PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

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REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **BRETT ALEXANDER PEDERSEN**, A Member of the State Bar.	)	**05-O-02315** **OPINION ON REVIEW**

I. INTRODUCTION

We review the recommendation of a hearing judge that respondent, Brett Alexander Pedersen, be suspended from the practice of law in this state for two years, execution of which be stayed, and that he be placed on probation for two years on conditions including 90 days' actual suspension for misconduct involving moral turpitude and a failure to employ only those means consistent with the truth in a single client matter. Respondent seeks a reversal of the culpability findings. The State Bar urges us to affirm the culpability findings and the discipline recommendation.

Respondent was admitted to the practice of law in California on June 12, 1990, and has no prior record of discipline. His misconduct occurred in April 2004. We have independently reviewed the record (Cal. Rules of Court, rule 9.12; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207) and find clear and convincing evidence to support all findings of culpability. The parties further request various modifications to factual findings and legal conclusions. To the extent we agree, the opinion so reflects; otherwise, as more fully discussed below, we adopt the factual and culpability findings of the hearing department, as modified. Finding duplicative charged offenses, no aggravation, and more mitigation than did the hearing judge, we conclude that the period of actual suspension should be reduced to 30 days.

II. DISCUSSION

A. Factual Background

Respondent represented Kevin and Sherry Fung (the Fungs) who were defendants in a civil complaint (*Hernandez v. Prudential California Realty I et al.*, Super. Ct. San Francisco City and County Ct. No. 324187) filed against them and other defendants for damages resulting from alleged fraud in connection with the sale of a house in San Francisco.

Although the Fungs settled with plaintiffs and executed a settlement agreement in February and March 2004, the Fungs were unable to pay their settlement contribution of $40,000 and plaintiffs' counsel filed a motion to enforce the settlement agreement pursuant to Code of Civil Procedure section 664.6.[1] In response, respondent suggested to plaintiffs' counsel that the parties stipulate to entry of judgment in order to expedite matters and minimize costs. Plaintiffs' counsel then drafted a stipulation for entry of judgment and a proposed judgment, which he faxed to respondent on April 12, 2004, with instructions to sign and return to him for filing. However, after the Fungs executed the stipulation and returned it to plaintiffs' counsel for filing, plaintiffs' counsel notified respondent on April 20, 2004, orally and in writing, that plaintiffs were no longer willing to enter a stipulated judgment and therefore would not execute it, that they had withdrawn their motion to enforce the settlement agreement, and that they would be appearing ex parte for an order to reset the trial date.

Despite the oral and written notification from plaintiffs' counsel, the following day respondent filed the stipulation for entry of judgment executed by the Fungs and the proposed judgment. Rather than modify these documents to reflect that they were submitted by the defendants, respondent filed the stipulation and proposed judgment prepared by plaintiffs' counsel. Because of this, line one of the first page of the stipulation, as well as line one of the

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[1]This section provides "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

proposed judgment, listed only plaintiffs' counsel as attorney of record for plaintiffs. Although plaintiffs did not sign the stipulation, ostensibly the pleadings were presented on their behalf since only their attorney's information appeared in the caption indicating counsel of record. (See Cal. Rules of Court, rule 2.111.)[2] No information identifying respondent or the parties he represented was included in either the stipulation or proposed judgment.

Contrary to the requirements of California Code of Civil Procedure section 664.5, subdivision (a), respondent neither served notice of entry of judgment on plaintiffs nor filed a proof of service with the court.[3] He did not disclose his actions to plaintiffs' counsel until April 27, 2004, when respondent filed his opposition to plaintiffs' motion to reset the case for trial and indicated therein that the stipulation and proposed judgment had already been sent to the court for filing.

On May 5, 2004, the court heard plaintiffs' motion to reset the matter for trial. At the hearing, respondent's associate appeared and argued that the trial should not be reset because there was a settlement agreement and a stipulation for entry of judgment that had been filed. Believing that the issue of whether there was an enforceable settlement agreement had to be litigated separately, the court explicitly declined to address it and granted plaintiffs' motion to set the matter for trial.

On May 11, 2004, the clerk rejected the proposed judgment respondent submitted because it was not on a court-approved form. Respondent resubmitted it on May 13, 2004, using

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[2]This rule requires that the first page of each pleading filed with the Superior Court have "(1) In the space commencing 1 inch from the top of the page with line 1, to the left of the center of the page, the name, office address or, if none, residence address or mailing address (if different), telephone number, fax number and e-mail address (if available), and State Bar membership number of the attorney for the party in whose behalf the paper is presented, or of the party if he or she is appearing in person."

[3]This statute requires that "In any contested action . . . the party submitting an order or judgment for entry shall prepare and mail a copy of the notice of entry of judgment to all parties who have appeared in the action or proceeding and shall file with the court the original notice of entry of judgment together with the proof of service by mail."

the court's form. Unlike the first filing, respondent indicated on the caption of the resubmitted pleading that he was the preparer and attorney of record for defendants. However, at no time did respondent inform the court that plaintiffs had withdrawn their consent to a stipulated judgment or that the matter had been reset for trial. Respondent also failed to serve opposing counsel or otherwise notify him of the resubmission of the corrected form of judgment. As a result, judgment was entered against the Fungs on May 26, 2004, requiring plaintiffs to file a motion to vacate the judgment, which was granted on June 9, 2004.

On June 29, 2006, the State Bar filed a Notice of Disciplinary Charges (NDC) alleging that respondent violated Business and Professions Code section 6068, subdivision (d),[4] and section 6106[5] by filing the stipulation and proposed judgment without disclosing that plaintiffs had withdrawn their consent to a stipulated judgment and by resubmitting the judgment without revealing that the matter had been restored to the trial calendar. Prior to the disciplinary trial, respondent entered into an extensive stipulation as to facts and admission of documents.

After trial, the hearing judge found that respondent willfully violated section 6068, subdivision (d), by resubmitting the judgment on May 13, 2004, without notifying plaintiffs' counsel, without notifying the court that plaintiffs had withdrawn their consent, and without notifying the court that the matter was back on the trial calendar. The hearing judge also concluded on these identical findings that respondent willfully violated section 6106.

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[4]All further references to section(s) are to this source. According to section 6068, subdivision (d), "It is the duty of an attorney . . . [¶] . . . [¶] (d) To employ . . . those means only as are consistent with truth . . . ."

[5]This section provides that "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension."

Additionally, the hearing judge determined that respondent acted with the intent of improperly securing an advantage on behalf of the Fungs.[6] Alternatively, the hearing judge found that respondent, through gross negligence, created the false impression that he had the authority and express permission of plaintiffs to request the court to enter judgment on their claims against the Fungs.

B. Culpability

Respondent contends that the hearing judge erred in finding that he committed ethical misconduct. We agree with the culpability findings of the hearing judge. However, unlike the hearing judge, we do not rely solely on respondent's submission of the corrected judgment as the basis for culpability. Instead, we also consider the filing of the first stipulation for entry of judgment and the first proposed judgment that identified plaintiffs' counsel, rather than respondent, in the attorney of record caption. According to California Rules of Court, rule 2.111, the attorney of record caption is mandatory and identifies "the attorney for the party in whose behalf the [pleading] is presented . . . ." By submitting pleadings that set forth plaintiffs' counsel as the attorney of record, respondent misrepresented to the court that plaintiffs and their attorney authorized the filing of the pleadings on their behalf. Respondent knew that such representation was false because at the time he submitted the pleadings for filing, he was already aware that plaintiffs had withdrawn their consent to file the stipulation and proposed judgment. We would note that when respondent resubmitted the corrected proposed judgment, he again had the opportunity to inform the court of plaintiffs' position, but failed to do so, indicating that his action was deliberate. Based on these facts, we find clear and convincing evidence that respondent failed to employ only those means consistent with the truth, in willful violation of section 6068, subdivision (d). (*Sullins v. State Bar* (1975) 15 Cal.3d 609, 620-621 [section 6068,

[6]Plaintiffs' counsel testified that he realized the Fungs could file for bankruptcy and discharge the stipulated judgment whereas a judgment based on fraud would not be dischargeable in bankruptcy. He therefore sought a new trial date since the Fungs allegedly breached the settlement agreement by not timely paying their portion of the settlement.

subdivision (d) "*unqualifiedly* require[s] an attorney to refrain from acts which mislead or deceive the court . . . ."].)

Respondent's affirmative misrepresentations constitute dishonest acts and support a finding that he willfully violated section 6106. (See *Levin v. State Bar* (1989) 47 Cal.3d 1140, 1147 [dishonest acts by an attorney are grounds for suspension or disbarment]; *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 220 [section 6106 applies to the misrepresentation of material facts].) However, since the same facts establish respondent's culpability under both section 6068, subdivision (d), and section 6106, the charges are duplicative, and we therefore assign no additional weight to the section 6106 violation in determining the appropriate discipline. (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 175 [where same facts underlie violations of both section 6106 and 6068, subdivision (d), no weight given to the section 6106 violation in determining the appropriate discipline].)

Because we find culpability based on respondent's affirmative misrepresentations, we need not and do not address respondent's arguments as to whether submission of the corrected judgment complied with legal requirements or whether the stipulation for entry of judgment was legally enforceable.

C. Discipline

1. Aggravating Circumstances

a. Finding the charged misconduct duplicative, we disagree with the hearing judge's conclusion that respondent committed multiple acts of wrongdoing. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(ii).[7])

b. We also disagree with the finding that respondent's misconduct significantly harmed the administration of justice. Although the entry of judgment and the subsequent request to vacate it unnecessarily consumed court resources, no evidence was offered

[7]All further references to standard(s) are to this source.

to indicate that respondent's misconduct caused the expenditure of excessive court resources or unduly burdened the court. Therefore, the record does not establish that the harm the court suffered was significant, as required by standard 1.2(b)(iv). (*In the Matter of Chesnut, supra,* 4 Cal. State Bar Ct. Rptr. at p. 176 [where attorney made misrepresentations to judges in Texas and California prolonging a jurisdictional battle between both state courts in a marital dissolution proceeding, evidence did not establish significant harm to the administration of justice].)

c. Since respondent acknowledges he made a mistake and in retrospect recognizes that it would have been better practice to have provided plaintiffs' counsel with notice, we disagree with the hearing judge's finding that respondent lacks an appreciation or understanding of his misconduct.

2. Mitigating Circumstances

a. We agree with the hearing judge that respondent's absence of any prior record of discipline over almost fourteen years of practice is a mitigating circumstance. (Std. 1.2(e)(i).) In fact, we afford it significant weight in mitigation. (See *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [over ten years of practice before first act of misconduct given significant weight].)

b. Unlike the hearing judge, we consider respondent's extensive stipulation to material facts and admission of documents to be a mitigating factor. (Std. 1.2(e)(v).)

3. Degree of Discipline

In determining the degree of discipline to recommend, we consider the standards, which serve as guidelines, as well as prior decisions imposing discipline based on similar facts. (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) On this record, the applicable standards would require respondent's suspension or disbarment. Since respondent's violation of section 6068, subdivision (d), involves dishonesty, standard 2.3 is most pertinent to our disciplinary analysis. If a member is culpable of either an act of moral turpitude, fraud, or intentional dishonesty toward a court, client and/or another person or concealment of a

material fact from a court, client and/or another person, standard 2.3 provides for actual suspension or disbarment depending upon the extent to which the victim(s) of the misconduct is harmed or misled, the magnitude of the act of misconduct, and the degree to which it relates to the member's acts within the practice of law. (See also std. 2.6(a).)

Since they are recognized as guidelines, however, it is not mandatory for us to adhere to the standards and recommend respondent's suspension or disbarment. Instead, we review the facts and circumstances surrounding this case, along with relevant case law, for additional guidance in order to best achieve the purposes of disciplinary proceedings, which are to protect the public, preserve public confidence in the profession and maintain the highest possible standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) As previously discussed, respondent's current misconduct is tempered by his cooperation with the State Bar and his lack of a prior record of discipline. Relying on State Bar Rules of Procedure, rule 264, respondent contends that his misconduct warrants only an admonition.[8] However, since respondent's misconduct involves dishonesty constituting moral turpitude, his reliance on this rule is inapt. The State Bar urges us to affirm the hearing judge's recommendation that respondent be actually suspended for 90 days. Since we have found duplicative charges of misconduct, no factors in aggravation and more mitigation than afforded by the hearing judge, we consider a 90-day actual suspension under these circumstances to be unduly harsh.

The gravamen of respondent's misconduct is an isolated instance of misrepresentation during an otherwise unblemished career. Our review of relevant cases involving misrepresentations or false statements to a court discloses a range of discipline as lenient as a public reproval and as severe as six months' actual suspension.

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[8]According to rule 264: "(a) When the subject matter of a disciplinary proceeding . . . does not involve . . . a serious offense . . . the Court may resolve the matter by an admonition . . . if . . . (1) the violation or violations were not intentional or occurred under mitigating circumstances, and (2) no significant harm resulted. [¶] (b) As used in this rule, 'serious offense' means conduct involving dishonesty, moral turpitude, or corruption . . . ."

In *Grove v. State Bar* (1965) 63 Cal.2d 312, the Supreme Court publicly reproved an attorney who, during an order to show cause hearing, intentionally misled a judge into believing an opposing party had defaulted when the attorney knew, but failed to inform the judge, that opposing counsel had actually requested a continuance. The attorney had previously been privately reproved. In deciding to publicly reprove him, the court observed that "There is nothing in the record to indicate that petitioner planned to mislead [the judge], and his failure to disclose that [opposing counsel] had requested a continuance may have reflected only a spur of the moment decision motivated by an overzealous regard for his client's interest." (*Id*., at pp. 315-316.)

The court publicly reproved the attorney in *Sullins v. State Bar, supra,* 15 Cal.3d at p. 609, for withholding from a judge a letter which was material to issues before the judge. The non-disclosure also permitted the attorney to secure a 50% contingency fee. His 45-year practice without prior discipline was countered by the fact that he misled the court for his own personal gain.

The attorney in *Davidson v. State Bar* (1976) 17 Cal.3d 570 was also publicly reproved after he concealed material facts from a judge by deliberately withholding a telephone number in a child custody matter. His act of moral turpitude was aggravated by the existence of a previous public reproval, but mitigated by evidence of his good character. (*Id*. at p. 574.)

In *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, we recommended a one-year stayed suspension, which the Supreme Court imposed, after the attorney intentionally misled a settlement conference judge regarding the status of a defendant and failed to obey a court order requiring the attorney's attendance at a settlement conference. We found his misconduct to be serious since "it 'is clearly the kind that threatens the public and undermines its confidence in the legal profession.' [Citation.]" (*Id*. at p. 225.) In determining the appropriate discipline to recommend, we considered the attorney's good character as well as his practice of law in excess of 30 years without misconduct.

The Supreme Court imposed a 30-day actual suspension in *Drociak v. State Bar* (1991) 52 Cal.3d 1085 after an attorney used a pre-signed verification in discovery proceedings and submitted discovery responses even though his client was dead. He had practiced for 25 years without incident and cooperated with the State Bar. Additionally, there was no client harm and the attorney acknowledged his misconduct.

The Supreme Court imposed a 60-day actual suspension in *Bach v. State Bar* (1987) 43 Cal.3d 848, when an attorney intentionally misled a judge about whether he was ordered to produce his client at a mediation hearing. There were no mitigating factors. In aggravation, the attorney failed to recognize the gravity of his misconduct and the court determined that his behavior threatened the public and undermined its confidence in the legal profession. (*Id*. at pp. 854, 857.)

We recommended 75 days of actual suspension in *In the Matter of Regan* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 844, where an attorney misled an appellate court by misrepresenting that his client never requested his appeal be dismissed and by failing to disclose that his client had fired him. Additionally, he made appearances without client authority, failed to adequately communicate, and failed to return a file. Although the attorney practiced for 17 years without incident, he demonstrated indifference toward his misconduct, which involved bad faith, multiple acts, and significant client harm.

In *In the Matter of Chesnut*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 166 we recommended six months' actual suspension for an attorney who falsely represented to two judges in different states that he had personally served an opposing party. Although we recognized the attorney's pro bono activities and good character, he displayed a lack of candor and also had a prior record of discipline involving similar misconduct. In reaching our discipline recommendation, we noted that the current misconduct involved two separate acts of dishonesty and that "Respondent's past and present misconduct show a disturbing willingness to employ deceitful means to accomplish his objectives." (*Id*. at p. 177.)

Respondent's misconduct is not as extensive as that in *Regan* and *Chesnut*. Furthermore, the absence of aggravating factors distinguishes respondent's case from *Bach*. The cases resulting in public reproval are less persuasive since they pre-date adoption of the standards and unlike *Grove*, we cannot conclude that respondent did not plan to mislead the court or that his conduct was the result of a spur-of-the-moment decision.

On balance, we believe that the facts of respondent's matter warrant a 30-day actual suspension, as was imposed in *Drociak*. Like the attorney in that case, respondent presented a document which he knew contained a material misrepresentation in order to advance the interests of his clients. Similarly, as in *Drociak*, respondent had an extensive legal career without disciplinary incident, cooperated with the State Bar, acknowledged his misconduct and caused no significant harm. We therefore conclude after our review of the record, applicable standards and relevant case law, that a 30-day actual suspension will adequately serve the discipline goals of protecting the public, the courts and the profession.

III. RECOMMENDATION

We recommend that respondent, Brett Alexander Pedersen, be suspended from the practice of law in the State of California for a period of six months; that execution of the six-month period of suspension be stayed; and that he be placed on probation for a period of one year on the conditions of probation recommended by the hearing judge, except that we reduce the recommended actual suspension to 30 days and that at the end of the probationary term, if respondent has complied with the terms and conditions of probation, the Supreme Court order suspending respondent from the practice of law for six months will be satisfied, and the suspension will be terminated.

IV. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court order in this matter and

to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

V. COSTS

We further recommend that the costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable as provided in Business and Professions Code section 6140.7 and as a money judgment.

WATAI, J.

We concur:

REMKE, P. J.

EPSTEIN, J.