

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case No. 10-O-06167-LMA
)	
CRAIG DOUGLAS FOSTER,)	
)	DECISION AND ORDER OF
Member No. 179488,)	INVOLUNTARY INACTIVE
)	ENROLLMENT
<u>A Member of the State Bar.</u>)	

I. INTRODUCTION

In this contested original disciplinary proceeding, respondent **Craig Douglas Foster** (respondent) is charged with two counts of professional misconduct arising from his practice of dentistry: (1) committing acts of moral turpitude, dishonesty, and corruption in willful violation of Business and Professions Code section 6106; and (2) failing to support the laws of California in violation of section 6068, subdivision (a), by violating certain provisions of the Business and Professions Code¹ relating to respondent’s practice of dentistry. The court finds, by clear and convincing evidence, that respondent is culpable of both counts.

In view of respondent’s serious misconduct, the evidence in aggravation, and the limited evidence in mitigation, the court recommends that respondent be disbarred from the practice of law.

¹ All statutory references are to the Business and Professions Code, unless otherwise indicated.

II. PERTINENT PROCEDURAL HISTORY

On April 19, 2000, an administrative law judge (ALJ) issued a proposed decision revoking respondent's dental license. The ALJ's proposed decision was adopted by the Dental Board on May 3, 2000, as its decision. Respondent thereafter sought review of the Dental Board's decision by writ of mandate in the superior court. Respondent filed two separate writ petitions. The superior court denied both by decision dated April 21, 2009.

Thereafter, on November 17, 2010, the Office of the Chief Trial Counsel, State Bar of California (State Bar), filed a Notice of Disciplinary Charges (NDC) against respondent in case no. 10-O-06167.²

Respondent filed an answer to the NDC on December 6, 2010.

On April 22, 2011, the State Bar filed a motion for collateral estoppel. The motion set forth 188 factual findings that the State Bar sought to establish under the principles of collateral estoppel in this matter. The court granted the State Bar's motion for collateral estoppel and respondent was precluded from re-litigating the 188 findings in the Dental Board proceeding.

Upon motions of the State Bar, the court filed an order on April 27, 2011, which sets forth that the court would take judicial notice of sections 726 and 1670 (State Bar exhibits 1 and 2 of the State Bar's April 12, 2011 request for judicial notice); section 1680 (State Bar exhibit 1 of the State Bar's April 20, 2011 request for judicial notice); sections 651 and 2278 (State Bar exhibits 1 and 2 of the State Bar's April 20, 2011 requests for judicial notice); and the March 9, 2011 Notice of Abandonment of Appeal (State Bar exhibit 6 of the State Bar's April 12, 2011 request for judicial notice). The court also took judicial notice of, but not for the truth of facts

² This current proceeding is based on the same transactions and occurrences as those set forth in State Bar Court case no. 00-O-12832 which was filed against respondent on April 22, 2003. In late 2009, the court granted the State Bar's motion to dismiss case no. 00-O-12832 without prejudice while further proceedings were conducted relating to the underlying Dental Board matter.

asserted in, the following documents: the Dental Board's decision, filed May 3, 2000, and the Sacramento County Superior Court's ruling after hearing, filed August 21, 2009 (State Bar exhibits 4 and 5, respectively, of the State Bar's April 12, 2011 request for judicial notice).

On May 2, 2011, the court granted the State Bar's motion to amend the NDC in this matter,³ and the State Bar's amended NDC was filed on May 3, 2011.

Trial was held on May 9-13, 2011. Deputy Trial Counsels Manuel Jimenez and Susan Kagan represented the State Bar. Respondent was represented by Samuel Bellicini of Fishkin and Slatter, LLP.

Following the filing of post-trial briefs, the court took this matter under submission for decision on May 23, 2011.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This court's findings of fact are based on the collaterally estopped facts, and the evidence and testimony introduced at this proceeding.

A. Jurisdiction

Respondent was admitted to the practice of law in the State of California on December 14, 1995, and has been a member of the State Bar of California since that time.

B. Credibility Determinations

The two primary witnesses who testified at the five-day trial in this proceeding are respondent and respondent's expert witness, Charles S. Syers, D.D.S. (Dr. Syers).

After carefully observing respondent testify before it and after carefully considering, *inter alia*, respondent's demeanor while testifying; the manner in which he testified; the character of his testimony; his interest in the outcome in this proceeding; his capacity to perceive, recollect, and communicate the matters on which he testified; and after carefully reflecting on the record as

³ The court had denied an earlier motion to amend the NDC on April 27, 2011.

a whole, the court finds that much of respondent's testimony lacked credibility. (Evid. Code, § 780; *In the Matter of Wright* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 219, 227 [State Bar Court Trial Judge should declare how he or she weighed the evidence and determined the credibility of the parties and witnesses].)

Some of respondent's testimony was inconsistent with the documentary evidence or with respondent's prior statements or testimony. Portions of respondent's testimony were implausible. At times, respondent's testimony appeared contrived and less than forthright.

As the State Bar aptly notes in its post-trial brief, respondent initially testified in this court that he had had sexual intercourse with 6 to 10 of his patients, but later testified that he had had sexual intercourse with 8 to 10 of his patients. However, in the Dental Board proceeding, respondent testified that he had sex with 10 to 20 of his patients.

Respondent's testimony regarding his treatment methods lacked credibility. His assertion that his treatment methods were all "physically based" and did not involve psychotherapy or even have any psychotherapy "like" aspect to them was clearly contradicted by credible evidence to the contrary. Likewise, the court found incredible respondent's testimony that his sexual relationships with patients C.D. and L.M.⁴ were consensual. As illustrated below, respondent knew or should have known that he was abusing his position as a health care practitioner and preying on the vulnerabilities of his clients for his own personal benefit.⁵

The court also finds, after carefully considering, inter alia, his manner and mode of testifying and his interest in the present proceeding, that much of Dr. Syers's testimony lacked credibility. Moreover, even if the court had found Dr. Syers to be a credible witness, the court

⁴ To prevent the publication of damaging disclosures concerning living victims of respondent's sexual misconduct, the complete names of the female patients who testified against respondent in the Dental Board disciplinary proceedings are omitted from this decision because the patients' best interests are served by anonymity.

⁵ This paragraph does not list all of respondent's testimony that the court rejected for want of credibility.

could not have and would not have relied on his expert-opinion testimony because he admittedly failed to review all of the relevant documents.

C. Findings of Fact

Respondent's Dentistry Practice

From September 10, 1975 to June 3, 2000, respondent was a practicing dentist, licensed in the State of California.

In the early eighties and thereafter, respondent was recognized in the dental community as a "specialist" in treatment for temporomandibular joint disorder (TMJ). He primarily treated patients suffering from TMJ disorders and myofascial pain disorders.

Respondent's practice involved continuous and intensive contact with patients. Patients were generally seen over an extended period of time, with appointments at least every two weeks.

Respondent personally applied extensive physical therapy modalities to his patients. He did not have a physical therapist on staff. Respondent prescribed narcotic medications for pain relief, sleep, and muscle relaxation. He injected narcotic medications as needed for pain relief during therapy appointments.

Stress reduction was a major focus of respondent's practice. He considered stress to be a major factor in the muscle tension that leads to headache and TMJ problems in female patients. Approximately 80 percent of respondent's patients were women.

Respondent, in a letter sent to the Dental Board, profiled his patients as follows:

"For over twenty years I have restricted my practice to 'third standard deviation; complex facial pain and TMJ cases. Generally, my patients' [sic] have a history of multiple prior treaters, long term analgesic use, depression to the point of suicidal ideation and ruined social lives. It is my chosen area and I have developed treatment modalities and a personality that generally interacts well with this category of patient in motivating them and moving them towards achieving their own "wellness."

Respondent's therapy typically continued for an hour to two hours. Respondent often massaged and manipulated the muscles of the patient's jaw, shoulders, upper back, and upper chest during therapy. Patients were generally alone with respondent during the manipulations and massage, and during the trigger point injections. Respondent frequently took the opportunity during these lengthy treatment sessions to discuss with the complaining witnesses their marriages, relationships, business, and family stresses.

The nature of respondent's practice, his treatments and therapeutic approach, in and of themselves, cultivated and facilitated intimacy and dependency, a situation which he encouraged.

As illustrated below, respondent committed various acts of misconduct in his dental practice from 1993 to 1998. Respondent's misconduct centered on his sexual liaisons with drug dependent patients, to whom he supplied medications. On June 3, 2000, respondent's dental license was revoked based on the misconduct. Thereafter, respondent appealed the revocation. On August 21, 2009, the superior court issued a decision affirming the revocation of respondent's dental license in the matter, *Foster v. The Dental Board of California*, Sacramento Superior Court case nos. 00CS00821 and 05CS01277.

The Patient C.D. Matter

In January 1996, C.D., a 33-year-old married woman, was referred to respondent for treatment of TMJ pain. Respondent diagnosed her with myofascial pain dysfunction, arthropathy, and stylohyoid ligament strain.

C.D.'s initial treatment consisted of trigger point injections, splint therapy, TENS stimulation, acupuncture, and acupressure to her neck and back. Over time, she received bee venom injections, sclerosing, sodium hyaluronate injections, and hydrostatic procedures.

Respondent placed C.D. on muscle relaxants and narcotic analgesics shortly after she began seeing him. He prescribed Dalmane,⁶ Vicodin,⁷ and Flexoril.⁸ She had taken nothing but Ibuprofen prior to treating with him. He often administered Demerol⁹ injections to her prior to treatment, and he advised her to take two Vicodin just prior to her appointments.

Respondent told C.D. that her life stresses were connected to her jaw pain and that he needed to know what was going on in her life so that he could try to reduce the pain. C.D. told respondent about the problems in her home and work life. Respondent asked her about her marriage and her children. Over time, C.D. told respondent that her husband was abusive. Respondent told C.D. that he was also a lawyer and discussed the possibility of divorce and other legal matters with her.

C.D. felt comforted by respondent's interest in her personal life. She felt that he was like a therapist. She had a great deal of stress in her life, and believed respondent when he said he could help to eliminate the stress. Between her first visit in January 1996 and the middle of May 1996, C.D. had seen respondent at least 8 times for 90-minute and 2-hour therapies, and had

⁶ Dalmane is a hypnotic agent used for the treatment of insomnia. (Physician's Desk Reference (PDR).)

⁷ Vicodin is a semisynthetic narcotic analgesic for the relief of moderate to moderately severe pain. Adverse reactions include drowsiness, mental clouding, lethargy, impairment of mental and physical performance, anxiety, fear, psychic dependency, and mood changes. Psychic dependence, physical dependency, and tolerance may develop after repeated administration. Dependency may occur after several weeks of continued use. (PDR.)

⁸ Flexoril relieves skeletal muscle spasm of local origin. Adverse reactions include possibility of increasing the effects of alcohol and other central nervous system (CNS) depressants. (PDR.)

⁹ Demerol is a narcotic analgesic with multiple actions qualitatively similar to morphine. The principle actions of therapeutic value are analgesia and sedation. Demerol is indicated and used for moderate to severe pain. The PDR warns that Demerol can produce drug dependency of the morphine type and thus has the potential for being abused. The PDR warns that Demerol should be used with great caution and in reduced dosage with patients who are concurrently receiving other narcotic analgesics, general anesthetics, other tranquilizers, sedative-hypnotics, tricyclic anti-depressants, and other CNS depressants including alcohol. (PDR.)

undergone a hydrostatic procedure. Respondent repeatedly asked C.D. to go to Mexico or Costa Rica with him. She declined.

Respondent engaged in a sexual relationship with C.D., beginning approximately three months after he began treating her.

During C.D.'s June 21, 1996 appointment, respondent told C.D. that her job and family stresses were undermining all of the progress he was making with her therapies. He persuaded her to leave town with him and fly in his airplane to his home in Dunsmuir. During the weekend in Dunsmuir, respondent and C.D. engaged in sexual intercourse. After the Dunsmuir trip, respondent and C.D. had sex several times over the next few months in respondent's apartment over his dental office; sometimes immediately before C.D.'s morning appointments.

C.D. was not an emotionally or physically healthy woman, and her condition was worsening during treatment. On February 18, 1996, approximately three months before he engaged in sex with C.D., respondent reported to C.D.'s attorneys that she suffered from, among other things, chronic right jaw, neck, and shoulder pain and numbness; inability to open her lower jaw comfortably or fully; nausea; baseline headaches with intermittent exacerbation; pain on mastication; occasional locking of jaws; and depression. Later, in a deposition in 1998, in C.D.'s personal injury case, respondent testified that C.D. suffered from these same symptoms and that her life was limited by her symptoms.

In his surgical report of April 18, 1996, he indicated that "she is failing multiple modalities of conservative treatment including splint therapy, medications and physical and manipulative therapy. She is on a soft food and liquid diet. The patient was experiencing intolerable and intractable pain with the trend of getting worse with time."

C.D. developed a dependency on Vicodin while in respondent's care, and respondent prescribed for her an average of 1.2 Vicodin per day for over a 15-month period.

On April 4 and April 18, 1996, respondent gave C.D. injections of Demerol. On or about May 24, 1996, during the time he first began engaging in sexual relations with C.D., respondent administered 3 ccs of intravenous Valium,¹⁰ 2 ccs of intravenous Demerol, and prescribed 30 Vicodin. On June 5, 1996, he gave her another injection of Demerol. On June 12, 1996, he performed sclerosing therapy and again prescribed 30 Vicodin. Between March 21, 1996 and May 25, 1996, respondent prescribed an average of 1.6 Vicodin (500 mg.) per day. He prescribed another 30 on May 24, 1996, and 30 again on June 14, 1996 (1.5 per day). Between March 13, 1996 and April 26, 1996, respondent prescribed 80 Dalmane (30 mg.) and 16 Roxiprin.¹¹ On May 30, 1996, he prescribed 10 Triazolam (Halcion-25 mg.).¹² He also prescribed Flexoril.

Respondent continued to prescribe Dalmane and Vicodin to C.D. as her condition worsened during their relationship. Between October 2, 1996 and March 21, 1997, he prescribed an average of 2.2 Vicodin per day. Demerol injections were administered on October 14, 1996; November 20, 1996; February 6, 1997; and February 27, 1997.

Between January 17, 1996 and June 1997, respondent treated C.D. approximately 40 times. C.D. stopped treating with respondent in June 1997. After she left respondent's office, C.D. continued to seek relief from her symptoms and continued taking prescribed medications.

¹⁰ Valium is an anti-anxiety, sedative, and muscle relaxant with central nervous system depressive effects.

¹¹ Roxiprin is a semisynthetic narcotic analgesic with multiple actions similar to morphine. The principle actions of therapeutic value are analgesia and sedation. It is indicated and used for moderate to severe pain. The PDR warns that it can produce drug dependency of the morphine type and thus has the potential for being abused. Patients receiving other narcotic analgesics general anesthetics, other tranquilizers, sedative-hypnotics, tricyclic anti-depressants, and other CNS depressants including alcohol may exhibit an additive CNS depression. (PDR.)

¹² Halcion - Triazolam - is a hypnotic and is indicated for short-term treatment of insomnia. It may have as a side effect a variety of abnormal thinking and behavior changes, such as release of inhibitions seen in association with alcohol. (PDR.)

C.D. became dependent upon Vicodin and Dalmane while under respondent's care. The amount of opiates (Vicodin, Demerol, and Roxiprin) prescribed and administered to C.D. and the length of use was inappropriate. The medications respondent prescribed have the long term effect of enhancing and prolonging pain. They also induce side effects such as drowsiness, dizziness, impaired judgment, impaired motor skills, and vision. They should only be used for short term acute pain situations.

Respondent prescribed C.D. an excessive amount of Vicodin for an extensive period of time. The PDR warns that physical and psychic dependence and tolerance may develop with use of Vicodin beyond several weeks of continued use.

Between March 13, 1996 and June 24, 1997, a 15-month period, respondent prescribed 270-30 mg. tablets of Dalmane and 10 tablets of Triazolam. The PDR warns that the prolonged use of Dalmane, a hypnotic agent for sleep, is contraindicated.

During her treatment with respondent, C.D. was taking between four and six Vicodin daily. Respondent had told her to take two on her way to appointments to relax her before treatment. Knowing that C.D. had ingested 1000 mg. of Vicodin on her way to his office, respondent administered Demerol to her when she arrived. The PDR warns that Demerol should be used with great caution and in reduced dosage with patients who are concurrently receiving other narcotic analgesics or sedative-hypnotics, and other CNS depressants.

Respondent failed to warn C.D. not to take Vicodin prior to the Demerol injections and failed to reduce the dosage of Demerol administered to her to take into account her Vicodin use, placing her at risk for adverse reactions. Respondent's actions in administering Demerol injections when C.D. had already ingested Vicodin violated the standard of care. Respondent repeated this violation of the standard of care on at least seven occasions.

Respondent also falsely documented that he had performed an arthroscopic surgery upon C.D.'s left TM joint on April 18, 1996. He falsely documented that he had a fully equipped surgical suite and a surgical assistant when he had neither.

On May 18, 1996, respondent performed a hydrostatic procedure on C.D. in his Redding office and misrepresented the procedure as an arthroscopic one. Respondent generated a "Surgical Report" of the procedure as arthroscopic surgery. The report indicates that the procedure was performed in the office surgical suite, which was a separate room equipped with all of the necessary surgical instruments, supplies, and medical monitoring equipment, including emergency oxygen and nitrous oxide tanks. The report indicated that there was a surgical assistant present.

Respondent's conduct was fraudulent. He misrepresented to those paying the bills and those involved with evaluating C.D.'s damages in her personal injury case that she suffered through an extensive surgery when she did not. In addition, a misleading surgical report can have a negative impact on a patient's future treatment.

The Patient L.M. Matter

In 1988, L.M. was involved in an automobile accident. She hit her mandible on the steering wheel, shattering four teeth and lost normal jaw alignment. In June 1988, she was in another automobile accident which exacerbated her jaw problems. L.M. had been evaluated and treated by nine to ten other health care practitioners with little success before coming to respondent.

On January 23, 1989, L.M. came into the care of respondent. She reported bilateral jaw pain since April 1988. L.M. treated with respondent an average of three times a month between January 1990 and December 1991.

At the beginning of his treatment of L.M., respondent began asking L.M. to go to lunch or dinner with him. She had a boyfriend and was not attracted to respondent, as he was a large man. She declined his invitations.

In July 1991, L.M. was involved in another automobile accident, wherein she struck her head and face. She received treatment from respondent.

In 1992, L.M. moved to the Vacaville area and continued to treat with respondent in his Sacramento office. L.M. continued to treat with respondent in 1993 and 1994.

Respondent told L.M. during treatment that she needed to reduce the stresses in her life, that she should tell him everything about her life, and that he was her counselor. He told her that he needed to know all about her personal life so that he could help her. He told her that knowing about her personal life gave him a broader understanding of how her personal life exacerbated her TMJ problems. Respondent told L.M. that her psychological condition had a bearing on her physical condition. She thought that he was her “salvation” and began to confide in him.

In July 1995, while L.M. was his patient, respondent had his first sexual encounter with her at his home in Dunsmuir. In August 1995, L.M. began dating respondent and went with him to Costa Rica. A few weeks after they returned from Costa Rica, she sought counseling and stopped dating him.

During their brief relationship, L.M. did not move in with respondent. She spent time with him at his Dunsmuir home and at his Sacramento apartment/legal office located above his dental office. Respondent’s medical records reveal that respondent treated L.M. for continuing complaints before, during, and after his sexual relationship with her.

L.M. was a vulnerable client. She had been to numerous practitioners over the years and had experienced limited success. She had constant complaints of pain and jaw joint dysfunction, which were not alleviated by treatment. While in respondent’s care, she had extensive therapy

and multiple surgeries. She was dependent upon respondent for pain relief. She suffered depression. She had many stressors in her life, which respondent induced her to disclose and discuss. She had suffered multiple car accidents, and was receiving worker's compensation benefits. She was dependent upon respondent to secure continuing benefits for her under the worker's compensation system.

Respondent suspected that L.M. had a methamphetamine addiction prior to having a sexual relationship with her. Respondent detected vulnerability in her, which would cloud her judgment. He cultivated her dependency and engaged her in a sexual relationship.

L.M. was particularly vulnerable to the pressure and influence of respondent. He exerted pressure and influence over her in order to induce her to have sexual relations with him. Respondent's intensive therapeutic approach and intrusive personal involvement with his patients' personal lives cultivated and encouraged the dependency and vulnerability L.M. felt towards respondent, and resulted in her having sexual relations with him. There was a causal nexus between respondent's practice and his sexual conduct with L.M.

Respondent also falsely and in a misleading manner documented a hydrostatic procedure he performed on L.M. on March 23, 1993, as an arthroscopic surgery. The surgery that respondent performed on L.M. was documented on a similar "form surgical report" as was used in documenting C.D.'s hydrostatic procedure. The report includes statements that TMJ surgery was performed on March 23, 1993, in a surgical suite.

The Patient I.L. Matter

In October 1996, I.L., a 41-year-old married woman began treating with respondent at his office in Redding.

Respondent performed a hydrostatic procedure and falsely documented the procedure as an arthroscopic surgery. Respondent falsely represented that he was qualified to perform

surgery, that he maintained a surgical suite with all necessary equipment, that he had employed a surgical assistant, and that he had utilized arthroscopic equipment and supplies in the course of an arthroscopic procedure.

Respondent also made comments to I.L. that sex was a good release for her stress.

The Patient T.O. Matter

Respondent treated patient T.O. from 1995 to July 23, 1998. Respondent gave T.O. trigger point injections. Sometimes T.O. would moan when experiencing great pain from the trigger point injections. Respondent asked her if the moaning sound was the same sound she made when she was having sex.

On one occasion when respondent was placing a Q-tip device up T.O.'s nostrils, respondent told her that if he were to push the Q-tips a little harder, the wires could go up into her brain and kill her. His comment so frightened T.O. that she refused to allow respondent to use the Q-tip treatment again.

Respondent's Letterhead

On two occasions in 1997, respondent used the prefix "Dr." in correspondence and failed to further indicate the type of certificate held.

Respondent used the following letterhead in correspondence:

THE MEDICAL/LEGAL OFFICES OF
DR. CRAIG D. FOSTER
1819 20TH STREET
SACRAMENTO, CA 95814

C. Conclusions of Law

Count One – Moral Turpitude (Section 6106)

Section 6106 prohibits an attorney from engaging in conduct involving moral turpitude, dishonesty, or corruption. Moral turpitude has been described as “an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in

general, contrary to the accepted and customary rule of right and duty between man and man.”
(*In re Craig* (1938) 12 Cal.2d 93, 97.)

Dentists are prohibited from having sexual relations with patients unless the patient is a spouse or in a domestic relationship with the dentist. (§ 726.) As noted in the Dental Board’s decision, health care practitioners have the potential to cloud or overcome a patient’s judgment. A health practitioner may use his status and authority to win his patient’s trust, manipulate their insecurities, and cause them to participate in a sexual relationship. (*Green v. Board of Dental Examiners* (Second Dist. 1996) 47 Cal.App.4th 786, 803.)

As a dental practitioner, respondent assumed a position of trust in his patients’ lives. Respondent, however, abused his role and defiled the trust that his patients placed in him. By inducing dental patients C.D. and L.M. to enter into a sexual relationship with him at a time when both C.D. and L.M. were vulnerable due to being heavily medicated and suffering from depression and chronic pain, respondent engaged in conduct involving moral turpitude, dishonesty, or corruption, in willful violation of section 6106.

The court further finds that by falsely documenting hydrostatic procedures performed on dental patients C.D., L.M., and I.L., as arthroscopic surgeries, respondent engaged in additional conduct involving moral turpitude, dishonesty, or corruption, in willful violation of section 6106.¹³

Count Two – Failure to Comply with Laws (§ 6068, subd. (a))

Section 6068, subdivision (a) provides that an attorney has a duty to support the laws of the United States and of this state. The State Bar alleged that respondent violated sections 651

¹³ The State Bar further alleged that respondent’s comments to patients, his use of a misleading letterhead, and his excessive prescriptions to C.D. constitute independent acts of moral turpitude. The court disagrees. While the facts surrounding some of these allegations help bolster the court’s finding that respondent committed moral turpitude by engaging in improper sexual relations with vulnerable patients, the evidence supporting these three allegations, when analyzed individually, does not rise to the level of moral turpitude.

[making a misleading or deceptive statement/advertisement]; 726 [sexual relations with a patient]; 1670/1680 [unprofessional conduct]; and 2278 [use of “doctor” without indication of type of certificate]. The court agrees. The evidence demonstrates, by clear and convincing evidence, that respondent violated sections 651, 726, 1670/1680, and 2278, in willful violation of section 6068, subdivision (a). It should be noted, however, that this finding is based on much of the same misconduct relied on by the court to establish culpability in Count One. Consequently, the court affords Count Two limited additional weight.

IV. LEVEL OF DISCIPLINE

The parties bear the burden of establishing mitigation and aggravation by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2.)¹⁴

A. Mitigation

The court found one factor in mitigation. (Std. 1.2(e).)

1. Good Character

Respondent presented seven witnesses who testified regarding respondent’s good character. Most of respondent’s character witnesses, however, had only read the pre-trial statements and believed this matter was just an issue of strict liability relating to respondent having sex with his patients. Despite this fact, the court finds that respondent’s character evidence warrants limited consideration in mitigation. (Std. 1.2(e)(vi).)

B. Aggravation

The record establishes two factors in aggravation by clear and convincing evidence. (Std. 1.2(b).)

¹⁴All further references to standards are to this source.

1. Prior Record of Discipline

Respondent's prior record of discipline is an aggravating circumstance. (Std. 1.2(b)(i).)

On June 8, 2007, the California Supreme Court issued an order (S151688) suspending respondent from the practice of law for one year, stayed, with two years' probation, and 90 days' actual suspension for three counts of misconduct. Said misconduct included respondent's improper withdrawal in a single-client matter and his commingling funds in his client trust account. In mitigation, respondent had no prior record of discipline and displayed candor and cooperation with the State Bar. In aggravation, respondent committed multiple acts of misconduct.

Prior discipline is a proper factor in aggravation "[w]hen discipline is imposed." (*Lewis v. State Bar* (1973) 9 Cal.3d 704, 715; see *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 171.) The aggravating force of respondent's prior discipline, however, is diminished by the fact that the present misconduct occurred before respondent committed the misconduct involved in his prior discipline. (See *In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343, 351.) Accordingly, the court does not assign significant weight to respondent's prior discipline.

2. Lack of Insight

At trial, respondent demonstrated a lack of insight into his wrongdoing. (See *In the Matter of Priamos* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 824, 830.) Respondent failed to appreciate the severity of his misconduct and continues to maintain the position that his sexual relations were consensual and mutual. Respondent's lack of insight into his misconduct warrants consideration in aggravation.

V. DISCUSSION

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

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

In this case, the standards call for the imposition of a minimum sanction ranging from suspension to disbarment. (Standards 2.3 and 2.6.) The most severe sanction is found at standard 2.3 which recommends actual suspension or disbarment for an act of moral turpitude, fraud, or intentional dishonesty.

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 urges that respondent be disbarred. Respondent, on the other hand, argues that he should be exonerated on all charges.

The court found some guidance in *In the Matter of Priamos, supra*, 3 Cal. State Bar Ct. Rptr. 824. In *Priamos*, the attorney represented a client who he knew to have fragile mental

health. The client asked the attorney to manage her investments and he agreed. The attorney took advantage of his client and invested in speculative ventures in which he had a financial interest. The attorney failed to render adequate accountings and unilaterally paid himself nearly \$450,000 in management and legal fees. He showed indifference to rectifying the harm he caused and a lack of insight into his misconduct. Accordingly, the Review Department recommended that the attorney be disbarred.

Like *Priamos*, the present case involves the abuse of a position of trust for personal gain. As his clients' health care practitioner, respondent was well aware of their physical and mental vulnerabilities. Despite this knowledge, respondent cultivated and facilitated an environment of intimacy and dependency, and ultimately engaged in sexual intercourse with drug-reliant patients. Respondent's actions were motivated by his own self interest.

In addition, respondent, like the attorney in *Priamos*, failed to demonstrate any insight into his own misconduct. Respondent remains convinced that his relationships were consensual and fails to acknowledge the influence he had over his vulnerable and prescription-reliant patients. Respondent's failure to appreciate the scope and breadth of his misconduct causes the court concern that respondent will continue to engage in similar abuses.

Therefore, having considered the nature and extent of the misconduct, the aggravating and mitigating circumstances, as well as the case law, the court finds that respondent's disbarment is necessary to protect the public, the courts, and the legal community; to maintain high professional standards; and to preserve public confidence in the legal profession.

VI. RECOMMENDATIONS

Accordingly, the court recommends that respondent **Craig Douglas Foster** be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys in this state.

A. California Rules of Court, Rule 9.20

It is also recommended that the Supreme Court order respondent to comply with California Rules of Court, rule 9.20, paragraphs (a) and (c), within 30 and 40 days, respectively, after the effective date of its order imposing discipline in this matter.¹⁵

B. 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.

VII. ORDER OF INVOLUNTARY INACTIVE ENROLLMENT

It is ordered that respondent be transferred to involuntary inactive enrollment status under section 6007, subdivision (c)(4), and rule 5.111(D) of the Rules of Procedure of the State Bar. The inactive enrollment will become effective three calendar days after this order is served.

Dated: August ____, 2011.

LUCY ARMENDARIZ
Judge of the State Bar Court

¹⁵Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)