STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

DONALD J. LOFTUS

A Member of the State Bar

No. 02–O–13160; 03–O–05017

Filed November 7, 2007

SUMMARY

While representing clients in a medical malpractice lawsuit, respondent surreptitiously recorded a telephone conversation with a doctor and threatened to contact a juror's employer. The hearing judge found respondent culpable of harassing a juror but found no culpability on three other charges. In recommending a one–year stayed suspension, the hearing judge considered the respondent's uncharged misconduct, harm to the administration of justice as well as respondent's 28 years of discipline–free practice. Both parties sought review.

The review department adopted most of the hearing judge's factual findings, modifying the culpability findings and finding fewer factors in mitigation and more factors in aggravation than did the hearing judge. The review department recommended that respondent be suspended for one year, stayed, that he be placed on probation for 18 months on the condition that he be actually suspended for three months.

COUNSEL FOR PARTIES

For State Bar: Don M. Anthony

For Petitioner: Donald J. Loftus

HEADNOTES

[1] **221.00 State Bar Act–Section 6106**
Although it is not inherently wrong for an attorney to communicate with an opposing party not represented by counsel, where an attorney instigates a conversation with an adverse party under false pretenses, secretly tape–records the conversation and thereafter lies about the surreptitious recording during litigation, the attorney is culpable of moral turpitude.

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

[2] **213.10 State Bar Act–Section 6068(a)**
In State Bar Court proceedings any reasonable doubts must be resolved in respondent's favor. Where construction of law prohibiting recording of confidential communications without consent was uncertain at the time respondent surreptitiously recorded a telephone conversation, it could have been possible to determine that respondent's conduct did not violate the law. Thus, the charge that respondent failed to support the laws of California was dismissed with prejudice.

[3] **343.00 Rule 5–320(D)**
In order to find a violation under rule 5–320(D), the State Bar must prove by clear and convincing evidence that respondent subjectively had the specific intent to harass or embarrass a juror, or influence a juror's actions in future jury service. Where respondent threatened to send a letter to a juror's employer only after the juror refused to sign an affidavit for respondent, and where respondent waited approximately one year before sending a letter to the juror's employer and then only after the State Bar filed a Notice of Disciplinary Charges, the facts convincingly establish respondent's subjective intent to harass the juror.

[4] **710.30 Mitigation–Long Practice With No Prior Discipline Record–Found But Discounted**
Where respondent had a license to practice law in Nebraska since 1973 but offered no evidence as to the scope or continuing nature of his practice there, mitigating credit for 27 years of discipline–free practice in Nebraska is severely diminished. However, respondent is entitled to full credit for 10 years of discipline–free practice in California.

[5] **740.51 Mitigation–Good Character–Declined To Find**
A single character witness is insufficient to be a mitigating circumstance.

[6] **740.53 Mitigation–Good Character–Declined To Find**
765.51 Mitigation–Pro Bono–Declined To Find
Where respondent's charitable work in the form of donating to charity the sales proceeds of a compact disc he recorded was uncontroverted, respondent's testimony on its own is not sufficient to establish his charitable work as a mitigating factor since there was no evidence as to where the proceeds were delivered or any supporting witnesses to attest to the work.

[7] **1015.03 Discipline Imposed in Disciplinary Matters Generally–Three Months**
Where respondent committed acts involving moral turpitude and harassed a juror in violation of rule 5–320(D), where there was mitigation for discipline–free practice, and where there was aggravation due to multiple acts of wrongdoing, significant harm to the administration of justice, and a demonstrated indifference toward rectification, the appropriate disciplinary recommendation was one year stayed suspension, 18 months of probation on conditions which included three months actual suspension.

ADDITIONAL ANALYSIS

Aggravation

Found

521	Multiple Acts
586.10	Harm To Administration Of Justice
591	Indifference

Found but Discounted

543.10	Duplicative of Section 6106 Charge

Other

106.30	Procedures–Pleadings–Duplicative Charges
221.50	State Bar Act–Section 6106.5

OPINION

REMKE, P.J.:

"It is common knowledge that it is increasingly difficult to obtain willing citizens to serve as members of a jury." (*Lind v. Medevac, Inc.* (1990) 219 Cal.App.3d 516, 521.) This case represents an attorney's failure to recognize both his obligations as an officer of the court and his ethical obligations as an attorney to insure that his conduct does not "exacerbate the reluctance of some persons to undertake jury service . . . ." (*Ibid.*) During respondent Donald J. Loftus's representation of his clients, not only did he harass a juror, he secretly tape–recorded a telephone conversation with an adverse party and then lied about it during the litigation. Such unscrupulous litigation tactics severely damage the reputation of the legal profession.

Both parties have sought review of the recommendation by the hearing department that Loftus be suspended from the practice of law for one year, that the execution of that suspension be stayed, and that he be placed on probation for 18 months. Upon our independent review, we adopt most of the hearing judge's factual findings, but modify the culpability findings. We also find fewer factors in mitigation and more factors in aggravation. With these modifications, we amend the disciplinary recommendation to include an actual period of suspension of 90 days.

I. BACKGROUND INFORMATION

Loftus was admitted to practice law in California on December 4, 1990, and has been a member of the State Bar since that date. He also has been licensed in Nebraska since 1973.

On August 27, 2004, the Office of Chief Trial Counsel of the State Bar of California (State Bar) filed a Notice of Disciplinary Charges (NDC) against Loftus charging him with violating Business and Professions Code section 6106,[1] for committing acts involving moral turpitude, in counts one and three; violating section 6068, subdivision (a), for failing to support the Constitution and laws of the United States and California by violating Penal Code section 632, for recording a confidential communication, in count two; and violating the Rules of Professional Conduct, rule 5–320(D),[2] for harassing or embarrassing a discharged juror, in count four. Loftus filed a response on September 13, 2004, denying all counts.

A two–day hearing was held on November 15 and 16, 2005. Subsequent to the hearing, Loftus filed a motion for mistrial, which was denied on February 27, 2006. The decision was filed on February 28, 2006. The hearing judge found culpability for violating rule 5–320(D), harassing a juror, in count four, and no culpability for counts one through three. She also found in aggravation uncharged misconduct based upon Loftus's dishonesty and bad faith, and for harming the administration of justice. In mitigation, the hearing judge considered Loftus's 28 years of discipline–free practice and his charitable work. She did not consider Loftus's one character witness as mitigation because he had limited knowledge of Loftus's character.

II. FACTS

Upon our de novo review of the record (Cal. Rules of Court, rule 9.12), we adopt most of the hearing judge's findings of fact, which are supported by clear and convincing evidence and summarized below. However, where relevant, we supplement the hearing judge's findings with details evident from the record.

A. Loftus Records a Conversation Without Permission

On August 29, 2000, Thomas Marcisz, a neurosurgeon, performed surgery on Tamara Lukeman (Tamara). The surgery was to correct a malfunctioning internal shunt. Shortly after the surgery, Tamara suffered a seizure that resulted in her subsequent hospitalization. Gabrielle Morris, another neurosurgeon at the same hospital, took over Tamara's

1. All further references to section(s) will be to the Business and Professions Code unless otherwise noted.

2. All further references to rule(s) are to the California Rules of Professional Conduct unless otherwise noted.

treatment from Dr. Marcisz. As part of her treatment, Dr. Morris externalized Tamara's shunt. After the shunt was externalized, in a state of confusion, Tamara disconnected the shunt and suffered severe brain damage.

Tamara and her husband hired Loftus to represent her in a medical malpractice lawsuit. On December 21, 2000, Loftus sent a letter to Dr. Morris, stating that he was Tamara's attorney. The purpose of the letter was to find out what orders, if any, were issued by Dr. Morris regarding restraints for Tamara, whether Tamara's removal of the shunt was the cause of her severe brain damage, and whether, in Dr. Morris's opinion, Dr. Marcisz's negligence was a substantial factor in bringing about the initial seizure.

Although Loftus knew that Dr. Morris would be a defendant in any medical malpractice lawsuit he filed, he failed to advise or warn Dr. Morris of this fact in his letter. He also failed to inquire whether Dr. Morris had retained counsel. Instead of revealing the adversarial nature of his inquiry, Loftus started the letter by stating, "[b]oth Tammy and Ken Lukeman have a great deal of admiration and respect for you and I am sorry to have to trouble you, however, I have a couple of questions about her medical care and treatment that need to be resolved." Loftus gave the impression that he was gathering information from Dr. Morris as a potential witness, not a defendant, and that he hoped "to obtain the above information without having to impose upon [her] by taking [her] deposition."

On December 27, 2000, Dr. Morris telephoned Loftus in response to his letter. Loftus claims he heard a strange noise on the phone and thought that perhaps Dr. Morris was recording the conversation or that she was using her speaker phone and someone else – possibly her attorney – was listening. When Loftus asked, Dr. Morris confirmed that she was not recording the conversation. Loftus contends that at that point he realized *his* tape–recorder was on and *he* was recording the conversation. Rather than turn it off or ask Dr. Morris if he could record the conversation, Loftus decided to continue the recording and not tell her. Loftus recorded the conversation because he was suspicious of Dr. Morris and wanted the recording in case he needed to impeach her statements later during the litigation. Had she been asked, Dr. Morris testified that she would not have consented to the conversation being recorded.

During the conversation, Dr. Morris answered several of Loftus's questions regarding her and Dr. Marcisz's care of Tamara. Dr. Morris said that she was more than happy to help Loftus with Tamara. Dr. Morris said that although Tamara was properly restrained, she was still able to pull the shunt out because "unfortunately that does happen." Dr. Morris stressed, "it's not that the nurses didn't do what they needed to do." Dr. Morris also said that Dr. Marcisz was incompetent, but that there was little connection between his competency and Tamara's injuries. Dr. Morris also told Loftus that she would have no problem stating under oath that Dr. Marcisz had a poor reputation in the medical community.

On May 22, 2001, Loftus filed a complaint against the hospital and Dr. Marcisz, alleging medical malpractice and intentional infliction of emotional distress. On October 17, 2001, Loftus filed a second lawsuit, alleging medical malpractice and naming only Dr. Morris as a defendant. The two cases were consolidated for trial.

On December 5, 2001, Dr. Morris retained attorney Daniel Belsky. On December 11, 2001, Belsky called Loftus to discuss a date for scheduling Dr. Morris's deposition. Belsky was aware of the conversation that occurred between Dr. Morris and Loftus on December 27, 2000, regarding Tamara's medical condition. While discussing a date for Dr. Morris's deposition, Loftus asked Belsky if Dr. Morris had tape–recorded the conversation. Belsky thought it was such a bizarre question that it prompted him to ask Loftus if he had recorded the conversation with Dr. Morris, to which Loftus replied that he had not.

During discovery, Loftus prepared responses to form interrogatories on behalf of his clients, Kenneth and Tamara Lukeman. The Lukemans' responses were dated October 29, 2001, and December 21, 2001, respectively, and signed by Loftus. The interrogatories specifically asked whether anyone on the Lukemans' behalf had interviewed any individual concerning the medical treatment giving rise to the lawsuit, and also asked whether anyone on the

Lukemans' behalf had recorded a statement from any individual regarding Tamara's medical treatment. The interrogatory responses failed to disclose the December 27, 2000, tape–recorded conversation between Loftus and Dr. Morris. The first time Loftus acknowledged that he had recorded his conversation with Dr. Morris was at the conclusion of Dr. Morris's February 5, 2002, deposition when he attempted to impeach the doctor's testimony. On February 11, 2002, Loftus signed a supplemental response to the form interrogatories wherein he admitted interviewing and recording a conversation with Dr. Morris.

B. Loftus's Conversation with a Juror

On August 5, 2003, in a consolidated trial before the Honorable Lisa Guy–Schall, a jury was selected in Tamara's medical malpractice matter. On August 21, 2003, Judge Schall told the jurors that they would have no jury duty on the following Monday. She also told them that they were on the honor system because it was not the court's obligation to tell their employers that there would be no jury duty.

On October 22, 2003, after the verdict in favor of the defendants and the jury had been discharged in Tamara's medical malpractice matter, Loftus contacted juror Stuart Shafer over the phone at his place of work to investigate his belief that Judge Schall had committed prejudicial error by her admonition to the jurors that the court would not advise their employers of their day off. Loftus had previously left at least four messages for Shafer. Loftus started out cordially asking Shafer questions about jury deliberation and jury instructions, which Shafer answered. Loftus then asked Shafer if he recalled Judge Schall telling the jurors when she dismissed them on August 21, 2003, that they would not have jury duty on Monday, August 25, 2003, but that she was not going to tell their employers. Shafer recalled Judge Schall making such a statement. Loftus next asked Shafer if he would sign an affidavit to that effect. Shafer declined to provide an affidavit because he did not feel comfortable in so doing. After Shafer refused to provide an affidavit, the tone of the conversation changed from being cordial to being adversarial.

The next question Loftus asked Shafer was whether he had gone to work on August 25, 2003. Shafer replied that he had not gone to work. Loftus then asked Shafer if his employer had paid him for jury service on August 25, 2003. Shafer told Loftus that he was not going to answer that question. After Shafer refused to answer the question, Loftus informed Shafer that he was going to write a letter to Shafer's employer informing the employer that Shafer did not have jury duty on August 25, 2003. Shafer was so angry at what he perceived to be Loftus's implicit threat that he told Loftus to never call him again and hung up on Loftus. The conversation between Shafer and Loftus lasted approximately five minutes. Loftus did not call Shafer again.

III. LOFTUS IS CULPABLE OF MISCONDUCT

Both parties have sought review. The State Bar contends that the hearing judge erred by not finding additional culpability for violating section 6068, subdivision (a), for Loftus's undisclosed recording of the conversation with Dr. Morris in violation of Penal Code section 632. Further, it contends that the hearing judge should have found additional factors in aggravation, namely that Loftus's failure to disclose the recording in interrogatories lacked candor, and that he demonstrated no remorse for his actions. The State Bar asks that "some period" of actual suspension be recommended, without recommending the length of suspension or providing any supporting case law. Loftus argues, among other things, that the hearing judge erred in finding culpability for count four and that all counts should be dismissed.

A. Count One – Secretly Recording a Conversation

Section 6106 provides that an attorney's commission of an act involving moral turpitude, dishonesty or corruption constitutes grounds for suspension or disbarment. Count one of the NDC alleges that Loftus violated section 6106 by recording his telephone conversation with Dr. Morris without her knowledge and with the intent to use the recording in the subsequent lawsuit against her. Focusing on the issue of confidentiality, the hearing judge declined to find culpability because it was not clear that Loftus believed or had reason to believe he was recording a "confidential communication." However, that analy-

sis is too narrow. When we look to the totality of the circumstances surrounding the recording, we find that Loftus's conduct was clearly dishonest and in violation of section 6106.

When Loftus tape–recorded his telephone conversation with Dr. Morris, he knew that she was the "primary focus" of any litigation. However, not only did he fail to warn her of this fact, he gave Dr. Morris the false impression that he was contacting her as a potential witness against the hospital and/or Dr. Marcisz. Then, without notice or permission, Loftus tape–recorded the conversation. Loftus justifies his decision to record the conversation by claiming that he heard a strange noise and thought that either Dr. Morris was recording the conversation or that someone else was listening – possibly her attorney. Loftus wanted the recording in case Dr. Morris later recanted her statements during litigation. Thus, not only was it likely that any recorded conversation could be used against Dr. Morris in subsequent litigation, it was the very reason Loftus recorded the conversation and, indeed, the exact purpose for which he ultimately used it.

Loftus's devious purpose in recording the conversation is further evident by his subsequent actions. In addition to failing to warn Dr. Morris that he was recording their conversation, Loftus lied to Belsky about it and then failed to disclose the recorded interview during discovery. Despite multiple opportunities in which he could have disclosed the recording, Loftus chose not to do so until the "gotcha" moment during Dr. Morris's deposition. Although they may make for good television drama, such Machiavellian litigation tactics cannot be condoned.

Moral turpitude includes fraud and has been said to mean dishonesty and conduct not in accordance with good morals. (*Call v. State Bar* (1955) 45 Cal.2d 104, 109.) A finding of gross negligence will support a charge of moral turpitude, even without an evil intent behind the act committed. (*In the Matter of Myrdall* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 363, 384.) "A finding of gross negligence in creating a false impression is sufficient [to find a] violation of section 6106. [Citations.] Acts of moral turpitude include concealment as well as affirmative misrepresentations. [Citations.] Furthermore, ' "[n]o distinction can . . . be drawn among concealment, half–truth, and false statement of fact. [Citation.]" [Citation.]' [Citation.]" (*In the Matter of Dale* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 798, 808.)

[1] Although it is not inherently wrong for an attorney to communicate with an opposing party not represented by counsel (see rule 2–100), we find that Loftus breached his ethical duties in this case. Loftus's misconduct began in a grossly negligent manner with Dr. Morris when he created the false impression that she was not an adverse party and that he was not recording the conversation, and evolved to his making false statements to conceal the truth. Loftus failed to demonstrate the good morals associated with being an attorney. The totality of the facts clearly and convincingly establish that Loftus is culpable of moral turpitude as charged by instigating a conversation with an adverse party under false pretenses, then secretly tape–recording it, and subsequently lying and concealing it during the litigation.

B. Count Two – Illegally Recording Confidential Communications

Section 6068, subdivision (a), requires attorneys to support the Constitution and laws of the United States and California. Count two charges a violation of this section based upon Loftus's recording of the conversation with Dr. Morris, allegedly in violation of Penal Code section 632, which prohibits recordings of confidential communications without consent.[3] The

3. Penal Code section 632 makes it a crime for any person to "intentionally and without the consent of all parties to a confidential communication, by means of [a recording device, to eavesdrop or record a] confidential communication..." The provision defines a confidential communication as "any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded."

hearing judge dismissed this count, finding that at the time of the recording the law was uncertain as to what was a "confidential communication." The State Bar asserts that no uncertainty existed and that Loftus should have known that the conversation fell under the protection of Penal Code section 632. We agree with the hearing judge.

The hearing judge found that when Loftus recorded his conversation with Dr. Morris in 2000, the Courts of Appeal were in disagreement over the critical term "confidential communication." One line of authority held that a conversation is confidential if a party to the conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded. (*Frio v. Superior Court* (1988) 203 Cal.App.3d 1480, 1488–1490; *Coulter v. Bank of America* (1994) 28 Cal. App.4th 923, 929.) The other line of authority held that a conversation is confidential only if the party has an objectively reasonable expectation that the content will not later be divulged to third parties. (*O'Laskey v. Sortino* (1990) 224 Cal.App.3d 241, 248; see also *Deteresa v. American Broadcasting Companies, Inc.* (9th Cir. 1997) 121 F.3d 460, 464.) It was not until 2002 that the California Supreme Court finally resolved the conflict. In *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 775, the Supreme Court adopted the reasoning in the *Frio* line of cases, holding that a conversation is deemed confidential if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded.

[2a] After reviewing the cases representing the two lines of construction of Penal Code section 632, we are inclined to agree with the hearing judge's finding that, given the uncertain state of the law at the time the telephone call was recorded, it could have been possible to determine that no violation occurred. When language in penal law is reasonably susceptible to two constructions, ordinarily the construction that is more favorable to the offender will be adopted. (*In re Tartar* (1959) 52 Cal.2d 250, 256.) "The defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact or as to the true interpretation of words or the construction of language used in a statute." (*Id.* at p. 257.) Likewise, in State Bar Court proceedings, any reasonable doubts must be resolved in the respondent's favor. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 438; *Young v. State Bar* (1990) 50 Cal.3d 1204, 1216.)

[2b] In the telephone conversation with Loftus, Dr. Morris stated that she would be willing to repeat under oath the comments that she made to Loftus. By agreeing to testify in court regarding her statements to Loftus, the content of the conversation between Dr. Morris and Loftus would ultimately be divulged to third parties. Thus, under the *O'Laskey* line of cases, the conversation between Dr. Morris and Loftus would not have been a "confidential communication." Thus, we cannot conclude that Loftus's conduct would have been construed as violating Penal Code section 632, and dismiss the charge with prejudice.

C. Count Four – Harassing a Juror

Rule 5–320(D) provides that "[a]fter discharge of the jury from further consideration of a case a member shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service." In order to find a violation under rule 5–320(D), the State Bar must prove by clear and convincing evidence that Loftus subjectively had the specific intent to harass or embarrass a juror, or influence a juror's actions in future jury service. (*In the Matter of Respondent A* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 255, 261–262.) We agree with the hearing judge's finding that Loftus violated this rule.

Loftus vehemently asserts that Shafer and the superior court judge engaged in a conspiracy to defraud Shafer's employer, and that it was his "duty as a citizen" to inform the employer of this fraudulent conduct. Whether or not Loftus truly believed he had such a duty, the manner and circumstances in which he presented the statement to Shafer is harassment.

[3] Upon Shafer's refusal to sign an affidavit regarding the judge's admonition, Loftus became adversarial. Further, it was only after Shafer's refusal to sign an affidavit that Loftus told Shafer he would send a letter to Shafer's employer. A juror should not have to endure such intimidation merely because he refuses to aid an attorney. Finally, despite

Loftus's claim that he had a duty as a citizen to report Shafer's conduct to the employer, he acknowledges that he sent the letter about a year after the conversation with Shafer and then only after the State Bar filed the NDC. Thus, we find that the facts surrounding the conversation convincingly establish Loftus's subjective intent to harass Shafer in violation of rule 5–320(D).

D. Count Three – Inappropriate Contact with a Juror

Count three of the NDC charges Loftus with violating section 6106 by harassing Shafer in an attempt to obtain a signed affidavit. The hearing judge did not find culpability for this count and neither party challenges that finding. We agree with the hearing judge.

Loftus's statement that he would contact Shafer's employer was nothing less than a threat made in his unbridled quest to win. Although the statement may have resulted from an unprofessional reaction born out of frustration in the moment, more restraint is demanded of attorneys. We find Loftus's repeated willingness to exploit his status as an attorney for improper purposes to be abhorrent.

Loftus's statement to Shafer is unethical and certainly constitutes a disciplinable offense. However, since the same misconduct that is alleged to constitute acts involving moral turpitude in this count also is alleged to be the basis of a rule 5–320 violation in count four, we decline to find culpability for both counts. The appropriate resolution of this case does not depend on how many rules of professional conduct or statutes proscribe the same conduct. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.) We find that this misconduct is better charged as a rule violation as set forth above in count four. Accordingly, we dismiss with prejudice count three.

IV. DISCIPLINE

A. Mitigation

Loftus has the burden to prove mitigating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).[4])

[4] Loftus has been admitted to practice in California since 1990. He also testified that he has had a license to practice in Nebraska since 1973, but offered no other evidence as to the scope or continuing nature of his practice in Nebraska, or whether he has ever been disciplined in that state. Based on the limited evidence, Loftus's mitigation credit for his 27 years of discipline–free practice is severely diminished. However, he is entitled to full credit for his 10 years of discipline–free practice in California prior to the current misconduct. (Std. 1.2(e)(i).)

[5] Loftus presented one character witness, Marc Anderson, as evidence in mitigation. (Std. 1.2(e)(vi).) Anderson's knowledge of Loftus's character is limited to assisting Loftus with one trial in 2001, which lasted approximately one month, and then having a "few lunches" together afterwards. The 2001 trial was Anderson's last professional contact with Loftus. Prior to assisting Loftus, Anderson did not know him and had no knowledge of Loftus's reputation in the community. The standard requires that "an extraordinary demonstration of good character" be shown by a "wide range of references in the legal and general communities and who are aware of the full extent of the member's misconduct." We agree with the hearing judge that Loftus's one character witness is insufficient to be a mitigating circumstance. (See *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 939.)

4. All further references to standard(s) are to these Standards for Attorney Sanctions for Professional Misconduct.

[6] Lastly, we disagree with the hearing judge's finding that Loftus's charity work establishes a separate factor in mitigation under standard 1.2(e)(vi). Loftus testified that he recorded a CD and donated the proceeds from the sale to charity. An attorney's charitable work may be considered as some evidence in mitigation, notwithstanding that it does not meet the criteria for character evidence set forth in standard 1.2(e)(vi). (*In the Matter of Crane and DePew* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 139, 158, fn. 22.) Although Loftus's testimony regarding these charitable activities is uncontroverted, there is no evidence as to where these proceeds were delivered or any supporting witnesses to attest to this work. Thus, respondent's testimony on its own is not sufficient to establish his charitable work as a mitigating factor.

B. Aggravation

The hearing judge found two factors in aggravation. First, she found evidence of uncharged misconduct, finding Loftus to be dishonest and acting in bad faith based on his lie to Belsky regarding the recording and his omission of the tape in the interrogatory responses. (Std. 1.2(b)(iii).) We agree that Loftus's misconduct was clearly surrounded by concealment and dishonesty, as he blatantly denied recording the conversation when directly asked. However, we do not consider it as an additional factor in aggravation because such a finding would be duplicative of the misconduct comprising acts of moral turpitude under count one.

Second, the hearing judge found that Loftus's treatment of Shafer significantly harmed the public and the administration of justice. (Std. 1.2(b)(iv).) We agree. Loftus's actions demonstrate contempt for his ethical responsibilities and further alienate jurors, many of whom are already unwilling to participate in jury service. (See *Lind v. Medevac, Inc.*, *supra*, 219 Cal.App.3d at p. 521.) Given the importance of the jury system, it is paramount that attorneys interact with jurors in the most professional and ethical manner. (*Ibid.*)

In addition, we find that Loftus committed multiple acts of wrongdoing. (Std. 1.2(b)(ii).) Not only did he harass a juror, he secretly tape–recorded a telephone conversation with an adverse party and then lied about it during the litigation.

Finally, we find further aggravation under standard 1.2(b)(v), as Loftus has demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. Loftus continues to assert that Shafer defrauded his employer and alludes that a conspiracy existed between the trial judge and the jurors. Loftus states that Shafer had "something to conceal" and that Shafer was angry because Loftus "wasn't complying with the judge's promise of silence." Loftus dismisses the more likely cause of Shafer's irritation, which was that Loftus clearly stated his intent to inform Shafer's employer that Shafer collected pay to which he was not entitled. We are concerned that in view of his lack of recognition of his wrongdoing, and the dubious justification for his actions, there is a risk that he may again commit similar misconduct.

C. Level of Discipline

When determining the appropriate level of discipline, we must always keep in mind that the purpose of discipline is not to punish the attorney, but to protect the public. (Std. 1.3; *Bach v. State Bar* (1987) 43 Cal.3d 848, 856.) To do this, we consider the standards, prior decisional law, and the facts and circumstances unique to this case. (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) Although the standards are afforded "great weight" in determining the appropriate level of discipline (*In re Silverton* (2005) 36 Cal.4th 81, 92), they are intended to be flexible in nature, so that we may "temper the letter of the law with considerations peculiar to the offense and the offender. [Citations]." (*In the Matter of Van Sickle*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 994.) We have found Loftus culpable of violating rule 5–320(D), and committing acts of dishonesty in violation of section 6106. Under standard 2.10, a violation of rule 5–320(D) provides for a range of discipline from a reproval to suspension. Standard 2.3 applies to Loftus's violation of section 6106 and provides that an act of moral turpitude, fraud or intentional dishonesty "shall result in actual suspension or disbarment" according to the gravity of the offense or the harm, if any, to the victim. When two or more standards apply, the most severe standard

should be used. (Std. 1.6(a); *In the Matter of Regan* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 844, 858.)

The hearing judge noted that she did not uncover any cases setting forth facts similar to the current matter, but found instructive both *Sorensen v. State Bar* (1991) 52 Cal.3d 1036, and *In the Matter of Scott* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 446. We appreciate her difficulty, as our review of case law reveals that the incidence of improper contact with jurors is rare. Although the State Bar advocates for "some period of actual suspension," it has cited no authority to support its position. Likewise, Loftus failed to present any cases that demonstrate the hearing judge erred in her discipline recommendation.

Although *Sorensen v. State Bar*, *supra*, 52 Cal.3d 1036, did not involve the type of misconduct presented here, the hearing judge found the case to be instructive because it involved an act of pursuing an action out of vindictiveness. The attorney in *Sorenson* pursued a meritless action for fraud and was found to have violated section 6068, subdivisions (c) and (g), by breaching his duty to maintain actions that appear to him legal or just and his duty not to encourage the commencement of an action from a corrupt motive of passion or interest. In aggravation, the Supreme Court considered that there was no justification in bringing the fraud action, no showing of regret or remorse about his actions, and the use of legal skill to abuse the litigation process and harass the opposing party. The court adopted the Review Department's recommendation of 30 days' actual suspension.

In *In the Matter of Scott*, *supra*, 4 Cal. State Bar Ct. Rptr. 446, the attorney pursued a series of four related lawsuits in which after each action was resolved unfavorably to the attorney, he filed the next. We found the attorney culpable of violating section 6068, subdivisions (c) and (g), as a result of his conduct in filing and pursuing the four lawsuits, and found that he did so in bad faith and for a corrupt motive. In imposing discipline, we noted that we were troubled by the attorney's portrayal that he was the victim and that he had not gained any insight into his misconduct. In mitigation, we considered the attorney's lack of prior discipline, but discounted his good character witnesses who were not aware of the full extent of his misconduct. In aggravation, we found that the misconduct harmed the administration of justice and that the attorney showed no recognition of his wrongdoing. Thus, the discipline imposed reflected the lack of insight by the attorney, as well as the harm to the victim and the assurance to the public and bar that such conduct will not be tolerated. (*Id.* at p. 458.) Taking into consideration all of the factors, we imposed two years' stayed suspension with two years' probation with conditions, including 60 days' actual suspension.

We also look for guidance to the case of *Levin v. State Bar* (1989) 47 Cal.3d 1140. Although the misconduct in *Levin* is significantly distinguishable from the current matter, we find it instructive in that the Supreme Court allowed for increased discipline upon considering the attendant aggravating factors. In *Levin*, the hearing department of the State Bar Court recommended an actual period of suspension of 30 days. On review, we recommended an increased period of six months' actual suspension. The Supreme Court adopted our recommendation, finding that in an attempt to settle a lawsuit the attorney made false statements of fact to the opposing counsel, and communicated with a party he knew to be represented by counsel. In a second matter, he settled a lawsuit without his client's permission, misrepresented to the settling insurance company that his client personally signed a release, and failed to deliver the settlement funds to his client or to provide a proper accounting. In assessing the level of discipline, the Supreme Court concluded that the attorney's ethical violations were aggravated by his dishonest attempts to conceal this wrongful conduct. (*Id.* at p. 1149.) Coupled with his multiple dishonest acts, the factors in aggravation outweighed the evidence in mitigation and justified the increase in discipline. (*Ibid.*)

In the current matter, Loftus's conduct is intolerable. Misconduct such as occurred here damages the integrity of the legal system, and discourages the public from participating in a vital function of the administration of justice. Based on the very serious misconduct of harassing a juror, we believe that this case calls for a higher level of discipline than in *Sorenson* and *Scott*. We are equally troubled by Loftus's dishonest answers and denial, on more than

one occasion, that he secretly recorded the telephone conversation with Dr. Morris. Finally, Loftus's comments on review regarding Shafer do not evince to us that Loftus fully appreciates the extent of his wrongdoing. He continues to boast that he had a "duty as a citizen" to report Shafer to his employer. Like the attorney in *Levin*, we are concerned that in view of the lack of recognition of his wrongdoing, there is a risk that Loftus may again commit similar misconduct. However, we note that the misconduct in this case is not as extensive as in *Levin* and less severe discipline is appropriate.

[7] Therefore, finding Loftus culpable for acts of moral turpitude and finding more factors in aggravation than the hearing judge, we conclude that an actual period of suspension is warranted. We amend the hearing judge's recommendation so that Loftus is placed on one–year suspension, stayed, with 18 months' probation, on the condition that he is actually suspended for the first 90 days.

V. RECOMMENDATION

It is hereby recommended that respondent Donald J. Loftus be suspended from the practice of law for one year, that execution of that suspension be stayed, and that he be placed on probation for 18 months, with the following conditions:

1. Respondent must be actually suspended from the practice of law for the first 90 days of probation;

2. During the period of probation, respondent must comply with the State Bar Act, the Rules of Professional Conduct and all conditions of probation;

3. Respondent must maintain, with the State Bar's 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).) 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.

4 Respondent must report, in writing, to the State Bar's Office of Probation in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation (reporting dates). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of his probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and must certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

(1) in the first report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation since the beginning of probation; and

(2) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, the Rules of Professional Conduct, and all other conditions of probation during that period.

During the last 20 days of this probation, respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, respondent must certify to the matters set forth in subparagraph (2) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

5. Subject to the proper or good faith assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer any inquiries of

the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.

6. Within one year after the effective date of the Supreme Court order in this matter, respondent must attend and satisfactorily complete the State Bar's Ethics School and provide satisfactory proof of such completion to the State Bar's Office of Probation in Los Angeles. This condition of probation is separate and apart from respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Accord, Rules Proc. of State Bar, rule 3201.)

7. The period of probation shall commence on the effective date of the order of the Supreme Court imposing discipline in this matter. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law will be satisfied and that suspension will be terminated.

It is further recommended 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.

It is further recommended that respondent be ordered to comply with California Rules of Court, rule 9.20, and to perform the acts specified in subdivisions (a) and (c) of that rule, within thirty (30) and forty (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.

It is further recommended 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 Business and Professions Code section 6140.7 and as a money judgment.

We concur:

WATAI, J.
EPSTEIN, J.