FILED DECEMBER 15, 2009

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **PHILIP EDWARD KAY,** **Member No. 99830,** A Member of the State Bar.	)	Case Nos. **01-O-01930-LMA** (02-O-15326; 03-O-00142; 05-O-03685) **DECISION**

I. Introduction

This is an unfortunate case. A savvy, experienced attorney fought hard for his clients in several noted sexual harassment cases and won huge awards on their behalf. But somewhere during his overzealous advocacy, he lost it, not the cases, but his integrity, professional decorum, credibility, and respect of the court. His insolent behavior toward several judges, including the State Bar Court, and opposing counsel and other outrageous conduct significantly harmed and obstructed the orderly administration of justice.

In this default, original disciplinary proceeding, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) charges respondent Philip Edward Kay with 19 counts of professional misconduct in three client matters, including: (1) failing to maintain respect for the courts; (2) maintaining unjust actions, proceedings, or defenses; (3) presenting a matter to a tribunal by seeking to mislead a judge by an artifice or false statement of fact or law; (4)

asserting personal knowledge of facts at issue when not testifying as a witness; (5) harassing or embarrassing jurors; (6) failing to obey court orders; (7) failing to perform with competence; (8) dividing a fee for legal services with a lawyer not a partner, associate, or shareholder of respondent or his law firm without client's written informed consent; (9) assisting in, soliciting, or inducing a violation of a Rule of Professional Conduct; (10) failing to inform his client of significant developments; and (11) committing acts of moral turpitude.

The court finds, by clear and convincing evidence, that respondent is culpable of most of the counts. Based upon the serious nature and extent of culpability, as well as the applicable aggravating and mitigating circumstances, the court recommends, among other things, that respondent be suspended from the practice of law for five years, that execution of suspension be stayed, that he be placed on probation for five years and that he be suspended for a minimum of three years and until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law, pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

II. Pertinent Procedural History

On June 11, 2008, the State Bar filed a notice of disciplinary charges (NDC). Respondent filed a response.

Supervising Trial Counsel Allen Blumenthal and Deputy Trial Counsel Susan I. Kagan represented the State Bar. Attorneys Jason L. Oliver and John W. Dalton were respondent's co-counsel.

On April 28, 2009, after 11 days of trial, which commenced on March 16, respondent refused to retake the witness stand. As a sanction, the court entered his default on May 11, 2009, but did not place him on inactive enrollment. A month later, the court denied respondent's

request to set aside the default and struck respondent's response, amended response and second amended response to the NDC on June 17, 2009.

After the State Bar filed its closing brief, the court took the matter under submission for decision on September 18, 2009.

III. Findings of Fact and Conclusions of Law

The following findings of fact are based on the evidence and testimony introduced at the proceeding until respondent's default was entered and on the well pleaded facts in the NDC, which were deemed admitted as evidence by respondent as a result of the default unless otherwise ordered by the court based on contrary evidence. (Rules Proc. of State Bar, rule 200(d)(1)(A).)

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 1, 1981, and has been a member of the State Bar of California since that time.

B. Credibility Determinations

With respect to the credibility of the witnesses, the court has carefully weighed and considered their demeanor while testifying; the manner in which they testified; their personal interest or lack thereof in the outcome of this proceeding; and their capacity to accurately perceive, recollect, and communicate the matters on which they testified. (Evid. Code, § 780 [lists of factors to consider in determining credibility].) Except as otherwise noted, the court finds the testimony of the witnesses to be credible. However, the court finds that the respondent's testimony lacked candor. His demeanor was rude, disruptive and disrespectful. He repeatedly refused to obey and disregarded court orders in these disciplinary proceedings. He often crossed over the line and impugned the integrity of this court.

C. Case No. 02-O-15326 (The Gober Matter)

Findings of Fact

Respondent represented six individuals (Dianne Gober, Terrill Finton, Sarah Lang, Talma (Peggy) Noland, Suzanne Papiro, and Tina Swann) in a matter alleging sexual harassment against Ralphs Grocery Stores ("Ralphs").

On August 1, 1996, respondent initiated a civil action against Ralphs in the San Diego County Superior Court in *Gober et al. v. Ralphs Grocery Company*, case No. N72142 ("*Gober*").

During his representation, respondent was repeatedly unprofessional, disrespectful, and rude to the court, opposing counsel, witnesses, parties, and all participants, both in the original trial in 1998 (*Gober I*) and the remanded trial on punitive damages in 2002 (*Gober II*). Both Judges Joan P. Weber and Michael M. Anello, who presided over the *Gober* trials, found that respondent committed misconduct throughout the trials.

During both trials, respondent repeatedly made gratuitous comments, speaking objections and argued with the court in front of the juries, despite the court's numerous warnings, admonitions, and orders to cease such improper conduct. He repeatedly asked identical or almost identical questions, despite the court's repeated sustaining of objections to these questions and repeated warnings, admonitions, and orders by the court about this conduct. Likewise, he repeatedly argued in front of the juries after the court sustained objections and warned him about arguing in front of the jury.

Because respondent would continually ask questions about customer complaints, despite the court's prior rulings, Judge Weber at a side bar repeatedly warned respondent that his conduct was improper. For example, the court warned respondent:

- "I've sustained the objection repeatedly that customer complaints of sexual conduct are not admissible. I have excluded it. It is not relevant to go into. Objection sustained. I will admonish you in front of the jury if you ask another question along these lines."

- "If you ask one question of this witness that has to do with sexual conduct by customers, I will set a hearing for contempt, because you repeatedly, sir, try to get around my rulings in a very offensive way."

Respondent repeatedly asked extremely argumentative and improper questions to witnesses in order to elicit inadmissible and prejudicial answers from the witnesses, often in violation of court orders and despite the court's warnings and admonitions and repeated sustaining of objections to these questions. He also repeatedly asked inadmissible questions, despite court admonitions, warnings, and orders. He repeatedly asked questions in violations of court orders, including orders that prohibited and limited the evidence sought to be elicited.

For example, the court told respondent:

- "Well we do have a severe problem, Mr. Kay, with objections that are sustained, and then you ask the exact same question and change one word, and it is improper to do that."

- "And in my opinion, the examination of this witness is out of control … Mr. Kay, your questions are very argumentative. If you do not get the exact response you are requesting from the witness you follow it up with the exact same question, changing one little word. We are going over every note and every word in the note ad nauseam."

For example, when respondent did not like a witness's answer he would make snide, sarcastic, and inappropriate gratuitous comments in front of the jury, such as:

- "Oh, please."
- "That's good, cause that's - - I like to hear that, because that means somebody is lying."
- "I didn't ask you to parrot your counsel's objections. I asked you to answer the question."

In denying respondent's request for a mistrial, the court told the parties:

> "I think I indicated quite a few times outside the presence of the jury what my concerns were, Mr. Kay, with your trial performance. I toyed with the idea of starting to sanction you in front of the jury. ... I decided on my own that I would not do that in front of the jury, because I did not want to prejudice your clients because of your trial performance and the way you examined witnesses.... So you know, I've thought long and hard about how to keep you from asking inappropriate questions, how to keep you from commenting after witnesses answer a question that you don't like the answer, your constant

commentaries on the record which I think probably a hundred times I've had to exclude because they are improper."

Respondent was also repeatedly rude and unprofessional before the court, the witnesses, opposing counsel, and all participants. Respondent was sarcastic to the court. He repeatedly badgered, berated, screamed, yelled, and/or raised his tone at witnesses and the court, despite court warnings, admonitions, and orders not to do this and instructions to calm down and act professionally. In *Gober I*, the bailiff as well as the judge warned respondent about his tone.

For example, the court told respondent the following:

- "Sir, I will tell you what, I have had to withstand a thousand times sanctioning you in front of the jury. . . . I have never, ever seen an attorney more rude and disrespectful on so many levels, sir. A ruling you will smirk at defense counsel, you will smug at the jury . . ."

- "You are smirking again."

- "You need to keep your voice down."

- "Oh no, you went ballistic on that question."

- "Again, the only problem I have is with the yelling."

- *Court*: "So even after I've read you from Jefferson that says this is at variance and that obviously trial judges, the majority of them don't allow it [leading your expert witness], you're still saying that you have the right to yell at me in front of the jury when I rule you can't ask the question?
  Kay: I didn't yell at you, your Honor. I didn't yell at you in front of the jury. I simply said: Your Honor, I have a right to ask a leading question.
  Court: You said it in a tone, sir, that was absolutely unprofessional.
  Kay: That's a new fact, your Honor."

- *Court*: "Sir, listen. I have never ever in eight years on the bench had a problem with a lawyer discussing the law with me. The only problem I have, sir, is in your demeanor. I don't mind at all people agreeing or disagreeing about any ruling I make, but everything we do in a court of law should be done outside the presence of the jury so that jurors do not get the impression, sir, that you are rude, obnoxious and unprofessional -
  Kay: There we go.
  Court: - - because lawyers should not behave that way, sir. As officers of the court every lawyer in this courtroom has a responsibility, as the court does, to be professional, polite to all counsel, the court, witnesses. And sir, I don't know if you're just having a bad couple of months, but you are incredibly rude to everyone in the

courtroom and you know, I've tried to say it, sir – again I didn't chastise you in front of the jury. Every time I try to do it, I try to do it as professionally as possible outside the presence of the jury, but sometimes it's gotten completely out of control."

- "There's no point in yelling and acting unprofessional in front of the jury and it's very unfortunate and very detrimental to your clients."

In *Gober I*, respondent almost got into a physical confrontation with opposing counsel in the hallway of the courthouse. He got into the face of opposing counsel and had to be restrained by co-counsel, John Dalton. Officer Christopher Mata had to intervene and come between the attorneys, while Mr. Dalton had his arms wrapped around respondent and was pulling him back. The court issued an order that counsel were to stay apart from each other and not to be within 10 feet of each other outside of the courtroom.

In *Gober II*, respondent continued his disrespectful conduct. He was angry, contentious, hostile, and disrespectful. He laughed and mocked the court and its rulings. He repeatedly smirked and was snide and sarcastic to the court.

For example, after an objection was sustained to one of his questions, respondent remarked in front of the jury:

> "I would suggest, just to save time, why don't we have a standing objection that every question I ask is subject to every standard objection under the Evidence Code, and then you can rule to save time."

During the in limine motions, respondent, in arguing the motions and in response to the court's rulings, made the following disrespectful statements and accusations to the court:

- "Excuse me, but the court under 5200 [sic] of the Rules of Professional Conduct cannot allow lawyers to sponsor lies, and it would be sponsoring a lie."

- "The court sent it back here for us to get a fair trial, and not to get railroaded. If you are going to continue to grant their motions, so be it."

- "So what the court's done now with all its rulings is to create a fiction, and the jury now will be hearing a fantasy."

- "It appears to - to the plaintiffs that this court has a problem with the concept of punitive damages. Either you don't understand what punitive damages are, or you're against them. If you're against them, you should not be judging this case . . . ."

- "All of those reasons make it very clear that we can't get a fair trial in this court, and I think the court should consider recusing itself based on these rulings. They are so incredibly biased and prejudicial. You're cutting our case down to a nub, and you know you're doing it, and you're doing it. It's amazing."

In response to court warnings about his conduct, respondent told the court:

- "You are demonstrating bias in this case, and it's bias against me, and that's directed, then, to my clients. And your bias is not only in the way you keep taking me down in front of the jury and making statements that aren't supported by the record, it's also demonstrate by the fact of some of the rulings in this case. As we're going to make a record. I guarantee, your Honor, that this record is going to be seen by a court of appeal one way or another."

- "Because you just made something up, your Honor, that didn't happen. When I made that statement in front of the jury, you never said I was yelling at you. I believe you would have taken me down in front of the jury."

Respondent even berated the court when it ruled in his favor. Both judges had to repeatedly instruct and admonish him to calm down, lower his pitch, and act professionally. Respondent also made faces at the court. In fact, at one point during the *Gober I* proceeding, the bailiff, outside the presence of the jury, threatened to remove respondent from the courtroom for his behavior.

Respondent also repeatedly made improper motions in front of the jury, despite the court's warnings and admonitions that this was improper. These included motions to reopen the case and several motions for mistrial. In *Gober I*, respondent also repeatedly instructed the court reporter to mark the record, and continued to do so even after the court warned him to stop instructing the court reporter to mark the record, so that the court had to order that the next time he did so he was going to be sanctioned.

Respondent repeatedly made personal attacks on opposing counsel, even in front of the jury. These statements were false and improper, especially when made in front of the jury.

Respondent falsely told the *Gober I* jury that opposing counsel had lied and sponsored false testimony, was unprofessional, violated her ethical duties, and violated court orders.

Respondent told the jury:

- "It's reprehensible to come in and defend a lawsuit simply by sponsoring false testimony."

- *Kay*: "Yet, she [Ms. Glatzer] has the audacity to stand before you as an officer of the court and argue to you, contrary to the law, contrary to her oath as an officer of the court.
  *Glatze*r: Objection, your Honor
  Court: Sustained.
  Kay: - - contrary to the law that they have already suffered a punishment through your award of compensatory damages, as the court has instructed you - - you can turn it off, John - - as opposed to punitive damages, which can only be awarded in phase two of this case. So that's just a flat out bald lie."

- "The law and the facts in this case don't matter to them. They'll say whatever they have to say, and they'll do whatever they have to do."

Respondent falsely accused the attorneys in *Gober II* of trying to mislead the court or the jury, of manufacturing and sponsoring false evidence, and of intimidating witnesses.

Respondent also repeatedly made personal attacks on the *Gober I* and *Gober II* courts. He repeatedly and falsely accused the judges of improper conduct, of bias, of unfairness, of sponsoring perjury, of refusing to follow the law, of making things up, of distorting the record, of creating a fiction, of railroading his clients, of arguing defendants' point of view, of sponsoring lies and false testimony to the jury, of intentionally not following precedent, of intellectual dishonesty, of condoning and covering up Ralphs' intimidation of witnesses, of engaging in a pattern of protecting Ralphs, and of judicial misconduct. He attacked the court's experience, stating that a ruling was either the result of a lack of experience or bias. He even accused Judge Weber of granting a mistrial in order to prevent the Court of Appeal from seeing her erroneous rulings.

This is another example of his sarcastic and disrespectful statements to the court:

> "Why don't we just do away with all the evidence, and then we can ask them to speculate, all right? Because what's the point of going forward? Because, you know, your honor, under the *Torres* case, I don't have to put the plaintiffs on. I can just tell the jury they have five hundred fifty thousand dollars on emotional distress, then we can do away with calling any witnesses. You can read them some story that has nothing to do with the evidence, then they can rule, because that's where we're going. ... you can just read them a story."

When the court told respondent that he could not sit in the courtroom during jury deliberations because it was not available, but suggested he could sit outside the courtroom or the lounge, he made faces at the court and rudely told the court:

> "That's an amazing thing. I appreciate the court's generous hospitality to say go out and sit out on a bench."

Respondent also accused the court of misrepresenting that she had never had a lawyer sit in the courtroom during jury deliberations and continued his disrespectful behavior to the court. He told the court:

> "And I don't believe in your thousand trials that you've never had a lawyer sit through deliberations. That's an amazing statement also."

The bailiff had to threaten to throw respondent out of the courtroom.

In the *Gober I* case, in pleadings and in court, respondent accused the court of judicial misconduct, relying on a case, *Bole v. Bole* (1946) 76 Cal.App.2d 344, 345-346, that did not remotely stand for the proposition he asserted. Respondent knew that *Bole* did not stand for the proposition he claimed and/or he knew it was not a reliable precedent. Respondent sought to mislead the court by an artifice or false statement of law.

Even after the court pointed out to respondent that *Bole* did not state what respondent claimed and that his accusation against the court was unethical, respondent continued to falsely accuse the court of judicial misconduct based on its rulings. The court also told respondent:

> "I think it is absolutely unethical to accuse a judge of judicial misconduct in a situation where a judge is trying in her best way she knows how to review the record and make rulings and call them as I see them, which is what I've done with every single ruling I've made in this case , and - - you know, I never add up who wins, who loses on one motion

> or another, what evidence is admitted, what evidence isn't admitted, what objections are sustained, what objections aren't sustained, but that pleading was outrageous in my judgment."

Respondent made his statements knowing they were false or made with reckless disregard for the truth. He knew his behavior during the trial was improper. His statements caused numerous discussions outside the presence of the jury, causing delay and extending the trial. They interfered with the administration of the court and the proceedings, and were made with the intent to deprive the defendant with a fair trial and to appeal to passion and prejudice.

Before the commencement of the *Gober II* trial, respondent Kay repeatedly filed, through his co-counsel, John Dalton, essentially duplicative, frivolous and false verified statements and petitions for writs of mandate to disqualify Judge Anello. These verified statements and petitions were filed for an improper purpose, namely to harass and manufacture bias. The verified statements and the petitions were duplicative, repetitive, and false.

For example, in the February 14, 2002 verified statement, respondent falsely accused Judge Anello of:

- Pursuing contempt proceedings based on a void or unenforceable order;
- Making false statements regarding the status of the contempt citations;
- Failing to advise criminal defendants of their rights;
- Pursuing a contempt proceeding against a criminal defendant who had not been properly served with the contempt citation;
- Acting as an advocate for defendant Ralphs. Respondents falsely claimed that Judge Anello invited Ralphs to seek sanctions and raise evidentiary objections;
- Conducting an unauthorized and ultra vires contempt motions hearing to determine contempt without a trial;
- Making unauthorized and derogatory statements regarding respondent at the contempt proceedings without any legal grounds or evidence in support of the statements; and
- Denying respondent’s right to make a record at the Trial Readiness Conference.

Judge Anello was not biased or prejudiced against respondent's clients in this matter. There was no valid basis for disqualifying him. Respondent knew this, but filed the multiple requests and petitions anyway. Respondent further knew that he was not raising new facts or issues in his multiple verified statements and petitions to recuse Judge Anello, but was raising

identical or almost identical facts and issues to the prior requests. He knew that the prior requests based on the same facts had been stricken and the Court of Appeal had denied the earlier petitions. He filed the petitions for an improper purpose: to harass and embroil Judge Anello in a dispute, and because he wanted a judge more favorable to them to hear the *Gober* matter. Having failed to obtain the favorable rulings he sought at the hearings on the motion in limine, respondent attempted to manufacture alleged bias or create hostility by the court so he could remove Judge Anello and obtain a judge he hoped would rule differently from Judge Anello.

The court repeatedly warned respondent about his speaking objections, his gratuitous statements in front of the jury, his raising his voice, his unprofessional and rude behavior, his attacks on opposing counsel, and his arguing in front of the jury. For example, the court told respondent:

- "Now look, Mr. Kay. We're not going to argue about it in front of the jury; not now, not ever."
- "Mr. Kay, you can calm it down. There's no need to throw a tantrum. ... Lower your pitch and we'll figure it out."
- "Mr. Kay, please stop arguing with me in front of the jury."
- "Mr. Kay here's another rule from now on: in front of the jury or otherwise, when the court speaks, you stop. It's a matter of common courtesy, and it's a matter of necessity for the court reporter. Failure to do that is going to be deemed to be disrespect and contempt toward the court."
- "I mean, again, I guess I should not have to be repeating this - - the speaking objections, the hostility, the anger, the explosions in front of the jury, the arguing with the court, that, in the court's view, is improper. It always has been, is now, will be."

During the trial, respondent repeatedly accused the court of improper conduct, of intellectual dishonesty, of bias, of unfairness, of sponsoring false testimony, and of judicial misconduct. For example, he told the court:

- "This is a joke at this point..."

- “You know, I thought maybe the court was gonna try to give us a fair trial. There is no way, based on what you've done, that we are coming close to receiving a fair trial here.”

- "You’re creating the most incredible disingenuous fiction after trial that ever existed."

- "You have distorted the record here this afternoon. Whether it was done intentional to cover them, I don't know. But I'm telling the court now."

- "For some reason the Evidence Code does not apply in this trial."

- "The court merely parrots what defense counsel has argued without ever placing any authority before the court that, quote, the first — the second jury can only hear the same evidence of the first jury."

During the trial, respondent repeatedly told the court that he would not obey the court's rulings and challenged the court to find him in contempt or sanction him. The court repeatedly warned respondent about this unprofessional and disrespectful behavior. Instead of stopping and being respectful and professional, respondent would repeatedly mock the court and tell it that he would not obey the court's orders and warnings. For example, respondent told the court:

- "So I'm telling the court right now, that the first witness I'm putting on the stand tomorrow would be Roger Misiolek, and I'm gonna have him testify about Irvine. And I'm not gonna be dissuaded from it. But the difference between me and them, I'm telling you exactly what I'm going to do, then you can go ahead and hold your contempt hearing on me. All right? Because you know what? I'm not gonna sit here and let you railroad us into a trial where you're basically saying they get to put credibility issues in front of the jury and then you're gonna instruct the jury disregard all this evidence, but on the other hand they get to hear it...."

- "I'm going there. I just told you that. I'm not holding back. We're on the record. So when I do it, you're not going to be able to say how could you do this. I'm telling you right now I'm going there. Then you can throw me in jail, and then maybe you'll have to declare a mistrial then."

- “Okay. So you better have the bailiff ready for action, because if you think that I've misunderstood your orders, that's fine. But I would much rather go to jail than just sit down and allow you to cram this down our throats. This is total hypocrisy on the part of this court.”

During the appeal of the *Gober II* matter, the Court of Appeal made no finding of bias, but did recuse Judge Anello in 2005 from further proceedings. It made no finding that Judge Anello did anything improper.

During the *Gober II* trial, despite the Court of Appeal's denial of respondent's petitions, respondent made at least seven motions for mistrial where he repeatedly listed as grounds for the mistrial motions "court bias," claiming the court excluded evidence he wanted to present and accusing the court of making its rulings based on bias. These rulings were based on legitimate reasons. Further, erroneous rulings do not show bias. Respondent's motions interfered with the orderly administration of the court, increased the time necessary to deal with these matters, and burdened the court.

During the *Gober I* and *Gober II* matters, respondent repeatedly suggested, implied, and directly stated to the juries that there was other evidence of Ralphs' misconduct that the plaintiffs were prevented from presenting; that his clients were being denied a fair hearing; and that evidence of defendant's misconduct was being improperly suppressed or hidden from the jury, despite the court's orders admonitions, and warnings about this conduct.

For example, respondent engaged in the following gratuitous statements, arguments, and colloquies in front of the jury after the court sustained objections by Ralphs:

> *Court*: Mr. Kay, I'm going to rule that preliminary stuff out about the lawyers, and I'm going to just ask you to begin with the substantive testimony, which looks like it starts over on page 791. Am I right? Your objection is noted. I understand the reason for it.
> *Kay*: Your Honor, I think you have to - -
> *Court*: I understand. We're not going to argue about it in front of the jury. I understand totally. Believe me, I understand the issue, but that's the court's ruling.
> *Kay*: Well, may we have an opportunity to be heard - -
> *Court*: We'll talk about it later.
> *Kay*: I have to put on - -
> *Court*: Mr. Kay, please. We're not going to debate these issues in front of the jury. I understand.
> *Kay*: I understand that, your Honor.

> *Court*: Stop. I understand. I want you to start reading the substantive testimony, wherever it begins, and if you - - you want me to pick it, it looks to me like it's the top of 799.
> *Kay*: I know where - -
> *Court*: Why don't you start there, and we'll talk about it later.
> *Kay*: I'm required, under the law of California, your Honor - -
> *Court*: Mr. Kay, please stop arguing with me in front of the jury.
> *Kay*: I'm not going to argue with the court.
> *Court*: Start reading the testimony.
> *Kay*: Your Honor, you're forcing me to waive my right - -
> *Court*: No, I'm not.
> *Kay*: - - under the Code of Civil Procedure, to bring a motion for mistrial.
> *Court*: Mr. Kay. Mr. Kay, stop now. Read the testimony from the witness. You and I will discuss these legal issues later, outside the hearing of the jury. I'm not going to say it again.
> *Kay*: There's no waiver of my mistrial motion? Thank you, your Honor.

While objecting in front of the jury during Ralphs' closing, respondent stated: "If counsel would stop lying to the jury."

Respondent repeatedly refused to comply with the court's orders and sustaining of objections. He repeatedly told the court that he would not obey the court's orders and challenged the court to find him in contempt or sanction him.

Respondent made at least seven motions for mistrial during *Gober II*. He repeatedly listed as his grounds for mistrial "court bias," claiming that the court would exclude evidence he wanted to present before the jury and accusing the court of making its rulings based on the court's bias against the plaintiffs and their counsel. These rulings were based on legitimate reasons, mainly that in the court's opinion the evidence that was to be presented to the jury was essentially the evidence that was originally presented in the first trial. Respondent's motions interfered with the orderly administration of the court, increased the time necessary to deal with these matters, and burdened the court.

Respondent's misconduct was designed to inflame the juries with passion and prejudice and to interfere with Ralphs' right to a fair trial. In fact, respondent's misconduct did inflame the juries to act with passion and prejudice and did interfere, or come close to interfering, with

Ralphs' right to a fair trial. Judge Anello testified that respondent's ongoing obstreperous conduct during the course of the trial caused multiple delays as the court would have to deal with his repeated outbursts. It also caused in *Gober II* the granting of a conditional new trial motion based upon his misconduct at trial.

After the trials, respondent also improperly provided, or caused to be provided, a letter to the jurors signed by respondent with attachments which included excluded evidence. The jurors received this letter as they were leaving the court. The letter informed them of evidence excluded by the court. It also stated:

> "We ask that should representatives from Ralphs contact you, you contact us so that we may give you the plaintiffs' perspective on issues they might raise with you. Finally, you should be aware that you're not required to speak with anyone involved in the trial, including the judge and her personnel."

Respondent's intent in providing the letter packets to the jurors was to make the jurors feel remorse or guilt for the level of damages awarded, bias the jurors against the court and opposing party and counsel, cause the jurors to have ill will and feelings against their jury service, influence their actions in future jury service, and prevent Ralphs and the court from being able to learn if there was any juror misconduct or basis for an appeal.

At the conclusion of *Gober I*, the court granted a mistrial based on juror misconduct. Ralphs had also moved for a new trial based on attorney misconduct. The court stated about respondent's misconduct:

> "Attorney misconduct. I read everything regarding this issue. I want the record to be clear that I have very grave concerns about the issue raised by defense counsel in their motion for new trial. I think this is in fact a close call on whether plaintiff's misconduct fundamentally prejudiced defendant's right to a fair trial. I think I made myself very clear during the course of the trial that I found Mr. Kay's conduct throughout the case to be exceedingly unprofessional. The most blatant areas that come to mind that are documented in great detail in defense pleadings were his repeated commentary on the evidence when witnesses were on the stand and what I consider to be an extremely unprofessional closing accusing Ms. Glatzer of violating her oath as an officer of the court and accusing her of bringing in perjury and blatant attacks on her personally, not the witnesses, which is obviously fair game. Anybody can comment on the testimony

itself, but I have never heard an attorney make such outrageous allegations in a closing argument against opposing counsel. It sickened me to hear it."

The court's granting of a new trial was affirmed on appeal. After the 2002 remand trial, Ralphs again moved for a new trial. At the hearing on the motion, nine of the jurors showed up to the hearing. The jurors also wrote letters to Judge Anello. After the hearing, Judge Anello granted a new trial. The court found the jury's award was inflated due in large part to respondent's misconduct in the *Gober II* trial. The court held:

> "Plaintiffs' counsel was unrelenting - - from opening statements to closing arguments and at numerous points in between - - in unjustifiably suggesting, implying, and directly stating that his clients were being deprived of their right to a fair trial in this case, and that evidence of Defendant's misconduct was being improperly suppressed or hidden from the jury. The Court concludes that this conduct by Plaintiffs' counsel improperly inflamed and resulted in a verdict framed by passion and prejudice."

The court's granting of a new trial was affirmed on appeal.

Conclusions of Law

Count 1A: Failure to Maintain Respect to the Courts (Bus. & Prof. Code, § 6068, Subd. (b)) [1]

Section 6068, subdivision (b), provides that it is the duty of an attorney to maintain the respect due to the courts of justice and judicial officers.

"Obedience to court orders is intrinsic to the respect attorneys and their clients must accord the judicial system." (*In the Matter of Boyne* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 389, 403.)

Respondent willfully failed to maintain the respect due to the courts of justice and judicial officers, in violation of section 6068, subdivision (b), by repeatedly: (1) acting unprofessionally, disrespectfully, and being rude to the witnesses, parties, and the court in the *Gober I and II* proceedings; (2) asking extremely argumentative and improper questions to witnesses in order to elicit inadmissible and prejudicial answers from the witnesses, often in

[1] References to sections are to the provisions of the Business and Professions Code.

violation of court orders; (3) making gratuitous comments and speaking objections before the juries; (4) making commentary and arguing with the court in front of the juries, despite repeated warnings and orders from the court that he should not do either of these; (5) even after the court sustained objections to his questions, asking identical or almost identical questions, despite the court sustaining objections to these questions and warning respondent about this conduct; (6) screaming, yelling, and/or raising his tone at witnesses and the court; (7) making personal attacks on opposing counsel in front of the jury; (8) being sarcastic and telling the court that he would not obey the court's order and challenging the court to find him in contempt; (9) making improper and false accusations against counsel and the court; (10) making motions for mistrial in front of the juries in *Gober I* and *Gober II*; (11) suggesting, implying, and directly stating to the juries in *Gober I* and *Gober II* that there was other evidence of Ralphs' misconduct that the plaintiffs were prevented from presenting, that his clients were being denied a fair hearing, and that evidence of defendant's misconduct was being improperly suppressed or hidden from the jury, despite the court's orders and warnings; (12) making false accusations of bias, unfairness, and judicial misconduct by both Judges Weber and Anello; and (13) making statements that respondent would not comply with the court's orders and challenging the court to find him in contempt or sanction him.

Therefore, by clear and convincing evidence, respondent willfully failed to maintain the respect of the courts of justice and judicial officers, in violation of section 6068, subdivision (b).

Count 1B: Failure to Maintain Just Action (§ 6068, Subd. (c))

Section 6068, subdivision (c) provides that it is the duty of an attorney to maintain just actions.

"We agree ... that attorneys have a duty to zealously represent their clients and assert unpopular positions in advancing clients' legitimate objectives. However, as officers of the

court, attorneys also have a duty to 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." (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591.)

By repeatedly filing essentially duplicative, frivolous, and false verified statements and writs of mandate to disqualify Judge Anello, and by filing them for an improper purpose, namely to harass and manufacture bias in a court, respondent willfully failed to maintained such actions, proceedings, or defenses only as appear to him legal or just, in willful violation of section 6068, subdivision (c).

Count 1E:[2] Moral Turpitude (§ 6106)

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty or corruption.

The commission of any act of dishonesty constitutes a violation of section 6106. (*In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, 497.)

By repeatedly filing essentially duplicative, frivolous, and false verified statements and writs of mandate to disqualify Judge Anello, by filing them for an improper purpose, namely to harass and manufacture bias in a court, and in an attempt to embroil a judge in the matter so as to disqualify him, respondent not only did not show respect for the court but that in doing so, he also committed acts of moral turpitude, dishonesty and corruption, in violation of section 6106.

Count 1F: Misleading the Judge or Jury (Rules Prof. Conduct, Rule 5-200(B))[3]

Rule 5-200(B) provides that in presenting a matter to a tribunal, a member must not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law.

[2] Counts 1C and 1D did not apply to respondent.

[3] References to rules are to the current Rules of Professional Conduct.

By falsely citing in his May 13, 1998 brief, "Plaintiff's Brief Regarding Failure to Identify Kathy Stahl During Discovery and the Court's Refusal to Allow Her Testimony," that *Bole v. Bole* stands for the proposition that a court's refusal to allow evidence constitutes judicial misconduct and by creating a false impression that the Rutter Group's Civil Trial and Evidence stood for the same proposition, without disclosing that the Rutter Group's Civil Trial and Evidence specifically warned that the cases it cited may not be reliable precedent and that modern appellate courts would probably treat erroneous sustaining of objections as error, but not judicial misconduct, respondent willfully presented a matter to a tribunal in a manner that sought to mislead a judge, judicial officer, or jury by an artifice or false statement of fact or law, in willful violation of rule 5-200(B).

Count 1G: Moral Turpitude (§ 6106)

Respondent willfully engaged in acts of moral turpitude, dishonesty, and corruption, in willful violation of section 6106: (1) by falsely citing in *Gober I* that *Bole v. Bole* stands for the proposition that a court's refusal to allow evidence constitutes judicial misconduct and by creating a false impression that the Rutter Group's Civil Trial and Evidence stood for the same proposition, without disclosing that the Rutter Group's Civil Trial and Evidence specifically warned that the cases it cited for that proposition may not be reliable precedent and that modern appellate courts would probably treat erroneous sustaining of objections as error, but not judicial misconduct; (2) by misrepresenting to the court in *Gober II* that Judge Weber stated that she was not going to follow the law; (3) by misrepresenting to the court in *Gober II* that Judge Weber stated that she was not going to follow binding authority and the cases of *Weeks* and *Trujillo*; (4) by misrepresenting to the court in *Gober II* that Judge Weber granted the new trial at the end of *Gober I* because she was aware of her prior egregious rulings and sought to prevent the Court of Appeal from looking at the record; (5) by falsely accusing the courts in both *Gober I* and *Gober*

II of judicial misconduct, of sponsoring perjury or false testimony, of permitting Ralphs to argue jury nullification, of tailoring its rulings to favor Ralphs, and of engaging in a pattern of protecting Ralphs; and (6) by falsely accusing Ralphs' attorneys of misrepresentation and of sponsoring perjury and false testimony.

Count 1H: Trial Conduct (Rule 5-200(E))

Rule 5-200(E) provides that in presenting a matter to a tribunal, a member must not assert personal knowledge of the facts at issue, except when testifying as a witness.

By asserting facts of his personal knowledge to the jury in statements and arguments before the jury, including responding to objections in *Gober I* that he checked the record and certain witnesses testified to certain things and by stating in his closing to the jury in *Gober II* that his private investigator found other women but just could not tell the jury about it, respondent willfully asserted personal knowledge of the facts at issue when not testifying as a witness, in willful violation of rule 5-200(E).

Count 1I: Contact With Jurors (Rule 5-320(D))

Rule 5-320(D) provides that after discharge of the jury from further consideration of a case a member must not ask questions or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror’s actions in future jury service.

By presenting letters to jurors that disclosed evidence ruled inadmissible and improper to disclose to the jury and by telling the jurors that they did not have to speak to anyone, including the court and its staff, respondent willfully made comments to a member or members of a jury, after discharge of the jury from further consideration of a case, that was intended to harass or embarrass the juror or to influence the juror's actions in future jury service, in willful violation of rule 5-320(D).

Count 1J: Failure to Obey A Court Order (§ 6103)

Respondent is charged in count 1J with a violation of section 6103, by willfully disobeying or violating an order of the court requiring him to do or forbear an act connected with or in the course of respondent's profession which he ought in good faith to do or forebear.

(1) By failing to abide by the court's in limine orders; (2) by repeatedly making speaking objections, gratuitous comments, asking the identical or near identical question to questions that had been asked and/or objections sustained to and arguing in front of both juries; (3) by repeatedly making motions in front of the juries, including motions for mistrial, despite the court's warnings and orders that this was improper and sustaining of motions to strike and objections; (4) by repeatedly screaming, yelling, and/or raising his tone at witnesses and the court, despite the court's sustaining of objections to this and warnings; (5) by repeatedly making personal attacks on opposing counsel in front of the jury and repeatedly making improper and false accusations against counsel and the court; (6) by repeatedly suggesting, implying, and directly stating to the jury that there was other evidence of Ralphs' misconduct that the plaintiffs were prevented from presenting, that his clients were being denied a fair hearing, and that evidence of defendant's misconduct was being improperly suppressed or hidden from the jury, in violation of court orders; and (7) by disclosing to the jury information that was excluded both during and after the trial, in violation of court orders, respondent willfully disobeyed or violated an order or orders 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, in willful violation of section 6103.

Count 1K: Failure to Perform Competently (Rule 3-110(A))

In count 1K, the State Bar charges that respondent violated rule 3-110(A) by failing to perform legal services with competence by repeatedly asking and presenting inadmissible

evidence regarding the conduct toward customers by Roger Misiolek, the former Store Director at the Ralphs store in Escondido in *Gober I,* in violation of court orders not to do so and despite the court's sustaining of objections to those questions; by repeatedly making speaking objections, gratuitous comments, asking the identical or near identical question to questions that had been asked and/or objections sustained to, and arguing in front of both juries; by repeatedly making motions in front of the juries, including motions for mistrial, despite the court's warnings and orders and sustaining of motions to strike and objections; by repeatedly screaming, yelling, and/or raising his tone at witnesses and the court, despite the court's sustaining of objections to this and warnings and orders that this was improper; by repeatedly making personal attacks on opposing counsel in front of the jury; by repeatedly making improper and false accusations against counsel and the court; by repeatedly suggesting, implying, and directly stating to the jury that there was other evidence of Ralphs' misconduct that the plaintiffs were prevented from presenting, that his clients were being denied a fair hearing, that evidence of defendant's misconduct was being improperly suppressed or hidden from the jury; and by repeatedly being rude and unprofessional to the court and opposing counsel.

The court finds that respondent's misconduct is not a matter of failure to perform with competence. Rather, based on such misconduct, respondent is more appropriately found culpable of failing to maintain respect to the court, failing to maintain a just action, committing acts of moral turpitude, seeking to mislead a judge or jury, and disobeying court orders under counts 1A, 1B, 1E, 1F, 1G, and 1J. Accordingly, respondent is not culpable of violating rule 3-110(A).

D. Case Nos. 01-O-01930 and 03-O-00142 (The Chambers Matter)

Findings of Fact

In or about 1992 and 1993, respondent represented Rena Weeks and Mary Rossman in a sexual harassment lawsuit against their employer, Baker & McKenzie, and attorney Martin Greenstein, in *Rena Weeks and Mary Rossman v. Baker & McKenzie, Martin Greenstein* (the *Weeks* matter). While representing the two clients, respondent solicited and entered into agreements to share his fees with two other attorneys, Arthur Chambers and Alan Exelrod, who were not partners, associates or shareholders of his firm, without obtaining his clients' written consent and without advising the clients of the agreements or the terms of the fee sharing agreements.

In or about September 1993, respondent had a falling out with attorney Chambers before the *Weeks* trial. On September 29, 1993, respondent wrote to attorney Chambers that Chambers was being removed effective immediately from the case with the clients' approval. At that time, respondent entered into a new fee sharing agreement with attorney Chambers. On October 4, 1993, Chambers accepted respondent's offer to share legal fees in the *Weeks* matter, despite being removed from the case, and receive 16.5 % of the fees. Respondent sent a copy of his September 29, 1993 letter to his clients, but never sought or obtained their written consent to the proposed fee division with Chambers or any fee division with Chambers.

On November 1, 1993, respondent wrote to Chambers complaining of his "malfeasance" and violation of fiduciary duties in the *Weeks* matter. Respondent reiterated that Chambers would receive the "payment as originally agreed upon of one-sixth of the attorney's fees of forty-percent (40%) recovered in *Weeks* upon submission of his time records." Respondent did not send a copy of this November 1, 1993 letter to the clients.

He also revised his fee sharing agreement with attorney Exelrod, whom he later actually shared his attorney fees with.

However, after agreeing to the new fee agreement with attorney Chambers, respondent refused to pay him. Attorney Chambers then sued respondent for the fees. Ultimately, the Superior Court ruled that the fee agreement violated rule 2-200 (fee splitting with another attorney). Attorney Chambers appealed the case to the Court of Appeal and then to the California Supreme Court.

On November 4, 2002, the California Supreme Court issued its decision in *Chambers v. Kay* (2002) 29 Ca1.4th 142 and refused to enforce the fee splitting agreement between attorney Chambers and respondent because to do so would violate rule 2-200.

Conclusions of Law

Count 2A: Fee Splitting With Another Lawyer (Rule 2-200(A))

Rule 2-200(A) prohibits a member from dividing a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless (1) the client has consented in writing after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and (2) the total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as defined in rule 4-200.

By dividing his fees for legal services in the *Weeks* matter with attorney Exelrod, who was not a partner of, associate of, or shareholder of respondent or his law firm, without obtaining the clients' consent in writing after a full disclosure was made in writing that a division of fees would be made and the terms of such division, respondent improperly divided a fee for legal services, in willful violation of rule 2-200(A).

Count 2B: Assisting, Soliciting or Inducing Violations (Rule 1-120)

Rule 1-120 provides that a member must not knowingly assist in, solicit, or induce any violation of these rules or the State Bar Act.

By offering to and entering into fee agreements with attorneys Chambers and Exelrod to share respondent's legal fees in the *Weeks* matter without obtaining the clients' written consent after a full disclosure was made in writing to the clients that a division of the attorney fee would be made and the terms of such division, although attorneys Chambers and Exelrod were not a partner of, associate of, or shareholder of respondent or his law firm, respondent solicited, assisted in, or induced a violation of rule 2-200, in violation of rule 1-120.

Count 2C: Failure to Communicate (Rule 3-500)

The State Bar alleges that respondent willfully violated rule 3-500, which provides that it is the duty of an attorney to keep clients reasonably informed of significant developments relating to the employment or representation, including responding promptly to reasonable status inquiries of clients.

By failing to inform Weeks and Rossman of and obtaining their consent to: (1) the fee splitting agreements with attorneys Chambers and Exelrod; (2) the changed terms and agreement with attorney Exelrod; (3) the division of tasks among respondent, Chambers, and Exelrod; (4) the advancement of costs by Chambers and Exelrod; (5) the November 1, 1993 letter to Chambers and its terms; and (6) the actual splitting of attorney fees and costs in the *Weeks* matter with Exelrod, respondent failed to keep his clients reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services, in willful violation of rule 3-500.

E. Case No. 05-O-03685 (The Ultrastar Matter)

Findings of Fact

In or about 2003, respondent co-counseled with John Dalton to represent four individuals (Lindsay Marsicz, Maureen Hora, Jessica Pollastrini, and Blair Pollastrini), in a matter alleging sexual harassment against Ultrastar Cinemas, Daniel Wooten, and Adam Gustafson.

On November 12, 2003, respondent initiated a civil action against Ultrastar Cinemas and others in the San Diego County Superior Court in *Marsicz v. Ultrastar Cinemas*, case No. GIC 820896 (Ultrastar matter).

Between February and May 2005, the Ultrastar action was heard before an impaneled jury with the Honorable John S. Meyer presiding. Attorneys Edward D. Chapin and Jill S. Houlahan of Gordon & Rees law firm represented Ultrastar in the trial. Respondent was also assisted by attorney Jason L. Oliver. The trial was bifurcated: first on the issue of liability and then on the issue of punitive damages.

During the Ultrastar trial, respondent was unprofessional, disrespectful, and rude to the court, opposing counsel, witnesses, parties, and all participants.

Respondent repeatedly made gratuitous comments and speaking objections before the Ultrastar jury, despite court warnings, admonitions, and orders. Respondent repeatedly made commentary and argued with the court in front of the jury, despite repeated warnings, admonitions, and orders from the court that he should not do either of these; and, even after the court sustained objections to his questions, he repeatedly asked identical or almost identical questions. He also repeatedly asked questions in violations of orders, including orders in limine that prohibited and limited the evidence sought to be elicited.

Respondent repeatedly made gratuitous statements and commentary before the jury. Further, respondent often stated or suggested to the jury that he or his clients were not receiving a fair trial, that the defendants' lawyers were acting improperly, or presented or suggested to the jury evidence that was inadmissible. He repeatedly made gratuitous statements in front of the jury where respondent was in fact asserting personal knowledge about facts and suggesting to the jury information on respondent's personal knowledge.

The court had to repeatedly strike respondent's commentary. Respondent also asked improper questions during the trial. Respondent's demeanor to the court in front of the jury was also disrespectful.

Respondent also repeatedly accused opposing counsel of improper and dishonest conduct. For example, respondent engaged in the following in front of the jury:

- *Chapin*: Let me have one moment, your Honor. I think there was a question, my question was pending, I don't think I got an answer to it. Did you ever determine whether your being sued had anything to do with your not getting the job at Harbor Police?
  Court: You raised it, Mr. Kay.
  Kay: I didn't raise it, I said complaint, I didn't say a lawsuit, your Honor. When are we going to enforce your orders.
  Court: He said a complaint.
  Kay: A complaint. Ms. Marsicz made a complaint. To the DFEH.
  Court: Mr. Kay, please sit down. Go ahead.
  Kay: When are we going to have some in limines enforced in this case?
  Court: Mr. Kay, that's inappropriate.
  Kay: Yes, it is, it's inappropriate to keep breaking them. Why do we have them? Let's just do away with them all.

- *Houlahan*: You never sued the theater owners?
  Kay: Your Honor, relevancy, move to strike. This is getting outrageous to start this.
  Court: Let's not have any comments, Mr. Kay. Please sit down.
  Kay: Can counsel be admonished not to get into areas that are subject to in limines.
  Court: Please sit down. Next question.

- *Chapin*: Well, did Ms. Ashton tell you about her observations concerning Mr. Wooten and Ms. Marcisz?
  Rubio: She was very surprised, that she always felt- - she felt that she was there a lot and she never saw anything that was like harassing.
  Kay: Objection; move to strike.

Court: It will be - - just calm down. It will be stricken.
Kay: Calm down. They rehearsed it. That's his witness, and they keep breaking your in limines. You want me to calm down, fine. Why don't we do away with all the orders and we can open up in this case.
Court: Mr. Kay, please sit down.
Chapin: Your Honor, I would ask - -
Court: Let's move on. I want to get through with this trial.
Kay: I would ask that counsel be admonished not to keep eliciting violative materials from his question.
Court: Mr. Chapin, just ask questions.

Respondent also repeatedly and falsely accused the court of judicial misconduct, bias, of assisting defendants, and of unfair treatment. For example, during the trial the following occurred:

Chapin: And what did you tell Mr. Grossberg in that meeting concerning your findings, what you had found in the interviews that you had conducted?
Rubio: Well, I summarized them and provided him a copy of the interviews, and basically told him that this was a very complex issue, and that I wasn't feeling comfortable doing these interviews.
Kay: Your Honor, I want a side-bar right now. Right there, I want a side-bar so we don't get into this.
Court: Denied at this point.
Kay: You have ruled out what he's getting into. I want a side-bar. You give Mr. Chapin side-bars. I do not want to have a jury instruction on this.
Court: Mr. Kay, that's inappropriate. Sit down.
Kay: I know it is, and it's inappropriate where they're going with this.

Furthermore, respondent repeatedly engaged in disrespectful conduct towards the court outside the jury's presence. For example:

Court: Mr. Kay, let me make one thing real clear. I have been real patient but you're pushing the envelope. What you say outside the presence of the jury is one thing. But you're pushing the envelope in front of the jury. I have been real patient. Just a minute, just let me, be real careful. I'm not stupid.
Kay: I didn't say you were.
Court: I'm patient, but my patience has a limit and when you start disrespecting the court in front of the jury, you don't want me to do what I can do.
Kay: I don't want you to do anything - -
Court: You can make your record, you can tell me whatever you tell me.
Kay: Enforce the in limine.
Court: It doesn't matter, I have a thick skin, you can seek a writ, you can appeal. I don't really care. It doesn't bother me one wit. I'm trying to give both parties a fair trial.

Respondent often attempted to use his statements in front of the jury to in effect testify before the jury, inform them that there was other evidence, and to improperly impassion the jury and deny the defendants a fair trial.

Respondent also repeatedly asked extremely suggestive, argumentative and improper questions to witnesses in order to elicit inadmissible and prejudicial answers and to present and suggest inadmissible evidence, often in violation of court orders. Even after the court sustained objections to his questions, he would repeatedly ask identical or almost identical questions. He did this despite repeated court warnings, admonitions, and orders that this was improper.

Respondent repeatedly made improper arguments and motions in front of the jury, including motions for mistrial and a directed verdict and motions to strike testimony. He also improperly requested stipulations and in front of the jury that Ultrastar's counsel be admonished. He repeatedly asked extremely argumentative and improper questions to witnesses in order to elicit inadmissible and prejudicial answers, often in violation of court orders.

Respondent also repeatedly suggested, implied, and directly stated to the jury that there was evidence of Ultrastar's misconduct that the plaintiffs were prevented from presenting. During the trial, respondent repeatedly sought to present witnesses and testimony that were not on his witness list. Outside the jury's presence, the court denied respondent's request to allow these witnesses or limited their testimony. Despite the court's rulings denying respondent's requests to present these witnesses, respondent repeatedly informed the jury that he wanted to present these witnesses and testimony and that these witnesses had evidence that he was prevented from presenting to the jury. Respondent did this to prejudice Ultrastar.

During his closing arguments, respondent improperly stated or implied to the jury that evidence was being hidden from the jury, that the plaintiffs were prevented from presenting

certain evidence and that there was other excluded evidence that supported the plaintiffs. He also attempted to argue about evidence not presented.

Respondent's statements, questions, and arguments in front of the jury were intended to appeal to the prejudice and passion of the jury and were made with the intent to deprive the defendants of a fair trial. Respondent's misconduct occurred repeatedly over the course of the trial despite numerous objections by Ultrastar and admonishments by the court. In fact, respondent's misconduct did inflame the jury to act with passion and prejudice and did interfere or come close to interfering with Ultrastar's right to a fair trial. It made the trial much longer than it should have been, it confused the issues and demeaned the process and the jury observed more than just the presentation of evidence through direct and cross examination and argument.

During the trial, respondent filed a verified statement to disqualify Judge Meyer, claiming bias. The court struck it as improper. Respondent also filed at least eight written motions for mistrial. These motions repeatedly argued that the court's erroneous rulings required mistrial, especially its exclusion of evidence that Dan Wooten and Molly Dingman, both Ultrastar managers, engaged in sex in the workplace. These motions were repetitive and disruptive to the proceedings.

Some of the motions contained false statements. For example, in the March 28, 2005 motion, respondent repeatedly and falsely accused the court of judicial misconduct, bias, assisting the defendants, of treating the parties differently, and of preventing the plaintiffs from getting a fair trial.

The jury awarded plaintiffs $850,000 in compensatory damages and $6 million in punitive damages. On or about June 1, 2005, Ultrastar moved for a new trial, arguing, among other things, that respondent's misconduct during the trial unfairly prejudiced the defendants and necessitated a new trial. The court issued a tentative order granting a new trial, in part based on

respondent's conduct. Following briefing, the court held a hearing on July 15, 2005, on the motions. At the hearing, respondent continued to be disrespectful to the court.

For example, he stated to the court:

> "But in this case, they had their last refuge in these post-trial motions and the court did exactly as I anticipated it would do, it bailed them out. Even though the court probably lacks jurisdiction to do it on the punitive damages, because they put that issue in front of the bankruptcy court, and the court bailed them out on the compensatory essentially saying it's going to substitute its version of the evidence in place of the jury. All of which is beyond this court's abilities."

On July 15, 2005, the court affirmed its tentative order, denying the motion for a j.n.o.v. and granting the motion for a new trial. Attached to the order was a copy of the court's tentative ruling, which stated:

> "The jury's excessive awards may be explained by Attorney Kay's overall conduct. For example, although the Court continuously sustained objections to question and repeatedly told the jury that a question is not evidence it appears that it became virtually impossible for the jury to distinguish between information communicated and suggested in a question from the actual evidence in a witness' answer. This kind of questioning and other conduct intended to appeal to the prejudice and passion of the jury occurred over the course of the trial despite objections and admonishment."

On August 24, 2005, respondent appealed. On May 30, 2006, the Court of Appeal reversed the trial court's granting a new trial as to the compensatory damages but affirmed as to the punitive damages.

Conclusions of Law

Count 3A: Failure to Maintain Respect to the Courts (§ 6068, Subd. (b))

Respondent willfully failed to maintain the respect due to the courts of justice and judicial officers, in violation of section 6068, subdivision (b), by repeatedly: (1) asking extremely argumentative and improper questions to witnesses in order to elicit inadmissible and prejudicial answers from the witness, often in violation of court orders; (2) making gratuitous comments and speaking objections before the jury and arguing with the court in front of the jury,

despite repeated warnings and orders from the court that he should not do either of these; (3) even after the court sustained objections to his questions, asking identical or almost identical questions, despite the court repeatedly sustaining objections to these questions and warning and admonishing respondent that his conduct was improper; (4) making improper and false accusations against counsel and the court; (5) making motions in front of the jury, including motions for a directed verdict and mistrial; (6) suggesting, implying, and directly stating to the jury that there was other evidence of defendant's misconduct that the plaintiffs were prevented from presenting, that his clients were being denied a fair hearing, and that evidence of defendant's misconduct was being improperly suppressed or hidden from the jury; (7) despite the court's orders and admonitions, advising the jury that it was prevented from presenting some witnesses and testimony, even after the court had previously ordered that the witnesses and testimony would not be permitted; (8) accusing the court of bias, unfairness, judicial misconduct, and assisting the defendant; (9) making sarcastic remarks to the court; (10) after the court had granted a new trial, stating that the court could take comfort in the fact that Mr. Wooten was a very happy individual and that he could feel safe in continuing to work and continue his management practices that were embraced by his employers; and (11) refusing to comply with the court's orders, rulings, warnings, and admonitions.

By all this conduct, respondent willfully failed to maintain the respect of the courts of justice and judicial officers, in violation of section 6068, subdivision (b).

Count 3B: Trial Conduct (Rule 5-200(E))[4]

By asserting his personal knowledge of certain facts to the Ultrastar jury in statements, questions, and arguments, such as telling the jury in closing that John Dalton had issued a subpoena, even though he knew that was not part of the record; telling a witness during

[4] The court hereby grants the State Bar's request to amend the NDC to correct the typographical error of charging a violation of rule 5-200(C). The correct charge is rule 5-200(E).

Ultrastar's cross examination of one of his clients that she said something in a deposition; repeatedly objecting to questions with the statement in front of the jury that he instructed his clients not to talk to other people; and during an examination of a witness, stating that he received a letter from "certain lawyers" and offering to bring it in, respondent willfully asserted personal knowledge of the facts at issue when not testifying as a witness, in willful violation of rule 5-200(E).

Count 3C: Failure to Maintain Just Action (§ 6068, Subd. (c))

By repeatedly filing duplicative and frivolous motions to dismiss, respondent willfully failed to maintain such action, proceedings, or defenses only as appear to them legal or just, in willful violation of section 6068, subdivision (c).

Count 3D: Moral Turpitude (§ 6106)

By repeatedly filing duplicative and frivolous motions for an improper purpose, namely to harass and manufacture bias in a court and interfere with the court's proceedings, and by falsely accusing the court of bias, of assisting the other side, of treating the parties differently, and, thus, of judicial misconduct, respondent willfully committed an act or acts involving moral turpitude, dishonesty or corruption, in willful violation of section 6106.

Count 3E: Failure to Obey A Court Order (§ 6103)

By repeatedly making speaking objections, gratuitous comments, asking the identical or near identical question to questions that had been asked and/or objections sustained to; by arguing in front of the jury; by repeatedly making motions in front of the jury; by repeatedly making personal attacks on opposing counsel in front of the jury; by repeatedly making improper and false accusations against counsel and the court; by repeatedly suggesting, implying, and directly stating to the jury that there was other evidence of the defendant's misconduct that the plaintiffs were prevented from presenting, that his clients were being denied

a fair hearing, and that evidence of defendant's misconduct was being improperly suppressed or hidden from the jury; by repeatedly informing the jury of witnesses and testimony that the court had ruled inadmissible; and by repeatedly accusing the defendant of arguing for jury nullification, despite the court's warnings, admonitions, and orders, respondent willfully disobeyed or violated an order or orders of the court requiring him to do or forbear an act connected with or in the course of respondent's profession which he ought in good faith to do or forbear, in willful violation of section 6103.

Count 3F: Failure to Perform Competently (Rule 3-110(A))

As discussed in count 1K in the Gober matter, the court finds that respondent's misconduct in this Ultrastar matter is not a question of failure to perform with competence. Rather, based on the alleged misconduct, respondent is more appropriately found culpable of failing to maintain respect to the court, failing to maintain a just action, committing acts of moral turpitude, and disobeying court orders under counts 3A, 3C, 3D and 3E. Accordingly, respondent is not culpable of violating rule 3-110(A) in count 3F.

F. Case Nos. 02-O-15326 and 05-O-03685 (The Gober and Ultrastar Matters)

Count 4A: Moral Turpitude (§ 6106)

The State Bar alleges that respondent willfully violated section 6106 in the Gober and Ultrastar matters by repeatedly making speaking objections, gratuitous comments, asking the identical or near identical question to questions that had been asked and/or objections sustained to, and arguing in front of the Gober I, Gober II, and Ultrastar juries during the evidentiary phase of the trial; by repeating making motions in front of the these juries, including motions for mistrial and a motion for a directed verdict, despite the courts' warnings and orders and sustaining of motions to strike and objections; by repeatedly making personal attacks on opposing counsel in front of the juries; by repeatedly making improper and false accusations

against counsel and the courts; by repeatedly suggesting, implying, and directly stating to juries that there was other evidence of misconduct that he was prevented from presenting to these juries; that his clients were being denied a fair hearing; that evidence of the opposing parties' misconduct was being improperly suppressed or hidden from the juries, in violation of court orders not to disclose such information; by repeatedly being rude and unprofessional to the courts and opposing counsel; by repeatedly violating his duties as an officer of the court to act professionally and respectfully to the court, opposing counsel, and the other parties; and by repeatedly failing to abide by the court's orders and rulings; and by failing to assist in the pursuit of the court proceedings.

Because these are the same facts that encompassed section 6106 violations in counts 1A through 1J and in counts 3A through 3E, it is not necessary to find respondent culpable of the same violations in count 4A. Therefore, the court hereby dismisses count 4A with prejudice. Little, if any, purpose is served by duplicative allegations of misconduct. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060.) But the court will consider these multiple acts of misconduct, which also demonstrate a pattern of abuse, in aggravation of respondent's conduct.

IV. Mitigating and Aggravating Circumstances

The parties bear the burden of establishing mitigation and aggravation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standards 1.2(b) and (e).)[5]

A. Mitigation

No mitigation was submitted into evidence. (Std. 1.2(e).) But respondent's lack of a prior record of discipline in 11 years of practice of law at the time of his misconduct in 1992 is a mitigating factor. (Std. 1.2(e)(i).) "Absence of a prior disciplinary record is an important

[5]All further references to standards are to this source.

mitigating circumstance when an attorney has practiced for a significant period of time." (*In re Young* (1989) 49 Cal.3d 257, 269.)

B. Aggravation

There are several aggravating factors.

Respondent's misconduct evidences multiple acts of wrongdoing, including failing to obey court orders; failing to maintain respect to the court; failing to maintain just actions; presenting a matter to a tribunal by seeking to mislead a judge by an artifice or false statement of fact or law; asserting personal knowledge of facts at issue when not testifying as a witness; harassing or embarrassing jurors; dividing a fee for legal services with a lawyer not a partner, associate, or shareholder of respondent or his law firm without client's written informed consent; assisting in, soliciting, or inducing a violation of a Rule of Professional Conduct; failing to inform his client of significant developments; and committing acts of moral turpitude. (Std. 1.2(b)(ii).)

Regarding the Ultrastar trial, Judge Meyer testified that "I don't have a recollection of the voluminous trial transcript, but would say that you could take any volume of the transcript, open it, and put your finger on something, and the chances would be pretty good that you would see some evidence of misconduct or something amounting to misconduct." The same is true of the other two *Gober* trials; and even truer of respondent's conduct in this proceeding.

Moreover, respondent's multiple violations also demonstrate a pattern of misconduct. "Only the most serious instances of repeated misconduct over a prolonged period of time could be characterized as demonstrating a pattern of wrongdoing." (*Levin v. State Bar* (1989) 47 Cal.3d 1140, 1149, fn. 14, citing *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1367.) Respondent's misconduct in the past 11 years in three separate matters (the Gober matter in 1998 and 2002; the Ultrastar matter in 2003 and 2005; and this disciplinary proceeding) depicts

a continuous course of conduct over an extended period of time which overburdens the court and blatantly disrupts court proceedings.

Respondent's misconduct was surrounded by dishonesty, bad faith, concealment, and overreaching. (Std. 1.2(b)(iii).) Respondent made false statements regarding his misconduct, including in his deposition testimony in this matter, falsely testifying that the State Bar fabricated the allegation that an incident almost occurred outside the courtroom with opposing counsel in the *Gober I* trial and that nobody ever accused him of almost getting into an altercation with opposing counsel. In fact, he was well aware of this accusation by others, which was made in open court in 1998 while he was present.

The State Bar urges the court to find respondent's misconduct before the State Bar Court as uncharged violations. It would be duplicative to do so since the violations comprise of the same multiple acts of misconduct which are already considered as serious aggravating factors under standard 1.2(b).

Respondent significantly harmed the clients, the public, and the administration of justice. (Std. 1.2(b)(iv).) His rude and disrespectful conduct disrupted and protracted the *Gober* and *Ultrastar* proceedings. Because of his behavior, the court had to remand the trials, thus wasting court's time and costs, delaying clients' right to receive their judgment awards and making the operation of the justice system more burdensome. He repeatedly made speaking objections and oral mistrial motions and referred to inadmissible evidence after repeatedly being warned by the courts not to do so, especially in front of the jury. The judges testified that it was difficult to hold respondent in contempt because they were constantly trying to balance the fairness of the trials and did not want to declare a mistrial based on his demeanor and rudeness. The record reveals that the judges dealt most creditably and evenhandedly under most demanding circumstances.

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) "The law does not require false penitence. [Citation.] But it does require that the respondent accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Respondent expressed no remorse or recognition of the serious consequences of his misbehavior. His unrestrained personal abuse and disruptive behavior that characterized his conduct in the underlying court proceedings is repeated in the State Bar Court proceedings. He often spoke after being ordered by the court not to make speaking objections. He would claim attorney client privilege and work product privilege and refused to answer the questions, even after the court had denied his privilege claim and ordered him to answer. He was similarly rude and offensive to the State Bar deputy trial counsel.

Respondent's failure to cooperate with the State Bar which ultimately led to his default for his improper refusal to testify when called again by the State Bar is also a serious aggravating factor. (Std. 1.2(b)(vi).) (See *In the Matter of* Dixon (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23, 45.) He failed to obey this court's orders even after being warned repeatedly that his failure to do so would be considered in aggravation. He was often rude and wanted to be referred to a "real court"[6] and would exclaim "finally!" when the court would sustain one of his objections.

[6] The Supreme Court stated: "We have described the bar as a 'public corporation created . . . as an administrative arm of this court for the purpose of assisting in matters of admission and discipline of attorneys.' [Citation.] In those two areas, the bar's role has consistently been articulated as that of an administrative assistant to or adjunct of this court, which nonetheless retains its inherent judicial authority to disbar or suspend attorneys." (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 557.) "Thus, the judicial power in disciplinary matters remains with this court, and was not delegated to the State Bar. For this reason, [respondent's] various claims that the State Bar operates an invalid 'private court' or 'de facto court' … must fail." (*Lebbos v. State Bar* (1991) 53 Cal.3d 37, 47-48.) Similarly, respondent's exclamation that the State Bar Court is not a "real court" must also fail.

Moreover, the State Bar argues that respondent failed to cooperate, as evidenced by the following misconduct:

- unrelenting frivolous objections, speaking objections, and commentary during the trial;
- countless refusal to answer questions;
- evasive and abusive answers when he gave answers;
- personal attacks on the witnesses, the court, and the State Bar's counsel;
- walking off the stand during the middle of his testimony and having to be ordered to return to the witness stand;
- turning around and refusing to face the State Bar when questioned;
- insulting comments to the State Bar prosecutors when answering, objecting or arguing matters;
- attacks on the State Bar Court;
- disruptive conduct during the trial;
- false testimony in his deposition regarding whether there was an accusation of his being almost involved in an altercation with an opposing attorney;
- answers to the disciplinary charges, denying every fact except his membership in the State Bar, even those stating when court made certain rulings;
- refusal to answer questions even when ordered to do so by this court;
- disrespectful statements to the State Bar and the State Bar Court;
- frivolous subpoenas and motions to this court, including his attempts to subpoena the State Bar Court judges, including this court;
- frivolous motion to disqualify the State Bar Court judges with no legitimate basis for such motions;
- attempt to subpoena through a notice in lieu of subpoena numerous State Bar personnel with no legitimate basis; and
- overall conduct disrupting and interfering with the proper administration of these proceedings.

This is clear and convincing evidence that respondent failed to cooperate with the State Bar. It is well settled that an attorney's contemptuous attitude toward the disciplinary proceedings is relevant to the determination of an appropriate sanction. (*Weber v. State Bar* (1988) 47 Cal.3d 492, 507.)

V. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest

possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) The standards provide a broad range of sanctions ranging from reproval to disbarment, depending upon the gravity of the offenses and the harm to the victim. Standards 2.3, 2.4(b), 2.6, and 2.10 apply in this matter.

The Supreme Court gives the standards "great weight" and will reject a recommendation consistent with the standards only where the court entertains "grave doubts" as to its propriety. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92; *In re Naney* (1990) 51 Cal.3d 186, 190.) Although the standards are not mandatory, they may be deviated from when there is a compelling, well-defined reason to do so. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1061, fn. 2; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions.

Standard 2.3 provides that culpability of moral turpitude and intentional dishonesty toward a court or a client must result in actual suspension or disbarment.

Standard 2.4(b) provides that culpability of a member's willful failure to perform services and willful failure to communicate with a client must result in reproval or suspension, depending upon the extent of the misconduct and the degree of harm to the client.

Standard 2.6 provides that culpability of certain provisions of the Business and Professions Code must result in disbarment or suspension depending on the gravity of the offense or the harm to the victim.

Finally, standard 2.10 provides that culpability of other provisions of the Business and Professions Code or Rules of Professional Conduct not specified in these standards must result in reproval or suspension depending upon the extent of the misconduct and the degree of harm to the client.

The State Bar urges disbarment, citing several cases in support of its recommendation, including *Lebbos v. State Bar* (1991) 53 Cal.3d 37; *In the Matter of Varakin* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 179; *Rosenthal v. State* Bar (1987) 43 Cal.3d 612; and *In the Matter of Dixon* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23.

But these cases involved more egregious acts of misconduct than that of respondent. Not only did those attorneys engage in disruptive conduct in the courtroom, indulge in a series of offensive statements against judges and opposing counsel, make the operation of the entire justice system more burdensome and engage in persistent obstructionism during the State Bar proceedings, but they also committed serious acts of intentional deceit, fraud and dishonesty and failed their duty owed to clients.

For example, in *Lebbos*, putting aside the attorney's verbal and written attacks on the judiciary, the attorney commingled client funds; served on counsel and filed with the court an altered copy of a court order, with intent to deceive; concealed assets from a judgment creditor; unilaterally altered and filed as genuine a stipulation; refused to abide a court's order recusing itself and lied to a client with respect to that order; and named a person as a plaintiff in a lawsuit without the person's knowledge or consent. Thus, the Supreme Court found that such a rampant course of misconduct and deceit fully warranted disbarment.

In *Varakin*, the attorney was disbarred for filing frivolous motions and appeals in four different cases over 12 years solely for the purpose of delay and harassment of his ex-wife and others who became embroiled in his vendetta against her and was proud of his conduct. He

persisted in this pattern of misconduct despite many sanctions. In fact, within four years, he received at least 14 sanctions, totaling $80,000. He also intentionally refused to report sanctions and to cooperate with the State Bar investigation. Stressing respondent's abuse of the judicial system, lack of repentance, and obdurate persistence in misconduct, the Review Department concluded that no discipline less than disbarment was consistent with the goals of maintaining high ethical standards for attorneys and preserving public confidence in the legal profession.

In *Rosenthal*, the attorney was found to have engaged in transactions rife with undisclosed conflicts of interest, taken positions adverse to former clients, overstated expenses and double-billed for legal fees, failed to return client files or provide access to records, failed to give adequate legal advice or provide his clients with the opportunity to obtain independent counsel, filed fraudulent claims and given false testimony, and engaged in conduct intended to harass his former clients, delay court proceedings, obstruct justice and abuse the legal process. He was therefore disbarred.

Finally, in *Dixon*, the attorney was found culpable of multiple counts of professional misconduct involving eight separate clients. She committed acts of moral turpitude, abandoned clients, failed to return unearned fees, misled the court and failed to communicate with six clients. She also displayed a pattern of falsely accusing witness, opposing counsel, former clients and the State Bar Court of being racist and the protectors of pedophiles and child abusers. She breached the high duty of loyalty owed to her clients, violated basic notions of honesty and endangered public confidence in the legal profession. The Review Department found that there was little hope that the attorney would conform her method of practicing law to the professional standards of this state. The attorney was disbarred.

In recommending discipline, the "paramount concern is protection of the public, the courts and the integrity of the legal profession." (*Snyder v. State Bar* (1990) 49 Cal.3d 1302.)

Refusing to continue to participate in the hearing after 11 days of trial shows that respondent comprehends neither the seriousness of the charges against him nor his duty as an officer of the court to fully participate in disciplinary proceedings. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507-508.) The court also had the opportunity to assess respondent's character and conduct over those 11 days of trial before his default was entered. Based on the court's observation and the record, respondent engaged in disruptive conduct in the courtroom, indulged in a series of offensive statements against judges and opposing counsel, wrongfully attacked opposing counsel, repeatedly made frivolous, scathing motions for mistrial and disobeyed court orders, overburdened the court system, and persistently obstructed the State Bar proceedings. Respondent became so engrossed in litigation that he lost all perspectives of common courtesy and civility in the courtroom and respect for the court.

At the same time, the court recognizes that respondent did not engage in any intentional deceit or fraud upon his clients. He did not breach the high duty of loyalty owed to his clients. (*In the Matter of Dixon* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23, 46.) In fact, he zealously litigated several sexual harassment lawsuits and won; but he had also caused collateral damage to himself, to the administration of justice and to his clients without recognition of any wrongdoing. Even the most zealous of attorneys is an officer of the court and has "a paramount obligation to the due and orderly administration of justice." (*Chula v. Superior Court In and For Orange County* (1952) 109 Cal.App.2d 24, 39.)

Balancing all relevant factors – respondent's misconduct, the standards, the case law, the significant aggravating evidence and his lack of a prior record of discipline in 11 years of practice, the court concludes that disbarring respondent would be unduly harsh. Yet, a long period of actual suspension is necessary. Therefore, placing respondent on a suspension for a

minimum of three years would be appropriate to protect the public, to preserve public confidence in the profession and to maintain the highest possible standards for attorneys.

Furthermore, respondent's default was entered as a terminating sanction for his refusal to obey this court's order to take the witness stand in the State Bar's case-in-chief and the purpose for imposing the sanction was to enable the State Bar to obtain evidence under respondent's control to which it was denied by reason of his refusal to take the stand. The default was not entered because respondent failed to file a response to the NDC or failed to appear at trial. Accordingly, the court concludes that the procedures set forth in rule 205 (duration and termination of actual suspension in default proceedings) are not applicable or appropriate under the unique circumstances presented here. Therefore, in addition to the recommended three years of actual suspension and five years of stayed suspension, the court also recommends that respondent be placed on probation for five years and comply with certain probation conditions.

VI. Recommendations

A. Discipline

Accordingly, the court hereby recommends that respondent **Philip Edward Kay** be suspended from the practice of law in California for five years, that said suspension be stayed, and that respondent be placed on probation for five years, with the following conditions:

1. Respondent must be actually suspended from the practice of law for the first three years of probation and until he shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law, pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct;
2. During the period of probation, respondent must comply with the State Bar Act and the Rules of Professional Conduct;

3. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report must be submitted on the next following quarter date, and cover the extended period.

   In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the probation period and no later than the last day of the probation period;

4. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation, which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein;

5. Within ten (10) days of any change, respondent must report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California, 94105-1639, and to the Office of Probation, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1;

6. Within one year of the effective date of the discipline herein, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015-2299, and passage of the test given at the end of that session.

Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE), and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201);

7. The period of probation must commence on the effective date of the order of the Supreme Court imposing discipline in this matter; and

8. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for five years that is stayed, will be satisfied and that suspension will be terminated.

B. Multistate Professional Responsibility Exam

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination during the period of his suspension and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

C. California Rules of Court, Rule 9.20

Respondent must also comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of this order. Willful failure to do so may result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.[7]

[7] Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

D. Costs

It is further recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: December _____, 2009

LUCY ARMENDARIZ
Judge of the State Bar Court