STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JACQUES C. CHEN

A Member of the State Bar

No. 89-O-11851

Filed October 15, 1993, reconsideration denied, January 10, 1994

SUMMARY

Respondent, represented by counsel, reached a settlement agreement in his disciplinary matter which was reflected in an order filed by the settlement conference judge. The Office of the Chief Trial Counsel refused to honor the agreement, contending that it was not binding and that one of its provisions was not acceptable. After entering into a subsequent settlement agreement on different terms, respondent sought relief from the costs awarded against him based on the alleged bad faith conduct of the Office of the Chief Trial Counsel in disavowing the original settlement agreement. The hearing judge denied the motion. (Hon. JoAnne Earls Robbins, Hearing Judge.)

Respondent sought review, contending that the hearing judge abused her discretion in declining to rule on his contention that the Office of the Chief Trial Counsel had acted in bad faith. The review department declined to grant relief, holding that although respondent could have sought to enforce the original settlement, he could not seek to have his costs reduced on account of his additional expenditure of attorneys fees due to the breach of the settlement agreement.

Counsel for Parties

For Office of Trials: Teresa M. Garcia

For Respondent: R. Gerald Markle

HEADNOTES

[1] **130 Procedure—Procedure on Review**
178.90 Costs—Miscellaneous
199 General Issues—Miscellaneous
Respondents in public proceedings should anticipate that their names will be published in any opinion except those resulting in dismissal or private reproval or, in the case of remanded proceedings, those which may potentially result in dismissal or private reproval. Accordingly, where respondent was on notice that petition for review of order denying relief from costs would

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Editor's note: The summary, headnotes and additional analysis section are not part of the opinion of the Review Department, but have been prepared by the Office of the State Bar Court for the convenience of the reader. Only the actual text of the Review Department's opinion may be cited or relied upon as precedent.

probably be referred to review department in bank, and where respondent had already been required to notify clients, courts and opposing counsel of his suspension, review department declined to omit respondent's name from published opinion in relief from costs matter.

[2 a, b] **130 Procedure—Procedure on Review**
169 Standard of Proof or Review—Miscellaneous
178.90 Costs—Miscellaneous
Where a party did not seek review of that portion of an order on a motion for relief from costs with which it disagreed, but stated its disagreement in its brief on review without seeking affirmative relief, that party's challenge to the order was not properly before the review department in a proceeding resulting from the opposing party's petition for review of a different portion of the same order.

[3] **167 Abuse of Discretion**
178.90 Costs—Miscellaneous
The standard for review of rulings on chargeable costs is abuse of discretion.

[4 a-c] **119 Procedure—Other Pretrial Matters**
139 Procedure—Miscellaneous
199 General Issues—Miscellaneous
Negotiations regarding an agreement ordinarily result in a binding contract when all of the essential terms are definitely understood, even if a formal writing is to be executed later and even if there is uncertainty in a minor, nonessential detail. Where all elements of a stipulation settling a disciplinary proceeding were resolved at a settlement conference, and the settlement judge's ensuing order indicated that a final compromise had been reached, the settlement agreement was binding even though no formal written stipulation had yet been signed.

[5 a, b] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
119 General Issues—Miscellaneous
139 Procedure—Miscellaneous
213.20 State Bar Act—Section 6068(b)
220.00 State Bar Act—Section 6103, clause 1
Where a settlement judge's order following a settlement conference indicated that a final compromise had been reached, the order was binding and an attorney's failure to abide by it, without moving for relief therefrom, constituted a violation of the statutes requiring obedience to court orders and respect for courts and judicial officers.

[6 a-c] **101 Procedure—Jurisdiction**
119 Procedure—Other Pretrial Matters
135 Procedure—Rules of Procedure
139 Procedure—Miscellaneous
194 Statutes Outside State Bar Act
No method of enforcement of settlement agreements in disciplinary proceedings is set forth in the Transitional Rules of Procedure, but an express provision governing this subject is not essential to the court's inherent jurisdiction to exercise reasonable control over proceedings before it in order to avoid unnecessary delay. Where one party refused to abide by a settlement agreement, the other party could have made a motion to compel enforcement of the agreement, by analogy with the statutory motion permitted by Code of Civil Procedure section 664.6, or could have asserted the agreement as an affirmative defense in the pending proceeding.

[7 a, b] **119 Procedure—Other Pretrial Matters**
136 Procedure—Rules of Practice
139 Procedure—Miscellaneous
159 Evidence—Miscellaneous
194 Statutes Outside State Bar Act
It is well established that an aggrieved party may properly bring to the court's attention the alleged breach of a settlement agreement arrived at before a judge and reflected in an ensuing court order. Rule 1231 of the Provisional Rules of Practice and Evidence Code sections 1152, subdivision (a) and 1154 only preclude evidence of settlement offers and negotiations that do not result in an agreement.

[8] **139 Procedure—Miscellaneous**
333.00 Rule 5-300(B) [former 7-108(B)]
A letter sent by counsel for one party in a disciplinary proceeding to the opposing counsel, with copies to the settlement judge and assigned trial judge, did not constitute a prohibited ex parte communication with the court.

[9] **179 Discipline Conditions—Miscellaneous**
1099 Substantive Issues re Discipline—Miscellaneous
2290 Section 6007(c)(2) Proceedings—Miscellaneous
The Supreme Court has expressly approved retroactive disciplinary suspension.

[10] **102.90 Procedure—Improper Prosecutorial Conduct—Other**
199 General Issues—Miscellaneous
204.90 Culpability—General Substantive Issues
Prosecutors must be held to the ethical standards which regulate the legal profession as a whole.

[11] **178.75 Relief from Costs—Denied**
The statute governing cost awards in disciplinary proceedings expressly excludes attorney fees from recoverable costs to either the State Bar or the respondent. Accordingly, the provision of the statute permitting reduction of costs for good cause cannot be interpreted to permit an offset for a party's incurrence of additional attorney's fees due to the other party's bad faith tactics in failing to comply with a settlement agreement.

ADDITIONAL ANALYSIS

[None.]

OPINION

PEARLMAN, P.J.:

This is a petition for review pursuant to rule 462(c), Transitional Rules of Procedure of the State Bar of California, of a hearing judge's order denying in part the verified petition of disciplinary respondent Jacques Clayton Chen ("Chen")[1] **[1 - see fn. 1]** for relief from an order assessing costs of a disciplinary proceeding.

The petition for relief alleged bad faith litigation tactics as a basis for reduction of costs otherwise recoverable by the State Bar.

The hearing judge found good cause to reduce costs otherwise recoverable by the State Bar for unnecessarily requiring respondent to respond to a pretrial motion, but no good cause to reduce recoverable costs for the alleged refusal of the Office of the Chief Trial Counsel ("OCTC") to honor a settlement agreement reached at a voluntary settlement conference in January of 1992 before a judge pro tempore because she considered the facts to be in dispute and was reluctant to get involved in the details of the settlement negotiation process.

On review, respondent contends that the hearing judge abused her discretion in partially denying relief from costs. **[2a]** OCTC did not seek review of the part of the order partially relieving respondent from costs for the unnecessary expenditure of respondent's counsel's time on the pretrial motion.[2] **[2b - see fn. 2]** In its brief responding to the petition for review, OCTC contends that the hearing judge did not abuse her discretion in granting respondent only a partial waiver of costs because of the factual dispute regarding the settlement negotiations in January of 1992 and that, in any event, the judge had no authority to interpret good cause under Business and Professions Code section 6086.10 to sanction the State Bar for alleged bad faith litigation tactics which did not affect chargeable costs. It therefore requests that this court deny respondent's petition.

BACKGROUND

A notice to show cause was filed against respondent in this proceeding on May 20, 1991, which was ultimately resolved by the filing, on June 24, 1992, of the parties' comprehensive stipulation as to facts and discipline calling for a period of two years suspension, stayed on certain terms and conditions of probation, including a nine-month period of actual suspension. This settlement was approved by a hearing judge of this court and the Supreme Court issued its order imposing the discipline contained in the settlement on December 30, 1992, including costs of $2,540. Pursuant thereto, respondent was placed on suspension effective January 29, 1993.

In a subsequent petition filed with the assigned hearing judge, respondent sought to be relieved from all of the costs, alleging that an earlier settlement had been reached on January 13, 1992, after the examiner and respondent's counsel participated in a series of three voluntary settlement conferences before a judge pro tempore.

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1. In *In the Matter of Respondent J* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 273, no objection was raised to respondent's counsel's request that respondent's name not be designated when he had not been required to notify clients and others of his brief suspension and had not anticipated referral of the petition by the Presiding Judge to the full review department for its consideration and published opinion. Here, a similar request for anonymity was made but an objection was timely raised. **[1]** Since respondent was on notice of the probable referral of this issue to the review department in bank and had already been required to comply with the notice requirements of rule 955, we see no policy reason not to publish respondent's name in this proceeding. Respondents in public proceedings should anticipate that their names will be published in any opinion except those resulting in dismissal or private reproval or, in the case of remanded proceedings, those which may potentially result in dismissal or private reproval. (See, e.g., *In the Matter of Respondent M* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 465, 468, fn. 1.)

2. **[2b]** A footnote in OCTC's brief did state that it disagreed with the hearing judge's analysis that the motion in limine was brought in bad faith. At oral argument, upon questioning by the court, the examiner belatedly asserted that OCTC was also challenging that part of the hearing judge's order reducing costs for the pretrial motion. Since no review was sought by OCTC nor any affirmative relief sought in its brief, we do not consider a challenge to that part of the hearing judge's order to be properly before us. (Cf. *In the Matter of Mudge* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 536, 540, fn. 1.)

Respondent alleged that essentially the same terms as later agreed upon were agreed upon at that time except that the nine-month period of actual suspension was to commence as of the effective date of petitioner's voluntary transfer to inactive membership status in February of 1992. Respondent further alleged that during the course of the final conference on January 13, 1992, the examiner excused herself from the hearing room for the purpose of obtaining approval from her supervising assistant chief trial counsel to the settlement generally, and in particular, to that portion of the settlement wherein the actual suspension condition would be deemed to have commenced as of the date of respondent's transfer to inactive status. Respondent further alleged that after returning to the hearing room a few moments later, the examiner informed respondent, his counsel and the judge that the necessary approval had been obtained.

The examiner has never disputed any of the terms of respondent's offer made during their settlement conference on January 13, 1992. She also has acknowledged that she had authority to reach a settlement at that conference. However, she disputes that she came to a final agreement at that conference, asserting that after conferring with her office by telephone, she merely stated that "the State Bar believed the offer would be a workable stipulation." She further alleges that "prior to the adjournment of the conference, [respondent's counsel] made the comment that no stipulation is final until it is in writing. I agreed, stating that I did not anticipate any problems in finalizing the stipulation."

Respondent's counsel alleged that following the January 13 conference, since respondent understood that all of the terms of the settlement had been fully agreed to and approved by the court, he took irremediable steps in reliance upon the agreement in order to prepare for his immediate transfer to inactive status.

The day after the January 13, 1992, settlement conference, the judge pro tempore issued an order that stated in pertinent part "The parties have reached a final compromise as to facts, culpability and disposition including investigation matter" and that "The parties are preparing a written stipulation memorializing their agreement." The examiner was ordered to submit the written stipulation reflecting the parties' agreement to respondent and his counsel by January 24, 1992. Respondent's counsel was ordered to return the stipulation by January 31, 1992.

Instead of preparing the written stipulation ordered by the court, the examiner telephoned respondent's counsel on January 23, 1992, and, in her own words, "informed him that the State Bar had taken the position that it will not stipulate to discipline which takes effect prior to the effective date of the Supreme Court order approving discipline. As such, I would not be able to stipulate to the settlement we orally agreed to on January 13, 1992." After the examiner disavowed the settlement agreement, respondent's counsel immediately proposed a modification of the agreement to provide that the court would determine the commencement date of the period of actual suspension. Respondent's counsel alleges that the examiner initially agreed to respondent's proposed modification, but by letter dated January 24, 1992, disavowed that agreement as well. That letter requested a response to a new proposal for a partial stipulation.

On February 7, 1992, petitioner's counsel responded to the examiner, sending copies of his letter to the judge pro tempore, as well as to the assigned trial judge, describing the disavowal by OCTC of two alleged consecutive agreements and urging reconsideration by OCTC of the proposal to leave the issue of the commencement date of the suspension for determination by the court.

In response to respondent's counsel's February 7, 1992, letter, the examiner filed a motion "in limine" on March 6, 1992,[3] asking the court to: (1)

3. A motion in limine is ordinarily a motion for an evidentiary ruling made on the threshold of a jury trial "designed to prevent the prejudicial effect that may result when an objection to evidence is sustained, and the jury is then instructed to disregard the evidence." (6 Witkin, Cal. Procedure (3d ed. 1985) Proceedings Without Trial, § 2, p. 328.) No reason appears why a formal motion set for a date prior to a judge trial was necessary here. Moreover, on February 5, 1992, the previously scheduled trial dates of February 13 and 14, 1992, were vacated due to the trial judge's unavailability due to lengthy illness. The examiner indicated to the court below that she had still been under the impression that the trial date remained on schedule when she filed her motion "in limine" one month later.

preclude petitioner from introducing into evidence inadmissible, confidential settlement negotiations; and (2) strike from the court's file the "improper correspondence" which respondent had provided to the court. Respondent's counsel filed opposition to the motion arguing that the motion should be denied because the prohibition against admissibility of settlement discussions ceased to exist once the settlement in the instant case was reached on January 13, 1992, and because respondent's counsel did not engage in a prohibited ex parte communication when he sent a copy of his February 7, 1992, letter to both judges. Respondent's counsel also argued that OCTC brought its motion in bad faith, and that it had also acted in bad faith in disavowing the settlement agreement, thereby forcing petitioner to incur unnecessary and significant expense. On May 22, 1992, due to the assigned hearing judge's continued unavailability due to illness, a different hearing judge issued an order denying OCTC's motion, criticizing the use of a motion and characterizing OCTC's citation of authorities as either being or bordering on an attempt to misrepresent to the court the circumstances of the present case.

Respondent's counsel asserts that in early April 1992, respondent, "having exhausted the meager resources he had available to finance his defense," instructed his counsel to accept unconditionally the "new" settlement position adopted by the OCTC because of its continued refusal to implement the agreement reached on January 13, 1992. By letter dated April 6, 1992, respondent's counsel conveyed respondent's acceptance of the new offer. As indicated above, the stipulation as to facts and discipline ultimately resolving the matter was subsequently prepared and filed on June 24, 1992 and the Supreme Court order with respect thereto was issued on December 30, 1992. Respondent's actual suspension commenced on January 29, 1993—almost one year after the date on which respondent alleges the parties agreed that he would start his suspension.

PROCEEDINGS RE COST RELIEF BELOW

By verified petition filed February 3, 1993, respondent sought relief under rule 462 of the Rules of Procedure[4] from that portion of the Supreme Court's order awarding disciplinary costs to the State Bar on the dual grounds that OCTC's conduct (1) in the settlement process and disavowal of the settlement agreement reached on January 13, 1992, and (2) in bringing its unsuccessful pretrial motion was in bad faith, and caused respondent to incur substantial and unnecessary defense costs. Respondent argued that the unnecessary increase in the cost of his defense was in excess of the amount of the disciplinary costs assessed against him.

On May 29, 1993, the assigned hearing judge issued an order on the petition. In the order, the court found good cause for a partial reduction in recoverable disciplinary costs based upon the expense respondent incurred in having to oppose the inappropriate pretrial motion.[5] However, as indicated above, the court denied respondent relief in connection with his submission that OCTC's settlement process amounted to bad faith and caused respondent to incur additional unnecessary expense. Respondent asserts that abuse of discretion was demonstrated because the court declined to consider the merits of his argument on the second issue. He bases this challenge on language on page two of the order which reads as follows: "This court is unwilling to become enmeshed in accusations and aspersions regarding what the parties did or did not say, or should or should not have done, during settlement negotiations. To do so would inject the court into an area that is jealously guarded from any information regarding offers, counteroffers, conditions, modifications, exchanges, etc."

On the basis of this court's opinion in *In the Matter of Respondent J* (Review Department 1993) 2 Cal. State Bar Ct. Rptr. 273, respondent asserts that

4. All references herein to the Rules of Procedure are to the Transitional Rules of Procedure of the State Bar.

5. The order required respondent's counsel to file a declaration of the number of hours spent in defense of the motion in limine and the hourly legal fee charged to respondent for that purpose. It then stated that "This court will order a partial waiver of disciplinary costs to be paid by the Respondent equal to one-half (1/2) the legal fees charged to Respondent specifically for defense of the motion in limine." No subsequent order had been issued as of the time of oral argument.

sufficient cause exists to warrant further relief from disciplinary costs.

DISCUSSION

[3] The standard for review of rulings on chargeable costs is abuse of discretion. (*In the Matter of Respondent J, supra*, 2 Cal. State Bar Ct. Rptr. at p. 276.) OCTC first argues that it was not an abuse of discretion for the hearing judge to decline to resolve the conflicting versions of the settlement process presented to her by the parties.

[4a] We therefore address the legitimacy of OCTC's position that no enforceable oral agreement had been reached at the settlement conference. Generally speaking "Parties may engage in preliminary negotiations, oral or written, in order to reach an agreement. These negotiations ordinarily result in a binding contract when all of the terms are definitely understood, even though the parties intended that a formal writing embodying these terms shall be executed later." (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 136, pp. 159-160, and cases cited therein.) It is also "well settled that an agreement definite in its essential elements is not rendered unenforceable by reason of uncertainty in some minor, nonessential detail. Hence, it is common practice to provide that such details be left to further agreement of the parties." (*Id.*, § 155, p. 176.)

[4b] Here, OCTC does not dispute that all of the essential elements of the agreement were resolved at the voluntary settlement conference. The only issue raised is whether statements were made at the time of the conference that the agreement was tentative and not intended to be binding until a formal written stipulation was signed. This position is no longer tenable in light of OCTC's failure to challenge the court order immediately following the January 13, 1992, settlement conference. That order is a form order with numerous options ranging from "the parties are unable to reach any compromise" to "the parties have reached a final compromise" which is the provision that the judge who presided over the settlement conference marked.

[4c, 5a] The position of the examiner that she only reached a tentative agreement at the settlement conference is belied by the opportunity on the form order for the judge to check a box which states just that: "The parties have reached a tentative agreement on a compromise." The order which instead denoted that the parties had reached a final compromise was served on the parties on January 14, 1992—nine days before the examiner called the respondent's counsel to tell him that she would not be following through with a written stipulation memorializing the oral agreement they had reached. The examiner and the persons in her office with whom she consulted apparently failed to appreciate that their office's subsequent conduct was in direct violation of a court order from which relief was never sought.

[6a] No method of enforcement of settlement agreements is set forth in the Rules of Procedure of the State Bar. However, the State Bar Rules of Procedure are largely modeled on the Code of Civil Procedure. Prior to enactment of Code of Civil Procedure section 664.6, there was also no specific statutory provision governing enforcement of civil settlement agreements although there were two generally recognized methods of enforcement of compromise agreements in civil proceedings: (1) an independent action to compel enforcement of the compromise or (2) setting up the compromise as a special defense by supplemental pleadings in the pending action. (7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 58, p. 66.) Witkin notes that the latter method was favored, since the defendant had the opportunity to have the affirmative defense tried first, before the merits.

In *Gregory* v. *Hamilton* (1978) 77 Cal.App.3d 213, 217-220, a Court of Appeal approved a third method of enforcement of settlement agreements—by motion to compel enforcement of the agreement and judgment thereon prior to trial in the proceeding. *Gregory* involved a settlement which was judicially supervised and the facts of settlement and terms were not subject to reasonable dispute. Later cases considered the proper approach in most cases to be a motion for summary judgment. (See, e.g., *DeGroat* v. *Ingles* (1983) 143 Cal.App.3d 399, 401; but see *Gopal* v. *Yoshikawa* (1983) 147 Cal.App.3d 128, 132.) The Legislature resolved the procedural issue in 1981 by enacting Code of Civil Procedure section 664.6

which provides: "If parties to pending litigation stipulate, in writing or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." This statute does not preclude alternative remedies such as those earlier established by case law. (*Gorman* v. *Holte* (1985) 164 Cal.App.3d 984.)

Here, before sending a letter complaining of the conduct of OCTC, respondent's counsel did attempt to pursue a similar remedy to that of an affirmative defense, by seeking to have the trial judge decide the only issue which OCTC had disputed—the timing of the commencement of the agreed discipline. However, the respondent's counsel apparently assumed he needed OCTC's consent to litigate this issue which was ultimately not forthcoming and eventually entered into a new stipulation rendering the issue moot except for possible sanctions. Although respondent's counsel indicates that he was aware of the possibility of a motion to enforce the settlement by analogy to Code of Civil Procedure section 664.6,[6] **[6b - see fn. 6]** he chose not to pursue that course for alleged monetary reasons. This was unfortunate. It could have saved both respondent and the State Bar considerable time and expense and resulted in earlier protection of the public.

Nonetheless, it is not respondent who is responsible for the unnecessary expenditure of litigant and judicial time in this proceeding and the consequent yearlong delay in public protection. **[5b]** The position of the examiner at oral argument was that OCTC was justified in failing to abide by the court order because respondents in other proceedings have allegedly sometimes reneged on settlement agreements. We cannot speculate as to what may have occurred in other proceedings, but OCTC should hold itself up as an example to others, not sink to the level of the lowest common denominator. It is a violation of Business and Professions Code section 6103 for any member of the State Bar wilfully to violate a court order and a violation of Business and Professions Code section 6068 (b) not to maintain the respect due to courts and judicial officers.

[7a] Here, OCTC's failure to abide by the court order was followed by its misguided motion "in limine" which asserted that respondent's counsel had improperly brought settlement discussions to the court's attention, citing rule 1231 of the Provisional Rules of Practice, Evidence Code sections 1152, subdivision (a) and 1154 and Rules of Professional Conduct, rule 7-108 (repealed May 27, 1989). Rule 1231 is expressly limited to exclusion of the content of a settlement conference that does *not* result in a stipulation. Evidence Code sections 1152, subdivision (a) and 1154 similarly refer to the inadmissibility to prove liability of settlement *offers*, not alleged settlement agreements. The examiner's research apparently failed to turn up reference to Code of Civil Procedure section 664.6 enacted 11 years previously or the case law that preceded and followed it expressly countenancing judicial remedies for alleged violation of settlement agreements.

Indeed, the examiner's citation of former rule 7-108(B) of the Rules of Professional Conduct was indicative of the inadequacy of her research. The hearing judge noted in her denial of the motion that rule 7-108(B) had been superseded three years earlier by rule 5-300(B). **[8]** Moreover, the thrust of the examiner's argument based on rule 7-108(B) was that the letter sent by respondent's counsel *to the examiner* with copies to both the settlement judge and assigned trial judge was a prohibited *ex parte* communication to the court. This argument was also meritless since there was patently no ex parte communication.

The problem with respondent's letter is that it was a communication to the court apparently seeking to influence the court without expressly seeking any judicial relief. It appeared simply to be airing dirty linen in front of the court. **[6c]** Appropriate alterna-

6. The Rules of Procedure of the State Bar are currently in the process of revision. **[6b]** An express provision governing enforcement of settlement agreements appears to be warranted although it is not essential to the court's inherent jurisdiction to exercise reasonable control over proceedings before it in order to avoid unnecessary delay. (See, e.g., *Jones* v. *State Bar* (1989) 49 Cal.3d 273, 287; cf. *Gorman* v. *Holte*, *supra*, 164 Cal.App.3d 984.)

tive courses available to respondent would have been either to make a motion to compel enforcement of the agreement by the settlement judge or to assert the settlement agreement as an affirmative defense in the pending proceeding before the assigned hearing judge. The examiner was entitled to question the propriety of the use of a letter addressed to her to advise the court of the issue without requesting any judicial relief, but she was wrong in challenging the contents of the letter under the authorities cited which provided no support for her position. **[7b]** To the contrary, it is well established that an aggrieved party may properly bring to the court's attention the alleged breach of a settlement agreement arrived at before a judge and reflected in an ensuing court order. (Cf. *Gopal* v. *Yoshikawa*, *supra*, 147 Cal.App.3d 128; *Gorman* v. *Holte*, *supra*, 164 Cal.App.3d 984; Code Civ. Proc. § 664.6; see generally 7 Witkin, Cal. Procedure (3d ed. 1985) Trial, §§ 58, 59, pp. 65-68.)

This brings us to the question of whether the remedy sought—reduction of recoverable costs under Business and Professions Code section 6086.10—is available in State Bar Court proceedings for the wrong done to respondent. In *In the Matter of Respondent J*, *supra*, 2 Cal. State Bar Ct. Rptr. 273, we upheld the discretion of a hearing judge to reduce a cost award for unjustified delay in settlement which increased the costs to respondent. However, as we noted therein, "Respondent recognized that no matter how cooperative he was and how responsive counsel for the State Bar were, certain costs would be chargeable to him in connection with the [discipline] to which he stipulated, even if such result had been reached very early in the negotiations." (*Id.* at p. 278.)

Respondent cannot claim that the chargeable costs in this proceeding would have been different had OCTC honored the original settlement agreement. We agree that the goal of public protection could have been far better served had the original agreement been fully executed. Respondent admitted his wrongdoing in January of 1992 and the public could have had almost immediate protection from the discipline system following respondent's recognition of his wrongdoing instead of the delay of one year that occurred instead. OCTC never sought to provide the court with a cogent rationale for relieving it from the stipulation it had been ordered to memorialize.[7]

OCTC argued on review that it would be inappropriate to compel the Supreme Court to order discipline with retroactive effect. But the stipulations uniformly recite that they are not binding on the Supreme Court and the respondent would therefore have proceeded knowing the risk that the Supreme Court might order greater discipline. (See, e.g., *Inniss* v. *State Bar* (1978) 20 Cal.3d 552, 555.) Ordinarily it does not have a practice of doing so. **[9]** Indeed, the Supreme Court has expressly approved retroactive disciplinary suspension in a number of cases. (See, e.g., *In the Matter of Mapps* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 1, recommended discipline adopted Nov. 29, 1990 (S016265).) The Supreme Court has also so credited interim suspension noting that "Whether a suspension be called interim or actual, . . . the effect on the attorney is the same—he is denied the right to practice his profession for the duration of the suspension." (*In re Leardo* (1991) 53 Cal.3d 1, 18 [ordering no prospective suspension in light of lengthy interim suspension]; see also *In the Matter of Stamper* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 96, 109-110, recommended discipline adopted Nov. 29, 1990 (BM 5274).)

Nor can OCTC find support for its concern in legislative pronouncements. Business and Professions Code section 6007 (d) automatically provides for commencement of disciplinary suspension prior to the Supreme Court disciplinary order in cases where inactive enrollment is ordered by the State Bar Court for violation of probation. Indeed, the policy belatedly asserted by OCTC here is inconsistent with its own practice in stipulating where appropriate to retroactive discipline. For example, two weeks after it disavowed its stipulation in this proceeding, it

7. The State Bar Rules of Procedure provide that either party may be relieved from a stipulation within 15 days of its approval for good cause shown. (Rule 407(c), Trans. Rules Proc. of State Bar.) But the rules were not followed here and no good cause was ever demonstrated.

entered into a stipulation in another proceeding to "give full credit for the period of interim suspension heretofore served" thereby agreeing to two months retroactive disciplinary suspension. (*In the Matter of Gibson*, No. 91-C-04938, stipulation filed February 10, 1992, approved by a State Bar Court judge February 13, 1992, and adopted by the California Supreme Court June 17, 1992 (S026054).) The June 1992 Supreme Court order expressly stated that it was ordering "actual suspension for 60 days retroactively concurrent with the period of interim suspension that commenced November 29, 1991."

The question remains whether the remedy sought by respondent's counsel for OCTC's disavowal of the agreement and disobedience of a court order is supported by any authorities. Respondent's counsel cites *Corkland* v. *Boscoe* (1984) 156 Cal.App.3d 989, 994, which affirmed a trial court order enforcing a settlement agreement. Respondent chose to forego such a motion here ostensibly due to the cost of such effort although he did pursue another course which appears at least equally consumptive of counsel's time.

Respondent's counsel argues that because OCTC is charged with the responsibility of enforcing compliance with ethical requirements and professional responsibility, its lawyers "ought not be above the law they are required to enforce." He urges this court to use Business and Professions Code section 6086.10 as a vehicle for sanctioning bad faith actions or tactics as defined in Code of Civil Procedure section 128.5, including frivolous actions or actions solely intended to cause unnecessary delay. He further argues that the bad faith requirement of section 128.5 does not require a determination of evil motive but includes vexatious tactics which unreasonably or unnecessarily injure the opposing counsel or party, citing *West Coast Development* v. *Reed* (1992) 2 Cal.App.4th 693, 702.

[10] We agree that prosecutors must be held to the ethical standards which regulate the legal profession as a whole. (*United States* v. *Lopez* (9th Cir. 1993) 989 F.2d 1032, 1042* [holding extreme sanction of dismissal of criminal case unavailable under the circumstances, but recommending alternative lesser sanctions of contempt or referral of federal prosecutor to the State Bar for disciplinary proceedings].) **[11]** However, we see no basis for offsetting the respondent's incurrence of attorneys' fees against otherwise chargeable costs. Business and Professions Code sections 6086.10 (b)(3) and (d) expressly exclude attorneys fees from recoverable costs either to the State Bar or respondent. Absent legislation extending Code of Civil Procedure section 128.5 to State Bar proceedings or Supreme Court authorization for doing so we cannot interpret "good cause" to include an offset for attorneys fees against recoverable costs.

CONCLUSION

For the reasons stated above, respondent's petition for review of the hearing judge's order regarding recoverable costs is DENIED.

We concur:

NORIAN, J.
STOVITZ, J.

* Editor's note: Opinion superseded by *United States* v. *Lopez* (9th Cir. 1993) 4 F.3d 1455.