PUBLIC MATTER – DESIGNATED FOR PUBLICATION

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case No. 14-O-00412
	)	
ROBERT ALAN MURRAY,	)	OPINION
	)	
A Member of the State Bar, No. 228691.	)	
	)	

During plea discussions in a child molestation case, Kern County prosecutor Robert Murray added two fabricated lines of testimony to the defendant's transcribed statement that made it appear that the defendant had admitted to having sexual intercourse with a 10-year-old child—an offense that carries a life sentence. Murray then transmitted the false document to the public defender. When confronted by the public defender nine days later, and despite several opportunities to correct the record, Murray claimed it was all a joke. The Kern County Superior Court did not see Murray's actions the same way and found his conduct to be so "egregious," "outrageous," and "conscience-shocking" that it violated the defendant's constitutional rights to counsel and to a fair trial. In light of the prejudicial impact, the superior court dismissed all criminal charges against the defendant. The California Court of Appeal affirmed the dismissal in a published opinion.

The matter was referred to the State Bar. A hearing judge found Murray culpable of grossly negligent conduct amounting to moral turpitude and recommended a 30-day actual suspension. The Office of the Chief Trial Counsel of the State Bar (OCTC) appeals, arguing the discipline is "grossly inadequate" given Murray's intentional behavior and the magnitude of the harm he caused, and requests a one-year actual suspension. Murray does not appeal and

contends, as the hearing judge found, that he was trying to create a moment of levity and ease relations with the public defender, and that he did not intend to deceive anyone or affect the outcome of the case.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we agree with the courts of record in this matter. We find that Murray deliberately created and inserted a fraudulent document into a criminal prosecution while he was actively negotiating a resolution by plea agreement. This altered evidence bore no indicia of being a "prank," and Murray made no prompt effort thereafter to control the consequences. Murray's behavior is wholly inappropriate and unbecoming of an experienced prosecutor, who is expected to adhere to the highest standards of ethical conduct and to act as a gatekeeper to the fair administration of justice. We therefore recommend a one-year actual suspension to protect the public and to maintain integrity and confidence in the legal profession.

I. PROCEDURAL BACKGROUND

On June 16, 2014, OCTC filed a Notice of Disciplinary Charges (NDC), charging Murray with one count of violating Business and Professions Code section 6106 (moral turpitude—misrepresentation/falsification of evidence)[1] and two counts of violating section 6068, subdivision (a) (failure to comply with laws).

Trial commenced on August 25, 2015, included four days of testimony, and was followed by post-trial briefing. On December 16, 2015, the hearing judge issued his decision, finding Murray culpable on the count of moral turpitude; the judge dismissed the other two counts and recommended a 30-day actual suspension.

[1] All further references to sections are to the Business and Professions Code unless otherwise noted.

II. FACTUAL BACKGROUND

On June 18, 2013, the Kern County District Attorney's Office charged Efrain Velasco-Palacios (Palacios or defendant) with five counts of lewd and lascivious conduct with a child—a charge with a maximum prison term of 16 years. The child—the 10-year-old daughter of Palacios's live-in girlfriend—alleged that Palacios improperly touched her chest and vaginal area, but did not accuse him of any penetrative acts. When interviewed by the police, Palacios, who primarily spoke Spanish, blamed the young girl for coming on to him, but denied that he had sex with her. He admitted, however, to hugging her, touching her breasts, kissing her, and placing messages on Facebook, asking her to go on vacation with him, telling her that he loved her, and stating that he wanted to "be grabbing [her] body again" and to "make love to [her] again."[2]

During pretrial settlement talks, Murray met with Ernest Hinman, the public defender appointed to represent Palacios, and offered a plea bargain of eight years. Hinman conveyed the offer to Palacios, who rejected it. Hinman continued to try to persuade Palacios to make a counteroffer and informed Murray that he believed Palacios would ultimately agree to a plea.

While Hinman was making these efforts, Murray told him he was considering re-interviewing the victim and reexamining the evidence to determine whether penetrative acts had occurred, and if so, dismissing the charges and refiling the case as an enhanced crime, which carried a life sentence. Murray also informed Hinman that a plea offer would likely be unavailable if the charges were refiled. Hinman insisted that although Palacios had made several admissions in his statement to the police, he did not admit to penetration. Murray disagreed and said he would review the file, which he did on October 21, 2013. He testified that he became frustrated when he realized Hinman was right and the evidence did not support the greater

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[2] Palacios's statement to the police was audio-recorded and then later translated into English for use in the criminal trial.

charge. He then added the following two lines to the end of Palacios's transcript that implied that Palacios had had sexual intercourse with the child:

> [Officer Martinez]: You're so guilty you child molester.
> [Palacios]: I know. I'm just glad she's not pregnant like her mother.

During normal business hours that same day, Murray emailed the altered transcript to Hinman from his office email account. Nothing in the text, font, or formatting of the alteration, or in the manner in which the altered document was delivered, signaled anything unusual. And there was some truth in Murray's manufactured admission because, in fact, the girl's mother was pregnant by Palacios. After sending the transcript to Hinman, Murray turned his attention to other pressing matters, and claimed he forgot about it.

Murray later defended his actions as a "joke." He testified in these proceedings that he was carrying an unusually heavy caseload at the time, including several infant homicide cases, and he underestimated the emotional toll it was taking as he struggled to cope with it. He stated that it was out of character for him to play a "prank" like this, but it was an attempt to deal with the stress through humor.

Hinman read the altered transcript within several days of receiving it. He did not recognize the false confession to be anything but genuine and had no reason to believe Murray was playing a "prank" on him. He testified: "There were some jokes over the years [with Murray], but the relationship between us was not one of, you know, playing a prank with a piece of evidence. I'd never seen that or heard of that before, ever. . . . I wouldn't have expected any prosecutor or defense attorney on a case to do that." Instead, Hinman was troubled that his copy of the transcript was incomplete. He was also reluctant to raise the issue directly with Murray; he did not want to alert Murray to any incriminating statements by Palacios that Murray might have overlooked.

Hinman then conducted a videoconference with his incarcerated client, asking him about the last two lines of the transcript, and informing him that an admission of penetration could be used to file more serious charges against him. Palacios denied making the statement. He later testified to the superior court that he initially had a good relationship with Hinman and was comfortable with Hinman representing him at trial; however, after Hinman approached him with falsified evidence, he "did not feel safe" and "[did not] even trust in [his] attorney anymore."

On October 28, 2013, the parties appeared in court for what was scheduled to be the first day of trial. Several other matters were also on calendar that day, and Murray and Hinman sat in different areas without talking. When the Palacios matter was called, Hinman asked for a continuance, and the court postponed the matter to November 5, 2013. Murray did not mention the fabricated lines in the transcript to Hinman.

Officer Martinez, who conducted the initial interview with Palacios, had been subpoenaed to testify and was also present in court that day. Martinez and Murray had never met before, and they left together to discuss the case at Murray's office. When Murray provided Martinez with a copy of Palacios's transcribed statement, he realized that the false confession was still included. He told Martinez to ignore those lines as they were a joke, and provided him with an accurate copy. However, Murray made no effort at that time to contact Hinman to set the record straight with him. Martinez testified in these proceedings that he did not think Murray's "joke" was funny.

On October 30, 2013, nine days after receiving the falsified transcript, Hinman emailed Murray to request a copy of the exact CD that Murray's transcriber/interpreter had used. Murray did not respond. Later that same morning, when they both arrived for a scheduled court hearing, Hinman asked if Murray had received his email. Murray said he had, and then disclosed that he

had fabricated the last two lines of Palacios's statement. Hinman testified that he was "shocked."

After discussing the matter with his supervisors, on November 15, 2013, Hinman filed a motion to dismiss the criminal charges against Palacios, alleging outrageous prosecutorial misconduct. The District Attorney's Office filed an opposition that included Murray's sworn affidavit describing the purported circumstances of the creation and transmission of the altered document. After the opposition was filed, the Public Defender's Office removed Hinman from the case, citing the appearance of impropriety.

On December 17, 2013, the superior court held a full evidentiary hearing on the motion to dismiss. Judge Staley, a retired criminal court judge, presided over the matter and heard argument and evidence, including the testimony of Hinman, Murray, and Palacios. At the conclusion of the two-day hearing, Judge Staley granted the motion to dismiss. Notably, in his written ruling, the judge expressly rejected Murray's joke excuse, finding that Murray acted intentionally:

> Murray sent Hinman a fabricated version of a statement that the defendant made to law enforcement. This was done through common ordinary criminal discovery channels. This version had added fabrications that were highly material. These fabricated additions fit directly into what Murray had told Hinman he was lacking, a fact which frustrated him. He sent this the same day he told Hinman that he could not find the evidence he needed for the greater charges.
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> Murray did not reveal this *intentional* fabrication that same day, the next day, or even within a week. Murray revealed the fact of the fabrication only after nine days and then only after Hinman indicated that he felt that there might be some abnormality with those 'new' statements.
>
> It was also not revealed until after the [*sic*] Hinman had questioned his client about making these statements. This had a prejudicial effect on the attorney-client relationship. The fabrication was 'in play' while the [*sic*] Murray knew Hinman was attempting to encourage his client to make counter offers to settle the case.
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> Even as a joke, a fact which was not proven, it does shock the conscience of the court. Could it have been done as a joke and been less outrageous? Possibly, if followed up with contact immediately and before the defense had the opportunity to

> act on the case with the fabricated admissions in mind. But those are not the facts of this case, as orchestrated by Murray.
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> Instead, Murray claims to have forgotten about having provided the fabricated version, despite this being a unique joke, in that he had never done anything like this before. Forgetting was attributed by the People to the press of other business, other cases which demanded Murray's time and attention, while this defendant and his attorney were left to respond to the fabrication. Again, Murray was fully aware of his caseload and its requirements. [¶]
>
> This court does not believe that it can tolerate such outrageous conduct that results in the deprivation of basic fundamental constitutional rights that are designed to provide basic fairness.
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> The prosecutor's conduct was egregious, outrageous, and it shocked the conscience of this court.

(*People v. Velasco-Palacios* (Super. Ct. Kern County, 2013, No. TF006398), italics added.)

The District Attorney's Office sought appellate review. On February 24, 2015, after briefing and oral argument (conducted by the State Attorney General's Office), the California Court of Appeal issued a published opinion upholding the dismissal of the case against Palacios. Specifically, the Court of Appeal affirmed the superior court's findings that Murray's actions were deliberate, prejudicial, and violative of the defendant's constitutional rights:

> Here, the trial court found Murray *deliberately* altered an interrogation transcript to include a confession that could be used to justify charges carrying a life sentence, and he distributed it to defense counsel during a period of time when Murray knew defense counsel was trying to persuade defendant to settle the case. Further, Murray did not reveal the alterations until nine days later, and only then when he was directly confronted about the fabricated lines by defense counsel. This is egregious misconduct and, as is shown . . . it directly interfered with defendant's attorney-client relationship. Because Murray clearly engaged in egregious misconduct that prejudiced defendant's constitutional right to counsel, the trial court was correct in finding Murray's actions were outrageous and conscience shocking in a constitutional sense.

(*People v. Velasco-Palacios* (2015) 235 Cal.App.4th 439, 447, italics added.)

III. MURRAY INTENTIONALLY CREATED AND TRANSMITTED A FALSE CONFESSION

A. Count One: Section 6106 (Moral Turpitude—Misrepresentation/Falsification of Evidence)[3]

In Count One of the NDC, OCTC alleged that Murray committed an act of moral turpitude when he knowingly created and transmitted Palacios's false confession to Hinman. At trial, Murray contested the charge, maintaining that his actions were an ill-conceived attempt at humor and that he did not intend to deceive anyone. The hearing judge agreed, but found Murray culpable of gross negligence. In what the judge described as a "joke-gone-bad," he found that Murray created a risk of significant harm to the pending criminal case and failed to take any precautionary steps or prompt curative measures to make it understood that the altered document was actually a "prank" document.

On review, Murray accepts the gross negligence finding, but we do not. Although the hearing judge's factual findings are afforded great weight, we must independently assess the record and may make different findings or conclusions. (Rules Proc. of State Bar, rule 5.155(A).)

The record undeniably demonstrates that Murray intentionally altered Palacios's statement. Murray himself testified that it was an "intentional" act. Moreover, both the superior court and the Court of Appeal found that Murray acted with purpose and motive. Both courts expressly rejected his "joke" defense and found that he "intentionally" and "deliberately" fabricated Palacios's statement to influence plea negotiations. Judge Staley found that the manufactured confession supplied the missing piece of evidence that Murray told Hinman he was lacking. Judge Staley also did not believe Murray's testimony that the press of business

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[3] Section 6106 states: "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension."

caused him to "forget" to notify Hinman of the fabrication since Murray claimed it was a "unique joke" in that he had never done anything like it before. Instead, the judge found that Murray was aware of his caseload and had ample time and opportunity to correct the record, yet he did nothing for nine days, and only when confronted by Hinman. By then, Hinman had used the altered material to try and encourage Palacios to settle the case.

Murray's actions prejudiced Palacios's right to a fair trial, compromised the entire case, and resulted in the dismissal of all criminal charges against Palacios.[4] Such conduct by a seasoned prosecutor is more than irresponsible or inattentive (as gross negligence denotes)—it is egregious and outrageous, and it shocks the conscience of the court. The criminal courts came to this conclusion, and, as a matter of law, the findings of these courts are entitled to a strong presumption of validity and prima facie weight. (*Maltaman v. State Bar* (1987) 43 Cal.3d 924, 947 [findings of other tribunals made under preponderance of evidence standard given strong presumption of validity in State Bar proceedings if supported by substantial evidence]; *In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 117-118) [court of appeal opinion to which attorney was party is, at minimum, considered prima facie determination of matters bearing strong similarity, if not identity, to charged disciplinary conduct].)[5]

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[4] Unlike the hearing judge, we see no reason to entertain a First Amendment free speech argument given that the criminal courts clearly found that Murray's actions prejudiced Palacios's constitutional right to counsel. (*Gentile v. State of Nev.* (1991) 501 U.S. 1030, 1075 [ability to restrict attorney participating as counsel in pending criminal case from speech that creates "substantial likelihood of material prejudice" to that proceeding or to parties' rights to fair trial is not violative of First Amendment].)

[5] While Murray was not technically a party to the Palacios criminal case, his falsification of Palacios's statement was the basis of the public defender's motion to dismiss—which included briefing and an evidentiary hearing where Murray testified and presented his version of events, as did Hinman and Palacios. Moreover, Murray's office (the Kern County District Attorney's Office) opposed the motion to dismiss and defended Murray's conduct. For purposes of our analysis, we find that Murray was equivalent to a party, his misconduct bears a strong similarity to the charged disciplinary misconduct in this proceeding, and Judge Staley's decision to grant the motion to dismiss was based on substantial evidence. This situation is analogous to a

While the hearing judge acknowledged the prior criminal court decisions and the appellate opinion, he failed to give them the proper weight. In fact, he gave them no weight at all, and then proceeded to explain how the evidence Murray presented in this proceeding differed from the criminal case. (*In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 206 [respondent has right to introduce evidence to controvert, temper or explain prior findings].) For the most part, the hearing judge said he was aided by "the far more revealing testimony" of Hinman, Chief Deputy Kang of the Public Defender's Office, Officer Martinez, and Murray, which, according to the hearing judge, "substantially undermine[d] many of the [criminal court] findings and conclusions." However, the record is clear that Murray was the only one who firmly believed his actions were a joke, as Hinman, Chief Deputy Kang, and Officer Martinez testified otherwise.

When Hinman was asked if he thought Murray's intent was to play a joke, he testified: "I don't know." He further testified that Murray would have been "stupid" to try and intentionally alter evidence because "he would have been caught, unless there was a plea in the case." Hinman's point is important because this is precisely what the criminal courts found—that Murray was trying to entice a plea with trumped-up facts and the threat of new, more serious charges.

Hinman's supervisor, Chief Deputy Kang, said he had never seen a prosecutor play a joke like this on a public defender in his office. When asked whether he thought Murray was joking, he testified: "Maybe, in some measure, in Mr. Murray's mind, this was funny. I don't see it as a joke."

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sanction proceeding against an attorney who is involved in a case, but not a named participant in the caption. (See *In the Matter of Lais, supra,* 4 Cal. State Bar Ct. Rptr. at p. 117.)

Similarly, when Officer Martinez was asked his opinion of Murray's actions, he testified: "I didn't think it was funny." He further testified that in his experience as a law enforcement officer, he had never before seen or heard of a prosecutor doing something like this.

Like the criminal courts, these witnesses did not find Murray's actions to be a joke or even an appropriate subject to joke about. Nor do we—"a trial is not a game." (*In re Ferguson* (1971) 5 Cal.3d 525, 531.)

The duties Murray violated are profound and fundamental to our system of justice. He failed to live up to the standard imposed on him by virtue of his unique role in the administration of justice. Our independent review of the record gives us no reason to diverge from the prior criminal court findings, which come to us with prima facie validity. Accordingly, we find that Murray intentionally breached his ethical duties as a prosecutor by creating and transmitting falsified material in a criminal case.

B. Count Two: Section 6068, Subdivision (a) (Failure to Comply with Laws)[6]

OCTC charged Murray with violating Palacios's Fourteenth Amendment right to due process and his Sixth Amendment right to counsel under the United States Constitution. The hearing judge dismissed this count as duplicative of Count One. OCTC does not challenge the dismissal, and we adopt it. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060 [little, if any, purpose is served by duplicate allegations of misconduct in State Bar Court proceedings].)

C. Count Three: Section 6068, Subdivision (a) (Failure to Comply with Laws)

OCTC also charged Murray with violating discovery statutes that require prosecutors to disclose, among other things, statements of all defendants and testifying witnesses within 30 days of trial. (Pen. Code, § 1054.1, subds. (b), (c), (e), and (f); Pen. Code, § 1054.7.) The hearing judge dismissed this count, finding Murray did not withhold any items subject to

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[6] Section 6068, subdivision (a), provides: "It is the duty of an attorney to . . . support the Constitution and laws of the United States and of this state."

disclosure: "[T]he gravamen of the State Bar evidence . . . is that [Murray] provided improper information, rather than withheld evidence. Such alleged conduct does not violate the specific statutes cited in this count." (Underscoring in original.)

While we disagree with the hearing judge and conclude that Murray violated at least the spirit of the discovery statutes when he produced falsified material (see Pen. Code, § 1054 [discovery statutes enacted to save time, protect victims and witnesses, and "promote the ascertainment of truth in trials"]), we adopt the dismissal of Count Three, which OCTC does not challenge on appeal.

IV. SIGNIFICANT HARM OUTWEIGHS STRONG MITIGATION

Standard 1.5 of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct requires OCTC to establish aggravating circumstances by clear and convincing evidence.[7] Standard 1.6 requires Murray to meet the same burden to prove mitigation. The hearing judge found five factors in mitigation (no prior discipline, cooperation, good character evidence, community service, and remorse) and only one factor in aggravation (significant harm). We adopt these findings, but on balance, assess less weight in mitigation and substantially more in aggravation based on the significant harm Murray caused to the public, the profession, and the overall administration of justice.

A. Aggravation

1. Significant Harm (Std. 1.5(j))

We find Murray's misconduct is aggravated by the significant harm he caused. The underlying criminal case involved a 10-year-old girl who reported being repeatedly molested by Palacios, her mother's live-in boyfriend—a heinous scenario. Due to Murray's intentional

[7] Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

misconduct,[8] the victim did not get her day in court. Moreover, Murray's actions directly interfered with Palacios's attorney-client relationship, causing Palacios to lose trust in his attorney. Lastly, the administration of justice suffered and was fundamentally undermined when the charges against Palacios were dismissed without resolution on the merits. Such egregious misconduct by a prosecutor violates basic notions of ethics, integrity, and fairness upon which the legal profession is built, it erodes confidence in law enforcement and the criminal justice system, and it puts the public at risk. (See *In re Field* (2010) 5 Cal. State Bar Ct. Rptr. 171, 184 [abuse of prosecutorial power negatively impacts reputation of District Attorney's Office and public's trust in criminal justice system]; see also *Price v. State Bar* (1982) 30 Cal.3d 537, 551 (dis. opn. of Richardson, J.) ["It is self evident that a lawyer's presentation to . . . counsel of deliberately fabricated documentary evidence strikes directly at the very integrity of the judicial process."].)

B. Mitigation

1. No Prior Discipline (Std. 1.6(a))

Murray practiced law in California for just under 10 years with no prior record of any discipline. We agree with the hearing judge that this period of unblemished practice is deserving of significant weight in mitigation. (*In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80, 88 ["entitled to full credit" for 10 years of discipline-free practice]; *Hawes v. State Bar* (1990) 51 Cal. 3d 587, 596 [more than 10 years of discipline-free practice entitled to significant mitigation].)

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[8] Because we find in our culpability analysis that Murray acted intentionally, we decline to give intentionality additional weight in aggravation as requested by OCTC. (*In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 68 [after determining factors giving rise to culpability for section 6106 moral turpitude violation, "[t]o again consider those factors in aggravation would improperly give them double weight"].)

When misconduct is serious, as it decidedly was here, a long record of no discipline is most relevant when the misconduct is aberrational. (*Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029.) Although the hearing judge did not make a specific finding in this regard, we assume that because he believed Murray's misconduct was a "joke," he did not think it was innate behavior that would likely recur. Based on the testimony of Murray and his character witnesses, we also believe this was an isolated act.

2. Cooperation and Candor (Std. 1.6(e))

Murray has been candid and cooperative throughout these proceedings and during the criminal proceedings. He waived his Fifth Amendment right, testified freely, and stipulated to facts. However, he did not stipulate to culpability. Such cooperation is entitled to mitigation credit, but, as both the hearing judge and OCTC point out, very limited credit. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [credit for stipulating to facts "very limited" where culpability is denied].)

3. Character Evidence (Std. 1.6(f))

Extraordinary good character, attested to by a wide range of references in the legal and general communities who are aware of the full extent of the misconduct, is entitled to mitigation credit. Murray presented a wide range of character references from numerous individuals, including several prosecutors and criminal defense attorneys, a sitting Kern County superior court judge, and bar association leaders, who were fully aware of his misconduct. Many testified that Murray had their continued support and that they believed in his integrity. Most influential was the testimony of the current elected District Attorney, Lisa Green, who submitted a lengthy letter, stating in part:

> I know Rob Murray and as such I know beyond a shadow of a doubt that he never intended that the transcript be used against the defendant, either in court or for any purpose. His intent, as he repeatedly stated, was to engage in a practical joke at the expense of the deputy public defender. It was a bad joke and Mr. Murray used poor

> judgment, but it was not a malicious act. From the point of disclosure of the existence of the altered transcript, Mr. Murray has taken full responsibility for his actions. He was and continues to be extremely apologetic and extremely remorseful. [¶] As the elected District Attorney, I recognize how Mr. Murray's conduct can impact the public's perception of my office. I further understand that the public's confidence in this office can be undermined by an incident such as this. I would never write this letter if I felt that Rob Murray intentionally edited the transcript in order to strengthen a case and obtain a conviction. In fact, if I believed for a moment that he acted with malevolent intent, I would have pursued termination. The truth is Rob Murray is a man of character who made a mistake. I ask you to take that into consideration as you decide the appropriate punishment. I ask you to not let one mistake define a man's career.

We agree with the hearing judge that Murray is entitled to significant weight in mitigation based on this and similar testimony from members of the bench and bar, who have a "strong interest in maintaining the honest administration of justice." (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319.)

4. Community Service

We also agree with the hearing judge that Murray's community service work is entitled to considerable weight. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) He is a former recipient of the Eagle Scout award and has been active in local scouting activities. He is an elder in his church and active in church life. Finally, he helps victims of crime and their families deal with the aftermath of emotional problems, and he earned the "Prosecutor of the Year" award from the group Mothers Against Drunk Driving.

5. Remorse (Std. 1.6(g))

The hearing judge gave Murray significant mitigation credit for recognizing his wrongdoing and expressing remorse. OCTC challenges this finding, claiming Murray did not engage in "prompt objective steps, demonstrating spontaneous remorse and recognition of the wrongdoing and timely atonement." We agree and assign limited weight. While there is no question Murray is remorseful now, his expression of regret, standing alone, is not deserving of significant weight. (*Hipolito v. State Bar* (1989) 48 Cal.3d 621, 627, fn. 2.) Murray had time

and opportunity yet did nothing to set the record straight in the Palacios case until confronted by Hinman. He took no prompt, remedial action, and, as a result, significant damage was done to the public, the profession, and the administration of justice.

V. LEVEL OF DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts and the legal profession; to preserve public confidence in the legal profession; and to maintain high professional standards for attorneys. (Std. 1.1.) Ultimately, we balance all relevant factors, including mitigating and aggravating circumstances, on a case-by-case basis to ensure that the discipline imposed is consistent with its purpose. (*In re Young* (1989) 49 Cal.3d 257, 266.)

Our analysis begins with the standards. While we recognize that they are not binding on us in every case, the Supreme Court has instructed that we should follow them "whenever possible" (*In re Young, supra,* 49 Cal.3d at p. 267, fn. 11), and they should be given great weight in order to promote "the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91.)

We consider standard 2.11 to be most apt as it addresses the presumptive discipline for acts of moral turpitude and provides that:

> Disbarment or actual suspension is the presumed sanction for an act of moral turpitude. . . . The degree of sanction depends on the magnitude of the misconduct; the extent to which the misconduct harmed or misled the victim, which may include the adjudicator; the impact on the administration of justice, if any; and the extent to which the misconduct related to the member's practice of law.

As an officer of the court and representative of the People, Murray is subject to the highest standards of honesty, fidelity, and rectitude. (*Price v. State Bar, supra,* 30 Cal. 3d at p. 551.) Prosecutors must meet standards of candor and impartiality not demanded of other attorneys. They are held to an elevated standard of conduct because of their "unique function . . .

in representing the interests, and in exercising the . . . power, of the state. [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

"The [prosecutor] is the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." (*Berger v. United States* (1935) 295 U.S. 78, 88.) Although our system of administering criminal justice is adversarial in nature, and prosecutors must be zealous advocates in prosecuting their cases, it cannot be at the cost of justice. (*United States v. Young* (1985) 470 U.S. 1, 7.) The "ultimate goal [of the criminal justice system] is the ascertainment of truth, and where furtherance of the adversary system comes in conflict with the ultimate goal, the adversary system must give way to reasonable restraints designed to further that goal." (*In re Ferguson, supra,* 5 Cal.3d at p. 531.) The court in *In re Ferguson* explained in very practical terms the special role of the prosecutor and the controls that must be in place to maintain that role:

> The duty of the district attorney is not merely that of an advocate. His duty is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial . . . . In the light of the great resources at the command of the district attorney and our commitment that justice be done to the individual, restraints are placed on him to assure that the power committed to his care is used to further the administration of justice in our courts and not to subvert our procedures in criminal trials designed to ascertain the truth.

(*Ibid.*)[9]

We find that Murray lost sight of the significant and vital duties placed upon him as a prosecuting attorney when he intentionally altered Palacios's statement to add a false confession. His misconduct during the course and scope of his work as a district attorney substantially prejudiced Palacios's relationship with his counsel. In fact, it compromised the entire criminal matter, resulting in all charges against Palacios being dismissed. His actions caused immense

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[9] Our recognition of a higher standard of conduct for prosecutors is not only derived from case law. As a result of a prosecutor's unique position in the administration of justice, we note that the American Bar Association adopted a rule of professional conduct detailing the "Special Responsibilities of a Prosecutor." (See ABA Model Rules Prof. Conduct, rule 3.8.)

harm to many others, too, including the 10-year-old victim and her mother, the public, the profession, and our system of justice.

Given the broad range of discipline in standard 2.11, we look to comparable case law to determine the appropriate level of discipline. (See, e.g., *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311). However, our research reveals very limited State Bar discipline case precedent for prosecutorial misconduct of this nature, with cases from our jurisdiction imposing discipline ranging from 30 days' to four years' actual suspension.[10]

In *Noland v. State Bar* (1965) 63 Cal.2d 298, a prosecutor committed an act of moral turpitude by attempting to delete the names of 65 pro-defense jurors from the jury list to gain an advantage at subsequent trials. The list was never used and no case was ever compromised. The prosecutor claimed he was acting out of an altruistic motive to "improve the jury system," and that no harm was intended or resulted. The Supreme Court imposed a 30-day actual suspension, finding that his misconduct was a "calculated thwarting of objective justice." (*Id.* at p. 302.) Murray's misconduct is substantially more serious than Noland's because it prejudicially affected a pending prosecution and caused actual harm to the victim, Palacios, and the administration of justice.

In *Price v. State Bar, supra,* 30 Cal.3d 537, a prosecutor altered evidence presented at a murder trial to obtain a conviction. His misconduct involved moral turpitude, and was aggravated when he attempted to conceal and minimize his acts by visiting the defendant in jail and offering to seek a more favorable sentence if the defendant agreed not to appeal the

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[10] We also note the dearth of precedent nationally; historically, relatively few reported cases addressed the professional discipline of prosecutors, and most involved minor sanctions. However, at least one court observed a changing trend toward greater discipline. (See *State ex rel. Oklahoma Bar Ass'n. v. Miller* (2013) 309 P.3d 108, 120 [imposing 180-day suspension for prosecutorial misconduct, Oklahoma Supreme Court noted "[i]nstances of prosecutorial misconduct from previous decades, such as withholding evidence, were often met with nothing more than a reprimand or a short suspension . . . [but] such misconduct is punished more harshly when it occurs now"].)

conviction. The prosecutor in *Price* presented significant evidence in mitigation, including no prior discipline, cooperation, remorse, good character evidence, and community service. Although the misconduct was extremely serious, the Supreme Court concluded that the weight of the mitigation militated against disbarment and imposed a two-year actual suspension. Unlike Price, Murray did not introduce altered evidence at trial, secure an actual conviction with altered evidence, or make any deals directly with Palacios.

In *In the Matter of Field, supra,* 5 Cal. State Bar Ct. Rptr. 171, a career prosecutor repeatedly, over a 10-year period, violated the due process rights of criminal defendants, violated court orders and directives, performed incompetently, did not respect the court, failed to obey the law, withheld evidence, misled a judge, and committed multiple acts of moral turpitude. Because of his compelling mitigation, including no prior record of discipline, he was spared disbarment, but was suspended for four years. Field's misconduct was exceptionally egregious and involved repeated and varied transgressions in many matters over many years.

Here, we agree with OCTC that a 30-day actual suspension is insufficient. A lengthier period of actual suspension is necessary to emphasize that Murray's misconduct is serious and cannot be countenanced. The superior court observed that it could not "tolerate such outrageous misconduct that results in the deprivation of basic fundamental constitutional rights that are designed to provide basic fairness . . . ." It took the extraordinary step of dismissing the criminal charges against Palacios. We believe that our decision should be equally forceful and clear as to the required professional standards. Accordingly, we recommend a one-year actual suspension from the practice of law.

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Robert Alan Murray be suspended from the practice of law for two years, that execution of that suspension be stayed, and that Murray be placed on probation for two years on the following conditions:

1. He must be suspended from the practice of law for the first year of his probation period.

2. He must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation.

3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, he must report such change in writing to the Membership Records Office and the State Bar Office of Probation.

4. Within 30 days after the effective date of discipline, he must contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of probation. Upon the direction of the Office of Probation, he must meet with the probation deputy either in person or by telephone. During the period of probation, he must promptly meet with the probation deputy as directed and upon request.

5. He must submit written quarterly reports to the Office of Probation on or before each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

6. Subject to the assertion of applicable privileges, he must answer fully, promptly, and truthfully, any inquiries of the Office of Probation that are directed to him personally or in writing, relating to whether he is complying or has complied with the conditions contained herein.

7. Within one year after the effective date of the discipline herein, he must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the tests given at the end of those sessions. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and he shall not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the period of probation, if he has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Murray be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners during the period of his actual suspension in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

VIII. RULE 9.20 COMPLIANCE

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

IX. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

HONN, Acting P. J.

WE CONCUR:

STOVITZ, J. *

McELROY, J.**

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* Retired Presiding Judge of the State Bar Court, serving as Review Judge Pro Tem by appointment of the California Supreme Court.

** Hearing Judge of the State Bar Court, assigned by the Presiding Judge pursuant to rule 5.155(F) of the Rules of Procedure.

Case No. 14-O-00412

In the Matter of

ROBERT ALAN MURRAY

Hearing Judge

Hon. Donald F. Miles

Counsel for the Parties

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CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on November 10, 2016, I deposited a true copy of the following document(s):

OPINION FILED NOVEMBER 10, 2016

in a sealed envelope for collection and mailing on that date as follows:

[X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

JONATHAN I. ARONS
LAW OFC JONATHAN I ARONS
100 BUSH ST STE 918
SAN FRANCISCO, CA 94104

[X] by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

BRANDON K. TADY, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on November 10, 2016.

Jasmine Guladzhyan
Case Administrator
State Bar Court