



STATE BAR COURT CLERK'S OFFICE
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STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 13-O-14606-LMA
)	
LORI JO SKLAR,)	
)	DECISION
Member No. 170218,)	
)	
<u>A Member of the State Bar.</u>)	

Introduction¹

In this contested disciplinary matter, respondent Lori Jo Sklar is charged with three counts of misconduct emanating from her representation of the plaintiffs in a class action lawsuit. The alleged misconduct includes seeking to mislead a judge; making a misrepresentation to a judge, constituting moral turpitude; and failing to obey court orders.

Having considered the facts and the law, the court finds Respondent culpable on two of the three counts, and recommends, among other things, that she be suspended for a period of thirty days.

Significant Procedural History

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) against Respondent on December 22, 2014. Respondent filed her response to the NDC on January 12, 2015.

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.

The State Bar was represented by Senior Trial Counsel Anthony Garcia and Deputy Trial Counsel Jamie Kim. Attorneys James Ham and Art Barsegyan represented Respondent. On August 13, 2015, the parties filed a stipulation of facts. The stipulation, however, was extremely limited and only included three facts.

A four-day trial in this matter was held on August 18 and 19, and September 10 and 11, 2015. This matter was submitted for decision on September 11, 2015.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on June 2, 1994, and has been a member of the State Bar of California at all times since that date.

Case No. 13-O-14606 – The *Elihu v. Toshiba* Class Action Matter

Facts

In February 2005, Respondent and co-counsel filed a class action lawsuit against Toshiba America Information Systems, Inc. (Toshiba), in a matter entitled *Elihu v. Toshiba*, Los Angeles Superior Court, case no. BC 328556. The parties agreed on a settlement in principal in April 2006. Thereafter, a protracted litigation occurred over Respondent's fees, as she sought fees in excess of \$20 million.

Respondent's Representations Regarding Her Fees

In August 2006, Respondent filed a declaration in support of the class action settlement and attached as an exhibit the "Notice of Pendency and Proposed Class Settlement of Class Action." In this notice it stated, among other things, that Respondent had "offered evidence that the benefit of the settlement is at least \$98,975,862 and believes that a reasonable fee for Class Counsel is 25% of that benefit. [Respondent] will seek legal fees in that amount, to be

apportioned between her and [co-counsel] by the Court.” (Exh. 15, p. 51.) Twenty-five percent of \$98,975,862 is \$24,743,965.50.²

On October 16, 2006, Dean Zipser, attorney for Toshiba, lodged an updated Class Notice and Settlement Agreement (Class Notice). The Class Notice stated that counsel (including Respondent) “have stated their approval of this form” and that the court approved the form on October 10, 2006. (Exh. 1, p. 2.) The Class Notice stated that Respondent’s co-counsel will ask for attorney fees and expenses of \$1,125,000, and that Toshiba will not oppose this request and has agreed to pay up to that amount. (Exh. 1, p. 10.) The Class Notice also stated that Sklar Law Offices will ask the court for attorney fees “in the amount of \$24,743,965.50, less whatever the Court awards [co-counsel] for its attorneys’ fees.” (Exh. 1, p. 10.) The Class Notice further noted that Toshiba would oppose Respondent’s requested attorney fees.

On January 26, 2007, Respondent was present at a court hearing where the court told Respondent’s counsel, “...do you really think that I’m going to allow this to proceed and give [Respondent] the benefit of \$24 million in fees without having her be deposed, without having her produce any documents? Do you really think I’m going to do that?” (Exh. 1017, p. 5.) The court later said, “The amount you want is staggering, and I think it has to be - - it has to be scrutinized before we get this - - before I approve this kind of an award.” (Exh. 1017, p. 7.)

On August 15, 2007, Respondent was present in court when her counsel told the court that Respondent will be claiming a percentage of the recovery in the “neighborhood of \$24 million.” (Exh. 1022, p. 17.)

On February 1, 2008, Respondent filed a fee petition on her own behalf. Respondent’s petition requested \$24,743,965.50 plus expenses if fees were calculated as 25 percent of the

² In this same document, it was represented that Respondent’s co-counsel would be seeking \$1,125,000 in attorney fees and expenses.

settlement value, or \$7,847,362.50 plus \$410,383.53 in expenses under the “lodestar” approach.³ (Exh. 4, p. 25.)

On April 24, 2009, Respondent was present in court when her counsel told the court that Respondent was asking for \$22 million as part of a percentage-based attorney fee. (Exh. 52, p. G-14.)

On April 5, 2010, in open court, Respondent stated that her fee petition was for \$12 million. Respondent then inexplicably asserted that she had never asked for “20-some million dollars” in attorney fees. (Exh. 7, p. 3.) The court challenged Respondent’s statement, and the following exchange transpired:

The Court: And are you saying to me never in this case have you asked for more than \$12 million in fees?

Respondent: I’ve never - - other than what has been contained in the fee petition - -

The Court: Ms. Sklar, can I not get a yes or no answer? Are you telling me that never in this case have you asked for more than \$12 million in fees?

Respondent: Your Honor, I’ve simply set forth - -

The Court: Okay. Ms. Sklar, I asked you - - can you answer that question with a yes or no? Have you ever asked for more than \$12 million in attorney’s fees for your services to this class?

Respondent: I have never asked for more than what is set forth in my fee petition.

The Court: Which is what?

Respondent: Which is roughly \$12 million.

(Exh. 7, p. 4.)

On June 30, 2010, the court issued its order regarding Respondent’s application for attorney fees and costs. In that order, the court concluded that Respondent’s recent

³ The lodestar method is generally determined by multiplying the number of hours worked with the prevailing hourly rate, as adjusted based on the degree of skill and difficulty involved in the case. (See Black’s Law Dict. (7th ed. 1999) p. 952, col. 2.)

representations that she had never asked for more than \$12 million in attorney fees were not truthful. The court awarded Respondent's law firm \$176,900 in total fees.⁴

Violation of Court Orders

Due to the exceptionally large amount of attorney fees sought by Respondent, the court permitted Toshiba to conduct discovery relating to the amount of time Respondent actually worked on the matter. After over a year of contentious discovery, Toshiba brought a motion for sanctions, alleging that Respondent had deleted or destroyed files that were responsive to an earlier court order that Respondent produce her time records in their native format.

On August 15, 2007, a hearing was held on Toshiba's motion for sanctions. The August 15, 2007 minute order required Respondent to agree on a neutral expert with Toshiba, and split the cost with Toshiba. The court ordered a forensic inspection of Respondent's computer. Within 30 days, the neutral expert was to search Respondent's backup files. Respondent was to permit the expert, selected and paid by Toshiba, to search Respondent's hard drives to recover time record files, including metadata, related to the class action. Respondent was allowed to redact all privileged information from the files. Respondent appeared in person and heard the court's order.

Respondent had some issues and objections with the way the court-ordered inspections were to take place, including but not limited to protecting her confidential information. Following a June 24, 2008 status conference, the court entered another order stating that Toshiba's expert's inspection of Respondent's computers would take place on July 22 and 23, 2008. Respondent appeared at the June 24, 2008 status conference and heard the court's order.

⁴ As laid out below, this amount was offset by \$165,000 in sanctions ordered against Respondent.

On July 18, 2008, Respondent appeared in a Minnesota court in a separate matter. There she told the court that she would not be complying with the computer inspections ordered on August 15, 2007, and June 24, 2008.

On July 21, 2008, Respondent informed Toshiba that the inspection would not proceed. The court-ordered forensic inspection of Respondent's computer never took place.

On July 28, 2008, the court set an Order to Show Cause (OSC) hearing for September 10, 2008, as to why Respondent should not be sanctioned for failing to comply with the court's orders relating to the computer inspection.

On September 10, 2008, the court found that Respondent had violated its orders to allow Toshiba's expert to inspect Respondent's computer. The court further stated that Toshiba could bring a motion for sanctions relating to, among other things, Respondent's failure to comply with the court's orders regarding the computer inspection.

On August 31, 2009, the Superior Court imposed monetary sanctions against Respondent for misuse of the discovery process and for failing to comply with the court's August 15, 2007, and June 24, 2008 orders on the forensic inspection of Respondent's computers. As a result, the court ordered that Respondent pay monetary sanctions to Toshiba in the amount of \$165,000. Respondent's payment of these sanctions was not payable until the court ruled on Respondent's fee petition.

On June 30, 2010, the court awarded Respondent's law firm \$176,900 fees, offset by the \$165,000 in sanctions. Respondent appealed.

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On August 7, 2013, the Court of Appeal upheld the order awarding monetary sanctions. In its decision, the Court of Appeal concluded, “There is no question that [Respondent] disobeyed the court’s August 15, 2007 order that she allow Toshiba’s expert to search her hard drive, and its further order on June 24, 2008, setting the inspection for July 22 and 23, 2008.” (Exhibit 9, p. 24.)

Conclusions

Count One – § 6068, subd. (d) [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. By falsely and intentionally representing in open court that she had never sought fees in excess of \$12 million in *Elihu v. Toshiba*, Respondent sought to mislead the judge by an artifice or false statement of fact, in willful violation of section 6068, subdivision (d).

Count Two – § 6106 [Moral Turpitude – Misrepresentation]

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. Since the same misconduct alleged in Count One is also alleged to be the basis for the moral turpitude violation in Count Two, the court declines to find culpability for both counts. 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.) The present misconduct is more aptly charged as an attempt to mislead a judge, in violation of section 6068, subdivision (d), as set forth above in Count One. Accordingly, Count Two is dismissed with prejudice.

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Count Three – § 6103 [Failure to Obey a Court Order]

Section 6103 provides, in pertinent part, that a willful disobedience or violation of a court order requiring an attorney to do or forbear an act connected with or in the course of the attorney's profession, which an attorney ought in good faith to do or forbear, constitutes cause for suspension or disbarment. As did the Superior Court and the Court of Appeal, this court rejects Respondent's arguments that she was justified in refusing the court-ordered computer inspections because of confidentiality and privilege issues. An attorney's belief as to the validity of an order is irrelevant to a section 6103 charge. (*In the Matter of Klein* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 1, 9, fn. 3.) Further, this court does not accept Respondent's argument that she did not have to comply with the court's order because there was not a signed court order. The essential elements of a willful violation of section 6103 are: (1) knowledge of a binding court order; (2) knowledge of what the attorney was doing or not doing; and (3) intent to commit acts or abstain from committing acts which violate court order. (*In the Matter of Maloney and Virsik* (2005) 4 Cal. State Bar Ct. Rptr. 774, 787.) All three of these factors have been established by clear and convincing evidence.

By knowingly and intentionally disobeying the Superior Court's August 15, 2007, and June 24, 2008 orders relating to the inspection of Respondent's computer, Respondent willfully disobeyed a court order requiring her to perform an act connected with or in the course of her profession, which she ought in good faith to have performed, in willful violation of section 6103.

Aggravation⁵

Multiple Acts (Std. 1.5(b).)

Respondent's multiple acts of misconduct warrant some consideration in aggravation.

⁵ All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

Lack of Insight

Respondent demonstrated little insight or understanding of her own misconduct. She refuses to accept any responsibility for the aforementioned misconduct, instead blaming everyone else. Respondent testified that she did everything in her power to comply with the Superior Court's orders; however, the credible evidence before this court demonstrates that the opposite is true. The Superior Court bent over backwards to accommodate Respondent's stated confidentiality and privilege concerns. Despite these efforts, Respondent still refused to comply with the court-ordered inspection.

Respondent's lack of insight and understanding regarding the present misconduct warrants some consideration in aggravation.

Mitigation

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

Respondent was admitted to practice law in California in 1994, and has no prior record of discipline. Her approximately fourteen years of discipline-free conduct prior to the present misconduct warrants significant consideration in mitigation. (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [more than ten years of discipline-free practice entitled to significant weight].)

Good Character (Std. 1.6(f).)

Respondent presented testimony and/or declarations from 14 character witnesses.⁶ These witnesses consisted of attorneys, former co-counsel, friends, and relatives. Respondent's character witnesses demonstrated an understanding of Respondent's misconduct and attested to her good character – highlighting her honesty, trustworthiness, work ethic, and legal competence. Respondent's extensive good character evidence warrants significant consideration in mitigation.

⁶ Three of Respondent's character witnesses testified and provided declarations relating to Respondent's good character.

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.)

Standard 1.7 provides that if a member commits two or more acts of misconduct and the standards specify different sanctions for each act, the most severe sanction must be imposed. Standard 1.7 further states that if aggravating or mitigating circumstances are found, they should be considered alone and in balance with any additional aggravating or mitigating factors.

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 disobedience or violation of a court order related to the member's practice of law, the attorney's oath, or section 6068, subdivisions (a), (b), (d), (e), (f), or (h).

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 Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar requested, among other things, that Respondent be actually suspended for 90 days. Respondent, on the other hand, argued that her case should be dismissed. Turning to the applicable case law, the court finds some guidance in *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211; and *Bach v. State Bar* (1987) 43 Cal.3d 848.

In *Jeffers*, discipline consisting of one year stayed suspension, two years' probation, and no actual suspension was imposed for violations of sections 6106; 6068, subdivisions (b) and (d); and rule 5-200. In one client matter, the attorney failed to appear as ordered at a mandatory settlement conference (MSC); failed to fully disclose information to the other party after representing to the MSC judge that he would do so; and intentionally misled the MSC judge regarding the status of a defendant. The attorney had no prior discipline in over 30 years of practice, and offered evidence of good character through his many civic and professional pro bono activities.

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. The attorney 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 willfully failed to obey two court orders and attempted to mislead a Superior Court judge. Considering her good character evidence and lack of a prior record of discipline, the present matter more closely equates to *Jeffers*. This court notes, however, that both *Jeffers* and *Bach* were written well before the implementation of standard

2.12, which provides for a minimum discipline of actual suspension. Respondent's good character evidence and lack of prior record are somewhat offset by her lack of insight into her own misconduct.

Accordingly, this court concludes that there is insufficient justification for departure from the presumed sanction outlined in standard 2.12(a). That being said, discipline on the low-end of that prescribed in standard 2.12(a) is warranted. In view of Respondent's misconduct, the case law, the standards, and the mitigating and aggravating factors, this court finds that, among other things, a 30-day period of suspension is appropriate, and provides adequate protection for the courts, the public, and the legal profession.

Recommendations

It is recommended that respondent **Lori Jo Sklar**, State Bar Number 170218, 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 probation⁷ for a period of two years subject to the following conditions:

1. Respondent is suspended from the practice of law for the first 30 days of probation.
2. 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.
3. 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.
4. 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

⁷ 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.)

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.

5. 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.
6. 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 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.
7. 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.)⁸

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.

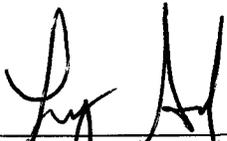
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⁸ Since Respondent lives in Minnesota, she may, in the alternative and upon prior approval of the Office of Probation of the State Bar of California, attend six hours of in-person continuing legal education classes on the subject of ethics. Respondent would still be required to complete this condition within one year after the effective date of the discipline herein.

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: November 16, 2015



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 November 16, 2015, 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:

JAMES IRWIN HAM
PANSKY MARKLE HAM LLP
1010 SYCAMORE AVE UNIT 308
SOUTH PASADENA, CA 91030

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

ANTHONY J. GARCIA, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on November 16, 2015.



Bernadette C.O. Molina
Case Administrator
State Bar Court