STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

ROBERT EARL WYRICK, III

A Member of the State Bar

No. 88-O-10804

Filed April 6, 1992; reconsideration denied, May 12, 1992

SUMMARY

Respondent was found to have concealed his prior suspension from practice on two job applications for attorney employment with the State of California, conduct involving moral turpitude. The hearing judge dismissed one other count which charged respondent, while on interim suspension, with failing to disclose the suspension on an application to be a judicial arbitrator and holding himself out implicitly as entitled to practice law. The hearing judge recommended that respondent be suspended for four months, stayed, with two years probation and no actual suspension. (Hon. Alan K. Goldhammer, Hearing Judge.)

Respondent requested review, contending that all disciplinary charges should have been dismissed because he had no intent to deceive his prospective employers, there was no reliance on the information he supplied on the forms, and he had followed the instructions of the prospective employers in preparing the applications. Respondent also contended that the hearing judge did not resolve all reasonable doubts in his favor and imposed an undue burden on respondent because of his prior record of discipline.

The review department reversed the hearing judge's decision to dismiss one of the counts. It found that respondent was grossly negligent in failing to ascertain the legal requirements for a judicial arbitrator and, in his application for the position, holding himself out as an active member of the bar when he was then on interim suspension from practice. Affirming the remaining culpability findings, and weighing the additional misconduct found together with the aggravating factors in the record, including respondent's prior record of discipline, the review department increased the recommended discipline to two years suspension, stayed, and two years probation, on the same conditions recommended by the hearing judge, but with an actual suspension of six months.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro, Gregory B. Sloan

For Respondent: Robert Earl Wyrick, III, in pro. per.

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.

HEADNOTES

[1] **191 Effect/Relationship of Other Proceedings**
1549 Conviction Matters—Interim Suspension—Miscellaneous
An attorney's interim suspension following a criminal conviction is not affected by the expungement of the conviction.

[2] **135 Procedure—Rules of Procedure**
166 Independent Review of Record
Even where the examiner does not seek review of the dismissal of a count of the notice to show cause, the review department is obligated to conduct a de novo review of the hearing judge's disposition of that count, and may reach a different conclusion based on the record. (Trans. Rules Proc. of State Bar, rule 453(a).)

[3 a-e] **221.00 State Bar Act—Section 6106**
231.00 State Bar Act—Section 6126
Where respondent was suspended from practice as a result of disciplinary charges, and by omitting this fact from his application for a position as a judicial arbitrator, created the false impression that he was currently able to practice law, respondent's gross negligence in failing to ascertain that active membership in the State Bar was a requirement of the position, and his improper holding himself out as entitled to practice law, constituted an act involving moral turpitude. A suspended attorney cannot expressly or impliedly create or leave undisturbed the false impression that the attorney has the ability to practice law.

[4 a, b] **159 Evidence—Miscellaneous**
166 Independent Review of Record
A hearing judge's interpretation of a written exhibit is not a determination on the credibility of a witness. The review department is free to make its own findings on issues that turn on documentary evidence, and to disagree with the hearing judge's resolution of such issues.

[5 a, b] **191 Effect/Relationship of Other Proceedings**
586.11 Aggravation—Harm to Administration of Justice—Found
Because a suspended attorney is unqualified to sit as a judicial arbitrator, any decisions the attorney renders as an arbitrator could be open to attack as void. Thus, respondent's misconduct in failing to disclose his suspended status when applying for an arbitrator position was of most serious concern because of its potential for harm to public confidence in the court system. Respondent's very service as an unqualified arbitrator harmed the administration of justice.

[6] **162.19 Proof—State Bar's Burden—Other/General**
204.90 Culpability—General Substantive Issues
221.00 State Bar Act—Section 6106
231.00 State Bar Act—Section 6126
Where respondent, who had been previously suspended from practice, described his legal career to a prospective employer in such a way as to indicate that respondent's practice of law had been uninterrupted, it was sufficient to establish culpability of misrepresentation to show that respondent knowingly presented a statement which itself tended to mislead. It was not material that the employer did not rely on the application or was not in fact deceived.

[7] **221.00 State Bar Act—Section 6106**
231.00 State Bar Act—Section 6126
Instructions on a job application asking for a statement of those experiences which met the requirements of the position sought did not entitle respondent to misrepresent his employment history by selective omissions or misrepresentations calculated to imply that there had been no hiatus in his ability to practice law.

[8] **103 Procedure—Disqualification/Bias of Judge**
162.90 Quantum of Proof—Miscellaneous
231.00 State Bar Act—Section 6126
A hearing judge's statement that the State Bar Court has a duty to ensure that suspended attorneys are scrupulously honest regarding their suspensions did not indicate that the judge had improperly shifted the burden of proof on culpability at the disciplinary hearing from the State Bar to the respondent. The view that suspended attorneys have a duty not to mislead the public about their suspensions has also been expressed by the Supreme Court.

[9] **221.00 State Bar Act—Section 6106**
720.50 Mitigation—Lack of Harm—Declined to Find
795 Mitigation—Other—Declined to Find
Misrepresentations are no less egregious when made to a public agency than when made to an individual client, and warrant discipline of no less magnitude.

[10] **801.41 Standards—Deviation From—Justified**
805.59 Standards—Effect of Prior Discipline
1092 Substantive Issues re Discipline—Excessiveness
1549 Conviction Matters—Interim Suspension—Miscellaneous
An attorney on interim suspension following a criminal conviction has little control over the length of such suspension prior to final resolution of the case. Where an attorney's prior actual suspension had consisted largely of time already spent on interim suspension, and such a lengthy actual suspension would not ordinarily have been imposed for the misconduct involved in the prior matter, and where imposition of an even greater actual suspension in the attorney's subsequent matter would have resulted in discipline far in excess of that warranted by the facts and comparable case law, it would not be appropriate to adhere strictly to the standard directing imposition of greater discipline for a second offense.

[11] **221.00 State Bar Act—Section 6106**
521 Aggravation—Multiple Acts—Found
535.20 Aggravation—Pattern—Declined to Find
621 Aggravation—Lack of Remorse—Found
1512 Conviction Matters—Nature of Conviction—Theft Crimes
Where an attorney's prior discipline involved culpability of moral turpitude for attempted receipt of stolen property, and the attorney's subsequent misconduct involved moral turpitude in misleading applications for employment, there was no pattern or common thread linking the former misconduct with the later case. However, the attorney's multiple breaches of ethical duties demonstrated that the attorney lacked a true understanding of professional responsibilities.

[12 a, b] **221.00 State Bar Act—Section 6106**
231.00 State Bar Act—Section 6126
801.45 Standards—Deviation From—Not Justified
Departure from the disciplinary standards was not justified based on the novelty of the issues raised in the matter, when the misconduct involved was respondent's misrepresentation of his status as an attorney, an area in which the governing rules have been clearly established for many years.

[13] **221.00 State Bar Act—Section 6106**
231.00 State Bar Act—Section 6126
511 Aggravation—Prior Record—Found
621 Aggravation—Lack of Remorse—Found
833.10 Standards—Moral Turpitude—Suspension
833.90 Standards—Moral Turpitude—Suspension
Attorneys placed on disciplinary suspension must be careful not to hold themselves out as being able to practice when they are not and must not mislead employers regarding their prior status. An attorney's statements in a resume or job interview should be as trustworthy as that professional's representation to a court or client. Where respondent did not seem to understand the seriousness of his ethical duties in this regard, and had a prior record of discipline, a period of actual suspension was necessary for the protection of the public.

ADDITIONAL ANALYSIS

Culpability
Found
221.12 Section 6106—Gross Negligence
Aggravation
Found
582.50 Harm to Client
Discipline
1013.08 Stayed Suspension—2 Years
1015.04 Actual Suspension—6 Months
1017.08 Probation—2 Years
Probation Conditions
1024 Ethics Exam/School

OPINION

NORIAN, J.:

In this case we face the issue of the obligations of an attorney who has been suspended from the practice of law in seeking employment as a superior court arbitrator during his suspension and as an attorney thereafter. Respondent, Robert Earl Wyrick, III, asks that we review the decision of a hearing department judge who found that respondent concealed his prior suspension from law practice on two job applications for attorney positions, in violation of Business and Professions Code section 6106.[1] The judge dismissed a third charge that respondent failed to disclose his then-current suspension when applying for an arbitrator position for a superior court on the basis that there was insufficient evidence of respondent's intent to mislead. The judge recommended that respondent's license be suspended for four months, that the suspension be stayed, and that respondent be placed on probation for two years with no actual suspension and with conditions, including attending ethics school and passing the California Professional Responsibility Examination.

On review, respondent asks that all counts in the notice to show cause be dismissed. He denies any intent to deceive in his employment applications, asserting that he merely followed the instructions of the individuals in the prospective employers' offices. He also contends that the prospective employers did not rely on the application forms or on his prior legal experience. In his view, the hearing judge failed to resolve all reasonable doubts in his favor and imposed an undue burden on respondent because of his prior record of discipline. The examiner for the Office of Trial Counsel contends that all of respondent's arguments are without merit.

At oral argument, we asked for further briefing from the parties on count one of the notice to show cause, which had been dismissed by the hearing judge.[2] Upon our independent review of the record we conclude that respondent held himself out to the Sacramento County Superior Court arbitration program as an active member of the State Bar while under interim suspension, a breach of duties in violation of section 6106. We concur with the hearing judge's findings on counts two and three. Given respondent's prior record of discipline and the additional finding of misconduct, we increase the recommended discipline to two years suspension, stayed, and two years of probation with conditions including six months of actual suspension. We adopt the remaining conditions of probation recommended by the hearing judge and further recommend, as did the hearing judge, that respondent be ordered to take and pass the California Professional Responsibility Examination within one year. We also recommend that respondent be ordered to comply with rule 955, California Rules of Court.

FACTS

Respondent was admitted to practice law in California in December 1973, and has a prior disciplinary record. On May 28, 1980,[3] the California Supreme Court placed respondent on interim suspension based on his conviction for attempting to receive stolen property in violation of Penal Code sections 496 and 664.[4] The conviction referral was

1. All further section references are to the Business and Professions Code unless otherwise stated.

2. In requesting the additional briefing, we asked the parties to focus on two prior Supreme Court cases, *In re Naney* (1990) 51 Cal.3d 186 and *In re Cadwell* (1975) 15 Cal.3d 762, and to compare those cases with the evidence submitted on count one.

3. The parties, in a stipulation filed in this matter on December 13, 1990 (December stip.), stated that respondent's interim suspension began on June 27, 1980. However, the Supreme Court's order, filed May 28, 1980, placed respondent on suspension effective immediately. (*In the Matter of the Conviction of Wyrick*, order filed May 28, 1980 (BM 4270).)

4. Respondent accepted from a former client two stolen used truck tires, with rims. He was convicted on March 12, 1980, and sentenced on April 14, 1980, to one year in state prison, with execution of the sentence suspended for three years, on conditions which included twenty-one days in the county jail and periodic reports to the county probation department. He satisfactorily completed the terms of probation and, pursuant to Penal Code section 1203.04, his conviction was expunged on April 4, 1983.

consolidated with another conviction matter then pending before the State Bar, an October 13, 1978 conviction for recording a conversation with the son of a client without the consent of the son, in violation of Penal Code section 632. Thereafter, a two-count original disciplinary proceeding was filed and consolidated with the conviction matters.[5] Respondent and Office of Trial Counsel entered a stipulation as to facts and discipline dated October 26-27, 1983 (exh. A), in which respondent admitted that his criminal conduct in attempting to receive stolen property constituted an act of moral turpitude, and that his October 1978 conviction and his misuse of the legal process in multiple cases involving the same defendant violated his oath and duties as an attorney. By order filed May 30, 1984, the Supreme Court suspended respondent for five years, commencing May 28, 1980 (the date he was placed on interim suspension); the execution of this suspension was stayed, and he was placed on probation for five years on conditions which included three and one-half years of actual suspension, commencing on May 28, 1980. He was also ordered to take and pass the Professional Responsibility Examination.

Count One: Letter Application to Be a Judicial Arbitrator

While on interim suspension, respondent was employed as a sales manager trainee for a tire company, a technical writer, and a substitute teacher, and sold consumer products from his home. (October stip., exh. A, p. 12.) Respondent also applied for a position as a judicial arbitrator in a letter he wrote to Robert A. Borghesi, then administrator of the judicial arbitration program for the superior court in Sacramento. (December stip.) In the letter he stated, "The following is a brief summary reflecting my qualifications based upon education and experience." In the letter, respondent also stated, "I am a member of the American Arbitration Association and the State Bar of California, having been admitted in 1973. My law practice has been that of a sole practitioner in a varried [sic] caseload." (*Ibid.*) He appended the honorific "ESQ." to his signature on the letter. Respondent admits that he did not volunteer that he was then suspended and could not practice. (December stip., p. 3.) Respondent claims that prior to sending his letter, he asked one of the administrative assistants in Borghesi's office whether active membership in the bar was necessary and was told it was not. (1 R.T. p. 13.) The hearing judge did not believe that respondent received this assurance from the court personnel. Respondent contends that he was unaware that rule 1604(b) of the California Rules of Court required a judicial arbitrator to be an active member of the State Bar and that had he known, he would not have applied for or served in the position. (1 R.T. pp. 30, 36.)[6] Respondent served on arbitration panels for the superior court from April 15, 1983, through November 28, 1983, while on interim suspension. (December stip., p. 3.) The conviction for which he had been placed on interim suspension had, however, been expunged upon completion of his criminal probation, approximately two weeks prior to the commencement of his services on the arbitration panel.[7] **[1 - see fn. 7]**

Count Two: Application to Office of Administrative Law

On November 19, 1984, six months after his actual suspension terminated, but during his probation term, respondent submitted an application for

5. The notice to show cause for the original proceeding alleged that between 1975 and 1979 respondent filed multiple lawsuits against two sets of defendants simultaneously in federal and state court and prosecuted the actions for the purpose of harassing the defendants. In the stipulation which resolved the disciplinary cases, respondent acknowledged culpability in the five court actions concerning one of the defendants, an expert witness who originally had a dispute with respondent over his fee to testify at trial. Respondent admitted that he repeatedly filed motions after the same motions had been previously considered and denied, filed other motions and then, without notice to the opposing party or the court, failed to appear at the hearings, and presented claims not warranted under existing law. The parties stipulated that respondent did not violate any court orders in his defense and prosecution of these multiple suits.

6. Hearings occurred in this matter on December 17, 1990, and January 4, 1991. We have referred to the December 17 hearing as "1 R.T." and the January 4 hearing as "2 R.T."

7. **[1]** The interim suspension of an attorney in accordance with section 6102 is not affected by the expungement of the criminal conviction.

state employment to the Office of Administrative Law (OAL) for a position as an entry-level attorney (legal counsel). In the section of the form requesting information on respondent's prior employment history, respondent indicated that he had been self-employed from December 1973 to the present, as a "Member, State Bar of CA, Fact Finder, Arbitrator, Mediator, Concilliator [sic] and Labor Rel. Consultant." (December stip., exh. B, p. 2.) Under the heading "duties," he included presenting court cases and appeals. (*Ibid.*) Respondent did not disclose his suspension from law practice on the application nor did he raise it during his interview for the OAL position.

Respondent contends that he was hired based on his interview, which took place prior to submission of the state application form at issue. He also asserts that admission to the bar was the sole criterion for the OAL position and the only prior legal experience he discussed with the OAL interviewer was his work as a law clerk and legal assistant while reading for the bar with a superior court judge and an appellate judge between 1968 and 1972. The hearing judge found that respondent did discuss his work on cases in which he appeared on his own behalf during the period of his suspension, but did not indicate that he appeared pro se. (Decision p. 6.) Respondent testified to the contrary at the hearing. (1 R.T. pp. 19-20.) Respondent was hired by the OAL and worked as a legal counsel from November 1984 until June 1985.

Count Three: Application to Department of Transportation

Respondent applied to work as deputy attorney general assigned to the California Department of Transportation (Cal Trans) by state application dated April 4, 1985. (December stip., pp. 3-4.) Respondent photocopied the application form he had submitted to the OAL, substituting the Cal Trans attorney position on the application, signed and dated the form. (1 R.T. p. 33.) Respondent maintained that his interview with Cal Trans focused on his employment with the OAL and he did not offer any information concerning his prior suspension or pro se appearances while suspended. (1 R.T. pp. 24-25.) Cal Trans hired respondent as a legal counsel and he began work on June 25, 1985. Five days later, respondent was seriously injured in an automobile accident and was placed on a leave of absence.

On October 10, 1985, Cal Trans dismissed respondent from his legal counsel position, alleging that respondent's written application was incomplete and misleading and that statements made by respondent during his three interviews with supervisors in Cal Trans were misleading as to his past experience and ability to practice law. The decision was upheld by the California State Personnel Board after a hearing before an administrative law judge in which respondent was represented by counsel. In his decision dated July 21, 1986, Judge Jose M. Alvarez found that respondent had omitted from his recitation of his past work experience his most recent employment at the OAL, his 1979 experience as general counsel to two companies (a mining firm and a manufacturing research and development firm), and his employment, while under suspension, as a substitute teacher and tire sales manager. (Exh. 1, p. 4.) As a consequence, he found respondent's application to be misleading and incomplete. He rejected respondent's testimony and found that in three interviews with supervisors at Cal Trans respondent represented that he had handled litigation from 1973 until the present without mentioning his period of suspension. Judge Alvarez determined that respondent's failure to voluntarily reveal his suspension to the interviewers in discussing his past work experience was misleading. (*Id.* at p. 5.) Judge Alvarez found respondent's overall conduct constituted fraud in securing his employment with Cal Trans and he was removed for cause. (*Ibid.*) The decision was adopted by the State Personnel Board on July 29, 1986.

Mitigation and Aggravation

Respondent presented little evidence in mitigation. Besides his own testimony, he offered one witness, Taylor S. Carey, a former co-worker at the OAL, who described the desperate need for entry-level attorneys at the OAL at the time of respondent's hire. (2 R.T. p. 9.) Carey characterized respondent as a diligent worker during the time they worked together. (2 R.T. p. 23.) Since leaving the OAL, he has

had little contact with respondent. (2 R.T. pp. 27-28.) Respondent also testified briefly concerning his subsequent employment, which is divided evenly between private practice and work as an arbitrator for the San Joaquin County Superior Court and private organizations.

The only aggravating factor identified by the hearing judge was respondent's prior record of discipline. (Decision pp. 18-19; Trans. Rules Proc. of State Bar, div. V, Stds. for Atty. Sanctions for Prof. Misconduct ["standard(s)"], std. 1.2(b)(i).)

ISSUES ON REVIEW

Count One: Letter Application to Be a Judicial Arbitrator

[2] The examiner did not seek review of the hearing judge's dismissal of count one. However, this department is obligated to conduct a de novo review of the dismissal of this count. (Trans. Rules Proc. of State Bar, rule 453(a).) After reviewing the record, we find that respondent held himself out as entitled to practice law in his letter applying for the position of arbitrator with the superior court in Sacramento when he was then on interim suspension.

Respondent was charged with concealing his suspended status from the judicial arbitration program of the Sacramento County Superior Court when he applied to be a judicial arbitrator. When respondent wrote his letter applying for the position, he was on interim suspension. The notice also charged that respondent "knew or should have known" of the provisions of rule 1604(b), California Rules of Court, requiring judicial arbitration panelists to be either retired judges or active members of the State Bar. The hearing judge did not find respondent was grossly negligent in failing to review the requirements for the post before he sent his letter of January 19, 1983, applying for the position. (Decision p. 10.) Nor did he find respondent's omission was an affirmative misrepresentation. The judge found that the letter, read as a whole, was not reasonably susceptible to a reading that respondent was able to practice law at the time the letter was written. (*Id.* at p. 11.) The hearing judge concluded that the examiner did not prove by clear and convincing evidence that respondent engaged in an act of dishonesty in violation of section 6106.

Respondent has asserted before the hearing judge and this department that a court administrative employee had given him incorrect advice upon which he relied in applying to be an arbitrator. The hearing judge found his testimony on this issue to be incredible and we defer to this finding which is based on an assessment of credibility. (*Connor* v. *State Bar* (1990) 50 Cal.3d 1047, 1056.)

[3a] Even if we accepted respondent's claim that he asked court personnel whether he needed to be a member of the bar and was told that admission to the bar was not required, it remains that respondent did not give the court administrator a true picture of his status. The problem was not that respondent was not a member of the bar; it was that respondent was then a member suspended from the practice of law as a result of disciplinary charges. Whether or not he actually knew bar admission was required, respondent asserted his membership in the State Bar as one of his qualifications for the arbitration position and signed his letter "ESQ." apparently in order to enhance the chances of his selection as an arbitrator. However, he misstated his status by omission. As a result, he created in his letter the false impression that he was then currently able to practice when in fact he could not.

[4a] We recognize that the hearing judge found that the letter, read as a whole, was "not reasonably susceptible of being interpreted as indicating he was then able to practice law." (Decision p. 11.) Nevertheless, this finding was based on the hearing judge's interpretation of the letter, and not on the testimony of a witness. Thus, we do not view the hearing judge's interpretation of the letter as a resolution of a credibility issue. We can make findings of our own on issues that turn on documentary evidence. (*In the Matter of Heiner* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 301, 309.)

[3b] While respondent was under suspension, he was prohibited from holding himself out as entitled to practice during the suspension period. (*Arm* v. *State Bar* (1990) 50 Cal.3d 763, 775; *In re Cadwell*, *supra*, 15 Cal.3d at 770.) The situation here is akin to

that in *In re Naney, supra*, 51 Cal.3d 186. There, the Court found misconduct[8] when a suspended attorney applied for a job requiring admission to the bar by means of a resume which reflected his original admission, but not his interim suspension. Naney asserted that when he applied, he believed that the position as in-house counsel did not involve the practice of law. The Court concluded that through his resume, the attorney was improperly holding himself out as a person permitted to practice law. (*Id.* at p. 195.)

[3c] Respondent had the obligation both to ascertain the requirements applicable to judicial arbitrators and, when presenting his legal qualifications, to advise the court arbitration administrator of his current status as a lawyer. By omitting any mention of his suspension in his letter and statements to court personnel, the court was not put on notice that respondent could not then practice law and was unqualified for the position. **[5a]** Since he was appointed when unqualified to serve, his service could render void any decision which he may have rendered as an arbitrator. (See Code Civ. Proc., §§ 473 [setting aside void judgments], 1615, subd. (d) [motion to vacate arbitration award]; *In re Henry C.* (1984) 161 Cal.App.3d 646, 652 [any act of disqualified judge absolutely void whenever brought into question]; see also *T.P.B.* v. *Superior Court* (1977) 66 Cal.App.3d 881, 885-886, and cases cited therein.)[9]

[3d] A suspended attorney cannot hold himself out as entitled to practice law. *In re Naney*, *Arm* v. *State Bar*, and *In re Cadwell* all stand for the proposition that an attorney cannot expressly or impliedly create or leave undisturbed the false impression that he or she has the present or future ability to practice law when in fact he or she is or will be on suspension. We apply the same principle to this case, and find that respondent, by omission, gave the judicial arbitration program a false impression in his application to be a judicial arbitrator that he was then entitled to practice law. **[4b]** We, therefore, disagree with the hearing judge in the interpretation of the letter application submitted by respondent. **[3e]** While we defer to the hearing judge's credibility determination that respondent did not act with intent to deceive, we find that respondent was grossly negligent in preparing the application letter and thereby improperly held himself out as entitled to practice law. As a result, he committed an act involving moral turpitude in violation of section 6106. (*In re Cadwell, supra*, 15 Cal.3d at p. 771.)

Counts Two and Three: State Employment Applications

Respondent (1) challenges the findings that he misled the two state agencies concerning his legal background; (2) contends he justifiably relied on state personnel officers in preparation of his applications, and (3) asserts that the hearing judge applied the wrong standard and improperly shifted the burden of proof from the State Bar to him. The examiner responds that respondent is merely rearguing his version of the facts without demonstrating that the hearing judge's findings are erroneous and is misreading the hearing judge's remarks from the close of the culpability portion of the hearing.

The hearing judge did not accept respondent's version of the facts, finding many of his explanations to be tortured and, overall, unpersuasive. We agree with the hearing judge. **[6]** A plain reading of respondent's description of his legal career on the applications is that he misrepresented the facts; respondent was not engaged in the practice of law continuously from his admission in 1973 to the present. The question of whether the state interviewers relied upon the application is not material to the issue of the truthfulness of respondent's statements on the application. Analogizing to the case law

8. The misconduct, which occurred after the initial disciplinary hearing in *Naney* and thus was uncharged, was considered as an aggravating circumstance. (*In re Naney, supra*, 51 Cal.3d at pp. 193-194.)

9. Respondent stated at oral argument that he could not remember whether he decided any cases as an arbitrator while on interim suspension. We note that he stipulated that he served on arbitration panels while on suspension (December stip., p. 3) and in motion papers before the hearing judge indicated that he was rendering decisions on or about August 1983 when he was still suspended. (Respondent's motion to dismiss, exh. A.)

involving wilful deception of a court, it is sufficient to show respondent knowingly presented a statement which itself tends to mislead without having to demonstrate actual deception. (*Davis* v. *State Bar* (1983) 33 Cal.3d 231, 240; *Pickering* v. *State Bar* (1944) 24 Cal.2d 141, 144-145.) In fact, respondent's application and his misleading statements during the interviews with Cal Trans resulted in his employment by the agency and were material. (Exh. 1, p. 5.)

[7] The hearing department decision does not address respondent's contention that he relied on instructions from state personnel board employees and the instructions on the form when completing his application. We find little merit in his arguments. Respondent does not assert that he was instructed to make misleading statements on his application. While the form does ask for detailed information "on the experience which you believe meets the entrance requirements," that was not a license for respondent to misrepresent employment history by selective omissions or other misrepresentations calculated to imply that no gap existed in his ability to practice law.

[8] The hearing judge's statement that the State Bar Court has a duty to ensure that suspended attorneys are scrupulously honest with respect to the facts of their suspensions (1 R.T. p. 58) does not indicate that he had shifted the burden of proof from the examiner to respondent in this case. Nor do his comments at the close of the culpability phase of the hearing reflect more than the judge's view, expressed by the Supreme Court as well, that suspended attorneys have a duty not to mislead the public concerning their suspensions. (*Arm* v. *State Bar*, *supra*, 50 Cal.3d at p. 775; *In re Cadwell*, *supra*, 15 Cal.3d at pp. 771-772.) We adopt the hearing judge's conclusion that respondent violated section 6106 in both counts two and three.

APPROPRIATE DISCIPLINE

The hearing judge himself noted that his recommended discipline was fairly lenient and a departure from the standards. (Decision p. 23.) The standards are guidelines and not binding on the Supreme Court or the State Bar Court. (*Howard* v. *State Bar* (1990) 51 Cal.3d 215, 221-222.) In this case, the judge departed from the standards because he viewed the issues raised in the case as novel, citing to our decision in *In the Matter of Mitchell* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 332. Moreover, he found respondent's misrepresentations to the state agencies less egregious than similar misconduct toward an individual client. Since the judge had reasonable doubts about whether respondent's prior and present acts of misconduct constituted a pattern of dishonesty, he resolved the issue in respondent's favor.

The Office of Trial Counsel initially recommended an actual suspension of four years, with five years probation, based on the standards and respondent's prior discipline. The trial examiner's personal view was a far more lenient recommended actual suspension of six months. (2 R.T. pp. 34-35.) The examiner on review acknowledged in his post-argument brief that some actual suspension would appear to be appropriate in this case and recommended a minimum of three months actual suspension. Respondent maintains that no discipline is warranted.

Under the standards, respondent's dishonest acts would ordinarily warrant, at a minimum, some actual suspension. The degree of discipline is dictated by the extent of harm to the victim of the misconduct, and the degree to which the misconduct relates to respondent's practice of law. (Std. 2.3.) In addition, an attorney with a prior record of discipline normally receives discipline greater than that imposed in the prior proceeding unless, because of remoteness in time and the minimal severity of the prior offense, it would be manifestly unjust to do so. (Std. 1.7(a).)

[5b] Among respondent's acts of misconduct, his application for the arbitrator position while on interim suspension is of most serious concern because of its potential for harm. Whatever arbitration cases he handled during that period are subject to attack as void because he acted as an unqualified arbitrator. No record was made at the hearing of the number of such cases. Nevertheless, respondent's mere service on a panel undermines the public's confidence in the court system and the administration of justice, since it has the potential to disrupt

both the court arbitration system and the finality of the arbitration cases heard by respondent. His very service as an unqualified arbitrator harmed the administration of justice.

[9] With respect to respondent's employment by OAL and Cal Trans, the hearing judge found that respondent's acts did not result in harm in the usual sense because their effect was on public agencies rather than individual clients. We disagree. Misrepresentations are no less egregious when a public body is misled, and they warrant discipline of no less magnitude. The definition of aggravating circumstance encompasses significant harm to "a client, the public or the administration of justice." (Std. 1.2(b)(iv).)

However, there is no clear and convincing evidence that respondent's misrepresentations caused significant harm to the state agencies for which he worked. Cal Trans discharged him from state employment as a result of his acts but the administrative law judge did not believe they would recur and thus did not bar respondent from applying for state government service in the future. His fellow employee vouched for respondent's excellent work while at OAL. Although there was deceit involved in respondent's misconduct, the resulting harm to the public and its state agencies was minimal.

The hearing judge concluded that there was little if any mitigating evidence present in the record. We agree. **[10]** Respondent's prior record of discipline has an aggravating impact on the discipline to be recommended. However, both the examiners at hearing and on review appear to have discounted this prior record almost as much as the hearing judge did. The discipline imposed in the prior case, three and one-half years of actual suspension, constituted the time he had already spent on interim suspension as of the time the stipulation was approved. The Supreme Court has recognized that an attorney on interim suspension has little control over the length of time he or she may be suspended from practice prior to final resolution of the case. (*In re Young* (1989) 49 Cal.3d 257, 267.) We agree with the hearing judge that we cannot reweigh the evidence in the prior case. We note, however, that the misconduct which respondent admitted in the stipulation would not ordinarily warrant such a lengthy actual suspension. The examiners who have appeared in this matter have proposed discipline of between three and six months actual suspension, far below the length of respondent's prior suspension. While we find respondent's prior discipline to be an aggravating circumstance, we conclude that strict adherence to standard 1.7(a) would result in discipline far in excess of what would be warranted under the facts and circumstances of the current case and comparable case law. (Cf. *In re Young*, *supra*, 49 Cal.3d at pp. 267-268.)

[11] Respondent's application as a judicial arbitrator occurred while he was on interim suspension in the previous matter. His misleading applications for employment with OAL and Cal Trans occurred within two years of the Supreme Court's final order resolving the case. Respondent admitted in the prior case that his criminal conviction for attempted receipt of stolen property was an act of moral turpitude and moral turpitude is again an issue in these cases. However, we do not see a pattern or "common thread" linking respondent's actions in these matters with his prior misconduct. (See *Arm* v. *State Bar*, *supra*, 50 Cal.3d at p. 780 [type of misconduct found in four disciplinary cases involving same attorney sufficiently dissimilar not to constitute a pattern or require disbarment].) Nevertheless, respondent's multiple acts of breaching his ethical duties demonstrate that he lacks a true understanding of his professional responsibilities. (*Ibid.*)

[12a] Another reason given by the hearing judge for his departure from the standards was because he viewed the issues raised in the case as novel, citing to our decision in *In the Matter of Mitchell*, *supra*, 1 Cal. State Bar Ct. Rptr. 332. In *Mitchell*, the attorney misrepresented his legal education on his resume and in interviews with prospective employers over a three-year period. His misrepresentation on the resume was, as in this case, by omission, leaving readers with a false impression as to where Mitchell went to law school. In addition, Mitchell lied about his law school education when asked in his interviews. However, the misrepresentations were not shown to have unduly influenced the decision to hire him, so little harm to the victims was found. He also lied in his answers to interrogatories from the State

Bar, an aggravating factor. Mitchell presented evidence concerning the emotional stress caused by his wife's medical condition and strained financial circumstances and he had no prior record of discipline, all mitigating circumstances. The Supreme Court, by order filed August 15, 1991, imposed on Mitchell the discipline recommended by this department: one year suspension, stayed, one year probation and sixty days actual suspension. (*In the Matter of Mitchell*, order filed August 15, 1991 (S020327).)

[12b] In weighing the discipline in *Mitchell*, we noted that except for the discussion of misrepresentations in a resume as an aggravating circumstance in *In re Naney*, *supra*, 51 Cal.3d 186, 195, there were no California cases regarding the appropriate discipline for these kinds of misrepresentations by an attorney seeking employment. (*In the Matter of Mitchell*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 339.) The hearing judge here relied on the novelty of the issue to mitigate the discipline. (Cf. *Hawk* v. *State Bar* (1988) 45 Cal.3d 589, 602 [attorney's conduct found less egregious since violation involved an issue of first impression and not a clearcut or established ethical rule].) However, the critical charge in this case concerned respondent's misrepresentation of his status as an attorney and the governing rules in this area have been clearly established for many years. (*In re Cadwell*, *supra*, 15 Cal.3d at p. 771.)

In the *Mitchell* case, the misrepresentations occurred over a long period of time (three years) and were knowingly promulgated by Mitchell. Mitchell also benefitted from extensive mitigating evidence and the lack of a prior record. Here, respondent's grossly negligent failure to disclose his interim suspension to the court arbitration program, and his participation thereafter, occurred while he was on interim suspension for a conviction of a crime involving moral turpitude.

In *Chasteen* v. *State Bar* (1985) 40 Cal.3d 586, the Supreme Court ordered a two-month actual suspension, conditioned on a lengthy probation and other conditions, for an attorney who knowingly engaged in practice for one year while suspended. The attorney, who had a prior record of discipline, had additional serious misconduct, including abandoning clients, failing to act competently, and commingling and misappropriating client funds. The attorney's misconduct was mitigated by his recovery from both the debilitating effects of alcoholism and a severe depression, which were contributing factors in his misconduct. Chief Justice Lucas, joined by two members of the court, dissented on the issue of the appropriate discipline and would have ordered a six-month actual suspension. (*Chasteen* v. *State Bar*, *supra*, 40 Cal.3d at p. 594 (dis. opn. of Lucas, C.J.).)

In both *Chasteen* and this case, previously disciplined attorneys breached their ethical duties while suspended from the practice of law. Both committed acts of moral turpitude; however, much of the additional misconduct found in *Chasteen* occurred prior to his suspension, while respondent's acts occurred while he was on suspension or probation. We do not find the extensive mitigating evidence in this matter which was persuasive in the *Chasteen* case. We cannot say that respondent has come to terms with his misconduct as did Chasteen. (*Id.* at p. 593.)

[13] Balancing the misconduct at issue, respondent's prior record of discipline and the aggravating factors, we find that a period of actual suspension is necessary for the protection of the public as respondent does not seem to understand the seriousness of his ethical duties. Attorneys must be careful not to hold themselves out as being able to practice when they are not and must not mislead employers regarding their prior status. Employers, clients and the public are entitled to rely on the statements of lawyers for what they say. As we stated in *Mitchell*, "An attorney's statements in a resume, job interview or research paper should be as trustworthy as that professional's representation to a court or client." (*In the Matter of Mitchell*, *supra*, 1 Cal. State Bar Ct. Rptr. at p. 341.)

RECOMMENDATION

For the foregoing reasons, we recommend that the Supreme Court order that respondent be suspended from the practice of law in this state for two years; that execution of the suspension be stayed; and that respondent be placed on probation for two years with conditions including actual suspension for the first six months of his probation. We adopt the remaining conditions of probation recommended by

the hearing judge and further recommend that respondent be ordered to take and pass the California Professional Responsibility Examination within one year of the effective date of the Supreme Court's order. We also recommend that respondent be ordered to comply with rule 955, California Rules of Court, and that he perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the date the Supreme Court order becomes effective.

We concur:

PEARLMAN, P.J.
VELARDE, J.*

* By appointment of the Presiding Judge pursuant to rule 453(c), Trans. Rules Proc. of State Bar.