THE SUPREME COURT OF OHIO

Toledo Bar Association,	:	Case No. 06-1994
	:	
Relator,	:	
	:	
v.	:	
	:	
Linda S. Cook,	:	
	:	
Respondent	:	

RESPONDENT'S OBJECTIONS AND BRIEF IN SUPPORT OF RESPONDENT'S OBJECTIONS TO REPORT, FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION-CARLOS GUERRERO VS BOARD OF EDUCATION OF THE EMERY UNIFIED SCHOOL DISTRICT
U.S. District court- Northern Dist. of California
Case No. C 92 2971 BAC et al. A-15

OBJECTIONS OF RESPONDENT TO REPORT, FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

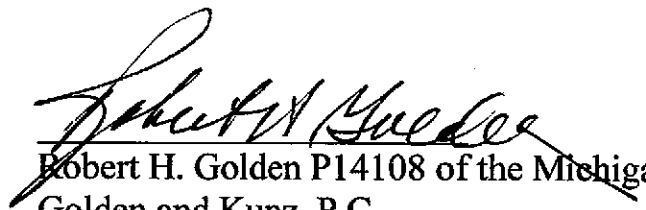
Now comes the above named Respondent, Linda S. Cook, by her Pro Hac Vice counsel, Golden and Kunz, P.C.., and objects to the Report, Findings of Fact and Conclusions of Law of the Board of Commissioners on Grievances and Discipline.

1.There is no evidentiary support for the findings of misconduct.

2. The Board has made findings of misconduct which were not charged in the Complaint filed in this matter and for which there is no evidentiary support which violates the Respondent's right to fair notice of what she is called upon to defend and violates her rights of due process of law.

3. The Hearing panel denied Respondent's Motion to have a bifurcated hearing on aggravation and mitigation, requiring Respondent to express remorse for acts which she maintained were not misconduct thereby denying her a fair hearing.

4. The recommended sanction of disbarment is far too severe and not supported by the record. There is a total lack of guidelines for the imposition of any sanction.



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STATEMENT OF FACTS

The Respondent, Linda S. Cook, is an attorney with offices in Sylvania, Ohio practicing under the firm name of Linda S. Cook and Associates and then as Cook Kennedy and Associates. She is primarily engaged in estate and Medicaid planning(Tr. Pg. 142). (Tr. Pg.21).

In May of 2000 Ms. Cook had discussions with Esther Benfer, a woman 89 years of age, at the Benfer farm in Ohio (Tr. Pg. 145)(Tr. Pg 144) (Tr. Pg. 143). When Ms. Cook left the Benfer farm, she had been engaged as an attorney and understood that she was going to prepare a trust estate plan for Ms. Benfer(Tr. Pg 145) consisting of a Trust, Will, Power of Attorney, Health Care Powers, etc. (Tr. Pg. 145). Substantial inquiry was made about Ms. Benfer's financial standing(Tr. Pg 147). Ms. Benfer wanted to leave her farm to a church to be used for religious purposes or for farming and boys schooling and counseling. (Tr. Pg 145). At their first meeting, Ms. Cook believed that she was being called upon to create a will or trust. (Tr. Pg. 143). A trust was not immediately created (Tr. Pg. 145) because Ms. Cook and Ms.

Benfer were concerned about the divestiture of the farm without adequate consideration of the possibility that Ms. Benfer might, in the future, need the proceeds from a sale of the farm in the event she would need to reside in a nursing home.

Ms. Cook and Ms. Benfer discussed Medicaid qualifications and it was determined that Ms. Benfer's assets were too great to qualify for Medicaid. (Tr. Pg 149-150). Even if she gave her farm away, as she wanted to do, she would be dis-qualified from Medicaid for at least a penalty period of 32 months and then would qualify for Medicaid only if she had reduced her assets to $1,500.00 (Tr. Pg 150-151). Originally Ms. Benfer wanted to create a trust, but then decided, after consultation with the Respondent, that a deed should be prepared conveying the farm to an individual, rather than to a trust, so that the "look back" period for Medicaid qualification would be only three instead of five years (Tr. Pg. 151-152).

Ms. Benfer had no family to whom she could deed her farm and asked Ms. Cook if she would be the grantee of the deed for her (Tr. Pg 152). She asked the Respondent to hold the farm until she was ready to convey it to the church(Tr. Pg 152). Because Ms. Benfer had no one else, Ms. Cook agreed to receive the farm and carry out Ms. Benfer's wishes,

conveying the farm to the church when the question of Ms. Benfer's need for the proceeds of sale of the farm no longer existed (Tr. Pg 153). It is this desire to help and aid her client that brought these proceedings.

Ms. Cook directed her staff to prepare a deed. She proofread the deed marking it with corrections and sent it back to be redone. Ms. Benfer had agreed to come into the office and execute the deed. The date of that appointment was the date Ms. Cook had put on the revision of the deed (Tr. Pg. 153-154).

Ms. Benfer called and asked if she could just come in and sign the deed. Since Ms. Cook had made the necessary corrections and had examined the descriptions, names and dates on the deed and found them to be correct, she did not anticipate any problem and told Ms. Benfer that she could come in although she, Ms. Cook, was not able to be there (Tr. Pg 154). Ms. Cook believes that the deed, with the correct dates that she had approved, had been misplaced and Nancy Cunningham, a staff member who prepared deeds, being unable to find the deed that was approved by Ms. Cook, cloned a deed from a computer file, printing out the new deed for Ms. Benfer to sign (Tr. Pg 155; Tr. Vol.# 2 Pg. 44)). The deed which Ms. Benfer signed was mistakenly dated "1998", and was not the deed that Ms. Cook had prepared (Tr. Vol. #2 Pg 37). This mistake was not discovered by Ms. Cook. Even

the witnesses present at the execution of the deed didn't notice the incorrect date. (Tr. Vol#2 Pg 13). This was deed "A", conveying the farm to Ms. Cook as trustee (Tr. Pg. 22). The deed was not prepared by Ms. Cook nor at her direction. (Tr. Vol.# 2 Pg. 44) The 1998 date on the deed was not a correct date (Tr. Pg. 155), but this error was not discovered by Ms. Cook until she received the formal complaint in this matter some five years after the transaction in question. (Tr. Pg. 155).

After the deed was executed and recorded, Ms. Benfer changed her mind about creating a trust. In order to correct the capacity of Ms. Cook reflected in the deed as "trustee", Ms. Cook crossed off "Trustee," inserted "married" and had the deed re- recorded (Tr. Pg 155-156). When Ms. Cook made the correction as to her status as grantee, she did not examine the balance of the deed and did not notice that the dates of execution were in error. (Tr. Pg 156). In fact the office staff didn't discover the error in dating until much later(The exact date when the office staff noticed the error was not remembered by the witness, Ms. McKay.) (Tr. Vol#2 Pg 31-32).

When the deed for transfer of the farm to the church was prepared the deed referred to a contract made between the church and Ms. Cook about support for Ms. Benfer, since she was retaining a life estate in the farm. (Tr. Pg 156-157). Although the contract was not executed on December 25, it was dated December 25,

with all parties permission (Tr. Pg 157) (Tr. Vol#2 Pg 14), but was not recorded until 2001 because the County would not approve the legal description. (Tr. Vol. # 2 pg 55).

For her services, Ms. Cook charged Ms. Benfer one cake "because I felt that Esther was trying to do something, something for the church and I felt that I could be a part of that." (Tr. Pg. 158).

Ms. Benfer offered Ms. Cook the charitable income tax deduction for conveyance of the farm to the church. Ms. Benfer, could not take the deduction (Tr. Pg. 171) because Ms. Benfer had insufficient income to take advantage of the tax deduction (Tr. Pg. 162-163). Ms. Cook in order to verify that Ms. Benfer could not use the deduction and Respondent could without being in violation of the Internal Revenue Code, consulted with Carl Winagel, a Certified Public Accountant,

Ms. Cook informed Ms. Benfer that she would not take the deduction until Ms. Benfer put her offer and gave permission in writing (Tr. Pg 158). The deduction was taken on Ms. Cook's 2000 federal tax return which was prepared and filed in October, 2001 (Tr. Pg 158) at a time when there was no longer an attorney–client relationship between Ms. Cook and Esther Benfer (Tr. Pg 159).

In taking the deduction, Ms. Cook relied upon the fact that Ms. Benfer would not have taken the deduction for lack of income (Tr. Pg. 163). In fact, Ms. Benfer didn't even have enough income to require the filing of a tax return. (Directing Ms. Benfer to consult with another attorney was not necessary since Ms. Benfer couldn't use the deduction in any event.) (Tr. Pg 162). Nothing that was done by Ms. Cook in relation to this charitable deduction in any way violated the Internal Revenue Code (Testimony of Tax Expert, Stuart Sherman commencing in Tr. Vol. #2 Pg 67).

If Ms. Cook believed that the taking of this tax deduction violated ethical rules, she would not have taken it. (Tr. Pg 172). Ms. Cook never intended any type of artiface to defraud or deceive in the preparation of any of the deeds. (Tr. Pg 172-173). If Ms. Cook had discovered the 1998 date on the deeds, she would have had the deeds re-executed or changed (Tr. Pg 173).

After the deed to the farm was executed on December 25, 2000, and the legal description on the deed was recertified Ms. Cook had no open matters for Ms. Benfer and did not represent her until 2004 when Ms. Benfer asked Ms. Cook to prepare certain health powers of attorney.

Subsequently, an attorney, believed to have been sent by members of the church, met with Ms. Benfer and had her revoke the existing health care powers. Thereafter, Ms. Cook met with Ms. Benfer, at Ms. Benfer's

request, (Tr. Vol. # 2 Pg 47) to restore the prior revoked powers (Tr. Vol. # 2 Pg 15).

Cook Kennedy and Associates of which Ms. Cook is a principal, keeps calendars which clearly indicate the dates when meetings were held with Ms. Benfer substantiating and corroborating that the year 1998 on the two deeds was entered in error (Tr. Vol. # 2 Pg 20-24).

_____._____.

When informed of the grievance by the Toledo Bar Association, Ms. Cook ratified a response of her attorney that indicated that the 1998 dates on the deeds were correct (Tr. Pg 166). In reviewing the file, Ms. Cook believed at that time, several years after the fact of Ms. Benfer's representation, that the dates were correct. She only discovered the errors in the deeds after the formal complaint was filed (Tr. Vol. # 2 Pg 63).

The existence of inaccuracies in dating of the deeds and the realization that they were due to clerical errors was brought to Ms. Cook's attention by:

1. Receipt of a formal complaint in this matter which alleged the deliberate back dating of the deeds. (Tr. Vol. # 2 Pg. 63).
2. The deed purportedly executed in 1998 referred to a trust created in 2000 (Tr. Pg. 161).
3. The Notary Public was not a Notary Public in

1998 (Tr. Pg 167).

4. Ms. Cook's realization that the deed had been cloned from some other deed and the dates were not changed (Tr. Pg.167).

In mitigation, there were substantial changes made in office procedure to see that these kind of errors would not be repeated in the future (Tr. Vol #2 Pg. 37-38; Tr. Vol # 2 Pg 41-43)

ARGUMENT

1.There is no evidentiary support for the findings of misconduct.

In this matter the Relator presented no witnesses other than the cross examination of the Respondent which the Board apparently disregarded. There was no contrary testimony. The Relator failed to carry its burden of proof by producing clear and convincing evidence of misconduct. In fact, the Relator produced no evidence whatever of misconduct. The documents themselves do not prove intent to defraud.

The Board finds that the testimony of Ms. Cook is not credible. (Board's Report pg 5 paragraph 11.). The failure of credibility does not give rise to the inference that misconduct occurred. There must be testimony or other evidence to establish the facts found by the Hearing Panel and contained in the Board's Report. The only other testimony contained in the record was that of Wendy McKay, which corroborated Ms. Cook's testimony, and a tax expert produced by the Respondent who testified that respondent did nothing improper in taking the charitable tax deduction.

The Board has wide latitude to determine the weight given to evidence and the credibility of witnesses before it. Soin et al v Greene County Board of Revision, 110 Ohio St.3d 408; 2006 Ohio 4708; 853

N.E.2d 1165 (2006). But in this case, the lack of weight and credibility of Respondent's testimony does not create a record of any misconduct. To disregard the testimony of the Respondent leaves the record bare. The record is silent if the testimony of Respondent is disregarded by the Board.

If the Board gives weight and credibility to Ms. Cook's testimony, then there is no proof of misconduct and certainly no clear and convincing proof of misconduct. If the Board does not find the testimony of Ms. Cook to be credible and gives such testimony no or little weight, then it must look to other clear and convincing testimony or evidence in support of the charges of misconduct. There isn't any in this case.

Linda Cook, Respondent, testified. Her testimony was corroborated by Wendy MacKay:

1. Esther Benfer had no family or children . She asked Linda Cook if she would accept conveyance of the farm to her and, when it was time, convey the farm to the church. (Tr. Pg 152). There is no evidence of any kind to the contrary.
2. Ms. Cook directed her staff to prepare a deed which she proof read and then returned for corrections. She did not prepare the deed that

was actually used. (TR Pg 153-155). There is no testimony or evidence to the contrary.

3. The deeds which were mistakenly dated were created by a staff member who cloned a deed from a prior deed stored in the office computer and on which the staff failed to correct the date. (Tr. Pg 155-157). There is no testimony or evidence to the contrary.
4. Ms. Cook did not discover the incorrect dates until the formal complaint was issued in this matter. (Tr. Pg 155). There is no testimony or evidence to the contrary.
5. Ms. Benfer had insufficient income to use the charitable tax deduction and if Ms. Cook didn't use it, the deduction would have been lost. (Tr. Pg 162-163). There is no testimony or evidence to the contrary.
6. When Ms. Cook took the tax deduction it was with the permission of Esther Benfer. (Tr. Pg 158). (There was no reason to suggest that Ms. Benfer consult another attorney. She could have consulted anyone she wished but the fact that she was unable to use the deduction would not change.)There is no testimony or evidence to the contrary.

7. When the tax deduction was used by Ms. Cook on her 2000 federal tax return in October of 2001, there was no attorney-client relationship in existence between Ms. Cook and Esther Benfer. Tr. Pg 159. There is no testimony or evidence to the contrary.
8. Ms. Cook intended no fraud or artifice in the preparation of any of the deeds, and if she had discovered the errors, she would have corrected them. (Tr. Pg. 172-173). There is no testimony or evidence to the contrary.

The Board's Report further stretches the credibility of the reader for:

1. To believe that the deeds were purposefully created to defraud fails to take into consideration that what was created was a 1998 deed which incorporates a 2000 trust. This certainly is something that anyone seeking to defraud would have changed or eliminated from the deed.
2. The Notary on the deeds was not a Notary in 1998.
3. No one was injured by the errors nor was anyone even subject to a possible injury and the mistaken dates were of no consequence.
4. The Board's Report makes findings for which there is absolutely no support in the record.

Further, the Board's report misstates the testimony and misunderstands the significance of the testimony in making its findings, for example:

1. On page 6, paragraph "a" of the Board's Report the Board states that Respondent made the claim that she received the Benfer farm in December of 1997 on her 2000 federal tax return. In order to make this finding the panel and Board have to totally ignore the testimony of Respondent's tax expert referring to the 1997 date as being the product of "Tacking" and explaining that the taxpayer is allowed to take your donor's holding period. Tr. Vol#2 Pg. 86:

> "Q Let me ask you to make an assumption that Ms. Cook did not, in fact, acquire the property in 1997 but, in fact acquired it in 2000. Would that have any effect on the amount or validity of her tax deduction for that charitable contribution?
> A No.
> Q Why not?
> A Because she is a carry over basis and carry over holding period."

After some brief questions indicating that the questioner did not understand the subject or the answers he was getting, the questioner continued:

> Q Okay. But if, if she acquired the property in 2000 it would be a short term gain or—
> A. She has a carry over holding period.
> Q What do you mean by a carry over basis?
> A She takes the basis of the donor."
> Tr. Vol#2 Pg 91

Further demonstrating that the panel did not understand the testimony or didn't hear it a panel member asks:

> "Q. And if the signer of the income tax return knew that they didn't obtain title to the property in December of 1997, would that be a violation of the federal income tax law?
> A. I guess it could be a technical violation, sure.
> Q Okay, And what significance would there be, if any, if title to this property were acquired in, instead of December of 1997, in May of 1998?
> A None
> Q And what difference would there be if title to this property were acquired in June of 2000?
> A. Same answer."
> Tr. Vol#2 Pg 91

In spite of the expert having stated it twice, the panel and thus the Board make a finding that Respondent made a false claim on her income tax return when she did not.

Board's Report pg 6 paragraph a).

It should be noted that only the formal donor of property to a charitable institution can take the tax deduction anyway. Not only couldn't Esther Benfer take the deduction because she had insufficient income, but she was not the donor recognized by the tax service.

2. There are findings of misconduct which were not charged or complained about in the complaint filed in this matter.

The complaint (each count will be dealt with separately) filed in this matter contains two counts charging two separate acts of misconduct neither of which was found by the hearing panel or in the Board's report:

> Count One:
>
> "That the respondent deliberately back dated deeds in order to avoid Medicaid's five year "look back" provisions in violation of DR 1-102(A)(4) and DR1-102(A)(6)."

Neither the hearing panel nor the Board's Report makes findings of fact or conclusions of law which support the allegations of Count One of the formal complaint. There has been no finding that the deeds were back dated in order to take advantage of the look back period of Medicaid and, in fact, there is no testimony nor evidence in support of this allegation.

> **Count Two:**
>
> "That the Respondent claimed a tax deduction on her personal Federal tax return for the charitable gift deduction of real estate in violation of DR 5-104(A)(1) by accepting employment in a matter in which the exercise of the lawyer's professional judgment reasonably may be affected by the lawyer's financial, business property or personal interests and DR 1-102(A) entering into a business transaction with a client if they have differing interests therein and DR 1-102(A)(4) conduct involving fraud etc. DR 1-102(A)(3) illegal conduct involving

> moral turpitude and Dr 1-102(A)(6) conduct adversely reflecting on the lawyer's fitness to practice law."

The crux of the complaint in Count Two is that a lawyer's position as attorney is compromised by her interest in the tax consideration. In order for the count to survive, the panel must find, amongst other findings, that at the time that Ms. Cook took the tax deduction she was an attorney for Ms. Benfer. If she was not acting as an attorney, if there was no attorney-client relationship, the count fails. The only testimony or evidence of the existence or non -existence of an attorney-client relationship at the crucial time is the testimony of Ms. Cook, when she was asked that specific question:

> "Q At the time that your tax return for the year 2000 was filed. It's dated sometime in October of 2001, was it filed on that date?"
> "A That's the date I signed it and mailed it."
> "Q At that time was there an attorney/client relationship between you and Esther Benfer?"
> "A No."
> Tr. Pg 1598-159

Accordingly, due to the absence of any proof of the existence of an attorney- client relationship between Ms. Cook, Respondent, and Ms. Benfer, Count Two must fail. Key to a violation of the rules is the existence of an attorney- client relationship.

The Board's Report makes a finding in regard to Count Two, but other than repeating the context of the count, the Board makes no statement

as to what the violation or misconduct was, if any. Paragraph 21 on page 10 of the Board's Report can be as easily read to hold that there was no violation of Count Two, for none is stated by the Board. Certainly, without a finding of an attorney-client relationship at the time, no misconduct can exist and the Board makes no such finding.

The Board however makes a specific finding that " the Respondent engaged in other conduct that adversely reflected on Respondent's fitness to practice law." See Board Findings Paragraph 20, pg10, apparently in response to the charge of Relator that there was a violation of DR 1-102(A)(6) but without indicating what that conduct was and without making any further findings. That other conduct, whatever it was, which certainly influenced the Board to make its recommendation of disbarment was not charged in the complaint and the finding of a violation should not stand, otherwise there is a substantial lack of procedural due process. In Re Ruffalo, 390 U.S. 544; S. Ct. 1222; 20 L.Ed. 2d 117, 43 Ohio Op. 2d 459 (1968).

While the Board does not identify what other acts influenced its opinion, it is clear that the Board made findings of misconduct of some other acts which affected its determination of a sanction and specifically weighed

on minds of the members of the Hearing Panel in their finding that the Respondent was not fit to practice law.

While the Rules of the Board do not make it clear that all acts of misconduct must be charged and that the respondent cannot be found guilty of acts not charged, such rules are certainly implied and this Court has so found in other cases. Ohio State Bar Ass'n vs Reid, 85 Ohio St.3d 327, 708 N.E.2d 193 (1999).

Procedural due process must be given the lawyer in misconduct proceedings. In Re Ruffalo, 390 US 544, 88 S. Ct. 1222, 20 Led2d 117 (1968). The Ruffalo case originates in Ohio where it was complained to the federal court that there were many findings of misconduct none of which were charged in the complaint. The United States Supreme Court found that Ohio violated Ruffalo's right to procedural due process by giving him no notice in the complaint filed against him as to the misconduct that was being charged. To find the lawyer committed misconduct not charged in the formal complaint violates those due process protections. In the Ruffalo case, the attorney, Ruffalo, was disbarred by Ohio. The United States Supreme Court refused to disbar Ruffalo from federal courts because the misconduct Ruffalo was found guilty of was never charged in the formal complaint. The

Court made it clear that had Ruffalo raised the Ohio disbarment in the federal proceedings, the court would have reversed the Ohio Court's findings for lack of due process. That case and those findings apparently has not made an impact sufficient to put an end to the practice of finding misconduct not charged. The opinion of the Board in this case is full of findings concerning actions not charged in the complaint. As was Ruffalo, Ms. Cook has been denied procedural due process.

This Hearing Panel and the Board's report indicate that the panel did not find Ms. Cook's testimony to be credible. It makes no statement in regard to the testimony of Ms. McKay which corroborates the testimony of Linda Cook. Certainly the finder of fact is the judge of credibility but, having found that certain testimony is not credible, in the absence of any other proofs, the finder of fact cannot make findings of fact not supported by any evidence. In the absence of evidence there cannot be an inference. In this case there is absolutely no evidence in support of the complaint charged against Ms. Cook even if her testimony is disregarded. If Ms. Cook's testimony is not disregarded, there is no evidence of misconduct.

The Panel announced at the onset of this trial that the measurement of the burden of proof was " clear and convincing". The panel stated:

> "... The burden of proof is on the Relator and to establish misconduct it must be proven by clear and convincing evidence..."
>
> Tr. Pg 5.

While all of the deeds are in evidence and the dates are reflected in the deeds, in the absence of Ms. Cook's testimony, if that testimony is to be disregarded, there still is a total absence of proofs which support misconduct. This Court set forth the elements which have to be proven to establish fraud in The State Ex Rel The Illuminating Company vs Cuyahoga County Court of Common Pleas et al, 97 Ohio St. 3d 69; 2002 Ohio 5312; 776 N.E.2d 92 (2002). Those elements are: (1) A representation or concealment of fact which is material. (2) Made falsely with knowledge of its falsity or with recklessness or disregard as to its falsity. (3) With intent to mislead another into relying upon it. (4) Justifiable reliance upon the representation or concealment. (5) Resulting in injury proximately caused by the reliance.

The proofs in this case fail to establish any of those elements:

1. There is no evidence whatever that the deeds were fraudulently prepared. (Ms. Cook testified that she did not prepare the deeds with the

wrong dates and didn't know about them at the time).

2. There is no evidence that any matter contained in the deeds was made falsely with knowledge of its falsity or with recklessness or disregard of its falsity.

3. There was no evidence whatever that the deeds were prepared with intent to mislead another into relying upon them. Further if someone did rely upon them, there would have been no injury.

4. There was no testimony from anyone of reliance on the deeds and,

5. There was no evidence of any injury proximately caused by the reliance on the incorrectly dated deeds.

There is no evidence of any kind establishing any, let alone all, of the elements of fraud as set forth by this court in The State Ex Rel The Illuminating Company vs Cuyahoga County Court of Common Pleas et al , 97 Ohio St.3d 69; 2002 Ohio 5312; 776 N. E2d 92 (2002) In the absence of

such evidence, there is a complete failure of proof of any misconduct charged in Count One of the formal complaint.

If on the other hand, the testimony of Ms. Cook is not disregarded, there can be no finding of misconduct for her testimony establishes the fact that:

1. She did not prepare the deeds "A" or "B".
2. She was not aware of the wrong dates on the deeds until the formal complaint was filed in this action.
3. She engaged in no deception and had no intent to do so.
4. There was no injury sustained by anyone and none planned.

The Hearing Panel does not have the right to imagine the opposite of Ms. Cook's testimony because they do not find that testimony credible. They still have to support their findings by clear and convincing evidence and in this case, no such evidence has been presented.

3. The Hearing Panel denied Respondent's motion to have a separate hearing on aggravation and mitigation, requiring respondent to express remorse for acts which she maintained were not misconduct thereby denying her a fair hearing.

Prior to the commencement of proofs in the trial of this matter, Respondent made a motion for a bifurcated hearing (Tr. Pg 8) contending that to require the respondent to show remorse before she was found guilty of acts of misconduct violated her right to a fair trial and violated her right to have her actions or inactions weighed without a lack of remorse entering the picture.(Tr. Pg. 8) To hold to the contrary, Respondent argued, violated her right to due process of law.(Counsel for respondent also wrote this Court and asked the Court to review the process and establish a bifurcated hearing so that a lawyer could press a defense without being required to have his or her client show remorse. This court responded to counsel's inquiry denying the necessity of entertaining such a request.)

> " Once misconduct is found, the issue becomes the appropriate discipline..."
>
> ABA/BNA Lawyer's Manual on Professional Conduct Sect. 101.3001(1986) cited with approval in Carlos Guerrero vs.

Board of Education of the Emery Unified School District, 1994 LEXIS 9259. See Appendix for a copy of this opinion

Fair play is one of the cornerstones of our legal system. Lawyers accused of misconduct have a right to the same fair play as any other person charged with mal conduct in this legal system. It is not fair to require the showing of remorse before there is a finding of misconduct. Why should one who believes herself not to be guilty of acts of misconduct be required at the same time to show remorse for those acts which she claims are not improper. The Hearing Panel and the Board's report specifically found that the Respondent did not show remorse:

> "Respondent has totally failed or refused to acknowledge any wrongful nature of her conduct."
>
> Board findings paragraph E pg 12 Appendix pg A-12

The conflicting requirements of pressing a defense and at the same time showing remorse or admitting that her actions were wrong violated the Respondent's rights to a fair trial.

Showing remorse or admitting wrongful conduct not only detracts from her defense, it is an act contrary to and inconsistent to that defense and can be viewed as an admission of wrongful conduct. How can one admit wrongful conduct on the one hand and at the same time press a defense that

the conduct was not wrongful? Why should an attorney have to show remorse for an act of misconduct while she is attempting to show that the act was not misconduct? Such a requirement is not fair and it does violate the right to a fair hearing and did violate this respondent's right to a fair hearing and did deny her due process of law. In Re Oliver, 333 U.S. 257; 68 S. Ct 499; 92 L.Ed. 682 (1947) cited with approval in In Re Ruffalo. 390 U.S. 544; 88 S. Ct. 1222; 20 L.Ed.2d 117; 43 Ohio Op.2d 459 (1968)

Ms. Cook did testify that she had taken steps, identifying those steps in substantial detail, to see that the acts she was accused of committing would never happen again, (Tr. Pg 159) but, she was of the belief that she had done nothing constituting misconduct(Tr. Pg. 159). It certainly would have been easy to show remorse, but such a showing would have forced the respondent to compromise her defense.

Would this Court countenance the requirement that in a murder trial the defendant be required to show remorse for his actions at the same time he was contending that he did not commit murder? Obviously this illustration is the extreme, but fair play should be equally applicable to attorney misconduct proceedings.

The Respondent understands that hearing panel members are volunteers and some may come to the hearing from a great distance, but is

the inconvenience of the Hearing Panel members, if a bifurcated hearing be required, reason to compromise a fair hearing and due process?

2. No potential for injury to the client, complainant or the public.
3. Inadvertent conduct establishing misconduct.
4. Deliberate conduct establishing misconduct.
5. Certain designated conduct such as criminal violations.

In making its recommendation to this court, the Board is left to its own devices with no guidelines at all. Take the alleged conduct of Ms. Cook as supported or not supported by the evidence. Does this conduct require a certain level of admonishment or punishment and if so, what is that level? The Board has recommended disbarment in this case where no one was injured, where there was no potential for injury and where there was no deliberate conduct. If there were deliberate conduct with substantial injury or substantial likelihood of injury should not the sanction imposed be greater than that to the contrary?

If we examine the whole record it is difficult to come away with the impression that there was misconduct or if there was, the misconduct is so miniscule that a sanction is neither necessary for the protection of the public nor desired. Yet the Board has recommended disbarment.

The American Bar Association has developed guidelines for the imposition of sanctions which this court could adopt.

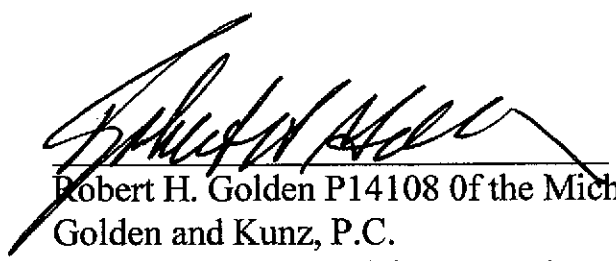
In any case, the sanction suggested by the Board to be imposed upon the Respondent in this case is not justified by the record and far too severe. In fact, the record raises the question of whether the allegations in the complaint have been proven at all, let alone by clear and convincing evidence.

REQUESTED RELIEF AND SIGNATURE

The Hearing Panel and Board exceeded its authority and found misconduct which was not charged in the complaint giving the Respondent no opportunity to present a defense to those charges.

The Hearing Panel neglected to decide the items of misconduct that were charged and found misconduct which is not supported by the record.

This Court should either dismiss these charges in their entirety or remand the case to the Board for rehearing before a new panel.



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BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

In Re:	:	
Complaint against	:	**Case No. 05-047**
Linda S. Cook **Attorney Reg. No. 0061876**	:	**Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio**
Respondent	:	
Toledo Bar Association	:	
Relator	:	

This matter came on for final hearing on August 17, 2006 and August 18, 2006 in Toledo, Ohio, before Panel Members Judge Daniel Gaul of Cuyahoga County, Theresa B. Proenza of Stark County and Charles E. Coulson of Lake County, Chair. None of the Panel members was a member of the Probable Cause Panel that heard this Complaint or resided in the District from which the Complaint arose. The hearing was held on the allegations contained in the First Amended Complaint, filed on September 13, 2005.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Panel unanimously finds, by clear and convincing evidence, that:

1) Respondent, Linda S. Cook, whose Supreme Court registration number is 0061876, was admitted to the practice of law in the State of Ohio on November 8, 1993, and is subject

to the Supreme Court Rules for the Government of the Bar of Ohio.

2) At all times material to the allegations contained in the Amended Complaint, an attorney/client relationship existed between the Respondent and Ms. Esther J. Benfer. Esther Benfer's date of birth was October 30, 1911 and at some point after Respondent commenced this representation, Benfer became unable to take care of herself or her property.

3) Linda Cook testified that the initial contact with Esther Benfer was in May, 2000. Between May, 2000 and June, 2001, [1] Respondent prepared the following documents for Esther Benfer. There is no dispute that all of the documents were signed on June 8, 2001:

A) Revocable Living Trust Agreement (Exhibit F);

B) Last Will and Testament (Exhibit G);

C) Comprehensive Durable Power of Attorney (Exhibit H);

D) Durable Special Power of Attorney (Exhibit I);

E) Assignment of Tangible Personal Property (Exhibit J).

As with the above documents, the bill submitted by Linda Cook for preparing these documents is also dated June 8, 2001 (Exhibit K).

4) Respondent named herself as a Co-Trustee along with Esther J. Benfer in the Revocable Living Trust Agreement, dated June 8, 2001 (Exhibit F). Respondent did not recommend

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[1] Respondent submitted pages of her computer generated calender (Exhibits 5, 6, 7, 8, 9 & 10) showing appointments with Esther Benfer in May 2000, June 2000, December 2000, May 2001 and June 2001. The work papers from Respondent's file for Esther Benfer containing the client's personal information have only one date, to-wit: May 8, 2001. This date is found on the "Client File Checklist" which is the last page of Exhibit E.

to Esther J. Benfer that she secure disinterested advice from an independent competent person or other counsel as to whether or not the Respondent should be named as a Trustee.

5) Respondent named herself as the personal representative of the Will, and if the Respondent could not so act, Respondent named her Law Office to act as the successor personal representative in the Last Will and Testament of Esther J. Benfer, dated June 8, 2001 (Exhibit G). Respondent did not recommend to Esther J. Benfer that she secure disinterested advice from an independent competent person or other counsel as to whether or not the Respondent and her Law Office should be named as the representative in the Will.

6) Respondent named herself as the agent to exercise the powers enumerated therein in the Comprehensive Durable Power of Attorney of Esther J. Benfer, dated June 8, 2001 (Exhibit H). Respondent did not recommend to Esther J. Benfer that she secure disinterested advice from an independent competent person or other counsel as to whether or not the Respondent should be appointed as "Agent" for Esther Benfer in the Power of Attorney.

7) Respondent appointed herself as the attorney-in-fact for Esther J. Benfer in the Durable Special Power of Attorney, dated June 8, 2001 (Exhibit I). Respondent did not recommend to Esther J. Benfer that she secure disinterested advice from an independent competent person or other counsel as to whether or not the Respondent should be named Esther Benfer's attorney-in-fact.

8) In the Assignment of Tangible Personal Property of Esther J. Benfer prepared by Respondent (Exhibit J), dated June 8, 2001, Esther J. Benfer assigned all of her tangible property "(jewelry, clothing, household goods, furniture, furnishings, fixtures, chinaware, silver, photographs, works of art, books, boats, automobiles, sporting goods, farm machinery, livestock, artifacts, and all other tangible articles of household goods or personal use)" to the Esther J. Benfer Living Trust (Exhibit J). This is the trust in which Respondent named herself as a Trustee.

9) Esther Benfer owned a parcel of real property, hereinafter called the Benfer Farm. Respondent testified during the hearing that she had discussions with Esther J. Benfer about the "look back" provision of the Medicaid law. Respondent's discussions with Esther J. Benfer explained that if she transferred her real property, divested herself of this asset, and at least three years had not passed, she would not be eligible for Medicaid benefits. On April 25, 2005, Respondent also testified [2]

> "Esther came to me about donating the property to the Church. There was concern about if she did that, if she became ill and went into the nursing home, how that nursing home bill would be paid because she didn't feel she had enough money to do that. Many times when we do Medicaid planning we gift to a child. They know there is a three year waiting period and if, by chance, they go in sooner they have to private pay. Either that child has to come up with it out of mom's

[2] Transcript of testimony given by Respondent "In the Matter of Esther Benfer, Incapacitated Individual and Protected Individual," Probate Court for the County of Lenawee, Michigan, File No, 04-01-44426CA, in the April 25, 2005 hearing on Petition for Authority to Pay Bills and Fees, page 26, lines 13 through 24.

funds, out of their funds, or, they would have to sell the home that was gifted to them in order to pay that. So, we did that so if that arose that could occur and whatever was left could still go to the Church."

Thus, as the Trust created by Respondent for Esther Benfer was dated June 8, 2001, and as explained by Respondent, any real property transferred into the trust would be subject to a three year "look back" period. This is unless the real property would appear to have been transferred three years earlier, to-wit: before June 8, 1998. With the Trust being created in June, 2001, the only way for the property to appear to have been transferred three years earlier in 1998, would be to fraudulently pre-date the deed.

10) Respondent prepared a Quit-Claim Deed transferring the Benfer Farm, to "Linda S. Cook, Trustee" (Exhibit A). Amazingly enough, this Quit-Claim Deed is dated May 20, 1998. This Quit-Claim Deed shows that it was recorded in the Fulton County Recorder's Office on July 12, 2001. At the hearing, Respondent maintained that the 1998 date was a typographical error. The Respondent testified that the typographical error occurred because a prior deed with the date of May 20, 1998 was saved on a computer and was used as a template, and all information was changed except that date. Respondent testified that the deed was actually prepared and executed in May or June of 2000. [3]

11) The Panel does not find credible the testimony of Respondent that the date on the Quit-

[3] The year 2000 will become significant and necessary to Respondent when we discuss Respondent's Income Tax Return for the year 2000. Respondent's 2000 Income Tax Return was signed by her on October 14, 2001 (Exhibit X).

Claim Deed (Exhibit A) was a mistake.[4] (See Time Line attached to this report) Specifically, as to Exhibit A, the Quit-Claim Deed transferring the Benfer Farm to the Respondent as Trustee, Respondent made the following inconsistent statements as to the true date that she received the title to the Benfer Farm:

a.) In Respondent's Federal Income Tax Return for the year 2000 (Exhibit X), Respondent stated that she received title to the Benfer Farm as a gift in December of 1997. The date Respondent made this claim on her Federal Income Tax Return is October 14, 2001.

b.) After the allegations contained in the Amended Complaint were being investigated by the Toledo Bar Association, an inquiry was made into the Benfer Farm property. Respondent signed and approved an August 18, 2004, letter (Exhibit N) wherein she states that she received title to the Benfer Farm as trustee on May 20, 1998.

c.) At the disciplinary hearing held on August 17, 2006 and August 18, 2006, Respondent testified that the actual date of the deed transferring the Benfer Farm to her as Trustee was prepared and signed in May or June of 2000.

d.) Respondent prepared a document (Exhibit M), signed by Esther Benfer, with the typed date of August 30, 2001. In this document dated August 30, 2001, the Respondent stated that Esther Benfer gave her the Benfer Farm

[4] In fact, the panel did not find much of Respondent's testimony to be credible and finds the dates Respondent placed on other documents to be inaccurate. The Panel further finds that the excessive number of "errors" have established a pattern of deception and misconduct, not errors.

property in 1998 as a gift.

12) After the Quit-Claim Deed (Exhibit A) had been recorded in July of 2001, Respondent made changes to it (See Exhibit B). Respondent claimed that the deed she prepared (Exhibit A) had a mistake . . . another mistake. Respondent said that she was supposed to have received the Benfer Farm as a gift to her, individually, not as the Trustee of Esther Benfer. Respondent took the recorded Quit-Claim Deed (Exhibit A), crossed out the word "Trustee" after her name, and typed in the word "Married." This altered deed was not re-signed by Esther Benfer. This altered deed (Exhibit B) was recorded by Respondent in the Fulton County Recorder's Office on September 10, 2001.[5]

13) Thereafter, Respondent prepared a Quit-Claim Deed (Exhibit C) and transferred title to the Benfer Farm to the United Methodist Church, reserving a life estate to Esther J. Benfer. Again, the dates of the preparation, signing and recording of the document appear removed in time and reality. [6] Respondent testified that she prepared Exhibit C in

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[5] This is another instance where Respondent's ruse that the deed's date of May 20, 1998 was a mistake breaks down. At the hearing, a member of Respondent's office staff, Wendy Mac Kay Warnecke, testified as to how Exhibit A's date could be a mistake, as it was prepared by using a formerly saved deed as a template. Ms. Warnecke also testified that she discussed this "1998" date with Respondent in 2001. When re-recording this deed (Exhibit B) in September, 2001, Respondent changed "Trustee" to "Married" but did not change the 1998 date, when she had the opportunity. Respondent testified at the hearing that she did not discover the "1998 Mistake" until after her letter of August 18, 2004 (Exhibit N).

[6] For IRS purposes, it is necessary to Respondent for it to appear that she gave the Benfer Farm to the Church in the year 2000. Even though Respondent lists on her 2000 Income Tax Return, "December 1997" as the date she received title to the Benfer Farm, she does not take a gift tax deduction until the tax year 2000. The 2000 tax return is dated October 14, 2001 (Exhibit X). If Respondent gave the farm to the Church in 2001 (as appears to the Panel to be the case) she would not be entitled to this tax deduction for the tax year 2000.

November or December of 2000. The Quit-Claim Deed is dated December 25, 2000 and Respondent says the deed was actually signed on December 25, 2000. This deed (Exhibit C) was recorded in the Fulton County Recorder's Office on December 13, 2001. The contract prepared by the Respondent with the Methodist Church (Exhibit O) for the transfer of the Benfer Farm, of which the Quit-Claim Deed (Exhibit C) is an instrument of transfer, is also dated December 25, 2000, but the testimony of Respondent was that the contract was not signed until after June of 2001.

14) Respondent prepared a document (Exhibit M), which was signed by Esther J. Benfer. This document has a typewritten date of August 30, 2001. This document reads: "I, Esther Benfer, give Linda S. Cook permission to write off on her income tax return the gift of real property that I gave her in 1998 and she gave to the Metamora United Methodist Church on December 25, 2000." Respondent did not recommend to Esther J. Benfer that she secure disinterested advice from an independent competent person or other counsel before signing this document of a gift.

15) For the tax years of 2000, 2001, 2002, 2003 and 2004 the Respondent took a total of nearly $225,000.00 [7] in income tax deductions for Respondent giving the Benfer Farm to the United Methodist Church (Exhibit T).

16) On April 16, 2004, Attorney Jeffrey L. Robinson wrote a letter to Respondent (Exhibit V). This letter was hand delivered to Respondent on April 20, 2004. Attorney Robinson stated that he was now representing Esther Benfer and enclosed a Revocation of a Power

[7] Tax Year 2000 = $56,804; Tax Year 2001 = $38,169; Tax Year 2002 = $55,454; Tax Year 2003 = $20,938; Tax Year 2004 = $53,608

of Attorney that was signed by Esther Benfer. He requested that Respondent have no further contact with Esther Benfer. Mr. Robinson asked about the status of the Benfer Farm property. He stated that Respondent had removed the personal property from Ms. Benfer's home, and Ms. Benfer now wanted her personal property returned as soon as possible.

17) Disregarding the letter of Attorney Jeffrey Robinson, on the same day she received it, Respondent, in her own handwriting, prepared Exhibit S. Exhibit S is a Petition for Appointment of Guardian of Incapacitated Individual in the State of Michigan Probate Court, Lenawee County. [8] In this Petition, Respondent states she is making this petition as Esther Benfer's "Attorney and Power of Attorney." Respondent signs the document as the "Petitioner," and Respondent further signs Respondent's sister's name, Dorothy M. Kennedy as the "Attorney." (Respondent did place her initials after the Kennedy signature.) Except for the frail and feeble signature of Esther Benfer on this document, all the handwriting belongs to the Respondent. In the Petition for Appointment of Guardian (Exhibit S), executed on April 20, 2004, Respondent, in the paragraph identified with a circled "H" states that Esther Benfer "lacks sufficient understanding or capacity to make or communicate informed decisions due to the following conditions: . . . physical illness or disability."

18) Despite Attorney Jeffrey Robinson's April 16, 2004 letter (Exhibit V), and despite Respondent's application to a Michigan Probate Court that Esther Benfer lacked

[8] Respondent's license as an attorney in the State of Michigan was suspended at this time.

sufficient understanding and capacity, on April 21, 2004 the Respondent had Esther Benfer sign a Comprehensive Durable General Power of Attorney (Exhibit U). Respondent again had herself appointed as the attorney and agent of Esther Benfer. And yet again, there is no evidence that Respondent recommended to Esther J. Benfer that she secure disinterested advice from an independent competent person or other counsel before signing this document, although it is evident by this time that Esther Benfer was not capable of making informed decisions.

19) Respondent claims that Esther Benfer suffered no harm because of her. As proof of Respondent's desire to only help Esther Benfer, she only charged Esther Benfer "one cake" for her representation (Exhibit K).[9] Respondent stated that Esther Benfer did not have sufficient income to take advantage of the gift tax deduction for the Benfer Farm, and if Respondent did not take it, the deduction would have gone to waste.

20) The Panel unanimously finds, by clear and convincing evidence, that as to Count 1 of the Amended Complaint, Respondent violated DR1-102(A)(4) in that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation; and DR1-102(A)(6) that the Respondent engaged in other conduct that adversely reflected on Respondent's fitness to practice law.

21) The Panel unanimously finds, by clear and convincing evidence, that as to Count 2 of the

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[9] This is in marked contrast to the $11,162.50 bill Respondent submitted for her services to Esther Benfer, "In the Matter of Esther Benfer, Incapacitated Individual and Protected Individual," Probate Court for the County of Lenawee, Michigan, File No, 04-01-44426CA. The court stated that it didn't "believe this billing in any way, shape or form," and only approved a payment of $500. April 25, 2005 hearing on Petition for Authority to Pay Bills and Fees, page 77, lines 22 through 24.

A-

Amended Complaint, Respondent violated DR 5-101(A)(1), that except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be, or reasonably may be affected by the lawyer's financial, business, property, or personal interests; DR 5-104(A), a lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure; DR 1-102(A)(4), engage in conduct involving dishonesty, fraud, deceit or misrepresentation; DR 1-102(A)(3), engage in illegal conduct involving moral turpitude; and DR 1-102(A)(6), engage in other conduct that adversely reflects on the lawyer's fitness to practice law.

MITIGATION

Respondent testified that she has improved her law office's use of forms so that a "mistake" such as occurred on the Quit-Claim Deeds having the wrong date should not reoccur. She also submitted evidence that she attended a seminar on April 30, 2003 titled "The ABC's of Successful Law Office Management for Small and Medium Firms." However, the Panel finds no mitigation on Respondent's behalf as outlined in BCGD Proc. Reg. 10(B)(2).

AGGRAVATION

The Panel unanimously finds pursuant to BCGD Proc. Reg. 10(B)(1) the following matters in aggravation are present.

A) Prior Disciplinary Offenses: On November 6, 2002, the Supreme Court of Ohio

in *Toledo Bar Association v. Cook*, 97 Ohio St.3d 225, 2002-Ohio-5787, suspended Respondent from the practice of law in the State of Ohio for one year, with six months stayed. In the prior disciplinary case, Respondent was found to have prepared a Will that named the Respondent's siblings' corporation as a beneficiary, in violation of DR 5-101(A)(2)(e). Respondent was reinstated to the practice of law on August 25, 2003.

B) Dishonest or Selfish Motive: The Panel unanimously finds that the Respondent's actions clearly showed a dishonest and/or selfish motive.

C) Pattern of Misconduct: Respondent testified that the discrepancy in dates were merely mistakes. The Panel unanimously finds that the number of "mistakes" have established a pattern of deception and misconduct, not errors.

D) Submission of False Evidence, False Statements, or other Deceptive Practices during Disciplinary Process: The Panel unanimously finds that during her testimony at the hearing, the Respondent's explanations of her conduct involved false statements and a pattern of deceptive practices.

E) Refusal to Acknowledge Wrongful Nature of the Conduct: Respondent has totally failed or refused to acknowledge any wrongful nature of her conduct.

RECOMMENDED SANCTION

Respondent acknowledges that she did not provide the best lawyering but insists that no violations of Disciplinary Rules have occurred. Respondent asks that the matter be dismissed. Relator asks that Respondent be permanently disbarred from the practice of law, or in the

alternative as a minimum, receive an indefinite suspension.

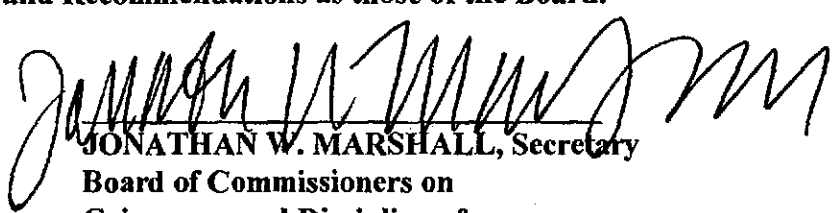
PANEL RECOMMENDATION

As the Panel found no mitigating factors, and a number of factors in aggravation, it is the unanimous decision of the Panel that Relator be disbarred from the practice of law.

BOARD RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on October 6, 2006. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends, based on the extraordinary acts of misconduct in the record, that the Respondent, Linda S. Cook, be permanently disbarred. The Board further recommends that the cost of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.



JONATHAN W. MARSHALL, Secretary
Board of Commissioners on
Grievances and Discipline of
The Supreme Court of Ohio

TIME LINE

for

TRANSFER OF BENFER FARM

The following is a time line of relevant dates that do not appear to be manipulated by Respondent or could not have been manipulated by Respondent:

May 8, 2001:	Client File Checklist prepared, (Exhibit E).
June 8, 2001:	Signing of: Revocable Living Trust Agreement, (Exhibit F). Last Will and Testament, (Exhibit G). Comprehensive Durable Power of Attorney, (Exhibit H). Durable Special Power of Attorney, (Exhibit I). Assignment of Tangible Personal Property, (Exhibit J).
June 8, 2001:	Date of Respondent's bill for the above services, (Exhibit K).
July 12, 2001:	Recording of first Quit-Claim Deed transferring the Benfer Farm to Respondent as "Trustee," (Exhibit A).
Between July 12, 2001 and September 10, 2001:	Respondent altered the recorded Quit-Claim Deed (Exhibit A) by crossing out "Trustee" and typing in "Married."
September 10, 2001:	Recording of altered Quit-Claim Deed changing Respondent's status from "Trustee" to "Married," (Exhibit B).
October 14, 2001:	Respondent signs her year 2000 Income Tax Return claiming her first gift deduction for the Benfer Farm, (Exhibit X).
December 13, 2001:	Recording of Quit-Claim Deed giving the Benfer Farm to the Church, (Exhibit C).

Source: Legal > Cases - U.S. > Federal Court Cases, Combined
Terms: misconduct remorse (Edit Search | Suggest Terms for My Search)

*1994 U.S. Dist. LEXIS 9259, **

CARLOS GUERRERO, guardian ad litem for JOSE GUERRERO, et al., Plaintiffs, v. BOARD OF EDUCATION OF THE EMERY UNIFIED SCHOOL DISTRICT, et al., Defendants. AND RELATED ACTIONS.

Cases Nos. C 92-2971 BAC, et al.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1994 U.S. Dist. LEXIS 9259

July 5, 1994, Decided
July 5, 1994, Filed; July 8, 1994, Entered

CASE SUMMARY

PROCEDURAL POSTURE: In plaintiff students' action against defendant board of education, an order to show cause why discipline should not be imposed against the students' attorney of record was issued.

OVERVIEW: The attorney represented the students in an action alleging that they were subjected to corporal punishment and inappropriate conduct by teachers and that unlawful racial discrimination occurred in the school district. The court denied the students' motion to certify their action as a class based upon their attorney's inability to adequately represent it, and issued an order to show cause why she should not be disciplined. The court determined that she should be suspended from the practicing law in certain cases for two years. The court determined that the attorney violated standards of professional conduct in 26 separate instances. She violated U.S. Dist. Ct., N.D. Cal., R. 110-3 by misrepresenting evidence, disrupting depositions and court proceedings with her emotional upset and instability, failing to serve documents on opposing counsel, and serving disorganized and incomplete papers on opposing counsel. The attorney violated Cal. Bar R., Prof. Conduct R. 3-110(A) by failing to support her accusations of racism, child abuse, and pedophilia against the school district and opposing counsel with facts. The attorney had several prior instances of misconduct.

OUTCOME: The students' attorney was suspended from the practice of law before the court for two years in cases involving minors, the operation or administration of educational institutions, and the city involved in the instant action.

CORE TERMS: deposition, discipline, teacher, opposing counsel, misconduct, emotional, transferred, practicing, interview, professional conduct, factual support, legal services, factual basis, inappropriate, retaliation, accusation, competence, accusing, decorum, upset, evidence to support, child abuse, opposing, videotape, contempt, corporal, Local Rule, guardian, declaration, molestation

LexisNexis(R) Headnotes ♦ Hide Headnotes

Governments > Courts > Rule Application & Interpretation

Legal Ethics > Practice Qualifications

A-15

HN1 Admission to practice before the United States District Court for Northern District of California is conditioned upon the lawyer's adherence to certain standards of professional conduct. Attorneys practicing in this district must maintain the respect due courts of justice and judicial officers; and perform with the honesty, care, and decorum required for the fair and efficient administration of justice. U.S. Dist. Ct., N.D. Cal., R. 110-3. More Like This Headnote

Legal Ethics > Client Relations > Effective Representation

HN2 Attorneys practicing in the United States District Court for the Northern District of California also are required to comply with the standards of professional conduct required of members of the State Bar of California. Among the rules that must be complied with is the following: A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence. Cal. Bar R., Prof. Conduct R. . 3-110(A). "Competence" in legal services applies to the diligence, learning and skill, and mental, emotional, and physical ability reasonably necessary for the performance of such service. Cal. Bar R., Prof. Conduct R. 3-110(B). The rules also clearly prohibit an attorney from attempting to mislead a judge by misrepresentations of fact or law. Cal. Bar R., Prof. Conduct R. 5-200 (B). More Like This Headnote

Legal Ethics > Sanctions > Disciplinary Proceedings > General Overview

HN3 The authority of a federal district court to discipline attorneys practicing before it is settled. The court may control the conduct of lawyers both in and outside of the courtroom. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Legal Ethics > General Overview

HN4 The rules of professional conduct apply to speech as well as conduct. The First Amendment notwithstanding, a lawyer's right to free speech is limited during litigation. It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed. Even outside the courtroom, lawyers in pending cases are subject to ethical restrictions on speech to which an ordinary citizen would not be. More Like This Headnote

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom

Legal Ethics > Professional Conduct > General Overview

HN5 Courts have imposed discipline for a wide range of conduct, including offensive and threatening speech. More Like This Headnote

Legal Ethics > Sanctions > Disciplinary Proceedings > General Overview

HN6 Before discipline may be imposed, an attorney must receive due process of law. There is no uniform process for enforcing these rules through discipline in the federal court system; rather, the judicial districts are free to define the rules to be followed

A-16

and the grounds for punishment. More Like This Headnote

Civil Procedure > Sanctions > General Overview

Governments > Courts > Rule Application & Interpretation

Legal Ethics > Sanctions > General Overview

HN7 In the event any attorney practicing before the court engages in conduct which may warrant discipline or other sanctions, the court or any judge may initiate proceedings for contempt or may, after reasonable notice and an opportunity to show cause to the contrary, take any other appropriate disciplinary action against the attorney. U.S. Dist. Ct., N.D. Cal., R. 110-7. More Like This Headnote

Legal Ethics > Sanctions > Reprimands

HN8 Once misconduct is found, the issue becomes the appropriate discipline. Discipline is determined on a case-by-case basis. Factors relevant to the determination include the nature of the misconduct, deterrence to the subject lawyer and others, preservation of the bar's integrity, protection of the public, condemnation of the conduct, justice to the subject lawyer, and consistency with other similar cases. If warranted, the discipline may take the form of disbarment, suspension from practice, probation with conditions, monetary sanctions, public reprimand, or private reprimand. More Like This Headnote

Legal Ethics > Professional Conduct > General Overview

Legal Ethics > Sanctions > General Overview

HN9 The presence of aggravating or mitigating factors may influence the nature of the discipline imposed. Aggravating factors include a pattern of serious, recurrent misconduct, a failure to appreciate the gravity of the conduct which is conceded, and a contemptuous attitude toward the disciplinary proceedings. Mitigating factors may include the lawyer's good character and reputation, lack of prior **misconduct, remorse,** inexperience, cooperation with disciplinary authorities, rehabilitation and substance abuse. Mitigating factors may affect the nature and extent of the discipline, but do not excuse any misconduct. More Like This Headnote

Legal Ethics > Sanctions > General Overview

HN10 Protection of the public, the courts, and the legal profession is the key goal of the disciplinary proceedings. The court's primary concern must be the fulfillment of proper professional standards, whatever the unfortunate cause, emotional or otherwise, for the attorney's failure to do so. More Like This Headnote

Family Law > Guardians > Appointment

Family Law > Guardians > Duties & Rights

Governments > Courts > Authority to Adjudicate

HN11 The court has greater supervisory powers where the litigants are minors, even after a guardian ad litem is appointed. The court may exercise supervisory powers to ensure that the minor's interests are protected -- such as by requiring court

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approval of stipulations or concessions that are binding on the minor. The relationship between a guardian ad litem or the attorney whom he employs and the minor is not the same as that between an attorney and an adult client. It is the duty of the guardian and the attorney to protect the rights of the minor, and it is the duty of the court to see that such rights are protected. An attorney's professional misconduct is detrimental to a minor's interest because it may lead to an adverse judgment without regard to the merits. The court may exercise its supervisory powers to prevent the harm to a minor client. More Like This Headnote

JUDGES: **[*1]** Caulfield

OPINION BY: BARBARA A. CAULFIELD

OPINION: ORDER IMPOSING DISCIPLINE ON ATTORNEY KATE DIXON

These related cases come before the court for resolution of matters raised by the court's issuance of an Order to Show Cause why discipline should not be imposed against plaintiffs' attorney of record, Kate Dixon, also known as Kathryn Jo-Ann Dixon (California State Bar No. 98514). Upon due consideration of the materials and evidence before it, the court determines that discipline is warranted and shall be imposed as stated below.

I. BACKGROUND

Kate Dixon is the attorney of record for plaintiffs in Guerrero v. Board of Education of the Emery Unified School District ("Guerrero") and the related cases listed above. There are two main issues in the cases: (1) whether students at Anna Yates Elementary School were subjected to corporal punishment and inappropriate conduct by teachers and other persons, and (2) whether unlawful racial discrimination occurred in the Emery Unified School District. The plaintiffs are minors who are or were students at Anna Yates Elementary School in the Emery Unified School District. Guardians ad litem have been appointed for the plaintiffs, and the plaintiffs **[*2]** are proceeding in forma pauperis.

In November 24, 1992, the court issued a temporary restraining order precluding inappropriate discipline of the students at Anna Yates school.

Plaintiffs sought to have the Guerrero case certified as a class action. On February 23, 1994, the court denied plaintiffs' motion to certify the action as a class action. Class certification was denied because Ms. Dixon was and is unable to fairly and adequately represent the interests of the class without co-counsel, and co-counsel was not obtained. In conjunction with the denial of the request for class certification, the court issued the Order to Show Cause discussed below.

A. The Order to Show Cause

On February 23, 1994, the court ordered Kate Dixon "to show cause why you should not be removed as counsel for plaintiffs in Guerrero and the related cases, and suspended from representing plaintiffs in similar actions, under Local Rule 110-7 for failing to perform legal services with competence (California Rule of Professional Conduct 3-110(A)) and failing to perform with the honesty, care, and decorum required for the fair and efficient administration of justice (Local Rule 110-3)." (February **[*3]** 23, 1994 Order to Show Cause ("OSC"), p. 1.) The OSC listed several matters which had prompted the court's concern: (1) a sanctions award of $ 15,000 against Dixon for improper conduct in a different federal court action, Dixon's failure to pay, and Dixon's failure to attempt to explain non-payment until contempt proceedings were commenced; (2) a state court judgment of $ 23,500 compensatory damages, $ 12,000 punitive damages, interest and costs against Dixon for conversion of

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client funds; (3) Dixon's conduct in Guerrero and the related cases indicating an inability to competently represent her clients and function as a lawyer in this court, exemplified by her inability to properly draft pleadings and inability to participate in depositions without direct court supervision; (4) Dixon's inflammatory and possibly slanderous statements in court proceedings and in filings; and (5) the disruption to plaintiffs' education due to the hostile manner in which this litigation is being pursued. The OSC also directed Dixon to provide factual support for several statements she made in plaintiffs' status conference statement.

B. Proceedings Following Order to Show Cause

Dixon filed a 24-page **[*4]** written Response to the OSC, before the date set for the hearing on the OSC. On March 11, 1994, the date set for the hearing on the OSC, Kate Dixon requested further details as to what her alleged misconduct was. The court referred Ms. Dixon to the listing in the OSC. The court also stated that occasionally the level of Dixon's emotional duress prevented her from going forward in proceedings, that Dixon's across-the-board accusations without proof could not gain relief for her clients, and that Dixon's emotional upset at depositions upset her clients. Dixon requested that the hearing be continued to enable her to hire counsel to represent her. The court granted the request, and continued the hearing until May 2, 1994. n1

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n1 Also at the March 11 hearing, Dixon became upset and made an emotional appeal for court intervention because there had been "hundreds" of violations of the court's temporary restraining order. The court set a hearing date to determine whether any violation of the court's temporary restraining order had occurred. Hearings were held on April 8 and 22 on the allegations of violations of the temporary restraining order.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*5]**

On May 2, 1994, the court held the continued hearing on the OSC. Dixon represented herself, and was not assisted by any other attorney. Dixon objected to a perceived violation of her due process rights. Dixon again asked the court to describe the specific conduct which had prompted the Order to Show Cause. (5/2/94 transcript, p. 6.) Dixon also requested that the court appoint a "special prosecutor" to investigate her conduct. Attorneys JoAnne Lowe, Francis Giambroni and Michael Harrington appeared and gave testimony at the court's request. (5/2/94 transcript, 5.) The court asked these three witnesses to be present to determine if Dixon's apparent lack of competency had manifested itself beyond that observed in the courtroom. (5/2/94 transcript, pp. 5.) Kate Dixon also testified.

II. FINDINGS OF FACT

Upon consideration of Kate Dixon's written Response to OSC, the testimony of Kate Dixon, JoAnne Lowe, Francis Giambroni, Michael Harrington, the court files, and the court's observations during this litigation, the court makes the following findings of fact:

A. Lack of Support for Allegations Made in Court Filings

1. Dixon's response to the OSC's directive to provide factual support **[*6]** for several statements she made showed that she had no appreciation of the problem and felt no remorse for making the statements in the Plaintiffs' Status Conference Statement.

2. In response to the court's directive to produce factual support for several statements Dixon had made in a status conference statement, Dixon had several general objections.

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Dixon claimed that the request was racially motivated, and would not have been made if her clients were Caucasian. n2 (Response to OSC, pp. 17-18.) Dixon also objected that the requested information was trial preparation material protected by the attorney-client privilege and attorney work product doctrine. (Id., p. 17.) Finally, Dixon claimed that she and her clients were witnesses to federal and state crimes, and revelation of the material might subject her and her clients "to retaliation by those who potentially committed these federal and state crimes." (Id., p. 18.) Her statements of fear of retaliation are uncorroborated by any credible evidence.

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n2 Charges of racism are a recurrent theme. Although Ms. Dixon is Caucasian, her clients are African-Americans, Indians, and Latinos. The school principal and several of the teachers whose conduct is at issue are African-Americans.

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3. Dixon was directed by the OSC to provide factual support for her statement that "because of brutal retaliation against students who testify (such as expulsions, suspension, at least twenty incidents of jailing in the Emery City Jail basement cell) . . . ." Dixon referred to the jailing of Kimberly Lane, but provided no evidence that Kimberly Lane had been jailed in retaliation for testifying. (Kimberly Lane is not a plaintiff in Guerrero or the related cases.) Dixon did not identify any other individual who had been jailed. Instead, she requested an opportunity to subpoena and question various city officials about jailing. Dixon also requested an opportunity to do discovery as to the identity of students expelled or suspended. n3 Apparently, Ms. Dixon hoped to uncover the basis for her statements with the aid of this court's subpoena power. The court finds that Dixon had no evidence to support the allegations regarding retaliation at the time she made the statement. No competent attorney would have made the statement regarding retaliation under the circumstances present and known to Ms. Dixon when Ms. Dixon made the statements.

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n3 Additionally, Dixon identified several depositions and stated that she would present testimony of several unidentified individuals regarding this subject matter, but did not describe to what the witnesses would testify.

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4. Dixon was ordered to provide factual support for her statement: "In early 1993 one child beat up one of the Emery school teachers who was sexually abusing boys in the school parking lot, at night, where this teacher lurked." Dixon responded that the testimony of several individuals would support this, as well as several documents. No such testimony was presented at the hearing. Dixon also claimed that the existing statements of AG and TW, records of the school district, and records of the teacher's absence "and his medical treatment for the incident" would support her charge. No records were presented to the court by Ms. Dixon, nor is the court aware of any such records. The court has reviewed the video-taped statements of Tony Winbush (Exhibit 34), Adelaida Guerrero (Exhibit 30), and Angel Gonzalez (Exhibit 2) -- the only students whose initials are TW or AG. None of those individuals mention the alleged incident. The court viewed almost three hours of videotaped statements to determine that they did not support the proposition for which Dixon had cited them. The court finds that, at the time she made the statement, Dixon had no evidence to

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support her statement that "in early **[*9]** 1993 one child beat up one of the Emery school teachers who was sexually abusing boys in the school parking lot, at night, where this teacher lurked." No competent attorney would have made the statement under the circumstances present and known to Ms. Dixon when Ms. Dixon made the statement. The court further finds that in citing to evidence which did not support the proposition for which she cited it, Dixon failed to perform legal services with the care and skill required of attorneys appearing before this court.

5. Dixon was ordered to provide support for her statement: "The Order prohibiting corporal punishment was violated hundreds of times. And this was covered-up." Dixon listed several depositions that she claimed would support her statement. Separate court hearings were conducted on plaintiffs' allegations that the court's order prohibiting inappropriate discipline had been violated. As stated in the order on those hearings, there was only one instance of inappropriate discipline, but no contempt was found. At these hearings, Dixon attempted to show a handful, not "hundreds," of violations of the court order. n4 No evidence was presented that corporal punishment or violations **[*10]** of the court order were covered up." The court finds that, at the time she made the statements, Dixon did not have evidence to support the statement that hundreds of violations of the court's order, or any cover-up, had occurred. No competent attorney would have made the statement under the circumstances present and known to Ms. Dixon when Ms. Dixon made the statements. The court further finds that Dixon acted beneath the standard of care and skill required of attorneys appearing in this court when she claimed that Lillian McDuffy had been struck in violation of the TRO while knowing that the alleged conduct occurred months before the TRO issued.

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n4 At least one of the claimed violations occurred before the TRO was issued. Dixon represented that the TRO was violated when Lillian McDuffy was allegedly pushed by a substitute teacher. The complaint filed on behalf of Lillian McDuffy by Kate Dixon in Case No. C93-1886 BAC and McDuffy's videotaped interview (Exh. 17) state that this event occurred on May 2, 1992. Dixon thus knew that the event occurred months before the TRO was issued on November 22, 1992.

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6. Dixon was ordered to provide factual support for her claim that the school principal was a "psychopath." Dixon responded that the principal had paddled and used a head-knocker n5 on students, and "it is a matter of opinion" whether such a person "is or is not a psychopath." (Response to OSC, p. 22.) Even if one assumes that the allegations were true that the principal did paddle and strike children with a head-knocker, such conduct alone does not support a claim that the person was a "psychopath." The court finds that, at the time she made the statement, Dixon did not have evidence to support the allegation of psychopathy. In view of the increasing, non-medical use of this term in everyday parlance, n6 the court does not find that Dixon's use of the term was inherently incompetent, although it was without factual basis.

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n5 The "head-knocker" was described by one student as a rolled-up piece of paper. Another student described it as a cardboard tube (from the core of a roll of paper towel) with tape wrapped around one end. Students were allegedly struck on the side of their heads with the "head-knocker." **[*12]**

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n6 The term "psychopath" is occasionally used to denigrate and call into question a person's mental competency.

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7. Finally, Dixon was ordered to provide factual support for her claim that "beginning in September 1993, about Eighty (80) children transferred out of Emery into Berkeley, Albany and Oakland to avoid battery and molestation and segregated conditions at Emery." Dixon identified by initials nine students who allegedly transferred out of the Emery school district. n7 Dixon did not suggest that she had any evidence that the reason any of these persons transferred out was "to avoid battery and molestation and segregated conditions." Dixon requested an opportunity to do discovery as to the identity of students who transferred out of Emery. n8 Apparently, Ms. Dixon hoped to develop the basis for her statements with the aid of this court's subpoena power. The court finds that, at the time she made the statement, Dixon had no evidence to support the allegations that eighty transfers had occurred or that the students transferred to avoid battery, molestation, and segregated conditions. No competent **[*13]** attorney would have made the statement under the circumstances present and known to Ms. Dixon when Ms. Dixon made the statements.

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n7 Dixon claimed that the videotapes of "LM, MM, MF, [and] TW" would support her statement. (Response to OSC, p. 23.) There was no videotaped interview of anyone with the initials MF. Mackie McDuffy (MM) and Lillian McDuffy (LM) stated in their interviews that they were still students at Anna Yates at the time of the taped interviews. Their interviews offer no proof of the truth of Dixon's statement. Tony Winbush (TW) did not specifically state why he had transferred, but his testimony suggested that he transferred to get into a school with better programs for students with learning disabilities.

n8 Dixon also identified several depositions and stated that she would present testimony of several unidentified individuals regarding this subject matter, but did not describe the expected testimony. The depositions were not presented to the court.

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B. Dixon's Interactions With Opposing **[*14]** Counsel

1. The court heard testimony at the May 2, 1994 hearing from three attorneys who represented defendants in Guerrero and the related cases.

2. Attorney Michael Harrington testified that at a deposition of Kate Dixon occurring in his law firm's offices, Dixon "reached out with her tablet, leaned across the table, and took a swipe at a coffee cup, and, in fact, would have knocked coffee all over [cross-examining attorney] Mr. Giambroni, but for the fact that he had finished his coffee." (5/2/94 transcript, p. 48:20-24.) Harrington later left the deposition to attend to other business, but had to return because of a commotion in the deposition room. He learned then that Dixon had made some physical contact with Giambroni. Dixon's physically threatening conduct to Giambroni was below the standard of conduct required of attorneys practicing in this court.

3. Attorney Harrington testified that at a deposition of one of her clients, Kate Dixon insulted

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him. During a break in the deposition, Harrington "stood up and [] started to ask Ms. Dixon if she would like a soda or a cup of coffee, at which point, she stood up and looked at me and she said, 'I know what you want, you want **[*15]** to suck Dr. Corona's cock. You want it up your ass.'" (5/2/94 transcript, pp. 49:23 - 50:1.) In making these statements, Dixon acted outrageously. Her conduct fell far below the level of competence and decorum required of lawyers practicing in this or any court.

4. Attorney Harrington also testified about Dixon's use of court filings to defame people. Harrington filed a motion to compel a deposition of one of Dixon's clients in a state court case relating to the treatment of children in the Emery Unified School District. In response thereto, Dixon filed a memorandum of points and authorities in which she stated:

> "Mr. Matthew Harrington, well known racist against black children and champion of the Emeryville pedophile ring, operated by organized crime and allowed to flourish with immunity from law enforcement in Alameda County, comes before this court intent upon setting up Kate Dixon on some kind of sanction to avert or avoid criminal indictment for his role in covering up the Emery child abuse ring and financial fraud attempts to seek a sanction for a notice of deposition, never received by Kate Dixon." (5/2/94 transcript, p. 53:6-17.)

Dixon's legal brief opposing the motion **[*16]** to compel was accompanied by her declaration under penalty of perjury in which she stated: "'Mr. Harrington, motivated by racial hatred against the children of Emery Unified School District, who he describes as 'nigger, hoods, and scum,' presents to this court a total lie against me in order to harass me and disrupt court processes.'" (5/2/94 transcript, pp. 53:23 - 54:3.) Mr. Harrington obtained an order from the state court sealing these two documents. (Id., p. 54:13-16.)

5. As Harrington described the above incidents at the OSC hearing, Kate Dixon interjected that Harrington was describing events in state court actions, and asked whether this court intended to inquire into her competency in state court actions as well as federal court actions. (5/2/94 transcript, p. 52:3-9.) Dixon then requested and was given an opportunity to respond to Mr. Harrington's comments about "this Alameda Superior Court issue." (Id., p. 55:8-9.) Dixon made a lengthy statement about a conspiracy to oust her from these proceedings and to cover up the misdoings in Emeryville. Dixon claimed that her opponents were trying to get rid of her because she was "the person who has all the work product and **[*17]** the information, and if [she] could be interviewed by the Federal Bureau of Investigation, and [she] would request that, and [she has] asked them to interview [her], [she] could bust this pedophile ring in Emeryville." (Id., pp. 64:23-65:3.) Regarding the first deposition incident about which Mr. Harrington testified, Dixon stated that it was Mr. Giambroni who had assaulted her and that she had wanted to call the police but was not allowed to do so. (Id., p. 72:9-17.)

6. The court finds that there is no evidence to substantiate Dixon's charge that Harrington engaged in pedophilia or did any of the other actions of which he was accused by Dixon. In so accusing Harrington, Dixon acted outrageously. Her conduct fell far below the level of competence and decorum required of lawyers practicing in this or any court.

7. Kate Dixon testified that there was "tremendous misconduct by these three counsel in the depositions where there are actual slurs -- actual things done which I would characterize as child abuse." (5/2/94 transcript, p. 69:8-10.) Dixon claimed that her conduct at the depositions had been necessary because she was "doing a deposition with a child abuser." (Id., **[*18]** p. 69:15-16.) In response to the court's inquiry as to what child abuse she had observed, Dixon stated: "During the depositions, Mr. Giambroni would grab his

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privates; he would rub himself; he would salivate; he would have foam coming out of his mouth; he would lean over to them." (Id., p. 70:17-20.) Dixon later stated that in depositions of students in this court, Mr. Giambroni had behaved inappropriately, "working them over and when they're a little female, getting all lewd and lascivious and abusive toward the girl, and grabbing his privates, totally disgusting. . . ." (Id., p. 77:7-11.) Giambroni denied all of Dixon's allegations, and attorney JoAnne Lowe stated that she had not observed any such conduct in the depositions which she attended. The court supervised several depositions in these cases by requiring that the depositions be held at the courthouse with the court available to resolve disputes. During these depositions, the court never received a complaint of inappropriate conduct. The court never observed any conduct by Giambroni remotely resembling the conduct of which Dixon accused him. The court notes that no one, including Dixon, ever suggested to the court **[*19]** that Giambroni was behaving inappropriately in depositions -- until Dixon did so in response to the OSC.

8. The court finds that Mr. Giambroni did not engage in inappropriate conduct toward deposition witnesses in these related cases. In accusing Mr. Giambroni of the inappropriate conduct, Dixon acted outrageously. Her conduct fell far below the level of competence and decorum required of lawyers practicing in this or any court.

9. Attorney JoAnne Lowe also stated that she recalled at least one deposition in which "Ms. Dixon looked like she was going to come up across the table. She would get up and lean across the table towards Mr. Giambroni, and on one occasion, I recall her fist being closed." (5/2/94 transcript, pp. 39:25 - 40:3.) Lowe also testified that Dixon had misrepresented to the court the contents of a videotape by claiming that there was a videotape of a child being slammed against a wall although the videotape was the child's statement of the alleged incident. (Id., p. 40:13-23.) Lowe also questioned Dixon's professionalism after Dixon called Lowe a racist and threatened to hold Lowe "personally liable for the abuse of the children." (Id., pp. 41:16, 42:14-15.) **[*20]**

10. Giambroni, Lowe, and Harrington also testified about other incidents involving Ms. Dixon's questionable and unprofessional behavior in these cases. Giambroni characterized Dixon as having "basically an obstructionist attitude" during depositions. (5/2/94 transcript, p. 17:1-2.) Dixon called Giambroni an "asshole" on and off the record at depositions. (Id., pp. 15:4-7, 34:6-10, and 48:3-12.) During the course of the depositions conducted in this courthouse, Dixon occasionally shouted, yelled, and called the questioning attorney names when she was displeased with the proceedings. (Id., pp. 15:24 - 16:3.) In some instances, the children cried, prompted in part by Dixon's behavior. (Id., pp. 17:14-16, 34:22 - 35:14.) During one deposition, Dixon recited answers for a witness she was representing, rather than let the witness answer. (Id., pp. 16:4-18, and 32:18 - 33:22.) Dixon has implied that attorney Giambroni is connected to organized crime. (Id., p. 48:10-12.) Giambroni stated that it was "not uncommon" for opposing counsel to be served with pleadings missing portions or in a "jumbled mess" such that one could not determine which attachment was supposed to relate **[*21]** to which document.

C. Dixon's Presentation At The Show Cause Hearing

1. Kate Dixon testified that several persons had been killed or beaten in Alameda County. (5/2/94 transcript, pp. 60-61, 73.) The implication of Dixon's testimony was that these killings and beatings were part of a large conspiracy in Alameda County involving the police department, the school district and other government officials. Dixon presented no evidence to corroborate her theory. The court finds that there is no credible evidence that a conspiracy to silence dissenters in Emeryville exists.

2. At the May 2, 1994 hearing, Dixon stated that she felt that a review of the depositions would aid in the resolution of the Order To Show Cause. (5/2/94 transcript, p. 67:9-14.) Dixon requested and was given ten days within which to identify the depositions or present

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the deposition excerpts she wished the court to read. (Id., pp. 67:4 - 68:10.) Dixon did not file any depositions, deposition excerpts, or any explanation for her failure to do so after the hearing.

3. Dixon's 24-page Response to OSC illustrates Dixon's attitude toward the requirement of a good faith basis for statements made to the court or in court **[*22]** filings. For example, Dixon stated: "My duty is not to protect teachers or administrators who have beaten and abused and molested children. My duty is to state the truth to the court, and to advocate for my clients' rights and protection. The teachers and administrators in this case have a simple way to preserve their reputations -- come clean before the Honorable Judge Caulfield." (Response to OSC, pp. 13-14.)

4. Dixon stated her views of her role in these related cases:

> It is also true, that I fight against racism in this society, against hate-crimes and this fight is not a picnic, nor for the faint-hearted. Furthermore, I am hated and targeted by the Ku Klux Klan, Aryan Nation, the various neo-Nazi parties, and the kidnappers and abusers of little children, and by the drug and gun runners who exploit these children. I also do not believe in the concept of "child love" and found it difficult to hear counsel for the Emery Unified School District, ask child after child in depositions under oath, repeatedly if he or she liked his teacher, how much he or she liked his teacher, and whether or not he or she found his or her teachers['] touches acceptable and friendly. [P] I am the **[*23]** personal enemy of child molesters in Alameda County. (Response to OSC, pp. 16-17.)

5. Dixon generally has not included the court among the targets of her negative comments, except that she did claim that the OSC was racially motivated.

D. Other Observations of Dixon's Conduct

1. Earlier in the Guerrero case, Dixon failed to serve on the defense attorneys the same document she had submitted to the court. Dixon submitted two different versions of a Second Amended Complaint to the court, but only the earlier version to defense counsel. It was not until the hearing on defendant's motion to dismiss the earlier version of the Second Amended Complaint that defense counsel learned that Dixon had filed a superseding Second Amended Complaint.

2. Kate Dixon's conduct described in this Order did not adequately represent her clients in Guerrero and the related cases. Dixon's conduct harmed the interests of her clients.

3. Dixon has grossly mischaracterized evidence on several occasions. See, e.g., footnote 4 above. Dixon's characterization of Exhibit 39 is another example of the problem. Exhibit 39 was entitled "Summarized transcripts of children's testimony in sealed videotapes." **[*24]** Dixon summarized the interview of Malikh Bratton (Exh. 5): "States that [teacher] repeatedly grabbed her chest and fondled her." The taped interview of Malikh Bratton on November 8, 1992 does not include this material. (Exh. 5, approx. 24 minutes into tape). Bratton stated in the interview that the teacher on one occasion grabbed her around the neck, grabbed her by the shoulders and yelled at her to stop talking -- clearly indicating hostility. Bratton neither stated nor implied that the teacher fondled her, or that his actions had any sexual overtones.

E. Dixon's Difficulties In Other Litigation

1. Substantial sanctions were awarded against Dixon for improper conduct in litigation in the

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Northern District of California. In Lane v. City of Emeryville, Case No. C 93-1128 BAC, Kate Dixon was sanctioned $ 15,000.00 by Judge Vukasin for attempting to remove a judge from a federal case by dismissing a complaint and re-filing the same complaint, and for filing a frivolous complaint. (Order entered July 30, 1993 in Case No. C93-1128 BAC.) Judge Vukasin analyzed Dixon's response to an order to show cause why sanctions should not be imposed:

> The court finds that Dixon's story is **[*25]** nothing more than an ad hoc apology, concocted in an attempt to cover up a rank instance of judge shopping. The court finds that Dixon's conduct -- dismissing case C-93-191-JPV and then three days later filing case C-93-1128 WHO without filing a notice of related cases -- was undertaken solely for the improper purpose of judge shopping. (Id., p. 6.)

Judge Vukasin also described the background of the Lane plaintiffs' dealings with the defendants in that case and concluded that the "action [was] legally frivolous" and the allegations were "wholly lacking in factual foundation." (Id., pp. 9-10.) After Judge Vukasin's death, the Lane case was transferred to this judge. Dixon did not pay the sanctions. Dixon did not attempt to explain her non-payment until contempt proceedings were commenced against her in Lane. On January 1, 1994, Dixon was held in contempt of court for failing to pay the sanction. Dixon represented to the court that she was having financial difficulties, and at one point suggested a payment schedule of $ 50.00 per month -- a schedule that would take 25 years to pay off the sanctions.

2. A state court judgment was entered against Ms. Dixon **[*26]** for conversion of client funds. In an action entitled Phelps v. Dixon, filed in San Francisco Superior Court, it was alleged that Dixon took $ 23,500 cash from a hospitalized elderly client's safe deposit box and refused to return the money to the client. A judgment of $ 23,500 compensatory damages, $ 12,000 punitive damages, interest, and costs was awarded against Dixon. Dixon's cross-complaint in the action was stricken as a sanction for Dixon's refusal to appear for a deposition following a court order to do so. Dixon also was sanctioned for refusing to answer post-judgment interrogatories in that action. The opposing attorney in the Phelps case filed a motion to have Dixon held in contempt of court, but on the date set for hearing, Dixon commenced a bankruptcy proceeding. n9

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n9 Robert N. Beechinor, the opposing counsel in the Phelps case filed a declaration in Kate Dixon's bankruptcy case. Beechinor's declaration came to this court's attention when it was attached as an exhibit to the Declaration of Joel Zeldin Re Response of Attorney Kate Dixon to January 3, 1994 Order, filed in Lane v. City of Emeryville, No. C93-1128 BAC on January 24, 1994.

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3. The California State Bar investigated Ms. Dixon's conduct described in the preceding paragraph. The court is unaware of any record of discipline imposed on Dixon. Dixon states that she was exonerated by the State Bar's investigation into the Phelps case.

4. The court has observed Dixon's conduct during a number of court proceedings. In several hearings, Dixon exhibited such a high degree of emotional upset that court proceedings were disrupted. Dixon's severe exaggerations and distortions have impeded her clients' ability to

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obtain redress for their grievances. The level of emotional duress Dixon experiences because of the subject matter of these cases -- i.e., involving alleged corporal punishment and racism in school -- prevents effective representation of her clients. Additionally, Dixon's hostility toward the City of Emeryville, Emeryville schools and the Emeryville Police Department often overtakes her ability to present clear argument on her clients' behalf.

5. The court has observed a number of the plaintiffs and the guardians ad litem in Guerrero and the related cases, in videotapes, depositions, and court hearings. The court has seen nothing to indicate **[*28]** that Dixon is making the allegations and statements described above at the request of her clients. The court believes that Dixon's accusations of pedophilia and retaliatory killings and beatings against the employees of the school district, the attorneys, and the police are originating primarily from Dixon.

III. CONCLUSIONS OF LAW

A. Standards of Conduct

*HN1*Admission to practice before the United States District Court for Northern District of California is conditioned upon the lawyer's adherence to certain standards of professional conduct. Attorneys practicing in this district must "maintain the respect due courts of justice and judicial officers; [and] perform with the honesty, care, and decorum required for the fair and efficient administration of justice . . . . " N. D. Cal. Local Rule 110-3.

*HN2*Attorneys practicing in this district also are required to comply with the standards of professional conduct required of members of the State Bar of California. Ibid. Among the rules that must be complied with is the following: "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." Cal. Rule Prof. Conduct 3-110(A). "Competence" **[*29]** in legal services applies to the diligence, learning and skill, and "mental, emotional, and physical ability reasonably necessary for the performance of such service." Cal. Rule Prof. Conduct 3-110(B). The rules also clearly prohibit an attorney from attempting to mislead a judge by misrepresentations of fact or law. Cal. Rule Prof. Conduct 5-200(B).

*HN3*The authority of a federal district court to discipline attorneys practicing before it is settled. In Re Snyder, 472 U.S. 634, 643, 105 S. Ct. 2874, 86 L. Ed. 2d 504 (1985). The court may control the conduct of lawyers both in and outside of the courtroom. See Chambers v. NASCO, Inc., 501 U.S. 32, 111 S. Ct. 2123, 2132, 115 L. Ed. 2d 27 (1991).

*HN4*The rules of professional conduct apply to speech as well as conduct. The First Amendment notwithstanding, a lawyer's right to free speech is limited during litigation.

> It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed. . . . Even outside the courtroom, a majority of the **[*30]** court in two separate opinions in the case of In re Snyder . . . observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be. (Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S. Ct. 2720, 2743, 115 L. Ed. 2d 888 (1991).)

*HN5*Courts have imposed discipline for a wide range of conduct, including offensive and

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threatening speech. E.g., Standing Comm. on Discipline of the United States District Court for the Southern Dist. of Cal. v. Ross, 735 F.2d 1168, 1171 (9th Cir. 1984) (finding attorneys' threats of physical harm to opposing counsel, such as "if you get in my way, I'm going to punch you right in the f---ing face" were so improper that they "speak for themselves"); People v. Genchi, 824 P.2d 815, 816 (Colo. 1992) (disciplining attorney for making uncomplimentary observations and physical threats during deposition and shoving deponent's wife after deposition); Office of Disciplinary Counsel v. Levin, 35 Ohio St. 3d 4, 517 N.E.2d 892, 893-94 (Ohio 1988) **[*31]** (discipline imposed for misconduct including physical threats and verbal abuse to opposing counsel during and after deposition).

*HN6*Before discipline may be imposed, an attorney must receive due process of law. In Re Ruffalo, 390 U.S. 544, 550, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968). There is no uniform process for enforcing these rules through discipline in the federal court system; rather, the judicial districts are "free to define the rules to be followed and the grounds for punishment." Ross, supra, 735 F.2d 1168, 1170.

The Northern District of California's Local rules establish procedures for enforcement of its rules of professional conduct. *HN7*"In the event any attorney practicing before the court engages in conduct which may warrant discipline or other sanctions, the court or any judge may initiate proceedings for contempt . . . or may, after reasonable notice and an opportunity to show cause to the contrary, take any other appropriate disciplinary action against the attorney." N. D. Cal. Local Rule 110-7.

Due process concerns were satisfied here. The OSC notified Dixon that discipline might **[*32]** be imposed, notified her of the specific rules implicated by her conduct, and listed the items which had prompted the court's concern. Dixon had an opportunity to be heard. She submitted a written brief with supporting documents which the court reviewed. Two hearings were held. At the first hearing -- three weeks after the OSC had issued -- Dixon requested and was granted a continuance. At the second hearing, Dixon was invited to present evidence and she testified.

Dixon claimed at both the first and second hearings that she did not understand what the charges were against her. The conduct and rules at issue were described in the OSC and at the first hearing on March 11, 1994. The testimony on May 2 disclosed to the court evidence of additional instances in which Dixon failed to comply with the same rules previously identified. Dixon claimed at the May 2 hearing that the charges were being developed against her on that day. Dixon requested and was granted permission on May 2 to file deposition excerpts in support of her position. Dixon's choice not to avail herself of this further opportunity to be heard is not a denial of due process.

B. Violations of Standards of Conduct

Dixon's **[*33]** conduct violated standards of professional conduct in twenty-six (26) separate instances:

1-4. Four instances of making inflammatory allegations at a time when she had no evidence or no objective good faith basis to support those allegation. n10

5. Becoming so emotionally upset and unstable at depositions that she disrupted the depositions, caused her own clients (children) to cry, which delayed and impeded the taking of testimony relevant to the charges of civil rights violations.

6. Becoming so emotionally upset and unstable that she was unable to follow the court's requests for performance of certain obligations on behalf of her clients.

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7. Accusing the court of racial bias when she had no evidence to support the accusation. n11

8-10. Three instances of misrepresenting the content of evidence submitted to the court. n12

11. Requesting relief from the court while in possession of evidence unequivocally refuting entitlement to such relief. n13

12-19. Eight instances of unprofessional conduct at depositions. n14

20. In a court hearing, accusing opposing counsel of engaging in lewd and lascivious conduct and child abuse during depositions without a factual basis for **[*34]** the statements.

21. Accusing opposing counsel of being a racist, and threatening to hold her personally liable for the abuse of the children without a factual basis for the statements.

22. Implying that opposing counsel is connected to organized crime without a factual basis for the statement.

23. Failing to file documents (i.e., deposition transcripts) she agreed to file with the court.

24. Failing to serve on the defense attorneys the same amended complaint she submitted to the court.

25. Serving opposing counsel with disorganized and incomplete pleadings in place of an entire set of pleadings.

26. Claiming conspiracies existed to harm or kill her and her clients and claiming that past killings and beatings in Alameda County were part of a conspiracy to silence dissenters in Emeryville -- but presenting no evidence or facts to corroborate the theory.

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n10 The statements were: (1) "because of brutal retaliation against students who testify (such as expulsions, suspension, at least twenty incidents of jailing in the Emery City Jail basement cell) . . . ." (2) "In early 1993 one child beat up one of the Emery school teachers who was sexually abusing boys in the school parking lot, at night, where this teacher lurked." (3) "The Order prohibiting corporal punishment was violated hundreds of times. And this was covered-up." (4) "Beginning in September 1993, about Eighty (80) children transferred out of Emery into Berkeley, Albany and Oakland to avoid battery and molestation and segregated conditions at Emery." **[*35]**

n11 Dixon claimed that the OSC was racially motivated, and would not have been issued if her clients were Caucasian.

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n12 First, Dixon stated that certain videotaped statements (Exhibits 2, 30, and 34) supported the statement that a student beat up a pedophile teacher lurking in a parking lot. Second, Dixon stated that the videotaped statements of "LM, MM, MF, [and] TW" supported the statement regarding transfers out of school to avoid battery, molestation and segregation. Third, Dixon stated that Exhibit 39 contained the statement of a witness fondled by a teacher.

n13 Dixon claimed that Lillian McDuffy had been struck in violation of the TRO while knowing that the alleged conduct occurred months before the TRO issued.

n14 Dixon's misconduct at depositions included: swiping a pad of paper at opposing attorney's coffee cup; making physical contact with opposing attorney; accusing opposing counsel of desiring to engage in sodomy with a client; making physically intimidating gestures (leaning across table with fists clenched); calling opposing counsel an "asshole" on and off the record; shouting, yelling, and calling the questioning attorney names which disrupted the proceedings, prompting child witnesses to cry; and reciting answers to a pending question for a witness she was representing, rather than letting the witness answer.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*36]**

The court finds that Dixon has consistently failed to perform with the honesty, care, and decorum required for the fair and efficient administration of justice, in violation of Local Rule 110-3. Dixon's misrepresentation of the content of evidence submitted to the court and request for relief to which plaintiffs were not entitled were failures to perform with the required honesty. Ibid. Dixon's emotional upset and instability disrupting depositions and court proceedings, unsubstantiated accusations against defendants, and defense counsel were failures to perform with the required decorum and care. Ibid. Dixon's failure to file the promised depositions (or inform the court of her choice not to file), failure to serve documents on opposing counsel that conformed to the court filing, and service of disorganized and incomplete papers on opposing counsel were failures to exercise the required care. Ibid.

The court also finds that Dixon has repeatedly failed to perform legal services with competence in Guerrero and the related cases in violation of California Rule of Professional Conduct 3-110(A). Dixon lacks the emotional stability and legal skill reasonably necessary **[*37]** to perform those legal services. The court has observed in court hearings that Ms. Dixon suffers enormous emotional strain due to the subject matter of this litigation and cannot adequately control her emotions in order to perform legal services adequately.

Dixon's anger and hostility about racism, child abuse and pedophilia in general overwhelm her work in these cases and lead to inept or unprofessional lawyering. Dixon has repeatedly labeled the opposing parties and opposing counsel as racists, child abusers, and pedophiles without a factual basis. This court finds zealous representation of clients essential to the judicial process, but zeal without a factual basis or production of evidence in a court of law defeats the clients' ability to be properly represented. Dixon's inability to support accusations with facts harms her credibility, and her loss of credibility cannot help but harm her clients' interests.

The court also finds that Dixon's misrepresentations as to the content of evidence submitted to the court and request for relief to which plaintiffs were not entitled were violations of California Rule of Professional Conduct 5-200(B) and California Business and Professions **[*38]** Code Section 6068(d).

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C. Discipline

HN8 Once misconduct is found, the issue becomes the appropriate discipline. Discipline is determined on a case-by-case basis. Factors relevant to the determination include the nature of the misconduct, deterrence to the subject lawyer and others, preservation of the bar's integrity, protection of the public, condemnation of the conduct, justice to the subject lawyer, and consistency with other similar cases. If warranted, the discipline may take the form of disbarment, suspension from practice, probation with conditions, monetary sanctions, public reprimand, or private reprimand. See ABA/BNA Lawyer's Manual on Professional Conduct § 101.3001 (1986).

HN9 The presence of aggravating or mitigating factors may influence the nature of the discipline imposed. Id., § 101.3101 (1987). Aggravating factors include a "pattern of serious, recurrent misconduct" (Lebbos v. State Bar of Cal., 53 Cal.3d 37, 45, 278 Cal.Rptr. 845, 806 P.2d 317 (1991)), "a failure to appreciate the gravity of the conduct which is conceded, and a contemptuous attitude toward the disciplinary proceedings . . .." Maltaman v. State Bar of Cal., 43 Cal.3d 924, 958, 239 Cal.Rptr. 687, 741 P.2d 185 (1987). **[*39]** Mitigating factors may include the lawyer's good character and reputation, lack of prior **misconduct, remorse,** inexperience, cooperation with disciplinary authorities, rehabilitation and substance abuse. See ABA/BNA Lawyer's Manual on Professional Conduct § 101.3201 (1986). Mitigating factors may affect the nature and extent of the discipline, but do not excuse any misconduct. Id.

The lack of discipline of Ms. Dixon by the California State Bar is a factor in mitigation. However, the factors in aggravation significantly outweigh it.

There are several factors in aggravation. First, the evidence presented reveals a "pattern of serious, recurrent misconduct" by Ms. Dixon in the context of the Guerrero cases. Dixon has repeatedly lashed out at lawyers and litigants on the opposing side with insults, threats and scurrilous accusations. Dixon's objectionable conduct toward defense counsel was not limited to a single attorney; she has had difficulties with all three defense attorneys. Ms. Dixon's inability to comport herself in a professional manner has repeatedly interfered with the administration of justice and endangered the interests of her clients.

Second, the conduct in the **[*40]** Guerrero cases is not the first instance of misconduct. As stated above, Dixon was found by another federal judge to have "judge-shopped" and filed a frivolous complaint, resulting in a sanction of $ 15,000. Dixon then failed to pay the sanction, and failed to explain non-payment until contempt proceedings were commenced. Dixon also suffered a state court judgment, including an award of punitive damages, for conversion of client funds. Dixon was sanctioned twice in that state court action. Dixon's filing of a scurrilous declaration and brief in yet another state court action accusing opposing counsel of being a racist pedophile also is troublesome. (The intent to insult the opponent and divert that court's attention is readily evident, as her statements were unrelated to the subject of the motion to compel.)

The final and most significant aggravating factor is Dixon's lack of comprehension of the impropriety of her conduct. Indeed, Dixon stands before the court with pride as she describes her fight and tenacity. The notion that threats, rudeness, vulgarity, scurrilous accusations and irrational screaming are acceptable as part of the rough-and-tumble of modern day litigation is **[*41]** simply wrong. Professional conduct standards exist to prevent just such an "anything goes" mentality. The noblest of causes does not entitle an attorney to ignore the standards of conduct by which all attorneys must abide.

The emotional and mental strain Dixon suffers, while unfortunate, cannot excuse the misconduct. HN10 Protection of the public, the courts, and the legal profession is the key

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goal of the proceedings. The court's "'primary concern must be the fulfillment of proper professional standards, whatever the unfortunate cause, emotional or otherwise, for the attorney's failure to do so.'" Snyder v. State Bar of Cal., 18 Cal.3d 286, 293, 133 Cal.Rptr. 864, 555 P.2d 1104 (1976). In determining the scope of discipline to be imposed, the court has taken into account the fact that much of Dixon's egregious behavior appears to have been prompted by her rage about child abuse, pedophilia and racism as well as extreme hostility to the governmental entities in Emeryville.

The protective function of attorney discipline is particularly significant in a case such as this, where the errant attorney represents children. *HN11*The court **[*42]** has greater supervisory powers where the litigants are minors, even after a guardian ad litem is appointed. The court may exercise supervisory powers to ensure that the minor's interests are protected -- such as by requiring court approval of stipulations or concessions that are binding on the minor. "'The relationship between a guardian ad litem or the attorney whom he employs and the minor is not the same as that between an attorney and an adult client. It is the duty of the guardian and the attorney to protect the rights of the minor, and it is the duty of the court to see that such rights are protected.'" In re. Christina B., 19 Cal.App.4th 1441, 23 Cal.Rptr.2d 918, 925 (4th Dist. 1993), quoting Berry v. Chaplin, 74 Cal.App.2d 652, 657, 169 P.2d 442 (2d Dist. 1946). An attorney's professional misconduct is detrimental to a minor's interest because it may lead to an adverse judgment without regard to the merits. The court may exercise its supervisory powers to prevent the harm to a minor client.

Absent court intervention at this point, Dixon's conduct very likely will cause harm **[*43]** to the legal rights of the minors. Her conduct has delayed the resolution of these cases. The court finds that Dixon is not adequately presenting the merits of the minors' case. Adverse termination of this litigation before the merits are reached is a distinct possibility because of Dixon's professional failures. The court's inherent power and obligation to ensure the protection of the minor litigants' interests provides an additional ground for items 4-6 of the discipline imposed.

It is not necessary for these cases to be fully tried on the merits before considering the propriety of discipline against Dixon. The court identified discrete statements as to which it required Dixon to make a factual showing. Dixon did not show that these statements had a factual basis. Hearing the merits of all the cases would not aid the court in ruling on the OSC. Many of Dixon's difficulties concern her methods, without regard to the substance of the case. For example, the merits of the Lane case are irrelevant to whether Dixon "judge-shopped," and the merits of the Guerrero cases are irrelevant to the propriety of screaming and obstructive tactics during depositions.

IV. DISPOSITION

1. **[*44]** Kate Dixon is hereby suspended from the practice of law before the United States District Court for the Northern District of California for the period of two years. This suspension is limited and shall preclude Dixon from practicing law in only the following types of cases:

a. Any class action;

b. Any case in which the rights of any minor are at issue;

c. Any case in which corporal punishment of minors is at issue;

d. Any case in which the operation and/or administration of any educational institution or educational program located in the Northern District of California is at issue; and

e. Any case in which the City of Emeryville, Emeryville Police Department, Emery Unified

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School District, or Board of Education of the Emery Unified School District -- or any agent of any of these entities -- is a party.

2. The suspension of Kate Dixon shall commence immediately.

3. If Dixon appears as counsel of record or as a party in any case in the Northern District of California during the period of two years from the date of this order, a copy of this order shall be filed with the court accompanying the first papers filed by or on behalf of Dixon.

4. Dixon is required to inform all clients of **[*45]** this order.

5. Within five days of the date of this order, Dixon shall file a formal notice of withdrawal from representation of the plaintiffs in Guerrero and the related cases.

6. Within five days of the date of this order, Dixon shall notify each of the plaintiffs and guardians ad litem in Guerrero and the related cases of her withdrawal.

7. Within five days of the date of this order, Dixon shall deliver a copy of this order to each of the plaintiffs and guardians ad litem in Guerrero and the related cases.

8. The clerk of this court shall send by mail a copy of this order to the State Bar of California, attention Robert P. Heflin, Discipline Enforcement, 333 South Beaudry Avenue, Los Angeles, California 90017. This order is being forwarded to the State Bar for the State Bar to take such action as it deems appropriate.

9. The clerk of this court shall send a copy of this order to any judge before whom Dixon has a case currently pending. Dixon will provide the clerk of the court with a list of cases (not including the cases which are the subject of this order) within 5 days of this order.

10. The clerk of this court shall file a copy of this order with the attorney **[*46]** discipline files of this court. The clerk shall send this order in response to an inquiry by the public or others regarding discipline of Dixon.

IT IS SO ORDERED.

Dated: July 5, 1994

Barbara A. Caulfield

United States District Judge

ORDER DISMISSING ACTION

The court hereby DISMISSES WITHOUT PREJUDICE this action because the proposed Third Amended Complaint fails to state a claim upon which relief may be granted. Any motion for leave to file a further amended complaint shall be filed within 180 days of the date of this order.

IT IS SO ORDERED.

Dated: 7/5/94

Barbara A. Caulfield

United States District Judge

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