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STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of	)	Case No.: 12-J-10617-LMA
	)	
<b>EARLE ARTHUR PARTINGTON,</b>	)	<b>DECISION</b>
	)	
Member No. 45731,	)	
	)	
<u>A Member of the State Bar.</u>	)	

**Introduction**<sup>1</sup>

On May 17, 2010, the United States Navy’s Office of the Judge Advocate General (Navy JAG) issued a letter decision finding that respondent **Earle Arthur Partington** had committed professional misconduct in that jurisdiction. Thereafter, the Navy JAG’s decision became final. As a result of that discipline, Respondent, who declined to attend the Navy JAG hearing, was suspended indefinitely from appearing before the Navy courts and boards.

Business and Professions Code section 6049.1, subdivision (a), provides, in pertinent part, that a certified copy of a final order by any court of record of any state of the United States, determining that a member of the State Bar committed professional misconduct in that jurisdiction, shall be conclusive evidence that the member is culpable of professional misconduct in this state. As a result, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated the above-entitled proceeding pursuant to Business and Professions Code section 6049.1, subdivision (b), and Rules of Procedure of the State Bar, rules 5.350-5.354. The court took judicial notice and admitted into evidence the Navy JAG’s May 17, 2010 decision.

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<sup>1</sup> Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

The issues in this proceeding are limited to: (1) the degree of discipline to be imposed upon Respondent in California; (2) whether, as a matter of law, Respondent's culpability in the Navy JAG proceeding would not warrant the imposition of discipline in California under the laws or rules applicable in California at the time of Respondent's misconduct in the Navy JAG proceeding; and (3) whether the Navy JAG proceeding lacked fundamental constitutional protections. (Section 6049.1, subd. (b)).

Pursuant to section 6049.1, subdivision (b), Respondent bears the burden of establishing either: (1) that the conduct for which he was disciplined before the Navy JAG proceeding would not warrant the imposition of discipline in California; or (2) that the Navy JAG proceeding lacked fundamental constitutional protection.

While it has not been established that the Navy JAG proceeding lacked fundamental constitutional protection, this court concludes that only one of the Navy JAG's two culpability findings warrants the imposition of discipline in California. In light of Respondent's lengthy legal career with no prior record of discipline, this court finds, among other things, that the appropriate level of discipline is a one-year period of stayed suspension.

#### **Significant Procedural History**

The State Bar initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on July 14, 2015. Respondent filed a response to the NDC on August 14, 2015.

The State Bar was represented by Deputy Trial Counsel Heather E. Abelson. Respondent represented himself. A two-day trial was held on November 2 and 3, 2015. This matter was taken under submission on November 3, 2015.

#### **Findings of Fact and Conclusions of Law**

Respondent was admitted to the practice of law in California on January 15, 1970, and has been a member of the State Bar of California at all times since that date.

## **Facts**

On April 29, 2006, Respondent entered an appearance as a civilian defense counsel in the general court martial of Stewart Toles, II, a U.S. Navy sailor stationed in Hawaii. On July 25, 2006, pursuant to a pretrial agreement, Toles pled guilty to several criminal charges, and was ultimately sentenced.

On March 23, 2007, Respondent filed an appellate brief before the United States Navy-Marine Corps Court of Criminal Appeals on behalf of Toles in the criminal matter *United States v. AMI Stewart C. Toles, II, USN*, NMCCA 200602374 (2007). In the appellate brief, Respondent stated, among other things, that: (1) the military judge “dismissed” the 18 U.S.C. section 1801 specifications;<sup>2</sup> (2) the military judge “acquitted” Respondent’s client on those specifications prior to the findings; (3) the military judge “ruled” that the “video voyeurism specifications ... did not allege that offense;” and (4) Respondent’s client “moved for neither an acquittal nor a dismissal of these specifications.” (Exhibit 6, pp. 4, 7-8.)

On October 30, 2007, the United States Navy-Marine Corps Court of Criminal Appeals issued its opinion affirming the military judge’s findings and sentence. In the opinion, the court found that Respondent’s appellate brief contained “wholly unsupported allegations of error,” “disingenuous” arguments, and misrepresentations of the trial record. (Exhibit 7, p. 4.) Specifically, the court found: (1) the military judge did not dismiss the 18 U.S.C. section 1801 offenses; (2) the military judge did not acquit Respondent’s client on the 18 U.S.C. section 1801 offenses prior to the findings; (3) the military judge did not rule that the 18 U.S.C. section 1801

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<sup>2</sup> 18 U.S.C. section 1801 applies to acts of video voyeurism. This section applies to those in the special maritime and territorial jurisdiction of the United States that intentionally capture images of individuals’ private areas when such individuals have a reasonable expectation of privacy, and without their consent. (18 U.S.C. section 1801, subd. (a).)

offenses failed to state an offense; and (4) Respondent's client did in fact move to dismiss the 18 U.S.C. section 1801 offenses. (Exhibit 7, p. 4.)

On September 22, 2008, the clerk of the Court of Criminal Appeals forwarded the opinion to the Assistant Judge Advocate General. On October 10, 2008, Respondent was advised by letter that a complaint had been filed with the Navy Rules Counsel (Rules Counsel) by the United States Navy-Marine Corps Court of Criminal Appeals.

On June 18, 2009, the Rules Counsel appointed Captain Robert Porzeinski, JAGC, USNR (Captain Porzeinski), to conduct a preliminary inquiry into the allegations of professional misconduct by Respondent. On July 16, 2009, Captain Porzeinski completed the preliminary inquiry. Captain Porzeinski concluded that Respondent violated rules 3.1 (Meritorious Claims and Contentions) and 3.3 (Candor and Obligation) of JAG Instruction 5803.1C, and recommended that a formal ethics investigation be convened.

On October 6, 2009, the Rules Counsel appointed Captain Robert Blazewick, JAGC, USN (Captain Blazewick), to conduct a formal ethics investigation into the allegations of professional misconduct by Respondent. That same day, Respondent was notified by letter of the commencement of the formal investigation and a list of professional conduct violations he had allegedly committed. Respondent was also advised of his rights, including his right to request a hearing before the Investigative Officer, his right to inspect all evidence, his right to present written or oral statements or materials, and his right to call witnesses and be assisted by counsel.

From October 29, 2009 to January 11, 2010, Respondent and Captain Blazewick exchanged letters and emails regarding the formal ethics investigation and Respondent's right to a hearing. In a letter from Respondent to Captain Blazewick, dated January 6, 2010, Respondent stated that he had "no intention" of participating in any hearing.

On January 11, 2010, Respondent was advised in writing that a hearing would be held on January 19, 2010. The hearing, however, was not ultimately held because Respondent refused to participate.

On February 19, 2010, Captain Blazewick presented the results of the formal ethics investigation to the Rules Counsel, along with a recommendation that the formal investigation be forwarded to the Navy JAG for further action.<sup>3</sup> The results of the formal ethics investigation suggested that Respondent violated Rules 3.1 and 3.3 of JAG Instruction 5803.1C.

On May 17, 2010, Vice Admiral James Houck, JAGC, USN, of the Navy JAG, issued a decision against Respondent. In this decision, Vice Admiral Houck found, by clear and convincing evidence, that Respondent violated Rules 3.1 and 3.3 of JAG Instruction 5803.1C. Specifically, Respondent was found to have taken “two misstatements made by the military judge when he said he was entering a ‘finding of not guilty’ with respect to certain specifications and, in turn, grossly exaggerated these misstatements in [Respondent’s] appellate brief to the point that [Respondent] intentionally misrepresented the posture of the case, by claiming the military judge dismissed and/or acquitted [Respondent’s] client of the offenses at issue.” (Exhibit 2, p. 3.) Vice Admiral Houck explained that the military judge made it clear on numerous occasions that he was actually rejecting Respondent’s client’s attempt to plead guilty, and was instead entering pleas of not guilty on the client’s behalf.<sup>4</sup> Vice Admiral Houck also found that it was “abundantly clear” that the military judge never dismissed the specifications nor otherwise acquitted Respondent’s client. (Exhibit 2, p. 4.)

Finding that Respondent filed an appellate brief containing statements he knew to be both false and misleading, Vice Admiral Houck indefinitely suspended Respondent from practicing

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<sup>3</sup> Captain Blazewick’s report is incorrectly dated February 19, 2009. The evidence before this court indicates the report was actually prepared on or about February 19, 2010.

<sup>4</sup> Vice Admiral Houck pointed out that Respondent acknowledged this fact on the record.

law in any and all proceedings conducted under the supervision and cognizance of the Department of the Navy.

On November 16, 2010, in an effort to obtain relief from the Navy JAG's decision, Respondent filed a complaint for damages, declaratory judgment, and injunctive relief in the United States District Court District of Columbia, *Partington v. Houck, et al*, case no. 1:10-cv-01962-FJS. On January 10, 2012, the District Court entered judgment against Respondent.

On February 6, 2012, Respondent filed an appeal of the District Court's judgment in the United States Court of Appeals for the District of Columbia Circuit, case no. 12-5038. On July 23, 2013, the Court of Appeals entered judgment affirming the District Court's opinion.

On September 30, 2013, Respondent filed a petition for writ of mandamus in the United States Supreme Court, case no. 13-414. On December 2, 2013, the United States Supreme Court denied Respondent's petition.

On March 10, 2014, Respondent filed a motion in the United States District Court District of Columbia, to declare the Court of Appeals' judgment void for lack of subject matter jurisdiction. On March 14, 2014, the District Court issued an order denying Respondent's motion.

On March 24, 2014, Respondent filed an appeal of the District Court's order in the United States Court of Appeals for the District of Columbia Circuit. On October 3, 2014, the Court of Appeals granted summary affirmance of the District Court's order.

On December 8, 2014, the Court of Appeals denied Respondent's request for rehearing. On February 18, 2015, Respondent filed a petition for writ of certiorari with the United States Supreme Court, case no. 14-1022. On April 20, 2015, the United States Supreme Court denied Respondent's petition.

On November 9, 2011, the Supreme Court of Hawaii issued a reciprocal discipline order based on the discipline imposed by the Navy JAG. On June 7, 2012, the District of Columbia Court of Appeals issued a reciprocal discipline order based on the discipline imposed by the Supreme Court of Hawaii. And on October 17, 2013, the Supreme Court of the State of Oregon issued a reciprocal discipline order based on the discipline imposed by the Supreme Court of Hawaii.

The record clearly demonstrates that Respondent declined multiple opportunities to participate in the Navy JAG hearing and proceedings. Based on the evidence before the court, it has not been established that the Navy JAG proceedings lacked fundamental constitutional protection.

### **Conclusions of Law**

#### **Violations of the Rules Regulating Practitioners Appearing Before the United States Navy-Marine Corps Court of Criminal Appeals**

As noted above, the Navy JAG found that Respondent violated rules 3.1 and 3.3 of JAG Instruction 5803.1C. Rule 3.1 of JAG Instruction 5803.1C states, in part, that an attorney “shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.” (Exhibit 3, p. 71.) Rule 3.3 of JAG Instruction 5803.1C states, in part, that an attorney shall not knowingly make a false statement of material fact or law to a tribunal. (Exhibit 3, p. 73.)

#### **Application of California Laws**

The court finds, as a matter of law, that some of Respondent’s culpability in the Navy JAG proceeding would warrant the imposition of discipline in California under the laws or rules applicable in this State at the time of Respondent’s misconduct as described in the Navy JAG proceeding, as follows:

Section 6068, subd. (d) [Attorney's Duty to Employ Means Consistent with Truth]

Section 6068, subdivision (d), provides that an attorney has a duty to employ those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of law or fact. Respondent willfully violated section 6068, subd. (d) by intentionally presenting disingenuous arguments and misrepresentations of the record of trial to the United States Navy-Marine Corps Court of Criminal Appeals in his appellate brief.<sup>5</sup>

Rule 5-200(A) [Trial Conduct, Consistent with Truth]

The State Bar alleged in the NDC that Rule 3.1 of JAG Instruction 5803.1C is analogous to rule 5-200. This court disagrees. Rule 3.1 of JAG Instruction 5803.1C precludes attorneys from, among other things, asserting or controverting an issue unless there is a basis for doing so that is not frivolous. Rule 5-200, on the other hand, does not apply to bringing and maintaining frivolous proceedings or issues. Instead, rule 5-200 focuses on employing means consistent with the truth, making honest representations to the court, and not seeking to mislead the judge.<sup>6</sup>

Comparing Rule 3.1 of JAG Instruction 5803.1C to rule 5-200 is like comparing apples to oranges. An attorney that raises or maintains a frivolous issue/action has not inherently employed means inconsistent with the truth. Similarly, all attorneys that employ means inconsistent with the truth are not maintaining frivolous actions. Accordingly, this court concludes that Respondent's violation of rule 3.1 of JAG Instruction 5803.1C does not demonstrate a violation of rule 5-200(A).

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<sup>5</sup> The State Bar alleged that Respondent's violation of rule 3.3 of JAG Instruction 5803.1C also demonstrates a violation of section 6106 [moral turpitude]. However, the appropriate resolution of this case does not depend on how many rules of professional conduct or statutes proscribe the same conduct. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.) Respondent's violation of rule 3.3 of JAG Instruction 5803.1C was more akin to an attempt to mislead a judge, in violation of section 6068, subdivision (d).

<sup>6</sup> Rule 5-200 has five subsections labeled (A) – (E). The NDC did not specify which subsection is alleged to be analogous to rule 3.1 of JAG Instruction 5803.1C. Upon review of each of these subsections, it's clear that none of them are analogous.

The court notes that a more analogous California rule/section appears to be section 6068, subdivision (c), which provides that an attorney has a duty to counsel or maintain those proceedings, actions, or defenses only as appear to the attorney legal or just. This section, however, does not apply to attorneys defending an individual charged with a public offense, as was the case here. Accordingly, this section also appears to be inapplicable.

### **Aggravation<sup>7</sup>**

#### **Lack of Insight**

Respondent demonstrated little insight or understanding of his own misconduct. Although he was fully aware of the underlying proceedings and chose not to participate, Respondent continues to argue that the Navy JAG proceedings were a sham. This court did not find credible Respondent's assertions that the Court of Appeals was blaming him because they wished to cover up the fact that the Navy prosecutors botched the underlying criminal case. Further, Respondent takes no personal responsibility for the underlying misconduct and continually shifts blame to others. Respondent's lack of insight and understanding regarding the present misconduct warrant some consideration in aggravation.

### **Mitigation**

#### **No Prior Record of Discipline (Std. 1.6(a).)**

Respondent was admitted to practice law in California in 1970, and has no prior record of discipline. His 37 years of discipline-free conduct prior to the present misconduct warrants highly significant consideration in mitigation. (*Friedman v. State Bar* (1990) 50 Cal.3d 235, 245 [more than 20 years of practice with an unblemished record is highly significant mitigation].)

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<sup>7</sup> All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

## Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d. 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d. 1016, 1025; Std. 1.1.)

In determining the level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d. 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628). Second, the court looks to decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d. 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

In this case, the standards call for the imposition of a sanction ranging from actual suspension to disbarment. Standard 2.12(a) provides that disbarment or actual suspension is the presumed sanction for a violation of section 6068, subdivision (d).

The standards, however, “do not mandate a specific discipline.” (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) It has long been held that the court is “not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender.” (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silvertown* (2005) 36 Cal.4th 81, 92.)

The State Bar requested, among other things, that Respondent be actually suspended for 30 days. Respondent, on the other hand, argued that his case should be dismissed. Turning to the applicable case law, the court finds some guidance in *Grove v. State Bar* (1965) 63 Cal.2d 312; and *Bach v. State Bar* (1987) 43 Cal.3d 848.

In *Grove*, the attorney, who had previously been privately reprovved, was found to have intentionally misled a judge by failing to inform the judge that the opposing party could not be present at a hearing and had requested a continuance. In response to Grove's contention that a failure to convey a request for continuance does not rise to the level of "misleading," the Supreme Court noted that "[n]o distinction can ... be drawn among concealment, half-truth, and false statement of fact. [Citation]." (*Grove v. State Bar, supra*, 63 Cal.2d 312, 315.) Noting that Grove did not plan to mislead the judge and that the misconduct was a momentary decision sparked by an overzealous regard for his client's interest, the Supreme Court ordered a public reproof.

In *Bach*, the attorney intentionally misled a judge regarding whether he was ordered to produce his client at a mediation hearing. In aggravation, the attorney had a prior public reproof, and demonstrated behavior that threatens the public and undermines its confidence in the legal profession. There were no mitigating factors. Bach was suspended for one year, execution of the suspension was stayed, and he was placed on probation for three years, with a 60-day actual suspension.

In the present case, Respondent filed an appellate brief containing statements he knew to be both false and misleading. Unlike *Grove* and *Bach*, Respondent has no prior record of discipline over a lengthy period of practice. Similar to *Grove*, the evidence indicates that Respondent's conduct was motivated by his overzealous representation of his client's interests. Outside of the false and misleading statements in his appellate brief, it appears that Respondent represented his client in a competent and conscientious manner.

Both *Grove* and *Bach* were issued prior to the implementation of the standards. That said, the limited scope of the present matter, coupled with Respondent's 37 years of practice with no prior record of discipline, justify deviation from the presumed sanction laid out in standard

2.12(a). In view of Respondent's misconduct, the case law, the standards, and the mitigating and aggravating factors, this court concludes that, among other things, a one-year period of stayed suspension is appropriate, and provides adequate protection for the courts, the public, and the legal profession.

### **Recommendations**

It is recommended that respondent **Earle Arthur Partington**, State Bar Number 45731, be suspended from the practice of law in California for one year, that execution of that period of suspension be stayed, and that Respondent be placed on probation<sup>8</sup> for a period of two years subject to the following conditions:

1. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of Respondent's probation.
2. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including Respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, Respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.
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 of the conditions of Respondent's probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 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 or any probation monitor that are directed to Respondent personally or in writing, relating to whether Respondent is complying or has complied with Respondent's probation conditions.
5. Within 30 days after the effective date of discipline, Respondent must contact the Office of Probation and schedule a meeting with Respondent's assigned probation

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<sup>8</sup> 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.)

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. During the period of probation, Respondent must promptly meet with the probation deputy as directed and upon request.

6. Within one year after the effective date of the discipline herein, Respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and Respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

At the expiration of the probation period, if Respondent has complied with all conditions of probation, Respondent will be relieved of the stayed suspension.

### **Multistate Professional Responsibility Examination**

It is recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the Supreme Court order imposing discipline in this matter and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

### **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: January 13, 2016

  
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LUCY ARMENDARIZ  
Judge of the State Bar Court

**CERTIFICATE OF SERVICE**

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of San Francisco, on January 13, 2016, I deposited a true copy of the following document(s):

**DECISION**

in a sealed envelope for collection and mailing on that date as follows:

- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

EARLE ARTHUR PARTINGTON  
1001 BISHOP ST STE 1330  
HONOLULU, HI 96813

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

HEATHER E. ABELSON, Enforcement, San Francisco

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on January 13, 2016.



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Bernadette Molina  
Case Administrator  
State Bar Court