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STATE BAR COURT
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PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of	)	**Case No.: 14-O-00412-DFM**
	)	
ROBERT ALAN MURRAY,	)	**DECISION**
	)	
Member No. 228691,	)	
	)	
A Member of the State Bar.	)	

INTRODUCTION

Robert Alan Murray (Respondent) is a highly regarded, skilled, and long-term prosecutor in the Kern County District Attorney Office in Bakersfield. He is a prior recipient of the Mothers Against Drunk Driving "Prosecutor of the Year" Award, presented to him in Washington D.C. In 2013, in an effort to ease relations with a relatively young Kern County Deputy Public defender, Ernest Hinman (Hinman), Respondent transmitted a prank document to the young public defender, which document Respondent anticipated the young attorney would immediately recognize to be humorous and a joke. Respondent had no intention of having this document ever be seen in a courtroom or viewed by Hinman as genuine. Unfortunately, this effort by Respondent at humor was ill-conceived and went incredibly badly, eventually resulting in the dismissal of a pending criminal proceeding then being handled by Respondent and Hinman.

As a result of that "joke-gone-bad," Respondent is now charged by the State Bar here with three counts of alleged prosecutorial misconduct. The counts include allegations of

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willfully violating Business and Professions Code[1] section 6106 (moral turpitude – misrepresentation/fabrication of evidence) and section 6068, subdivision (a) (failure to comply with laws)[two counts]. While this court dismisses two of those counts, it nonetheless finds culpability and recommends discipline as set forth below.

PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed in this matter by the State Bar of California on June 16, 2014. On July 10, 2014, Respondent filed his response to the NDC.

On July 21, 2014, the initial status conference was held in the case. At that time the case was scheduled to commence trial on October 15, 2014, with a two-day trial estimate.

Thereafter, at the October 14, 2014 pretrial conference in the matter, the parties notified the court that the appeal by the California Attorney General's Office of the dismissal of the underlying criminal prosecution was still pending. As a result, this proceeding was ordered abated until the appellate court in the criminal matter issued its decision.

In late April, 2015, the State Bar notified this court that the appellate decision in the criminal case had been filed, affirming the trial court's dismissal of the criminal prosecution. As a result, this case was unabated and scheduled to commence trial on August 25, 2015, with a four-day trial estimate.

Trial was commenced and completed as scheduled, followed by a period of post-trial briefing. The State Bar was represented at trial by Senior Trial Counsel Kimberly G. Anderson. Respondent was represented at trial by Jonathan Arons.

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[1] Unless otherwise noted, all future references to section(s) will be to the Business and Professions Code.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on Respondent's response to the NDC, the extensive stipulation of undisputed facts filed by the parties, and the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in California on December 3, 2003, and has been a member of the State Bar at all relevant times.

Case No. 14-O-00412

On June 18, 2013, defendant Efrain Velasco-Palacios (Palacios) was charged by the Kern County District Attorney's Office with five counts of violating Penal Code section 288(a) (lewd and lascivious conduct with a minor). The maximum sentence the defendant could have received for a violation of that section, as charged, was 16 years in state prison.

The charges against Palacios involved allegations that he had participated in lewd and improper behavior with the daughter of the woman with whom Palacios was living. At the time of this alleged misconduct began, the daughter was less than 12-years-old. When the matter was being investigated by the police, the girl was interviewed in a recorded session, during which she alleged that Palacios had improperly touched her in the chest and vaginal areas, but she did not accuse him of having sexual intercourse with her or of effecting any digital penetration of her vagina.

Palacios was also interviewed by the police regarding the allegations. The interview was audio-recorded and, because Palacios spoke primarily Spanish, was conducted by a Spanish-speaking police officer. During the interview, Palacios acknowledged that he had hugged the young girl, touched her breasts, and kissed her. He also acknowledged placing messages on Facebook, asking her to go on vacation with him, telling her that he loved her, and stating that he

wanted to "be grabbing [her] body again" and to "make love to [her] again."[2] (Ex. 7.) In the interview, however, Palacios repeatedly denied having sex with the girl or ever touching her "private parts." During the interview, Palacios sought to blame the young girl for his actions, accusing her of coming on to him. The police report resulting from this interview indicated that Palacios had admitted to "feeling her up."

On July 18, 2013, defendant was arraigned, was assigned a public defender, and entered a plea of not guilty to all counts. At that time, neither Respondent nor Hinman was assigned to the case.

On August 23, 2013, a Readiness Hearing took place in the criminal case. Respondent made his first appearance in the case as the Deputy District Attorney assigned to the case. Deputy Public Defender Ernest Hinman also made his first appearance at that time. The case was then continued to October 4, 2013, at which time the court confirmed the trial date of October 15, 2013.

As part of the routine disclosure of evidence in the case, a copy of the audio recording of the Palacios interview, but not a translation of it, was provided by Respondent to Hinman in August 2013. Hinman then had a translation of the interview prepared for his own use.

At the Readiness Conference on October 4, 2013, Respondent offered Palacios a plea bargain involving a plea to one count of violating Penal Code section 288(a) and eight years' state prison. This offer was rejected by Palacios. Hinman then made several counteroffers, none of which included a violation of section 288(a) and all of which would have resulted in little or no time by Palacios in jail. Respondent rejected these counteroffers. In conjunction with this Readiness Conference, Respondent told Hinman he was considering re-interviewing the victim on the question of whether digital penetration had occurred. The young girl had previously

[2] The young girl had not accused Palacios of having sex with her.

indicated that Palacios had attempted to digitally penetrate her vagina but that she had pushed him away before he was able to do so. In contrast, the police report summarizing the Palacios interview seemed to suggest that he had acknowledged effecting some digital penetration. Respondent told Hinman that if the evidence indicated that such a digital penetration had occurred, he would consider dismissing the pending case and refiling the matter to include a violation of Penal Code section 288.7(b), a charge which carries a potential life sentence.

Although there was no history of practical jokes between Respondent and Hinman prior to October 2013, there was a history of them joking with one another about the cases in which they were opposing counsel. By way of example, during this same conversation on October 4, 2013, Hinman lamented to Respondent that all of the cases that he and Respondent had handled together had been very good cases for Respondent and very bad cases for Hinman. The two individuals then engaged in what Respondent described as "joking and laughing about the fact that Palacios' defense would not fly in the courtroom" – conduct described by their superiors during the trial of the instant proceeding as "gallows humor." In their friendly discussion, Respondent responded to Hinman's expression of frustration by asking if Hinman's complaint was that his clients were not "just guilty" but instead were "super guilty." To that, Hinman laughed and replied that he preferred to call it "not having a viable defense." Respondent then replied that he felt Palacios actually had "no defense" in the case, since he had admitted everything charged and was seeking to justify his actions by accusing the young girl of coming on to him. To this, Hinman retorted that Palacios had a defense – "just not a viable one." Hinman also indicated that he was doing his best to settle the case. In other areas, Hinman also indicated that he was intending to file a motion to continue the scheduled *Palacios* trial beyond the existing October 15, 2013 trial date to a date in December. After this conversation on

October 4, 2013, there were never any further discussions between Respondent and Hinman about settling the *Palacios* case.

After this October 4, 2013 conversation and prior to the scheduled October 15, 2013 trial date, Hinman filed his motion to continue the *Palacios* trial to December 2013. On October 15, 2013, both Respondent and Hinman appeared in court, both fully expecting that the case would be postponed to a later date. As expected, the court delayed the commencement of the scheduled trial to October 28, 2013.

On October 18, 2013, a hearing was held on a demurrer filed by Hinman to the charges then pending against Palacios. Hinman, based on his own translation of the Palacios interview recording, told Respondent that, while there were other admissions by Palacios in the taped interview, digital penetration was not one of those admissions. Respondent then told Hinman during this same conversation that, based on his review of the discovery in the case, he did not feel that there had been any intercourse or digital penetration and that he had decided not to file any new charges. (Ex. 4, p. 83.) This decision was based on Respondent's view that even an admission during the interview by Palacios of digital penetration would not support a criminal conviction in the absence of some corroborating evidence from another source, such as the victim herself. Respondent had concluded that there was no such corroborating evidence. Despite Respondent's statement to Hinman that no new charges were going to be filed, Hinman continued to insist that Palacios had not admitted to any digital penetration during the course of the interview and encouraged Respondent to review the interview translated transcript to verify that no such admission had occurred, despite the contrary indications in the police report. Respondent agreed that he would do so, although he was extremely busy and felt that the exercise was unnecessary.

On October 21, 2013, Respondent reviewed for the first time the translation his own office had prepared of the *Palacios* interview. In doing so, he saw that Hinman was correct in stating that Palacios had not admitted to any digital penetration during the course of the interview. Instead, Palacios had repeatedly denied either digitally penetrating the female victim or having any sexual intercourse with her. Respondent, knowing that he had promised to provide a copy of his office's translation to Hinman which would show that Hinman had always been correct in his prior comments, then decided to make a joke about the prior issue by adding two additional lines to the end of the transcription. The lines read:

> *"Martinez: You're so guilty you child molester.*
> *"Palacios: I know. I'm just glad she's not pregnant like her mother."*[3]

On October 21, 2013, at 8:45 a.m., Respondent sent the altered translation to Hinman with an email stating:

> Ernie,
> Here's a copy of the translated transcript of your client's interview. Let me know if you have any disagreements on the translation.
> Thanks,
> Rob

At the time Respondent decided to play this joke, Respondent had no intention of this altered translation ever being used in the criminal case itself, either as an exhibit or as a means of influencing the settlement of it. To the contrary, Respondent assumed that Hinman would immediately recognize that the two new lines at the end of the transcript were a joke and that Hinman would be calling him about the joke soon after reading the document. Respondent believed that Hinman would immediately recognize the additional two lines as a joke, rather than actual admissions by Palacios, because Hinman was very familiar with his own translation of the interview, because the tone and content of the two lines at the end of the transcript (in which

[3] Palacios had impregnated the mother of the young girl during the time that he was living with the mother and her daughter.

Palacios seemed to be suddenly and gratuitously acknowledging that he had had sexual intercourse with the young victim) were in stark contrast to Palacios' repeated and emphatic denials of any such sexual intercourse throughout the balance of the transcript, and because Respondent had just told Hinman that he was not going to file new charges. When Hinman did not promptly call Respondent shortly after the email was sent, Respondent just assumed that Hinman's busy schedule was preventing him from getting around to reading the document.

Unfortunately, all of Respondent's assumptions about how Hinman would react to the altered translation were incorrect. When Hinman read the altered translation within several days after receiving it, he did not recognize that the last two lines were a joke. If this was a failure on his part, it was not an unreasonable or unforeseeable one under the circumstances. While Hinman and Respondent had frequently joked with one another about their cases, there was no history of any practical jokes between them, especially one involving the alteration of potential evidence. Further, while Hinman recognized that the last two lines of the altered transcript did not appear in his own office's translation of the Palacios interview, he was concerned that his copy of the audio recording of the interview might not have included the last comments made by his client during that interview. This concern was fueled by the fact that the transcripts of both offices included comments by the interviewer that he was having battery problems with the recording device. Finally, there was nothing in the formatting of the alteration or in the manner in which the altered document was delivered by Respondent to highlight or signal that there was anything unusual about the document, that it was not the actual translation prepared by the prosecutor's office for use at trial, that it included two new lines, or that there was anything about the document that Respondent expected Hinman to find funny.

During the trial of the instant proceeding, Hinman testified that he now regrets not simply just calling Respondent to ask him about the last two lines. Unfortunately, he did not do so,

fearing that Respondent was somehow unaware of the last two lines of the translation and, if made aware of them, might reverse his decision not to file new charges against Palacios. Instead of contacting Respondent, Hinman, among other things, conducted a videoconference with his incarcerated client on October 24, 2013, during which Hinman asked him about the last two lines of the translation. Palacios denied ever making any such comments or admissions. Hinman told his client that these last two lines did not appear in his office's own translation of the interview and that he would look into the situation.

On October 28, 2013, Respondent and Hinman both appeared for the scheduled trial call, along with many other attorneys on various other matters. Because Hinman and Respondent were at different locations in the crowded courtroom, neither made any effort to talk with the other. Both attorneys fully expected that the case would not be going to trial at that time. Instead, when their matter was called, Hinman made another motion to continue the hearing, and the court trailed the jury trial to November 5, 2013. Also arriving in court that day was Officer Moises Martinez (Martinez), the police officer in Taft, California, who had conducted the interview with Palacios. Officer Martinez had been subpoenaed by Hinman to appear as a witness at the scheduled trial but then was not notified by Hinman of the lack of any need for Martinez to travel from Taft to Bakersfield on October 28, 2013, because of the expected continuance. Because Martinez was then in Bakersfield and he and Respondent had never met before, when the brief court appearance was completed they went together back to Respondent's office to discuss the *Palacios* case.

When Martinez and Respondent got back to Respondent's office, Respondent went on his computer to print out for Martinez a copy of his office's translation of the Palacios interview. When he printed the document to give to Martinez, Respondent realized that document, as it was saved on his computer, still included the last two lines that he had added as a joke. Respondent

immediately told Martinez to ignore those lines, explained that they were a joke directed to the public defender, and quickly provided Martinez with a copy of the translation that did not include the last two lines. It was at this time that it dawned on Respondent how "stupid" his prior actions in providing Hinman with a modified translation had been. However, rather than immediately calling Hinman about the situation, Respondent decided that he wanted to talk in person with Hinman about the situation. They were already scheduled to be back in court together on the *Palacios* matter on the morning of October 30, 2013.

During this same time period, Hinman, after talking with his client and verifying that the audio CD previously provided to his office did not include the additional comments, was at a loss about how to handle the situation. He had considered the possibility that Respondent had merely added the two last lines, but he ruled that out based on his assumption that Respondent would have already talked with him about the alterations. Hinman then consulted with a supervisor in his office about the situation, who advised Hinman merely to ask Respondent for an exact copy of the audio CD on which Respondent's translator had relied in preparing the translation. Acting on this advice, on October 30, 2013, at 9:00 a.m., Hinman sent Respondent an email, stating, "I'm looking over your transcript to the recording of Mr. Palacios statement and I'm not sure I have the same CD that you do. Can you provide a copy of the exact CD reviewed by your transcriber/interpreter." This email ended with comment, "I'll see you in court at 10:00 a.m." (Ex. 6, p. 27.)

Later that same morning, when Respondent and Hinman arrived for a scheduled in-camera hearing concerning a subpoena by Hinman of the alleged victim's school records, Hinman asked Respondent if he had received his email sent earlier that morning. Respondent replied that he had and then asked Hinman if he was referring to the last two lines of the transcription. When Hinman replied that he was, Respondent told him that he had added those

two lines as a joke. He then went on to explain that he after seeing that Hinman was right, and he was wrong, about what had been said by Palacios during the interview and because Hinman "had been so wound up about the case." In response to Respondent's acknowledgement of his additions to the translation, Hinman did not complain at the time of Respondent's actions or accuse him of any improper act. Instead, his face turned red, he smiled, and he shook his head. Respondent then put his arm on Hinman's shoulder and added that he was sorry for any inconvenience that the joke might have caused. He also promised to provide Hinman an unaltered copy of the translation, which he did later that same day.

On November 1, 2013, the Public Defender's Office filed a motion to continue the trial previously set for November 5, 2013. On November 5, 2013, the court granted motion to continue the trial and continued it to February 3, 2014, with a readiness hearing set for January 24, 2014. The court also ordered that all pre-trial motions would be heard on December 19, 2013.

During this same time period, the negative impact of Respondent's prank on the criminal proceeding came to be recognized. After talking with Respondent, Hinman went to discuss the situation with Robert More, the appointed Kern County Public Defender. According to the trial testimony of Public Defender More in this proceeding, Hinman came to his office "bothered" that a prosecutor had "fabricated an admission." As recounted by More in his trial testimony, Hinman did not disclose to More in this conversation that Respondent had stated that the fabricated document was sent as a joke; nor did Hinman reveal to More the reasons for sending the prank document previously explained to Hinman by Respondent. Attorney More, upset that a Kern County prosecutor would fabricate a false admission to use in a pending criminal case, then called Lisa Green, the elected Kern County District Attorney, and accused Respondent of seeking to fabricate false evidence. Responding to that serious charge, District Attorney Green

then promptly put Respondent on administrative leave, initiated an internal investigation, and ordered Respondent not to report to work. At some point during this same time period, one or possibly both of the two involved offices notified the California Attorney General's office, which then commenced a criminal investigation to determine whether Respondent had committed any crimes. While this investigation eventually proved to be negative, it resulted in Respondent remaining on administrative leave from his office for more than three months.

On November 15, 2013, Hinman filed a pleading entitled "Motion to Dismiss Based Upon Outrageous Governmental Misconduct Fabrication of Incriminating Statement." Prior to filing this motion, Respondent reported to Palacios the fact that his investigation of the disputed interview translation had resulted in Respondent explaining that the document was intended as a joke. Palacios made no complaint about Hinman or his office when informed of the results of Hinman's efforts, and Hinman continued to act as counsel for Palacios in filing the motion to dismiss. Prior to filing the motion, Hinman had actually concluded himself that Respondent's activities had actually been intended as a joke. Indeed, when he was contacted by the District Attorney's representative investigating the allegations against Respondent, Hinman told the investigator that he believed Respondent had no criminal intent in sending him the prank document, and instead described Respondent's actions as "A bad joke that had gone bad." The results of this investigator's inquiries were sent to the Attorney General's office. They were not, however, made known to Judge Staley, either in the motion to dismiss or in the District Attorney's opposition to it.[4]

On December 5, 2013, the District Attorney's Office filed an opposition to Defendant's motion to dismiss and a request by the Public Defender to advance the hearing. Because

[4] When asked during the trial of this matter why he had gone forward with the motion to dismiss after concluding himself that Respondent was only seeking to effect a joke, Hinman's only response was that he did not want to be faulted for failing to take advantage of an opportunity to benefit his client.

Respondent had been on administrative leave during the entire pendency of this motion and was the subject of the two investigations regarding his conduct, he was not provided with a copy of the motion to dismiss. Instead, he was only asked to provide a sworn declaration regarding the circumstances surrounding his creation and transmission of the altered translation. Although Respondent was entitled to assert his Fifth Amend Privilege and refuse to provide such a declaration, due to the ongoing investigation by the Attorney General's office of possible criminal charges against him, Respondent put together his recollection of the various events, unaided by any knowledge of the allegations and omissions of the pending motion to dismiss and supporting declaration by Hinman. He also was not allowed to participate in either the preparation for the hearing of the motion or in its conduct, other than as a witness called by the Public Defenders' office to testify.

In the declaration prepared by Respondent, he provided as background for his attempt at continued humor his discussion with Hinman on October 4, 2013, when Hinman had opined that Palacios did not have a viable defense. When Hinman's supervisors at the Public Defenders' Office learned of this October 4, 2013 statement by Hinman, they concluded that it would be advantageous to remove Hinman as assigned counsel for Palacios in the case.[5] They informed

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[5] While Chief Deputy Public Defender Peter Kang, who handled the hearing of the motion to dismiss, testified in this proceeding that Hinman had denied making any such comment about the viability of his client's case, Hinman, aware of that accusation by Respondent, made no effort to deny it during either the hearing of the motion to dismiss or during the trial of this proceeding. Chief Deputy Kang also testified that Hinman did not disclose to him the fact that Respondent had told Hinman the altered translation was intended as a joke until after the District Attorney's opposition to the motion to dismiss was filed.

The conduct by Hinman that resulted in his removal from the *Palacios* case occurred on October 4, 2013, prior to any misconduct by Respondent. The supervisor's expressed concern that a prosecutor could use this statement at a future trial of the case to the detriment of Palacios was a risk created by Hinman's conduct and not Respondent's subsequent disclosure of it. Indeed, if there was any such risk of a future use of the Hinman statement at a future trial, that risk was probably reduced by Respondent's disclosure of the conduct, since it alerted and would have enabled Palacios' defense counsel to avoid any prejudice by filing an appropriate motion in limine.

the District Attorney's office of this decision just prior to the commencement of the hearing of the motion.

On December 10, 2013, the court issued an order scheduling the motion to dismiss for hearing on December 17, 2013.

On December 17, 2013, the hearing on the motion to dismiss took place. A different Deputy Public Defender and Deputy District Attorney appeared, and both Respondent and Hinman testified at the hearing on the Motion to Dismiss.

On December 19, 2013, the court issued it's ruling on the Motion to Dismiss, granting the motion.

On January 31, 2014, the District Attorney's Office filed a Notice of Appeal. The eventual appeal, however, was conducted by the State Attorney General's Office, which argued that dismissal of the proceeding was error.

On February 25, 2015, the Court of Appeal filed an opinion affirming the dismissal of the case.

As a result of the dismissal of the pending criminal matter, Respondent was disciplined by his office with a week of unpaid leave. Unquestionably even more punishing of Respondent was the fact that the allegations and findings that he had committed prosecutorial misconduct had generated ongoing and uncomplimentary media attention. As a result of that media coverage, Respondent has received hate mail and, at work, has been removed from any further jury trial responsibilities based on the office's concern that local juries, not knowing Respondent but likely to be or become aware of the media's unfavorable characterizations of Respondent, would be inclined to view him with distrust.

Count 1 - Section 6106 [Moral Turpitude – Concealment/Misrepresentation]
Count 2 – Section 6068, subd. (a) [Failure to Comply with Laws

Under section 6106, "The commission of any act involving moral turpitude, dishonesty or corruption . . . constitutes a cause for disbarment or suspension." For purposes of State Bar disciplinary proceedings, moral turpitude is "any crime or misconduct reflecting dishonesty, particularly when committed in the course of practice . . . ." (*Read v. State Bar* (1991) 53 Cal.3d 394, 412.) Acts of moral turpitude include omissions, concealment and affirmative misrepresentations. (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315.)

In Count 1, the State Bar alleges:

> On or about October 21, 2013, while he was the assigned prosecutor in the case entitled *People of the State of California v. Efrain Velasco-Palacios*, Kern County Superior Court Case No. TF006398A, Respondent sent discovery to the defendant's attorney, which included an English translation of the defendant's Spanish recorded statement, but where Respondent added the following statements which he knew were not part of the interview, which implied that the suspect had had sexual intercourse/penetration with the victim:
>
> > "[Officer]: You're so guilty you child molester.
> > "[Suspect]: I know. I'm just glad she's not pregnant like her mother."
>
> Respondent knew that the defendant had not made those statements at the time he sent them to the defendant's attorney, which was an act of moral turpitude, dishonesty or corruption in willful violation of Business and Professions Code section 6106.

It is undisputed that Respondent created and transmitted to Hinman a translation that included a purported admission that was knowingly fabricated by Respondent. This document, while knowingly false, was not intended to effect any fraud on the court or on anyone else, but instead was only intended by Respondent to be a joke – either "with" or "on" Hinman. The question of whether a false statement, intended to be understood as a joke, may be treated as a basis for professional discipline is not resolved by merely concluding that the statement was made and was knowingly false. Instead, as correctly stated by the court in the underlying criminal proceedings, the assessment must be made on a case-by-case basis. This is so for

numerous reasons. First, any blanket prohibition against any joke being made by a prosecutor about a pending case to an opposing defense counsel, if the joke contains any untrue factual statement, would undoubtedly violate the attorney's constitutional right to Free Speech under the First Amendment. As stated by the United States Supreme Court in *Gentile v. State Bar of Nev. (1991) 501 U.S. 1030:* "At the very least, our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law. See, e. g., *In re Primus*, 436 U.S. 412, 56 L.Ed.2d 417, 98 S. Ct. 1893 (1978); *Bates v. State Bar of Arizona, supra.* We have not in recent years accepted our colleagues' apparent theory that the practice of law brings with it comprehensive restrictions, or that we will defer to professional bodies when those restrictions impinge upon First Amendment freedoms. And none of the justifications put forward by respondent suffice to sanction abandonment of our normal First Amendment principles in the case of speech by an attorney regarding pending cases." (*Id.* at p. 1054.)

Further, well-settled cases make clear that statements published as intended humor may be protected from legal infringement by virtue of the Free Speech protections of both the federal and state constitutions, even though the statements may include representations known to be untrue. (See, e.g., *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543; *San Francisco Bay Guardian, Inc. v. City and County of San Francisco* (1993) 17 Cal.App.4th 655.)

Conversely, the possibility that misrepresentations may justify discipline is not ruled out by a simple finding that the false representation was published with the intent that it would be understood by its recipients as being humorous and factually untrue. (See, e.g., *Polygram Records, Inc. v. Superior Court, supra,* 17 Cal.App.4th at p. 552 [rejecting argument that "comedy is a form of expression that is categorically protected by the First Amendment"].)

Instead, there may be regulations on otherwise protected speech based on considerations of time, place, and manner. One such recognized restriction is the ability to restrict an attorney, who is participating as counsel in a pending criminal case, from speech which creates the "substantial likelihood of material prejudice" to that proceeding or the rights of the parties to a fair trial in it. (See *Gentile v. State Bar of Nev.*, *supra* 501 U.S. at p. 1075 ["standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials"].)

Here, the State Bar seeks to discipline Respondent for his conduct as a prosecuting attorney in (1) altering a potential trial exhibit as a joke by including within it false and ostensibly incriminating information and (2) then transmitting that altered document to opposing defense counsel without taking steps to prevent harm to the pending criminal proceeding from resulting. If Respondent's conduct falls within those parameters, discipline is not prohibited by First Amendment protections. Such is the case here.

The prohibition of section 6106 against acts of moral turpitude includes misrepresentations and acts of dishonesty. Such acts of moral turpitude need not result from conduct intended to be malevolent. Instead, an act of moral turpitude may result from an attorney's gross negligence. (See, e.g., *In the Matter of Yee* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 330.) As stated by the Review Department in *In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9, 10:

> We are reluctant, therefore, to ascribe to respondent a specific intent to deceive when the hearing judge who considered respondent's testimony and that of other witnesses found none. This does not exonerate respondent from moral turpitude charges as to his false statement regarding the Judicial Council proceedings on his motion to disqualify the trial judge in Smith. . . . Gross negligence is a well-established basis for finding an act of moral turpitude. (See *Simmons v. State Bar* (1970) 2 Cal.3d 719, 729; *In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468, 478.)

Just as did the Review Department in *Moriarty*, this court concludes here that Respondent is culpable of an act of moral turpitude but not for reasons resulting from any intent by him to deceive his opposing counsel or to affect in any way the pending criminal matter. Quite the contrary, Respondent simply created and transmitted an altered document with the expectation that it would quickly be observed by its recipient to be a joke. His goals in seeking to create a moment of levity with that recipient may arguably have even been commendable.

This court's finding that Respondent is culpable of an act of moral turpitude is based on Respondent's gross negligence, conduct constituting extreme departures from the ordinary standards of conduct and creating a risk of significant harm to the pending criminal case. In the first instance, Respondent's decision to alter and transmit to opposing counsel an actual potential trial exhibit as the medium for his humorous but false admissions of uncharged criminal conduct was, by itself, an extreme departure from the standard of ordinary care and immediately created a reasonably foreseeable potential future harm in and/or to the criminal proceeding. While the risk of such harm being realized might have been minimized by a number of different possible precautionary measures that Respondent might have taken to make clear to anyone that the altered document was not genuine, Respondent took none of them. Instead, his alterations were made in the same font and style as the other statements by Palacios in the transcript; the document contained no labeling or other designation to indicate to its reader that it had been altered, was not an potential trial exhibit, or was an attempt at humor; Respondent made no effort to deliver the document in person so that he could monitor and/or control for any unexpected interpretation or response his effort; and he included in his accompanying email no comment or other indication clearly alerting Hinman that the accompanying document included alterations or attempts at humor.

Making the situation even worse, although Respondent had anticipated that Hinman would promptly contact him as a result of the joke, when no response was received Respondent made no effort to investigate whether his joke had been misunderstood. Then, even when he realized on October 28, 2013, that his joke had been a mistake, he still elected to wait for two more days to discuss the situation with Hinman. In the meanwhile, the risks created by the altered potential trial exhibit were being realized.

Such massive deviations by Respondent from the ordinary standards of care constituted gross negligence on his part and resulted in his attempts at humor being acts of moral turpitude, in willful violation of the prohibition of section 6106.

Turning to Count 2, this court finds that the State Bar makes the very same factual allegation in that count as are contained in Count 1, and merely replaces the legal conclusion in Count 1 (that the conduct violated section 6106) with the following:

> "By sending the English translation of the defendant's Spanish recorded statement to the defendant's attorney, Respondent violated the defendant's due process rights under the Fourteenth Amendment to the United States Constitution and Respondent violated defendant's right to counsel under the Sixth Amendment to the United States Constitution. Respondent thereby wilfully violated Business and Professions Code section 6068(a) by failing to support the Constitution and laws of the United States and of this state."[6]

Because this count is founded on the very same facts underlying this court's finding of Respondent's culpability of violating section 6106, it is duplicative and, accordingly, is dismissed.

As an additional basis for dismissing Count 2, the court concludes that the additional evidence received by this court during the trial of this disciplinary proceeding, including the far more revealing testimony of Hinman, Chief Deputy Kang of the Public Defenders Office,

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[6] Section 6068, subdivision (a), makes it the duty of an attorney "[t]o support the Constitution and laws of the United States and of this state."

Officer Martinez, and Respondent, substantially undermines many of the findings and conclusions of both Judge Staley in his order dismissing the criminal case and, in turn, the appellate court's affirming and characterizing those findings. By way of example, Judge Staley began his analysis of the impropriety of Respondent's conduct by finding that Respondent had indicated to Hinman on October 4, 2013, that he "was considering dismissing and refiling the case, adding more serious charges against the defendant that would include a life sentence" and that "Murray's consideration of this possible new charge was not resolved until October 21, 2013." (Ex. 3, p. 3.) In the instant proceeding the parties stipulated that Respondent had only indicated to Hinman on October 4, 2013, that he "was considering re-interviewing the victim on the question of whether digital penetration had occurred. Respondent told Hinman if the evidence did, then he would consider dismissing and refiling the case to include a violation of Penal Code section 288.7(b), which carries a life sentence." (Stipulation, ¶6, p. 2.) There was no evidence that Respondent ever re-interviewed the young victim. Moreover, contrary to Judge Staley's finding, the uncontradicted evidence during the trial of the instant matter was that Respondent had informed Hinman on October 18, 2013, prior to Respondent's sending of the prank document, that he had decided not to file any new charges. This fact conflicts dramatically with Judge Staley's finding, unsupported by any evidence during the instant trial, that Respondent was frustrated on October 21, 2013, after reviewing the translation of the interview, "that there was no evidence that would justify the new charge with the life term in that translated transcript." (*Ibid.*)

Similarly, in Judge Staley's order, he emphasized that, "No explanation was offered to show what kept Murray from telling Hinson [sic] that he needed to speak to him after the [October 28, 2013] appearance." (Ex. 3, p. 4.) Judge Staley did not have the benefit of the testimony of Respondent and Officer Martinez on that issue, unlike this court.

As a further example of how the evidence in the instant proceeding differed, explained or departed from findings in the criminal matter, Judge Staley concluded that it had not been proven in that proceeding that Respondent's conduct was a joke. Such was certainly not the case in the instant proceeding, where there was overwhelming evidence, even the testimony of Hinman, that Respondent's actions were only meant to be a joke.[7] Moreover, there was no evidence during the instant trial that the prank document was ever intended by Respondent to be used by him or by anyone else as evidence in the criminal case or to affect Hinman's handling of that case.[8]

For all of the above reasons, Count 2 is dismissed with prejudice.

Count 3 – Section 6068, subd. (a) [Failure to Comply with Laws

In this count, the State Bar alleges:

> "By sending the English translation of the defendant's Spanish recorded statement to the defendant's attorney, Respondent violated Penal Code section 1054.1, subdivisions (b), (c), (e) and (f) and Penal Code section 1054.7. Respondent thereby wilfully violated Business and Professions Code section 6068(a) by failing to support the Constitution and laws of the United States and of this state."

When the State Bar rested its case-in-chief on issues of culpability, counsel for Respondent moved to dismiss Count 3 based on the State Bar's failure to meet its burden of proof. (Rules Proc. of State Bar, rule 5-110.) When counsel for the State Bar was asked to

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[7] Indeed, Hinman had concluded, even before his filing of the motion to dismiss, that the altered translation was simply intended by Respondent to be a joke. Judge Staley did not become aware of that fact because he sustained a relevancy objection made by the Public Defender's Office to a question posed to Hinman during cross-examination which would have led to the disclosure of that fact.

[8] The above assessment should not be interpreted as this court disputing Judge Staley's decision to dismiss the criminal case. As Judge Staley correctly concluded, because the misconduct by Respondent presented a demonstrable threat of prejudice the burden was on the prosecution to prove by a preponderance of the evidence that the defendant was not prejudiced by that misconduct. Based on the evidence provided in the hearing before Judge Staley by the prosecution, hindered by the circumstances preventing Respondent from fully participating in the preparation of the opposition to the motion, the prosecution failed to meet its burden. In that regard, however, this court would emphasize that the prosecution's failure to prove a negative in that hearing does not equate to satisfying the State Bar's obligation to prove a positive in this proceeding by clear and convincing evidence.

present its opposition to the motion, the court was informed that the State Bar recognized that this count was "the most difficult of the three counts to prove" and that the count was the "weakest" of the three counts."

At the conclusion of the argument, this court dismissed this count pursuant to rule 5-110. Each of the code provisions alleged in this count are discovery statutes requiring, inter alia, that prosecuting attorneys, within a specified time frame, turn over "statements of all defendants" and "relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial . . . ." The undisputed evidence presented by the State Bar during its case-in-chief was that all statements of the defendant were timely turned over to Hinman in August 2013. There was no evidence that any items subject to the cited Penal Code sections were withheld.

The gravamen of the State Bar's evidence in this proceeding is that Respondent provided improper information, rather than withheld evidence. Such alleged conduct does not violate the specific statutes cited in this count, especially since the altered document was not a statement by the defendant, but instead a translation of that statement and one never intended by Respondent to be used at trial. Finally, to the extent that there might have been any duty to provide the accurate translation to defendant's counsel, that was done on October 30, 2013.

Confirming this court's oral order during the trial, this count is dismissed with prejudice.

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, Stds. for Atty. Sanctions for Prof. Misconduct,[9] std. 1.5.) The court finds the following with respect to aggravating circumstances.

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[9] All further references to standard(s) or std. are to this source.

Significant Harm

Respondent's misconduct caused the pending criminal prosecution to be dismissed without resolution on its merits. This is significant harm and an aggravating factor.. (Std. 1.5(f).)

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.6.) The court finds the following with regard to mitigating factors.

No Prior Discipline

Standard 1.6(a) provides that a respondent should receive mitigation credit for "the absence of any prior record of discipline over many years of practice coupled with present misconduct, which is not likely to recur." Such is the case here. Respondent had practiced law in California with no prior record of any discipline for slightly less than ten years prior to the commencement of the instant misconduct. Respondent's lengthy tenure of discipline-free practice is entitled to significant weight in mitigation. (Std. 1.6(a); *In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80, 88 ["entitled to full credit" for 10 years of discipline-free practice].)

Cooperation/Candor

Respondent has demonstrated candor and cooperation throughout the time that his conduct was a subject of scrutiny in the criminal case and during the pendency of this disciplinary proceeding. In the criminal case, although he was being accused on intentionally fabricating evidence for use in the criminal case, resulting in an investigation of him by the Attorney General's office for possible criminal conduct, Respondent waived his Fifth Amendment rights and voluntarily and candidly provided his recollections of the events surrounding his creation and use of the altered translation. He followed the same course in

responding to the State Bar's investigation and this disciplinary proceeding. Further, while Respondent did not admit culpability in the matter, he entered into an extensive stipulation of facts, thereby assisting the State Bar in the prosecution of the case. Such conduct is a mitigating circumstance. (Std. 1.6(e); see also *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 50; cf. *In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [credit for stipulating to facts but "very limited" where culpability is denied].)

Character Evidence

Respondent presented good character testimony from numerous individuals, including numerous prosecutors and criminal defense attorneys, representing a wide range of references in the legal and general communities and who are aware of the full extent of the Respondent's misconduct.

Among the individuals attesting to Respondent's good character are a number of prominent representatives of Kern County, including a sitting superior court judge; the current and past elected district attorneys of that county; and the current administrator of the Kern County Bar Association's Indigent Defense Program, who was the immediate past president of the Criminal Defense Section of the Kern County Bar Association. The fact and content of their voluntary and public support for Respondent in this context, given the adverse publicity associated with Respondent's actions in that community, make clear how respected and valued Respondent is as a member of that community.

By way of examples, the letter of the superior court judge began by emphasizing that it was being sent voluntarily by the judge and without having been solicited to do so. The letter ended with the following assessment:

> "I can tell you, without hesitation or reservation, that the actions of Mr. Murray were a failed attempt at humor. No more, no less. The fact that his integrity has been called into question is absurd. I have worked with

> him for almost a decade and find him nothing less than an outstanding young man with character beyond reproach.

In turn, the letter from the attorney now administering the Kern County Bar Association's Indigent Defense Program makes clear how highly regarded Respondent is by those who routinely oppose him:

I am submitting this letter in support of Robert Murray whom I have observed over the past seven or eight years while he practiced law as a deputy district attorney here in Kern County. Throughout this period I have found Mr. Murray to be dedicated and hard working. I also know from personal experience that his integrity is of the highest level.

. . .

> As the immediate past president of the Criminal Defense Section of the Kern County Bar Association I can also state that Mr. Murray has the support of the private defense bar. His current situation has been discussed at the board of directors meetings where support was unanimously given.
>
> We understand that Mr. Murray's actions constitute a serious lapse in judgement. However, we also understand that this entire affair was a bad joke gone awry.
>
> The law profession has been enhanced by Mr. Murray's participation. I hope the Bar sees fit to allow him to continue as his loss would be a blow to the profession as a whole.

The current District Attorney's letter of recommendation is also especially significant, because she is an elected official, whose continued tenure depends on the voters of that community. She is also the individual who commissioned the initial investigation of the situation and disciplined Respondent with unpaid leave for his actions. In her lengthy letter, she concludes:

> I know Rob Murray and as such I know beyond a shadow of a doubt that he never intended that the transcript be used against the defendant, either in court or for any purpose. His intent, as he has repeatedly stated, was to engage in a practical joke at the expense of the deputy public defender. It was a bad joke and Mr. Murray used poor judgment, but it was not a malicious act. From the point of the disclosure of the existence of the altered transcript, Mr. Murray has taken full responsibility for his actions. He was and continues to be extremely apologetic and extremely remorseful. When the easy thing would have been for him to claim his Fifth Amendment privilege when the case came before Judge Staley on a

> motion to dismiss, he testified in an effort to prevent dismissal of the case, a child molest case. He testified despite the fact criminal charges were still pending review by the Attorney General's Office. He testified because it was the right thing to do, and perhaps most importantly he testified because it was the truth.
>
> As the elected District Attorney, I recognize how Mr. Murray's conduct can impact the public's perception of my office. I further understand that the public's confidence in this office can be undermined by an incident such as this. I would never write this letter if I felt that Rob Murray intentionally edited the transcript in order to strengthen a case and obtain a conviction. In fact, if I believed for a moment that he acted with malevolent intent, I would have pursued termination. The truth is Rob Murray is a man of character who made a mistake. I ask you to take that into consideration as you decide the appropriate punishment. I ask you to not let one mistake define a man's career.

In addition to the character letters placed in evidence during the trial, this court also heard favorable character testimony regarding Respondent from Deputy Public Defender Hinman, who had been called by the State Bar to testify against Respondent. During his testimony, Hinman answered questions from the State Bar regarding his opinion of Respondent's character by testifying that Respondent was a man of "good character" and by repeatedly stating that he did not think that Respondent was "evil." Instead, Hinman described Respondent's actions as a "bad joke that went very wrong" and as "a mistake that snowballed into something really big."

For such extensive character evidence, Respondent is entitled to significant mitigation credit. (Std. 1.6(f); *In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319 [testimony from members of bench and bar entitled to serious consideration because judges and attorneys have "strong interest in maintaining the honest administration of justice"].)

Community Service

Respondent presented significant evidence of community service, which is "a mitigating factor that is entitled to 'considerable weight.' [Citation.]." (*Calvert v. State Bar* (1991) 54

Cal.3d 765, 785.) A former recipient of the Eagle Scout award, he has been active in supporting local scouting activities in his community. He is an Elder in his church and actively assists numerous church members with various matters. Finally, he actively works to assist the victims of crime and their families to deal with the emotional problems caused by their experiences. His efforts have been sufficiently significant that, as previously noted, he was awarded the Mothers Against Drunk Driving award for being the Prosecutor of the Year, an award presented to him in Washington, D.C.

Remorse

From the time that Respondent informed Hinman on October 30, 2013, that the altered translation was sent to Hinman as a joke, he apologized to Hinman for any inconvenience that he had caused. He had earlier realized that his effort at humor had been a mistake.

Since then, Respondent has repeatedly expressed his regret and remorse for his actions, including testifying during the hearing on the motion to dismiss in December 2013, that "it was obviously a mistake to joke around this way." (Ex. 4, p. 49.) As corroborated by the many character letters received in evidence, he has also acknowledged to many in his community the impropriety of his prior actions and his remorse for that conduct. During the instant trial, he credibly expressed his sincere regret for his ill-conceived efforts at humor and he persuasively testified that such misconduct had never occurred on any prior occasion and would never be repeated in the future. Such recognition by Respondent of the error of his aberrational misconduct is a significant mitigating factor.

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney but to protect the public, the courts, and the legal profession; to maintain the highest possible

professional standards for attorneys; and to preserve public confidence in the legal profession. (Std. 1.1; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate level of discipline, this 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.) The court then looks to the 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.) As the Review Department noted more than two decades ago in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, even though the standards are not to be applied in a talismanic fashion, they are to be followed unless there is a compelling reason that justifies not doing so. (Accord, *In re Silverton* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.) 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. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *Gary v. State Bar* (1988) 44 Cal.3d 820, 828; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

While the State Bar urges this court to recommend discipline including two years of actual suspension, the two cases cited by the State Bar in support of that outcome involve conduct far more extensive and egregious that Respondent's misconduct here.

While there are no cases comparable to the instant case, this court concludes that a recommendation of a one year suspension, stayed, and a one year probation, with conditions including an actual suspension of thirty (30) days is both appropriate and consistent with the applicable standards and case precedents.

With regard to those precedents, the court notes and is guided by the discussion of the Review Department in *In the Matter of Maloney and Virsik* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 774:

> The Standards for Attorney Sanctions for Professional Misconduct provide us with guidelines in determining the appropriate degree of discipline to be recommended. (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.) The gravamen of respondents' misconduct is their multiple misrepresentations to the Superior Court. Standard 2.3 provides: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a . . . client or another person or of concealment of a material fact to a . . . client or another person shall result in actual suspension or disbarment . . . 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." We note that respondents' misconduct was closely aligned with their practice.
>
> The standards are to be construed in light of the decisional law (*In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 30), although we find few analogous cases because respondents' misconduct is unusual in its duration and varied procedural contexts. In cases involving fraud on the court, the discipline imposed ranges from stayed suspension to 6 months' actual suspension. At one end of the disciplinary spectrum are cases such as *Sullins v. State Bar* (1975) 15 Cal.3d 609, and *In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, where no actual suspension was imposed on attorneys who misled or misrepresented facts to the court. In *Sullins*, the Supreme Court ordered public reproval of an attorney found to have committed moral turpitude by failing to disclose to the court a letter he received while representing the executor in a probate case. The letter was from the decedent's nephew disclaiming any interest in the property under his aunt's will. (*Sullins v. State Bar, supra*, 15 Cal.3d at p. 615.) Sullins requested an increase in his contingency fee, from 33 and 1/3 percent to 50 percent, arguing the matter had been and would be "fiercely contested." (*Id.* at p. 616.) The court noted that in analogous cases the discipline imposed was more severe, but considered Sullins's 45 years of practicing law without blemish and adopted the disciplinary board's recommendation of public reproval.
>
> In *In the Matter of Jeffers, supra*, 3 Cal. State Bar Ct. Rptr. at p. 226, we recommended a one-year suspension, stayed, and two years' probation. Jeffers failed to disclose to a superior court judge that his client had died, in spite of repeated questions by the judge that should have elicited this information. (*Id.* at pp. 217-218.) Jeffers also had written numerous letters to other counsel involved in the matter and failed to advise them of his client's death. (*Id.* at p. 218.) Jeffers was sanctioned for failing to

appear as ordered at a mandatory settlement conference. We determined that there was insufficient evidence in the record to give weight in aggravation to a prior out-of-state discipline, but we gave significant weight in mitigation because several character witnesses testified for Jeffers, Jeffers had practiced law in excess of 30 years before the prior disciplinary matter, and participated in many civic and pro bono activities.

The misconduct in the present case is similar to *Sullins* and *Jeffers*, but it is more far-reaching since it involves numerous pleadings and appearances over a four-month time period. There also is substantial aggravation in the instant case where none was found in *Sullins* and *Jeffers*. But here, the mitigation evidence to some extent offsets the evidence in aggravation. On balance, more serious discipline is warranted here than in those cases where no actual suspension was imposed.

In the middle of the disciplinary spectrum is *McMahon v. State Bar* (1952) 39 Cal.2d 367, where the Supreme Court suspended McMahon for sixty days for making misrepresentations in an effort to mislead the court. McMahon alleged the deceased died intestate in order to appoint his client as administrator in the probate proceeding. However, McMahon had information regarding the existence of a will which he failed to disclose. McMahon is similar to the case at hand in that the attorneys ignored the information available to them and proceeded with legal action which misrepresented facts to the court in an effort to mislead. But the extent of the deception is far more limited in the *McMahon* case and the court there did not address aggravation or mitigation evidence.

Also falling somewhere in the middle of the spectrum is *Bach v. State Bar, supra*, 43 Cal.3d 848, wherein an attorney intentionally misled a judge that he had not been ordered to produce his client at a child custody mediation, or in the alternative that he had not been served with such an order. However, the evidence showed that Bach was informed of the order both orally and in writing. The Supreme Court found that this conduct was serious and involved moral turpitude and was the kind of behavior "that threatens the public and undermines its confidence in the legal profession." (*Id.* at p. 857.) In ordering a one-year stayed suspension, with a three-year probation and 60 days' actual suspension, the court noted there was no mitigation evidence. (*Ibid.*) Moreover, the attorney in *Bach* had previously been publicly reproved for communicating with an adverse party represented by counsel, which was found to be an aggravating circumstance. Here, the misrepresentations were more numerous and there were significantly more aggravating factors, but here also is strong mitigation evidence, which was absent in *Bach*. Also, Bach had a previous disciplinary record, which is not a factor in the present case.

On the higher end of the discipline spectrum are the cases of *In the Matter of Chesnut, supra*, 4 Cal. State Bar Ct. Rptr. 166, *In the Matter of Farrell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 490, and *Levin v. State Bar*

(1989) 47 Cal.3d 1140, where attorneys who made misrepresentations were actually suspended for six months. In the case of *In the Matter of Chesnut, supra*, 4 Cal. State Bar Ct. Rptr. 166, we recommended six months' actual suspension for an attorney who falsely represented to two judges that he had personally served papers on an opposing party. (*Id.* at pp. 171-175, 177.) As in the instant case, we found in mitigation that the attorney's eight witnesses demonstrated good character and that the attorney engaged in pro bono activities. (*Id.* at pp. 175-177.) In *Chesnut*, like this case, we found in aggravation the attorney did not admit to any wrongdoing and the testimony in the State Bar Court lacked candor. However, in *Chesnut*, our key concerns were the attorney's prior disciplinary record and the fact that the attorney had been in practice for less than five years at the time of his second discipline, which we found "requires strong prophylactic measures." (*Id.* at p. 178.) Here, although respondents' conduct is more egregious, there is no other evidence of misconduct having occurred either before or after this matter.

We also consider *In the Matter of Farrell, supra*, 1 Cal. State Bar Ct. Rptr. 490, wherein an attorney was suspended for two years, stayed, and placed on six months' actual suspension. Farrell was found culpable of violating section 6106 because he falsely stated to a trial judge that a witness had been subpoenaed and he failed to cooperate with the State Bar. (*Id.* at p. 497.) In mitigation, Farrell believed that the subpoena had actually been sent by a member of his staff, but had no basis to believe it had been served. In aggravation, he had a prior record of discipline in two client matters resulting in 90 days' actual suspension. The misconduct here is far more serious, but Farrell's prior discipline is a significant distinguishing factor.

Lastly, in *Levin v. State Bar, supra*, 47 Cal.3d 1140, an attorney misrepresented to opposing counsel that he had the authority to settle the case as an officer of his incorporated client. (*Id.* at p. 1143.) Levin was not an officer, but under this guise, he also tried, on numerous occasions, to communicate with the adverse litigant despite the opposing counsel's letters that Levin stop these communications. (*Id.* at p. 1143.) In the same disciplinary proceeding, but in a different client matter, Levin settled a personal injury claim without the client's consent and failed to inform her of the settlement. Instead, Levin paid himself his fees and then gave the remaining settlement proceeds to the client's cousin, who gave the client only a part of the money, claiming the rest was payment for a debt owed. The client then requested an accounting from Levin, which he failed to deliver. (*Id.* at p. 1145.) The court found that Levin's acts of dishonesty were the most reprehensible of his misconduct. (*Id.* at p. 1147.) The misconduct in *Levin*, while more varied, is perhaps the closest in scope to the case at hand.

Mitigating weight was given due to Levin's 18 years of practice without prior discipline and his unblemished conduct subsequent to the State Bar

investigation, as well as for his candor and cooperation with the State Bar. Nevertheless, the court found this evidence was outweighed by aggravating evidence of Levin's attempts to conceal his dishonest acts, and that his dishonesty while not actually constituting a pattern of wrongdoing, "at the very least . . . demonstrated repeated, similar acts of misconduct" which merited six months' actual suspension. (*Id.* at pp. 1149-1150.)

The primary purposes of the disciplinary proceedings are 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. (Std. 1.3; *In re Morse, supra*, 11 Cal.4th at p. 205.) But, no fixed formula applies in determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Instead, we determine the appropriate discipline in light of all relevant circumstances. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) In the instant case, we have found less culpability and more mitigation, but we also have found considerably more aggravation than the hearing judge. Respondents clearly lost their way when they abandoned any notion of objectivity and professional responsibility in their effort to co-opt the litigation process for the benefit of their client, RVN. Given that they had ample time over a four-month period to reflect on what they were doing, we are concerned that respondents' serious ethical lapses may not be aberrational. (See *Mosesian v. State Bar* (1972) 8 Cal.3d 60, 65.) The aggregate number of their misrepresentations also raises concerns over whether the misconduct was aberrant. (*In the Matter of Kueker* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 583, 594.)

Militating in favor of respondents is their strong character evidence demonstrating their commitment to community service and social justice, their reputation for honesty and diligence, and their unblemished record save for their unfortunate foray into spurious litigation tactics. Also, while respondents' misconduct is serious and repeated, it occurred in a single client matter. Moreover, while not attempting to minimize the gravity of their misconduct, it was the result of over-zealous representation of their client and not for personal gain. Thus, even though the seriousness of the misconduct in this case appears to be most like those cases imposing six months actual suspension, we do not believe such severe discipline is needed here.

Although the hearing judge viewed the respective culpability of each respondent as similar, and found more mitigation evidence for Maloney, we conclude that respondent Maloney's actions warrant greater discipline than those of respondent Virsik. We find Virsik to be less culpable than Maloney since he did not appear or make misrepresentations at the February 16th hearing in the Superior Court, and there is no evidence he prepared the misleading February 16th RFD, which Maloney submitted to the Superior Court. Also we find that Virsik is not culpable of

> overreaching in aggravation, because there is no evidence he prepared the misleading letters to the bank demanding that RVIT's accounts be transferred to RVN. Finally, and perhaps most importantly, as the State Bar points out in its brief on appeal, and as Maloney has so stipulated, he was the partner in charge of the litigation tactics here in question, and he had more than 30 years' experience, while Virsik was a relatively inexperienced associate. As such Maloney must bear more responsibility than Virsik. Regrettably, Maloney's "lengthy practice and professional achievements did not aid [either] respondent in avoiding basic violations of the Rules of Professional Conduct." (*In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 765.) Accordingly we recommend 90 days' actual suspension for Maloney on the conditions stated below, and we find the appropriate discipline for Virsik to be 60 days' actual suspension on the conditions stated below.

When one considers the nature and intent underlying Respondent's misconduct, the many significant mitigating factors, and this court's confident conclusion that there will be no repetition by Respondent of such misconduct, a discipline falling in the middle of the above cases appears appropriate.

RECOMMENDED DISCIPLINE

Actual Suspension

For all of the above reasons, it is recommended that **ROBERT ALAN MURRAY,** State Bar No. 228691, be suspended from the practice of law for one year; that execution of that suspension be stayed; and that Respondent be placed on probation for one year, with the following conditions:

1. Respondent must be actually suspended from the practice of law for the first thirty (30) days of probation.
2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.
3. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of

probation. Upon the direction of the Office of Probation, he must meet with the probation deputy either in person or by telephone. During the period of probation, he must promptly meet with the probation deputy as directed and upon request.

4. 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 his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

5. He must submit written quarterly reports to the Office of Probation on or before each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his 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.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating

to whether he is complying or has complied with the conditions contained herein.

7. Within one year after the effective date of the discipline herein, he 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 he shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if Respondent has complied with all conditions of probation, the stayed suspension will be satisfied and that suspension will be terminated.

Multistate Professional Responsibility Examination

It is further recommended that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination within one year after the effective date of the Supreme Court order imposing discipline in this matter, or during the period of his suspension, whichever is longer, and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period. (See *Segretti v. State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.) Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

Costs

It is further recommended that costs be awarded to the State Bar in accordance with section 6086.10 and that such costs be enforceable both as provided in section 6140.7 and as a money judgment. It is also recommended that Respondent be ordered to reimburse the Client

Security Fund to the extent that the misconduct in this matter results in the payment of funds and that such payment obligation be enforceable as provided for under Business and Professions Code section 6140.5.

Dated: December 16, 2015

DONALD F. MILES
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 Los Angeles, on December 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 Los Angeles, California, addressed as follows:

JONATHAN IRWIN ARONS
LAW OFC JONATHAN I ARONS
100 BUSH ST STE 918
SAN FRANCISCO, CA 94104

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

KIMBERLY ANDERSON, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on December 16, 2015.

Tammy Cleaver
Case Administrator
State Bar Court