STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

JAMES ALAN TWITTY

A Member of the State Bar

Nos. 88-O-15237, 89-C-16261, 89-C-16262, 90-C-16527, 90-O-15541, 90-O-15712

Filed January 19, 1994

SUMMARY

Respondent and the State Bar reached an agreement to resolve five of the six disciplinary matters in a consolidated proceeding. In the sixth matter, respondent, while representing a defendant in a criminal case, and knowing that another lawyer represented another defendant in the same case, had communicated with the other defendant about a plea bargain in the case without the other lawyer's consent. The parties submitted the sixth matter for a culpability determination to a hearing judge pro tempore, who concluded that respondent had violated the rule against communicating with a party represented by counsel. (Philip L. Johnson, Judge Pro Tempore.)

The parties included this culpability determination in a comprehensive stipulation, which recommended two years stayed suspension and four years probation, conditioned on thirty days actual suspension. The parties agreed that if respondent had not been found culpable in the sixth matter, the recommended discipline would have called for three years, rather than four years, probation. Further, the stipulation stated that the parties intended to preserve the right to seek review even though they were entering into a stipulation. The hearing judge approved the stipulation.

Respondent requested review, contesting his culpability in the disputed count. The review department granted the request, but cautioned the parties that the entire proceeding was subject to independent review. The review department affirmed the culpability finding, and held that given respondent's serious improper communications and other stipulated wrongdoing, the recommended discipline was inconsistent with decisional law and insufficient. Because the parties had agreed to a highly unusual stipulation to preserve time and resources and had not contemplated that seeking review would result in discipline more severe than the discipline recommended in the order approving the stipulation, the review department relieved the parties from their stipulation and remanded the proceeding to allow them to reach a new stipulation or to try the proceeding.

COUNSEL FOR PARTIES

For Office of Trials: Janice G. Oehrle

For Respondent: R. Gerald Markle

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 a-c] **119 Procedure—Other Pretrial Matters**
130 Procedure—Procedure on Review
135 Procedure—Rules of Procedure
139 Procedure—Miscellaneous
166 Independent Review of Record

Where parties to a disciplinary proceeding reached a stipulation but agreed to preserve right to seek review as to one contested culpability issue, review department construed order approving stipulation and hearing judge's partial decision as together constituting a decision for the purpose of review. However, review department was obligated to review entire record independently and had authority to make findings, conclusions, and a disciplinary recommendation at variance with those of hearing department. (Trans. Rules Proc. of State Bar, rule 453(a).) Agreement between parties could not restrict review department's obligation of independent review. Accordingly, review department declined to limit its review to contested culpability decision, and was not bound by stipulated discipline recommendation.

[2] **130 Procedure—Procedure on Review**
136 Procedure—Rules of Practice
159 Evidence—Miscellaneous

Where parties jointly requested augmentation of record with exhibits which they had provided to hearing judge for consideration in rendering decision and had intended to make part of record, and which hearing judge had relied on in reaching decision, and which were vital to review, record would have been incomplete without exhibits, and request to augment was granted. (Prov. Rules of Practice, rule 1304.)

[3] **135 Procedure—Rules of Procedure**
146 Evidence—Judicial Notice
191 Effect/Relationship of Other Proceedings
194 Statutes Outside State Bar Act

Rules of evidence in civil cases are generally applicable in State Bar proceedings (Trans. Rules Proc. of State Bar, rule 556) and include taking judicial notice of records of any federal court of record. Where neither party specifically requested augmentation of record with federal court's opinion on appeal in related matter, but respondent attached copy of such opinion to review brief, review department took judicial notice of such opinion.

[4] **162.11 Proof—State Bar's Burden—Clear and Convincing**
166 Independent Review of Record

The State Bar must prove culpability by clear and convincing evidence. Where respondent requested review department to make supplementary finding concerning culpability, but record clearly and convincingly established a fact inconsistent with such proposed finding, review department declined to adopt proposed finding.

[5] **162.20 Proof—Respondent's Burden**
166 Independent Review of Record

Respondent must establish mitigating circumstances by clear and convincing evidence. Where respondent requested review department to make supplementary findings pertaining to mitigating circumstances, but did not present clear and convincing evidence in support of such proposed findings, review department declined to adopt them.

[6 a, b] **257.00 Rule 2-100 [former 7-103]**

An attorney who is representing a client may not communicate directly or indirectly about the subject of the representation with a party whom the attorney knows to be represented by another lawyer in the matter, unless the attorney has the consent of the other lawyer. Where respondent represented a defendant in a criminal case, and a co-defendant's lawyer had authorized respondent to communicate with the co-defendant only for the purpose of preparing a joint defense, respondent's communication with the co-defendant about a plea bargain without the other lawyer's consent was improper.

[7 a, b] **257.00 Rule 2-100 [former 7-103]**

When a party already represented by counsel seeks advice from an independent lawyer of the party's choice in order to hire new counsel or obtain a second opinion, attorneys may communicate with such party. However, where respondent represented a defendant in a criminal case, knew that another lawyer represented another defendant in the case, and conceded that a potential conflict existed between the interests of the two defendants, this potential conflict prevented respondent from acting as an independent attorney whom the other defendant might consult for an unbiased second opinion.

[8] **151 Evidence—Stipulations**
162.20 Proof—Respondent's Burden
795 Mitigation—Other—Declined to Find

Where respondent's declaration attached to stipulation suggested mitigating circumstances, but stipulation did not specify whether State Bar accepted statements in declaration as true and hearing judge did not indicate whether statements were found to be persuasive, review department declined to reach conclusion regarding possible mitigating factors suggested by declaration.

[9] **119 Procedure—Other Pretrial Matters**
135 Procedure—Rules of Procedure
139 Procedure—Miscellaneous
165 Adequacy of Hearing Decision
802.69 Standards—Appropriate Sanction—Generally

When judges are asked to approve stipulations, they cannot rely solely on State Bar's acquiescence in proposed discipline, but must exercise their independent judgment in carrying out their obligation to examine stipulation, admitted facts, and proposed discipline for fairness to parties and for extent to which public will be adequately protected thereby. (Trans. Rules Proc. of State Bar, rule 407(a).)

[10 a, b] **257.00 Rule 2-100 [former 7-103]**
584.10 Aggravation—Harm to Public—Found
1091 Substantive Issues re Discipline—Proportionality
1093 Substantive Issues re Discipline—Inadequacy

Where respondent engaged in serious improper communications with a represented party, exposing the party to serious risks of harm, some of which occurred, and committed other stipulated wrongdoing, recommended discipline of four years probation conditioned on thirty days actual suspension was inconsistent with decisional law and insufficient.

[11 a, b] 119 Procedure—Other Pretrial Matters
130 Procedure—Procedure on Review
139 Procedure—Miscellaneous
166 Independent Review of Record
1093 Substantive Issues re Discipline—Inadequacy

Where parties agreed to highly unusual stipulation expressly preserving right to seek review, but did not contemplate that review department would recommend discipline more severe than that set forth in order approving stipulation, parties' expectation that review department would be bound by stipulated discipline was unjustified. However, it was appropriate to relieve parties from stipulation due to their mutual mistake. Accordingly, review department vacated order approving stipulation and remanded proceeding for new stipulation or trial.

ADDITIONAL ANALYSIS

Culpability
Found
257.01 Rule 2-100 (former 7-103)

Aggravation
Found
521 Multiple Acts
541 Bad Faith, Dishonesty
561 Uncharged Violations
691 Other

Mitigation
Found
710.10 No Prior Record
Found but Discounted
735.30 Candor—Bar

Standards
801.30 Effect as Guidelines
802.30 Purposes of Sanctions
802.61 Appropriate Sanction
844.13 Failure to Communicate/Perform
863.90 Standard 2.6—Suspension
901.30 Miscellaneous Violations—Suspension

Other
1511 Conviction Matters—Nature of Conviction—Driving Under the Influence
1554.10 Conviction Matters—Standards—No Moral Turpitude

OPINION

PEARLMAN, P.J.:

In this unusual consolidated proceeding, at the request of respondent, James Alan Twitty, we review a decision on culpability in one matter and an order approving a stipulation as to all of the consolidated matters. The stipulation incorporated the hearing judge pro tempore's decision concluding that respondent violated rule 2-100 of the Rules of Professional Conduct by communicating with a party whom respondent knew to be represented by another lawyer without the other lawyer's knowledge and consent. We affirm the conclusion of culpability, but we vacate the order approving the stipulation because it recommends an inadequate sanction based on the current record. Given the mutual mistake of the parties as to the effect of their stipulation in the event of review, we relieve the parties of their stipulation and remand the consolidated cases for further proceedings consistent with this opinion.

I. PROCEDURAL POSTURE

We turn our attention first to the unusual procedural posture of the current proceeding.

In early 1992, after several settlement conferences, the parties were able to reach agreement on five of six pending matters. In case number 90-O-15541, the parties had not been able to agree on culpability but had agreed to incorporate into their global settlement the court's resolution of the disputed issue. The hearing judge pro tempore assigned to the case was not asked to hold a hearing, but to rely solely upon evidence offered in the trial of *United States* v. *Lopez* (N.D.Cal. 1991) 765 F.Supp. 1433, order vacated by *United States* v. *Lopez* (9th Cir. 1993) 4 F.3d 1455 ("*Lopez*"), and upon United States District Judge Marilyn Hall Patel's opinion in *Lopez*. In May 1992, the hearing judge filed a decision determining respondent's culpability in case number 90-O-15541. In reaching his underlying decision regarding respondent's communication with a separately represented criminal defendant, the hearing judge found that respondent had communicated with the criminal defendant outside the presence of the defendant's counsel on a subject not authorized by the defendant's counsel and without the knowledge and consent of the defendant's counsel, that he had interfered with the attorney-client relationship, and that he was culpable of communicating with a represented party.

The parties had sought to limit the resulting discipline by prior agreement between themselves. Pursuant thereto, they agreed, among other things, to thirty days actual suspension for all other matters and three years of probation. They further agreed in advance that the total period of probation would be lengthened to four years if respondent were found culpable in case number 90-O-15541. If the hearing judge had not found respondent culpable in case number 90-O-15541, the length of the recommended stipulated probation for the consolidated proceeding would have remained three years under the terms of the parties' agreement.

On December 2, 1992, the parties filed a stipulation covering all six cases: 88-O-15237, 89-C-16261, 89-C-16262, 90-C-16527, 90-O-15541, and 90-O-15712. In case number 88-O-15237, respondent stipulated that he had failed to return a file upon the request of a client and the client's new attorney, to communicate with clients, to refund the unearned portions of advanced fees in two matters, and to cooperate with the State Bar in its handling of case number 88-O-15237. In cases number 89-C-16261, 89-C-16262, and 90-C-16527, respondent acknowledged several convictions for drunk driving and stipulated that by these convictions he had violated his duties as an attorney. The parties apparently concluded that these convictions did not constitute acts of moral turpitude, but did not expressly so indicate.[1] In case number 90-O-15712, respondent

1. The parties were unable to reach a stipulation with respect to the charge of an act of moral turpitude in count three of case number 88-O-15237 and submitted that question to the hearing judge who determined that respondent did not violate section 6106 of the Business and Professions Code in that count. No issue has been raised herein regarding that determination which we conclude was appropriately reached on the current record. However, in light of our determination to relieve the parties of their stipulation and remand the proceeding, the parties are free to readdress this issue, among others.

stipulated that he failed to reply promptly to reasonable requests for information from clients.

Based on all of the stipulated facts and the court findings in case number 90-O-15541, the parties' stipulation recommended that respondent be suspended from the practice of law for two years, that execution of the suspension be stayed, and that respondent be placed on four years probation on various conditions, including actual suspension for thirty days. The stipulation stated that the parties intended to preserve the right to seek review even though they were entering into a stipulation. On December 11, 1992, the hearing judge filed an order approving the stipulation.

[1a] Respondent requested review. We granted the request because the parties specifically provided in their stipulation that the right to seek review would be preserved. However, we informed the parties that we would construe the order approving the stipulation, coupled with the hearing judge's partial decision, as together constituting a decision for the purpose of review. Citing rule 453(a) of the Transitional Rules of Procedure, we cautioned the parties that we are obligated to review the entire record independently when a proceeding is brought before us and that we may adopt factual findings, legal conclusions, and a disciplinary recommendation at variance with those of the hearing department.

II. AUGMENTATION OF THE RECORD

[2] The parties jointly seek to augment the record with eleven exhibits pertaining to two transcripts of proceedings before then United States Magistrate Judge Claudia Wilken, five transcripts of proceedings before United States District Judge Marilyn Hall Patel, a stipulation correcting a transcript of proceedings before Judge Patel, the opinion filed by Judge Patel, a memorandum issued by former United States Attorney General Thornburgh, and a declaration by attorney Barry Tarlow. The parties provided these documents to the hearing judge pro tempore for consideration in rendering his partial decision and intended to make them part of the record on review. Because the hearing judge relied on the eleven exhibits in reaching his partial decision and because they are vital to our review, the record would be incomplete without them. We therefore grant the joint request for augmentation of the record pursuant to rule 1304 of the Provisional Rules of Practice.

[3] The parties have not specifically requested that we augment the record of the current proceeding with the circuit court opinion in *Lopez*, although respondent attached a copy of the original version of this opinion to his opening brief on review. The rules of evidence in civil cases are generally applicable in State Bar proceedings (Trans. Rules Proc. of State Bar, rule 556) and include taking judicial notice of the records of any federal court of record. (Evid. Code, § 452, subd. (d)(2).) In order to have a complete record before us, we take judicial notice of the final version of the circuit court opinion in *United States* v. *Lopez* (9th Cir. 1993) 4 F.3d 1455.

III. FACTS OF CASE NUMBER 90-O-15541

Neither the factual findings nor the legal conclusions of cases number 88-O-15237, 90-C-16527, 89-C-16261, 89-C-16262, and 90-O-15712 are in dispute. We therefore focus on case number 90-O-15541.

Although respondent challenges the legal conclusions of the decision below in case number 90-O-15541, he asserts that he accepts the factual findings of that decision. Nor does the deputy trial counsel dispute these findings. Because clear and convincing evidence supports these findings, we adopt them as our own.

As discussed above, we have granted the request by both parties that we augment the record with Judge Patel's opinion in *Lopez*. Respondent stated at oral argument that he did not quarrel with Judge Patel's factual findings, and the deputy trial counsel has not disagreed with those findings. In the following statement of the facts pertaining to case number 90-O-15541, we adopt a few factual findings from Judge Patel's opinion where such findings rest on uncontroverted evidence and clarify significant points. As specifically indicated below, we also adopt one finding of fact which respondent disputed during the federal trial before Judge Patel, but which rests on clear and convincing evidence.

In December 1989, the federal government charged Jose Lopez ("Lopez"), Antonio Escobedo ("Escobedo"), and Alfredo Olivas ("Olivas") with distribution of cocaine and heroin, conspiracy to distribute these drugs, and aiding and abetting. The case was assigned to United States District Judge Fern Smith, who denied bail to Lopez and Escobedo.

At the beginning of the case, respondent made several appearances on behalf of all three defendants, primarily at bail and detention proceedings. Eventually, attorney Barry Tarlow ("Tarlow") became counsel for Lopez, respondent became counsel for Escobedo, and attorney Harold Rosenthal ("Rosenthal") became counsel for Olivas.

Before Tarlow became Lopez's counsel, respondent had initially discussed possible disposition of the charges against Lopez and Escobedo with attorney John Lyons ("Lyons"), the federal prosecutor assigned to the case. Lyons made it clear to respondent that Lyons would consider a disposition of the case only if both Lopez and Escobedo entered into a plea agreement.

In representing Lopez, Tarlow took the position that his client had a viable entrapment defense. Discussions with Lyons about a plea agreement ended after Tarlow became Lopez's lawyer.

Tarlow, Rosenthal, and respondent divided responsibility for the preparation of the case. Tarlow authorized respondent to speak with Lopez only for the purpose of preparing a joint defense for trial. Tarlow did not authorize respondent to meet or confer with the government on behalf of Lopez. Because respondent had responsibility for investigating the case against Lopez and Escobedo, he spoke with both defendants during his visits to the jail where they were incarcerated.

In March or April 1990, Escobedo telephoned respondent and expressed an interest in the possibility of reopening plea negotiations with the government. Lopez, as well as Escobedo, wanted respondent to come to the jail to discuss this possibility. Both Lopez and Escobedo were concerned about their children and wished to obtain early release in order to be closer to their children.

Without informing Tarlow, respondent went to the jail and met with Lopez and Escobedo, both of whom asked respondent to arrange a meeting with Lyons to discuss a negotiated plea. Lopez requested that respondent not inform Lopez's attorney, Tarlow, about Lopez's desire to meet with Lyons or about the anticipated meeting with Lyons. Although the record contains conflicting evidence about the reason for this request, the record establishes that Lopez informed respondent that Lopez was not terminating Tarlow's services and wanted Tarlow to represent Lopez if the case went to trial.

Respondent had several telephone conversations with Lopez and Escobedo about meeting with Lyons and made a second trip to the jail to discuss plea negotiations with the two defendants. Respondent did not inform Tarlow about any of these communications with Lopez.

Respondent then contacted the government on behalf of Lopez and Escobedo without informing Tarlow. During the trial before Judge Patel, respondent denied that he encouraged Lopez or Escobedo to enter into negotiations with the government. Instead, respondent contended that he did not want to explore the alternative of negotiating a plea and that he preferred to try the case.

Judge Patel described this contention as not credible because respondent initiated the contact with the government on behalf of Lopez and Escobedo, concealed his ongoing communications about plea negotiations from Tarlow, went to considerable lengths to ensure that the meetings with the government occurred, and asked Rosenthal not to tell Tarlow about the meetings. Judge Patel found that such actions did not constitute the conduct of an attorney with no interest in plea negotiations. (*Lopez*, 765 F.Supp. at p. 1440, fn. 12.) Although the hearing judge in the current disciplinary proceeding did not address this finding, we agree that clear and convincing evidence supports the finding and adopt it as our own.

At the request of Lopez and Escobedo, respondent told Lyons that Lopez and Escobedo wished to meet with Lyons to discuss a possible plea agreement and that Lopez did not want Tarlow to be present at,

or aware of, the meeting. Lyons believed that Lopez feared for the safety of Lopez's family if Tarlow learned of the negotiations with the government. This belief was allegedly supported by government information that a drug source had threatened the families of Lopez and Escobedo. Lyons assumed that Lopez was part of a drug ring paying Tarlow's fees for representing Lopez.

Because Lopez wanted to meet without Tarlow, Lyons arranged a hearing on May 21, 1990, before then Magistrate Judge Claudia Wilken, who conducted an in camera hearing in which she interviewed Lopez. Tarlow was not present at, or aware of, this hearing; respondent did not attend the hearing; and Lyons did not appear until the end of the hearing. Although Lyons testified that he did not inform Magistrate Judge Wilken of his suspicion about the source of Tarlow's fees, her remarks apparently reflected an assumption that someone else was paying Tarlow's fees. Lopez informed Magistrate Judge Wilken that Lopez wanted to ask the government two questions. Magistrate Judge Wilken warned Lopez about the danger of entering into plea negotiations without counsel, offered Lopez the opportunity to retain counsel other than Tarlow, and explained that respondent represented Escobedo, not Lopez. Lopez signed a waiver prepared by the government. This waiver stated that Tarlow represented Lopez, that Lopez wanted to speak to the government outside of Tarlow's presence, that Lopez did not believe Tarlow represented Lopez's best interests, and that Lopez waived the right to have Tarlow present at the meeting. When Lyons appeared, Magistrate Judge Wilken stated that Lopez had waived the right to have Tarlow present for the purpose of asking two questions and that she would conduct another in camera hearing if Lopez wanted to proceed with plea negotiations after receiving answers to the two questions.

Immediately thereafter, Lyons met with respondent, Lopez, and Escobedo in Lyons's office. Lyons explained that the government would not use any information from the meeting against Lopez or Escobedo. Tarlow was not present at, or aware of, this meeting. Although respondent made it clear that he was only representing Escobedo, it was understood that Lopez was to have the benefit of respondent's advice to Escobedo. At the meeting, respondent gave Escobedo advice which was intended for the benefit of Lopez, as well as Escobedo. In reply to a question from Lyons about the source of Tarlow's fees, respondent asserted that Lopez and Lopez's family were paying the fees. Lopez asked whether he could be released to be closer to his children and whether his safety and his family's safety could be guaranteed if he cooperated with the government. Although Lopez did not supply information to the government, he indicated that he might be willing to do so.

Without Tarlow's knowledge or consent, respondent had subsequent discussions with Lopez and Escobedo about the possibility of a plea agreement. Respondent then arranged a second meeting with Lyons.

On May 30, 1990, Magistrate Judge Wilken held another in camera hearing alone with Lopez and verified that Lopez wished to meet again with the government without Tarlow present. After Lopez again waived the right to have Tarlow present, Lyons immediately met with respondent, Escobedo, and Lopez in Lyons's office. Under pressure from Lyons to provide some significant information, Lopez supplied Lyons with the names of others allegedly involved in drug trafficking. Tarlow was not present at, or aware of, the second hearing or the second meeting.

After the second meeting, Lyons sent respondent a proposed plea agreement for Escobedo and indicated that the same sort of agreement might be available for Lopez if Lopez obtained a lawyer to represent him for the purpose of plea negotiation. Eventually, Lopez and Escobedo rejected the proposed plea agreement.

In early August 1990, Lyons told Rosenthal that the government had been negotiating a possible plea agreement involving Lopez and Escobedo without Tarlow's knowledge or consent. Rosenthal contacted respondent, who initially denied the occurrence of plea negotiations and later asked Rosenthal not to inform Tarlow about the negotiations because such information would ruin the possible plea agreement. Rosenthal, however, informed Tarlow.

Tarlow promptly filed papers indicating that he had learned about the secret communications between Lopez and the government. On August 15, 1990, Tarlow withdrew as counsel of record for Lopez. According to Tarlow, such withdrawal was necessary because the government communications with Lopez had undermined Tarlow's ability to present an entrapment defense, which Tarlow believed was meritorious, and had destroyed the trust and confidence essential to an attorney-client relationship.

Lopez subsequently retained William Osterhoudt ("Osterhoudt") to represent him. Arguing that Lyons had violated Lopez's Sixth Amendment right to counsel and rule 2-100 of the California Rules of Professional Conduct,[2] Osterhoudt filed a motion to dismiss the indictment against Lopez. Judge Smith, to whom the case had originally been assigned, referred this motion to Judge Patel and recused herself. Judge Patel took testimony from Lyons, Lopez, and respondent and considered declarations by Lyons and Tarlow. Concluding that Lyons had violated rule 2-100, but not the Sixth Amendment, Judge Patel granted Lopez's motion. Judge Patel declined to hold Lyons in contempt or to refer Lyons for disciplinary proceedings because Lyons was following the dictates of a policy commonly known as the Thornburgh Memorandum put forward by the Attorney General of the United States.[3] The same, however, was not true of respondent, whom Judge Patel referred to the State Bar of California for disciplinary proceedings. (*Lopez*, 765 F.Supp. at p. 1462, fn. 50.)

The Ninth Circuit Court of Appeals accepted the conclusion that Lyons had violated rule 2-100, but rejected the determination that the extreme sanction of dismissal of the indictment was the appropriate remedy for Lyons's misconduct. Accordingly, it vacated the order dismissing the indictment and remanded the case. (*United States* v. *Lopez* (9th Cir. 1993) 4 F.3d 1455.)

IV. DISCUSSION

A. Independent Review of the Record

[1b] In the order granting review, we informed the parties that we would construe the order approving the stipulation, coupled with the hearing judge's decision on culpability in case number 90-O-15541, as together constituting a decision for the purpose of review. Respondent urges us to limit our construction of what constitutes the decision to the decision on culpability in case number 90-O-15541. He asserts that the parties expended substantial time and resources in negotiating a stipulation and that neither side should be deprived of the benefit of their bargain.

[1c] Respondent concedes that he understood the Supreme Court would not be bound by the stipulated discipline, but suggests that he thought we would nonetheless be bound by the stipulated discipline in making our recommendation to the Supreme Court. To the contrary, rule 453(a) of the Transitional Rules of Procedure, cited in our order as the basis for our acceptance of review, not only requires an independent review of the entire record, but also authorizes findings, conclusions, and a disciplinary recommendation at variance with the hearing department. Because review was sought, the entire proceeding is before us. An agreement between the parties cannot restrict our obligation of independent review.

B. Respondent's Request for Supplementary Findings

Respondent asserts that he does not quarrel with the factual findings of the partial decision, but requests us to make the following supplementary findings:

(1) Tarlow did not tell respondent that any particular subject matter was off limits in respondent's communications with Lopez.

2. The Northern District of California has adopted the California Rules of Professional Conduct as the applicable standards of professional conduct for the district. Unless otherwise indicated, all further references to rules are to the Rules of Professional Conduct.

3. Tarlow independently filed a complaint against Lyons with the Arizona State Bar, to which Lyons belonged. (*Lopez*, 765 F.Supp. at p. 1462, fn. 49.) There is no information in this record as to the outcome of that proceeding.

(2) Respondent encouraged Lopez to tell Tarlow that Lopez wanted to speak with Lyons or alternatively to accept representation by other counsel.

(3) Lopez told respondent that Tarlow informed Lopez that Tarlow would withdraw from representing Lopez if Lopez sought to cooperate with the government.

(4) Tarlow withdrew from representing Lopez upon learning of Lopez's meetings with Lyons, and such withdrawal is consistent with Tarlow's general practice of never representing criminal defendants who cooperate with the government because such cooperation is personally, morally, and ethically offensive to Tarlow.

(5) Lopez instructed respondent to maintain Lopez's interest in meeting with Lyons in strictest confidence and under no circumstances to reveal such interest to Tarlow.

The deputy trial counsel asserts that the record does not support these proposed supplementary findings and notes that respondent failed to ask the hearing judge to reconsider the decision and make the proposed supplementary findings.

[4] Proposed supplementary finding (1) concerns an issue of culpability: whether respondent communicated with Lopez, whom he knew to be represented by Tarlow, without Tarlow's consent. With regard to culpability issues, the deputy trial counsel must prove culpability by clear and convincing evidence. (*In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 239-240, and cases cited therein.) As set forth above in the statement of facts and as discussed below in the subsection dealing with rule 2-100 of the Rules of Professional Conduct, the record clearly and convincingly establishes that Tarlow authorized respondent to confer with Lopez only for the purpose of preparing a joint defense. We therefore decline to adopt respondent's proposed supplementary finding (1).

[5] The rest of respondent's proposed supplementary findings do not concern issues of culpability. Instead, they pertain to mitigating circumstances, which respondent must establish by clear and convincing evidence. (See Trans. Rules Proc. of State Bar, div. V, Stds. for Atty. Sanctions for Prof. Misconduct ("stds."), std. 1.2(e); *In the Matter of Respondent K* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 335, 360.) Proposed supplementary findings (2), (3), and (5) rest upon selective, self-serving testimony by respondent during the trial of *Lopez*; proposed supplementary finding (4) rests upon part of Tarlow's declaration. Proposed supplementary findings (2), (3), and (5) are inconsistent with testimony by Lopez, and proposed supplementary finding (4) ignores the remainder of Tarlow's declaration and is misleading about Tarlow's position. Because respondent has not presented clear and convincing evidence in support of proposed supplementary findings (2), (3), (4), and (5), we decline to adopt them.

C. Violation of Rule 2-100

[6a] Rule 2-100 provides that an attorney who is representing a client "shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the [attorney] has the consent of the other lawyer." In the decision on culpability in case number 90-O-15541, the hearing judge determined that respondent violated rule 2-100 by communicating with Lopez about a plea bargain without Tarlow's consent when respondent knew that Tarlow represented Lopez. We agree.

Respondent argues that this culpability determination is erroneous because respondent had broad authority from Tarlow to communicate with Lopez and that discussion of cooperation with the government was within the scope of such authority. According to respondent, Tarlow should have restricted the scope of the authority if Tarlow intended to limit it.

[6b] Respondent's argument is inconsistent with his professed acceptance of the hearing judge's factual findings in the partial decision. The hearing judge found: "Tarlow authorized Respondent to meet and confer with defendant Lopez for the purpose of preparing a joint defense *only*. Tarlow did not authorize Respondent to meet or confer with the government on behalf of defendant Lopez." (Partial Decision,

finding 5, p. 3, emphasis added.) The hearing judge reiterated this finding in the final paragraph of the partial decision, which stresses that Tarlow authorized respondent to communicate with Lopez "for the purpose of preparing a joint defense *only*. Tarlow did not authorize Respondent to discuss with Lopez a change of plea and/or any form of cooperation with the government . . . ." (*Id.* at p. 9, emphasis added.)

Respondent mischaracterizes the hearing judge's crucial finding. According to respondent's brief on review, the hearing judge found: "Tarlow authorized [respondent] to meet and confer with Lopez for the purpose of preparing a joint defense on behalf of the three defendants. Tarlow did not *specifically* authorize [respondent] to meet or confer with the government on behalf of Lopez." (Emphasis added.) Respondent's omission of the word "only" and addition of the word "specifically" fundamentally alter the hearing judge's finding.

Clear and convincing evidence supports the hearing judge's finding. Although respondent claims that he had authority from Tarlow to discuss with Lopez the option of cooperating with the government, respondent assiduously concealed such discussions. According to respondent's own testimony, respondent initially lied to Rosenthal, counsel for codefendant Olivas. Respondent told Rosenthal that Lopez and Escobedo had not met with Lyons when respondent knew that a meeting had occurred and when respondent himself had arranged and attended the meeting. Respondent testified that he later admitted the meeting to Rosenthal and asked Rosenthal not to tell Tarlow because Tarlow would ruin the plea negotiations.

Also, respondent testified that Tarlow did not tell respondent that respondent had the authority to negotiate anything with the government on behalf of Lopez. According to Tarlow, respondent had permission from Tarlow to speak with Lopez in order to prepare for trial, but respondent "had no express, implied or apparent authority, or permission to discuss or arrange informant activities" with Lopez.

Respondent contends that if he had told Lopez to discuss government cooperation with Tarlow and had refused to have any further involvement in the matter, he would have "cast Lopez adrift in a sea in which [Lopez's] interests would not have been served . . . by anyone." According to respondent, the disclosure to Tarlow of Lopez's interest in government cooperation would have left Lopez without a lawyer because "Tarlow would have immediately withdrawn."

Respondent's contentions pertain to mitigation rather than culpability and are not supported by clear and convincing evidence in the record. Lopez testified that Tarlow did not threaten to withdraw from representing Lopez if Lopez sought to cooperate with the government, and that respondent told Lopez that Lyons believed it would be easier to reach a plea agreement if Tarlow were not present. According to Lopez, Lopez kept the plea negotiations secret from Tarlow because of the expense of involving another lawyer and because of representations from respondent that Tarlow did not need to be present at negotiations and would make such negotiations difficult.

Tarlow's declaration also contradicts respondent's contentions. According to Tarlow, it was *not* a condition of Tarlow's representing Lopez that Lopez refrain from cooperating with the government. Tarlow asserted that a condition of this sort would be improper. Also, Tarlow stated that he agreed to convey any government offer of cooperation to Lopez, but not to be involved personally in any continuing negotiations with the government. Tarlow offered three reasons for such noninvolvement: (1) such "conduct is personally morally and ethically offensive to" him; (2) a competent attorney could be brought in to negotiate a plea for "a low and reasonable fee"; and (3) his adversarial style and relationships with prosecutors would generally prevent his "participation in finalizing informant arrangements" from being in the best interest of a client, whereas an "independent lawyer who has a closer and friendly . . . relationship with the prosecutor's office, should be able to negotiate a better informer deal . . . ."

Tarlow stated that pursuant to his agreement with Lopez, if Lopez wanted to become an informer and if another lawyer successfully negotiated a plea for Lopez, Tarlow's services would no longer be necessary. In addition, Tarlow maintained that if

negotiations proved unsuccessful, Tarlow would resume his representation of Lopez "and would try the case unless matters had occurred during the negotiations that compromised [Tarlow's] ability to defend [Lopez]." Because a lawyer would have handled the negotiations on behalf of Lopez, Tarlow stated in his declaration that he did not consider it likely that unsuccessful plea negotiations would hurt his ability to take the case to trial.

Tarlow stressed that he in no way sought to discourage or dissuade Lopez "from exploring an informer arrangement" if Lopez found such an arrangement to be in Lopez's best interest, that Tarlow's agreement with Lopez served to "preserve the integrity of the attorney-client relationship and the trust and confidence upon which it is based," and that the agreement made it unlikely that Lopez would undermine Tarlow's ability to defend Lopez. Although Tarlow asserted his personal objection to informer arrangements, he stated that he did not intend to demean a lawyer who is involved in such arrangements. Tarlow stated that he would have conveyed any government offer to Lopez and, at Lopez's request, would "have inquired of the prosecutor about a deal . . . ." According to Tarlow, Lopez knew that merely expressing an interest in negotiating with the government would not lead Tarlow to withdraw.

[7a] Respondent claims that rule 2-100(C)(2) protects his receiving information about Lopez's desire to speak with Lyons and his relaying this information to Lyons. Pursuant to rule 2-100(C)(2), rule 2-100 shall not prohibit "Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice." The discussion accompanying rule 2-100 explains that rule 2-100(C)(2) "is intended to permit [an attorney] to communicate with a party seeking to hire new counsel or to obtain a second opinion."

[7b] Rule 2-100(C)(2) does not protect respondent. In *Gendron* v. *State Bar* (1983) 35 Cal.3d 409, 424, the Supreme Court observed, "Existing case law as of 1976 clearly informed attorneys of their duty to refrain from representing multiple defendants in any criminal case where there was a possibility of conflicting defenses." Respondent concedes that a potential conflict existed between the interests of his client, Escobedo, and the interests of Tarlow's client, Lopez. This potential conflict prevented him from acting as an independent attorney whom Lopez might consult for an unbiased second opinion.

Respondent testified that he *could not* represent Lopez and advised Lopez of this fact. According to respondent, he told Lopez several times that Escobedo was his client, that he had to protect Escobedo's interest, and that Lopez was on Lopez's own if Lopez talked with the government. As respondent acknowledged, Lyons repeatedly asserted that Lyons would consider disposing of the case only if both Escobedo and Lopez entered into a plea agreement. Although respondent later testified that he was not sure that he believed Lyons's assertions, his conduct and Lyons's conduct reflect their understanding that a plea agreement would have had to include Lopez. Respondent knew, however, that Tarlow considered Lopez to have a valid entrapment defense and planned to take the case to trial. Thus, clear and convincing evidence establishes that respondent did not qualify as an independent lawyer from whom Lopez might seek a second opinion under rule 2-100(C)(2).

D. Other Stipulated Misconduct by Respondent

The record contains no evidence to support changes in the determinations about respondent's other acts of stipulated misconduct.

E. Aggravating and Mitigating Circumstances

1. Aggravating circumstances

The stipulation correctly identifies two aggravating circumstances: (1) that respondent's acknowledged misconduct evidences multiple acts of wrongdoing (see std. 1.2(b)(ii)) and (2) that in addition to his drunk driving convictions, respondent was convicted of fighting in a public place. The stipulation, however, does not take into account the fact that respondent's improper communications with Lopez were followed by acts of dishonesty. (See std. 1.2(b)(iii).) In the trial of *Lopez*, respondent admitted that he initially lied to Rosenthal about the plea negotiations involving Lopez.

2. Mitigating circumstances

The stipulation correctly lists as a mitigating circumstance that respondent was admitted to the California State Bar in May 1974 and has no prior record of discipline. (See std. 1.2(e)(i).) Also, the stipulation states without qualification as a mitigating circumstance that respondent was candid and cooperative with the State Bar during the current disciplinary proceeding. (Std. 1.2(e)(v).) This statement requires correction. In case number 88-O-15237, respondent stipulated that he failed to cooperate with the State Bar. Thus, a finding of mitigation under standard 1.2(e)(v) cannot include case number 88-O-15237. **[8]** Other mitigating circumstances are suggested by a declaration which respondent made on December 1, 1992, and which is attached to the stipulation. We reach no conclusion as to these factors because the stipulation does not specify whether the Office of the Chief Trial Counsel accepts as true any or all of the statements in respondent's declaration and because the hearing judge pro tempore did not indicate in his order approving the stipulation whether he found any of the unopposed statements persuasive.

F. Discipline

The question we must address is whether, upon de novo review, we can recommend to the Supreme Court the stipulated discipline of 30 days actual suspension for the multiple acts of wrongdoing acknowledged in the stipulation and established in the record before us.

The deputy trial counsel asserted at oral argument that respondent's improper communications with Lopez alone constituted "very serious" misconduct. Indeed, it is obvious from the federal district court opinion in *Lopez* and majority and concurring opinions on appeal therefrom that the district and circuit court judges before whom the criminal case was pending viewed the secret communications with Lopez by Lyons and respondent as very serious ethical breaches. Nonetheless, the deputy trial counsel agreed with respondent's contention that the violation of rule 2-100 warranted only an extra year of probation in connection with the stipulated 30 days actual suspension for all of the other matters in which respondent had stipulated to culpability.

Neither the parties, in seeking approval of the stipulation, nor the hearing judge pro tempore, in approving the stipulation, cited any specific authority for the recommended discipline. Nor did the parties cite any authority to this review department in seeking its review of this consolidated proceeding. Only after the review department called relevant cases to the parties' attention and requested supplemental briefing thereon were any authorities cited by either party.

[9] When judges are asked to approve stipulations they cannot rely solely on the State Bar's acquiescence in the proposed discipline, but must exercise their independent judgment in carrying out their obligation under rule 407(a) of the Transitional Rules of Procedure to "examine the stipulation and its admitted facts and proposed disposition for fairness to the parties and the extent to which the public will be adequately protected thereby."

The determination of the appropriate sanction begins with the standards, which serve as guidelines. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) The sanction must ultimately be determined by a balanced consideration of all relevant factors (*Grim* v. *State Bar* (1991) 53 Cal.3d 21, 35) and must be consistent with the discipline imposed in similar proceedings. (See *Snyder* v. *State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

The standards relevant to the current proceeding call for discipline of reproval or suspension depending upon the extent of the misconduct and degree of harm. (See stds. 1.6, 2.4, 2.6, 2.10, 3.4.) In focusing on the particular level of discipline appropriate here we must also bear in mind the primary purposes of disciplinary proceedings: the protection of the public, courts, and legal profession; the maintenance of high professional standards by attorneys; and the preservation of public confidence in the legal profession. (See std. 1.3.) In reaching a decision to approve a stipulation, the court must also conclude that the order is justified under applicable precedent.

In examining relevant case law, we focus here on respondent's most serious misconduct as established by this record: his improper communications with a represented party. "If two

or more acts of professional misconduct are found or acknowledged . . ., the sanction imposed shall be the more or most severe of the different applicable sanctions." (Std. 1.6(a).) In older cases, the sanction for an attorney who communicated with a represented party was usually three months actual suspension. (See *Turner* v. *State Bar* (1950) 36 Cal.2d 155; *Carpenter* v. *State Bar* (1930) 210 Cal. 520.) Also, in *Mitton* v. *State Bar* (1969) 71 Cal.2d 525, 535, an attorney's communication with a represented party "alone" justified three months actual suspension, although the attorney had two prior records of discipline (a three-month actual suspension and a private reproval).

In *Turner* v. *State Bar*, *supra*, 36 Cal.2d 155, a former defense counsel in a civil action helped the plaintiffs in their attempt to settle on appeal without the knowledge or consent of the plaintiffs' counsel, whom Turner knew to be opposed to the settlement. Because of Turner's active involvement in assisting the plaintiffs and communicating with them on a subject of controversy, the Supreme Court determined that Turner had violated former rule 12 of the Rules of the California State Bar, which provided that an attorney "'shall not communicate with a party represented by counsel upon a subject of controversy, in the absence and without the consent of such counsel . . . .'" (*Id.* at p. 155.) Ordering three months actual suspension, the Supreme Court observed, "it cannot be said that a suspension of three months is too harsh." (*Id.* at p. 159.)

In *Crane* v. *State Bar* (1981) 30 Cal.3d 117, 124, the Supreme Court adopted the former State Bar Court's recommended sanction of one year's stayed suspension, one year's probation, and no actual suspension, although it was "arguable that the penalty imposed [was] actually lenient." Crane not only had communicated directly with represented parties, but also had threatened them and had committed an act of moral turpitude and dishonesty.

In *Kelly* v. *State Bar* (1988) 45 Cal.3d 649, 659, the Supreme Court disbarred an attorney for two "serious" unexplained and unmitigated acts of misconduct: (1) misappropriation of almost $20,000 of client trust funds, as well as failure to account to the client, and (2) communication with an adverse party without the knowledge and consent of the party's counsel.

In *Levin* v. *State Bar* (1989) 47 Cal.3d 1140, the Supreme Court imposed a sanction of three years stayed suspension, three years probation, and six months actual suspension on an attorney who committed misconduct in two matters. In the one matter, Levin did not employ means consistent with truth, attempted to deceive opposing counsel and a court by false statements of fact, and communicated with a party whom he knew to be represented by counsel. In the other matter, he settled a personal injury claim without the knowledge or consent of his client, did not deliver settlement funds, did not provide a proper accounting, and misrepresented to the settling insurance company that his client had signed the release. In aggravation, he attempted to conceal his dishonest acts. In mitigation, he had no prior record of discipline, suffered prejudicial delay, was candid and cooperative with the State Bar, and had been the subject of no further disciplinary complaints since his misconduct.

Two reproval cases have also been cited to this court. In *Abeles* v. *State Bar* (1973) 9 Cal.3d 603, the Supreme Court publicly reprimanded an attorney who directly communicated with a represented party. The Supreme Court explained that the attorney had no prior record of discipline and that his misconduct may have reflected only an error of judgment based on the attorney's misinterpretation of the applicable disciplinary rule and based on the party's statement that the party's counsel of record did not represent the party.

In *Shalant* v. *State Bar* (1983) 33 Cal.3d 485, the Supreme Court publicly reproved an attorney who improperly withdrew disputed funds from a trust account, failed to communicate with a client, and communicated with a represented party. Shalant had a prior record of discipline, a private reproval. Justice Mosk, joined by Chief Justice Bird, would have dismissed the proceeding on the ground that it arose from trivial matters and was basically a dispute between two attorneys over the reasonable amount of a fee. (*Id.* at p. 490 (dis. opn. of Mosk, J.).)

[10a] The State Bar acknowledges that here respondent's improper communications were serious; this fact clearly distinguishes the instant case from *Abeles* v. *State Bar*, *supra*, 9 Cal.3d 603 and *Shalant* v. *State Bar*, *supra*, 33 Cal.3d 485. In seeking to obtain a plea agreement for his own client, Escobedo, respondent involved Tarlow's client, Lopez, in secret plea negotiations with the government although respondent knew that Tarlow believed Lopez to have a valid defense and planned to try the case. Respondent thereby exposed Lopez to two serious risks if the plea negotiations failed: (1) that Lopez would destroy the trust and confidence necessary for Lopez to maintain an attorney-client relationship with Lopez's counsel of choice and (2) that Lopez would compromise the entrapment defense. The former occurred, and the latter may have happened. Respondent's misconduct is worse than the misconduct of Lyons, who was following the dictates of the former United States Attorney General and approached Judge Smith regarding the proposed plea negotiations. (See *Lopez*, 765 F.Supp. at p. 1462, fn. 50.) Also, the secret meetings arranged by respondent resulted in the consumption of considerable judicial time and effort and the lengthening of the criminal case against Lopez by about three years.

[10b] In addition to his improper communications with Lopez, respondent engaged in other stipulated wrongdoing. In view of the seriousness of his violation of rule 2-100 and the number and range of his other stipulated acts of misconduct we must vacate the order approving the stipulation. On the basis of the record before us, the recommended sanction is inconsistent with decisional law and clearly insufficient to protect the public, to maintain high professional standards by attorneys, and to preserve public confidence in the legal profession.

G. Request for Remand

[11a] In the event that we decided to vacate the order approving the stipulation, respondent requested that we remand the current proceeding rather than recommend a different degree of discipline to the Supreme Court. He argues that the parties agreed to a highly unusual stipulation to preserve time and resources and that they did not contemplate that we would recommend more severe discipline than the discipline recommended in the order. The State Bar agrees with respondent's position. Nonetheless, when the parties reached their stipulation, they admittedly knew that the Supreme Court could increase the discipline, and they expressly agreed to reserve the right of intermediate review before the Review Department. Their expectation that we would not examine the recommended discipline in the consolidated proceeding while otherwise conducting independent de novo review was unjustified.

[11b] We recognize, however, that the parties would have been relieved of all effects of the stipulation if the hearing judge had disapproved it (Trans. Rules Proc. of State Bar, rule 407(d)) and that at the time they entered into the stipulation they did not realize the import of preserving a right of review. We therefore deem it appropriate in the unusual circumstances of this proceeding to relieve the parties from their stipulation because of their confusion about the requirements of our independent review. Given the mutual mistake of the parties, remand appears to be appropriate to allow them to reach a new stipulation or to try the remaining matters. In either event, the hearing judge will be in a position to recommend to the Supreme Court the appropriate discipline for all of respondent's acts of misconduct in light of established aggravating and mitigating factors and the relevant case law.

V. CONCLUSION

We conclude that respondent violated rule 2-100 and that the sanction recommended by the order approving the stipulation is clearly inadequate on the basis of the record before us. Accordingly, we affirm the decision on culpability, vacate the order approving the stipulation, and remand the consolidated cases for further proceedings consistent with this opinion.

We concur:

NORIAN, J.
STOVITZ, J.