

PUBLIC MATTER – DESIGNATED FOR PUBLICATION

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STATE BAR COURT
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REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of

Patrick Joseph Maloney, Jr., and
Thomas Steven Virsik,

Members of the State Bar.

00-O-14000; 00-O-14001
(Consolidated.)

OPINION ON REVIEW

This case illustrates how over-zealous advocacy compromised the ethical obligations of respondents Patrick J. Maloney Jr. and Thomas Virsik to the courts and the legal system. Respondent Maloney was admitted to practice in 1969 and has no prior disciplinary record. Respondent Virsik, who worked as an associate for Maloney, was admitted in 1997 and has no prior discipline. Respondents represented the Round Valley Nation (RVN), a dissident faction of the Round Valley Indian Reservation, which was engaged in an intra-tribal power struggle with the Round Valley Indian Tribes (RVIT). Respondents advised RVN in their efforts to dispossess RVIT of its governing authority. Respondents also represented Carlino Bettega, who was sued by RVIT for employment harassment, in a case entitled *Round Valley Indian Tribes v. Bettega* (*Bettega*). During the course of that litigation, the Mendocino County Superior Court (Superior Court) imposed sanctions against respondents pursuant to Code of Civil Procedure section 128.7 for their "egregious conduct" arising from the "surreptitious attempt by counsel Maloney and



Virsek [*sic*] . . . to dismiss the action and to perpetrate a fraud upon the court and opposing counsel. . . .”

The hearing judge below found, inter alia, that respondents were culpable of acts of misrepresentation to the Superior Court constituting moral turpitude in violation of Business and Professions Code section 6106 and the failure to obey the Superior Court’s sanction order in wilful violation of Business and Professions Code section 6103. The hearing judge recommended that respondent Maloney be placed on probation for two years with conditions, including actual suspension of 45 days and that respondent Virsik be placed on two years’ probation with conditions, including 90 days’ actual suspension. Respondents and the State Bar here appeal.

Upon our de novo review of the record (*In re Morse* (1995) 11 Cal.4th 184, 207), we adopt some of the hearing judge’s culpability findings and reject others, as discussed more fully below. We also re-weigh some of the aggravating and mitigating factors considered by the hearing judge and find substantial additional aggravating circumstances, including numerous acts of uncharged but proven misconduct. We ultimately recommend that respondents be suspended for one year, stayed, on the condition that respondent Maloney receive 90 days’ actual suspension and respondent Virsik receive 60 days’ actual suspension.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Respondents Assist RVN with Attempted Tribal Coup

RVIT is organized under the Indian Reorganization Act of 1934, title 25 United States Code section 461 et seq., pursuant to a Constitution, which was adopted in its revised form in

1994, pursuant to title 25 United States Code section 476, and approved by the Deputy Commissioner of Indian Affairs of the Bureau of Indian Affairs of the United States Department of the Interior (BIA).¹ For many years RVIT and RVN have been engaged in a wide-ranging dispute over RVIT's governing authority and its conduct of tribal business.

Respondents were retained by RVN in February 2000 to advise about a strategy to effect a bloodless "coup." On February 10, 2000, RVN held a meeting of its supporters to consider the formation of a new tribal government and to elect an "Interim Tribal Council." A "Declaration of Independence" was signed by forty-four individuals on February 16, 2000. The election procedures required by the 1994 Constitution and title 25 United States Code section 476(a) were not followed, and instead respondents fashioned a novel election approach to unseat the governing council of RVIT.² RVN held an election on April 14-16, 2000. It has never been determined if those who voted were qualified voters, but those who did participate voted overwhelmingly to adopt a new constitution and to elect a new government to replace RVIT. RVN then unilaterally declared an election "victory."

The governing council of RVIT publicly repudiated the election, calling it a "sham" and disavowed the legitimacy of RVN's Interim Tribal Council. The BIA also rejected RVN's claim of

¹The 1994 Constitution enabled the BIA to maintain a government-to-government relationship with RVIT.

²Respondents argue that they were prevented from following the election procedures required by the 1994 Constitution because the BIA never provided them with a list of qualified voters.

victory after it was notified by RVN on May 8, 2000, of the outcome of the election.³ Similarly, the Office of Self-Government of the United States Department of Interior (OSG) declined a request from RVN that it be allowed to participate in the Self-Government Program on March 30, 2000, because it found that RVN was “not from the tribal governing authority recognized by the BIA.”

Respondents now concede on appeal that the determination of the election outcome was “preliminary.” Nevertheless, immediately after the April 14-16 election, RVN set about to appropriate the rights and privileges of RVIT as the governing authority. On April 17, 2000, the Chairperson of the Interim Council of RVN, Janice Freeman, made written demands to “all banks transacting business in Mendocino County” instructing that “any and all accounts, credit cards, line of credit, or other institutional relationships between your institution and the . . . RVIT . . . are no longer authorized.” A few days later, RVN notified RVIT’s Tribal Council that all of the current employees of RVIT’s governmental administration were *de facto* fired and must meet with RVN representatives if they had an interest in being re-hired by RVN’s newly elected governing body. Similarly, RVN notified the Commissioners of the Round Valley Housing Authority that RVN was

³Respondents appealed to the BIA’s Central California Superintendent, which issued a decision on November 11, 2000, declining to recognize RVN and continuing to recognize RVIT as the official tribal government. Respondents then appealed to the United States Department of Interior, Office of Hearings and Appeals, Interior Board of Indian Appeals (IBIA), which affirmed the BIA’s decision on January 29, 2003. In its Order, IBIA held that RVIT’s 1994 Constitution provided for the proper procedures for recall elections and amendments to the Constitution itself. “Rather than attempting to change the 1994 constitution through the established procedures, [RVN] decided to circumvent those procedures. . . . *Therefore, their election was invalid. . . .*” (Emphasis added.) (IBIA’S Order Affirming the BIA Decision was made part of this record upon order of this court on August 15, 2003, granting respondents’ Motion to Augment the Record, filed on June 16, 2003.)

terminating their authority "*effective immediately.*" (Emphasis in the original.) Finally, RVN wrote to Stephen Quesenberry of the California Indian Legal Services, which had represented RVIT for nearly 30 years, advising him that RVN was terminating their legal services.

Respondents actively participated in these efforts to perfect the coup. For example, respondent Maloney assisted RVN in its efforts to appropriate RVIT's funds and bank accounts. On April 28, 2000, he sent a letter on his law firm letterhead to the General Counsel of Tri Counties Bank, John Dunlop, enclosing a "Resolution" by RVN attesting that the April 14-16 election had dissolved RVIT and established RVN "as the official and legal Tribal Government." The enclosed Resolution also specified Freeman and Dolores Bettega "as the only persons with the authority to withdraw and transfer funds or sign check(s) on behalf of [RVN]." At the time of this written communication to the bank instructing them to transfer RVIT's assets and accounts to RVN, Maloney knew that RVN's claim of victory was in dispute, because he sent a second letter to Dunlop on the same day, enclosing two newspaper articles from *The Round Valley News*. One of the articles reported that the BIA's Agency Superintendent had reaffirmed "its exclusive recognition and support of the existing tribal government [RVIT]," and the other article reported that RVIT viewed RVN as an "outlaw group" whose attempted overthrow of the government was "a fraud on the law abiding tribal members of the Round Valley Tribes. . . ." Maloney commented about these articles in his cover letter to Dunlop, saying "this will give you som [sic] idea of where the new government is headed."⁴ The bank's attorney refused to accede to Maloney's directions,

⁴Maloney disingenuously testified in the hearing below that he had not read these articles, even though he forwarded them to Dunlop and referenced their contents in his cover letter. Virsik testified at trial that he (Virsik) knew about the articles around the time they were

telling him in a letter dated May 1, 2000, that both the BIA and the attorneys for RVIT had advised the bank "that this new organization does not have proper tribal authority to take control of the accounts on deposit with Tri Counties Bank." Maloney confirmed his receipt of this letter on May 3, 2000.

B. Respondents' Involvement with the Bettega Lawsuit

As part of the internecine power struggle between RVN and RVIT, respondents attempted on several occasions to obtain a dismissal of RVIT's lawsuit against Bettega (who was a member of RVN) using a variety of procedural maneuvers.⁵ Maloney supervised Virsik in the preparation of most of the pleadings, although at times Virsik prepared certain documents without Maloney's review, even signing Maloney's name to the documents.

1. February 16th Request for Dismissal

The day after the adoption of the Declaration of Independence, and two months *before* RVN held its election, Maloney appeared at a hearing on February 17, 2000, in the *Bettega* lawsuit on a motion to modify the restraining order against Bettega. At that hearing, and prior to consideration of the motion, Maloney submitted to the judge a Request for Dismissal, dated

published.

⁵As noted *ante*, Carlino Bettega, a member of RVN, was sued for workplace harassment of RVIT's employees. Thereafter, Bettega filed a cross-complaint against RVIT in which he sought affirmative relief from RVIT and restraining orders against 23 of RVIT's employees. Quesenberry and the California Indian Legal Services represented RVIT in the *Bettega* lawsuit, and respondents represented the defendant and cross-complainant, Bettega.

February 16, 2000 (February 16th RFD)⁶, which was signed by respondent's client, Freeman, who purported to be making the request for dismissal on behalf of RVIT in pro per.⁷ The February 16th RFD misrepresented that Freeman had the authority on behalf of the plaintiff, RVIT, to request the dismissal of the case with prejudice. Quesenberry, the attorney for RVIT, was given no prior notice of the February 16th RFD. Although Maloney claimed to the Superior Court that he did "not know the significance of [the dismissal request]," he nevertheless signed it as the attorney for the defendant Bettega and argued in support of the dismissal request, claiming "Ms. Freeman's power is based on the Declaration of Independence and the establishment of an interim government."

Maloney failed to disclose to the Superior Court that Ms. Freeman and RVN were his clients, and he falsely implied that the February 16th RFD was a legally sufficient and enforceable document by signing it on behalf of Bettega and attesting that "consent to the . . . dismissal is hereby given." The Superior Court refused to file the February 16th RFD.

2. May 7th Request for Dismissal

Undaunted, respondents submitted a second Request for Dismissal, dated May 7, 2000 (May 7th RFD), to the clerk of the Superior Court. Virsik prepared the May 7th RFD at Maloney's

⁶For purposes of consistency, unless otherwise stated, we refer to the pleadings by the dates they were signed because not all of the pleadings that respondents submitted to the Superior Court were actually filed by the court.

⁷The February 16th RFD and the two other requests for dismissal respondents submitted for filing in the *Bettega* lawsuit were prepared on a Judicial Council of California form Request for Dismissal (Judicial Council Forms, form 982(a)(5)). That form permits the clerk of the court to dismiss an action with or without prejudice without judicial oversight or participation (Code Civ. Proc., § 581), and its use is mandatory (div. III, Appendix to Cal. Rules of Court) except when a party seeks the dismissal of a proceeding by filing a motion to dismiss.

direction, and Maloney signed it as the attorney of record for and on behalf of the plaintiff, RVIT, even though he also was the attorney of record for the defendant Bettega. Maloney and Virsik also were identified on the May 7th RFD as the attorneys for RVN's "Interim Tribal Counsel." Maloney personally submitted the May 7th RFD to the Superior Court clerk for filing, but the clerk did not file it, apparently because it had become separated from two other supporting documents. Respondents misrepresented on the May 7th RFD that they were the attorneys for RVIT and as such were authorized to seek a dismissal of the *Bettega* lawsuit when they knew that RVIT was represented by Quesenberry and the California Indian Legal Services, and that RVIT and Quesenberry had not agreed to a substitution of counsel or the dismissal of the case. They also misrepresented that RVN had standing to file pleadings and to intervene.

3. May 8th Declaration of Maloney

A Declaration In Support of Dismissal of Action, dated May 8th (May 8th Declaration) was filed in the Superior Court at the same time that respondents submitted the May 7th RFD. Respondents Virsik and Maloney were identified on the May 8th Declaration as the attorneys for Bettega and the Interim Tribal Counsel [of RVN], and Maloney signed the pleading as the declarant. In the May 8th Declaration, Maloney described in some detail the "Constitutional election," as a conclusive and uncontested victory for RVN. Maloney attested that "[n]o Tribal member (or anyone else) has to date challenged the election . . ." and that, under the 1994 Constitution, any such challenge was required to have been made within three days after the election.

When they filed the May 8th Declaration, respondents knew that the election outcome was only preliminary and was contested by RVIT, the BIA and the OSG, which had expressly refused to recognize RVN as the legally constituted governing body. Respondents did not advise the Superior Court of these facts. Also, in the May 8th Declaration respondents affirmatively misrepresented that RVN had the authority to and in fact did terminate the services of RVIT's attorney, Stephen Quesenberry, and to direct him to dismiss the *Bettega* lawsuit when they knew that Quesenberry had not withdrawn from his representation of RVIT, and that RVIT had neither agreed to substitute respondents as their counsel nor to terminate the *Bettega* lawsuit.

4. May 8th Opposition to First Motion for Sanctions

On May 9th, Maloney also filed an Opposition to RVIT's first Motion for Sanctions, which he signed on May 8th, as attorney for the defendant, Bettega (May 8th Opposition).⁸ In the May 8th Opposition, respondents averred, inter alia, that RVIT's first Motion for Sanctions was moot because "the form of the government of the plaintiff has changed since the motion was filed and *the governing body has since dismissed the action.*" (Emphasis added.) Respondents misrepresented that "The Interim Tribal Council, which is now the governing body of the Tribal members, has dismissed Mr. Quesenberry, directing him to dismiss the instant action which apparently was not done. The Interim Tribal Council now stands in the shoes of the prior employer-plaintiff [RVIT]. . . . [T]he Interim Tribal Council has directed its replacement counsel [respondents] to file a dismissal. . . . *As the action has been dismissed by the original plaintiff-*

⁸RVIT's first Motion for Sanctions was based on the filing by RVN of an alleged frivolous cross-petition.

employer's successor as a matter of political process, the motion for sanctions is moot. . . ."

(Emphasis added.)

5. May 11th Request For Dismissal and Letter to the Court Clerk

In response to a telephone conversation with the clerk's office of the Superior Court, Virsik prepared and submitted yet a third Request for Dismissal, dated May 11, 2000 (May 11th RFD), together with a transmittal letter advising: "You may disregard the prior [May 7th RFD] and file the enclosed one in its stead."⁹ Respondents were denominated on the May 11th RFD as attorneys for "Round Valley Nation f/k/a Round Valley Indian Tribes." Virsik signed Maloney's name on the May 11th RFD twice -- as the attorney for the plaintiff RVIT *and* for the defendant and cross-complainant Bettega.¹⁰

Respondents again misrepresented in the May 11th RFD that they were attorneys for the plaintiff RVIT in the *Bettega* matter, and as such they were authorized to seek dismissal of the entire action with prejudice. They also misrepresented that RVN was formerly known as RVIT.

6. Notice of Name Change

In addition to the May 11th RFD, respondents filed a Notice of Change of Name (Notice) which identified them as attorneys for the "defendant [*sic*] Round Valley Nation f/k/a Round

⁹The record discloses that Virsik prepared the documents that accompanied his transmittal letter of May 11th without Maloney's review. Nevertheless, "[a]n attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority." (*Crane v. State Bar* (1981) 30 Cal.3d 117, 123.)

¹⁰The record shows that as of May 11th respondents claimed to be the attorneys for the defendant and cross-complainant, Bettega, and for RVN and RVIT. As we discuss in aggravation, *post*, the simultaneous representation of all three parties in the *Bettega* lawsuit constituted a non-waivable conflict of interest. (Rules Prof. Conduct, rules 3-700(c) & 3-310.)

Valley Indian Tribes.” This document, which was signed by Virsik using Maloney’s name, averred that the plaintiff RVIT had changed its name to RVN as the result of the April “constitutional election” which had caused a change in the “form of governance.” This was a stealth attempt to substitute RVN for RVIT as the plaintiff in the *Bettega* case, in order to effect a dismissal of the *Bettega* case without authorization by RVIT or the intervention of the Superior Court.

Respondents knew when they filed the Notice that RVIT had not changed its name to RVN and had not consented to the substitution of RVN as a party/plaintiff.

7. Bettega’s Reply to RVIT’s Opposition to Strike or Tax Costs

Finally, on May 11th, respondents filed a Reply to RVIT’s Opposition to Motion to Strike or Tax Costs (Reply) on behalf of Bettega. Respondents again wore multiple legal hats when filing this pleading. Instead of appearing as the attorneys for RVN and/or the Interim Tribal Council, they appeared on behalf of defendant Bettega and also as the “newly retained counsel” for the plaintiff, RVIT.¹¹ Respondents represented unconditionally that “plaintiff Round Valley Indian Tribes has been replaced in a constitutional election by the Round Valley Nation. . . .” Respondents further stated in the Reply they were “filing the dismissal, as the record reflects. Thus, the issues of costs are moot.” Finally, they misrepresented as a *fait accompli* that RVN was “the successor of the plaintiff . . . [and] has in fact dismissed [the case] itself” and that the issue of costs accordingly was moot.

On May 12, 2000, RVIT’s attorney, Quesenberry, responded vigorously to respondents’ various tactics in a Declaration in Opposition to Defense Counsel’s Fraudulent Attempts to

¹¹See footnote 10, *ante*, regarding a non-waivable conflict of interest.

Dismiss Action. He attested that Maloney had filed various pleadings and taken action "without any authorization of [RVIT], with full knowledge that his other client [RVN] had no lawful authority to act on [RVIT's] behalf, and without informing the Court . . . in fact, that the United States government has reaffirmed that the duly authorized and recognized governing body of the Tribes is the Tribal Council [of RVIT]." Quesenberry further averred that Maloney and RVN's actions were intended "to convert [the *Bettega*] case of workplace harassment into an expanded and unwarranted inquiry into the laws and internal affairs of the Round Valley Indian Tribes."

The Superior Court responded on May 15, 2000, and ordered sua sponte the clerk not to file either the May 7th RFD or May 11th RFD, but merely to lodge the documents in the file. In its order, the Superior Court specifically found that Maloney "is not the attorney for the plaintiff named in this action. Interim Tribal Council is not a party to this action. [RVN] is not a party to this action."

C. Respondents Sanctioned for Attempted Fraud on the Court

Undeterred by the Superior Court's findings in its May 15th order, respondents filed three more pleadings, each containing additional misrepresentations.

1. May 15th Supplemental Declaration

Respondents filed a Supplemental Declaration in Support of Dismissal of Action, dated May 15, 2000 (May 15th Declaration). Attached to this Declaration as an exhibit was a May 10th letter "from an unidentified employee of the BIA" stating that the BIA "did not recognize the political faction known as the [RVN]." By way of excuse, Maloney averred that he received this letter after he filed his May 8th Declaration. Maloney nevertheless misled the Superior Court as to

the import and relevance of the BIA letter. The "unidentified employee of the BIA" who signed the letter was Dale Risling, Sr., who respondents knew was the Superintendent at the California BIA because they had previously contacted him on several occasions on behalf of RVN to deal with tribal governance issues.

In this May 8th Declaration, Maloney also admitted that he knew of the BIA's opposition to RVN's victory claim at least as early as April 15, 2000, because of the newspaper article published in *The Round Valley Times*. However, he attempted to minimize the significance of this knowledge by averring that the effect of the "Constitutional election" was "to divorce the Tribes from the BIA and instead proceed under a self-governance program of the Department of the Interior." Maloney again misled the Superior Court because he failed to disclose that as early as March 30, 2000, his client, Freeman, wrote to the BIA on behalf of RVN seeking the BIA's assistance in "effecting the orderly transfer of accounts, resources and responsibilities to the new [RVN] government." Maloney also failed to disclose that RVN had been denied participation in the self-governance program by the Director of the OSG because RVN did not meet the criteria and because the request was "not from the tribal governing body recognized by the [BIA]."

Maloney did not recant or correct his previous misstatements about the election outcome. He also did not recant his previous misrepresentation about his status as attorney for RVIT or his authority and standing to seek a dismissal of the *Bettega* case on RVIT's behalf.

2. May 16th Supplemental Opposition to Sanctions

Even though the Superior Court ruled on May 15th that neither the Interim Tribal Council nor RVN was a party to the *Bettega* action, on May 16, 2000, respondents filed a Supplemental

Opposition to Sanctions and appeared as attorneys, not only for Bettega, but on behalf of RVN and the Interim Tribal Counsel. In the Opposition, respondents again stated that the "constitutional" election had resulted in a change in governance, and that "the new sovereign [RVN] has retained other counsel to dismiss this action." Respondents thus refused to adopt or adhere to the previous factual and legal determinations of the Superior Court.

3. RVIT files a Second Sanctions Motion Against Respondents

As a result of respondents' efforts to dismiss the *Bettega* case, on May 12, 2000, Quesenberry filed a second Motion for Sanctions¹² pursuant to Code of Civil Procedure section 128.7. The hearing on the second Motion for Sanctions was set for June 23, 2000. On June 8, 2000, the Superior Court filed its Decision on Motion to Tax Costs and Decision on Motions for Sanctions (June 8th Decision). The Superior Court denied RVIT's first sanctions motion, arising from the filing of the cross-petition, but granted RVIT's second sanctions motion relating to the attempted fraud on the Superior Court, finding that but for the diligence of RVIT's counsel and the clerk, the "surreptitious attempt by counsel Maloney and Virsek [*sic*] . . . to dismiss the action and to perpetrate a fraud upon the court and opposing counsel . . ." would have gone undetected. Furthermore, the Superior Court found respondents had "clearly represented to the court that they represented the plaintiff [RVIT] in the [*Bettega*] matter," which was untrue because RVIT's legal counsel had not "consented to a substitution of counsel and . . . RVIT itself had not applied to the court for an order of the court substituting counsel, and . . . no notice was given by the plaintiff

¹²As noted in footnote 8, *ante*, Quesenberry filed RVIT's first Motion for Sanctions in response to an alleged frivolous cross-petition filed by Bettega.

[RVIT] or its counsel of record . . . of an intent to substitute counsel.” The Superior Court noted that “no argument has been advanced by [respondents] that their action was inadvertent or that it was the result of a failure to understand the applicable law.”

The Superior Court accordingly imposed sanctions on Bettega and respondents jointly and severally in the amount of \$1,500, payable to RVIT and an additional \$500, payable to the court.¹³

4. June 12th Opposition to Sanctions

Even though the Superior Court ordered sanctions on June 8th, respondents filed an Opposition to Sanctions on behalf of Bettega, dated June 12, 2000 (June 12th Opposition), because respondents asserted they understood the June 8th Decision to be a tentative ruling since it was made before Bettega’s and Maloney’s opposition was due and before the scheduled June 23, 2000, hearing on the second sanctions motion. In the June 12th Opposition, respondents continued to assert that Quesenberry had been properly dismissed as legal counsel for RVIT and that their client, RVN, had the authority to retain new legal counsel on RVIT’s behalf.

¹³Respondents did not appeal this sanctions order, which is final and binding on them. However, respondents appealed the imposition of the restraining order on behalf of Bettega, which the California Court of Appeal for the First District affirmed in an unpublished opinion on July 27, 2001. Among the issues raised in the appeal was whether the Superior Court improperly refused to enter the dismissal of the *Bettega* case proffered by respondents. The Court of Appeal found the Superior Court properly rejected the request for dismissal because it was filed without authorization of RVIT. In respondents’ Brief to the Court of Appeal, they conceded that Bettega was not appealing the sanctions order, although they gratuitously raised the issue “as a matter of caution.” The Court of Appeal responded, in dicta, that “plainly it was misconduct for counsel to purport to represent both sides in seeking a dismissal, without having secured a proper substitution of counsel for [RVIT].”

5. Plaintiff's Withdrawal of Second Sanctions Motion

On June 19, 2000, Quesenberry filed a pleading for RVIT entitled Withdrawal of Inadvertently Filed Notice of Motion and Motion for Sanctions (Withdrawal) because RVIT's second motion for sanctions was filed in violation of Code of Civil Procedure section 128.7(c)(1).¹⁴ Quesenberry included with the Withdrawal a letter dated June 15, 2000, asking that the hearing on the second sanctions motion be removed from the June 23rd calendar and stating that he disagreed with respondents' statement that the June 8th Decision was a tentative ruling. On June 21, 2000, Virsik sent the Superior Court a letter stating that Bettega had no objection to the Withdrawal of the Second Motion for Sanctions. The next day, Virsik sent the Superior Court another letter confirming Bettega's understanding that the June 23rd hearing on the Second Motion for Sanctions had been taken off calendar in accordance with Quesenberry's request. Respondents thereafter verified that the matter had been taken off calendar, and the Superior Court's docket entry confirms that the second motion for sanctions was removed from the calendar, stating: "Matter dropped."

Quesenberry sent the Superior Court a letter in response to Virsik's June 21st letter to the Superior Court, reiterating his understanding that the Superior Court's June 8th Decision imposing monetary sanctions was final because "the Court has authority under the California Rules of Court and the Local Rules to impose sanctions on its own initiative"

¹⁴The version of Code of Civil Procedure section 128.7(c)(1) in effect in 2000 mandates that a motion for sanctions under section 128.7 must be served on opposing counsel, but must not be filed or otherwise presented to the court for at least 30 days after service so as to provide the opposing counsel with at least a 30-day "safe harbor" in which he or she may withdraw or correct the alleged offending pleading without penalty.

6. Order to Show Cause Re: Respondents' Failure to Pay Sanctions

Some six months later, in early January 2001, Quesenberry sent respondents a letter about their failure to pay RVIT the \$2,000 in sanctions. Quesenberry sent a copy of his letter to the Superior Court, and relying on that letter, the Superior Court issued an order to show cause (OSC) on January 10, 2001, directing respondents and Bettega to show why further sanctions should not be imposed on them for not paying the earlier sanctions. Respondents replied to the OSC, setting forth their position that the June 8th Decision was void on due process grounds because the sanctions were imposed before respondents were given the opportunity to be heard. In addition, respondents noted that the Superior Court had previously advised counsel at an earlier hearing on the first sanctions motion that it would "see you folks on June 23 [for a hearing on the second sanctions motion]." Nevertheless, respondents tendered two cashier's checks to the clerk of the Superior Court, payable to RVIT and the Superior Court if the court determined that such payment was warranted. The Superior Court ordered the cashier's checks to be delivered to RVIT and the Superior Court, but it did not impose additional sanctions.

D. State Bar Proceedings

On November 20, 2000, the State Bar filed and served Notices of Disciplinary Charges (NDCs) on respondents, which were amended and filed on July 23, 2002. Respondents were charged with misrepresentations constituting moral turpitude under Business and Professions Code section 6106 (Count One);¹⁵ seeking to mislead a judicial officer in violation of section 6068,

¹⁵Unless otherwise indicated, all further statutory references are to the Business and Professions Code.

subdivision (d) (Count Two); failing to obey a court order under section 6103 (Count Three); and failing to report sanctions under section 6068, subdivision (o)(3) (Count Four). Upon the filing of the NDCs, a vigorous discovery battle ensued, culminating in an order of the hearing judge granting the State Bar's Motion to Compel on April 5, 2002, after she considered and rejected in part respondents' assertion of the attorney-client privilege on behalf of Bettega, RVN, and RVN's Interim Tribal Council.¹⁶

On August 6, 2002, the first day of a five-day trial, respondents' Partial Stipulations were filed. On December 13, 2002, the hearing judge issued her decision, finding respondents culpable on Counts One and Three. With respect to Count Two, the hearing judge found clear and convincing evidence that respondents deliberately sought to mislead the Superior Court judge in violation of section 6068, subdivision (d), but she nevertheless dismissed Count Two as duplicative of the misconduct alleged in Count One. After trial, the hearing judge dismissed Count Four, upon request of the State Bar in its Closing Brief. After weighing mitigating and aggravating factors, the hearing judge imposed discipline of one year's suspension, stayed, and two years' probation with conditions, including an actual suspension of 45 days for respondent Maloney and 90 days for respondent Virsik.

Respondents and the State Bar seek review in this court. Respondents ask that they be exonerated of all charges, or in the alternative, that we remand this matter for a full hearing to

¹⁶In her decision, the hearing judge found that respondents were not candid or cooperative during discovery, having redacted documents that were not privileged and claiming that their privileged materials comprised seven linear feet, then subsequently submitting only six inches of documents to the court.

enable them to present witnesses and evidence for which they asserted the attorney-client and/or work product privileges in the trial below. The State Bar asks us to affirm the hearing judge's findings of culpability and most of the factors in aggravation and mitigation, but the Bar seeks six months' actual suspension for both respondents.

II. DISCUSSION

On appeal, respondents raise myriad issues that ultimately are not relevant to our consideration of the decision below. As to those arguments not expressly addressed herein, we have considered and rejected them as unmeritorious. The issues that *are* material are relatively straightforward: 1) Did respondents commit acts of moral turpitude in the course of litigating the *Bettega* case; and 2) Did respondents disobey the Superior Court's sanction order in violation of section 6103.

A. Count One: Misrepresentation; Moral Turpitude (Section 6106)

We agree with the hearing judge's finding that respondents committed acts of moral turpitude in wilful violation of section 6106 by knowingly making repeated misrepresentations to the Superior Court. It is well established that acts of moral turpitude include an attorney's false or misleading statements to a court or tribunal. (*Bach v. State Bar* (1987) 43 Cal.3d 848, 855; *Chefsky v. State Bar* (1984) 36 Cal.3d 116, 124.) The actual intent to deceive is not necessary; a finding of gross negligence in creating a false impression is sufficient for violation of section 6106. (*In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9, 15; *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 90-91.) Acts of moral turpitude include concealment as well as affirmative misrepresentations. (*Grove v. State Bar* (1965) 63 Cal.2d 312,

315.) Indeed, “[n]o distinction can . . . be drawn among concealment, half-truth, and false statement of fact. [Citation.]’ [Citation.]” (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) Also, it is not necessary that respondents actually succeeded in perpetrating a fraud on the court. (See, e.g., *Bach v. State Bar*, *supra*, 43 Cal.3d 848, 852-853, 855 [attorney violated section 6106 even though he did not succeed in committing fraud on the court due to intervention of opposing counsel].)

The misconduct alleged in Count One involved numerous pleadings submitted by respondents to the Superior Court for filing in the *Bettega* matter.¹⁷ These pleadings were permeated with half-truths, omissions, and outright misstatements of fact and law. The Supreme Court “has denounced such misleading conduct and has not hesitated to impose discipline in such cases. [Citations.]” (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 316.) Respondents’ misconduct was compounded when they signed many of their pleadings under penalty of perjury, which gave the additional imprimatur of veracity to their misstatements and should have put reasonable persons on notice to take care that their pleadings were accurate, complete and true.

The hearing judge found that “Respondents’ statements to the [Superior] court were made with an intent to secure an advantage, which was to dismiss the lawsuit against their client *Bettega*.” We agree. Their deception thus was not the result of mere carelessness; rather, respondents intentionally wove a tapestry of deception in their over-zealous efforts to effectuate a legal strategy. Taken as a whole, respondents’ conduct reflects an indifferent disregard of their

¹⁷The following pleadings were identified in Count One: 1) May 7th Request for Dismissal; 2) May 8th Declaration of Maloney; 3) Notice of Change of Name; 4) May 11th Request for Dismissal; and 5) Reply to Opposition to Motion to Strike or Tax Costs.

duty to adhere to the requirements of the law and their professional responsibilities as officers of the court, which is additional evidence of moral turpitude. *In re Caldwell* (1975) 15 Cal.3d 762, 772; *In the Matter of Snyder* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 593, 600.)

B. Count Two: Misleading a Judge or Judicial Officer (Section 6068(d))

The hearing judge found that respondents' repeated misrepresentations to the Superior Court were sufficient to establish respondents' culpability as charged in Count Two for violation of their duty under section 6068, subdivision (d), never to seek to mislead a judge or other judicial officer by an artifice or false statement of law or fact. However, she further found that "the misconduct underlying the section 6068 (d) charge is covered by the section 6106 charge, which supports identical or greater discipline. . . ." We agree, and accordingly recommend that Count Two should be dismissed as duplicative of Count One. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.)

C. Count Three: Failure to Obey a Court Order (Section 6103)

The hearing judge found that respondents wilfully violated section 6103 by failing to pay sanctions totaling \$2,000 as ordered by the Superior Court. As we discuss below, we do not adopt this culpability finding, and we therefore recommend Count Three be dismissed with prejudice.

Before an attorney may be disciplined under section 6103, the State Bar must prove by clear and convincing evidence that the attorney wilfully disobeyed or violated a court order. (*In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592, 603.) Generally, the level of wilfulness required for acts of professional misconduct is established by a showing that the attorney merely acted purposefully (i.e., the attorney knew what she or he was doing and intended

either to commit the act or abstain from committing it). (*King v. State Bar* (1990) 52 Cal.3d 307, 313-314.) Section 6103 requires a somewhat more precise level of wilfulness. (*In the Matter of Respondent X, supra*, 3 Cal. State Bar Ct. Rptr. at p. 603.)

At a minimum, it must be established that an attorney “ ‘knew what he was doing or not doing and that he intended either to commit the act or to abstain from committing it.’ ” [Citations.]” (*King v. State Bar, supra*, 52 Cal.3d at p. 314, emphasis added.) The record here concerning respondents’ knowledge of the import of the Superior Court’s sanctions decision of June 8, 2000, is confusing at best. The Superior Court filed its decision without receiving a response or opposition from Bettega or respondents, which they understood they would be entitled to under Code of Civil Procedure section 128.7, subdivision (c). Furthermore, a hearing on the second motion was set for June 23, 2000, fifteen days *after* the Superior Court issued its decision, and the Superior Court even reminded the parties at the May 19th hearing that it would see the attorneys at the June 23, 2000 hearing. Respondents therefore believed it was a tentative ruling, and accordingly, on June 13, 2000, filed an opposition to the second sanctions motion, referencing the hearing set for June 23, 2000. Thereafter, in a letter dated June 15, 2000, RVIT’s attorney asked the clerk to take the June 23rd hearing off calendar. He also filed a pleading entitled “Withdrawal of Inadvertently Filed Notice of Motion and [Second] Motion for Sanctions.” Respondents then wrote to the Superior Court on June 21, 2000, stating that they did not oppose RVIT’s withdrawal of the second sanctions motion, and doing so would render the premature rulings in the June 8 decision moot. Finally, before the June 23, 2000 hearing, respondents called the Superior Court and were told that RVIT’s

motion had been "dropped." This was corroborated by the Superior Court's docket sheet stating "Matter dropped."

Accordingly, we find that there is not clear and convincing evidence in the record that respondents knew there was a final, binding court order. Such knowledge is an essential element to establishing that an attorney wilfully disobeyed or violated it in violation of section 6103. (*In the Matter of Hindin* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 666 [review department adopted hearing judge's finding that attorney's failure to obey court order did not violate section 6103 because attorney did not receive notice of the order in time to comply with it]; *In the Matter of Respondent Y* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862, 867-868 [review department agreed with hearing judge that, because attorney clearly knew of the relevant court order, the only issue regarding the charged violation of section 6103 was whether attorney had a reasonable time to comply with the order]; see also, *In the Matter of Whitehead* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 354, 367 [knowledge of a court order necessary to establish culpability under section 6068, subdivision (b) for failure to obey the order]; *In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 403-404 [attorney's lack of knowledge defense to charged violations of section 6068, subdivision (b) and section 6103 for failure to obey court orders rejected because attorney was present when the orders were issued and because the opposing party sent attorney written requests for compliance with the orders].)¹⁸ Neither do we find sufficient evidence that they

¹⁸Our conclusion is expressly limited to section 6103 violations and does not modify prior holdings that the wilfulness of an attorney's violation of a rule of the Rules of Professional Conduct is not dependent upon the attorney's knowledge of the rule (*King v. State Bar, supra*, 52 Cal.3d at p. 314; *Gassman v. State Bar* (1976) 18 Cal.3d 125, 131); nor does it modify the holding that, in the context of rule 955 of the California Rules of Court, wilfulness requires

intended to disobey the court's decision, and accordingly, we recommend that Count Three should be dismissed with prejudice.

D. Count Four: Failure to Report Sanctions (Section 6068(o)(3))

As we noted *ante*, the State Bar moved, in the interests of justice, to dismiss the charges relating to respondents' alleged violations of section 6068, subdivision (o)(3) by not reporting to the Bar the sanctions imposed on them in the Superior Court's June 8, 2000 Decision. The State Bar does not here contest the action of the hearing judge, who dismissed Count Four. We have concluded that there is insufficient evidence of respondents' knowledge of a final, binding sanctions order, and therefore, it would be improper to now find a violation of section 6068, subdivision (o)(3). Accordingly, we adopt the hearing judge's dismissal of Count Four.

III. DISCIPLINE

To properly assess the degree of recommended discipline, we consider each case on its own facts, as well as the evidence in mitigation and in aggravation. (See, e.g., *Rodgers v. State Bar*, *supra*, 48 Cal.3d 300, 316.)

A. Mitigation

1. Good Faith (Std. 1.2(e)(ii))¹⁹

Respondents assert as mitigation that they acted reasonably and in good faith. (Std. 1.2(e)(ii).) They contend that even if their analysis of the facts and the law in this matter are

"[o]nly a general purpose or willingness to commit the act or permit the omission." (*Durbin v. State Bar* (1979) 23 Cal.3d 461, 467.)

¹⁹This reference and all further references to standards are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

without merit, lawyers must be free to assert unpopular positions on behalf of their clients if they believe in good faith they are correct. We agree with respondents that attorneys have a duty to zealously represent their clients and assert unpopular and novel positions in advancing their clients' legitimate objectives. However, as officers of the court, attorneys also have a duty to the judicial system to assert only legal claims or defenses that are warranted by the law or are supported by a good faith belief in their correctness. (Rules Prof. Conduct, rule 3-200(B).) "In order to establish good faith as a mitigating circumstance, an attorney must prove that his or her beliefs were both honestly held *and* reasonable. [Citation.]" (*In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646, 653, italics added.) To conclude otherwise would reward an attorney for his unreasonable beliefs and "for his ignorance of his ethical responsibilities." (*In the Matter of McKiernan* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 420, 427.)

Even though respondents and the State Bar stipulated that respondents had researched the law and on that basis believed the election was valid, that stipulation does not establish good faith mitigation. Their misrepresentations of fact and law went far beyond the specific issue of the validity of the election results. For example, respondents misrepresented that RVIT had fired its legal counsel and that they were authorized to substitute themselves as RVIT's counsel of record in the *Bettega* litigation. They further misrepresented that they were authorized by RVIT to dismiss the *Bettega* lawsuit, that RVN was a party/plaintiff with standing to dismiss the lawsuit, and that RVIT had changed its name to RVN.²⁰

²⁰Respondents contend on appeal that their good faith defense was compromised by their assertion of the attorney-client privilege, because they were unable to disclose privileged documents and communications with their clients as well as various statements by federal

Moreover, the stipulation as to their belief in the validity of the election does not address respondents' failure to disclose to the Superior Court the nature and extent of the various challenges to the legitimacy of the election. "Whether or not [respondents] believed [they] had colorable arguments . . . , [they were] duty bound not to mislead or attempt to mislead the court" (*Bach v. State Bar*, *supra*, 43 Cal.3d at p. 855.)

The Superior Court's finding that respondents' conduct was "egregious," is further evidence that they did not act reasonably.²¹ Given the magnitude of their deception and the breadth of their actual knowledge about the true state of affairs surrounding the intra-tribal battle, we find no basis on this record to conclude that respondents had an honest or reasonable belief in the truth and accuracy of their statements to the Superior Court. Indeed, respondents' misconduct "exceeds the bounds of zealous advocacy. It cannot be condoned." (*Davis v. State Bar* (1983) 33 Cal.3d 231, 239.) We therefore give no mitigative weight to their assertion of a good faith belief in the election outcome.

government officials assuring them that they need not rely on the BIA recognition of the RVN prior to asserting the RVN's rights. However, this purportedly privileged evidence would not establish a good faith belief in the numerous misrepresentations described above unrelated to the validity of the election outcome.

²¹While not dispositive, the Superior Court decision and its findings and conclusions are entitled to a strong presumption of validity if supported by substantial evidence. (*In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 117.) We note that under Code of Civil Procedure section 128.7 the Superior Court's imposition of sanctions required an extremely high showing of bad faith, frivolous tactics or intention to cause delay.

2. Absence of Prior Discipline (Std. 1.2(e)(i))

The hearing judge found that respondent Maloney practiced law for 31 years with no prior disciplinary record, and gave weight to this factor as mitigation. We agree. (Std. 1.2(e)(i).)

Although the present misconduct is serious, the lack of a prior record of discipline may be considered as a mitigating factor. (*In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 13 [many years of practice without a prior record may be considered as a mitigating circumstance even if the present misconduct is serious].) Respondent Virsik had only practiced law in California for less than 3 years prior to his misconduct, which is not a sufficient time period for mitigative evidence. (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456; Std. 1.2(e)(i).)

3. Good Character Testimony and Community Service

The hearing judge gave the testimony of the character witnesses "significant" mitigative weight, but she did so only as to Maloney. We find the good character testimony to be compelling as to both respondents. A total of thirteen witnesses testified in this matter; six witnesses testified on behalf of both Maloney and Virsik, and Virsik presented three additional witnesses who spoke only on his behalf.²² (Maloney also presented four other character witnesses who testified exclusively on his behalf.) All of the witnesses were reasonably informed about respondents' misconduct and all testified that their opinion of Maloney or Virsik would not change if the misconduct were found to be true. The overwhelming theme of the character testimony was

²²The hearing judge only considered the three witnesses who testified solely for Virsik and in so doing, she found that they did not reflect "a wide range of references in the legal and general communities." (Std. 1.2(e)(vi).)

respondents' sincere and substantial commitment to using their professional skills on behalf of the under-served, and to do good works within the community. The character testimony goes a long way towards explaining respondents' belief, albeit misguided, that their litigation strategy would right the perceived wrongs of the downtrodden RVN faction.

Maloney's character witnesses testified that he is an honest person who has provided extensive contributions to society, including extensive pro bono work. His commitment to the practice of law is often selfless and sometimes to his personal detriment, but he nevertheless is motivated to do the right thing for the ends of social justice. Maloney presented five attorney witnesses, all with many years of practice, who believed he had excellent character and a reputation for honesty in the community.

Virsik's character witnesses included four attorneys. These character witnesses testified to their personal knowledge of his honesty and competence, but they were unable to comment on his reputation in the community since Virsik had been practicing law for only a short period. Virsik's character witnesses testified that Virsik is a respectful and considerate person who helps others and devotes time to pro bono work and community services.

A sampling of the 13 witnesses is instructive. Elihu Harris, an attorney for almost 30 years, was the former mayor of Oakland and former chair of the Judiciary Committee in the State Assembly for 12 years. Harris has known Maloney for 20 years, and met with him regarding his representation of RVN. Harris testified that Maloney is absolute in his commitment to professionalism and to social justice on behalf of his clients and that he is honest, very frank, and has a firm sense of right and wrong. Harris stated that Maloney's involvement in the community

included helping abused women and the homeless, including raising money for a women's shelter in Oakland. Harris has known Virsik for 10 years and thinks of him as a man of few words. Harris believed Virsik has a reputation for honesty and professionalism in his work. Harris further testified that respondents' motivation to represent the RVN was not for financial gain since they absorbed significant costs and time to help them.

Janet Clinton, an attorney for 22 years and co-owner of their office building with Maloney, has known Maloney for 20 years and has had contact with him four or five times a week for the last five years. Clinton testified that Maloney has a firm belief in social justice, has a sterling character and is committed to helping young people. She helped represent Maloney in a dispute concerning a mobile home park for low income seniors that Maloney owns where Maloney spent tens of thousands of dollars to protect the residents of the mobile home park from a disadvantageous agreement, which was against his own self-interest. Clinton also has known Virsik for the past 10 years and sees him three to four times a week. Her opinion is that he is an upright, honest person and is extremely sincere. Virsik also participated in Leukemia walk-a-thons.

Several impressive witnesses testified on behalf of Maloney only. Kathy Neal was a business owner for 13 years and a former member of the State Bar Board of Governors. Neal has known Maloney for 20 years, and has known him well for 10 years, because he and Neal have taught continuing legal education classes together and served on volunteer boards, including a women's shelter in Oakland. She testified he is an exceptional person and she respects his honesty and integrity as well as his commitment to law and justice. Neal finds that Maloney is a unique

individual with a strong belief in the basic rights for everyone and has used his education and knowledge to argue vociferously for the interests of justice.

John Macmeeken is a retired attorney who practiced for 45 years. He was a member and then chairman of the disciplinary committee of the State Bar for 12 years. Macmeeken has known Maloney for 16 years through the Outlook Club of California, where they met twice a month. Macmeeken understands the charges against Maloney, but this did not detract from his opinion that Maloney has an excellent character and is concerned about the administration of justice. Macmeeken believes Maloney is a fair, thoughtful person whose word is unimpeachable and that he has a reputation as a straight shooter and as a reliable and conscientious lawyer who serves his clients well.

Virsik's three other witnesses testified as to his honesty, diligence and professionalism. They all knew him well because of their personal relationships with him as a sister, friend and girlfriend. However, their objectivity may well have been affected by their personal relationships with him. Because Virsik had been in practice for only a few years, he did not have the opportunity to develop as widespread a reputation among the community or to perform as extensive pro bono activities as Maloney. But, both respondents demonstrated their significant commitment to pro bono work and community service, which "is a mitigating factor that is entitled to 'considerable weight.'" (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785, quoting *Schneider v. State Bar* (1987) 43 Cal.3d 784, 799.)

B. Aggravation

We must balance the strong evidence in mitigation against the substantial evidence in aggravation as reflected in this record.

1. Uncharged But Proven Misconduct (Std. 1.2(b)(iii))

The record contains clear and convincing evidence of numerous acts of uncharged but proven misconduct, which we here consider for purposes of establishing aggravation under standard 1.2(b)(iii). (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36.) Specifically, we find that respondents wilfully made additional misrepresentations to the Superior Court in the following instances: 1) the February 16th Request for Dismissal; 2) Maloney's oral statements to the Superior Court at the February 17th Hearing; 3) the May 9th Opposition for Sanctions; 4) the May 13th Opposition to Motion for Sanctions; 5) the May 16th Supplemental Opposition to Motion for Sanctions; and, 6) the May 16th Supplemental Declaration by Maloney.

"[T]he filing of false or misleading pleadings or documents is ground for discipline." (*Davis v. State Bar, supra*, 33 Cal.3d at p. 239.) As discussed in detail *ante*, the record is replete with additional pleadings and verbal statements, not identified in the NDC, which were rife with material omissions and express misstatements of fact and law. The high degree of integrity, frankness and truthfulness required of respondents as officers of the court cannot be underestimated. (*Spears v. The State Bar* (1930) 211 Cal. 183, 187.) Moreover, respondents had an unconditional and continuing duty to make full disclosure to the Superior Court (Cf. *In the Matter of Ike* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 483, 493; Rules Regulating Admission to Practice Law, rule VI, § 7); nevertheless, they chose to conceal the full and complete factual circumstances

surrounding the disputed tribal election, as well as the novelty of the legal theories and authorities upon which they were seeking to induce the Superior Court to dismiss the *Bettega* case. We consider this in aggravation.

2. Overreaching (Std. 1.2(b)(iii))

The hearing judge found in aggravation that respondents' misconduct was surrounded by dishonesty, concealment and overreaching (std. 1.2(b)(iii)), but she gave this no weight because she found this evidence was duplicative of the misconduct in Count One. We agree, insofar as the aggravating circumstances apply to respondents' attempted fraud on the Superior Court. However, we find that Maloney's conduct in writing on his letterhead stationery to the Tri-Counties Bank instructing the bank to transfer RVIT's accounts and assets to RVN constitutes overreaching and is an aggravating factor. When he wrote the letter to the bank, Maloney knew that the results of the election were only "preliminary," and yet respondent asserted the authority of RVN as unconditional in order to dispossess RVIT of its property. Maloney's misuse of his professional status in this context was clearly improper. This evidence of overreaching is not duplicative of the misconduct charged in Count One, and we find this is aggravation with respect to Maloney. (Std. 1.2(b)(iii).)

3. Lack of Candor in the State Bar Court (Std.1.2(b)(vi))

The hearing judge found some of respondents' testimony in the proceeding below was not credible and that they lacked candor as well. Great weight is given to the hearing judge's findings on credibility (i.e., believability) and candor (truthfulness). (*In the Matter of Dahlz* (Review Dept.

2001) 4 Cal. State Bar Ct. Rptr. 269, 282.) However, it is still our responsibility to independently examine the record.

Upon our de novo review, we find clear and convincing evidence that some of respondents' testimony was neither believable nor truthful. An example of respondents' lack of candor is their testimony before the hearing judge about the BIA's position with respect to RVN's constitution. At their August 2002 trial, Maloney testified: "I don't know of any BIA disapproval of the constitution." Similarly, Virsik testified that the BIA had approved RVN's constitution as "a matter of the administrative law standard, failing to act, they approved it [the constitution.]" Yet, two years prior to this testimony, respondents had appealed the BIA's Pacific Regional Director's written decision of November 6, 2000, declining to recognize RVN's constitution.

Equally questionable is respondents' testimony that they never intended to "file" the various requests for dismissal in the *Bettega* matter and that they merely intended to "lodge" the documents with the Superior Court for its further consideration and action. Not only did Virsik specifically instruct the clerk of the Superior Court in writing to "file" the May 11th RFD, but respondents stated in several of their pleadings that the requests for dismissal were being submitted for filing or had already been filed. Further, Virsik in his oral argument in the Superior Court on May 19, 2000, expressly represented that "the [RVN] has in fact *filed* a dismissal of this action as successor of what was the [RVIT] as the plaintiff. . . ." (Emphasis added.) The record thus is at complete odds with respondents' testimony in the hearing department. (See *Franklin v. State Bar* (1986) 41 Cal.3d 700, 708.)

Much of respondents' testimony also was evasive and inconsistent, and replete with convenient memory lapses. (See, e.g., *In the Matter of Chesnut*, *supra*, 4 Cal. State Bar Ct. Rptr. 166, 172.) Moreover, when asked about various questionable legal positions that he asserted in the Superior Court in the *Bettega* litigation, Maloney repeatedly deflected responsibility for his actions to his clients. For example, Maloney was asked "was it your position . . . that the BIA was not authorized to speak on behalf of the Interim Tribal Council or the council membership?" He responded: "That was my client's position. I shouldn't be saying it's my position." Again, when asked "didn't [you] care what California Indian Legal Services had to say about the validity of the election?" he responded "My client did not care what California Indian Legal Services did."

Respondents' testimony went beyond equivocation; it was disingenuous and dishonest. The Supreme Court has on several occasions stated " 'that deception of the State Bar may constitute an even more serious offense than the conduct being investigated.' " (*In the Matter of Dahlz*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 282, citing *Franklin v. State Bar*, *supra*, 41 Cal.3d 700, 712 (dis. opn. of Lucas, J.), italics omitted.) We accordingly find respondents' lack of candor to be a strong aggravating circumstance. (*In the Matter of Dahlz*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 282; *In the Matter of Kaplan* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 509, 522.)

4. Harm to the Administration of Justice (Std. 1.2(b)(iv))

We agree with the hearing judge's finding in aggravation that respondents' conduct interfered with the proper administration of justice. (*In the Matter of Mason* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 639, 642.) Respondents assert that no harm occurred because "everyone" knew about the on-going battle for power, and therefore no one was deceived. They are wrong.

The Superior Court specifically found in its June 8th Decision that “[a]s a result of [respondents’] action California Indian Legal Services was required to perform substantial additional work and its client Round Valley Indian Tribes incurred additional expense.” The judge ordered additional monetary sanctions against respondents because of the burden respondents had imposed on the court. The record clearly establishes that respondents’ actions threatened the efficient administration of justice and improperly burdened the court system and RVIT’s attorneys, which we find is an aggravating circumstance. (Std. 1.2(b)(iv).)

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

Additionally we find in aggravation that respondents committed multiple acts of misconduct. (Std. 1.2(b)(ii).) This was not a case of one or two inadvertent or even negligent misrepresentations to the Superior Court. Respondents’ misconduct was comprised of multiple acts which were committed in concert with each other over a three-month period. (*Rodgers v. State Bar, supra*, 48 Cal.3d 300, 317.) Time and again, respondents chose to expressly or impliedly create a false picture of the true state of affairs and to ignore contrary facts and legal position. Respondents had numerous opportunities to correct their misleading statements, and yet they chose not to do so. By their repeated acts of misconduct, respondents have demonstrated a pattern of disrespect for professional norms, which we find as additional aggravation. (*In the Matter of Babero* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 322, 334.)

6. Indifference Towards Atonement or Rectification (Std. 1.2(b)(v))

Respondents’ demonstrated lack of insight into the seriousness of their misconduct is particularly troubling to this court. They continue to claim in the face of overwhelming facts and

legal authority that their conduct was justified, which demonstrates an indifference toward rectification of or atonement for the consequences of their misconduct, and we find this is an additional aggravating circumstance. (Std. 1.2(b)(v); *In re Morse, supra*, 11 Cal.4th 184, 197-198, 206, 209.) Respondents' conduct "reflects a seeming unwillingness even to consider the appropriateness of [their legal strategy] or to acknowledge that at some point [their] position was meritless or even wrong to any extent. Put simply, [respondents] went beyond tenacity to truculence." (*Id.* at p. 209; see also *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 958 [meritless defenses show lack of insight in the wrongfulness of one's actions].)

7. Conflicts of Interest

In their single-minded effort to effect a political upheaval, respondents steadfastly failed to recognize their serious conflicts of interest.²³ Without question, attorneys owe a duty of undivided loyalty to their clients. Respondents ignored this duty and instead purported to represent RVIT's interests in the *Bettega* harassment lawsuit while simultaneously advancing Bettega's and RVN's litigation and political strategies. Given there was an actual conflict, as opposed to a potential conflict, respondents could not represent the various entities and individuals they asserted were their clients in the absence of obtaining their written, informed consent. (Rules Prof. Conduct, rules 3-700(c) & 3-310.) They claimed that the "appropriate" conflicts waivers had been obtained when they had not.

²³The record discloses that in the *Bettega* litigation respondents claimed to simultaneously represent the plaintiff, RVIT, the defendant, Bettega and the "cross-claimant" RVN.

The Supreme Court explained the policy that underlies rule 3-310 in *Anderson v. Eaton* (1930) 211 Cal. 113, 116: "The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. [Citation]." To here overlook respondents' conduct in purportedly representing multiple parties in the same lawsuit would greatly diminish this important policy. Accordingly, we find their efforts to simultaneously represent all three parties in the *Bettega* case to be aggravating conduct.

C. Level of discipline

The Standards for Attorney Sanctions for Professional Misconduct provide us with guidelines in determining the appropriate degree of discipline to be recommended. (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) The gravamen of respondents' misconduct is their multiple misrepresentations to the Superior Court. Standard 2.3 provides: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a . . . client or another person or of concealment of a material fact to a . . . client or another person shall result in actual suspension or disbarment . . . depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law." We note that respondents' misconduct was closely aligned with their practice.

The standards are to be construed in light of the decisional law (*In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 30), although we find few analogous cases

because respondents' misconduct is unusual in its duration and varied procedural contexts. In cases involving fraud on the court, the discipline imposed ranges from stayed suspension to 6 months' actual suspension. At one end of the disciplinary spectrum are cases such as *Sullins v. State Bar* (1975) 15 Cal.3d 609, and *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, where no actual suspension was imposed on attorneys who misled or misrepresented facts to the court. In *Sullins*, the Supreme Court ordered public reproof of an attorney found to have committed moral turpitude by failing to disclose to the court a letter he received while representing the executor in a probate case. The letter was from the decedent's nephew disclaiming any interest in the property under his aunt's will. (*Sullins v. State Bar, supra*, 15 Cal.3d at p. 615.) *Sullins* requested an increase in his contingency fee, from 33 and 1/3 percent to 50 percent, arguing the matter had been and would be "fiercely contested." (*Id.* at p. 616.) The court noted that in analogous cases the discipline imposed was more severe, but considered *Sullins*'s 45 years of practicing law without blemish and adopted the disciplinary board's recommendation of public reproof.

In *In the Matter of Jeffers, supra*, 3 Cal. State Bar Ct. Rptr. at p. 226, we recommended a one-year suspension, stayed, and two years' probation. *Jeffers* failed to disclose to a superior court judge that his client had died, in spite of repeated questions by the judge that should have elicited this information. (*Id.* at pp. 217-218.) *Jeffers* also had written numerous letters to other counsel involved in the matter and failed to advise them of his client's death. (*Id.* at p. 218.) *Jeffers* was sanctioned for failing to appear as ordered at a mandatory settlement conference. We determined that there was insufficient evidence in the record to give weight in aggravation to a prior out-of-state

discipline, but we gave significant weight in mitigation because several character witnesses testified for Jeffers, Jeffers had practiced law in excess of 30 years before the prior disciplinary matter, and participated in many civic and pro bono activities.

The misconduct in the present case is similar to *Sullins* and *Jeffers*, but it is more far-reaching since it involves numerous pleadings and appearances over a four-month time period. There also is substantial aggravation in the instant case where none was found in *Sullins* and *Jeffers*. But here, the mitigation evidence to some extent offsets the evidence in aggravation. On balance, more serious discipline is warranted here than in those cases where no actual suspension was imposed.

In the middle of the disciplinary spectrum is *McMahon v. State Bar* (1952) 39 Cal.2d 367, where the Supreme Court suspended McMahon for sixty days for making misrepresentations in an effort to mislead the court. McMahon alleged the deceased died intestate in order to appoint his client as administrator in the probate proceeding. However, McMahon had information regarding the existence of a will which he failed to disclose. McMahon is similar to the case at hand in that the attorneys ignored the information available to them and proceeded with legal action which misrepresented facts to the court in an effort to mislead. But the extent of the deception is far more limited in the *McMahon* case and the court there did not address aggravation or mitigation evidence.

Also falling somewhere in the middle of the spectrum is *Bach v. State Bar, supra*, 43 Cal.3d 848, wherein an attorney intentionally misled a judge that he had not been ordered to produce his client at a child custody mediation, or in the alternative that he had not been served with such an

order. However, the evidence showed that Bach was informed of the order both orally and in writing. The Supreme Court found that this conduct was serious and involved moral turpitude and was the kind of behavior "that threatens the public and undermines its confidence in the legal profession." (*Id.* at p. 857.) In ordering a one-year stayed suspension, with a three-year probation and 60 days' actual suspension, the court noted there was no mitigation evidence. (*Ibid.*) Moreover, the attorney in *Bach* had previously been publicly reprovved for communicating with an adverse party represented by counsel, which was found to be an aggravating circumstance. Here, the misrepresentations were more numerous and there were significantly more aggravating factors, but here also is strong mitigation evidence, which was absent in *Bach*. Also, Bach had a previous disciplinary record, which is not a factor in the present case.

On the higher end of the discipline spectrum are the cases of *In the Matter of Chesnut*, *supra*, 4 Cal. State Bar Ct. Rptr. 166, *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, and *Levin v. State Bar* (1989) 47 Cal.3d 1140, where attorneys who made misrepresentations were actually suspended for six months. In the case of *In the Matter of Chesnut*, *supra*, 4 Cal. State Bar Ct. Rptr. 166, we recommended six months' actual suspension for an attorney who falsely represented to two judges that he had personally served papers on an opposing party. (*Id.* at pp. 171-175, 177.) As in the instant case, we found in mitigation that the attorney's eight witnesses demonstrated good character and that the attorney engaged in pro bono activities. (*Id.* at pp. 175-177.) In *Chesnut*, like this case, we found in aggravation the attorney did not admit to any wrongdoing and the testimony in the State Bar Court lacked candor. However, in *Chesnut*, our key concerns were the attorney's prior disciplinary record and the fact that the attorney had been

in practice for less than five years at the time of his second discipline, which we found "requires strong prophylactic measures." (*Id.* at p. 178.) Here, although respondents' conduct is more egregious, there is no other evidence of misconduct having occurred either before or after this matter.

We also consider *In the Matter of Farrell, supra*, 1 Cal. State Bar Ct. Rptr. 490, wherein an attorney was suspended for two years, stayed, and placed on six months' actual suspension. Farrell was found culpable of violating section 6106 because he falsely stated to a trial judge that a witness had been subpoenaed and he failed to cooperate with the State Bar. (*Id.* at p. 497.) In mitigation, Farrell believed that the subpoena had actually been sent by a member of his staff, but had no basis to believe it had been served. In aggravation, he had a prior record of discipline in two client matters resulting in 90 days' actual suspension. The misconduct here is far more serious, but Farrell's prior discipline is a significant distinguishing factor.

Lastly, in *Levin v. State Bar, supra*, 47 Cal.3d 1140, an attorney misrepresented to opposing counsel that he had the authority to settle the case as an officer of his incorporated client. (*Id.* at p. 1143.) Levin was not an officer, but under this guise, he also tried, on numerous occasions, to communicate with the adverse litigant despite the opposing counsel's letters that Levin stop these communications. (*Id.* at p. 1143.) In the same disciplinary proceeding, but in a different client matter, Levin settled a personal injury claim without the client's consent and failed to inform her of the settlement. Instead, Levin paid himself his fees and then gave the remaining settlement proceeds to the client's cousin, who gave the client only a part of the money, claiming the rest was payment for a debt owed. The client then requested an accounting from Levin, which he failed to

deliver. (*Id.* at p. 1145.) The court found that Levin's acts of dishonesty were the most reprehensible of his misconduct. (*Id.* at p. 1147.) The misconduct in *Levin*, while more varied, is perhaps the closest in scope to the case at hand.

Mitigating weight was given due to Levin's 18 years of practice without prior discipline and his unblemished conduct subsequent to the State Bar investigation, as well as for his candor and cooperation with the State Bar. Nevertheless, the court found this evidence was outweighed by aggravating evidence of Levin's attempts to conceal his dishonest acts, and that his dishonesty while not actually constituting a pattern of wrongdoing, "at the very least . . . demonstrate[d] repeated, similar acts of misconduct" which merited six months' actual suspension. (*Id.* at pp. 1149-1150.)

The primary purposes of the disciplinary proceedings are the protection of the public, the courts, and the legal profession; the maintenance of high professional standards by attorneys; and the preservation of public confidence in the legal profession. (Std. 1.3; *In re Morse, supra*, 11 Cal.4th at p. 205.) But, no fixed formula applies in determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Instead, we determine the appropriate discipline in light of all relevant circumstances. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) In the instant case, we have found less culpability and more mitigation, but we also have found considerably more aggravation than the hearing judge. Respondents clearly lost their way when they abandoned any notion of objectivity and professional responsibility in their effort to co-opt the litigation process for the benefit of their client, RVN. Given that they had ample time over a four-month period to reflect on what they were doing, we are concerned that respondents' serious ethical lapses may not be aberrational. (See *Mosesian v. State Bar* (1972) 8

Cal.3d 60, 65.) The aggregate number of their misrepresentations also raises concerns over whether the misconduct was aberrant. (*In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594.)

Militating in favor of respondents is their strong character evidence demonstrating their commitment to community service and social justice, their reputation for honesty and diligence, and their unblemished record save for their unfortunate foray into spurious litigation tactics. Also, while respondents' misconduct is serious and repeated, it occurred in a single client matter. Moreover, while not attempting to minimize the gravity of their misconduct, it was the result of over-zealous representation of their client and not for personal gain. Thus, even though the seriousness of the misconduct in this case appears to be most like those cases imposing six months actual suspension, we do not believe such severe discipline is needed here.

Although the hearing judge viewed the respective culpability of each respondent as similar, and found more mitigation evidence for Maloney, we conclude that respondent Maloney's actions warrant greater discipline than those of respondent Virsik. We find Virsik to be less culpable than Maloney since he did not appear or make misrepresentations at the February 16th hearing in the Superior Court, and there is no evidence he prepared the misleading February 16th RFD, which Maloney submitted to the Superior Court. Also we find that Virsik is not culpable of overreaching in aggravation, because there is no evidence he prepared the misleading letters to the bank demanding that RVIT's accounts be transferred to RVN. Finally, and perhaps most importantly, as the State Bar points out in its brief on appeal, and as Maloney has so stipulated, he was the partner in charge of the litigation tactics here in question, and he had more than 30 years' experience, while

Virsik was a relatively inexperienced associate. As such Maloney must bear more responsibility than Virsik. Regrettably, Maloney's "lengthy practice and professional achievements did not aid [either] respondent in avoiding basic violations of the Rules of Professional Conduct." (*In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 765.) Accordingly we recommend 90 days' actual suspension for Maloney on the conditions stated below, and we find the appropriate discipline for Virsik to be 60 days' actual suspension on the conditions stated below.

IV. FORMAL RECOMMENDATION

We recommend that respondents Patrick J. Maloney and Thomas S. Virsik be suspended from the practice of law in the State of California for one year, that execution of this suspension be stayed, and that respondents be placed on probation for two years on the following conditions:

1. Respondent Maloney be actually suspended from the practice of law in the State of California during the first 90 days of probation; and respondent Virsik be actually suspended from the practice of law in the State of California during the first 60 days of probation.
2. Respondents must comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all the terms and conditions of this probation.
3. Respondents must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a)(1).) Respondents must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondents' home addresses and telephone numbers will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondents must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.
4. Respondents must report, in writing, to the State Bar's Office of Probation in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondents are on probation (reporting dates). However, if respondents' probation begins less than 30 days before a reporting date, respondents may submit the first report no later than the second reporting date after the beginning of probation. In each report, respondents must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

- (a) in the first report, whether respondents have complied with all the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar, and all other terms and conditions of probation since the beginning of probation; and
- (b) in each subsequent report, whether respondents have complied with all the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar, and all other terms and conditions of probation during that period.

During the last 20 days of this probation, respondents must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, respondents must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

- 5. Subject to the proper or good faith assertion of any applicable privilege, respondents must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to respondents, whether orally or in writing, relating to whether respondents are complying or have complied with the terms and conditions of this probation.
- 6. Within one year after the effective date of the Supreme Court order in this matter, respondents must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation in Los Angeles. This condition of probation is separate and apart from respondents' California Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondents are ordered not to claim any MCLE credit for attending and completing this course. (Accord Rules Proc. of State Bar, rule 3201.)
- 7. Respondents' probation will commence on the effective date of the Supreme Court order in this matter. And, at the end of the probationary term, if respondents have complied with the terms and conditions of probation, the Supreme Court order suspending respondents from the practice of law for one year will be satisfied, and the suspension will be terminated.

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that respondents be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

VI. RULE 955

We further recommend that respondent Maloney be ordered to comply with rule 955 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule

within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

VII. COSTS

We further recommend that the costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs be payable in accordance with Business and Professions Code section 6140.7.

EPSTEIN, J.

We concur:

STOVITZ, P. J.
WATAI, J.

Case Nos. 00-O-14000 and 00-O-14001 (Consolidated)

In the Matter of Patrick J. Maloney, Jr. and Thomas S. Virsik

Hearing Judge

Hon. Pat McElroy

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CERTIFICATE OF SERVICE
[Rule 62(b), Rules Proc.; 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 January 14, 2005, I deposited a true copy of the following document(s):

OPINION ON REVIEW, FILED JANUARY 14, 2005.

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:

Spencer W. Strellis
Law Ofc Spencer W. Strellis
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Oakland, CA 94612

Jonathan I. Arons
Law Ofc Jonathan I. Arons
101 Howard St. #310
San Francisco, CA 94105

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

Esther Rogers, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **January 14, 2005.**


Shemainee Carranza
Case Administrator
State Bar Court