

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

CLIFFORD LEE CASEY

A Member of the State Bar

No. 04-O-11237

Filed December 4, 2008

SUMMARY

Respondent negotiated a transfer of real property between two of his clients, and as a result of the transfer his minor son received a 50 percent interest in the property from the recipient client without the son's notice. Respondent failed to disclose in writing the terms of the transfer to the client who was the original owner of the property. As a result, the client lost title to the property, but remained on the deed of trust, which put her at risk of having to pay the balance of the mortgage upon a default in the mortgage payments or recordation of the grant deed. The hearing judge found respondent culpable of acquiring a pecuniary interest adverse to his client, but did not find respondent culpable of acts of moral turpitude. The hearing judge found respondent was entitled to substantial credit in mitigation for 12 years of service as a judge pro tem, but was not entitled to mitigation credit for good moral character or remorse. In aggravation, the hearing judge found respondent had a prior record of discipline, significantly harmed his client, was indifferent and lacked insight into the seriousness of his misconduct. The hearing judge recommended respondent be placed on three years' probation on the condition that he be actually suspended for 90 days. (Hon. Richard A. Platel, Hearing Judge.)

The review department reversed the hearing judge's findings regarding culpability. Instead, the review department concluded that respondent did not acquire a pecuniary interest adverse to his client, but that he was culpable of acts of overreaching and breach of fiduciary duty that constituted moral turpitude in violation of section 6106. The review department adopted the hearing judge's findings in aggravation and mitigation, and adopted the recommendation that respondent be suspended for three years, stayed, and that he be placed on three years' probation on the condition that he be actually suspended for 90 days.

COUNSEL FOR PARTIES

For State Bar: Paul T. O'Brien

For Respondent: George S. Wass

HEADNOTES

[1 a–b] 273.00 Rule 3–300 [former 5–101] (improper transaction with client)

Respondent did not acquire a pecuniary or financial interest in his client's former condominium under rule 3-300. The fact that a second client, to whom the condominium was transferred, gave respondent's minor son a 50 percent ownership interest to induce respondent to manage the condominium did not create on the part of the respondent any ownership, possessory, security, or other interest in the property. To violate rule 3-300, an attorney must be a party to or financially gain from the business transaction. Respondent's role in the negotiations did not make him a party to the purchase of the condo, nor did his management of the condo or the ownership interest acquired by his son make him a third party beneficiary to the transaction.

**[2 a–b] 221.00 State Bar Act–Section 6106 (moral turpitude, corruption, dishonesty)
430.00 Breach of Fiduciary Duty**

Respondent ignored his role as a fiduciary to one client when, while negotiating the transfer of her real property to his other client, he failed to advise her that she would no longer have any right, title, or interest in the property, that she remained on the deed of trust placing her at risk of having to pay the mortgage upon default in the mortgage payments or recordation of the grant deed, or that she would continue to receive the tax bills. At best, respondent was grossly negligent in failing to disclose the terms of the sale and the pros and cons of the transactions to his client, and at worst, respondent intentionally concealed the information to the advantage of his other client and his son. Respondent exploited his superior knowledge and position of trust to the detriment of his vulnerable client, which constituted an act or moral turpitude.

**[3 a–c] 221.00 State Bar Act–Section 6106 (moral turpitude, corruption, dishonesty)
430.00 Breach of Fiduciary Duty**

In addition to the fiduciary duty to fully inform his client about the sale of her condominium, respondent breached correlative fiduciary duties to adequately document the terms of the sale in a manner reasonably calculated for the client to understand, to advise his client that she should consult another attorney, or to disclose the serious conflicts in representing both parties to the transfer transaction. Respondent's conduct constituted overreaching, and as a result of his multiple conflicts, he gravely compromised his duty of loyalty to his client.

[4] 765.10 Mitigation Substantial Pro Bono Work–Found

Respondent's 12 years of service as a judge pro tem was entitled to substantial mitigation credit.

[5] 582.10 Aggravation–Harm to Client–Found

Client was significantly harmed where, as a result of respondent's actions, she had to hire new counsel, incurred a significant amount of attorney's fees, and unsuccessfully attempted to reclaim her condominium for three years.

[6] 591 Aggravation–Indifference to Rectification/Atonement–Found

Substantial weight in aggravation assigned to respondent's lack of insight into his wrongdoing where he failed to realize his actions while representing both parties to a real property transfer compromised his fiduciary duties, and he believed he was not culpable because one of the clients was awarded only nominal damages in a civil suit against him. Respondent thus misperceived the purpose of disciplinary proceedings, which is protection of the public and the profession, and on

which the extent of civil damages awarded have little or no relevance.

ADDITIONAL ANALYSIS

Culpability

Found

- 221.19 Section 6106
- 430.01 Breach of Fiduciary Duty

Not Found

- 273.05 Rule 3–300 [former 5–101]

Aggravation

Found

- 511 Prior record
- 582.10 Harm to client
- 591 Indifference

Mitigation

Found

- 765 Substantial pro bono work (12 years service as a judge pro tem entitled to substantial mitigation credit)

Declined to Find

- 740.51 Good Character
- 745.52 Remorse

Discipline

- 1013.09 Stayed Suspension–3 years
- 1015.03 Actual Suspension–3 months
- 1017.09 Probation–3 years

OPINION

EPSTEIN, J.:

This matter highlights some of the ethical perils when an attorney negotiates a business transaction between two clients. The hearing judge found respondent, Clifford Casey, acquired a pecuniary interest adverse to his client in violation of rule 3-300 of the Rules of Professional Conduct¹ and recommended that respondent be placed on three years' probation on the condition that he be actually suspended for 90 days. Respondent seeks review of the hearing judge's discipline recommendation, arguing that it is too harsh because he made an "innocent mistake" in failing to disclose the material terms of the transaction to one of his clients. The State Bar asks us to adopt the hearing judge's recommendation.

We review the record de novo (*In re Morse* (1995) 11 Cal.4th 184, 207), and we reverse the hearing judge's finding of culpability under rule 3-300. Instead, we find respondent culpable as charged of violating Business and Professions Code section 6106 (moral turpitude).² However, based upon all relevant circumstances, as well as the standards³ and guiding case law, we conclude that the hearing judge's discipline recommendation is sufficient to protect the public, the courts and the profession.

I. FACTUAL AND PROCEDURAL BACKGROUND

Respondent was admitted to practice law in California on June 23, 1978, and he has been a member of the State Bar since that time. He stipulated to a prior discipline resulting in a public reproof in October 2003 due to his conviction of three misdemeanor violations of unlawful entry into the property of another (Pen. Code, § 602, subd. (1)).

In 1985, Thomas and Ida Stewart, who lived in Santa Ana, California, purchased a condominium in Palm Springs for \$49,990. In 1992, the Stewarts decided to sell the condo to two elderly women (Tenants), but when they could not qualify for a loan, the Stewarts agreed to lease the condo to them for twenty years with an option to purchase the condo. The terms of the lease required the Tenants to pay rent, which was the equivalent of the monthly mortgage payment, the Homeowners Association (HOA) dues and the property taxes. Title to the condo remained in the Stewarts' name until payment in full of the mortgage.

In 1998, when the Tenants fell behind on the HOA dues, Mrs. Stewart contacted respondent and retained him to prosecute an unlawful detainer action against them, which he filed on September 3, 1998. Respondent resolved the matter prior to trial by negotiating an agreement whereby the Tenants relinquished their rights under the lease and assigned to the Stewarts a rental agreement which they had with a subtenant.

In July 1999, Mrs. Stewart again contacted respondent and asked him to assist her because the Stewarts had not paid past-due HOA dues on the condominium, and the HOA was threatening foreclosure. Mrs. Stewart wrote to respondent, explaining that this situation posed a financial hardship: "I can't believe it falls upon me to make these payments in arrears, that are due. Where are my rights? . . . My home in Santa Ana is our nest egg . . . We survive on our pensions and try to meet our monthly responsibilities." Respondent negotiated a payment plan with the HOA requiring the Stewarts to pay an additional \$200 per month, but Mrs. Stewart could not agree to those payments due to her declining finances, and also because Mr. Stewart had become ill and had moved to a retirement home in Florida to be

1. All further references to "rule(s)" are to the Rules of Professional Conduct, unless expressly noted.

2. All further reference to "section(s)" are to the Business and Professions Code, unless expressly noted.

3. All further references to "standard(s)" are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, unless expressly noted.

closer to his family. Mrs. Stewart continued to live in Santa Ana, but she traveled back and forth to visit her husband, increasing the Stewarts' living expenses. To add to her worries, the subtenant living in the Stewarts' condo failed to pay the rent on time, causing Mrs. Stewart additional hardship.

At this point in time, the record becomes murky due to conflicting testimony between respondent and Mrs. Stewart and the absence of corroborating evidence. Respondent testified that Mrs. Stewart offered to sell him the Palm Springs condo. Specifically, he said that Mrs. Stewart asked him to assume the mortgage payments for the condo, pay the past-due HOA dues and pay the taxes. At the time, there was a balance of approximately \$34,000 left on the condominium's first trust deed. The parties stipulated that the condominium's fair market value as of July, 1999, was approximately \$29,000 to \$34,000.

Respondent testified that he told Mrs. Stewart that he was not interested in purchasing the condo but he had a client named Ajax Corporation (Ajax) that might be interested. Ajax had at least one shareholder, Ray Lyons, who was also president of the company. Lyons was a long-standing client and friend of respondent, as well as a business partner in at least one deal involving the purchase of a bar. Not only did respondent represent Ajax, but he was also its agent for service of process and, at different times after March 2001, he served as Ajax's president.⁴

Respondent testified that he communicated Mrs. Stewart's offer to Lyons and that Lyons was interested, but wanted respondent to be "involved" in managing the condo for him "so that [Lyons] wouldn't have to be – you know, have a problem with it or be burdened with it." He further testified that Lyons suggested that respondent's minor son, Chance Casey, be made a joint tenant and be given a 50-percent ownership interest in the condo, in part because Lyons was fond of Chance, and in part, according to respondent, because "this was [Lyons'] way of getting me involved to manage this condominium for

him." Respondent did not disclose the terms of the proposed purchase by Ajax in writing to the Stewarts.

Mrs. Stewart had a very different understanding of the transaction. She testified that she asked respondent to "handle" the condo for her since she "had not been able to get the tenant who was there to pay her on time." Since respondent was in "Palm Springs and [she] was in Santa Ana," she thought it was "easier for him to – to look over the property and see what [could] be done because she wasn't getting anywhere with" the current tenant. Mrs. Stewart further testified: "I contacted Mr. Casey as my counsel. I thought that I – he would look after my interest and help me to resolve this matter hopefully with good tenants, and of course I expected him to be reimbursed one way or another even if it came to the point where we had to sell the condominium. If it came to that, I said to him, 'Remember, Mr. Casey, we share.'" Mrs. Stewart thus believed that respondent would help to stabilize the property with good tenants and that if at some point it became necessary to sell the condo, she and respondent would in some manner share in the proceeds of the sale.

On August 27, 1999, respondent sent a letter to the Stewarts while they both were in Florida, enclosing a grant deed to the condo for them to sign. The letter stated in its entirety: "Enclosed is a deed to the Palm Springs condo for the two of you to sign and return to me. Although Mrs. Stewart has said that it is not necessary, I am obligated to tell you that you have the right to have a lawyer of your choosing review the document and our transaction overall." Mrs. Stewart testified that she did not receive this letter, which was sent around the time of Mr. Stewart's death in August of 1999.

Even though the Stewarts did not sign the deed, respondent assumed management of the condo in August 1999 on behalf of Ajax. Respondent collected the rent and paid the mortgage and HOA fees out of his office account, with reimbursement from Ajax.

4. The hearing judge also found that at various times respondent had an ownership interest in Ajax. We find no evidence in the record to support this finding.

On March 2, 2001, Mrs. Stewart traveled by bus from Santa Ana to Palm Springs and met respondent at a notary office to sign the grant deed. Mrs. Stewart testified that she signed the deed at that point because she knew she would “owe [respondent] money eventually and not being able to pay him, that [signing the deed] was the only way to show good faith.” The deed conveyed the Palm Springs condo to respondent’s son, Chance, and Ajax, Inc., as tenants in common. Chance had no knowledge that he had obtained a one-half interest in the condo. On the same date she signed the deed, respondent provided Mrs. Stewart a check for the mortgage payment she had advanced for the month of March. However, Mrs. Stewart remained liable on the deed of trust, which was not cancelled or re-conveyed to her. Mrs. Stewart also wanted respondent to reimburse her \$500 for the money she advanced for the taxes. Respondent told Mrs. Stewart that he would send her the money, but he never did. Mrs. Stewart called respondent a number of times seeking the \$500 for the taxes, but he never spoke to her again after the meeting in the notary office.

Mrs. Stewart filed a civil suit against respondent, received a judgment in her favor of one dollar, but did not obtain legal possession of the condo. Mrs. Stewart’s attorney’s fees for the suit against respondent totaled between \$67,000 and \$77,000, of which she paid \$10,000.

On October 23, 2006, after the conclusion of Mrs. Stewart’s civil case against him, respondent

filed a libel action against Mrs. Stewart and her attorneys, alleging that Mrs. Stewart’s attorneys wrote a defamatory letter to Ajax’s president, Lyons, stating that respondent had defrauded Mrs. Stewart. At the time of the hearing below, respondent had not served the complaint on Mrs. Stewart or her attorneys because he claimed he might amend it to dismiss Mrs. Stewart if she had no knowledge of the alleged libelous letter.

The State Bar filed a Notice of Disciplinary Charges (NDC) on March 27, 2006, alleging three counts of misconduct in one client matter. On April 11, 2006, respondent filed a response denying culpability. On September 19, 2006, the parties filed a partial stipulation as to certain facts, and the hearing judge dismissed Count 2 of the NDC.⁵ After three days of hearings, the matter was submitted on August 13, 2007. On November 8, 2007, the hearing judge filed a decision finding culpability on Count 1 of the NDC, acquiring an interest adverse to a client, in violation of rule 3-300. The hearing judge further found there was insufficient evidence to establish moral turpitude under Count 3. He recommended a three-year stayed suspension, three years’ probation, and 90 days’ actual suspension. Respondent sought review of this decision on December 12, 2007. The State Bar did not request review. On December 17, 2007, the hearing judge filed a Modification Order to correct the duration of time within which respondent had to pass the Professional Responsibility Examination and to correct a typographical error of the probation term.⁶

5. The hearing judge dismissed Count 2 (circumventing a court order) on the State Bar’s motion because it could not produce evidence to support the charge. Upon our de novo review, we adopt the hearing judge’s dismissal of this count with prejudice.

6. Respondent alleges that the hearing judge, *sua sponte*, increased his discipline recommendation when he filed the Modification Order. Respondent is incorrect because in the November 8, 2007, Decision, first paragraph under “VI. Recommended Discipline,” the hearing judge clearly recommends respondent be suspended for “three years.”

However, under probation condition number 8, a typographical error stated “the Supreme Court order suspending Casey from the practice of law for *two* years” (emphasis added).

The Modification Order did not increase the recommended discipline but only corrected the typographical error to ensure that the suspension outlined in the probation condition corresponded with the suspension recommendation.

II. CULPABILITY DISCUSSION

A. Count 1: Rule 3-300 – Acquiring Pecuniary Interest Adverse to Client

Rule 3-300 provides in relevant part: “[a] member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client . . .” unless certain requirements are satisfied.⁷

The hearing judge found respondent culpable of violating rule 3-300 by reason of acquiring a pecuniary interest in the Palm Springs condo that was adverse to Mrs. Stewart without fully disclosing to her the terms of that transaction in writing and without obtaining her written consent. The hearing judge concluded that the following facts established that respondent acquired a pecuniary interest in Mrs. Stewart’s condo: 1) he agreed to manage the condo for Ajax; 2) his minor son received a 50% interest in the property from Ajax without the son’s knowledge; and 3) respondent was Ajax’s attorney and agent for service of process at the time of the transaction. The hearing judge explained: “Respondent’s personal and professional life were so entangled with Lyons and Ajax that it was incumbent on respondent to follow his ethical obligations under rule 3-300 and make the requisite disclosures and obtain Mrs. Stewart’s written consent.” Although we agree with the ethical concerns articulated by the hearing judge, we do not agree that the record establishes that respondent either entered into a business transaction with Mrs. Stewart or acquired a pecuniary interest – or any other ownership, possessory, or security interest – within the meaning of rule 3-300.

We look to *In the Matter of Fandey* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 767 as

precedent. Fandey introduced his father to a client who was interested in selling his home. Fandey attended the negotiations between his father and the client, and helped prepare the documents for the sale of the client’s home to his father. The client originally listed the home at \$180,000, but Fandey convinced the client to offer the property at \$30,000 less under the pretext that the client would receive a tax savings. Fandey’s father bought the home at the reduced price. The hearing judge in the *Fandey* case reasoned that “the closeness of the relationship between respondent and his parents is tantamount to respondent himself entering into a business transaction with [the client].” (*Id.* at p. 774.) The hearing judge found that Fandey was accordingly culpable, inter alia, of improperly obtaining an interest in a client’s property and/or entering into a business transaction with a client in violation of former rule 5-101 (the predecessor to rule 3-300).

We reversed, and instead found that Fandey’s close relationship with his father and his involvement in the negotiation of the sale of his client’s property to his father was not evidence “that respondent was a party to or benefitted financially from either property transaction.” (*In the Matter of Fandey, supra*, 2 Cal. State Bar Ct. Rptr. at p. 777.) We nevertheless found Fandey’s conduct in negotiating the property transactions between his father and his client constituted overreaching and a conflict of interest and therefore was a significant aggravating factor under standard 1.2(b)(iii).⁸ (*Id.* at pp. 777-778.)

[1a] As in *Fandey*, we do not find that respondent acquired a pecuniary or financial interest in Mrs. Stewart’s condo under rule 3-300. Ajax’s agreement to give Chance Casey a 50-percent ownership interest in order to induce respondent to manage the condo did not create on the part of respondent any “ownership, possessory, security or other interest” in the

7. Those requirements are: (A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client’s choice and is given a reasonable opportunity to seek that advice; and (C) The client consents in writing to the terms of the transaction or acquisition.

8. The misconduct involving overreaching and conflict of interest was not charged in the NDC in *Fandey* and therefore was considered as aggravation. Here, we address respondent’s similar actions as *charged* misconduct in our discussion of Count 3, *post*.

property. To the contrary, the grant deed, which is the only written evidence of the transaction, transferred the Stewarts' ownership interest in the condo to Ajax and Chance, who became the two owners as tenants in common. (*Emery v. Emery* (1955) 45 Cal.2d 421, 432 [minor child's property is his or her own, and not that of child's parents]; see also Fam. Code, § 7502 [parent has "no control over the property of [a] child"]; *In re Tetsubumi Yano's Estate* (1922) 188 Cal. 645, 649 [minority does not incapacitate a person from taking and holding real estate].)

[1b] Rule 3-300 further provides that "[a] member shall not enter into a business transaction with a client . . ." However, to violate rule 3-300, an attorney must be a party to or financially gain from the business transaction. (*In the Matter of Fandey, supra*, 2 Cal. State Bar Ct. Rptr. at pp. 776-777; cf. *In the Matter of Peavey* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 483, 485 [attorney entered into agreement with clients where clients loaned him \$25,000 with option to convert loan into partnership to share in proceeds from sale of book attorney produced]; *In the Matter of Gillis* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 387, 392-393 [attorney sold his residential property to client in exchange for substantial portion of settlement proceeds attorney obtained for client]; *In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 160-161 [attorney convinced clients to invest \$80,000 in attorney's business park development partnership].) Respondent's role in the negotiations did not make him a party to the purchase of the condo. We could find no clear and convincing evidence establishing that respondent was financially even a third party beneficiary by virtue of his management of the condo or the ownership interest acquired by his son. "For a third party to qualify as a beneficiary under a contract, the contracting parties must have intended to benefit that third party, and their intent must appear from the terms of the contract. [Citations.]" (*Kirst v. Silna* (1980) 103 Cal.App.3d 759, 763.)

Accordingly, we conclude that the hearing judge was incorrect in finding respondent culpable of violating rule 3-300.

B. Count 3:

Section 6106 – Acts Involving Moral Turpitude

Our finding that the State Bar did not establish a rule 3-300 violation does not absolve respondent of culpability. To the contrary, the conduct alleged in Count 1 also is alleged in Count 3 as constituting acts involving moral turpitude in violation of section 6106. The hearing judge found there was not clear and convincing evidence of moral turpitude. We disagree. Indeed, as we discuss below, we find the moral turpitude allegations in Count 3 are clearly established by evidence of respondent's failure to act as a fiduciary in fully communicating the terms of the sale or properly documenting the transaction, his overreaching, and his conflicts of interest.

Mrs. Stewart was about 80 years old when she contacted respondent about the HOA dues. She advised him she could not pay the arrearages because she was "strapped." Additionally, she testified that "everything was – my husband was on his death bed, and I was living – he was living in Florida. We were living in Florida and in California. My expenses were terribly high, and we had depleted our savings, and I just couldn't – couldn't advance any more money." It is clear from the record that the Stewarts sought respondent's legal advice when they were in financial distress and emotionally vulnerable.

[2a] Respondent testified that his role in the transaction between Mrs. Stewart and Ajax was "[j]ust as the guy in the middle, the go-between delivering information back and forth." Respondent's testimony completely ignores his role as a fiduciary. "The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over the dependent party." [Citation.] (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813.) Respondent did not advise Mrs. Stewart that she would no longer have any right, title or interest in and to the condo, or that she would remain on the deed of trust, which put her at risk of having to pay the balance of the mortgage upon a default in the mortgage payments or recorda-

tion of the grant deed.⁹ Mrs. Stewart was also not advised that she would continue to receive the tax bills.

[2b] We find, at best, respondent was grossly negligent in failing to fully disclose the terms of the sale of the condo as well as the pros and cons of the transaction to Mrs. Stewart. At worst, respondent intentionally concealed the information to the advantage of Ajax and his son. A finding of gross negligence is sufficient for a violation of section 6106. (*In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9, 15; *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 90, 91.) As Mrs. Stewart's attorney, "respondent exploited [his] superior knowledge and position of trust to the detriment of [his] vulnerable client and this clearly constituted an act of moral turpitude." (*In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 244; see, e.g., *In the Matter of Gillis, supra*, 4 Cal. State Bar Ct. Rptr. at pp. 397-98 [attorney sold his own home to a client for fair market value but without full disclosure of the risks involved in the transaction]; *In the Matter of Brockway* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 944, 959-60 [attorney used technical legalese in fee agreement to disadvantage of clients who spoke limited English]; *In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, 807 [attorney elicited a confession from incarcerated defendant with 10th grade education].)

[3a] In addition to his fiduciary duty to fully inform Mrs. Stewart about the sale of her condo, respondent had a correlative fiduciary duty to ensure that the transaction was properly documented. (*In the Matter of Fandey, supra*, 2 Cal. State Bar Ct. Rptr. at p. 778.) Respondent maintains that the terms of the sale were adequately documented by the grant deed Mrs. Stewart signed on March 2, 2001. We disagree. The deed merely disclosed that Ajax and Chance Casey were the grantees. It did not disclose the material terms of the sale or the ramifications of the transfer of the property in a manner reasonably calculated for Mrs. Stewart to understand the consequences of her signing the deed. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 663.)

[3b] We also find respondent's August 27, 1999, letter, which accompanied the grant deed he sent to Mrs. Stewart, to be woefully inadequate. There is no mention in the letter of the terms of the transaction or the consequences to her. (*Rose v. State Bar, supra*, 49 Cal.3d at p. 663.) More importantly, the letter does not disclose respondent's conflicts of interest. (*Ibid.*) His precautionary language, "I am obligated to tell you that you have the right to have a lawyer of your choosing review the document and our transaction overall" merely suggested that she *could* consult another attorney; he did not advise her that she *should* consult an attorney, which he was required to do. (*Ibid.*) Indeed, his letter "implied it was unnecessary because he would be looking out for her interests." (*Ibid.*) Had respondent fully disclosed the terms of the sale in writing, the discrepancies between his and Mrs. Stewart's understanding of the transaction should have become apparent to both of them.

[3c] Respondent further breached his fiduciary duty to Mrs. Stewart because of his divided loyalties among her, his other client Ajax, and his son, Chance. It is the attorney's "duty to advise each client with undivided loyalty. [Citation.]" (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 616.) We found in *In the Matter of Fandey, supra*, 2 Cal. State Bar Ct. Rptr. at pp. 777-778, that an attorney's participation in similar negotiations involving the sale of a client's real property was "rife with potential and actual conflicts of interest," which constituted overreaching. We thus observed: "Perhaps because of the conflicting loyalties respondent faced between [his client] and respondent's father, respondent did not safeguard [his client's] interests in these transactions . . . he did not adequately explain the transactions to [his client] or advise [his client] to seek independent counsel. . . ." (*Ibid.*) Respondent did not disclose the serious conflicts in representing Mrs. Stewart and Ajax (and vicariously his son). "As a consequence of his multiple conflicts, respondent lost any claim to objectivity or neutrality, and in so doing he gravely compromised his duty of loyalty to [his client] . . ." (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 594.)

9. The record reflects that the mortgage was subject to a "due on sale" provision.

III. DISCIPLINE

The primary purpose of these disciplinary proceedings is not to punish but to protect the public, the courts, and the legal profession. (Std. 1.3; *Bach v. State Bar* (1987) 43 Cal.3d 848, 856.) No fixed formula applies in determining the appropriate level of discipline. (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 403.) Rather, we determine the appropriate discipline in light of all relevant circumstances, including mitigating and aggravating circumstances. (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

A. Mitigation

[4] We agree with the hearing judge's finding that respondent's service as a judge pro tem from 1986 to 1998 is entitled to substantial mitigation credit. (*In the Matter of Respondent E* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 729.)

Two character witnesses, Ford Dent Munn, Esq. and George Wass, Esq., testified to respondent's good moral character. The hearing judge afforded Wass' testimony minimal weight because he found Wass lacked candor due to his failure to disclose that he represented respondent in the libel action against Mrs. Stewart and her attorneys. Respondent challenges this credibility determination. However, even if, *arguendo*, we were to deem Wass' testimony credible, we would assign no weight in mitigation to respondent's character evidence because his two witnesses do not constitute a broad range of references from the legal and general communities. (Std. 1.2(e)(vi); *In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 840 [respondent not entitled to mitigation for good character based on testimony of two witnesses].)

Additionally, we agree with the hearing judge that no weight should be given in mitigation to respondent's testimony that he feels very bad about Mrs. Stewart's situation because his words of remorse do not amount to "objective steps promptly taken" by him to make amends for his misconduct.

(Std. 1.2(e)(vii); *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 519.) Respondent has not even made restitution to Mrs. Stewart for her \$500 tax payment for which she was to be reimbursed.

B. Aggravation

We adopt all of the hearing judge's findings in aggravation.

Respondent has a prior disciplinary record. (Std. 1.2(b)(i).) In a 2003 conviction referral matter, respondent stipulated to a public reproof for his guilty plea for three misdemeanor violations of Penal Code section 602, subdivision (1) for entering property without consent, which were crimes not involving acts of moral turpitude.

[5] We agree with the hearing judge's finding that respondent significantly harmed Mrs. Stewart. (Std. 1.2(b)(iv).) She had to hire new counsel, incurred a significant amount of attorney's fees, and suffered "three years of misery" in an unsuccessful attempt to reclaim her condo.

[6] Respondent's lack of insight into the seriousness of his misconduct is particularly troubling. (Std. 1.2(b)(v).) For example, in his Opening Brief, respondent asserts his conduct did not hurt Mrs. Stewart and that "it is nice to protect little old ladies, but it is very common that many people use the age of the client as a ploy to win lawsuits." He also characterizes his misconduct as "a minor ethical problem." Respondent fails to understand or acknowledge that his representation of Mrs. Stewart in any way compromised his fiduciary duties; instead, he believes that he "went out of his way to help" her. Respondent also believes he has no culpability because Mrs. Stewart was only awarded nominal damages in her civil suit against him. He thus misperceives the purpose of these disciplinary proceedings, which is protection of the public and the profession. The extent of the damages awarded to Mrs. Stewart for respondent's tortious conduct or breach of contract is of little or no

relevance to this court.¹⁰ We assign substantial weight in aggravation to respondent's indifference and failure to appreciate the wrongfulness of his misconduct.

C. Level of Discipline

The hearing judge relied on standard 2.8¹¹ and two cases involving conflicts of interest and self-dealing to assess the level of discipline: *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297 and *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735. Although culpability in these cases is grounded in a different rule, the factual underpinnings of the misconduct are somewhat similar to the instant case.

In *In the Matter of Lane, supra*, 2 Cal. State Bar Ct. Rptr. 735, the gravamen of the case was Lane's failure to document various transactions with his client in violation of rule 5-101 (the predecessor to rule 3-300). (*Id.* at p. 745.) We also found violations of rules 3-310 (formerly 4-101 and 5-102), 3-400 (formerly 6-102) and 3-700 (formerly 2-111(A)(2)). Over the course of many years, Lane made at least two loans to his client totaling \$100,000, and he secured the loans with a variety of the client's personal and business assets, a second mortgage on the client's home, an assignment of stock, and a UCC-1 covering all of the client's personal property, including his car, household furnishings and similar items. Lane continued to represent his client in a variety of lawsuits. He also sued his client on several occasions and was his co-defendant in at least one case. Several years later, Lane urged, then threatened, his client to ensure he filed for Chapter 7 bankruptcy proceedings, in part as an effort to protect Lane's interests in the various properties, including over \$17,000 in legal fees that were subject to a confession of judgment. (*Id.* at pp. 742, 745.)

Lane not only failed to properly document the transactions, he did not adequately explain all of the ramifications of his continued representation to his client. (*In the Matter of Lane, supra*, 2 Cal. State Bar Ct. Rptr. at p. 745.) Lane also failed to return the client's files after he was sued for malpractice. Aggravation included multiple acts of misconduct and indifference. Lane's mitigation included his 25 years of practice without prior discipline and his good standing in the legal community as established by his good character evidence. (*Id.* at p. 748.) *Lane* involves far more extensive misconduct than here, although the client in that case was not an elderly and vulnerable individual, but rather a wily businessman. In fact, we found in *Lane* that there was "bad judgment, greed and self-interest on both sides." (*In the Matter of Lane, supra*, 2 Cal. State Bar Ct. Rptr. at p. 750) In recommending 60 days' actual suspension, we noted that the attorney had already "paid a high personal and financial cost for his poor judgment." (*Ibid.*)

The second case relied on by the hearing judge, *In the Matter of Hultman, supra*, 3 Cal. State Bar Ct. Rptr. 297, involved an attorney who was the trustee of a testamentary trust and who made two loans to himself from that trust. Both loans were interest-only with no due date for payment of the principal. We found that the attorney not only violated rule 3-300, but that he was culpable of moral turpitude as a result of his gross neglect in managing the trust and in filing a false accounting with the probate court. (*Id.* at p. 307.) Evidence in mitigation included the 13 years of discipline-free practice, good character testimony of seven witnesses, remorse and restitution. We recommended 60 days' actual suspension. *Hultman* presents similar misconduct involving self-dealing and moral turpitude, but there is more mitigation than in the instant case.

10. The record is devoid of documentation establishing the causes of action in the complaint filed by Mrs. Stewart against respondent. Nor do we have any evidence of the findings of fact or conclusions of law made by the Superior Court, which further diminishes the relevance of Mrs. Stewart's civil case to our disciplinary analysis.

11. Standard 2.8, which applies to rule 3-300 violations, provides for suspension unless the misconduct and harm to client are minimal, in which case reproof is recommended.

We also look to standard 2.3, which provides: “Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a . . . client or another person of concealment of a material fact to a . . . client or another person shall result in actual suspension or disbarment . . . depending upon the magnitude of the act of misconduct and the degree to which it relates to the member’s acts within the practice of law.”¹² Respondent’s misconduct was aligned with his practice because he negotiated the sale of the condo between two clients and Mrs. Stewart looked to him as her attorney to protect her interests.

Some of the misconduct in *In the Matter of Fandey, supra*, 2 Cal. State Bar Ct. Rptr. 767, wherein we imposed a six-month actual suspension was similar to respondent’s involvement in negotiating the sale of Mrs. Stewart’s condo. However, we find the case is not useful in assessing the appropriate level of discipline because the primary focus of our culpability determination in *Fandey* was his aiding and abetting of his client’s flight from California in order to avoid compliance with a child support order. Thus, we consider *Fandey* as involving more serious misconduct than the instant case.

In *In the Matter of Gillis, supra*, 4 Cal. State Bar Ct. Rptr. 387, Gillis received six months’ actual suspension for violation of rule 3-300 in a single client matter. Gillis sold his residential property to his client in exchange for a portion of the settlement funds that Gillis obtained for his client in a wrongful death action. Gillis’ client was unemployed, lacked skills for employment (except housekeeping) and received Aid to Families with Dependent Children. We determined that Gillis committed acts of moral turpitude and breached his fiduciary duty to his client because the transaction was not fair and reasonable. He failed to disclose encumbrances on the property and the need for title insurance, and he entered into the transaction

partially for his own benefit. We found an additional act of moral turpitude based on Gillis’ deliberate attempt to mislead the State Bar investigator as well as a violation of section 6068, subdivision (e) for failing to maintain his client’s confidences. With the exception of misleading the State Bar investigator, we found Gillis’ acts were unintentional but grossly negligent. In mitigation, Gillis practiced for 26 years without prior discipline. In aggravation, we found multiple acts of misconduct. Again, Gillis’ misconduct was more serious than the instant case.

Finally, in *In the Matter of Johnson, supra*, 3 Cal. State Bar Ct. Rptr. 233, we found Johnson culpable of breaching her fiduciary duty to her client who was also her sister-in-law. Johnson represented the client in a personal injury action, subsequently borrowing \$20,000 of the settlement proceeds without repaying the loan. We found that Johnson’s unsecured loan was neither fair nor reasonable to her client, who was in fragile health and unsophisticated in business matters. In addition to moral turpitude, we found Johnson violated former rule 8-101 for failing to place the settlement proceeds in a trust account and to pay the remainder promptly. Johnson received mitigation for her 11 years of practice without incident. In aggravation, we found that her misconduct significantly harmed her client and involved multiple acts of wrongdoing. Further, Johnson showed indifference towards rectification for the misconduct, made no attempt to repay the loan and exhibited a lack of candor during the hearing. Johnson received two years’ actual suspension for her misconduct.

Upon our de novo review of the record, we conclude that the recommendation of the hearing judge is within the confines of the decisional law and the applicable standards. Our conclusion is underscored by the State Bar, which sought 90 days’ actual suspension below, and here asks us to adopt the recommended discipline of the hearing judge.

12. Respondent’s assertion that we cannot recommend suspension or disbarment without a finding of moral turpitude is not only incorrect (e.g., §§ 6077, 6103), it is moot because we found his misconduct did involve moral turpitude.

IV. RECOMMENDATION

For the foregoing reasons, we recommend that respondent Clifford Lee Casey be suspended from the practice of law in the State of California for three years, that execution of that suspension be stayed, and that respondent be placed on probation for three years on the following conditions:

1. That respondent be actually suspended from the practice of law in the State of California during the first 90 days of the period of his probation and until he makes restitution to Ida Stewart in the amount of \$500 plus 10% interest per annum from March 2, 2001 (or to the Client Security Fund to the extent of any payment from the fund to Ida Stewart, plus interest and costs, in accordance with Business and Professions Code section 6140.5) and furnishes satisfactory proof thereof to the State Bar's Office of Probation. Any restitution to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

2. If respondent is actually suspended for two years or more, he shall remain actually suspended until he provides proof to the satisfaction of the State Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

3. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of this probation.

4. Respondent must maintain, with the State Bar Membership Records Office and the State Bar's Office of Probation in Los Angeles, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a)(1).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current home

address and telephone number. (Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

5. Respondent 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, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report must be submitted on the next following quarter date, and cover the extended period. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (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 proper or good faith assertions of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation [and any probation monitor assigned under these conditions] which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein.

7. Within one year of the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion 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 Requirement (MCLE) requirement, and respondent shall not receive MCLE credit for attending Ethics School (Rules Proc. of State Bar, rule 3201).

8. Respondent's probation will commence on the effective date of the Supreme Court order impos-

ing discipline in this matter. At the end of the probationary term, if respondent has complied with the conditions of probation, the Supreme Court order suspending respondent from the practice of law for three years will be satisfied, and the suspension will be terminated.

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year of the effective date of the Supreme Court order in this matter and to provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

VI. RULE 9.20

It is further recommended that respondent be ordered to comply with rule 9.20, California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule, within 30 and 40 days, respectively, from the effective date of the Supreme Court order herein.

Willful failure to comply with the provisions of rule 9.20 may result in revocation of probation; suspension; disbarment; denial of reinstatement; conviction of contempt; or criminal conviction.

VII. 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.

We concur:
REMKE, P. J.
STOVITZ, J.*

* Hon. Ronald W. Stovitz, Retired Presiding Judge of the State Bar Court, sitting by designation of the Presiding Judge.