resources Office (ARCR) has his current office address, email address, and telephone number. If he does not maintain an office, he must provide the mailing

¹⁶ Standard 1.2(c)(1) provides: "Actual suspension is generally for a period of thirty days, sixty days, ninety days, six months, one year, eighteen months, two years, [or] three years"

address, email address, and telephone number to be used for State Bar purposes. He must report, in writing, any change in the above information to ARCR, within 10 days after such change, in the manner required by that office.

5. Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Smith must schedule a meeting with his assigned probation case specialist to discuss the terms and conditions of his discipline and, within 30 days after the effective date of the court's order, must participate in such meeting. Unless otherwise instructed by the Office of Probation, he may meet with the probation case specialist in person or by telephone. During the probation period, he must promptly meet with representatives of the Office of Probation as requested by it and, subject to the assertion of applicable privileges, must fully, promptly, and truthfully answer any inquiries by it and provide to it any other information requested by it.
6. During Smith's probation period, the State Bar Court retains jurisdiction over him to address issues concerning compliance with probation conditions. During this period, he must appear before the State Bar Court as required by the court or by the Office of Probation after written notice mailed to his official membership address, as provided above. Subject to the assertion of applicable privileges, Smith must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.
 - a. **Deadlines for Reports.** Smith must submit written quarterly reports to the Office of Probation no later than each January 10 (covering October 1 through December 31 of the prior year), April 10 (covering January 1 through March 31), July 10 (covering April 1 through June 30), and October 10 (covering July 1 through September 30) within the period of probation. If the first report would cover less than 30 days, that report must be submitted on the next quarter date and cover the extended deadline. In addition to all quarterly reports, Smith must submit a final report no earlier than ten days before the last day of the probation period and no later than the last day of the probation period.
 - b. **Contents of Reports.** Smith must answer, under penalty of perjury, all inquiries contained in the quarterly report form provided by the Office of Probation, including stating whether he has complied with the State Bar Act and the Rules of Professional Conduct during the applicable quarter or period. All reports must be: (1) submitted on the form provided by the Office of Probation; (2) signed and dated after the completion of the period for which the report is being submitted (except for the final report); (3) filled out completely and signed under penalty of perjury; and (4) submitted to the Office of Probation on or before each report's due date.
 - c. **Submission of Reports.** All reports must be submitted by: (1) fax or email to the Office of Probation; (2) personal delivery to the Office of Probation; (3) certified mail, return receipt requested, to the Office of Probation (postmarked on or before the due date); or (4) other tracked-service provider, such as Federal Express or United Parcel Service, etc. (physically delivered to such provider on or before the due date).

- d. **Proof of Compliance.** Smith is directed to maintain proof of his compliance with the above requirements for each such report for a minimum of one year after either the period of probation or the period of his actual suspension has ended, whichever is longer. He is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.
7. Within one year after the effective date of the Supreme Court order imposing discipline in this matter, Smith must submit to the Office of Probation satisfactory evidence of completion of the State Bar Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he will not receive MCLE credit for attending Ethics School. If he provides satisfactory evidence of completion of Ethics School after the date of this decision but before the effective date of the Supreme Court's order in this matter, he will nonetheless receive credit for such evidence toward his duty to comply with this condition.
8. For a minimum of one year after the effective date of discipline, Smith is directed to maintain proof of his compliance with the Supreme Court's order that he comply with the requirements of California Rules of Court, rule 9.20(a) and (c). Such proof must include the names and addresses of all individuals and entities to which notification was sent pursuant to rule 9.20; copies of the notification letter sent to each such intended recipient; the original receipt and tracking information provided by the postal authority for each such notification; and the originals of all returned receipts and notifications of non-delivery. Smith is required to present such proof upon request by OCTC, the Office of Probation, and/or the State Bar Court.
9. The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the probation period, if Smith has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Smith be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court order imposing discipline in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).) If Smith provides satisfactory evidence of taking and passage of the MPRE after the date of this opinion but before the effective date of the Supreme Court's order in this matter, he will nonetheless receive credit for such evidence toward his duty to comply with this condition.

VIII. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against a member who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

McGILL, J.

WE CONCUR:

PURCELL, P. J.

HONN, J.

CERTIFICATE OF SERVICE

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

I am a Court Specialist of the State Bar Court of California. 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 February 12, 2019, I deposited a true copy of the following document(s):

OPINION FILED FEBRUARY 12, 2019

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

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

KEVIN P. GERRY
711 N SOLEDAD ST
SANTA BARBARA, CA 93103 - 2437

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

Joseph R. Carlucci, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on February 12, 2019.



Mel Zavala
Court Specialist
State Bar Court