

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case No.: **07-O-13150** (07-O-13198;
) 07-O-13379) - RAP
MICHAEL JUDE O'BRIEN,)
) **DECISION**
Member No. 147414,)
)
)
A Member of the State Bar.)

I. INTRODUCTION

In this contested, original disciplinary proceeding, respondent **MICHAEL JUDE O'BRIEN** is charged with five counts of misconduct in two client matters. The court finds respondent culpable of three counts. Respondent represented himself in this matter. Special Deputy Trial Counsel James R. Evans, Jr., represented the Office of the Chief Trial Counsel of the State Bar of California (State Bar).

Having considered the facts and the law, the court recommends, among other things, that respondent be suspended from the practice of law in California for one year, that execution of suspension be stayed, that he be placed on probation for two years with conditions, including that he be suspended from the practice of law for the first six months of probation.

II. PERTINENT PROCEDURAL HISTORY

The State Bar initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on July 30, 2010. Respondent filed a response to the NDC on August 24, 2010.

Trial was held on January 19, 20, 21, and 24, 2011.

On January 19, 2011, at the State Bar's request, count five was dismissed without prejudice. On that same date, the court also dismissed count one (see Count One, *post*) and part of count two (see Count Two, *post*).

On January 20, 2011, the second day of trial, the State Bar filed a motion to amend the NDC to include violations of Business and Professions Code sections 6103 and 6106. The court denied the motion.

The matter was submitted for decision on January 24, 2011, at the conclusion of the hearing.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on June 11, 1990, and has been a member of the State Bar of California since that time.

B. Credibility Determinations

With respect to the credibility of the witnesses, the court has carefully weighed and considered their demeanor while testifying; the manner in which they testified; their personal interest or lack thereof in the outcome of this proceeding; and their capacity to accurately perceive, recollect, and communicate the matters on which they testified. (See, e.g., Evid. Code, § 780 [list of factors to consider in determining credibility].) Except as otherwise noted, the court finds the testimony of the witnesses to be credible. The court, however, finds that respondent's testimony was not credible and lacked candor.

C. Stipulated Facts

At the time of trial, on January 19, 2011, the parties' Stipulation of Undisputed Facts (stipulation) was filed with the court. The parties stipulated to the following facts:

Commencing in 1999 and continuing to the present, respondent has been a party to a family law proceeding, *In re Marriage of O'Brien*, California Superior Court, case no. GD 023457 (the Family Law Action).

The California Court of Appeal found that respondent had stipulated to the appointment of a special master in the Family Law Action.

The special master submitted his report to the trial court on May 7, 2004. The special master found that the requests of respondent's former spouse for discovery were reasonable and that respondent failed to comply with the discovery and production requests. The special master recommended that the trial court find in favor of respondent's former spouse and grant her motion to compel.

On October 21, 2004, the trial court in the Family Law Action ruled on the parties' request for child support and attorney fees. The trial court ordered respondent to pay monetary sanctions in the sum of \$41,000. On December 2, 2004, the court filed an amended order, reducing the sanctions to \$40,500. On March 18, 2005, the trial court again amended its order.

In making its March 18, 2005 order, the trial court noted that: (1) respondent had been dilatory in his document production and (2) respondent, who had stipulated to the appointment of a special master, raised objections to the special master, only after the special master had filed his report. The special master found that respondent had not complied with discovery. As of October 1, 2004, respondent still had not produced items such as all the 1099s from his real estate practice. The documents that had been produced were disorganized and copied over other documents or cut off. Also, respondent inappropriately sought third party discovery from the then current husband of respondent's former spouse.

The trial court noted that on the lunch break from the July 23, 2004 hearing, respondent "filed a notice of appeal of all orders, even though the hearing was not concluded in order to take

the position that the court had lost jurisdiction to conclude the hearing and make the orders he then would intend to appeal.” The court stated that respondent had agreed to pay \$9,000 for a forensic accountant; respondent then changed his mind and appealed the order requiring him to pay the money. Respondent, thereby, caused his former spouse to incur additional fees when he litigated the amount of the bond to post.

On March 18, 2005, the trial court order required respondent to pay his former spouse a total of \$40,500, which consisted of attorney fees in the amount of \$37,000, granted pursuant to California Code of Civil Procedure sections 2023 and 2032¹ and Family Code sections 271 and 3557, and an additional \$3,500 pursuant to Family Code section 2030.

Respondent appealed from the rulings of the trial court.

In a December 29, 2005, unpublished opinion of the Court of Appeal of the State of California, Second Appellate District, Division Two, Civil No. B177096 (the Appellate Opinion), the Court of Appeal ruled on respondent’s appeal. A true and correct copy of the Appellate Opinion is attached to the Notice of Disciplinary Charges in this matter. The opinion is citable here under California Rules of Court, Rule 8.1115(b). The Appellate Opinion disposes of certain appeals by respondent of various orders of the Los Angeles Superior Court.

Respondent unsuccessfully filed a petition for review of the Appellate Opinion with the California Supreme Court (*Marriage of O’Brien*, case no. S140989). On March 15, 2006, the California Supreme Court denied review of the rulings in the Appellate Opinion.

The Appellate Opinion reflects that in acting as attorney for himself in the Family Law Action, respondent asserted positions and took actions, which he knew or should have known

¹ Although there is no specific statute referenced in paragraph 12 of the parties’ stipulation, there is no doubt that “section 2031,2023” [sic], refers to sections 2023 and 2031 of the California Code of Civil Procedure.

were without probable cause and were asserted or taken for the purpose of harassing and/or maliciously injuring his former spouse in connection with the Family Law Action, as follows:

(a) during the course of the still-pending hearing in the Family Law Action and before any order was entered on the matter before the court, respondent, on a lunch break, undertook to file a Notice of Appeal of All Pending Orders, so that he could and did then take the position that the Superior Court had lost jurisdiction to conclude the hearing and that further trial court proceedings should be stayed pursuant to California Code of Civil Procedure section 916.² The Appellate Court characterized respondent's act [i.e., the premature filing of a notice of appeal made for the purpose of depriving the trial court of jurisdiction] as "sanctionable" and as a "sophomoric stunt."

(b) the Appellate Court upheld the trial court's finding that respondent "willfully failed to comply with discovery requests" in the action by producing documents in response to discovery requests in a manner designed to "impede a timely determination of his income," by making unfounded objections, and by engaging in delay tactics. He was sanctioned for misuses of the discovery process and conduct frustrating the policy of the law.

As a result of respondent's actions, the Court of Appeal granted the request of respondent's former wife for \$23,712 in sanctions under section 907 of the Code of Civil Procedure³ (frivolous appeal or appeal taken solely for delay) and/or California Rules of Court, rule 27(e).

² Paragraph 17 of the stipulation incorrectly states that the California Rules of Court is the code that states that the perfecting of an appeal stays proceedings in the trial court. However, the code to which the parties should have referred in their stipulation is the California Code of Civil Procedure. Section 916 of the Code of Civil Procedure, not rule 916 of the California Rules of Court, states that the perfecting of an appeal stays proceedings in the trial court.

³ Paragraph 18 of the stipulation incorrectly refers to "Rules of Court, Rule 907;" however, the Appellate Opinion granted sanctions under section 907 of the Code of Civil Procedure.

Specifically, the appellate court found that respondent's appeal was frivolous. The Court of Appeal stated:

Section 907 provides that when an appeal is frivolous or taken solely for delay, the reviewing court may add to the costs of appeal such damages as may be just. California Rule of Court, rule 27, subdivision (e) permits a Court of Appeal to impose sanctions on a party's or its own motion, including the award or denial of costs for taking a frivolous appeal or appealing solely to cause delay, for including in the record any matter not reasonably material to the appeal's determination; or committing any other unreasonable violation of these rules.

An appeal is deemed frivolous when it is prosecuted for an improper motive, such as harassing the other party or delaying the effect of an adverse judgment, or when it indisputably has no merit. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.)

[Respondent] filed multiple untimely appeals, one during the course of a hearing. He has misrepresented on appeal what occurred in the trial court, including his stipulation to a special master, and agreement to pay a forensic accountant \$9,000. He also mischaracterizes the special master's calculation of his income, claiming that the special master imputed income based on deposits to [Respondent's] client trust account, when the imputed income was based on wages paid by [Respondent] to himself as well as expenses paid from his business, trust, and personal accounts. [Respondent] has caused [his former spouse] and the judicial system to expend unnecessary resources and time.

In the Appellate Opinion, the Court of Appeal expressly instructed the Clerk of the Court of Appeal to forward a copy of the Appellate Opinion to the State Bar pursuant to Business and Professions Code section 6068.7(c) which provides: "The State Bar shall investigate any matter reported under this section as to the appropriateness of initiating disciplinary action against the attorney."

On July 20, 2007, the Honorable Marjorie Steinburg, a judge of the superior court, entered an order after hearing in which respondent appeared as a party and as counsel of record, finding respondent to be a vexatious litigant.

D. Additional Findings of Fact

On or about March 23, 2004, at a court hearing in the Family Law Action, respondent, through his counsel, stipulated on the record to the appointment of a special master for discovery

purposes. Respondent was present in court. Respondent's stipulation to the appointment was clear and unambiguous. The scope of the special master's duties was also discussed.⁴

By letter dated April 7, 2004, from respondent to the special master, respondent discussed the scope of the special master's duties and sent a retainer check in the amount of \$250. Respondent also informed the special master that he was preparing documents. Respondent, however, never sent any documents to the special master.

Respondent's former-spouse, Desiree Tulleners (Tulleners), through counsel, supplied documents to the special master that respondent had made available to her through discovery. These documents were not complete records of respondent's income, since he had not provided all of the documents that had been requested in discovery. Tulleners also prepared a summary of the documents and included the summary with the documents she sent to the special master.

The special master prepared a report for the court based on the documents he received from Tulleners. In his report, the special master imputed respondent's annual income to be about \$160,000. Respondent received the report shortly before a hearing in the family law action. On May 14, 2004, respondent filed an objection to the report of the special master. At the hearing, however, which was held on May 25, 2004, respondent did not object to the appointment of the special master.

Respondent did not agree with, among other things, the special master's finding of imputed income of \$160,000 and the finding that respondent had used his client trust account for personal expenses. On June 30, 2004, respondent submitted a pleading to the court in which it

⁴ In this disciplinary proceeding, however, respondent repeatedly testified that he did not stipulate to the appointment of a special master, because there was no meeting of the minds. In support of his argument, respondent testified that what was meant by his attorney, who had stated on the record, "We'll stip to the appointment of a special master," was that respondent was willing to stipulate to the appointment, not that he was stipulating to the appointment. The court finds that respondent's testimony and explanation of his position regarding the appointment of the special master lacks candor.

was stated that: (1) he had complied with discovery requests; (2) the special master had been appointed without consulting the parties; and (3) Tulleners has submitted “secret factual summaries” to the special master. Tulleners filed a response to respondent’s June 30th pleading in which she, among other things, requested \$2,342.50 in sanctions.

At a court hearing on July 9, 2004, respondent informed the court that he had an appeal on hand, which he was ready to file, despite the fact that the court had not yet ruled on the matter. Thereafter, on July 23, 2004, another hearing was held in the matter, during which respondent requested a bond amount so that he could file an appeal, although the court still had not issued an order in the matter. During the lunch break, respondent filed an appeal. He returned to the trial court in the afternoon and argued before the court that it lacked jurisdiction to hear the matter since he had filed an appeal. The court did not agree with respondent and continued the hearing.

On October 21, 2004, the trial court ruled on the parties’ request for child support and attorney fees, and ordered respondent to pay sanctions. Thereafter, on December 2, 2004, the court amended its order; on March 18, 2005, the court again amended its order. (See Stipulated Facts, *ante*.)

On August 28, 2007, the court in the Family Law Action entered an order concerning child support owed by respondent to Tulleners. For the year 2007, the court ordered that from January 1, 2007 to the present and ongoing in the future, respondent’s monthly child support obligation to be paid to Tulleners would be \$1,118, before add-ons. For the year 2006, the court ordered that from January 1, 2006 through December 31, 2006, respondent’s monthly child support obligation to be paid to Tulleners would be \$1,285, before add-ons. However, after the trial court entered its order, respondent did not increase the amount of the monthly child support payments he made to Tulleners. Rather, respondent continued to pay \$738 per month, which

was \$547 less per month than the court ordered for the year 2006, and \$380 per month less than the court had ordered for the year 2007. The court order of August 28, 2007, is unambiguous and clearly requires respondent to pay retroactive child support for years 2006 and 2007.

Due to respondent's recalcitrance, Tulleners was forced to file motions requesting that the court issue orders to show cause as to why respondent should not be held in contempt for failing to pay child support. Respondent, however, settled with Tulleners before any OSC hearings were held. But, respondent's conduct caused Tulleners to incur unnecessary attorney fees and also placed an unwarranted burden on the court and the administration of justice.

E. Conclusions of Law

1. The O'Brien Family Law Matter (Case Nos. 07-O-13150 (07-O-13198))

Count One – Prohibited Objective of Employment (Rules Prof. Conduct, Rule 3-200(A))⁵

Rule 3-200(A) provides that a member must not seek, accept, or continue employment if the member knows or should know that the objective of such employment is to bring an action, conduct a defense, assert an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person.

The court dismissed Count One without prejudice at the start of trial. The court found that the precise wording of rule 3-200(A) does not apply to respondent as he did not seek, accept or continue employment in the underlying matter. Respondent was not employed, but, rather represented himself at the trial level in his marriage dissolution proceeding and on appeal. Thus, there is no clear and convincing evidence that respondent willfully sought, accepted, or continued employment, which is one of the elements of a rule 3-200(A) violation.

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⁵ Unless otherwise stated, all further references to "rule(s)" are to the Rules of Professional Conduct of the State Bar.

Count Two – Suppression of Evidence (Rule 5-220)

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 produce.

The court dismissed the rule 5-220 charge at the beginning of trial because the charge was improperly pleaded.

Count Two – Trial Conduct (Rule 5-200(A))

Count Two – Trial Conduct (Rule 5-200(B))

Count Three – Misleading a Judge (Bus. & Prof. Code, § 6068, subd. (d))⁶

Count Three – Commencing or Continuing an Action from a Corrupt Motive (Bus. & Prof. Code, § 6068, subd. (g))

Rule 5-200(A) provides that in presenting a matter to a tribunal, a member must employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with the truth. Rule 5-200(B) provides that in presenting a matter to a tribunal, a member must not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law.

Section 6068, subdivision (d) provides that an attorney must employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with the truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

Section 6068, subdivision (g) provides that an attorney must not encourage either the commencement or continuance of an action or proceeding from any corrupt motives of passion or interest.

By: (1) falsely claiming, only after the special master had issued a report to the parties and the superior court, which was unfavorable to respondent, that he had not stipulated to a special master for discovery purposes; and (2) filing an appeal from court orders that respondent

⁶ Unless otherwise stated, all further references to “section(s)” are to the Business and Professions Code.

claimed had been issued by the superior court at a July 23, 2004 hearing when, in fact, he knew that the court had not yet entered any orders at that hearing, respondent is culpable of willfully violating rules 5-200(A) and 5-200(B), and section 6068, subdivisions (d) and (g).

The court finds by clear and convincing evidence that respondent intentionally made false statements of fact or law regarding the stipulation he entered and regarding the trial court having issued final orders from which an appeal could be taken, thereby seeking to mislead the judges for the corrupt purpose of avoiding unfavorable rulings and staying the superior court proceeding in order to deprive that court of jurisdiction.

However, as the misconduct underlying the violations of rules 5-200(A) and 5-200(B), and section 6068, subdivisions (d) and (g) is the same, respondent's misrepresentations to the courts made for corrupt motives is treated as a single violation in determining discipline. (See *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 221.)

Count Four – Failure to Comply with Laws (Bus. & Prof. Code, § 6068, subd. (a))

Business and Professions Code section 6068, subdivision (a), provides that an attorney has a duty to support the Constitution and the laws of the United States and California.

The Supreme Court has rejected the practice of charging an attorney with a violation of the duty under section 6068, subdivision (a) to “support ...the laws of this state” without specifically identifying the underlying provision of law allegedly violated. The Court held that such practice failed to put the attorney on sufficient notice of alleged violations and undermined meaningful review of any decision based on such general charging allegation. (*In the Matter of Lilley* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 476, 486.)

The requirement of specification of the underlying provision of law allegedly violated means that the Supreme Court interprets section 6068, subdivision (a) “as a conduit by which attorneys may be charged and disciplined for violations of other specific laws which are not

otherwise made disciplinable under the State Bar Act.” (*In the Matter of Lilley, supra*, 1 Cal. State Bar Ct. Rptr. at p. 487.) The circumstances which will support a finding of a violation of section 6068, subdivision (a) if properly charged in a notice of disciplinary charges are as follows: (1) where there is a violation of a statute not specifically relating to the duties of an attorney, (2) where there is a violation of a section of the State Bar Act which is not by its terms, a disciplinable offense, and (3) where there is a violation of an established common law doctrine which governs the conduct of attorneys, which is not governed by any other statute. (*Ibid.*)

However, none of the afore-cited circumstances is involved in this case. Thus, the court determines that there is no proper basis for finding a section 6068, subdivision (a) violation. (See, *In the Matter of Lilley, supra*, 1 Cal. State Bar Ct. Rptr. at p. 487.)

Accordingly, the court dismisses the charge based on a violation of section 6068, subdivision (a) with prejudice.

Count Four – Failure to Maintain Respect Due to the Courts (Bus. & Prof. Code, § 6068, subd. (b))

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

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

On August 28, 2007, the court in the Family Law Action ordered that respondent pay retroactive child support for the year 2006 in the amount of \$1,285 per month and starting in the year 2007 and ongoing into the future, the court ordered that respondent pay child support in the amount of \$1,118 per month. However, respondent did not comply with the court order.

a. Respondent's Arguments

In this disciplinary proceeding, respondent testified that: (1) an order of the court entered on January 25, 2010, relieved him from the responsibility to pay any retroactive child support previously ordered; and (2) the court's order of August 28, 2007, did not require him to pay anything, but rather, only set forth amounts owed.

Respondent asserted in his testimony before this court that the "truth" is that he is not required to pay additional child support and that he has not failed to comply with the court's support order.

During the hearing in this matter, respondent repeatedly testified that by his calculations Tulleners owed him money for child support. Respondent submitted an exhibit summarizing his payments to Tulleners for child support. Respondent relied upon his own version of the facts and interpretation of law to support his assertion. He included as credit for child support paid to Tulleners such items as: (1) medical insurance payments for his children, which payments were included in a support order separate from the child support order at issue; (2) payments by respondent of sanctions and attorney fees in the Family Law Action; and (3) other costs not associated with the court's child support order. Thus, irrespective of the payments required by the August 28, 2007 court order in the Family Law Action, respondent testified that his calculations represented the "just" amount of child support that he was required to pay Tulleners and he was "finding the truth" regarding his child support obligations.

In sum, respondent argues that he did not have to comply with the court's child support order, because his version of the circumstances was the "truth" and his method of calculating child support is "just." Such assertions are without rational basis and, thus, are rejected by this court.

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b. Respondent Failed to Obey a Court Order

In his testimony, respondent made statements in disregard of the plain language of the court order.⁷ The court order of August 28, 2007, is unambiguous and clearly requires respondent to pay retroactive child support for years 2006 and 2007. Moreover, this court notes that there is no evidence in the record, other than respondent's assertion, that a January 25, 2010 court order relieved respondent from the duties spelled out in the August 28, 2007 support order.

Contrary to respondent's calculations and testimony, the documentary evidence received in the disciplinary proceeding in the form of the August 28, 2007 child support order shows that: (1) the trial court entered a valid order; (2) respondent was aware of the order; and (3) the order was a final order. The evidence, including respondent's testimony, shows clearly and convincingly that respondent failed to comply with the court's August 28, 2007 support order without just cause.

The court notes that throughout this disciplinary proceeding, respondent's testimony has changed and his version of the "truth" becomes whatever best supports his claim at the moment, irrespective of any facts with which he is confronted. Here, respondent's belief that he can decide the "truth" and what is "just," irrespective of an unambiguous court order is without merit. Respect due to the courts, as required by section 6068, subdivision (b), includes compliance with court orders absent a good faith belief in a legal right not to comply. (*In the Matter of Jeffers, supra*, 3 Cal. State Bar Ct. Rptr. at p. 221.)

Here, respondent's failure to comply with the court's support order is based on his belief that it was wrongly calculated and that it is not just. But, for an attorney to ignore an order

⁷ Respondent's testimony can be described as like a chameleon. Throughout this disciplinary proceeding, respondent's testimony would change at any given time depending on what the evidence produced at trial disclosed. Respondent's definition of the truth or the significance of an exhibit was determined by which facts best supported his claim at a given moment, and he disregarded anything in opposition to those facts.

because he believes it to be unjust or because he disagrees with it is not a good faith belief in a legal right not to comply. There can be no plausible belief in the right to ignore final orders one personally considers invalid. (See *In the Matter of Boyne, supra*, 2 Cal. State Bar Ct. Rptr. at p. 404.)

Thus, the court finds that given respondent's knowledge of the court order, his unexcused failure to comply with it constitutes a willful violation of section 6068, subdivision (b).

2. The Herron Matter (Case No. 07-O-13379)

Count Five – Failure to Communicate (Rule 3-500)

Count Five – Failure to Communicate (Bus. & Prof. Code, § 6068, subd. (m))

Rule 3-500 provides that a member must keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.

Section 6068, subdivision (m), provides that it is the duty of an attorney to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

The court dismissed Count Five without prejudice on the State Bar's oral motion at the beginning of trial in this matter.

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IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Mitigation

Two mitigating factors have been established in the record by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)⁸

Respondent was admitted to the practice of law in California on June 11, 1990, and did not engage in misconduct until mid-2004. Accordingly, he is entitled to mitigation for his more than 14 years of discipline-free practice. (Std. 1.2(e)(i).)

Respondent cooperated during the State Bar Court proceedings, including executing an extensive stipulation to facts in this matter. (Std. 1.2(e)(v).)⁹

B. Aggravation

Four aggravating factors have been established in the record by clear and convincing evidence. (Std. 1.2(b).)

Respondent engaged in multiple acts of misconduct. (Std. 1.2(b)(ii).)

Respondent's misconduct significantly harmed his former spouse and the administration of justice. (Std. 1.2(b)(iv).) Respondent's misconduct caused his former spouse stress in her personal and professional life and caused her to incur additional legal fees totaling about \$100,000. Respondent harmed the administration of justice by overburdening an already burdened court system with frivolous appeals and motions.

Respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) It is clear that respondent lacks an

⁸ All further references to standard or std. are to this source.

⁹ However, this mitigating circumstance is offset by respondent's lack of candor during his testimony in this proceeding. (See Aggravation, *infra*.) Furthermore, respondent stipulated to easily provable facts such as what occurred in the trial court proceedings, findings of the special master, orders of the trial court, and findings of the appellate court. This would also discount the weight to be given this mitigating factor.

understanding of the nature of his misconduct. Respondent showed absolutely no remorse for his actions, other than perhaps a lack of judgment for filing his “lunch break appeal.”

Respondent displayed a lack of candor during his testimony in this proceeding. (Std. 1.2(b)(vi).) In particular, the court found respondent’s testimony regarding the stipulation to the appointment of a special master lacking in candor.

V. DISCUSSION

In determining the appropriate discipline to recommend in this matter, the court looks at the purposes of disciplinary proceedings and sanctions. Standard 1.3 sets forth the purposes of disciplinary proceedings and sanctions as “the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession.”

In addition, standard 1.6 provides that the specific discipline for the particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions.

The standards provide a broad range of sanctions ranging from reproof to disbarment, depending upon the gravity of the offenses and the harm to the victim. (Standards 2.6 and 2.10.)

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

The court is “not bound to follow the standards in talismanic fashion. (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994, quoting *Howard v. State Bar* (1990) 51

Cal.3d 215, 221-222.) It is permitted to temper the letter of the law with considerations peculiar to the offense and the offender. In addition, the courts consider relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors.

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

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

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

In the instant matter, the State Bar urges that respondent be suspended from the practice of law for one year. Respondent, on the other hand, seeks the dismissal of all counts or a public admonishment.

The court finds guidance on the appropriate discipline in *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, which in many respects is quite similar to the instant matter.

In *Chesnut*, the attorney was actually suspended from the practice of law for six months, with two years' stayed suspension and three years' probation for violations of sections 6068(d)

and 6106. In a family law matter, the attorney misrepresented to a Texas judge and to a California judge that he had personally served the husband with the California dissolution pleadings. In aggravation, the court considered one prior instance of discipline (which had resulted in 15 days actual suspension) and lack of candor. The court found that the attorney's testimony in the State Bar Court proceeding stating that he had served papers on the husband was untruthful and therefore lacked candor. In mitigation, the attorney offered evidence of good character and pro bono community service.

Like Chesnut, respondent has not admitted to any wrongdoing. To further aggravate the situation, respondent's attestations in this proceeding that he had not stipulated to a special master in the Family Law Action at best lacked candor in that he unambiguously had so stipulated.

The court rejects respondent's repeated assertions throughout the course of this disciplinary proceeding that he was fighting to bring out the "truth." Rather, respondent's testimony was that of an individual seeking to cover his wrongdoing.

The court is greatly concerned by the nature of respondent's misconduct and his failure to acknowledge or appreciate the impropriety of his actions. In the interests of protection of the public, the courts and the legal profession, and in view of the minimal mitigating circumstances and the significant aggravating circumstances, the court recommends that respondent receive a lengthy period of suspension to impress upon him the seriousness of his wrongdoing.

VI. RECOMMENDED DISCIPLINE

It is hereby recommended that respondent **Michael Jude O'Brien**, State Bar Number 147414, be suspended from the practice of law in California for one (1) year, that execution of

that period of suspension be stayed, and that he be placed on probation¹⁰ for a period of two (2) years subject to the following conditions:

1. Respondent Michael Jude O'Brien is suspended from the practice of law for the first six (6) months of probation.
2. Respondent is to comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar, and all of the conditions of this probation.
3. Within thirty (30) days after the effective date of the Supreme Court order in this proceeding, respondent must contact the State Bar's Office of Probation in Los Angeles and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in-person or by telephone. Thereafter, respondent must promptly meet with the probation deputy as directed and upon request of the Office of Probation.
4. Respondent is to maintain, with the State Bar's Membership Records Office and the Office of Probation, his current office address and telephone number or, if no office is maintained, an address to be used for State Bar purposes (Bus. & Prof. Code, § 6002.1, subd. (a)(1)). In addition, respondent is to maintain, with the State Bar's Office of Probation, his current home address and telephone number (Bus. & Prof. Code, § 6002.1, subd. (a)(5)). Respondent's home address and telephone number are not to be made available to the general public unless his home address is also his official address on the State Bar's Membership Records. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in this information no later than 10 days after the change.

¹⁰ The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

5. Respondent is to submit written quarterly reports to the State Bar's Office of Probation no later than January 10, April 10, July 10, and October 10 of each year. Under penalty of perjury under the laws of the State of California, respondent must state in each report whether he has complied with the State Bar Act, the Rules of Professional Conduct of the State Bar, and all conditions of this 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 the quarterly reports, respondent is to submit a final report containing the same information during the last 20 days of his probation.

6. Subject to the assertion of any applicable privilege, respondent is to fully, promptly, and truthfully answer all inquiries of the State Bar's Office of Probation that are directed to him, whether orally or in writing, relating to whether he is complying or has complied with the conditions of this probation.

7. Within the first year of his probation, respondent is to attend and satisfactorily complete the State Bar's Ethics School and to provide satisfactory proof of his successful completion of that program to the State Bar's Office of Probation. The program is offered periodically at either 180 Howard Street, San Francisco, California 94105-1639 or at 1149 South Hill Street, Los Angeles, California 90015-2299. Arrangements to attend the program must be made in advance by calling (213) 765-1287 and by paying the required fee. This condition of probation is separate and apart from respondent's Minimum Continuing Legal Education ("MCLE") requirements; accordingly, he is ordered not to claim any MCLE credit for attending and completing this program. (Accord, Rules Proc. of State Bar, rule 3201.)

8. This probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. 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 him from the practice of law for one year will be satisfied.

Multistate Professional Responsibility Examination

It is also recommended that Michael Jude O'Brien be ordered to take and pass the Multistate Professional Responsibility Examination within one year after the effective date of this order and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period. Failure to do so may result in suspension. (Cal. Rules of Court, rule 9.10(b).)

California Rules of Court, Rule 9.20

It is further recommended that Michael Jude O'Brien be ordered to comply with rule 9.20 of the California Rules of Court and perform the acts specified in subdivisions (a) and (c) of that rule within thirty (30) and forty (40) calendar days, respectively, after the effective date of the Supreme Court's order imposing discipline in this matter.

Costs

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

Dated: April 20, 2011.

RICHARD A. PLATEL
Judge of the State Bar Court