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Public Matter

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of	)	Case No. SBC-23-O-30270-DGS
	)	
MARLA ANNE BROWN,	)	DECISION AND ORDER OF DISMISSAL
	)	
State Bar No. 140158.	)	
	)	

Introduction

In this disciplinary proceeding, the Office of Chief Trial Counsel of the State Bar of California (OCTC) charged Respondent Marla Anne Brown (Respondent) with four counts of professional misconduct stemming from statements made through Respondent's personal Twitter account over a three-day period in May 2020, including: (1) moral turpitude by making a misrepresentation on her Twitter biography; (2) moral turpitude by directing others to commit acts of violence; (3) committing a criminal act that reflects adversely on her fitness as a lawyer by violating Title 18, United States Code (18 U.S.C.), section 2101; and (4) committing a criminal act that reflects adversely on her fitness as a lawyer by violating California Penal Code, section 404.6, subdivision (a). Due to a lack of clear and convincing evidence,[1] the court dismisses all four counts with prejudice.

[1] OCTC has the burden of proving the charges by clear and convincing evidence. 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.) This "standard of proof . . . which requires proof making the existence of a fact highly probable – falls between the 'more likely than not' standard commonly referred to as a preponderance of the evidence and the more rigorous standard of proof beyond a reasonable doubt." (*Conservatorship of O.B.* (2020) 9 Cal.5th 989, 995.)

Significant Procedural History

OCTC initiated this action by filing a Notice of Disciplinary Charges (NDC) against Respondent, on March 3, 2023. Respondent filed a response to the NDC on April 7.

On May 18, 2023, OCTC filed a motion to amend the NDC. OCTC's unopposed motion was granted on June 12, and OCTC filed an amended NDC (ANDC) the same day. Respondent filed a response to the ANDC on June 27.

A five-day trial was held June 27-30 and July 7, 2023. On the last day of trial, July 7, the parties filed a Stipulation as to Exhibits. The parties filed timely post-trial briefs on July 28,[2] and the court took the matter under submission the same day.[3]

Throughout this case, OCTC was represented by Trial Counsel Akili P. Nickson, and Respondent was represented by attorneys Anthony Radogna of the Law Offices of Anthony Radogna, Krista L. Baughman and Jesse D. Franklin-Murdock of Dhillon Law Group Inc., and Christopher Brizzolara.

Jurisdiction

Respondent was admitted to the practice of law on June 6, 1989, and has since been a licensed attorney of the State Bar of California.

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[2] The court found good cause to permit post-trial briefing. (See Rules Proc. of State Bar, rule 5.111(A).)

[3] On July 28, 2023, the First Amendment Lawyers Association and Foundation for Individual Rights and Expression filed a motion for leave to file a brief as amici curiae in support of Respondent. OCTC filed an opposition on August 7. Upon careful review, the motion is hereby DENIED. First, rule 5.153(C) of the Rules of Procedure of the State Bar, which concerns procedures in the Review Department, does not provide this court with the authority to grant the relief requested. Additionally, the court notes that the motion is also untimely, having been filed late in the day on the 21st day after trial concluded. (See Rules Proc. of State Bar, rule 5.111(A) ["In no event may briefing extend submission beyond 21 days from the last day of trial."].)

Findings of Fact

The following findings of fact are based on the testimony and documentary evidence presented at trial.

Respondent's Twitter account

In approximately 2009, Respondent created a public account on the social media platform Twitter, under the handle @SoCalMAB. About a year later, Respondent created her biography which read as follows:

> LAPD Union attorney; Public Sector
> Labor and Employment attorney; USC
> alum, football booster; Fan of USC, Evan
> Lysacek, Lakers, running and sports in general.

(Exh. 8.)

Years later, between 2016 and 2018, she updated her biography to include a background photograph depicting a portion of a football field and a profile photograph of herself with University of Southern California (USC) football player Michael Pittman, Jr., who she and others believed deserved to play but was benched in favor of other players.

Respondent's Twitter account remained public from 2009 through May 31, 2020, the date she closed her account, as discussed *post*. Respondent's account did not contain her name, address, or contact information. Respondent did not advertise her law practice nor did clients communicate with her or hire her services through the account. Her account also did not contain a blue checkmark from Twitter, which is used to signal that the account is verified. Though her account was pseudonymous, Respondent's name and contact information was apparently discoverable through further internet searches based on her biography information.

Respondent was not overly active or popular on Twitter. Over the course of the decade, she had comparatively few followers, consisting mostly of friends generally interested in sports, including USC football. As of late May 2020, Twitter showed that she had only 199 followers,

which increased to 280 as of May 31, 2020 – the day she deleted her account.[4] None of her followers were police officers, police departments, or police unions. Twitter also showed little activity on the tweets at issue, such as comments, re-tweets, likes, or direct messages, as discussed *post.*

Respondent's work with law enforcement unions and officers

Prior to creating her Twitter profile in 2010 and through the present, Respondent's legal practice has focused on civil litigation, primarily representing law enforcement unions, law enforcement officers, and other public sector employees with employment issues.

Between 1992 and 2001, Respondent worked for the law firm of Green & Shinee. Attorney Richard Shinee and two partners at the firm worked almost exclusively on representing law enforcement in civil litigation, administrative and disciplinary proceedings, arbitrations, investigations into officer misconduct, and civil service hearings. The firm represented members of small and large police departments and unions, including the Los Angeles Police Protective League (LAPPL) and the Association for Los Angeles Deputy Sheriffs (ALAD).[5] While at Green & Shinee, Respondent primarily worked as a civil litigation attorney representing officers and their families. Many of these cases were referred from the LAPPL and the officers that belonged to that union. In addition to the referrals, the LAPPL also independently hired and paid for attorneys on cases that affected their members as a whole.

Between 2001 and 2012, Respondent was partially self-employed as an attorney in the same area of practice. She worked on cases with other attorneys and law firms. She also

[4] Respondent's number of followers was minuscule in comparison to others, including one witness who testified at trial that he had between 15,000 and 20,000 followers. Moreover, some Twitter account holders have over one million followers and individuals with many followers are called influencers. Respondent was not an influencer.

[5] The LAPPL is the union that represents the rank-and-file officers of the Los Angeles Police Department (LAPD) and ALAD is the union that represents deputy sheriffs.

received cases directly from the LAPPL, after being appointed to the LAPPL panel in 2000. The panel consisted of a group of several dozen attorneys, who received referrals from the LAPPL to assist officers with various legal matters dealing with their employer, the LAPD. The LAPPL paid Respondent and other panel attorneys for consultations with its union members and other legal services. The panel attorneys were not employees of the LAPPL but worked on behalf of the LAPPL and the individual officers and employees of the LAPD. Respondent received referrals and payments directly from the LAPPL, as a panel attorney, until 2012.

Between 2012 and the present, Respondent continued to work directly for officers who were LAPPL members and for law firms and attorneys who received LAPPL referrals. She also worked closely with experienced attorneys in this area, such as Gregory W. Smith and Robert Frank. Both attorneys have associated with Respondent on legal matters involving law enforcement union issues on multiple occasions.

In summary, throughout the course of Respondent's lengthy career, she has been a member of a relatively small group of approximately 50 attorneys in Southern California that specialize in representing law enforcement unions and officers in administrative proceedings and various civil litigation. In this role, Respondent had no authority to direct officers to do or refrain from doing any action related to their duties as peace officers.[6]

Relevant socio-political context

On May 25, 2020, George Floyd, an African American, was killed by the Minneapolis, Minnesota police. A graphic video showing excessive use of force by the police emerged and fueled demonstrations against police brutality, racism, and criminal justice reform throughout the

[6] LAPD is set up as a paramilitary group with a distinct chain of command in which orders are passed from the chief to lower ranking personnel. Officers follow orders from superiors and not from civilians, including attorneys that represent the officers, members of their families, or their unions.

United States.[7] While most demonstrations were peaceful, some individuals exploited the situation as cover to commit various crimes during the protests.

Respondent lived near the Grove shopping mall (the Grove) in Los Angeles at that time, and the following timeline of events illustrates the escalating nature of the protest activity in and around Los Angeles when Respondent posted the tweets at issue:

In downtown Los Angeles (DTLA) protests began in the afternoon on Wednesday, May 27, 2020, with a group of approximately 300 to 500 protestors gathering at the corner of Alameda Street and Aliso Street. Police monitored social media and the group and learned that some intended to walk onto the 101 Freeway to block traffic and others wanted to march in a different direction. Between approximately 9 p.m. and 10 p.m., police initiated contact with an organizer of a splinter group that made their way to Temple Street and Broadway and blocked the intersection.[8] The protests that day lasted until midnight or 1 a.m., and police found it increasingly difficult to contain and monitor the different groups. As the number of protesters grew, police became more concerned for public safety because some of the protestors were non-peaceful and violating laws. So, in anticipation of similar protests the following day, LAPD prepared itself for crowd management/control and possible rioting.

The next day, Thursday, May 28, 2020, LAPD continued to prepare for peaceful and nonpeaceful protesters as national media coverage showed large crowds amassing in different cities around the country. Around 5 p.m. that day, a group of protestors gathered in front of the Los Angeles City Hall (City Hall). As with the previous night, some protesters left the main group. These protesters made their way to Figueroa Street and the 110 Freeway and disrupted

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[7] These protests took place during the height of the COVID-19 pandemic, at a time when many cities were under stay-at-home orders.

[8] Police contact with organizers was important because it allowed police to work with the group's plans so as to allow the protestors to express themselves while keeping the public safe.

traffic. LAPD had 22 Mobile Field Force (MFF)[9] units present to attempt to control the crowds, but the protests became chaotic.

The following day, Friday, May 29, 2020, national media coverage showed increasingly large protests taking place across major U.S. cities. So, in anticipation of larger and possibly more violent protests in Los Angeles, the LAPD Chief prepared a briefing, identifying several objectives and strategies that included facilitating demonstrations, preparing metropolitan platoons to support operations, preparing supplies and air units, and preventing violence or property damage.

Protests continued throughout the day on Friday. The morning protestors appeared primarily focused on expressing their views peacefully. But the afternoon protestors appeared more mixed, with some intent on peaceful expression and others determined to agitate and commit crimes.

In the early afternoon, protestors gathered in front of City Hall on the Spring Street steps. Although the group did not have a permit,[10] they used different social media platforms, including Twitter, to communicate and encourage participants to join the protests. The crowd began to grow and moved away from City Hall, scattering throughout DTLA. Groups of protesters were moving in different directions and some of the protesters were on bicycles, scooters, and automobiles, making it more difficult for the LAPD to assist with traffic/crowd control.

Shortly after 2 p.m., the LAPD declared a citywide Tactical Alert. This meant, in part, that all on-duty resources were designated for the locations requested and only police work of

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[9] A MFF is a unit consisting of one lieutenant, six sergeants, and 44 officers. It is further divided into squads with 10 officers with one sergeant commanding the group.

[10] The City of Los Angeles received some applications for permits to demonstrate, which the LAPD welcomed because they identified the organizers, the size of the anticipated gathering, and other information.

major importance could be diverted elsewhere. By approximately 5:30 p.m., the LAPD was unable to manage the large crowds and keep the peace in certain areas so they requested additional and specialized units. The Los Angeles Fire Department (LAFD) also assisted, responding to “fire and medical incidents in hostile crowds.” (Exh. 1015, p. 353.)

By approximately 7 p.m., certain protesters were excited and uncontrollable – overpowering police tools. In response, MFF units requested and received approval to use less-than-lethal 37mm rounds.[11] Additional units were called into the area to help, including units to the 110 Freeway. A large crowd of approximately 150 entered the freeway and the California Highway Patrol attempted to handle them. After the group exited the freeway, they continued on the streets of DTLA. Additional MFF units responded to the area of 7th and Figueroa streets, where the LAPD intended to make a large-scale arrest, but protesters used motorized scooters to block them and delay their response. Within the hour, protestors had broken through crowd containment measures and proceeded to vandalize and loot a Target store on Figueroa Street before continuing their march through the streets of DTLA.

By late Friday evening, there was a full-scale riot in parts of Los Angeles, with widespread acts of violence, theft, and destruction. For example, a group of approximately 300 protesters threw bottles and launched incendiary devices at officers near the intersection of 7th and Figueroa streets. A few blocks away, another group of protesters surrounded officers and attacked them with rocks and bottles. A few blocks from there, another group damaged police vehicles, vandalized businesses, ignited trash containers, broke windows, and assaulted officers.

Crime continued past midnight, with additional approvals for the use of less-than-lethal 37mm and 40mm rounds. Motor Strike teams (Strike Teams) were called in for reinforcement to

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[11] Non-lethal 37mm (or 40mm) rounds are small, stinger, rubber bullets emitted from a launcher and used to control or disburse protesters and rioters.

different parts of the city. Gun shots were fired at more than one location. Trash continued to be burned, causing toxic smoke to disburse throughout the area and making police air support more difficult. Protesters also gained roof access to some buildings to attain elevated positions to attack officers. Looting and vandalism continued. Laser pointers were also used to disrupt police helicopter pilots. And, although numerous arrests were made, the situation continued to be chaotic, violent, dangerous, and extremely difficult for the police to handle. Discussions began on how to handle the next few days, including a potential curfew and seeking mutual aid from other police departments and the California National Guard.

The following day, Saturday, May 30, 2020, chaos continued throughout parts of Los Angeles, including west of DTLA. There was continued looting, arson, vandalism, attacks on officers, and other crime. The crowds were larger than in the previous days. For example, protesters gathered before noon at Pan Pacific Park[12] for an event put on by Black Lives Matter (BLM) and the Students for George Floyd. Police command visited the location at approximately 11 a.m. to initiate communication with event organizers but could not locate or identify any leaders. Police became concerned because the event was unpermitted and they were unable to ascertain who was in charge. By noon, the number of protesters at the Pan Pacific Park event grew to approximately 1,500-2,000. At 12:50 p.m. LAPD called a Tactical Alert.

By 1 p.m. the number of protestors at Pan Pacific Park had grown to approximately 2,500. A crowd of approximately 1,500 left the south side of the park. Meanwhile, a group of several hundred left the north side of the park. Some protesters overtook an intersection, blocking vehicle traffic and allowing speakers to address the group. The LAPD had seven Strike Teams and two metropolitan Tactical Support Element (TSE) teams available to help with crowd control and potential violence. Although officers attempted to control vehicle traffic as the large

[12] Protesters were also at other parts of the city.

crowds moved, protestors overtook the streets and prevented vehicles from moving. LAPD air support advised that a group of 200 protestors north of the park were confronting and actively blocking a police vehicle. Some protestors overtook a city bus with the driver and passengers inside. Local news networks broadcasted these incidents, and others, live on television.

By 2 p.m. some protestors had vandalized the city bus, endangering passengers that were still inside. A Strike Team was sent to assist; however, the Strike Team was unexpectedly surrounded by additional protestors and unable to move. Protestors assaulted these officers by throwing items at them. A TSE team was sent to rescue the Strike Team officers, other officers, and the city bus. The TSE team arrived and received approval to use less-than-lethal munitions.

Meanwhile, in another nearby area, at 2:35 p.m., officers reported being surrounded and assaulted with objects; police vehicles were being vandalized and set on fire; and protestors were attempting to break into buildings and/or set them on fire. Police tools continued to be ineffective against the violent protesters, as shown on live news broadcasts.

By late afternoon, a full-scale riot was again underway in certain parts of the city. A disbursal order was given over a public address system in one area due to a declaration of an unlawful assembly. Police orders were not followed, which caused MFF units to form skirmish lines. The mayor of Los Angeles appeared on local television and called for calm. At 4:45 p.m., the mayor then issued a written Declaration of Local Emergency, noting that while many events had been peaceful others had been lawless and violent with over 500 arrests already made and the potential for continuing lawlessness. The emergency declaration requested the county and the governor to declare an emergency for the entire County of Los Angeles.

Local news networks continued to broadcast live video feeds of protestors and criminality, showing looting, extensive damage to private and public property, and violence directed at officers. Bricks, concrete, and water bottles containing unknown substances were

thrown at officers while some protestors were armed with guns, crowbars, golf clubs, and bats. Officers were continually outnumbered and assaulted, and LAPD tools, including disbursement orders, continued to be ineffective.

Between 6 and 7 p.m., protesters were actively looting stores at the Grove, near Respondent's home. Trash dumpsters were used as weapons, and some dumpsters were lit on fire. The police substation at the Grove was also set on fire. Riots continued in different parts of the city and the mayor issued an order setting curfew between 8 p.m. that evening and 5:30 a.m. the following day. Although a city-wide curfew was declared, it was not enforced, and from 7 p.m. until after midnight, violence and criminality continued. LAFD and its force protection detail responded and were assaulted with rocks and bottles, while fire engines were blocked by a barricade of dumpster fires.

Due to the civil unrest and limited resources, the City and County of Los Angeles requested state assistance, including the activation of the California National Guard. Governor Gavin Newsom granted the request and issued a Proclamation of a State of Emergency, which included the mobilization of the California National Guard.

Though violent and nonviolent protests continued on Sunday, May 31, 2020, police were eventually able to control violent protesters from committing further crimes.

Respondent's tweets during the protests in Los Angeles

During the above-described Los Angeles protests, Respondent broadcasted the following tweets[13] from her Twitter handle @SoCalMAB:

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[13] The tweets presented at trial were modified versions of Respondent's tweets as they appeared on Twitter. For example, some of the tweets were shown with enlarged, bolded, and/or highlighted font. Other tweets were incomplete, and some were missing details such as the symbols showing whether there were any comments, re-tweets, likes, or direct messages.

Tweet No. 1 (May 29 at 7:53 p.m.)

On May 28, 2020, congressmember Lee Zeldin, Twitter handle @RepLeeZeldin, tweeted: "While the country is reopening coast to coast, the House Speaker just canceled session in DC for THE NEXT . . . ENTIRE . . . MONTH![emoji]"[14] (Exh. 9, p. 1.) That same day, an anonymous account, with the Twitter handle @Gamblrslivesmtr, responded to Zeldin's tweet, stating: "Because she been told but to show up DC… DC is about to get overrun by Antifa. Get out[.]" (*Id*.)

Twenty-four hours after Zeldin's tweet and twenty-three hours after @Gamblrslivesmtr's tweet, on May 29, 2020, at 7:53 p.m. – while certain crowds were engaging in violence and destruction and the protests were uncontrollable in parts of Los Angeles – Respondent replied to @Gamblrslivesmtr, @RepLeeZeldin, and @SidneyPowell1 stating: "*Can't wait. At last a reason to shoot them*" (Tweet No. 1). (*Id*.) The Twitter symbols under Tweet No. 1 did not show any comments, re-tweets, likes, or direct messages. No tweet from @SidneyPowell1 was presented in evidence and it was unclear as to whom Tweet No. 1 was directed.

Tweet No. 2 (May 30 at 10:38 a.m.)

Sometime on May 29, 2020, an individual by the name of Tania Ganguli, Twitter handle @taniaganguli, tweeted: "The CVS at 8th and Grand is being looted. Just one door smashed but people are going through. Dozens of cops were at this intersection a few hours ago and several have drive by but none stopped this." (Exh. 9, p. 2.) The account was verified with a blue checkmark, and the Twitter symbols below the tweet showed 24 comments, 89 re-tweets, 208 likes, and no direct messages.

[14] Tweets are quoted in their exact format with uppercase font, misspellings, grammatical errors, and missing punctuation. Emojis, however, are not included. Furthermore, each of Respondent's tweets are italicized to draw attention to the reader but did not appear so in the evidence admitted at trial.

On May 30, 2020, at 10:38 a.m., Respondent replied to @taniaganguli and @latimes as follows: "*So let CVS leave the neighborhood. Along with Whole Foods and every other quality business. And then watch these sand thugs complain about no businesses In The area*" (Tweet No. 2).[15] (*Id.*) The Twitter symbols under Tweet No. 2 revealed that one person liked the tweet but there were no comments, re-tweets, or direct messages. No tweet from @latimes was presented in evidence.

Tweet No. 3 (May 30 at 12:49 p.m.)

On May 30, 2020, at 12:49 p.m., Respondent posted a tweet replying to @eugenegu and @realDonaldTrump writing:

> *You preaching from your ivory tower. Let's send them after you. Once the cop was arrested it was all over. But people like you promote destruction. It's no wonder the black community never Improves it's lot. No responsibility. No consequences. At this point they deserve the result*

(Tweet No. 3). (Exh. 9, p. 3.)

The Twitter symbols under Tweet No. 3 were missing. Furthermore, the tweets from @eugenegu or @realDonaldTrump, to which Respondent was apparently replying, were not presented in evidence.

Tweet No. 4 (May 30 at 1:16 p.m.)

At 1:16 p.m., on May 30, 2020, Respondent tweeted: "*@Brian_Claypool If your client was the Cop involved in the Floyd death you'd be the last person wanting a rush to judgment by the Feds. You don't even know that Floyd was accused of forgery*" (Tweet No. 4). (Exh. 9, p. 4.)

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[15] It is unclear what was meant by the term "sand thugs." Respondent's testimony was that she meant to type "criminals and thugs"; whereas one of the witnesses speculated that the term was meant to be a racial slur. No person testified that they had ever heard the term before or that it was a recognized term. In any case, this tweet was not charged as part of the misconduct in the ANDC and is not dispositive of any issue before the court.

The Twitter symbols under Tweet No. 4 showed no comments, re-tweets, likes, or direct messages.

Tweet No. 5 (May 30 at 2:35 p.m.)

At 2:35 p.m., on May 30, 2020, Respondent posted a tweet in reply to @RaptorsGirl99, @MidSentryModern, and "2 others" stating, as follows: "*They need to be shot*" (Tweet No. 5). (Exh. 9, p. 6.) The Twitter symbols under Tweet No. 5 were cut off in the screen shot presented. Also, evidence was not presented as to what tweet or tweets Respondent was replying nor was the identity of the "2 others" established. Moreover, it is unclear who Respondent was referring to in her tweet as "they."

Tweet No. 6 (May 30 at 5:39 p.m.)

Sometime on May 29, 2020, an individual by the name of Andy Lassner, Twitter handle @andylassner, broadcasted the following tweet from a verified Twitter account: "Reminder that Colin Kaepernick repeatedly tried to peacefully tell us every Sunday that we had a major, systemic problem." (Exh. 9, p. 7.)

The following day, on May 30, 2020, at 5:39 p.m., Respondent replied to Lassner's tweet stating, "*Only system is BLM*" (Tweet No. 6). (*Id*.) The Twitter symbols under Tweet No. 6 indicated that one person commented on the tweet, but there were no re-tweets, likes, or direct messages.

Tweet No. 7 (May 30 at 6:17 p.m.)

On May 30, 2020, an individual by the name of Josh Ethier, Twitter handle @josh_ethier, broadcasted the following tweet from a verified Twitter account: "Heads up LA protesters at #fairfax and #lacienega, the Venice/La Brea police department just sent about 20 cars over, blocking traffic, traveling fast. Stay safe." (Exh. 9, p. 8.) The Twitter symbols below Ethier's tweet showed that it had two comments, 48 re-tweets, 78 likes, and no direct messages.

Roughly an hour later, at 6:17 p.m., Respondent replied to Ethier's tweet stating: "*Shoot the protesters*" (Tweet No. 7). (*Id*.) The Twitter symbols under Tweet No. 7 showed that four people commented, but there were no re-tweets, likes, or direct messages. The comments were not presented in evidence, and it was not shown to whom Respondent was directing her message.

Tweet No. 8 (May 30 at 6:45 p.m.)

In reply to a tweet by @sandyhamada, on May 30, 2020 at 6:45 p.m., Respondent broadcasted the following tweet: "*You sound as dumb as your profile suggests. BH is full of middle easterners. And they are huge liberals. So ho ahead and shoot yourself in the foot*" (Tweet No. 8). (Exh. 9, p. 12.) @sandyhamada's initial tweet was not provided in evidence nor were the Twitter symbols under Respondent's tweet.[16]

Tweet No. 9 (May 30 at 9:37 p.m.)

Sometime on May 30, 2020, an individual by the name of Charlie Kirk, Twitter handle @charliekirk11, broadcasted the following tweet from a verified Twitter account: "RT if President Trump should classify ANTIFA as a Domestic Terror organization!" (Exh. 9, p. 10.) The Twitter symbols showed that the tweet received 2,200 comments, 44,000 retweets, 80,000 likes, and no direct messages.

Respondent replied to Kirk's tweet, at 9:37 p.m., on May 30, 2020, stating: "*Along with BLM*" (Tweet No. 9). (*Id.*) The Twitter symbols under Tweet No. 9 showed that two people commented on the tweet, but there were no re-tweets, likes, or direct messages. The two comments were not presented in evidence.

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[16] Exhibit 9, p. 12, which is a screen shot with four tweets by Respondent, including her reply to @sandyhamada, has Twitter symbols at the bottom of the image indicating 8 re-tweets, 43 likes and no comments or direct messages, but it was not established to which tweet these symbols corresponded.

Tweets Nos. 10-15 – date and time unknown

On some date and time in late May, Respondent posted replies to various other tweets. For example, she replied to @JoeNBC stating "*Omg Scarborough you've hit a new low in stupidity. Let's go burn your house down with you in it*" (Tweet No. 10); @dorothyk98, stating "*So where do you and your rich friends live? They'll be right over*" (Tweet No. 11); @MayorOfLA, stating "*Where's the national guard you lazy pig?*" (Tweet No. 12); and @MidSentryModern and @sexywill, stating "*Let's burn your house*" (Tweet No. 13). (Exh. 9, p. 11.)

None of the tweets to which Respondent was replying were provided in evidence and the Twitter symbols below each of the foregoing reply tweets by Respondent showed no comments, re-tweets, likes, or direct messages. Moreover, it is unclear who Respondent was referring to in the reply to @JoeNBC or to @MidSentryModern and @sexywill, when she used "us" in the contraction "let's" or who Respondent was referring to in the reply to @dorothyk98, when she used "they" in the contraction "they'll."

Additionally, on some unknown date and time in late May, Respondent broadcast the following two tweets: "*Yes and they should be shooting the looters*" (Tweet No. 14) and "*They should be shot. And if it was your business, you'd pull the trigger*" (Tweet No. 15). (Exh. 9, p. 12.) The Twitter symbols under Tweet No. 14 showed that one person liked the tweet, but there were no comments, re-tweets, or direct messages, while the Twitter symbols under Tweet No. 15 showed no comments, re-tweets, likes, or direct messages. Again, it was unclear who Respondent was referring to by "they" in either Tweet No. 14 or Tweet No. 15.

Visibility of Respondent's Tweets

Although the evidence suggested that Respondent's tweets went viral at some time during the Los Angeles protests, there was no evidence of Twitter records showing who or how many

people saw Respondent's tweets – be it the original tweet, a re-tweet, or a screen shot of the tweet. Respondent did not target the delivery of her information nor did she use any Twitter feature that can be used to enhance dissemination. She did not use hashtags, re-tweet her own tweets, or tag any individual or group to gain attention (with the exception of Tweet No 4, which did not include any mention of violence). Instead, screen shots were taken of her tweets and then disseminated by others on Twitter.

Five individuals who attended protests in various parts of Southern California, and who apparently personally saw Respondent's tweets, testified in this proceeding. It was not entirely clear as to when each of the five individuals first saw the tweets, but they each saw the tweets at different times and likely when one or all of Respondent's tweets were "trending."[17] One protester saw them either in the evening of May 30, 2020, or early the next day after participating at the Pan Pacific Park protest. Another one saw them "trending" sometime after 10 p.m. on May 31 or in the early morning of June 1. Another saw Respondent's tweets sometime after he returned home from a protest in Long Beach on May 31. Another saw them after returning home from a May 29 or 30 protest in Riverside. Finally, another recalled specifically seeing a screenshot of Tweet No. 7, sometime prior to June 1 and before participating in any protest but could not recall the exact time. Notably, none of the five individuals who testified said that they saw the tweets while attending a protest nor that they knew of violence erupting as an apparent result of the tweets.[18] And each stated that they felt safe enough to attend additional protests after viewing Respondent's tweets.

[17] No evidence was presented showing the trending topic or tweets.

[18] Overall, the witnesses experienced peaceful protests but felt an uneasy tension at the protests. Two witnesses attributed the tension to the strong police presence, as one would reasonably expect at a protest to express dissatisfaction and anger over police practices in Minnesota and elsewhere.

Response to Respondent's tweets

On Sunday, May 31, 2020, at approximately 6 p.m., Respondent became aware of the virality of her tweets. She was contacted by her friend and LAPPL panel attorney, Gregory W. Smith, who told her to contact LAPPL General Counsel Robert R. Rico. Respondent contacted Rico, whom she had known professionally, and Rico explained that the LAPPL board members had complained about her tweets. Respondent was surprised by the reaction to her tweets, and she was apologetic, remorseful, and cordial with Rico.

Rico wanted Respondent to dissociate herself from the LAPPL and asked her to disseminate a retraction stating that she was not an LAPD union attorney. Consequently, Respondent changed her Twitter biography, to read: "Labor and Employment attorney; USC alum, Fan of USC, Lakers, running and sports in general[.]" (Exh. 14.) And, on May 31, 2020, at 6:43 p.m., Respondent tweeted, as follows: "*I am no longer an LAPD union attorney or LAPD Officer attorney and have not been for some time. My twitter bio inaccurately stated that I was and I apologize for the misrepresentation.*" (Exh. 10.) This tweet was effective in ending any appearance that her tweets were endorsed by the LAPPL.[19]

Also, during the evening of May 31, 2020, several media outlets contacted Respondent about her tweets. For example, Los Angeles Times (LA Times) sportswriter Ryan Kartje, who covered USC sports, called and spoke with Respondent while she was at home. Kartje informed Respondent about steps taken by USC to revoke her booster privileges and about a statement Pittman made about her tweets. Respondent was unaware that USC had taken action against her for the tweets. Respondent gave several statements about her tweets, which were later published

[19] Subsequently, the LAPD, using the Twitter handle @LAPDHQ, and the LAPPL sent out tweets informing the public that @SoCalMAB was not an employee of the LAPD or an attorney for the LAPPL. Specifically, the LAPPL tweeted the following: "This person is NOT an attorney for the LAPPL. The Tweets associated with her account are repugnant and we denounce them in the strongest possible terms." (Exh. 12.)

in an LA Times article. Respondent expressed regret that she sent out the tweets, acknowledging that they were "horrible" and "very stupid remarks." (Exh. 5, p. 5.) She also admitted sending the tweets in "a fit of anger" after protests came near her home. (*Id*. at p. 6.) In Respondent's own words, she "did a really dumb, stupid thing." (*Id*. at p. 7.)

That evening, at 8:39 p.m., Respondent replied to a tweet from Pittman stating: "*My remarks were made in a fit of anger at circumstances in general. It was a stupid thing to say. And wasn't directed at anyone's race. Just upset at all the destruction.*" (Exh. 13.) She also attempted to remove the photograph of Pittman and herself but was unable to do so because her account was frozen. Because she could not alter her biography page photograph, she deleted the account.

Conclusions of Law[20]

The misconduct alleged in this matter stems from Respondent's use of her personal Twitter account. Respondent admits that she used Twitter under the handle @SoCalMAB, created her biographical page, and posted the tweets charged in the ANDC, but she maintains that her Twitter biography was accurate and argues that the First Amendment to the United States Constitution (First Amendment) protects her tweets as rhetoric used to express her feelings about the events unfolding around her and, accordingly, may not form the basis for professional discipline.

Respondent's First Amendment Defense

The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech." And it is well-established that the "First Amendment protects the freedom of expression of all citizens, including lawyers." (*Jacoby v. State Bar* (1977)

[20] Unless otherwise indicated, all references to rules are to the Rules of Professional Conduct and all statutory references are to the Business and Professions Code.

19 Cal.3d 359, 368; see also *In the Matter of Dixon* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23, 30 ["Disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment."]; *In the Matter of Anderson* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 775, 781 ["Like all other citizens, attorneys are entitled to the protection of the First Amendment, even as participants in the administration of justice."]; rule 8.4, comment 6 ["This rule does not prohibit those activities of a particular lawyer that are protected by the First Amendment to the United States Constitution or by Article 1, section 2 of the California Constitution."])

Notably, the broad protection of the First Amendment covers many forms of speech, even blatantly "offensive or disagreeable" speech. (*Texas v. Johnson* (1989) 491 U.S. 397, 414; see also *Matal* v. *Tam* (2017) 582 U.S. 218, 223 ["Speech may not be banned on the ground that it expresses ideas that offend"]; *Young v. American Mini Theatres, Inc.* (1976) 427 U.S. 50, 63-64 (plurality opinion) ["Nor may speech be curtailed because it invites dispute, creates dissatisfaction with conditions the way they are, or even stirs people to anger"; *Street v. New York* (1969) 394 U.S. 576, 592, ["It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"].) One theory underlying this important principle is that "our representative democracy only works if we protect the 'marketplace of ideas.' " (*Mahanoy Area School District v. B.L.* (2021) 141 S.Ct. 2038, 2046.) Social media platforms, such as Twitter, operate as a modern-day version of this "marketplace of ideas" – where information is easily consumed and disseminated through images, text, or stories ranging from nugatory and/or pointless observations to meaningful opinions concerning matters of public concern.

Nevertheless, the court recognizes that the protections of the First Amendment are not absolute and certain categories of speech have been deemed not worthy of constitutional

protection. For example, false statements are not protected speech. (*Garrison v. State of Louisiana* (1964) 379 U.S. 64, 75 [“the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection”].) Likewise, “advocacy of the use of force” where it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action” is not protected and may be regulated or punished. (*Brandenburg v. Ohio* (1969) 395 U.S. 444. 447 (*Brandenburg*).)

Additionally, “[b]ecause attorneys are officers of the court with a special responsibility to protect the administration of justice, courts have recognized the need for the imposition of reasonable speech restrictions upon them.” (*Anderson*, *supra*, 3 Cal. State Bar Ct. Rptr. at p. 781.) As such, speech otherwise entitled to full constitutional protection may nonetheless be sanctioned if it obstructs or prejudices the administration of justice.[21] (Cf. *U.S. v. Wunsch* (9th Cir. 1996) 84 F.3d 1110, 1116-1117 & fn. 10; *Gentile v. State Bar of Nevada (*1991) 501 U.S. 1030, 1074-75; *Standing Comm. on Discipline v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1442, 1443 [attorney speech may not be sanctioned absent showing that conduct was “highly likely” to prejudice administration of justice].) Even outside the context of the courthouse or pending litigation, the U.S. Supreme Court has found that attorneys are not necessarily “protected by the First Amendment to the same extent as those engaged in other businesses.” (*Gentile v. State Bar of Nevada, supra,* 501 U.S. at p. 1073.) For example, in evaluating restrictions on attorney solicitation or advertising, akin to commercial speech, the Supreme Court has typically “engaged in a balancing process, weighing the State’s interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech at issue.” (*Ibid.*)

[21] For example, a statement that interferes with a fair trial is prejudicial to the administration of justice. (See *Anderson, supra,* 3 Cal. State Bar Ct. Rptr. at p. 782.)

Here, OCTC seeks to have this court recommend that professional discipline be imposed upon Respondent based on the thoughts and viewpoints she expressed on her personal Twitter account, where her biography page described her as an attorney. In doing so, OCTC misinterprets the body of constitutional law relating to attorney speech, essentially contending that all speech uttered by an attorney is a separate category of speech that is entitled to lessened constitutional protections, regardless of whether the speech was communicated in an attorney's professional capacity or otherwise relates to the practice of law. The court does not agree, finding that the full protections of the First Amendment apply – particularly where, as here, Respondent's speech was communicated in her capacity as a private citizen; was used to express her personal thoughts, emotions, or ideas; and was completely unrelated to the practice of law.

With these principles in mind the court addresses each of the charged counts of misconduct.

Count One – § 6106 [Moral Turpitude – Misrepresentation]

Section 6106 provides, in part, that the commission of any act involving dishonesty, moral turpitude, or corruption constitutes cause for suspension or disbarment. And acts of moral turpitude may be cause for discipline whether or not they are committed in the practice of law. (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 576.)

In Count One, OCTC charged Respondent with committing an act of moral turpitude in violation of section 6106, by misrepresenting to the public at large, between about May 29 through May 31, 2020, that she was an "LAPD Union Attorney" when she knew that statement was false and misleading because (1) she was never an employee of an LAPD Union; and (2) while she had previously served as a panel attorney for the LAPPL, she had not done so in several years.

Moral turpitude is broadly defined as conduct which is contrary to justice, honesty, and good morals. (*Calzada v. Sinclair* (1970) 6 Cal.App.3d 903.) In a disciplinary context, the term "moral turpitude" may be defined as "an act of baseness, vileness or depravity in the private and social duties which a [person] owes to [other persons], or to society in general, contrary to the accepted and customary rule of right and duty between [persons]." (*In re Calaway* (1977) 20 Cal.3d 165, 166.) To hold that an attorney has committed an act involving moral turpitude is to characterize the attorney as unfit to practice law. (*In re Higbie* (1972) 6 Cal.3d 562, 570.)

To establish a violation of section 6106, a certain level of intent, guilty knowledge, or willfulness is required. An attorney "should not under any circumstances attempt to deceive another person. [Citations.]" (*McKinney v. State Bar* (1964) 62 Cal.2d 194, 196.) And case law establishes that even a finding of grossly negligent misrepresentation may be sufficient to support a finding of moral turpitude, depending on the totality of the relevant surrounding circumstances. (See *In the Matter of Yee* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 330, 333-334 [attorney culpable of moral turpitude based on grossly negligent misrepresentation affirming to the State Bar that she completed her minimum continuing legal education hours]; see also *Call v. State Bar* (1955) 45 Cal.2d 104, 109 [to determine whether grossly negligent misrepresentation constitutes moral turpitude, statements must be read in light of additional surrounding facts].)

Here, OCTC argues that Respondent's unqualified description of herself as an "LAPD Union Attorney" on her Twitter biography was false and misleading – pointing out that Respondent even acknowledged having made a "misrepresentation" in her May 31, 2020 tweet that she issued at the request of Rico. (Exh. 10.) OCTC further argues that such misrepresentation was intentional, or at least grossly negligent, because Respondent knowingly

maintained a public Twitter account and deliberately chose not to update her biographical information despite not having worked as a panel attorney with the LAPPL since 2012.

As a preliminary matter, the record did not clearly establish that "LAPD Union attorney" had a defined meaning, such that it was capable of being proven false. There is no entity known as the "LAPD Union." The LAPD deals with various unions, including the LAPPL, who interact with attorneys in various ways. Also, Respondent's unrebutted testimony established that since 1992 she has acted as counsel for the LAPPL and LAPPL members in a variety of capacities – initially while working in a firm with attorneys who performed work on behalf of the LAPPL and LAPPL members, later as a panel attorney for the LAPPL, and finally while working with other attorneys who received direct referrals from the LAPPL. When she established her Twitter biography in 2010, she was on the LAPPL panel and since that time she has continued to do work for the union and its members. While it is true that Respondent has not served as a panel attorney for the LAPPL in many years, the record established that Respondent's use of the generic term "LAPD Union attorney" was the result of her sincere, honestly held, and reasonable belief that the information was an accurate biographical description, in that her legal work through most of her career involved work for the LAPPL, the police union that represents the rank-and-file of the LAPD.[22] Therefore, there is not clear and convincing evidence that Respondent's characterization of herself as an LAPD union attorney was objectively false or misleading, either at the time it was made or during the time period in question.

Moreover, assuming arguendo that such characterization was false or misleading as of May 29-31, 2020, the court does not find that Respondent's failure to timely update her personal

[22] This helps explain why Respondent was receptive and immediately agreed to attorney Rico's request to dissociate herself from the LAPPL by broadcasting that she was "no longer an LAPD union attorney" after it was brought to her attention that her tweets were causing controversy.

Twitter biography constitutes an intentional or grossly negligent act amounting to moral turpitude, when taking into consideration all of the surrounding circumstances. In context, her biography also described her as a "Public Sector Labor and Employment Attorney" and included information about her educational background and other interests. (Exh. 8.) Notably, there was no evidence that Respondent used Twitter to solicit legal business from the LAPPL union, law enforcement officers, or the public in general; to communicate with clients; or to post about her legal work in any way. No identifying information, such as her name, bar number, business address, email, or phone number, was included in her Twitter biography. In fact, to view the information contained in her Twitter biography, one would have to deliberately search for Respondent's account or otherwise navigate to her separate biography page. And even when her biography was located, without her name and contact information, an observer would still have difficulty determining who the account holder was without doing additional research on the internet.

In sum, OCTC did not show clear and convincing evidence to support the conclusion that Respondent made a material misrepresentation amounting to an intentional or grossly negligent act of moral turpitude by including the characterization, "LAPD Union Attorney," in her personal Twitter biography. So, Count One is dismissed with prejudice.

Count Two – § 6106 [Moral Turpitude -Directing Others to Commit Acts of Violence]

In Count Two, OCTC alleges that, between May 29 and May 31, 2020, Respondent committed acts of moral turpitude by posting certain tweets "that directed other[s] to commit acts of violence, including calls to shoot, summarily execute, and burn down the homes of members of the public." (ANDC, p. 3, par. 11.) In particular, the ANDC alleges the following tweets constituted misconduct: (a) "*Can't wait. At least a reason to shoot them*" (Tweet No. 1); (b) "*They need to be shot*" (Tweet No. 5); (c) "*Yes and they should be shooting the looters*"

(Tweet No. 14) and "*They should be shot. And if it was your business you'd pull the trigger*" (Tweet No. 15); (d) "*Shoot the protesters*" (Tweet No. 7); (e) "*Let's burn your house*" (Tweet No. 13); and (f) "*Omg Scarborough you've hit a new low in stupidity. Let's go burn your house down with you in it*" (Tweet No. 10).[23]

Because Count Two charges Respondent with misconduct based purely upon the content of her speech, the protections of the First Amendment are implicated.

Brandenburg is the seminal case addressing the protections of the First Amendment as applied to speech that advocates for violence or illegal action. In *Brandenburg*, a Ku Klux Klan leader stated to those gathered at a rally, which was covered by media and shown on television, "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." (*Id.* at p. 446). The leader also announced a march on Congress. As a result, the leader was charged with a violation of the Ohio Criminal Syndicalism statute, which prohibited (1) advocating crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform; and (2) gatherings with the purpose of teaching criminal syndicalism. In finding that the Ohio statute violated the First Amendment, the Court distinguished mere advocacy (protected speech) from incitement to imminent lawless action (not protected speech) – the latter involving intent to provoke lawless action and circumstances that would suggest that such action is imminent and likely to occur.[24]

[23] The tweets in subparts (a), (b), (d), (e), and (f) were made by Respondent between May 29 and May 31 while the tweets in subpart (c) were made some time in late May, on a date and time unknown.

[24] In a recently issued decision, the U.S. Supreme Court restated the mens rea needed for incitement to constitute punishable speech, as articulated in *Brandenburg*. The Court distinguished this category of speech, which requires a strong intent requirement, from the "true threats" category of speech, which requires a lower level, reckless standard. (*Counterman v. Colorado* (2023) 143 S. Ct. 2106, 2118.)

OCTC contends that *Brandenburg* is not applicable to Respondent's speech because of the fact that she is an attorney. However, Respondent was not speaking in her capacity as an attorney and the court did not receive any evidence demonstrating that her speech was prejudicial to the administration of justice or otherwise related to the practice of law. Therefore, the court sees no basis to afford it diminished protections as "attorney speech" and OCTC must establish that Respondent's speech is otherwise unprotected. Under the test established by *Brandenburg,* in order to establish that Respondent's speech crossed the line from mere advocacy into unlawful incitement, OCTC must establish: (1) Respondent's culpable state of mind, i.e., that she had the specific intent to incite imminent lawless action; and (2) that such imminent lawless action was likely to occur, i.e., a listener was present who was able to understand and follow through on Respondent's intent.

Though OCTC challenges the applicability of *Brandenburg* to this attorney disciplinary proceeding, it maintains that the elements of the *Brandenburg* test have been met. OCTC argues that Respondent's intent is established by looking at the plain language of her tweets, the socio-political context in which they were posted, and the numerosity of her tweets. OCTC further argues that the imminence and likelihood requirements are established because the tweets were posted during the ongoing protests, a volatile environment fueled by anger over the excessive use of force by police that had been building to a tipping point, making it likely that someone would respond to the calls for violence. The court does not agree.

Preliminarily, the court notes that Respondent's tweets cannot be understood in isolation from their context because it is context that gives meaning to our words and actions. Moreover, Respondent's individualized perception of the events going on around her is particularly relevant to understanding her motivation for and intent behind the statements made in her tweets. Significantly, more than two hours before Respondent posted her first tweet, small riots had

erupted in parts of Los Angeles. Yet instead of looking to the specific context for each of Respondent's tweets, OCTC focuses on the generalized global context during the relevant time frame, presenting an incomplete and selective picture of the circumstances giving rise to Respondent's tweets.

For example, the specific context of Tweet No. 1, which was posted at 7:53 p.m., is not entirely known because only tweets from two of the three individuals that Respondent was replying to were presented. From the information that was presented, it appears that Respondent was merely reacting to someone else's post about events going on in Washington D.C. Moreover, "*Can't wait. At last a reason to shoot them*" is an expression of a provocative opinion, not a directive. Even if it were viewed as a directive, it is not clear to whom the tweet would have even been directed nor that any person in a position to so act even saw the tweet.

The same is true of Tweet No. 5 ("*They need to be shot*"), Tweet No. 10 ("*Omg Scarborough…Let's go burn your house down with you in it*"), Tweet No. 13 ("*Let's burn your house*"), Tweet No. 14 ("*Yes and they should be shooting the looters*"), and Tweet No. 15 ("*They should be shot…if it was your business you'd pull the trigger*"). These tweets were all posted while riots were taking place in and around Los Angeles and are not specific calls for action directed to anyone in particular. Tweet Nos. 5, 10, and 13 were replies to other individuals, but the crucial context for Respondent's statements, i.e., the tweets that precipitated such a response from Respondent, were not presented in evidence. And Tweet Nos. 14 and 15, which are phrased as commentary on something that someone else said, also appear to be missing necessary context.

The only tweet that can arguably be seen as a directive, is Tweet No. 7 ("Shoot the protestors"), which was apparently posted in reply to an earlier tweet that was warning protestors at the intersection of Fairfax Ave. and La Cienega Blvd. that police were on their way.

However, it was not established to whom Respondent's tweet was directed nor that any listener was at or near the intersection of Fairfax Ave. and La Cienega Blvd. at the time that Tweet No. 7 was posted. Significantly, Tweet No. 7 was posted at 6:17 p.m. on May 30, 2020, while full-scale riots were underway in parts of the city, including looting and violence near Respondent at the Grove.

In evaluating whether OCTC has established the requisite evidence of Respondent's intent, this court must resolve all reasonable doubts about culpability in favor of Respondent and must choose the inference leading to innocence if equally reasonable inferences may be drawn from the facts. (*In the Matter of Respondent H* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 234, 240, and cases cited therein.) Here, Respondent presented this court with a credible and reasonable interpretation of the meaning behind her words, i.e., that she posted the above-noted tweets as an expression of her anger, fear, and frustration with the violence taking place around her and in disagreement with some of the sentiments she saw being expressed by others on Twitter. Respondent did not use any Twitter feature to widely enhance her tweets or to otherwise ensure they might be viewed by people who could and would act as she suggested. And, when it was brought to her attention that her tweets had upset people, she expressed immediate regret and remorse over her incredibly poor choice of words. In view of the totality of the circumstances surrounding Respondent's tweets, the court finds that there is not clear and convincing evidence that Respondent intended for her words to incite imminent lawless action. Rather, the evidence tends to show that Respondent's speech was an ill-advised and careless expression of her thoughts and emotions in response to her perceived experience.

Even if Respondent's intent had been established, OCTC failed to establish that the circumstances of Respondent's speech were such that it was likely to incite imminent lawless action. It was not clear who was the intended audience for the tweets nor that any person in that

audience was able to understand the directive communicated by the tweets and was in a position to act on such directive.[25] Respondent did not specify where or when the communicated action was to occur.[26] No witness was presented that saw the tweets at, or even near, when such tweets were posted. None of the five protestors who testified at trial saw Respondent's tweets while at a protest. The Twitter symbols under Respondent's tweets showed only one of her tweets received any comments (Tweet No. 7) – none of which were presented in evidence – and only one of Respondent's tweets received any likes (Tweet No. 14). As for the other tweets, the Twitter symbols were either missing or contained no evidence of comments, re-tweets, likes, or direct messages. In sum, assuming arguendo that it had been shown that Respondent intended such action – shooting protestors and burning Scarborough's and/or other person's homes – there was not clear and convincing evidence to establish that such action was both imminent and likely to occur.

The court acknowledges that the State Bar undoubtedly has a strong interest in the protection of the public, the preservation of confidence in the legal profession, and the maintenance of the highest professional standards of attorneys licensed in this State. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.1; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) However, while the State Bar may have a special interest in regulating attorney *conduct*, this does not give the State Bar the unfettered authority to regulate attorneys in their daily lives to censor unfavorable speech that it deems "reprehensible, unethical, and outside the bounds of good moral conduct expected of attorneys." (OCTC

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[25] In *Hess v. Indiana* (1973) 414 U.S. 105, 109 (*per curiam*) the Court held that because Hess's statement "[w]e'll take the f---ing street later" or "[w]e'll take the f--ing street again" at an antiwar demonstration was not directed to any person, it could not be incitement and was protected speech.

[26] The tweets did not direct people to shoot protestors at any particular location nor did they disclose the home address of Scarborough and/or any address for that matter.

Closing Brief, p. 11.) OCTC's concern for the potential adverse effect on the public perception of lawyers and confidence in the fair administration of justice is purely speculative and based on the subjective effect on potential listeners. Therefore, it is not a compelling justification for the infringement upon Respondent's freedom of expression.

Although the Court does not condone Respondent's tweets, which are unbecoming of an attorney, OCTC did not show that Respondent had the intent to incite imminent lawless action, that her tweets were likely to be heard by an audience that would understand her intent, nor that such imminent lawless action was likely to occur as a result of her tweets. Therefore, Respondent's pure speech, which is otherwise protected by the First Amendment, cannot be the sole basis for professional discipline and Count Two is dismissed with prejudice.

Count Three and Four – Rule 8.4(b) [Misconduct – Criminal Acts]

Rule 8.4(b) provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." In Count Three, OCTC charged that Respondent violated 18 U.S.C., section 2101, the federal anti-rioting statute, a criminal act that reflects adversely on her honesty, trustworthiness, or fitness as a lawyer. In Count Four, OCTC charged that Respondent violated California Penal Code section 404.6, subdivision (a), the California anti-rioting statute, a criminal act that also reflects adversely on her honesty, trustworthiness, or fitness as a lawyer.

In order to establish culpability for a violation of rule 8.4(b), OCTC must prove that the elements of the respective criminal statutes have been met and that the criminal acts reflect adversely on Respondent's honesty, trustworthiness, or fitness as an lawyer.

18 U.S.C., section 2101(A) provides, in pertinent part, that a person may be found guilty of a crime if such person travels in interstate or foreign commerce or uses any facility of interstate or foreign commerce with the intent to (1) incite a riot, (2) participate in or carry on a

riot, (3) commit any act of violence in furtherance of a riot, or (4) aid and abet any person to so act *and* during such travel or use or thereafter, the individual performs or attempts to perform any other overt act for any of the previously identified purposes. Furthermore, as defined in 18 U.S.C., section 2102(b), "the term 'to incite a riot', or 'to participate in, or carry on a riot', includes, but is not limited to, instigating other persons to riot, but shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief."

Similarly, in order to establish a violation of Penal Code section 404.6, subdivision (a), it must be proven that:

> 1. The accused (did an act or engaged in conduct that encouraged a riot[,]/ [or] urged others to commit acts of force or violence[,]/ [or] urged others to burn or destroy property);
>
> 2. The accused acted at a time and place and under circumstances that produced a clear, present, and immediate danger that (a riot would occur/ [or] acts of force or violence would happen/ [or] property would be burned or destroyed);
>
> AND
>
> 3. When the accused acted, she intended to cause a riot.

(Judicial Council of California Criminal Jury Instructions (2023 edition), CALCRIM No. 2682.) And, for the purposes of establishing criminal liability under Penal Code section 404.6, subdivision (a), a riot is defined as when "two or more people, acting together and without legal authority, disturb the public peace by using force or violence or by threatening to use force or violence with the immediate ability to carry out those threats." (*Ibid*; see also Pen. Code § 404, subd. (a).)

These are both specific intent crimes, which require that OCTC prove, first and foremost, that Respondent intended to incite a riot. As discussed above in Count Two, clear and

convincing evidence was not presented that Respondent intended to incite a riot.[27] To the contrary, the evidence revealed that Respondent's tweets were an emotionally charged response to the violent protests and ongoing riots that she was hoping would come to an end.

In sum, OCTC did not establish, by clear and convincing evidence, that Respondent violated the federal or California anti-rioting statutes, a necessary predicate to a finding of culpability for a violation of rule 8.4(b). Accordingly, Counts Three and Four are dismissed with prejudice.

Order

Because the court finds that Marla Anne Brown, State Bar Number 140158, is not culpable of the charged misconduct, this entire proceeding is dismissed with prejudice. Any reference to this matter on the attorney's profile page will be removed pursuant to the clerk's entry of dismissal. However, public cases remain available on the court's public docket.

As Marla Anne Brown has been exonerated of all charges following a trial on the merits, she may, upon the finality of this Decision and order, file a motion seeking reimbursement for costs under Business and Professions Code section 6086.10, subdivision (d). (See Rules Proc. of State Bar, rule 5.131.)

Dated: October 3, 2023

DENNIS G. SAAB
Judge of the State Bar Court

[27] Finding that the requisite mens rea was not established, the court does not address here whether the use of Twitter satisfies interstate commerce or whether the statutory definition of "riot" was satisfied. Also, not finding Respondent violated the statutes, the Court does not address whether the criminal act reflects adversely on Respondent's honesty, trustworthiness, or fitness as an attorney in other respects.