FILED APRIL 2, 2013

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of	)	Case No.: **12-O-13459-LMA**
JERRY F. CHILDS,	)	**DECISION**
Member No. 218457,	)	
A Member of the State Bar.	)	

Introduction[1]

In this contested disciplinary proceeding, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) charges that respondent JERRY F. CHILDS engaged in an act involving moral turpitude, dishonesty, or corruption (§ 6106) when he sent opposing counsel an expert witness list and an expert witness declaration that respondent knew were false and misleading. For the reasons set forth *post,* the court finds that respondent is culpable of the charged misconduct and that the appropriate level of discipline for the found misconduct is one year's stayed suspension and two years' probation on conditions, including a 60-day period of (actual) suspension.

The State Bar was represented by Deputy Trial Counsel Christine Souhrada. Respondent appeared in propria persona.

/ / /

[1] 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.

Significant Procedural History

The State Bar filed the notice of disciplinary charges (NDC) in this proceeding on September 12, 2012. Thereafter, respondent filed a response to the NDC on October 5, 2012. A one-day trial was held on January 18, 2013. The court took the matter under submission for decision on January 18, 2013.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on January 4, 2002, and has been a member of the State Bar of California since that time.

Facts

On November 23, 2009, Patricia Foronda retained Attorney Jeffrey D. Bohn to bring medical malpractice claims against Kaiser Foundation Hospitals and others (hereafter collectively referred to as Kaiser) for allegedly failing to timely diagnose and treat her deceased husband, Richard Foronda, for a stroke. Thereafter, Attorney Bohn filed a demand for arbitration against Kaiser for Foronda in September 2010.

In about October 2011, Attorney Bohn hired respondent as an associate attorney in Bohn's law office. Soon thereafter, respondent began working on Foronda's case. According to respondent, to succeed on her medical malpractice claims, Foronda was required to prove by testimony from one or more medical experts (1) that Kaiser breached the applicable standard of care when it treated Richard Foronda and (2) that Kaiser's breach of the standard of care caused, within a reasonable medical probability, Richard Foronda's death.

In November 2011, respondent reviewed Richard Foronda's medical records with a Dr. Risley. Dr. Risley told respondent that she did not believe that Kaiser had beached the applicable standard of care. In November 2011, respondent also spoke with Adrianna Padilla, M.D., about Kaiser's treatment of Richard Foronda, and Dr. Padilla told respondent that she did

not see a breach in the standard of care. And, perhaps more importantly, Dr. Padilla told respondent that she was *not* an expert and has never held herself out as an expert.

Also, in November 2011, Kaiser served on Foronda a demand to exchange information concerning expert trial witnesses (Code Civ. Proc., § 2034.010, et seq.). That demand specified December 5, 2011, as the date on which the parties were required to exchange expert witness lists and expert witness declarations. Kaiser did not receive an expert witness list or an expert witness declaration from Foronda on December 5, 2011. Accordingly, on January 5, 2012, Kaiser's attorney, Andrew S. Miller, faxed a letter to respondent requesting that Foronda immediately dismiss her demand for arbitration against Kaiser.

On January 11, 2012, respondent faxed, to Attorney Miller, an expert witness designation (i.e., expert witness list) and an expert witness declaration. Both the expert witness designation and the expert witness declaration are dated December 12, 2011, and are signed by respondent on behalf of the Law Offices of Jeffrey D. Bohn, which is the "Attorney for claimant, Patricia Foronda." Moreover, in the expert witness designation, Dr. Padilla is listed as Patricia Foronda's retained expert. And, in the expert witness declaration, respondent stated that "As to retained expert, Adriana Padilla, MD, I am informed and believed that the following is true:

* * *

> B. General Substance of Testimony
>
> Dr. Padilla is expected to testify as to the standard of care for the Family Medicine in the local community, and to offer an opinion regarding whether Kaiser … met the standard of care with regard to the treatment of Richard Foronda. Dr. Padilla will also offer opinion testimony regarding the standard of care and causation with relation to the death of Richard Foronda.
>
> C. Agreement to Testify
>
> Dr. Padilla has agreed to testify and is sufficiently familiar with the current action to give a meaningful deposition concerning [her] opinions.

(Ex. 1, p. 2-3 [which are Bate stamped 000528 and 000529, respectively].)

On January 11, 2012, when respondent faxed the expert witness designation and the expert witness declaration to Attorney Miller, respondent knew that the designation and declaration were false and misleading. Specifically, respondent knew that Dr. Padilla had not been retained as an expert witness for Patricia Foronda in the *Foronda v. Kaiser* arbitration; that Dr. Padilla had not agreed to testify in the *Foronda v. Kaiser* arbitration; and that Dr. Padilla was not sufficiently familiar with the *Foronda v. Kaiser* arbitration to give a meaningful deposition regarding her expert opinions.

As respondent admitted in a written response to a State Bar request for information, respondent knew there was no expert witness who would testify for Patricia Foronda on the standard-of-care issue; nevertheless, respondent submitted "an expert exchange" (i.e., the expert witness designation and the expert witness declaration dated December 12, 2011) to Attorney Miller "in order to preserve Ms. Foronda's rights." (Ex. 2, p. 3 [which is Bate stamped 001737].) According to respondent, he "did this on the advice of [Attorney] Bohn," his employer. (Ex. 2, p. 3 [which is Bate stamped 001737].)

On January 13, 2012, Kaiser submitted, to the arbitrator presiding over the *Foronda v. Kaiser* arbitration, a motion in limine for an order precluding claimant Patricia Foronda from calling any expert witnesses at the arbitration hearing and a motion to dismiss the arbitration. In its motion in limine, Kaiser asserted that Foronda should be precluded from calling any expert witnesses at the arbitration hearing because she unreasonably failed to serve an expert witness list or an expert witness declaration on Kaiser on or before December 5, 2011. In its motion to dismiss, Kaiser correctly asserted that, if the arbitrator granted the motion in limine to preclude Foronda from calling any expert witnesses, then Foronda would be unable to establish her medical malpractice claims and the arbitration proceeding should be dismissed.

On about January 17, 2012, respondent submitted, on behalf of Foronda, an opposition to Kaiser's motion to dismiss and a motion to continue the arbitration hearing. In those pleadings, respondent did not disclose that Foronda's expert witness designation and the expert witness declaration dated December 12, 2011, were false and misleading. Instead, respondent effectively repeated the false assertion that Foronda had a designated expert witness by contending that Foronda's expert witness could not offer a complete opinion on the matter because Kaiser had failed to produce the recording of September 18, 2009, telephone conversation between Richard Foronda and Kaiser appointment and advice call center representative.

On January 20, 2012, the arbitrator signed an amended order in which he denied Foronda's motion to continue the arbitration hearing and granted both Kaiser's motion in limine to preclude Foronda from calling any expert witnesses and motion to dismiss arbitration.

Conclusions of Law

Count One - (§ 6106 [Moral Turpitude])

Section 6106 provides: "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his [or her] relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension. …"

The record clearly establishes that respondent engaged in an act involving moral turpitude in willful violation of section 6106 on January 11, 2012, when he faxed the expert witness designation and the expert witness declaration dated December 12, 2011, to Attorney Miller with *actual knowledge* (1) that the designation *falsely* designated Dr. Padilla as the retained expert witness for Patricia Foronda in the *Foronda v. Kaiser* arbitration and (2) that the expert witness declaration *falsely* stated that respondent was informed and believed that Dr. Padilla had agreed to testify in the *Foronda v. Kaiser* arbitration and that Dr. Padilla was

sufficiently familiar with the *Foronda v. Kaiser* arbitration to give a meaningful deposition regarding her expert opinions. Moreover, the record clearly establishes that this conduct also involves dishonesty in willful violation of section 6106 because respondent faxed the false and misleading expert witness designation and expert witness declaration to Attorney Miller in an attempt to prevent the arbitrator from dismissing the arbitration and to obtain a continuance.

Aggravation[2]

The State Bar did not establish any aggravating circumstances by clear and convincing evidence.

Mitigation

No Prior Record of Discipline (Std. 1.2(e)(i).)

Respondent is entitled to mitigation based on his 10 years of misconduct free practice even though the present misconduct is serious. As the review department noted in *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 106, fn. 13, the Supreme Court has repeatedly given mitigation under standard 1.2(e)(i) for no prior record of discipline in cases in which the misconduct was serious. (E.g., *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 317; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029.)

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 legal profession, and to maintain the highest possible professional standards for attorneys. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate 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*

[2] All references to standards (stds.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Koehler (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Second, the court looks to decisional law for guidance. (*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 the present proceeding, standard 2.3 is the applicable standard. Standard 2.3 provides:

> Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law.

The generalized language of standard 2.3 provides little guidance to the court. (*In re Brown* (1995) 12 Cal.4th 205, 220; *In re Morse* (1995) 11 Cal.4th 184, 206.) Nonetheless, it remains clear that attorneys have a duty to refrain from misleading and deceptive acts without qualification or exception. (§ 6068, subd. (d); *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 315.) Thus, "deceit by an attorney is reprehensible misconduct whether or not harm results and without regard to any motive or personal gain." (*Codiga v. State Bar* (1978) 20 Cal.3d 788, 793.) In fact, the Supreme Court has repeatedly rejected the contention that an attorney's misconduct is less egregious because the attorney was representing or protecting a client's interests. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090.) In short, the zealous representation of a client does not include practicing deceit on the client's behalf. (*In the Matter of Katz* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 430, 438.)

Acts of moral turpitude include an attorney's false or misleading statements. And, acts of moral turpitude include not only affirmative misrepresentations, but also concealment. (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315.) "No distinction can therefore be drawn among concealment, half-truth, and false statement of fact. [Citation.]" (*Ibid.*)

The court is aware that cases involving a single instance of deliberately giving false testimony or making a knowingly false statement have resulted in discipline as low as a reproval. However, in those cases there were substantial mitigating circumstances that are not present here. (E.g., *Mushrush v. State Bar* (1976) 17 Cal.3d 487 [public reproval for one instance of false statements in obtaining a court order]; *Sullins v. State Bar* (1975) 15 Cal.3d 609, 622 [public reproved for non disclosure of material information].)

The court finds *In the Matter of Mitchell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332 and *Bach v. State* Bar (1987) 43 Cal.3d 848 to be instructive on the appropriate level of discipline. In *Mitchell*, the attorney was placed on one year's stayed suspension and one year's probation on conditions, including a sixty-day (actual) suspension, for committing acts of dishonesty in violation of section 6106. In that case, the attorney knowingly misrepresented his education on a resume he sent to various law firms and by failing to correct the misrepresentation during an interview with a law firm. In aggravation, the attorney in *Mitchell* gave deceitful answers to interrogatories served on him by the State Bar. In mitigation, the court gave the attorney limited mitigation for his five years of discipline free practice and for a single letter about his good character. The attorney was also given some mitigating credit because of his personal problems (i.e., stress over his wife's loss of a child in the eighth month of pregnancy and over his wife's subsequent pregnancy); because his misconduct did not occur during the actual practice of law; and because there was only minimal harm.

In *Bach*, the attorney was placed on one year's stayed suspension and three years' probation on conditions, including a 60-day (actual) suspension. In that case, the attorney mislead a judge by falsely stating that he had not been ordered to have his client appear for mediation. The attorney in *Bach* had previously been publicly reproved for communicating with an adverse party who was represented by an attorney.

On balance, the court concludes that the appropriate level of discipline is one year's stayed suspension and two years' probation on conditions including a 60-day (actual) suspension. This discipline is necessary to impress upon respondent that, without qualification or exception, it is unacceptable for an attorney to deliberately make a false or misleading statement.

Recommendations

Discipline

The court recommends that respondent JERRY F. CHILDS, State Bar number 218457, be suspended from the practice of law in the State of California for one year, that execution of the one-year suspension be stayed, and that he be placed on probation for a period of two years subject to the following conditions:

1. Childs is suspended from the practice of law for the first 60 days of probation.

2. Childs 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 30 days after the effective date of the Supreme Court order in this proceeding, Childs must contact the State Bar's Office of Probation in Los Angeles and schedule a meeting with Childs's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, Childs must meet with the probation deputy either in-person or by telephone. Thereafter, Childs must promptly meet with the probation deputy as directed and upon request of the Office of Probation.

4. Childs is to maintain, with the State Bar's Membership Records Office in San Francisco and Office of Probation in Los Angeles, 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, Childs 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)). Childs'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).) Childs 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.

5. Childs is to submit written quarterly reports to the State Bar's Office of Probation in Los Angeles 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, Childs 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 30 days, that report must be submitted on the next following quarter date, and cover the extended period.

In addition to the quarterly reports, Childs 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, Childs 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, Childs must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of his successful completion of that program to the State Bar's Office of Probation in Los Angeles. 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 Childs'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 in this matter. At the expiration of the period of this probation, if Childs 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 and that suspension will be terminated.

Professional Responsibility Examination

The court further recommends that respondent JERRY F. CHILDS be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and to provide proof of his passage of that examination to the State Bar's Office of Probation in Los Angeles within one year after the effective date of the Supreme Court order in this matter. Failure to pass the MPRE within the specified time may result, without further hearing, in respondent's suspension until passage. (*Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8; see also Cal. Rules of Court, rule 9.10(b); Rules Proc. of State Bar, rule 5.161(A)(2), 5.162(A)&(E).)

Costs

Finally, the court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that those costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: April ___, 2013

____
LUCY ARMENDARIZ
Judge of the State Bar Court