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STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of **BROOKE P. HALSEY, JR.,** **Member No. 142330**, A Member of the State Bar.	)	**Case No. 02-O-10195-PEM** **DECISION**

I. Introduction

"The criminal is to go free because the constable has blundered." (*People v. Defore* (1926) 242 N.Y. 13, 21 [opinion by Justice Benjamin Cardozo].) Respondent Brooke P. Halsey, Jr., a former prosecutor, was determined that that policy of exclusionary rule would not apply and deter justice in his murder trial against Dr. Louis Pelfini, who respondent was convinced had murdered his wife, Janet Pelfini. The sheriff's department and a forensic pathologist may have blundered in respondent's case, but respondent was not going to let Dr. Pelfini go free, even at the cost of violating his fundamental duties as a prosecutor.

In another matter, respondent dismissed a criminal complaint against a defendant whom he knew.

Respondent is here before this court in a disciplinary proceeding for having committed multiple acts of alleged professional misconduct. The charged misconduct includes (1) failure to comply with California law; (2) intentional suppression of evidence; (3) gross negligent suppression of evidence; (4) suppression of evidence contrary to legal obligations; (5) seeking to mislead a judge; (6) failure to avoid the representation of adverse interests; (7) acts of moral turpitude; and (8) misrepresentations.

This court finds, by clear and convincing evidence, that respondent is culpable of six of the ten counts of charged acts of misconduct. Based upon the serious nature and extent of culpability, as well as the applicable mitigating and aggravating circumstances, the court recommends, among other things, that respondent be suspended from the practice of law for four years, that execution of suspension be stayed, and that he be placed on probation for five years with conditions, including an actual suspension of three years from the practice of law 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 February 9, 2005, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC). Respondent filed a response. On September 14, 2005, the State Bar filed a first amended NDC. Respondent filed a response to the first amended NDC. On October 17, 2005, the parties filed a stipulation to some of the facts underlying the State Bar's charges.

A 21-day trial was held on October 18, 2005; January 31, 2006; February 1-3, 7-10, 21-24, and 28, 2006; and March 1-2, 7-9, and 14-15, 2006. During trial, the court granted the State Bar's motion to amend the NDC to conform to proof.

Deputy Trial Counsel Esther Rogers and Robert A. Henderson represented the State Bar. Attorneys Joseph M. Burton and Gregory G. Iskander of Duane Morris LLP represented respondent.

Following receipt of closing briefs from the parties, the court took this proceeding under submission on May 15, 2006.

III. Findings of Fact and Conclusions of Law

The following findings of fact are based on the evidence and testimony introduced at this proceeding and on the parties' stipulation, which was admitted into evidence.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 11, 1989, and has been a member of the State Bar of California since that time.

B. The Pelfini Matter – Findings of Fact

This case involved (1) a botched sheriff's investigation of the death of a prominent physician's wife, (2) an incompetent and biased forensic pathologist who committed grave errors in his autopsy and who was secretly coached to be a credible expert witness, and (3) most important of all, a deputy district attorney whose strong conviction that "the husband did it" blinded his sense of duty as a prosecutor to promote justice and the ascertainment of truth and to meet the standards of candor and impartiality not demanded of other attorneys.

1. Botched Investigation

In 1990, respondent was employed as a deputy district attorney with the Sonoma County District Attorney's Office (the D.A.'s office). He handled mostly Fish and Game cases until 2000 when he was assigned his first homicide case – the *Pelfini* matter.

On November 7, 1999, Dr. Louis Pelfini telephoned 911 and reported that his wife, Janet Pelfini, had committed suicide by drowning herself in a bucket of water.

When the Sonoma County Sheriff's Department responded to the scene of her suspicious death, it nevertheless determined that Mrs. Pelfini's death should be treated as a suicide and not as a possible homicide. As a result, the proper protocol for investigation of a homicide was not followed. The area was not secured, evidence was not collected from the scene of the death, certain photographs were not taken to evaluate the cause of death, and Dr. Pelfini was not taken to the sheriff's department for a formal interview.

2. Incompetent Pathologist

On November 9, 1999, Dr. Thomas Gill, a forensic pathologist, performed an autopsy of Mrs. Pelfini. Unfortunately, Dr. Gill was not a competent pathologist and committed several serious errors in the autopsy, including:

- Failing to take any photographs;
- Failing to diagram the neck dissection;
- Failing to note a scar on Mrs. Pelfini's neck;
- Placing incorrectly Mrs. Pelfini's bruise; and
- Failing to note mucus plugging that would have been consistent with asthma.

In fact, Dr. Gill created new drawings of his autopsy a year after his autopsy to correct errors in his autopsy report.

By early 2000, the sheriff's department suspected that Mrs. Pelfini may have been murdered and began treating her death as a possible homicide. The sheriff's department conducted an investigation and considered Dr. Pelfini the prime suspect. The detectives investigating the cause of death were Roy Gourley, Sal Borruso and Spencer Crum.

Thereafter, the sheriff's department concluded that Dr. Pelfini murdered Mrs. Pelfini and Dr. Gill determined that her cause of death was suffocation.

The *Pelfini* matter was originally assigned to another deputy district attorney, but in mid-2000, it was reassigned to respondent – his first homicide case.

In December 2000, respondent represented the D.A.'s office in a grand jury proceeding to determine whether there was sufficient evidence to issue a criminal indictment against Dr. Pelfini for the death of Mrs. Pelfini. On December 14, Dr. Gill testified before the grand jury and stated that Mrs. Pelfini died by suffocation. Dr. A. Jay Chapman, a forensic pathologist, also testified before the grand jury and agreed with Dr. Gill's opinion that Mrs. Pelfini's death was a homicide.

On December 19, 2000, the grand jury indicted Dr. Pelfini for violations of Penal Code sections 187(a) (murder);192(a) (voluntary manslaughter); 273.5(a) (infliction of corporal injury resulting in a traumatic upon a spouse; and 1203.075 (intentional infliction of great bodily harm) in *People v. Louis Emilio Pelfini,* Sonoma County Superior Court case number SCR-30250. Respondent signed the indictment on behalf of the D.A.'s office.[1]

Dr. Pelfini employed defense attorney Chris Andrian to represent him. Because Mrs. Pelfini's death was not initially treated as a crime, there was limited physical evidence to support the prosecution's position that Dr. Pelfini committed the murder. Andrian knew that the entire defense case hinged on Dr. Gill's testimony as he was the expert who conducted the autopsy and who concluded that her death was caused by suffocation. There were no eyewitnesses, other than Dr.

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[1]The indictment incorrectly noted that November 8, 1999, was the date of murder. It should have been November 7, 1999, based on documentary evidence, such as the Sheriff's Department Statement.

Pelfini, to Mrs. Pelfini's death.

Andrian testified that having handled in excess of 25 homicide cases, it was standard procedure for him to investigate the expert witness's background. He then hired Chris Reynolds to conduct an investigation into Dr. Gill's background.

Reynolds's investigation uncovered some facts about Dr. Gill's background that directly impacted on his credibility, experience, competence, and qualifications as an expert witness, including:

- Dr. Gill was fired by the Marion County Coroner's Office in Indianapolis, Indiana, in 1994 due to inadequate work quality and poor courtroom demeanor;
- Indiana prosecutors complained that errors by Dr. Gill adversely affected their criminal cases;
- Dr. Gill ruled that a 17-month-old child died from an infection when in fact, the child was killed trying to free himself from a dilapidated crib at a baby sitter's house;
- Dr. Gill's drunken driving arrest resulted in a temporary suspension of his Indiana medical license;
- Dr. Gill failed to secure permanent employment at the Los Angeles County Coroner's Office and was demoted due to concerns about his skills as a forensic pathologist;
- Dr. Gill took several years and three attempts to become a board certified pathologist; and
- Dr. Gill withheld information about the suspension of his medical license when he was hired in California.

Once Reynolds discovered that Dr. Gill had serious problems in his past, Andrian made a strategic decision to go public with Dr. Gill's history by contacting a staff member of The Press Democrat, a local Santa Rosa newspaper.

On April 24, 2001, the *Pelfini* matter was set for a jury trial in October 2001. On May 1, 2001, a member of The Press Democrat contacted Detective Gourley and told him about Dr. Gill's current and past problems and relayed that they planned to write an article about Dr. Gill. Gourley immediately contacted respondent as they knew that Dr. Gill's expert testimony was crucial to prove

the murder charge, especially since the initial investigation provided respondent with limited physical evidence. Alarmed that Dr. Gill's credibility would be attacked, respondent and the three detectives (Gourley, Borruso and Crum) flew to Indiana, Los Angeles and New York to investigate Dr. Gill's past. Respondent's participation in the investigation was directly related to the *Pelfini* matter.

Respondent and the detectives' investigation confirmed, among other things, that Dr. Gill while in the Indiana coroner's office, was arrested for a DUI on his way to work, and that in Indiana, his autopsy reports were inaccurate and incomplete. On June 27, 2001, Gourley summarized their investigation in a memorandum entitled "Pelfini Case" and gave a copy of the memo to respondent. Prior to this investigation, they already opined that Dr. Gill was a poor witness at the grand jury proceeding. Now, they became very concerned about Dr. Gill's testimony at trial, particularly regarding his background, licensing, and prior employment, and about potential weaknesses regarding Dr. Gill's autopsy of Mrs. Pelfini. They believed that he needed some assistance to become a more credible witness.

3. Secretly Coaching the Pathologist

On June 17, 2001, The Press Democrat published an article exposing critical issues surrounding Dr. Gill's autopsy, competency and background that Reynolds had discovered during his investigation. The article was damaging to the prosecution of the case.

As a result, Assistant Sheriff Gary Zanolini hired speech pathologist and communications trainer Jeffrey Harris (a speech pathologist for 20 years) in an effort to improve Dr. Gill's communications skills and general courtroom demeanor for the *Pelfini* trial. But as the training progressed, it went beyond its original purpose to improve Dr. Gill's general courtroom presence – it tampered with the heart of Dr. Gill's testimony to rehabilitate his credibility.

Dr. Gill and Harris met about two times a week from June through November 2001 for a total of approximately 40 training sessions at Detective Gourley's office. Gourley instructed Harris to work with Dr. Gill not only on his demeanor but more important, on how to gloss over the shortcomings of Dr. Gill's background and his autopsy and on anticipating responses to questions during direct and cross examination at the *Pelfini* trial. Harris videotaped and took notes of his

sessions with Dr. Gill, as he routinely did with his clients. Both Gourley and respondent were fully aware of the videotaping and notetaking.

Although respondent knew that Harris and Dr. Gill discussed Dr. Gill's background and experience and the deficiencies of his autopsy in these sessions, respondent never told them not to talk about the substantive facts of the *Pelfini* trial. Harris testified that he was never given any limitations on what to discuss with Dr. Gill and that if he had been told not to talk about the specifics of the *Pelfini* trial, he never would have had any discussions about the *Pelfini* matter. Harris even asked respondent for questions to work on with Dr. Gill during the sessions. In response, respondent provided to Dr. Gill a set of written answers to questions regarding Dr. Gill's background and prior employment. Harris recalled that in at least one session, respondent suggested answers to some of the issues raised by Reynolds's investigation and in the news article and to questions that respondent had given to Dr. Gill.

During a session on June 27, 2001, Dr. Gill and Harris discussed respondent's proposed answers. Without confirming its accuracy, respondent suggested Dr. Gill to testify as follows: "To my knowledge, there has never been an acquittal based on an autopsy I performed." In fact, Dr. Gill did not know whether there ever had been an acquittal based upon his autopsy.

On July 17, 2001, respondent found out that Harris was working with Dr. Gill when he stopped by Gourley's office and came upon their training session in progress. Respondent noticed the camera and monitor and observed Harris videotaping Dr. Gill. Respondent discussed the idea of conducting a mock trial for the purpose of assisting Dr. Gill with his testimony. Respondent also gave Dr. Gill and Harris some ideas about what questions Dr. Gill could expect during trial and how Dr. Gill could best describe his experience in Indianapolis with the least damage (i.e., DUI and employment termination).

Dr. Gill had two mock trials – August 18 and November 13, 2001. Gourley arranged for his friend Jeffrey Bryant, a deputy attorney general, to play the part of defense attorney Andrian and provided him with materials regarding Dr. Gill's background and the investigation of Mrs. Pelfini's death, including police and autopsy reports. Harris videotaped the mock trial session and took notes, which respondent was fully aware of. Gourley was also present.

During the first mock trial when the video recorder was turned off, respondent advised Dr. Gill to be prepared to answer detailed questions such as what information Dr. Gill had before he performed Mrs. Pelfini's autopsy and how Dr. Pelfini suffocated Mrs. Pelfini. After the first mock trial, it was expected that Dr. Gill would hone his testimony and would be given another opportunity to practice the responses in a second mock trial.

In preparation, Harris transcribed the questions that respondent and Bryant asked at the first mock trial and typed up Dr. Gill's responses. Harris provided respondent with the first mock trial transcript and the videotape, expecting respondent to review the videotape and give him feedback.

On October 10, the court reset the *Pelfini* trial to November 5, 2001.

Throughout the summer and fall of 2001, respondent, Dr. Gill, Gourley, and Harris met regularly for about an hour to prepare for the Pelfini trial. Harris openly took notes of these meetings. Their discussions involved very detailed topics and provided specific guidance for Dr. Gill's testimony, including:

- How to modify Dr. Gill's responses;
- How to answer anticipated questions;
- Whether Andrian knew about Dr. Gill's inadequate work at the Los Angeles County Coroner's Office;
- Why Dr. Gill failed to take photographs of Mrs. Pelfini's autopsy;
- How to answer questions regarding Mrs. Pelfini's autopsy, including the bruises behind the neck, lack of hyperinflation of the lungs (commonly seen in suffocation), emphysema and mucus plugging;
- How to explain respondent's and Harris's "work" with Dr. Gill;
- Why Dr. Gill did not call Crime Scene Investigation when he determined that Mrs. Pelfini's death was suspicious;
- Why Dr. Gill took so long to make the diagnosis of suffocation; and
- How to divert attention from Dr. Gill's employment history in Indiana.

To further prepare his testimony for the trial, Dr. Gill listened to two audio cassette tapes in his car. The tapes contained anticipated questions, prepared answers, witness statements and

impeachment evidence regarding Dr. Gill's background and experience.

Dr. Gill, respondent, and Bryant participated in the second mock trial, while Gourley and Harris were the observers. Respondent knew that Harris tape recorded and took notes at the session. The second mock trial tape contained approximately one hour 53 minutes of Dr. Gill practicing direct and cross examination. Respondent played himself and Bryant played Andrian. During the second mock trial, Dr. Gill and Harris made references to the fact that they had "crafted" and "framed' responses regarding Dr. Gill's background and experience. Respondent acknowledged that he knew that Dr. Gill had a prepared answer. In fact, Harris asked respondent if he had any problem with the answers Dr. Gill and Harris had prepared for the mock trial one transcript. Harris also informed respondent that Dr. Gill had been diligent in recording answers and listening to them in his car. Harris further asked respondent if they could practice questions regarding Mrs. Pelfini's autopsy.

After the second mock trial, Harris transcribed the questions respondent and Bryant asked at the session and provided Dr. Gill and respondent with a copy of the transcribed questions. Harris instructed Dr. Gill to fill in the answer that Dr. Gill felt was the best answer to the questions. Harris then took the questions that respondent and Bryant asked at the second mock trial and typed up Dr. Gill's new response into the space he left blank for an answer. Harris's mock trial two transcripts contained Dr. Gill's witness statements and exculpatory evidence regarding Dr. Gill's background and prior experience. Respondent knew that Harris took notes and videotaped the sessions and the mock trials, but he never disclosed them to Andrian before the November trial.

4. Multiple Misrepresentations to the Court During Discovery

In fact, on June 12, 2001, the defense made an informal discovery request that respondent provide all information relating to the prosecution team's investigation regarding Dr. Gill's background, qualifications and prior experience. But, on July 27, 2001, respondent replied that his investigation was irrelevant to the *Pelfini* matter, even though respondent knew that the investigation and the Gourley memo were directly relevant to the *Pelfini* case.

Thereafter, in four separate discovery hearings (July 31, August 21 and 28, and September 5, 2001) before Judge Elliot Daum, respondent maintained to the court that the information requested

by the defense, in particular, the Gourley memo:

- Was irrelevant;
- Consisted of "only opinion evidence by people [in Indiana] that worked and had motivation to say things about Dr. Gill to regain a contract" ;
- Was not discovery for the *Pelfini* matter per se but consisted of personnel record which would require a release from the Sheriff's Department;
- Would not be accessible if the "Sheriff's reports" were deemed personnel records;
- Was not in his possession; and
- Was not known to him.

Respondent further told the court that he was only aware of the general content and the type of information that was gathered in the investigation, that he was not aware of the specific facts that was gathered and that his knowledge was limited. Respondent also claimed that the people who conducted the investigation were not detectives on the *Pelfini* case. He stated: "I think it was a group of people that were available and I don't know exactly to what extent detectives in this case are involved."

Contrary to respondent's representations to the court,

- The Gourley memo was clearly relevant to the *Pelfini* case, as its title so stated;
- The memo was not a personnel record;
- Respondent knew that the information gathered was much more than opinion evidence from individuals in Indiana;
- Respondent did not have to get a release from the Sheriff's Department since respondent had participated in the investigation and had received a copy of the memo;
- Respondent knew exactly what information was gathered;
- Respondent knew that the information was directly relevant to the *Pelfini* matter; and
- Respondent knew who the lead detective was in the case (Borruso) and knew to what extent the detectives were involved in the interviews (respondent participated in the interviews).

5. Trial

On November 5, 2001, the trial commenced. Judge Elliot Lee Daum presided over the case. Between November 8 and December 3, the jury was selected.

Respondent's Proposed Witness List included Dr. Gill and Dr. Walter Finkbeiner, a pulmonary pathologist, as witnesses. On November 5, 2001, Andrian and Reynolds received a packet of information from the D.A.'s office regarding a flawed autopsy of an infant performed by Dr. Gill. Dr. Gill had misdiagnosed and concluded that the cause of death was suffocation when in fact, it was not a homicide. Andrian informed the court and respondent of this new information.

At the same time, respondent requested a continuance of the trial, arguing that if a new expert witness, Dr. Finkbeiner, supported the defense's claim that asthma attack was the cause of death, then he would dismiss the case. The court granted respondent's request.

The following day, respondent and investigator Kris Allen went to Dr. Finkbeiner's office. Dr. Finkbeiner specifically noted that Dr. Gill in his autopsy made no mention of mucus plugging when in fact the slides taken of Mrs. Pelfini's lungs clearly indicated mucus plugging. In other word, Mrs. Pelfini could have died from an asthmatic event, and not from suffocation. Allen prepared a report of their interview and gave it to respondent.

On November 14, defense investigator Reynolds and attorney Steve Gallenson went to interview Dr. Finkbeiner. Again, Dr. Finkbeiner noted that mucus plugging was obvious even without the aid of a microscope, that Dr. Gill missed the diagnosis and that asthma may have been the cause of death. Respondent did not forward a copy of Allen's report until after defense's interview with Dr. Finkbeiner.

By December 3, the trial had resumed because respondent had told the court that based on his interview with Dr. Finkbeiner he was moving ahead with the trial. Dr. Gill testified in the *Pelfini* trial for four consecutive days. On December 12, 2001, The Press Democrat reported that the prosecutors brought Dr. Gill to an empty courtroom to rehearse his testimony for the *Pelfini* case and that there was a consultant in the courtroom, who was working with him to improve his public speaking. This article alerted Andrian to the fact that there were mock trial rehearsals of Dr. Gill's testimony.

On December 12, 2001, Andrian immediately requested discovery regarding the mock trials to find out if there were any statements or evidence that should have been disclosed to him. Respondent then revealed to the court that Harris had possession of videotapes of the mock trial that included statements by Dr. Gill. The court ordered respondent to turn over to the court any statements by Dr. Gill that had been reduced to writing and more important, any recorded statements by Dr. Gill.

6. Further Misrepresentations to the Court During Trial

At the same December 12 hearing, respondent told the court that he had meetings with Dr. Gill about other cases, not necessarily about the *Pelfini* case, and that Dr. Gill's preparation did not go to the substance of the *Pelfini* case. But he had participated in about four to five meetings with Dr. Gill discussing how Dr. Gill would testify regarding his prior employment history and his autopsy of Mrs. Pelfini, which went to the substance of the case.

When respondent, Allen, Dr. Gill and Harris met that evening to discuss the court's order regarding the mock trial tapes, Harris suddenly blurted out aloud that he wondered if the court wanted the videotapes of the 40 sessions he had with Dr. Gill. Allen said he had to turn over to her all the audio and videotapes he had. The meeting broke up quickly as Allen went with Harris to retrieve all his written notes, statements and videotapes of the *Pelfini* matter. Allen testified that respondent told her he did not know of the session tapes.

On December 13, 2001, at the court's request, respondent submitted copies of the videotapes for the court's review.

On the following day, the court ordered respondent to turn over the videotapes and Harris's notes to defense, as it questioned the validity of Dr. Gill's testimony in light of the contents of the videotapes. To give the parties time to review the videotapes, the court also dismissed the jury until December 19.

On December 17, 2001, the court conducted a hearing to decide what impact the videotapes would have on the *Pelfini* trial and determined that it would conduct an evidentiary hearing regarding the videotapes, including hearing testimony from Harris, Dr. Gill, Gourley and respondent.

Respondent told the court that Dr. Gill and Harris discussed how Dr. Gill should sit straight

during their training sessions and denied any testimony practice. He said: "They go on and they talk about [the *Pelfini* case] as if they were an attorney and a witness preparing for trial. However, this is not an attorney, this is a speech pathologist and this is not a trial preparation . . . nor would I condone, nor would I participate in it. This goes way outside the scope of anything I ever envisioned going on between the speech pathologist and this witness." In fact, respondent knew that they were practicing Dr. Gill's testimony for the trial and respondent participated in the two mock trial sessions.

On the very next day, December 18, respondent moved to dismiss the case against Dr. Pelfini admitting that the videotapes had done irreparable harm to the case. Respondent told the court that he did not know about the videotapes or that Harris and Dr. Gill went into detail regarding the *Pelfini* matter during the sessions. Respondent stated, in part:

> I did not know the extent to which they went into their testimony. The extent of work that they did . . . I had no idea that they were going into facts specific to the *Pelfini* case . . . I gave specific direction that the facts . . . were not to be gone into and that it was supposed to be a general training exercise . . . to further Dr. Gill's ability to testify . . . And that they had violated my direct input at the mock trials . . . I am seeing things that are shocking to me with regard to the role that this speech pathologist took with Dr. Gill . . . it goes into the realm of tailoring testimony and crafting answers . . . I did not have knowledge . . . I did not know the existence of these tapes.

On the contrary, respondent knew that the tapes existed and had helped to prepare Dr. Gill's testimony by providing suggested answers to questions and by providing questions for Dr. Gill to work on.

Finally, on December 18, 2001, in light of the damages done, the court granted respondent's motion to dismiss and dismissed the case against Dr. Pelfini.[2]

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[2] "Dismissal of charges is an extraordinary remedy, which is reserved for the few cases where conduct by the prosecution has completely eliminated the possibility of a fair retrial." (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1387.)

C. The Pelfini Matter – Conclusions of Law

1. Count One: Failure to Comply With Laws (Bus. & Prof. Code, § 6068, Subd. (a))[3]

The State Bar charges that respondent violated section 6068, subdivision (a), by violating California Penal Code section 1054.1, subdivisions (e) and (f), and by failing to comply with the requirements of *Brady v. Maryland* (1963) 373 U.S. 83 and subsequent cases interpreting *Brady*.

Section 6068, subdivision(a), provides that an attorney has a duty to support the Constitution and the laws of the United States and of this state.

California Penal Code section 1054.1 (prosecuting attorney; disclosure of materials to defendant) requires the prosecuting attorney to disclose to the defendant all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecutor knows it to be in the possession of its investigating agencies:

> (e) Any exculpatory evidence.
> (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case.

California Penal Code section 1054.7 (disclosure of information; time limitations) requires that the prosecutor disclose exculpatory evidence and relevant written or recorded statements of witnesses whom the prosecutor intends to call at trial at least 30 days prior to the trial.

One of the purposes of the discovery statutes is to promote the ascertainment of truth in trials by requiring timely pretrial discovery. (Pen. Code, § 1054.)

Prosecutors have a constitutional mandate to disclose material, exculpatory evidence to defendants in criminal cases. *Brady v. Maryland* (1963) 373 U.S. 83 and subsequent cases interpreting *Brady* require prosecutors to disclose, prior to trial, impeaching evidence and evidence favorable to the defense. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor." (*Id.* at p. 87.)

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[3] All references to section are to Business and Professions Code, unless otherwise indicated.

The *Brady* due process rule has four components: (1) information must be evidence; (2) evidence must be favorable to an accused; (3) favorable evidence must be material; and (4) favorable, material evidence must be disclosed. In short, *Brady* requires a prosecutor to voluntarily disclose to the defense all exculpatory evidence in the possession of the prosecution team.

Similarly, in *People v. Ruthford* (1975) 14 Cal.3d 399, 406, the California Supreme Court summarized the duty of the prosecutor as follows: there is a "duty on the part of the prosecution, even in the absence of a request therefor, to disclose all substantial material evidence *favorable to an accused*, whether such evidence relates directly to the question of guilt, to matters relevant to punishment, or to the credibility of a material witness" (emphasis in original).

Here, by clear and convincing evidence, respondent wilfully violated section 6068, subdivision (a), by failing to reveal all exculpatory evidence and relevant statements by witnesses to the defense, as mandated by the *Brady* rule and Penal Code sections 1054.1, subdivisions (e) and (f), and 1054.7.

Respondent had an obligation to disclose to the defense the following evidence:

- Harris's notes and the 40 session tapes;
- The first mock trial tape and its transcript;
- The second mock trial tape and its transcript; and
- The two audio cassette tapes.

The videotapes, notes, transcripts and cassette tapes contained Dr. Gill's witness statements, impeachment evidence and exculpatory evidence as to Dr. Gill's background and prior experience and his qualifications, credibility and competency as a witness.[4] Respondent knew or should have known that such evidence is favorable to the defense; it is material; and the prosecution team had possession of the evidence. He knew or should have known that the discoverable evidence was critical and would have impugned the credibility of Dr. Gill. Yet, he did not disclose its existence until after a local newspaper during trial exposed Dr. Gill's secret rehearsal of testimony with a

[4]During one of the taped sessions, Dr. Gill opined that Dr. Pelfini should have been charged with manslaughter rather than murder.

consultant (Harris), who was working with him to improve his public speaking. Thus, respondent withheld, prior to trial, impeaching evidence and evidence favorable to the defense pursuant to the *Brady* rule and to the California Penal Code, in wilful violation of section 6068, subdivision (a).

2. Count Two: Moral Turpitude – Intentional Suppression of Evidence (Bus. & Prof. Code, § 6106)

The State Bar charges that respondent committed acts of moral turpitude by intentionally suppressing evidence that he knew or should have known he had an ethical duty to disclose, in wilful violation of section 6106, which provides that a member's commission of any act of moral turpitude, dishonesty or corruption constitutes grounds for suspension or disbarment.

Respondent argues, among other things, that he did know about the evidence and therefore, he did not have the intent to suppress the evidence. His argument is rejected as the court does not find his testimony to be credible. There is clear and convincing evidence that respondent knew about the extent of Dr. Gill's coaching and knew about Harris's notetaking and videotaping. In fact, he walked in a session in July 2001 and then later, participated in the two mock trials.

Even assuming arguendo that respondent did not know the full extent of Dr. Gill's coaching, "we can only conclude this is so because he adhered to an approach unlikely to uncover this information....[A] prosecutor cannot adopt a practice of 'see no evil or hear no evil.' Under these circumstances, the prosecution has an affirmative duty and cannot – by looking the other way – shirk its constitutional obligation to prevent prosecution witnesses from deceiving the jury." (*People v. Kasim, supra,* 56 Cal.App. 4th at p. 1386.) As the State Bar noted, like the prosecutor in *Kasim*, respondent purposefully made himself ignorant of the details by taking a "see no evil or hear no evil" approach. Such a conscious decision to look the other way is no defense.

Respondent's other contentions, i.e. work product privilege and good faith, are without merit. As the Supreme Court stated in *Brady*, the prosecution has a constitutional duty to disclose material evidence, irrespective of the good faith or bad faith of the prosecutor. It does not matter whether such a "'prosecutorial failure' is 'intentional, negligent or inadvertent.' [Citation.] Here, error is amply demonstrated because there is no doubt that favorable evidence, which should have been made available to the defense, was suppressed." (*People v. Kasim, supra,* 56 Cal.App.4th 1360, 1381.)

Furthermore, the relevant, discoverable videotapes, notes, transcripts and cassette tapes in this matter are not protected under work product privilege because they are not writings that reflect the impressions, conclusions, opinions, legal research, or theories of the prosecutor's office. (Code Civ. Prod., § 2018.030 and Pen. Code, § 1054.6.)

Therefore, the court finds respondent culpable, by clear and convincing evidence, of violating section 6106 by intentionally suppressing the evidence that he knew or should have known he had an ethical duty to disclose.

3. Count Three: Moral Turpitude – Suppression of Evidence with Gross Negligence (Bus. & Prof. Code, § 6106)

The State Bar charges, as an alternative to count two, that respondent committed acts of moral turpitude by suppressing evidence that he knew or should have known he had an ethical duty to disclose with gross negligence, in wilful violation of section 6106.

The misconduct underlying both counts two and three is the same. Given that respondent has been found culpable of violating section 6106 by suppressing evidence with intent, it is not necessary to find him culpable of violating section 6106 by suppressing evidence with gross negligence. Therefore, count three is hereby dismissed with prejudice.

4. Count Four: Suppression of Evidence (Rules of Prof. Conduct, Rule 5-220)[5]

Rule 5-220 provides that an attorney must not suppress any evidence that the attorney or the attorney's client has a legal obligation to reveal or to produce.

The State Bar alleges that respondent had a legal obligation to produce the videotapes, notes, transcripts and cassette tapes to the defense and his failure to disclose them is suppression of evidence, in violation of rule 5-220.

By clear and convincing evidence, respondent wilfully violated rule 5-220 by suppressing the evidence of Dr. Gill's witness coaching under the *Brady* rule and Penal Code section 1054.1, subdivision (f). However, because the same facts underlie both section 6068, subdivision (a), and

[5] Unless otherwise provided, reference to the rules are to the current Rules of Professional Conduct.

rule 5-220 violations, the court will not attach additional weight to the finding of the rule 5-220 violation in determining the appropriate discipline to recommend in this matter. Little, if any, purpose is served by duplicative allegations of misconduct. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060; *In the Matter of Chestnut, supra,* 4 Cal. State Bar Ct. Rptr. 166, 175.)

5. Count Five: Misrepresentations (Bus. & Prof. Code, § 6106)

In count five, there is clear and convincing evidence that respondent committed acts of moral turpitude in wilful violation of section 6106 by making multiple misrepresentations to the court before and during trial, including as follows:

- By taking the position in his July 27, 2001 reply that information gathered with respect to Dr. Gill's background was irrelevant to the *Pelfini* case;
- By telling the court in the July 31 hearing that the information that Andrian sought regarding information on Dr. Gill was irrelevant and only opinion evidence;
- By telling the court he did not have access to the Gourley memo at the August 21 hearing;
- By giving the impression that he did not know the content of the Gourley memo at the August 28 hearing when he had already received a copy of the memo;
- By making statements regarding the lack of connection between the detectives who conducted the investigation into Dr. Gill's background and the *Pelfini* case at the September 5, 2001 hearing;
- By denying knowledge of the sessions, noontime meetings and mock trials at the December 12 hearing;
- By denying that he knew that Harris and Gill were practicing Dr. Gill's testimony for the *Pelfini* matter at the December 17 hearing;
- By denying his role in the sessions and mock trials at the December 18 hearing; and
- By denying his knowledge of the existence of the tapes.

6. Count Six: Seeking to Mislead a Judge (Bus. & Prof. Code, § 6068, Subd. (d))

Section 6068, subdivision (d), prohibits an attorney from seeking to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

By clear and convincing evidence, respondent wilfully violated section 6068, subdivision (d), by seeking to mislead the judge when he made repeated misrepresentations to the court at various discovery hearings and at trial, including by stating that:

- The investigation regarding Dr. Gill was irrelevant to the *Pelfini* matter when he knew that it was relevant;
- The information gathered was personnel records when he knew it was not;
- He had limited access to and knowledge of the Gourley memo when he actually possessed a copy of the memo himself;
- He was unaware of the specific information that was gathered when he participated in the investigation;
- The detectives who conducted the investigation were not involved in the *Pelfini* matter when their purpose of investigation was directly related to the *Pelfini* matter;
- Dr. Gill's training sessions and mock trials did not go to the substance of the *Pelfini* matter when they involved specifically the substance of the case;
- He would not condone or participate in the sessions when he actively acted as a consultant and took part in the mock trials;
- The sessions went beyond the scope of anything he had envisioned when he knew what was taking place and provided questions and answers for Dr. Gill to practice on;
- He did not know the videotapes existed when he was present during one of the sessions being videotaped; and
- He denied any knowledge of the extent to which Dr. Gill was being coached when he, along with Harris, offered advice and guidance to prepare Dr. Gill to be a more credible witness. In fact, Judge Daum testified that he felt respondent misled him.

However, because the misconduct underlying both sections 6106 and 6068, subdivision (d), violations is the same, the court finds the charges to be duplicative and will not attach additional weight to the finding of the section 6068, subdivision (d), violation in determining the appropriate discipline to recommend in this matter. (*Bates v. State Bar, supra,* 51 Cal.3d 1056.)

D. The Strain Matter – Findings of Fact

1. Investigation Regarding Strain's Trespass

Respondent met Kevin Strain at a gym when he was in college. After respondent graduated from law school and started working at the Sonoma County District Attorney's Office, he stopped going to the gym and consequently lost contact with Strain in 1990.

On April 8, 2001, Strain and James Sauve, along with Strain's dogs, hunted wild pigs in Healdsburg, California. At some point during the hunt, the dogs which were not leashed crossed over onto private property owned by Tim Fechter. Strain and Sauve followed the dogs. Fechter escorted them off his property. Fechter then complained to the Department of Fish and Game that Strain and Sauve were hunting on his property without his permission.

Fish and Game Warden Mike Otto began investigating the complaint. On April 13, 2001, Otto spoke with Strain regarding the April 8 incident. During their discussion, Strain boasted to Otto that respondent and Strain were friends and that due to their friendship, the D.A.'s office would not pursue charges against him.

As a prosecutor, respondent handled Fish and Game cases regularly and would dismiss cases if they were not provable.

Thereafter, Strain contacted respondent to inform respondent that he was under investigation for illegally hunting wild pigs and gave respondent his version of the April 8 incident. Respondent told Strain he would look into the matter. Respondent then telephoned Captain Michael Wade, Otto's supervisor, to determine the investigation status. During the telephone conversation, respondent told Wade that he knew Strain from being in the same health club. After a very brief conversation, Wade informed respondent that he did not have a lot of information about the case and that he should contact Otto for further information.

Respondent testified that after his conversation with Wade, he was left with the impression that the case in all likelihood would not go forward. As such, respondent called Strain and told him that he did not think the case was going to be filed. But neither Wade nor Otto ever informed respondent that the Strain matter should not or would not be filed.

Wade then advised Otto that respondent had been inquiring about the April 8 incident and that

he should contact respondent about the case. Otto obliged but was unable to reach respondent. Otto left a voice mail for respondent to return his call. Respondent did not return Otto's call.

After completing the investigation, Otto concluded that Strain was trespassing on private property with the intention of taking or destroying wild pigs, a violation of Fish and Game Code section 2016,[6] a misdemeanor. However, before writing his report on the incident for review by the D.A.'s office, Otto went to speak with Misdemeanor Charging Deputy Attorney Cynthia Ashmore, who was in charge of evaluating cases the Department of Fish and Game forwarded to the D.A.'s office for prosecution. In speaking with Ashmore, Otto was concerned whether he should prepare a time consuming and lengthy report if the D.A.'s office did not intend to pursue the case against Strain due to the relationship between respondent and Strain.

Ashmore assured Otto that if the case were provable, her office would file it. She told him that she would be responsible for determining whether the D.A.'s office would pursue criminal charges and that the D.A.'s office did not give preferential treatment to friends of deputy district attorneys. She therefore told Otto to prepare and forward his investigative report to her, which he did.

2. Criminal Complaint Filed

After reviewing the report, Ashmore decided that the case was provable and thus, filed a misdemeanor complaint against Strain and Sauve on July 17, 2001, in *People v. Strain and Sauve*, Sonoma County Superior Court, MCR 382710, charging them with a violation of Fish and Game Code section 2016. After Ashmore signed off on charging the case, she was no longer involved in the case. The matter was set for arraignment on September 6, 2001.

In late July, after being informed that a criminal complaint had been filed against him, Strain contacted respondent for the second time. Respondent again agreed to look into the matter. To this end, respondent retrieved the *Strain* file; he did not consult with Ashmore or Otto. Although he was not assigned to the case, as a Deputy District Attorney Level IV, respondent did not need a

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[6]Fish and Game Code section 2016 prohibits unlawful entry upon land cultivated, enclosed by fence, or uncultivated or unenclosed with signs forbidding trespass, for the purpose of discharging any firearm or taking or destroying any mammal or bird on such lands without having first obtained written permission from the owner of such lands.

supervisor's permission to retrieve the file or dismiss such a misdemeanor Fish and Game case. However, chief deputy district attorney Ken Gnoss[7] testified that if a deputy attorney was handling a case outside his/her assignment, he or she should talk to a supervisor because of its possible impact on his/her caseload.

3. Respondent Dismissed Criminal Complaint

Here, respondent did not inform anyone in the D.A.'s office that he was reviewing the *Strain* matter. He did not confer with Otto or Ashmore regarding the basis for their opinions that sufficient evidence existed to prove the charges. Rather, he evaluated the case on his own, determined that there was reasonable doubt and thus, sought a dismissal "in the interest of justice." He executed a request for dismissal on July 24, 2001. Respondent did not inform Ashmore or anyone else in the D.A.'s office that he was dismissing the case. Nor did respondent ever provide an oral or written disclosure to anyone in the D.A.'s office prior to his request for dismissal that he knew Strain. At the same time, respondent did not request the dismissal due to his personal relationship with Strain. He did not believe that the case was provable.

On August 2, 2001, the court granted the dismissal.

Soon Otto found out that the case had been dismissed. When he told Ashmore, she was surprised and decided to explore further.

When Ashmore retrieved the file, she saw respondent's handwritten notes dated July 24, 2001, stating, "talked w/Capt. Wade & Otto previously – It was thought before that this case would not be filed. It's close but no way to prove that defendants aren't chasing a lost dog. Reas[onable] doubt for jury of 12. If happens again this won't work as excuse." (State Bar exhibit 29.) But Otto had never had a conversation with respondent. And Wade and respondent only had the one conversation concerning the *Strain* matter prior to its dismissal.

Ashmore decided to discuss the dismissal with Gnoss, her supervisor. After their meeting, Ashmore wrote a memo expressing her concerns about the office protocol on dismissal of cases, the appropriateness of respondent's involvement in the dismissal of an unassigned case, and the

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[7]Ken Gnoss is currently a Sonoma County superior court judge.

appropriateness of respondent's filing a dismissal in a case where he had some kind of a relationship with the suspect.

On January 11, 2002, chief deputy district attorneys Gnoss and Kathleen De Loe met with respondent and inquired into the circumstances surrounding his dismissal of the criminal complaint against Strain and Sauve. At that meeting, respondent admitted that he knew Strain but that the last time he saw him was 10 years ago. Respondent said he filed the request for dismissal and advised Strain to contact the Department of Fish and Game to apologize for his conduct. Respondent has not had any contact with Strain since the dismissal.

After the D.A.'s office investigated the facts surrounding the dismissal, Gnoss issued a May 3, 2002 counseling memo to respondent, reminding him that "The prosecutor must be impeccably professional because he or she is required to meet standards of candor and impartiality not demanded of [other attorneys]." (*People v. Kelly* (1977) 75 Cal.App.3d 672, 688-689.) In the memo, Gnoss concluded that given respondent's prior relationship with Strain and Strain's boasting during the initial investigation of his relationship with respondent and because respondent was not the deputy attorney assigned to the case, respondent should not have handled the case. Concern was expressed that the seeking out of information on behalf of Strain from Fish and Game officials and the subsequent dismissal of the case gave the impression to Fish and Game officials and members of the D.A.'s office that respondent was acting on behalf of Strain due to their prior relationship. In other word, respondent gave an appearance of impropriety.

Respondent admitted in his closing brief that the prudent course of action would have been for respondent to speak with a supervisor first but argued that there was no actual impropriety by respondent.

E. **The Strain Matter – Conclusions of Law**

1. Count Seven: Conflict – Current Relationship with a Party or Witness (Rules of Prof. Conduct, Rule 3-310(B)(1))

Respondent is charged in count seven with a wilful violation of rule 3-310(B)(1), which provides that a member of the State Bar shall not accept or continue representation of a client without providing written disclosure to the client where the member has a legal, business, financial,

professional or personal relationship with a party or witness in the same matter.

Respondent is not culpable of violating rule 3-310(B)(1). There is no clear and convincing evidence that respondent had a current personal relationship with Strain. They knew each other when respondent was in college but lost contact with each other after respondent began working in the D.A.'s office in 1990. In fact, when the *Strain* matter arose, respondent had not seen or spoken to Strain for 10 years. Thus, respondent and Strain did not have a current personal relationship in April 2001.

However, respondent did have a past relationship with Strain and therefore, rule 3-310(B)(2) would be applicable.

2. Count Seven (A): Conflict – Previous Relationship With a Party or Witness (Rules of Prof. Conduct, Rule 3-310(B)(2))

During trial, the court granted the State Bar's motion to amend the NDC to conform to proof to include a charged violation of rule 3-310(B)(2) as count 7A.

Rule 3-310(B)(2) provides that a member of the State Bar shall not accept or continue representation of a client without providing written disclosure to the client where the member knows or reasonably should know that: (a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and (b) the previous relationship would substantially affect the member's representation.

The intent of the rule is clearly prophylactic. The Supreme Court articulated the policy which underlies the proscription against representation of adverse interests found in rule 3-310: "By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests. Nor does it matter that the intention and motives of the attorney are honest. The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent." (*Anderson v. Eaton* (1930) 211 Cal. 113, 116; see *In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 593.)

"The relationship between an attorney and client is a fiduciary relationship of the very highest character." (*Clancy v. State Bar* (1969) 71 Cal.2d 140, 146.) "It is . . . an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances." (*Anderson v. Eaton, supra,* 211 Cal. 113, 116; see *In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 350-351.)

Here, respondent, as a prosecutor, represented the People of the State of California through the D.A.'s office in the *Strain* matter when he signed and filed the request for dismissal. As such, he owed a fiduciary duty to the People and must not assume a position antagonistic to the People without its consent and knowledge of all the facts and circumstances. Instead, he assumed a position antagonistic to the People by dismissing the matter without ever disclosing to anyone in or provided written disclosure to the D.A.'s office that he had a previous personal relationship with Strain.

As Gnoss counseled in his memo, respondent should not have handled the case, given respondent's prior relationship with Strain and respondent not being the deputy attorney assigned to the case. Respondent's conduct – attempting to find out the status of the investigation from Captain Wade, putting a note in the *Strain* file that the defendants could have been chasing a lost dog, and dismissing the case – gave the impression to Fish and Game officials and members of the D.A.'s office that respondent was acting on behalf of Strain due to their prior relationship. Respondent's conduct clearly gave an appearance of impropriety even though there was no actual impropriety.

He had placed himself in a position where he might be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent – the People.

Therefore, by clear and convincing evidence, respondent is culpable of violating rule 3-310 (B)(2) by representing the People without providing written disclosure to the D.A.'s office where he knows or reasonably should know that he previously had a personal relationship with Strain, the defendant, in the same matter; and that the previous relationship would substantially affect his representation in that he caused the case against Strain to be dismissed.

3. Count Eight: Corruption (Bus. & Prof. Code, § 6106)

Moral turpitude has been defined as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general . . . . [Citations.] Moral turpitude has also been described as any crime and misconduct committed without excuse [citations] or as any 'dishonest or immoral' act, not necessarily a crime. [Citations.] The concept of moral turpitude depends upon the state of public morals . . . as well as on the degree of public harm produced by the act in question." (*In re Higbie* (1972) 6 Cal.3d 562, 569-570.)

The State Bar alleges that respondent engaged in corruption by retrieving the *Strain* file, by working on the *Strain* matter when it was outside of his job responsibilities, by falsely giving the impression in the file that Wade and Otto thought the case would not be filed as justification for dismissing the matter, by failing to disclose to the D.A.'s office that respondent had a past personal relationship with Strain, by failing to adequately investigate whether there was sufficient evidence to support the allegations in the criminal complaint, by working on the matter when respondent had a previous personal relationship with Strain, by failing to confer with Otto, Ashmore or any of his supervisors regarding his decision to dismiss the matter, by failing to inform Otto, Ashmore or any of his supervisors that respondent dismissed the matter, by requesting dismissal of the matter and by dismissing the matter because of respondent's previous personal relationship with Strain.

While respondent had clearly violated his duty as a prosecutor to avoid the appearance of impropriety and to avoid conflicts of interest in violation of rule 3-310(B)(2), there is no clear and convincing evidence that he engaged in acts of corruption in wilful violation of section 6106.

As a level IV deputy district attorney, respondent had the authority, without his supervisor's permission, to retrieve the *Strain* file and to dismiss a case that he believed to be not provable even though he was not assigned to handle it. After speaking with Wade, he was under the mistaken impression that the case against Strain would not be filed. He was wrong. When he found out that the case was filed, he made an independent evaluation that there was reasonable doubt for a jury of 12 and opined that the case should be dismissed in the interest of justice. Respondent had no obligation to consult with Otto, Ashmore or anyone in the D.A.'s office that he was seeking a dismissal. Finally, respondent's previous personal relationship with Strain called his attention to the

case, but respondent did not dismiss the case against Strain because of their relationship. There is no clear and convincing evidence that Strain influenced respondent's decision to dismiss the case or that respondent acted on behalf of Strain. Gnoss testified that had he found evidence that respondent was acting on behalf of Strain, the consequences to respondent would have been more severe than a counseling memo.

Respondent undoubtedly had an ethical obligation under office protocol and as a prosecutor to advise the D.A.'s office that he knew Strain and to disqualify himself from handling the case. And thus, the court has found that he had failed to avoid the appearance of impropriety and violated his duty under rule 3-310(B)(2) as discussed above in count seven. But respondent's acts did not constitute corruption; he is not culpable of violating section 6106.

4. Count Nine: Misrepresentations (Bus. & Prof. Code, § 6106)

The State Bar alleges that respondent committed acts of moral turpitude by making misrepresentations to Gnoss during their May 3, 2002, discussion and in his July 24, 2001 handwritten notation in the *Strain* file.

The court does not find that respondent's handwritten notation in the file and his discussion with Gnoss rise to the level of moral turpitude where he honestly and reasonably held the belief that the *Strain* case involved a minor offense which may not be provable and that it should be dismissed. Respondent admitted that he had written the notation in haste and that he made a mistake indicating that he had spoken to Otto. But he had no intent to mislead anyone. Although Wade never told him that the case would not be filed, respondent, based on his own evaluation and experience as a prosecutor in Fish and Game cases, reasonably thought that the case was not provable and therefore would not be pursued. He was obviously mistaken that the case would not be filed but he was not dishonest in opining that the case was not provable.

As a result of respondent's misconduct, Gnoss wrote a counseling memo, admonishing respondent to avoid involvement in cases not assigned to him and that if he had an ethical conflict because of the relationship he may have with one of the parties, respondent should have the case reassigned. But there is no clear and convincing evidence that respondent's representations to Gnoss rise to the level of moral turpitude.

Therefore, respondent did not commit any act involving moral turpitude in wilful violation of section 6106 in count nine.

IV. Mitigating and Aggravating Circumstances

A. Mitigation

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(e).)[8]

Respondent was admitted to the practice of law in December 1989 and has no prior record of discipline. Respondent's 10 years of discipline-free practice at the time of his misconduct in 2000 is a strong mitigating factor. (Standard 1.2(e)(i).) "Absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time." (*In re Young* (1989) 49 Cal.3d 257, 269.) In addition, the court notes that the misconduct occurred more than five years ago and there is no evidence of further misconduct.

Respondent presented 17 character witnesses; six of whom are attorneys and commissioners. (Standard 1.2(e)(vi).) The witnesses included: Roy Gourley, Janis Nicholas, Bruce Rochester, Spencer Crum, Gregory John Jacobs, Steven Riske, George Lawry, Larry Smith, Glen Olson, Tom Furrer, Donna Lee Ryan, Joseph Soldis, Jackie Michael Mullins, Michelle Cartensen, Lawrence Ornell, Randy Biehler, and Stephany Joy. Favorable character testimony from employers and attorneys are entitled to considerable weight. (*Feinstein v. State Bar* (1952) 39 Cal.2d 541, 547.) The witnesses all attested to his good moral character. They believe respondent to be truthful, honest, and trustworthy. Most of them would not change their opinions of him even if he was found culpable of the alleged misconduct in this proceeding.

Jackie Michael Mullins, a former Sonoma County Deputy District Attorney who had supervised respondent's work almost on a daily basis and has known respondent since 1991, praised respondent's integrity and work ethics.

Joseph Soldis, a criminal investigator, testified that he worked with respondent when he was

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

a police officer and found him to be ethical and hardworking.

Donna Lee Ryan, a former Sonoma County Deputy District Attorney, also praised respondent's high standard of ethics, diligence and determination to do the right thing. She acknowledged that he had some difficulties in organizational skills and that he was probably overwhelmed. But she has never known him to be dishonest or a venal manipulator.

Larry Smith, a former mayor of Tiburon, has known respondent since respondent was a child. He attested to respondent's integrity, commitment to the community and involvement in various community foundations to help kids become stewards of the environment. He further testified that respondent is a model parent and an all-around good person.

The court finds that these witnesses represent an extraordinary demonstration of respondent's good character attested to by a wide range of references in the legal and general communities and who are aware of the full extent of the member's misconduct.

However, the weight to be accorded to this character evidence was diminished somewhat by the State Bar's character witnesses against respondent, including Chris Andrian, Chris Reynolds, Kristin Allen, Cynthia Ashmore, Stephen Gallenson, and Mary Lou Hillberg Lennox. These witnesses attested to respondent's unreliability, untrustworthiness, dishonesty, and unprofessionalism.

Respondent devoted much time doing various community work, especially in support of fish and wildlife protection and conservation goals. (Standard 1.2(e)(vi).) He was recognized for his work in abalone conservation and as a member of the Sonoma County District Attorney Domestic Violence/Sexual Assault/Elder Abuse/Child Abuse Vertical Prosecution Unit. Respondent was also involved in a community program on educating young teens about the laws on guns and taught administrative law to undergraduates.

B. Aggravation

Aggravating factors must be established clearly and convincingly by the State Bar. (Standard 1.2(b).)

Respondent committed multiple acts of wrongdoing, including failing to obey California law; failing to avoid the representation of adverse interests; and committing acts of moral turpitude. (Standard 1.2(b)(ii).)

Respondent significantly harmed the public and the administration of justice by failing to uphold his duties as a prosecutor to reveal exculpatory evidence in the *Pelfini* matter and to disclose his prior relationship with Strain to the D.A.'s office. (Standard 1.2(b)(iv).)

However, the court does not find that there is additional clear and convincing aggravating evidence under (1) standard 1.2(b)(iii) (respondent's misconduct was not surrounded by dishonesty and concealment since respondent has already been found culpable of committing acts of moral turpitude); (2) standard 1.2(b)(v) (respondent did not demonstrate indifference toward rectification of or atonement for the consequences of his misconduct since he has expressed some remorse and acknowledged some errors); or (3) standard 1.2(b)(vi) (respondent did not display a lack of candor when he would not admit to certain allegations).

V. Discussion

The purpose of 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.)

Respondent's misconduct involved two matters. 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 client. The applicable standards in this matter are standards 1.6, 2.3, 2.6, and 2.10. The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach case must be resolved on its own particular facts and not by application of rigid standards." (*Id.* at p. 251.) While the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

Standard 2.3 provides that culpability of moral turpitude and intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person must result in actual suspension or disbarment. As discussed above, respondent's suppression of evidence and misrepresentations to the court in the *Pelfini* matter were acts of moral turpitude.

Standards 2.6 and 2.10 provide that culpability of California law and wilful violation of a rule

of professional conduct will result in reproval, suspension or disbarment, depending on the gravity of the offense or the harm to the client.

The State Bar urges disbarment while respondent argues that a maximum of six months' stayed suspension would be adequate. Both parties cited to two Supreme Court cases involving prosecutorial misconduct in support of their recommended level of discipline – *Noland v. State Bar* (1965) 63 Cal.2d 298 [30 days actual suspension] and *Price v. State Bar* (1982) 30 Cal.3d 537 [two years actual suspension].

In *Noland*, a prosecutor counseled and aided in the unauthorized removal of the names of "pro-defense" prospective jurors from the official jury list. His ex parte tampering with the selection of potential jurors to gain advantage at subsequent trials constituted the calculated thwarting of objective justice. The Supreme Court actually suspended the attorney for 30 days, finding that he had achieved no insight into the grave significance of his actions and that he must be discouraged from attempting any further zealous abuses of judicial administration. (*Id.* at p. 303.)

In *Price*, a prosecutor altered evidence in a criminal trial and attempted to prevent discovery of his misconduct by discussing the alteration with the judge in the absence of opposing counsel and communicating to the defendant – after conviction but before sentencing – an offer to seek favorable sentencing in exchange for defendant's agreement not to appeal the conviction. Because the attorney had no prior record of discipline in 11 years of practice, he was under mental and emotional stress, he was cooperative and remorseful throughout the proceedings, and witnesses testified to his good reputation as lawyer and his active involvement in civic affairs, the Supreme Court found that the mitigating evidence militate against disbarment. Thus, he was suspended for five years, stayed, placed on probation for five years, and actually suspended for two years.

The State Bar also cited to *In the Matter of Kenneth J. Peasley* (2004) 208 Ariz. 27, in which a prosecutor in Arizona was disbarred for intentionally presenting false testimony from a detective in the prosecution of two capital murder defendants. The State Bar argues that respondent's suppression of exculpatory evidence in this instant case is comparable to Peasley's presenting false testimony in a murder case. The court finds Peasely's misconduct much more egregious than that of respondent. There, the prosecutor elicited false testimony against two defendants in a capital murder

trial in 1993, again presented the same false testimony in the 1997 retrial of one of the defendants, and exploited that false testimony in the closing argument in both trials. In other word, he repeated his misconduct in two trials. Here, respondent failed to disclose evidence to the defense, but eventually, dismissed the case against the defendant, recognizing that he had done irreparable harm to the case.

The court finds guidance in *Price*. Respondent similarly suppressed evidence in a criminal trial and tried to hide his misconduct by misrepresenting to the court that he had no knowledge of the evidence (i.e., videotapes, cassette tapes, transcripts, and written notes). But respondent's mitigation is not as compelling as that of the attorney in *Price*. Like *Price*, respondent also had no prior record of discipline in 10 years of practice and an array of character witnesses testified to his good moral character and extensive public service. Respondent has shown some remorse and admitted to some mistakes made.

But unlike *Price*, he has not quite fully recognized his wrongdoing or its significant harm on the administration of justice and public confidence in the legal profession, particularly in view of his position as a prosecutor and the clear and convincing evidence that he deliberately withheld discoverable evidence favorable to the defense in the *Pelfini* matter. Respondent lacks the understanding or appreciation that his job carries a heavy burden and that it is his responsibility as a prosecutor to ensure that "justice shall be done." Indeed, very high ethical standards are demanded of a prosecutor; respondent could not afford to be careless or inattentive in carrying out his duties. Yet, respondent chose to ignore his ethical obligations and to be less than candid with the defense and the court. His "see no evil or hear no evil" approach is inexcusable.

In his closing argument in this proceeding, respondent still heldfast to the position that he never intentionally did anything improper. He has not accepted full responsibility for his misconduct. As a prosecutor, he knew or should have known that he "is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer."

(*Berger v. United States* (1935) 295 U.S. 78, 88.)

It is well established that a prosecutor must be impeccably professional for he must meet standards of candor and impartiality not demanded of other attorneys. Here, it is clear that respondent failed to be candid and truthful in all dealings with the court and counsel. His strong belief that the victim was murdered, his overzealousness to convict and his determination not to let the "criminal" go free blurred his understanding of a prosecutor's special duty to promote justice and to seek truth.

Consequently, respondent committed serious misconduct that warrants a more severe level of discipline than the two years of actual suspension imposed in *Price* but less than disbarment as was ordered in the Arizona case, *Peasley.*

Disbarment is not the appropriate degree of discipline to be imposed in this case. Moreover, in California cases where disbarment was ordered, the attorneys were criminally convicted for their crime of bribery or perjury. (See *In re Bloom* (1977) 19 Cal.3d 175; *In re Weber* (1976) 16 Cal.3d 578; *In re Allen* (1959) 52 Cal.2d 762; and *In re Hanley* (1975) 13 Cal.3d 448.) Here, there was no criminal conviction for respondent's misconduct.

Although respondent's suppression of exculpatory evidence, misrepresentations to the court and failure to disclose his relationship with a defendant do not warrant disbarment, the case law and the standards provide that placing respondent on a long period of actual suspension would be appropriate to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys. After balancing all relevant factors, including the underlying misconduct and the mitigating and aggravating circumstances, the court concludes that a three-year actual suspension would be commensurate with the gravity of respondent's act and is necessary for the protection of the public, the courts and the legal profession.

VI. Recommended Discipline

Accordingly, the court hereby recommends that respondent **Brooke P. Halsey, Jr.,** be suspended from the practice of law for four years, that execution of that 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 four years that is stayed, will be satisfied and that suspension will be terminated.

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and provide proof of passage to the Office of Probation, within the period of his actual suspension. Failure to pass the MPRE within the specified time results in actual suspension by the Review Department, without further hearing, until passage. (But see Cal. Rules of Court, rule 951(b), and Rules Proc. of State Bar, rule 3201(a)(1) and (3).)

It is also recommended that the Supreme Court order respondent to comply with rule 955, paragraphs (a) and (c), of the California Rules of Court, within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter. Wilful failure to comply with the provisions of rule 955 may result in revocation of probation, suspension, disbarment, denial of reinstatement, conviction of contempt, or criminal conviction.[9]

[9]Respondent is required to file a rule 955(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

VII. Costs

The court recommends that costs be awarded to the State Bar pursuant to section 6086.10 and are enforceable both as provided in section 6140.7 and as a money judgment.

Dated: August 1, 2006

PAT McELROY
Judge of the State Bar Court