FILED APRIL 4, 2013

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of **JON MICHAEL ALEXANDER,** **Member No. 129207,** A Member of the State Bar.	Case Nos.: **11-O-12821-LMA (11-O-14028)** **DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

Introduction[1]

This is respondent Jon Michael Alexander's fourth disciplinary proceeding. He has been charged with committing several acts of prosecutorial misconduct as the District Attorney of Del Norte County, including talking to a defendant in the absence of her retained counsel.

"In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence."[2] "Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime. [Citations.]" (*Massiah v. U.S.* (1964) 377 U.S. 201, 205.)

In this contested matter, respondent's seven alleged counts of misconduct in three matters include: (1) prohibitive giving or lending to a judge or official; (2) acts of moral turpitude and

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

[2] The Sixth Amendment to the U.S. Constitution.

corruption; (3) communications with a represented party without consent; (4) suppression of evidence contrary to legal obligation; and (5) failure to perform services competently.

This court finds, by clear and convincing evidence, that respondent is culpable of three of the charged counts of misconduct. Based upon the serious nature and extent of culpability and the applicable mitigating and aggravating circumstances, particularly his three prior records of discipline, the court recommends that respondent be disbarred from the practice of law.

Significant Procedural History

The State Bar of California, Office of the Chief Trial Counsel (State Bar), initiated this proceeding by filing a notice of disciplinary charges (NDC) on May 15, 2012. Respondent filed a response on June 4, 2012.

An eight-day hearing was held on October 15-19 and 22-24, 2012. Trial Counsel Donald R. Steedman and Linda I. Yen represented the State Bar. Respondent was represented by attorneys Kurt W. Melchior, Robert J. Sullivan, Farschad Farzan, Sarah Andropoulos, and Catherine F. Ngo of Nossaman LLP. The parties filed a stipulation as to facts on October 15, 2012.

On October 4, 2012, respondent filed a motion for judgment based on discriminatory prosecution. Respondent asked the court to rule on the motion after trial. Accordingly, after having carefully reviewed and considered respondent's arguments and finding no good cause being shown, the court hereby denies respondent's request to dismiss this proceeding on the ground of discriminatory prosecution.

On January 14, 2013, following the filing of closing briefs, the court took this matter under submission.

Findings of Fact and Conclusions of Law

Respondent was admitted to the practice of law in California on July 2, 1987, and has been a member of the State Bar of California at all times since that date.

The following findings of fact are based on the response to the NDC, the stipulation as to facts, and the testimony and evidence presented at trial.

The Sanford Loan Matter (Case No. 11-O-12821)

Facts

Prior to July 2009, respondent was a public defender for Del Norte County. Linda Sanford was the Assistant Chief Probation Officer of Del Norte County.

As a probation officer, Sanford was an official of the Del Norte County Superior Court.

In July 2009, when respondent was still a public defender who represented numerous defendants and Sanford was still the assistant chief probation officer, respondent loaned $14,000 to Sanford. Respondent made a loan to an official of a tribunal.

To date, Sanford has not fully repaid the loan.

Respondent and Sanford are close personal friends such that gifts are customarily given and exchanged. In the past, Sanford had given respondent used suits and gas money to help him out. She had also given him a lithograph as a gift. Sanford regards him as her brother.

At the time that respondent made the loan to Sanford, respondent regularly represented criminal defendants whose probation reports and recommendations were sometimes personally prepared by Sanford. Such probation reports are relied on and/or considered by the court.

At the time that respondent made the loan to Sanford, Sanford was assigned as the probation officer for at least one of respondent's cases. Although respondent did not disclose this loan to others, some members of the public were aware of the loan, including some judges and opposing counsel.

On January 3, 2011, respondent was sworn in as the District Attorney of Del Norte County.

Between July 2009 and December 2011, Sanford was the assigned probation officer on some of respondent's cases when he was the assigned public defender and later when he was the elected district attorney.

Conclusions

Count One – (Rule 5-300(A) [Contact with Officials])

Rule 5-300(A) provides that an attorney must not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the attorney and the judge, official, or employee is such that gifts are customarily given and exchanged.

Respondent and Sanford are close personal friends. In the past they had exchanged gifts to help each other out. Unlike gas money or used suits, the $14,000 loan is arguably not a gift that is customarily given and exchanged between respondent and Sanford. But because loans are allowed amongst personal relationships and respondent and Sanford treat each other as family, there is no clear and convincing evidence that respondent willfully violated rule 5-300(A) by loaning money to Sanford.

Count Two – (§ 6106 [Moral Turpitude and Corruption])

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment.

The State Bar alleges that by making a $14,000 loan to Sanford without disclosing it to the court and opposing counsel in actual or potential cases to which Sanford was or could be assigned, respondent committed an act of corruption.

"The word 'corruption' indicates impurity or debasement and when found in the criminal law it means depravity or gross impropriety." (Rollin M. Perkins & Ronald N. Boyce, Criminal Law (3d ed. 1982) p. 855.)

Corruption is the "act of doing something with an intent to give some advantage inconsistent with official duty and the rights of others; a fiduciary's or official's use of a station or office to procure some benefit either personally or for someone else, contrary to the rights of others." (Black's Law Dict. (8th ed. 2004) p. 371, col. 1.)

In this Sanford loan matter, there is no clear and convincing evidence that respondent made the loan with the intent to obtain some advantage from Sanford.

However, respondent must recognize that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate."[3]

"The prosecutor is a public official vested with considerable discretionary power to decide what crimes are to be charged and how they are to be prosecuted. [Citations.] … he 'is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartiality is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.' (*Berger v. United States* (1935) 295 U.S. 78, 88 [citations])." (*People v. Superior Court* (1977) 19 Cal.3d 255, 266.) "[B]ecause the prosecutor enjoys such broad discretion that the public he serves and those he accuses may justifiably demand that he perform his functions with the highest degree of integrity and

[3] Rule 3.8 of the American Bar Association Model Rules of Professional Conduct, Comment (1998).

impartiality, and with the appearance thereof." (*People v. Superior Court* (1977) 19 Cal.3d 255, 266-267.)

Because respondent as a prosecutor and Sanford as a probation officer worked on some of the same criminal matters, representing different interests, "[i]t is essential that the public have absolute confidence in the integrity and impartiality of our system of criminal justice. This requires that public officials not only in fact properly discharge their responsibilities but also that such officials avoid, as much as is possible, the appearance of impropriety." (*People v. Rhodes* (1974) 12 Cal.3d 180, 185.)

Respondent argues that disclosures are not required in small counties because relationships and friendships are not secret or concealed in small counties.

This court rejects such argument. Small counties are not exempt from disclosure requirements. As the district attorney, respondent must avoid the appearance of impropriety and any potential conflict of interest in order to maintain the public confidence in the prosecutor. He must conduct his duties with the utmost honesty and transparency.

Nevertheless, respondent's failure to disclose the $14,000 loan is not clear and convincing evidence of an act of corruption. Sanford needed financial assistance and respondent was there to help a friend. While the loan "does not look good," there is no clear and convincing evidence that respondent's ulterior motive was to corrupt Sanford's professional judgment in the criminal cases. The loan casts doubts on respondent's impartial judgment but does not rise to the level of an act of moral turpitude, dishonesty or corruption in willful violation of section 6106.

The Mavris Loan Matter (Case No. 11-O-14028)

Facts

At all relevant times, a State Bar disciplinary matter, case No. 03-O-01010 ("State Bar matter"), was pending against respondent.

On April 16, 2010, attorney George Mavris ("Mavris") substituted into the State Bar matter as respondent's attorney of record. In 2010, Mavris and respondent were good friends, both professionally and socially.

In November 2010, respondent was elected as the District Attorney of Del Norte County.

On December 3, 2010, Jackie Zlokovich was charged with two misdemeanor violations in *People v. Zlokovich* in Del Norte County Superior Court (the "Zlokovich matter").

On or about December 21, 2010, Mavris loaned respondent $6,000. On or about December 27, 2010, respondent repaid the loan to Mavris.

On January 13, 2011, Mavris replaced attorney John Fu as Zlokovich's attorney of record in the Zlokovich matter.

On January 13, 2011, Mavris hand-delivered a letter to respondent requesting that respondent review the Zlokovich matter and suggesting that they discuss dismissal of the matter in its entirety after respondent reviewed the file.

Between January 15 and January 31, 2011, respondent and Mavris exchanged emails in which Mavris repeatedly asked respondent to dismiss the Zlokovich matter, and respondent responded that he would review the matter.

On February 1, 2011, a pretrial status conference was held in the Zlokovich matter. Judge William Follett presiding over the pretrial status conference told the parties that the case should not proceed and that it "had no legs."

On February 28, 2011, respondent and Mavris appeared in the Zlokovich matter, and they reported to the court that the case had been resolved.

On March 1, 2011, respondent and Mavris appeared in the Zlokovich matter and respondent moved to dismiss the matter. The court through Judge Robert Weir granted the motion and dismissed the case.

Between January and March 2011, Mavris remained as respondent's attorney of record in his pending State Bar matter.

Respondent did not disclose to the Del Norte County Superior Court that Mavris was his counsel in the State Bar matter and did not disclose that Mavris had loaned respondent money in December 2010.

Conclusions

Count Three – (§ 6106 [Moral Turpitude and Corruption])

The State Bar alleges that by failing to recuse himself from the Zlokovich matter, by failing to disclose to the court that Mavris was respondent's State Bar attorney and that Mavris had recently loaned respondent money, and by reviewing the Zlokovich matter and by moving to dismiss the Zlokovich matter without informing the court of respondent's relationship with Mavris, respondent engaged in acts of corruption.

Arguably, respondent should have disqualified himself from participating in the prosecution of the Zlokovich matter to avoid the appearance of a conflict of interest with respect to his official duties. But there is no clear and convincing evidence that his failure to do so affected his ability to impartially perform the discretionary functions of his office. Despite Mavris's persistent request that Zlokovich matter be dismissed, it was not until after Judge Follett had determined that the case "had no legs" that respondent agreed to dismiss the case. The Zlokovich matter was apparently a weak case.

Similarly, respondent should have disclosed to the court that Mavris was his attorney in the State Bar matter and that Mavris had loaned him money. The public has a legitimate expectation that the prosecutor performs his functions with the highest degree of integrity and impartiality and with the appearance of integrity and impartiality. "The advantage of public prosecution is lost if those exercising the district attorney's discretionary duties are subject to

conflicting personal interests which might tend to compromise their impartiality." (4 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Introduction to Criminal Procedure, §24, pp. 38-39.)

But, there is no clear and convincing evidence that respondent's failure to disclose his personal relationship with Mavris or the personal loan from Mavris affected his ability to impartially perform the discretionary functions of his office or that the Zlokovich matter was dismissed because of undue influence.

Therefore, as in the Sanford loan matter, respondent's concealment and appearance of impropriety in this Mavris loan matter dampen the integrity of the office of prosecution and disregard those obligations of prosecutorial discretion. Yet, there is no clear and convincing evidence that respondent's misconduct constituted acts of corruption or moral turpitude in willful violation of section 6106.

The Taylor Matter (Case No. 11-O-12821)

Facts

On March 31, 2011, Michelle Taylor ("Taylor") and Damion VanParks ("VanParks") were pulled over by police and searched. When the police were in the process of searching Taylor, she stated, "It's not mine! It's not mine!" referring to the methamphetamine and marijuana she had in her possession. Taylor also informed a police officer that the drugs belonged to VanParks, that he had told her to hide them, and that that was why the drugs were on her person.

On May 6, 2011, Taylor and VanParks were charged with three felonies relating to the possession and sale of the drugs in *People v. Taylor and VanParks* in Del Norte County Superior Court.

On May 6, 2011, defense attorney Darren McElfresh ("McElfresh") was appointed to represent Taylor and defense attorney William Cater ("Cater") was appointed to represent VanParks.

On July 8, 2011, Taylor went to respondent's office without an appointment to speak with respondent directly about the pending criminal charges.[4] Respondent asked Taylor if she was represented by counsel and Taylor indicated to respondent that she was represented by McElfresh.

Respondent did not cease the conversation as soon as he learned that Taylor was represented by counsel. He continued to speak to her.

Respondent spoke to Taylor about the facts surrounding the criminal charges and questioned her about the facts relevant to the criminal charges. For example, respondent asked Taylor, "Who sold you the drugs?"

At the time, respondent did not have defense attorney McElfresh's consent to speak with Taylor about the pending criminal charges.

Taylor stated to respondent that she wanted to speak with him because she wanted to tell him that the drugs were hers and not VanParks'.

The statements made to respondent regarding ownership of the drugs were inconsistent with the statements Taylor made at the time of her arrest in March 2011.

Respondent did not make any record of his July 8, 2011 encounter with Taylor.

On July 11, 2011, defense attorney Cater told Katherine Micks ("Micks"), the assistant district attorney of Del Norte County, that Cater believed that Taylor spoke with respondent and

[4] The court does not find credible that respondent had permission to speak to Michelle Taylor before July 11, 2011.

told respondent that the "dope was hers." Cater wanted Micks to drop the charges against VanParks.

On July 11, 2011, when Assistant District Attorney Micks asked respondent if he had a conversation with Taylor, he denied it.

That same morning of July 11, 2011, respondent asked defense attorney McElfresh if he might have permission to speak to his client Taylor. McElfresh allowed respondent to speak to Taylor for the sole purpose of discussion on drug rehabilitation only. At no time before this date did respondent have permission from McElfresh to speak with Taylor.

Respondent did not inform defense attorneys McElfresh or Cater that Taylor had given him a statement a couple of days before regarding the facts underlying the pending criminal charges. The statement was exculpatory evidence favorable to VanParks. However, Cater did believe that perhaps a conversation between respondent and Taylor had taken place.

Unbeknownst to respondent, his July 8, 2011 conversation with Taylor was recorded.

On July 19, 2011, a preliminary hearing was conducted in *People v. Taylor and VanParks*. Respondent, defense attorney McElfresh, defense attorney Cater, and Taylor were present at the preliminary hearing. Defendant VanParks was not present. The court ordered a bench warrant for his arrest.

At the hearing, respondent still did not inform McElfresh, Cater or the court about his July 8, 2011 conversation with Taylor.

When VanParks arrived at the conclusion of the preliminary hearing, he was taken into custody. Respondent did not inform the court that he had exculpatory evidence favorable to VanParks, namely, Taylor's claim that the drugs were hers and not his.

On July 20, 2011, an Information was filed against Taylor charging her with three felonies related to the transportation and possession of drugs.

On July 21, 2011, defense attorney Leroy Davies was appointed to represent VanParks.

Prior to August 10, 2011, VanParks obtained the recording of the conversation between respondent and Taylor. A chain of events began to unravel.

On August 10, 2011, VanParks provided defense attorney Davies with the recording of the conversation between respondent and Taylor.

The next day, Davies provided respondent with a copy of the same recording. Respondent then provided defense attorney McElfresh with a copy of that recording.

On August 19, 2011, the court dismissed the charges against VanParks.

On October 19, 2011, respondent provided McElfresh with a declaration under penalty of perjury stating that "[a]ny prior discussions with Michelle Taylor, presently represented by attorney Darren McElfresh, were **immediately** brought to Mr. McElfresh's attention." (Emphasis added.) The declaration also stated that Taylor's statements to respondent "are deemed confidential and pursuant to the *Massiah*[5] decision, will never be used against Ms. Taylor in any case(s) presently pending against her."

On January 20, 2012, the attorney general's office took over the prosecution of Taylor's pending criminal matter.

Conclusions

Count Four - (Rule 2-100(A) [Communication with a Represented Party])

Rule 2-100(A) provides that an attorney, while representing a client, must not directly or indirectly communicate about the subject of the representation with a party the attorney knows is represented by another attorney, unless the attorney has the consent of the other attorney.

[5] *Massiah* rule is the principle that an attempt to elicit incriminating statements from a suspect whose right to counsel has attached but who has not waived that right violates the Sixth Amendment. (*Massiah v. United States* (1964) 377 U.S. 201.)

Respondent claims that he had permission to speak to Taylor on July 8. But in fact, defense attorney McElfresh never gave such consent. Respondent was allowed to discuss about rehabilitation with Taylor on July 11, but not before that date. Therefore, Taylor was denied the basic protections of the guarantee of the Sixth Amendment when respondent elicited information from her in the absence of her counsel. (*Massiah v. United States* (1964) 377 U.S. 201, 206.)

By speaking with Taylor on July 8, 2011, about her pending criminal matter without the consent of her defense attorney when he knew that she was represented by McElfresh, respondent clearly and convincingly violated rule 2-100(A).

Count Five - (§ 6106 [Moral Turpitude])

"[U]nder our system of justice the most elemental concepts of due process of law contemplate that an indictment be followed by a trial, 'in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law.' [*Spano v. New York* (1959) 360 U.S. 315, 327.]" (*Massiah v. United States, supra,* 377 U.S. 201, 204.)

In this Taylor matter, respondent clearly and convincingly committed acts involving moral turpitude, dishonesty and corruption in willful violation of section 6106: (1) by speaking to Taylor whom he knew was represented by counsel; (2) by failing to immediately inform defense attorney McElfresh that he had spoken with Taylor until he realized that the conversation was tape-recorded; (3) by failing to inform defense attorney Cater that Taylor had provided statements favorable to VanParks; (4) by falsely declaring under penalty of perjury that any prior discussions with Taylor were "immediately" brought to defense attorney McElfresh's attention when he did not inform McElfresh until August 11, 2011, more than a month after he had spoken to Taylor on July 8, and only after discovering that there was a tape

of the conversation; (5) by failing to disclose to the court of the exculpatory evidence favorable to VanParks at the July 19 hearing and by allowing VanParks to be taken into custody knowing that he had exculpatory information on VanParks; and (6) by misrepresenting to Assistant District Attorney Micks that he did not have a conversation with Taylor on July 8.

Count Six - (Rule 5-220 [Suppression of Evidence])

Rule 5-220 provides that an attorney must not suppress any evidence that the attorney or the attorney's client has a legal obligation to reveal or to produce.

Prosecutors have a constitutional mandate to disclose material, exculpatory evidence to defendants in criminal cases. *Brady v. Maryland* (1963) 373 U.S. 83 and subsequent cases interpreting *Brady* require prosecutors to disclose, prior to trial, impeaching evidence and evidence favorable to the defense. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecutor." (*Id*. at p. 87.)

Respondent had a legal obligation to reveal to VanParks and his defense attorney the incriminating statements Taylor made to him on July 8, 2011, claiming that the drugs were hers and not VanParks'. Yet, he intentionally concealed these statements until he discovered that there was a tape of their conversation. Thus, the court finds that respondent willfully violated rule 5-220 by failing to immediately disclose to the defense the July 8, 2011 conversation of which he was obligated to reveal.

Count Seven - (Rule 3-110(A) [Failure to Perform Legal Services with Competence])

Rule 3-110(A) provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

The State Bar alleges that respondent failed to perform legal services with competence because, among many things, he spoke to a criminal defendant he knew was represented by counsel and he failed to inform defense attorney about the exculpatory evidence.

The gravamen of respondent's misconduct is based not on his failure to perform competently but on his failure to perform ethically, in violation of his professional duties, of which he is found culpable in counts four, five, and six. Thus, the court does not find that respondent willfully violated rule 3-110(A).

Aggravation[6]

Prior Record of Discipline (Std. 1.2(b)(i).)

Respondent has three prior disciplines.

1. On March 28, 1996, the State Bar Court issued an order of private reproval against respondent in which he stipulated to, for failing to keep all agreements made in lieu of disciplinary prosecution and for two criminal misdemeanor convictions for driving with a suspended license. (State Bar Court case No. 93-C-17720.)
2. On November 18, 2003, the California Supreme Court filed an order that suspended respondent from the practice of law for two years, stayed, and actually suspended him for six months until he made restitution and until the State Bar Court terminated his actual suspension. Respondent's misconduct involved failure to return unearned fees of $4,500 and the unauthorized practice of law while suspended for failure to pay his State Bar membership fees. (Supreme Court case No. S118572; State Bar Court case Nos. 02-O-15150; 02-O-14887.)

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

3. On April 21, 2011, the California Supreme Court filed an order suspending respondent from the practice of law for two years, stayed, and placing him on probation for three years on condition that he be actually suspended for 60 days, based on his successful completion of the Alternative Discipline Program.[7] Respondent was culpable of misconduct in four matters, including failure to perform services competently, failure to communicate with clients, engaging in the unauthorized practice of law, failure to release client file, failure to refund unearned fees, and an ex parte communication with a sentencing judge in a criminal case in order to influence the sentence. In mitigation, the court found, among several activities, that respondent helped others who were struggling with drug addiction, that he directed all 12-Step meetings and programs for juveniles, that he was a board member of the Jordan Recovery Center, and that he was a member of the Democratic Central Committee. (Supreme Court case No. S186367; State Bar Court case Nos. 03-O-01010; 03-O-01107; 04-N-10577; 05-O-04949; 06-O-11409).

Respondent's misconduct in this proceeding occurred during the probationary period of his third prior record of discipline. Aggravating circumstance of prior misconduct was magnified by the fact that respondent committed the current misconduct while on probation in prior disciplinary proceeding. (*In the Matter of Katz* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 430.)

Multiple Acts/Pattern of Misconduct (Std. 1.2(b)(ii).)

Respondent's multiple acts of misconduct are an aggravating factor. He knowingly engaged in a forbidden conversation with Taylor in the absence of her retained counsel and then

[7] The State Bar Court's Alternative Discipline Program is for attorneys with substance abuse and/or mental health issues.

denied it to the assistant district attorney; failed to reveal exculpatory evidence favorable to the defense; allowed a defendant to be taken into custody when he knew there was exculpatory information about his innocence; and falsely declared under penalty of perjury that his conversation with Taylor was "immediately" disclosed to her defense attorney.

Harm to Client/Public/Administration of Justice (Std. 1.2(b)(iv).)

Respondent significantly harmed the public and the administration of justice by failing to uphold his duties as a district attorney.

Respondent's misconduct frustrated the administration of justice. His abuse of his prosecutorial power has negatively impacted the reputation of the district attorney's office and the public's trust in the justice system. While his loan to Sanford and the concealment of his relationship with and the loan from Mavris do not clearly violate the Rules of Professional Conduct or the provisions of the Business and Professions Code, the appearance of his impropriety clearly harmed the integrity and reputation of the judicial system. The appearance of his impropriety questions his role as a prosecutor to ensure that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. (Rule 3.8 of the American Bar Association Model Rules of Professional Conduct, Comment (1998).)

Indifference Toward Rectification/Atonement (Std. 1.2(b)(v).)

Respondent demonstrated lack of insight into his wrongdoing. He blames others for his ethical and professional relapses, including outside political forces and the State Bar. He continues to assert, despite overwhelming evidence to the contrary, that he did not commit any acts of misconduct and that he had permission from defense attorney to speak to the defendant. Respondent contends that the State Bar was vindictive and targeted him, resulting in this alleged

discriminatory prosecution. He argues that he has been deliberately singled out for prosecution on the basis of his prior disability and medical condition of former drug use.

The court finds his arguments without merit. "The law does not require false penitence. [Citation.] But it does require that the respondent accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Yet, in his closing brief, respondent states: "it remains Respondent's abiding conviction that he has not violated any of his duties as an attorney and that all the charges against him should be dismissed."

Mitigation

Good Character (Std. 1.2(e)(vi).)

Respondent presented an impressive list of character witnesses and substantial evidence of his community work, which took four of the eight days of hearing. Thirty-one witnesses testified on his behalf and over 180 declarants supported his good character. They included judges, mayor, criminal defense attorneys, deputy district attorneys, community leaders, politicians, social workers, law enforcement personnel, and friends. Many of whom traveled from long distances for respondent. Favorable character testimony from employers and attorneys are entitled to considerable weight. (*Feinstein v. State Bar* (1952) 39 Cal.2d 541, 547.) Because judges and attorneys have a "strong interest in maintaining the honest administration of justice" (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319), "[t]estimony of members of the bar . . . is entitled to great consideration." (*Tardiff v. State Bar* (1980) 27 Cal.3d 395, 403.)

The witnesses all attested to his good moral character and compelling dedication to the Del Norte County community. They have known respondent for many years. They opined that respondent is an inspiration to those who have fallen on a substance abuse problem and that he is

a living exemplar that rehabilitation from severe substance abuse is possible. They testified that he is helpful and compassionate in fighting crimes. Almost every single witness testified that it would be detrimental to the Del Norte County community to not have respondent as its district attorney and believed that respondent should not be suspended or disbarred. Moreover, they attested to respondent's commitment to the community, especially those with substance abuse problems, to his passion for fighting the methamphetamine epidemic, to the significant impact he has had on the community at large, and to his involvement in various community organizations.

The court finds that these character witnesses represent a demonstration of respondent's good character attested to by a wide range of references in the legal and general communities. Their testimony centered on the harm the community would suffer if respondent was disbarred. But they invariably dismissed respondent's misconduct as either insignificant or not at all unethical. Many did not comprehend its egregiousness.

The State Bar has also acknowledged that respondent presented evidence that he is well respected by many members of the community and that these community members appreciate the public service work that respondent has performed. However, respondent has also attracted a group of vociferous enemies in the community.

Respondent has always devoted much time doing valuable community work. He started first 12 Step Program for youth in Del Norte County. There is an extensive list of organizations that respondent is involved in, such as Relay for Life, Marine Mammal Center, Jordan Recovery Center, Democratic Central Committee, and Little League Of Del Norte County. Such civil service normally deserves recognition as a mitigating circumstance.

However, similar mitigating circumstances which had been found sufficiently mitigating to avert an attorney's disbarment for prior misconduct was not sufficient to justify a recommendation short of disbarment in a subsequent matter in view of the attorney's additional,

serious misconduct and the need for protection of the public. (*In the Matter of Snyder* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 593, 600-601.)

Therefore, testimony of many highly reputable character witnesses attesting to respondent's high standing in the legal community is given significant weight in mitigation. But the mitigating weight given to some of his community service and pro bono activities is diminished since they were previously considered in his third prior discipline.

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

Respondent's misconduct involved communicating with a defendant without the consent of her counsel, failing to disclose exculpatory evidence to the defense, and committing several acts of moral turpitude. The standards provide a broad range of sanctions ranging from actual suspension to disbarment, depending upon the gravity of the offenses and the harm to the client. The applicable standards in this matter are standards 1.6, 1.7, 2.3 and 2.10. The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach case must be resolved on its own particular facts and not by application of rigid standards." (*Id*. at p. 251.) While the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

Standard 1.6(a) provides, in pertinent part, that when two or more acts of misconduct are found in a single disciplinary proceeding, and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions.

Standard 1.7(b) provides that, if an attorney has two prior records of discipline, the degree of discipline in the current proceeding must be disbarment unless the most compelling mitigating circumstances clearly predominate.

Standard 2.3 provides that culpability of an act of moral turpitude, fraud or intentional dishonesty, or of concealment of a material fact, must result in actual suspension or disbarment depending upon the degree of harm to the victim, the magnitude of the misconduct, and the extent to which it relates to the member's practice of law.

Finally, standard 2.10 provides that violations of any provisions of the Business and Professions Code or Rules of Professional Conduct not specified in these standards must result in reproval or suspension depending upon the gravity of the misconduct or harm to the victim, with due regard to the purposes of imposing discipline.

Respondent contends that he has not violated any of his duties as an attorney and urges that all charges against him be dismissed. He asserts that the State Bar had engaged in discriminatory prosecution against him.

The State Bar, on the other hand, urges disbarment, arguing that respondent represents an unmitigated danger to the public, that respondent does not believe that the normal ethical and legal rules apply to him, and that he believes that anyone who objects to his egregious misconduct is motivated by malice and in league with his adversaries. In support of its recommended level of discipline, the State Bar cited, among others, *In the Matter of Field* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 171 [four years' actual suspension for prosecutorial misconduct in four criminal matters over a ten-year period]; and *Price v. State Bar* (1982) 30 Cal.3d 537 [two years' actual suspension for altering evidence at a murder trial in order to obtain a conviction].

In *Price*, a prosecutor altered evidence in a criminal trial and attempted to prevent discovery of his misconduct by discussing the alteration with the judge in the absence of opposing counsel and communicating to the defendant – after conviction but before sentencing – an offer to seek favorable sentencing in exchange for defendant's agreement not to appeal the conviction. Because the attorney had no prior record of discipline in 11 years of practice, he was under mental and emotional stress, he was cooperative and remorseful throughout the proceedings, and witnesses testified to his good reputation as lawyer and his active involvement in civic affairs, the Supreme Court found that the mitigating evidence militate against disbarment. Thus, he was suspended for five years, stayed, placed on probation for five years, and actually suspended for two years.

In *Field*, an overzealous deputy district attorney abused his prosecutorial power, concealed evidence and violated the constitutional rights of defendants in favor of winning cases. Because of his compelling mitigation, he was not disbarred but was actually suspended for four years with five years' probation and five years' stayed suspension, which is basically the longest period of suspension short of disbarment.

While respondent's misconduct was not as egregious as that of the attorneys in *Price* and *Field*, his acts of moral turpitude, dishonesty or corruption still undermine a compelling societal interest in preserving the integrity of the office of the district attorney. But most notably, those attorneys had no prior disciplinary record and were remorseful for their misconduct.

Here, on the contrary, respondent has three prior records of discipline and absolutely denies any wrongdoing. An attorney's failure to accept responsibility for actions which are wrong or to understand that wrongfulness is an aggravating factor. (*Carter v. State* Bar (1988) 44 Cal.3d 1091, 1100-1101.) Respondent is found culpable of multiple acts of serious misconduct in the Taylor matter, but not in the Sanford and Mavris loan matters, absent clear and

convincing evidence. While the appearance of impropriety of those personal loans and relationships, fraught with potential conflicts of interest, may not be disciplinable, it is detrimental to the public's trust in the criminal justice system and the integrity of the office of the district attorney. "Any financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." (*People v. Superior Court (Clancy)* (1985) 39 Cal.3d 740, 749.)

In the Mavris matter, having the same attorney who represented him in a State Bar matter as his opposing counsel in a criminal matter and having received a personal loan from that same attorney clearly should not have been tolerated and should have been disclosed to the court, whether or not any undue influence or prejudice would have resulted. Such relationships and financial dealings are manifestly improper.

In the Taylor matter, he knew or should have known, as an experienced prosecutor, that there was no excuse for his conversation with a defendant in the absence of her retained counsel, regardless whether she had "barged" in to his office uninvited and voluntarily made several incriminating statements during the course of their conversation. He had clearly violated the *Massiah* principle. To further aggravate the harm, he did not disclose to the defense and had even denied that this conversation had ever taken place, until he discovered that the conversation was recorded. Only then did he notify opposing counsel to remedy a potential *Brady* violation. Before that, at a preliminary hearing, knowing there was exculpatory evidence favorable to defendant VanParks, he was silent when VanParks was taken into custody. Such actions reflect that as a prosecutor, respondent failed to recognize the heavy burden of his job and his responsibility to ensure that "justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

"The first, best, and most effective shield against injustice for an individual accused … must be found … in the integrity of the prosecutor. [Citation.]" (*In the Matter of Field, supra,* 5 Cal. State Bar Ct. Rptr. 171, 186-187.)

The court finds respondent's credibility tenuous. For example, his declaration under penalty of perjury, attesting that any prior discussions with Taylor were "immediately" brought to defense attorney McElfresh's attention when he did not inform McElfresh until more than a month after he had spoken to Taylor, is incredulous. At this proceeding, respondent still maintains that he had permission to speak to Taylor when in fact he did not. His lack of candor and truthfulness in his dealings with the court and opposing counsel demonstrate that he did not comprehend his special duty as a prosecutor to promote justice and seek the truth, and not merely to convict.[8]

Prosecutors are held to an elevated standard of conduct because of their "unique function … in representing the interests, and in exercising the sovereign power, of the state." (*People v. Hill* (1998) 17 Cal.4th 800, 820.) "The duty of the district attorney is not merely that of an advocate. His duty is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial … In the light of the great resources at the command of the district attorney and our commitment that justice be done to the individual, restraints are placed on him to assure that the power committed to his care is used to further the administration of justice in our courts and not to subvert our procedures in criminal trials designed to ascertain the truth." (*In re Ferguson* (1971) 5 Cal.3d 525, 531.)

Although respondent presented an impressive array of good character testimony, attesting to his high standing in the Del Norte County community, the mitigation does not outweigh the

[8] Several character witnesses credited respondent to be instrumental in fighting the methamphetamine epidemic in Del Norte County. At the same time, another witness testified that since respondent became a district attorney, everything was a felony.

substance and nature of his extensive record of prior discipline and the egregiousness of his current misconduct. Respondent's refusal to recognize his misdeeds and the severity he had harmed the administration of justice and the integrity of the legal profession concerns this court. For 20 years, respondent repeatedly violated his ethical and professional duties, beginning in 1991 (conviction for driving without a valid driver's license) through 2011 (prosecutorial misconduct). Consequently, the court finds no reasonable cause to deviate from standard 1.7(b) and recommends that respondent be disbarred for the "protection of the public, the profession, and the courts, maintenance of high professional standards, and preservation of public confidence in the legal profession." (*Rose v. State Bar* (1989) 49 Cal.3d 646, 666.)

Recommendations

It is recommended that respondent Jon Michael Alexander, State Bar Number 129207, be disbarred from the practice of law in California and respondent's name be stricken from the roll of attorneys.

California Rules of Court, Rule 9.20

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

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.

Order of Involuntary Inactive Enrollment

Respondent is ordered transferred to involuntary inactive status pursuant to Business and Professions Code section 6007, subdivision (c)(4). Respondent's inactive enrollment will be effective three calendar days after this order is served by mail and will terminate upon the effective date of the Supreme Court's order imposing discipline herein, or as provided for by rule 5.111(D)(2) of the State Bar Rules of Procedure, or as otherwise ordered by the Supreme Court pursuant to its plenary jurisdiction.

Dated: April _____, 2013

LUCY ARMENDARIZ
Judge of the State Bar Court