STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

BRADLEY LYNN JENSEN

A Member of the State Bar

[No. 11-C-11890]

Filed September 20, 2013, as modified October 11, 2013

SUMMARY

The review department adopted a hearing judge's findings that the facts and circumstances surrounding an attorney's misdemeanor violation of Penal Code section 273a, subdivision (b) (child endangerment), did not involve moral turpitude but did involve other misconduct warranting discipline. In aggravation, the review department agreed with the hearing judge that the attorney had a prior record of discipline. It also adopted the hearing judge's findings of remorse and community service in mitigation. However, it did not adopt the finding that the attorney proved good character. Additionally, the review department considered mitigating the attorney's cooperation. The review department agreed with the hearing judge that disbarment under standard 1.7(b) would be unjust and adopted the hearing judge's disciplinary recommendation of a 120-day actual suspension.

COUNSEL FOR PARTIES

For State Bar: Cydney Tabor Batchelor

For Respondent: Bradley L. Jensen

HEADNOTES

[1 a-c] 1519 Substantive Issues in Conviction Matters—Nature of Underlying Conviction—Other Crimes
1527 Substantive Issues in Conviction Matters—Moral Turpitude—No Moral Turpitude
1691 Admissibility and/or Effect of Record in Criminal Proceeding

Where respondent was convicted of misdemeanor child endangerment for leaving his nine-month-old daughter alone in hotel room for 40 minutes, fact of conviction established respondent's guilt of all elements of crime, but hearing was required to determine whether facts and circumstances involved moral turpi tude. Where State Bar failed to introduce clear and convincing evidence that respondent lied to police, no moral turpitude was established.

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

[2 a,b] **102.90 Other improper prosecutorial conduct**
130 Procedure on Review
192 Constitutional Issues - Due Process/Procedural Rights

Where State Bar conceded at trial that respondent's conviction did not involve moral turpitude, but argued on review that conviction did involve moral turpitude, State Bar's unexplained change of position was troubling, because it denied respondent opportunity to develop trial record on the issue.

[3 a,b] **142.20 Evidentiary Issues—Hearsay—Insufficiency to Support Finding (rule 5.104(D) (2011))**

Police reports offered by the State Bar did not clearly and convincingly establish respondent's dishonesty, for purposes of finding that crime involved moral turpitude, because the reports contained significant inconsistencies and multi-layered hearsay making the statements not the sort of evidence on which responsible persons are accustomed to rely.

[4a-c] **1531 Substantive Issues in Conviction Matters—Other Misconduct Warranting Discipline—Found**

Not every violation of law by an attorney merits discipline and the court must examine the facts and circumstances to decide if the attorney has committed criminal conduct that is disciplinable. An attorney's conviction for child endangerment by leaving his daughter unattended in a hotel room falls at the very low end of misconduct justifying professional discipline since it is unrelated to the practice of law but reflects poorly on the attorney's judgment and on the legal profession in general.

[5] **513.90 Aggravation—Prior record of discipline—Found but discounted or not relied on—Other reason**

Attorney's two prior records of discipline from 2007 and 2011 were assigned limited aggravating weight given the nature and extent of the prior misconduct, the minimal discipline imposed, the fact the attorney committed some of the misconduct in his second disciplinary case before his wrongdoing in the first disciplinary case, and because the misconduct in the second disciplinary case occurred before the attorney was disciplined in the first disciplinary case.

[6] **142.20 Evidentiary Issues—Hearsay—Insufficiency to Support Finding (rule 5.104(D) (2011))**
545 Aggravation—Intentional misconduct, bad faith, etc. (1.2(b)(iii))—Declined to Find

Where State Bar's evidence that respondent lied to law enforcement included inconsistencies and hearsay statements, evidence did not clearly and convincingly establish aggravating factor of dishonesty.

[7] **588.50 Aggravation—Harm (1.2(b)(iv))—To all of the above (or unspecified, or other)—Declined to find**

Where victim of respondent's crime of misdemeanor child endangerment suffered only potential harm from being left alone in hotel room, and child's vulnerability had already been considered in finding that respondent's crime warranted discipline, Review Department declined to consider harm as aggravating factor. In addition, fact that hotel staff, police, and child services personnel had to participate in criminal investigation did not, by itself, clearly and convincingly prove significant harm to the public or the administration of justice.

[8] **740.51 Mitigation—Good character references(1.2(e)(vi))—Declined to find—Insufficient number of references**

Attorney not entitled to mitigation for good character because he presented the testimony of only two character witnesses.

[9] 745.10 Mitigation—Remorse/restitution/atonement (1.2(e)(vii))—Found
Attorney's admission that his actions evidenced a significant lapse in judgment, his willingness to accept discipline, and his post-conviction voluntary enrollment in parenting courses beyond those required as a condition of probation established acceptance of responsibility for misconduct and warranted significant weight in mitigation.

[10] 735.10 Mitigation—Candor and cooperation with Bar (1.2(e)(v))—Found
Where attorney stipulated to admission of documents which established his culpability for misconduct warranting discipline and assisted the prosecution, such cooperation warranted considerable weight in mitigation.

[11a-d] 806.59 Application of Standards—Standard 1.7 (Effect of Prior Discipline)—(b) Disbarment after two priors—Declined to apply—Other reason
The Supreme Court has not automatically applied standard 1.7(b) even in the absence of compelling mitigation. We must examine an attorney's prior discipline cases along with present misconduct to determine the appropriate aggravating weight. Disbarring the attorney under standard 1.7(b) would be unjust because his prior misconduct overlapped, he was not a recidivist offender who failed to learn from past disciplines and his present misconduct was not more serious than his prior ethical misconduct.

[12] 901.90 Application of Standards—Standard 2.10—Violations Not Specified Above—Applied—Suspension—Other reason
1554.10 Application of Standards—Conviction Cases—No Moral Turpitude But Discipline Warranted (Standard 3.4)—Applied
For a single misdemeanor crime not involving moral turpitude and unrelated to practice of law, a short actual suspension is appropriate. Where attorney committed misdemeanor violation of Penal Code section 273a, subdivision (b) (child endangerment) and where the misconduct was aggravated by two prior records of discipline but mitigated by cooperation, remorse and pro bono service, the appropriate discipline recommendation was a 120-day actual suspension.

ADDITIONAL ANALYSIS

Aggravation
Declined to find
584.50 Harm—To public
586.50 Harm—To administration of justice

Mitigation
Found
765.10 Substantial pro bono work

Discipline
1024 Ethics school/ethics exam
1613.06 Stayed suspension—One year
1615.03 Actual suspension—Three months (incl. anything between 3 and 6 mos.)

OPINION

PURCELL, J.

The State Bar appeals a hearing judge's discipline recommendation based on Bradley Lynn Jensen's misdemeanor child endangerment conviction. Jensen left his nine-month-old daughter in a crib in a hotel room for at least 40 minutes while he took his toddler son for a walk. The hearing judge found that the facts and circumstances surrounding the conviction did not involve moral turpitude but did involve other misconduct warranting discipline. The judge recommended a 120-day actual suspension subject to a one-year stayed suspension and two-years' probation.

The State Bar renews its trial request that Jensen be disbarred since this is his third discipline case.[1] His two prior records are from 2007 and 2011, for which he received a 90-day stayed suspension and a 30-day actual suspension, respectively. The State Bar asserts that the present case is aggravated because Jensen lied to law enforcement upon his arrest. It also alleges, for the first time on review, that this dishonesty amounts to moral turpitude and further supports disbarment. Jensen did not appeal, and accepts the recommended discipline.

After independently reviewing the record (Cal. Rules of Court, rule 9.12), we note that the trial evidence was very limited. The State Bar presented no witnesses. Instead, it relied on documents the parties stipulated to, including the record of conviction, the police report, and a suspected child abuse report. However, these documents establish little more than the conviction itself and do not prove moral turpitude or that Jensen was dishonest. Jensen testified and presented evidence of three factors in mitigation: extensive community service, remorse, and cooperation with the State Bar.

Our goal in this conviction proceeding is to determine the proper professional discipline, not to impose punishment for a crime. Jensen's isolated act of parental neglect demonstrates a serious lack of judgment about the safety of his child. But it minimally constitutes grounds for professional discipline because it does not involve moral turpitude and is entirely unrelated to the practice of law. While we give some weight to Jensen's prior discipline cases, we agree with the hearing judge that disbarring him under standard 1.7(b) for "leaving a baby alone in a hotel room for approximately 40 minutes would be a disproportionate level of discipline." We adopt the hearing judge's recommended discipline.

I. FINDINGS OF FACT[2]

On March 14, 2011, Jensen and his two young children accompanied his wife to Los Angeles for her work-related project. They stayed in a hotel in Santa Monica. In the early evening, with his wife at work and his nine-month-old daughter napping in a crib, Jensen left the hotel with his three-year-old son. He planned to pick up a baby bottle that his wife was going to drop off at the hotel's front desk, and then take his son for a walk. His daughter's crib was placed in the bathtub of the hotel room, with two of the crib legs inside the bathtub and two on the outside. Since the crib frame rested on the bathtub ledge, the outside legs were an inch above the floor.

After Jensen left the room, his wife dropped off the bottle at the hotel desk. A bellman took it to the room and discovered the baby crying in the bathroom. He contacted hotel staff, who tried to call Jensen five times over 20 minutes. When they could not reach him, they notified the authorities. Jensen was gone for at least 40 minutes.[3]

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[1] Standard 1.7(b) of the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct directs that an attorney with a record of two prior disciplines shall be disbarred unless the most compelling mitigating circumstances clearly predominate. All further references to standards are to this source.

[2] Our findings are based on the parties' Pretrial Stipulation to the Admission of the State Bar's Exhibits, the trial evidence, and the hearing judge's undisputed findings.

[3] Without offering an excuse for leaving his daughter unattended, Jensen testified he had been distracted that day because it was the birthday of his sister, who had been killed in a drunk-driving accident: "It was weighing on me in a context and a condition where I shouldn't have been watching the children by myself, in a hotel or someplace other than our home, and the stresses of trying to – it was a straw that was among other straws that were on my back or on my mind at the time.

Two police officers responded and were waiting in the room when Jensen returned. The officers did not permit him to attend to his daughter, and he became upset, angry, and confrontational. The officers questioned him about his whereabouts and the length of time he had been away. Jensen explained why he left the room. His cell phone communications with his wife, Kristine, substantiated his statements.[4]

According to the police reports, Jensen told the officers he was gone for no more than about 10 minutes, and he had not walked farther than the large tree in the valet area. The report stated that the hotel security video, which had an inaccurate digital time stamp, showed that Jensen pushed a stroller "E/B on Wilshire Bl . . . .[and] then walks N/B on the entrance driveway of the hotel, past the large tree near the valet area . . . [and] then uses a ramp located just east of the south hotel entrance and enters the hotel via a side door."

Jensen testified at the hearing below that he never told the officers he had been gone only 10 minutes: "I told more than one officer on March 14, 2011, that I would make trips up and down the hallway or up and down the elevator, in what I estimated to be 10 minutes, at certain times, but I didn't say that I was only gone for 10 minutes." He also testified that he was absent from the room for about 40 minutes when he returned to discover the officers. The State Bar presented no evidence to rebut Jensen's testimony.

The officers concluded that Jensen had left his daughter in an unsafe environment. Both children were immediately taken into protective custody. Jensen was arrested and charged with a violation of Penal Code section 273a, subdivision (b), misdemeanor child endangerment.[5]

In November 2011, he pled no contest, and the superior court sentenced him to two years of informal probation, imposed a fine, granted credit for one day in jail, and ordered him to complete 52 weeks of parenting classes.[6] At his discipline trial, Jensen testified: "I take this very seriously. I could not be more soul-seared by what happened." He sought out and attended parenting classes in addition to those ordered by the superior court. There is no evidence establishing that Jensen ever failed to comply with his criminal probation.

II. NO MORAL TURPITUDE IN THE FACTS AND CIRCUMSTANCES SURROUNDING THE CONVICTION

[1a] For purposes of attorney discipline, Jensen's conviction proves he is guilty of all requisite elements of his crime. (Bus. & Prof. Code § 6101, subd. (a).)[7] After the State Bar transmitted his conviction record to us, we referred it to the hearing department to determine whether the facts and circumstances of the crime involved moral turpitude or other misconduct warranting discipline and, if so, what discipline should be imposed. (§ 6102, subd. (e); *In re Morales* (1983) 35 Cal.3d 1, 5-6.)

[2a] The State Bar prosecutor conceded at closing argument that Jensen's conduct did *not* involve moral turpitude: "We argue that this case does not involve moral turpitude, but it does involve other conduct that should receive discipline in this matter." The hearing judge agreed.

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4. The relevant text messages read: Kristine: "I have bottle in the car. Assuming I should drop it off right! There's also baby food in the Trader Joes bag" 6:10 PM
Kristine: "Bottles coming upstairs :)" 6:18 PM
Jensen: "G and I are out for a walk. H is napping in crib in bathroom. What time do you come back tomorrow?" 6:18 PM

5. This section provides: "Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor."

6. The maximum penalty allowed for this crime includes six months in jail, 48 months' probation, 52 weeks of child abuser's treatment program, and issuance of a criminal protective order. (Pen. Code, §§ 19 & 273a, subd. (c).)

7. All further references to sections are to the Business and Professions Code.

[1b][3a] The State Bar now contends that Jensen's misconduct involved moral turpitude in part because he lied to the police officers about (1) leaving the room for only 10 minutes and (2) not leaving the hotel property.[8] But for reasons detailed below, the police reports offered by the State Bar do not clearly and convincingly establish Jensen's dishonesty. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552 [clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command unhesitating assent of every reasonable mind].)

[1c][3b] First, the statements in the reports were contradicted by Jensen's testimony, which the State Bar did not rebut and the hearing judge accepted. (Rules Proc. of State Bar, rule 5.155(A) [hearing judge's factual findings entitled to great weight on review].) Next, the reports contained significant inconsistencies among the responding officers, as the hearing judge noted.[9] Finally, some statements were made by hotel staff and involved multi-layered hearsay, including descriptions of images on a security videotape on which the time stamp was incorrect. These hearsay statements within the reports are not the "sort of evidence on which responsible persons are accustomed to rely. . . ." (Rules Proc. of State Bar, rule 5.104(C).) Without evidence that reconciles the inconsistencies or adequately rebuts Jensen's testimony, we do not find clear and convincing evidence of his dishonesty. Resolving all doubts in Jensen's favor (*Alberton v. State Bar* (1984) 37 Cal.3d 1, 11), the hearing judge correctly found no moral turpitude in the facts and circumstances surrounding his conviction.

III. JENSEN'S MISCONDUCT WARRANTS PUBLIC DISCIPLINE

[4a] Even if an attorney commits a crime that does not involve moral turpitude, we may still recommend discipline if "other misconduct warranting discipline" surrounds the conviction. (*In re Kelley* (1990) 52 Cal.3d 487, 494-495 [Supreme Court imposes discipline for misconduct not amounting to moral turpitude as exercise of its inherent power to control practice of law and to protect legal profession and public].) But not every violation of law by an attorney merits discipline. (*Id.* at p. 496; *id.* at pp. 499-500 (conc. opn. of Mosk, J.); *id.* at p. 500 (dis. opn. of Panelli, J.).) In fact, "the integrity of the profession cannot require professional discipline in addition to criminal sanctions for every violation of law as an example to others." (*In the Matter of Respondent I* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 260, 271.) We must therefore examine the facts and circumstances surrounding Jensen's crime, and not merely look to the conviction, to decide if he has committed misconduct that is disciplinable. (See *In re Gross* (1983) 33 Cal.3d 561, 566 [misconduct, not conviction, warrants discipline]; *In the Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 589, fn. 6 [whether acts underlying conviction amount to professional misconduct "is a conclusion that can only be reached by an examination of the facts and circumstances surrounding the conviction"].)

[4b] In this case, few facts were presented beyond those necessary to constitute the conviction. Based on this limited record, we find that Jensen's actions fall at the very low end of misconduct justifying professional discipline. (Compare *In the Matter of Respondent I, supra*, 2 Cal. State Bar Ct. Rptr. 260 [no professional discipline for two drunk-driving convictions while on inactive status where attorney sought immediate treatment and posed no risk to clients after reinstatement] with *In re Kelley, supra*, 52 Cal.3d at pp. 495-496 [public reproval for two drunk-driving convictions where attorney disrespected legal system by committing second offense while on probation for first and had continuing alcohol abuse problem].) In particular, we note that leaving his

[8] **[2b]** Without explanation, the State Bar changed its position as to whether the facts and circumstances surrounding the conviction involve moral turpitude. Such a change is troubling at this late date because it denies Jensen an opportunity to have developed the trial record on this issue. (See *In re Strick* (1983) 34 Cal.3d 891, 898 [attorney is entitled to "procedural due process in proceedings which contemplate the deprivation of his license to practice his profession"]; *Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 422-423 [points not raised at trial not considered on appeal].)

[9] "[M]y quick review [of the reports] indicates that the police officers were a little – kind of all around the lot here on what they saw happen, some of them. We have 40 minutes, 50 minutes, 90 minutes. . . . We have the description that the child was in the bathtub, when I don't think the child was ever in the bathtub, unless you count the crib being in the bathtub means that the child was left unattended in the bathtub."

daughter unattended at the hotel had nothing to do with the practice of law, his child was not injured, and no substance abuse was involved. Further, his wife of 13 years testified that he is a good father: "Mr. Jensen is very diligent about the safety of his children, and concerned for their welfare, and concerned about being the best parent that he can be." She also attested that his "short lapse in parenting judgment was unfortunate, but it was a one-time occurrence," and he is "remorseful to the depths of his soul." Jensen has assumed full responsibility for his actions, taken classes on proper parenting, and shown remorse for and recognition of his misconduct.

[4c] Even so, we believe that the totality of circumstances surrounding Jensen's conviction warrants discipline, a conclusion he does not dispute. Foremost, his daughter was particularly vulnerable to a risk of harm because she was only nine months old. At that age, 40 minutes is a significant period of time to leave an infant alone. Further, the child was left in a crib in a hotel bathroom, a dangerous place for an unsupervised baby. Finally, Jensen had no legitimate or emergency justification to leave. His misconduct resulting in a child endangerment conviction reflects poorly on his judgment and on the legal profession in general, and properly calls for public discipline.[10]

IV. AGGRAVATION AND MITIGATION

The offering party bears the burden of proof for aggravation and mitigation. The State Bar must establish aggravating circumstances by clear and convincing evidence. (Std. 1.2(b).) Jensen has the same burden to prove mitigating circumstances. (Std. 1.2(e).)

A. One Aggravating Factor

The hearing judge found one factor in aggravation based on Jensen's two prior records of discipline. We agree. However, we reject the State Bar's request for additional aggravation for dishonesty and significant harm.

1. Two Prior Records of Discipline (Std. 1.2(b)(i))

[5] Jensen was admitted to practice law in California in 1996. He has two prior records of discipline from 2007 and 2011. The hearing judge assigned limited aggravation to these cases, given the nature and extent of the prior misconduct, the minimal discipline imposed, and the fact that Jensen committed some of the misconduct in his second case before his wrongdoing in the first case. We also note that the misconduct in the second case occurred between 2002 and 2004, before he was disciplined in the first case in 2007. For these reasons, we also assign limited aggravating weight to Jensen's prior record. (See *In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618-619 [diminished aggravating weight for two acts of contemporaneous misconduct charged in separate cases].)

2007 Discipline (In re Jensen on Discipline
(Oct. 22, 2007, S155013)
Cal. State Bar Ct. No. 05-O-04598)

In October 2007, the Supreme Court ordered discipline, including a 90-day stayed suspension, for Jensen's misconduct in a 2003 family law case. He filed a dissolution petition and prepared a marital settlement agreement, but incompetently failed to finalize the case. In mitigation, he had practiced law for seven years without discipline and took responsibility for his wrongdoing by refunding $3,000 in attorney fees. No aggravating circumstances were present.

2011 Discipline (In re Jensen on Discipline
(April 4, 2011, S190322)
Cal. State Bar Ct. Nos. 06-O-13965, 07-O-11738)

[10] The Supreme Court has imposed discipline for crimes not involving moral turpitude and unrelated to the practice of law. (See *In re Hickey* (1990) 50 Cal.3d 571 [30 days' suspension for carrying concealed weapon involving alcohol and violence]; *In re Titus* (1989) 47 Cal.3d 1105 [public reproval for carrying concealed, loaded firearm and reckless driving]; *In re Otto* (1989) 48 Cal.3d 970 [six months' suspension for assault and domestic violence].)

In April 2011, the Supreme Court ordered discipline, including a 30-day actual suspension, for Jensen's misconduct in two client matters.

The first matter occurred in 2002, before Jensen committed misconduct in his 2007 discipline case. He prepared and filed a meritless opening appellate brief with the California Court of Appeal. He stipulated that he took and continued employment with the objective to present a claim that was not warranted under existing law.

The second matter occurred two years later in 2004, before Jensen was charged or found culpable in his 2007 discipline case. During a personal dispute over maintenance service on his car, Jensen sent three letters using the letterhead, name, and signature of another attorney. He also called the manager of the service company, identified himself as the other attorney, and threatened criminal and civil recourse if the dispute was not resolved.

Jensen stipulated that he was culpable of: (1) moral turpitude for sending letters in another attorney's name in order to mislead the manager; and (2) threatening to pursue criminal recourse to obtain an advantage in a civil dispute. In mitigation, he did not cause harm, was experiencing serious family problems, and successfully completed the State Bar Court Alternative Discipline Program (ADP). His 2007 discipline case was an aggravating factor.

2. No Aggravation for Dishonesty (Std. 1.2(b)(iii)) or Harm (Std. 1.2(b)(iv))

[6] The State Bar argues that the present case is aggravated because Jensen lied to law enforcement. As noted, the inconsistencies among the police reports and the hearsay statements therein do not clearly and convincingly establish that he was dishonest.

[7] The State Bar also seeks aggravation for the "potential" harm he exposed his daughter to when he left her unattended. Standard 1.2(b)(iv) provides for aggravation where the attorney's misconduct "harmed significantly a client, the public or the administration of justice." We find that the State Bar's claim is speculative. Moreover, we relied on the daughter's vulnerability as a factor that proved Jensen's misconduct warrants discipline. We do not consider it again in aggravation. (*In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 68 [where factual findings used to find culpability, it is improper to again consider in aggravation].)

Finally, the State Bar alleges that Jensen harmed the public and the administration of justice because the police, child services, and hotel staff members had to participate in the criminal investigation. But no evidence establishes specific, cognizable harm to the hotel or these public agencies. The fact that law enforcement agencies and hotel staff responded to the report that a child was left alone does not by itself clearly and convincingly prove significant harm to the public or the administration of justice.

B. Three Mitigating Factors

The hearing judge found three factors in mitigation – good character, community service, and remorse. Of these factors, we assign credit for community service and remorse but not for good character. In addition, we credit Jensen for his cooperation with the State Bar.

1. No Credit for Good Character (Std. 1.2(e)(vi))

[8] Jensen presented the testimony of two character witnesses – his wife and an attorney he knew through the State Bar Lawyer Assistance Program (LAP). The State Bar argues that two witnesses are insufficient to establish good character under standard 1.2(e)(vi), which requires an extraordinary demonstration of good character from a wide range of references in the legal and general communities. We agree and assign no mitigating weight to this factor. (*In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 840 [two character witnesses not mitigating under std. 1.2(e)(vi)].)

2. Credit for Community Service/Pro Bono Work

Pro bono work and community service are mitigating factors. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) Jensen testified that he performed extensive community service. He volunteered at his church twice a week, served as president of the Sunday school, and played the organ and piano at services. He assisted church members and fellow LAP participants with legal and administrative issues. He has served as a mentor for an at-risk youth. After his twin son passed away in 2008, and his surviving premature son required heart surgery, Jensen and his wife volunteered at the hospital neonatal unit. The couple is currently organizing a service project to assist families with members who are hospitalized.

The State Bar urges only modest mitigating weight for Jensen's community service because he "offered no corroborative testimony or documentary evidence to establish such service." (*In the Matter of Shalant, supra,* 4 Cal. State Bar Ct. Rptr. at p. 840 [limited mitigation weight for community service established only by attorney's own testimony].) But Jensen's wife, who is in a position to know about his daily activities, corroborated most of his testimony. We assign considerable mitigation to Jensen's commendable community service.

3. Credit for Remorse and Recognition of Wrongdoing (Std. 1.2(e)(vii))

[9] Standard 1.2(e)(vii) provides mitigation for "objective steps promptly taken by the member spontaneously demonstrating remorse, recognition of the wrongdoing found or acknowledged which steps are designed to timely atone for any of the consequences of the member's misconduct." We find that Jensen promptly accepted responsibility for his misconduct. He pled no contest to the criminal charge. At his discipline trial, he admitted his actions showed a "significant lapse in judgment" and that he made a "stupid" mistake. He also stated: "I am here to serve my penance. I am here to take my just discipline on this." Finally, he voluntarily enrolled in and attended parenting courses beyond those ordered as a condition of his criminal probation. His wife and a law colleague described him as remorseful and completely devoted to his family. This evidence merits significant mitigation.

4. Credit for Cooperation (Std. 1.2(e)(v))

[10] Although the hearing judge did not find cooperation as mitigation, we assign it considerable weight. At trial, Jensen entered into a stipulation with the State Bar admitting documents that established his culpability for other misconduct warranting discipline. His actions assisted the prosecution. On review, he continues to admit culpability and accepts the hearing judge's recommended discipline. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [extensive weight in mitigation given to those who admit culpability and facts].)

V. LEVEL OF DISCIPLINE

Our goal is to recommend the appropriate discipline to protect the public, the courts, and the legal profession. (Std. 1.3.) 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.) We begin with the standards, which are guidelines we follow whenever possible to promote uniformity. (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.)

A. No Disbarment under Standard 1.7(b)

Standard 1.7(b) provides that an attorney should be disbarred for a third discipline unless the most compelling mitigating circumstances clearly predominate. Jensen's mitigation (community service/pro bono work, remorse, and cooperation) is not compelling nor does it clearly predominate over his misconduct and the aggravation of his two prior disciplines.

[11a] However, the Supreme Court has not automatically applied standard 1.7(b) even in the absence of compelling mitigation. (See, e.g., *Conroy v. State Bar* (1991) 53 Cal.3d 495 [one-year suspension for failing to act competently and

misrepresentations involving moral turpitude with no mitigation and two prior disciplines]; *Blair v. State Bar* (1989) 49 Cal.3d 762 [two years' actual suspension for failing to perform in three client matters with "extensive prior disciplinary record" including three suspensions and "marginal" mitigation].) Under the Supreme Court's guidance, we also have not reflexively applied the standard in every case but rather have done so "with an eye to the nature and extent of the prior record. [Citations.]" (*In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, 217); see *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697 [limited nature and extent of two prior discipline records do not justify disbarment].)

[11b] We therefore must examine each of Jensen's discipline cases along with his present misconduct to determine the appropriate aggravating weight. "Merely declaring that an attorney has [two prior] impositions of discipline, without more analysis, may not adequately justify disbarment in every case." (*In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136.) Jensen's 2007 discipline was not serious; he failed to finalize a dissolution case that resulted in a 90-day stayed suspension. In contrast, his 2011 discipline was very serious. It concerned two client matters and involved his poor judgment and dishonesty for filing a frivolous appeal and posing as another attorney. Yet it was significantly mitigated by lack of harm, serious family problems, and successful completion of ADP over a three-year period. Minimal discipline (30-day actual suspension) was imposed.

Most importantly, as stated, all of Jensen's prior misconduct occurred between 2002 to 2004 – almost three years before his first discipline was imposed in 2007. It would be improper to penalize an attorney for two "priors" based on the timing of the complaints rather than the true chronology of the misconduct. (*In the Matter of Miller, supra,* 1 Cal. State Bar Ct. Rptr. at p. 136 ["To properly fulfill [the] purposes of lawyer discipline, we must examine the nature and chronology of respondent's record of discipline"].) The State Bar argues that full weight should be given to the prior discipline cases due to the common thread of dishonesty running through the 2011 case and the present matter. We reject this argument because the State Bar never clearly and convincingly proved that Jensen was dishonest in the present case.

[11c] We conclude that the nature and extent of Jensen's prior disciplines do not justify disbarment. (*In the Matter of Buckley* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 201, 205, fn. 2 [even on third discipline, disbarment not proper if manifestly disproportionate to cumulative misconduct].) Jensen is not a recidivist offender who failed to learn from his past disciplines. His present misconduct took place on a day he was not working as a lawyer compared to his past misconduct which primarily occurred in his law practice. Further, this is not a case where Jensen committed increasingly serious misconduct – a parent's lack of judgment in caring for a child is professionally less concerning than impersonating an attorney, filing a frivolous appeal, or failing to finalize a lawsuit. "[P]art of the rationale for considering prior discipline as having an aggravating impact is that it is indicative of a recidivist attorney's inability to conform his or her conduct to ethical norms. . . ." (*In the Matter of Sklar, supra,* 2 Cal. State Bar Ct. Rptr. at p. 619.)

[11d] Given Jensen's remorse, cooperation, and efforts to learn about avoiding parental neglect, we agree with the hearing judge that disbarring him under standard 1.7(b) would be unjust. (See *Blair v. State Bar, supra,* 49 Cal.3d at p. 776, fn. 5 [clear reasons for departure from standards should be shown].) However, we do find guidance in standard 1.7(a), which provides that discipline should be progressive. Since Jensen previously received a 30-day suspension, the presumption we follow in this case is that he should receive a longer suspension.

B. 120-Day Actual Suspension Is Appropriate Discipline under the Standards

Standard 3.4 is most apt and provides that conviction of a crime involving "other misconduct warranting discipline" should result in a sanction appropriately reflecting the nature and extent of the misconduct. In doing so, we look to and balance the totality of the circumstances, the nature of the crime, the facts and circumstances surrounding the convic-

tion, and the aggravating and the mitigating circumstances. (*In re Larkin* (1989) 48 Cal.3d 236, 244.) We also examine comparable precedent to ensure consistency among discipline cases. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

[12] There is little guidance for discipline when an attorney with a prior record is convicted of misdemeanor child endangerment. We have, however, recommended a short period of actual suspension for attorneys with prior disciplines who commit a single misdemeanor crime that does not involve moral turpitude and is unrelated to the practice of law. (See, e.g., *In the Matter of Buckley, supra,* 1 Cal. State Bar Ct. Rptr. 201 [public reproval for misdemeanor solicitation of lewd act in public place aggravated by two prior private reprovals]; *In the Matter of Anderson, supra,* 2 Cal. State Bar Ct. Rptr. 208 [60-day actual suspension for five drunk-driving convictions aggravated by two prior reprovals]; *In the Matter of Bouyer* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 888 [90-day actual suspension for misdemeanor conviction of failing to file reports of state employment taxes with state aggravated by three prior disciplines for which respondent on probation at time of crime].) Considering these cases and standard 3.4's directive that discipline reflect the nature and extent of Jensen's misconduct, we believe that the hearing judge's recommended discipline including a 120-day actual suspension will adequately protect the public and preserve the integrity of the legal profession.

VI. RECOMMENDATION

For the foregoing reasons, we recommend that Bradley Lynn Jensen be suspended from the practice of law for one year, that execution of that suspension be stayed, and that Bradley Lynn Jensen be placed on probation for two years with the following conditions:

1. He must be suspended from the practice of law for the first 120 days of the period of his probation.

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 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 test given at the end of that session. 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.)

8. He must comply with all conditions of his criminal probation and must so declare under penalty of perjury in any quarterly report required to be filed with the Office of Probation. If he has completed probation in the criminal matter, or completes it during the period of his disciplinary probation, he must provide satisfactory documentary evidence of that criminal probation completion in the next quarterly report. If such satisfactory evidence is provided, he will be deemed to have fully satisfied this probation condition.

9. 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 one-year period of stayed suspension will be satisfied and that suspension will be terminated.

VII. PROFESSIONAL RESPONSIBILITY EXAMINATION

We do not recommend that Bradley Lynn Jensen be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners since he previously did so in 2012 as ordered in *In re Jensen on Discipline* (April 14, 2011, S190322).

VIII. RULE 9.20

We further recommend that Bradley Lynn Jensen 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.

I CONCUR:
EPSTEIN, J.

REMKE, P. J.

I respectfully dissent.

The fundamental question here is whether attorney sanctions should be imposed on Bradley Lynn Jensen based on his misdemeanor conviction for child endangerment under Penal Code section 273a, subdivision (b).[11] Based on the record in this case, the answer is no.

It is undisputed that Jensen's conviction does not inherently involve moral turpitude and that professional discipline is warranted only if the facts and circumstances surrounding the conviction involved moral turpitude or other misconduct warranting discipline. (*In re Rohan* (1978) 21 Cal.3d 195, 203 (lead opn. of Clark, J.) I agree with the majority that the surrounding circumstances do not support a finding of moral turpitude, but disagree with the conclusion that they constitute other misconduct warranting discipline.

Jensen's conduct involved a single, isolated act of leaving his napping nine-month-old daughter in her crib alone in a hotel room for approximately 40 minutes while he took his restless three-year-old son for a walk. While his behavior was decidedly irresponsible *and* criminal, it does not warrant professional discipline. It did not involve the practice of law, a

[11] The record establishes that Jensen's conviction relates to the provision that penalizes any person who "willfully causes or permits [a] child to be placed in a situation where his or her person or health may be endangered," but "under circumstances or conditions other than those likely to produce great bodily harm or death." (Pen. Code, § 273a, subd. (b).)

violation of a court order, or other acts of dishonesty; it did not include violent acts or result in harm to his child or any third party; and it did not occur as a result of alcohol or substance abuse – factors listed in the cases cited by the majority that indicate an attorney's conviction may constitute other misconduct warranting discipline. Furthermore, Jensen has accepted responsibility for his conduct, shown his sincere remorse, and taken corrective action to avoid any such future transgressions – factors negating the need for discipline as a preventive measure to avert potential professional problems.[12]

"[I]t would be unreasonable to hold attorneys to such a high standard of conduct that every violation of the law, however minor, would constitute a ground for professional discipline." (*In re Kelley, supra,* 52 Cal.3d at p. 496.) That is the case here. Jensen's regrettable behavior in his personal life was a violation of the Penal Code, but it does not signify misconduct that "demeans the integrity of the legal profession and constitutes a breach of the attorney's responsibility to society." (*In re Rohan, supra,* 21 Cal.3d at p. 204 (lead opn. of Clark, J.).) Since the conduct surrounding his conviction did not involve moral turpitude, impair the performance of his professional duties, or otherwise affect his fitness as a member of the bar, "we should leave the matter to the sanction of the criminal law or public opprobrium." (*In re Kelley, supra,* 52 Cal.3d at p. 500 (conc. opn. of Mosk, J.).) Accordingly, I would dismiss this proceeding.

[12] *In re Kelley* (1990)52 Cal.3d 487, 498 (heightened need for discipline where attorney fails to recognize alcohol problem and potential effect on her professional practice); *In re Brown* (1995) 12 Cal.4th 205, 216-217 (discipline "imposed only if the criminal conduct reflects directly and adversely on the attorney's fitness to practice law"); see *In re Gross* (1983) 33 Cal.3d 561, 566 ("primary concern in these disciplinary proceedings is to protect the public, the courts and the legal profession itself from attorneys who are not fit to practice law").