PUBLIC MATTER—NOT DESIGNATED FOR PUBLICATION

Filed February 15, 2018

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	Case Nos. 12-O-18163; 14-O-04029;
	)	14-O-06411 (consolidated)
DAVID ALAN SHAFER,	)	
A Member of the State Bar, No. 86436.	)	OPINION AND ORDER
	)	
and	)	
	)	
STUART JAY FURMAN,	)	
A Member of the State Bar, No. 98981	)	
	)	

This disciplinary proceeding arises from two consolidated but factually distinct matters. In the first, the Office of Chief Trial Counsel of the State Bar (OCTC) charged David Alan Shafer with misconduct relating to his representation of clients in a joint business venture. The charges included failing to disclose and obtain waivers of actual and potential conflicts of interest, obtaining an adverse business interest without disclosure to his client, and breach of fiduciary duty for using his client's confidential information for his own benefit. The second matter involves Shafer's and Stuart Jay Furman's representation of Lewis Grauss, an elderly client suffering from cognitive impairment. OCTC charged them with multiple counts of wrongdoing, including elder abuse, statutory financial abuse of an elder, solicitation, aiding the unauthorized practice of law (UPL), breach of fiduciary duties, and failure to perform with competence.

The hearing judge found Shafer culpable in the joint business venture and both Shafer and Furman culpable in the Grauss matter. The judge recommended discipline for each that included a one-year actual suspension. Shafer and Furman both appeal, disputing the judge's

culpability findings, and asserting that any culpability, if found, warrants only a public reproval. OCTC did not appeal and requests that we affirm the hearing judge's findings. Since the two matters are factually distinct, we address them separately.

We begin with Shafer's and Furman's provision of estate planning services to Grauss, a 93-year-old client who was losing his independence as his health declined. Upon independent review of the record (Cal. Rules of Court, rule 9.12), we do not affirm the hearing judge's culpability findings nor her discipline recommendation. Instead, we find that Shafer and Furman consistently worked in Grauss's best interest, and are therefore not culpable of any misconduct.

As to the joint business venture, Shafer stipulated to culpability for three counts of misconduct, and we affirm the hearing judge's finding of culpability on the remaining six counts. Weighing the single factor in aggravation and the substantial mitigation, we recommend a 60-day actual suspension as appropriate discipline for Shafer's misconduct.

Trial on both of these consolidated matters took place over 17 days during October and November 2016. The hearing judge issued her decision on March 10, 2017.

I. SHAFER AND FURMAN—GRAUSS MATTER (CASE NOS. 14-O-04029, 14-O-06411)

A. Procedural History

On April 26, 2016, OCTC filed a nine-count Notice of Disciplinary Charges (NDC) charging Shafer and Furman with: (1) engaging in elder abuse of their client Grauss, acts involving moral turpitude, in violation of Business and Professions Code section 6106;[1] (2) two counts of violating section 6068, subdivision (a), by breaching fiduciary duties to their client and

[1] All further references to sections are to the Business and Professions Code unless otherwise noted. Under section 6106, "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise . . . constitutes a cause for disbarment or suspension."

by committing statutory financial abuse of an elder;[2] (3) violating rule 1-400(C) of the Rules of Professional Conduct by allowing Shafer's employee to solicit a potential client;[3] (4) violating rule 1-300(A) by allowing Shafer's employee to present informational seminars and to communicate with clients without proper supervision, thus aiding UPL;[4] (5) two counts of violating rule 3-310(B)(1) and 3-310(B)(3) by representing their client without providing written disclosure that they had a relationship with his daughter that would substantially impact their representation and without obtaining his consent;[5] (6) violating rule 3-110(A) by failing to represent their client with competence;[6] and (7) violating section 6068, subdivision (m), by failing to keep their client reasonably informed of significant developments.[7] The parties filed a Stipulation as to Facts on October 6, 2016.

[2] Under section 6068, subdivision (a), it is the duty of an attorney "[t]o support the Constitution and laws of the United States and of this state."

[3] All further references to rules are to the Rules of Professional Conduct unless otherwise noted. Under rule 1-400(C), "A solicitation shall not be made by or on behalf of a member or law firm to a prospective client . . . ."

[4] Rule 1-300(A) provides that "[a] member shall not aid any person or entity in the unauthorized practice of law."

[5] Rule 3-310(B)(1) provides that a member shall not accept or continue representation of a client without providing written disclosure where the member has a relationship with a party or witness in the same matter. Rule 3-310(B)(3) provides that a member shall also not accept or continue representation of a client without providing written disclosure where the member has a relationship with another person that the member knows or reasonably should know would be substantially affected by resolution of the matter.

[6] Rule 3-110(A) provides that "[a] member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence."

[7] Under section 6068, subdivision (m), it is the duty of an attorney "[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

B. Facts[8]

1. Background—Shafer, Cotney, and Furman

Shafer was admitted to the practice of law in California on May 31, 1979. At his first law practice in Orange County in 1981, he focused on estate planning, which he continued when he started his own practice, The Shafer Law Group (SLG), in Auburn. After meeting Ed Cotney in 2009, Shafer hired him as a paralegal. Cotney assisted Shafer's estate planning practice by gathering information, obtaining documents, conducting research, and preparing drafts of documents. Shafer supervised Cotney's work—he held regular weekly meetings with Cotney, and reviewed all drafts Cotney prepared.

Cotney was a military veteran. While working at SLG, he also held seminars with Helen Justice, the Chief Executive Officer of Advanced Wellness Geriatric Care Management, Inc. (Advanced Wellness). Advanced Wellness offered programs on estate planning, tax planning, and veterans' benefits. If attendees sought additional information, they were referred to Shafer for legal advice.

Cotney introduced Shafer to Furman, who was admitted to practice in California on December 1, 1981. Furman's law firm, Southern California Legal Center provided estate planning, including Veterans Administration (VA) benefits planning. Since Shafer did not have this specialized experience, he referred clients needing those services to Furman. Their fee-sharing arrangement was that Furman paid Shafer up to a 30 percent fee for each referred client.

2. Lewis Grauss

Lewis Grauss was born in January 1920. He served in the United States military from 1942 to 1945. He married Roberta Yotter Grauss, and they had one daughter, Dale Masters. In

[8] We base the factual background on the Stipulation as to Facts, trial testimony, documentary evidence, and the hearing judge's factual findings, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).)

1965, the family moved to Diamond Bar, California. In November 1998, Grauss and Roberta established a living trust that designated Masters and her husband John as successor trustees and beneficiaries. After Roberta died in 2005, Grauss continued to live in the Diamond Bar house.

In June 2013, Grauss's neighbor called Masters because Grauss was upset and confused about his checking and two savings accounts. He wrote a check that bounced because he had not transferred sufficient funds from his savings into his checking account. Masters visited her father, and he agreed to add her name to his accounts so she could help him with any problems.

While home alone in August 2013, Grauss fell and broke his hip. The hospital called Masters, who immediately went to Diamond Bar. Grauss was still in the hospital after undergoing surgery when she arrived. After he was discharged, he was sent to a rehabilitation center and assigned a social worker. Grauss and Masters met with the social worker and decided Grauss could not care for himself on his own. After Masters researched assisted living facilities, she and Grauss decided he should move to Eskaton Village (Eskaton), a facility in Placerville close to Masters's home.

3. Grauss Moves to Eskaton—Financial and Mental Capacity Concerns

On September 9, 2013, Masters drove her father from Diamond Bar to Eskaton. She brought some furniture and knickknacks from his home to make him feel more comfortable. Eskaton was a high-quality facility, but expensive. Initially, care at Eskaton cost $5,500 a month, but it could rise to $10,000 a month depending on the required level of care. Grauss moved into an independent cottage, and Masters hired caregivers from an agency, Harlow's Help, to provide 24-hour care for him.

Masters was immediately concerned about her father's ability to afford Eskaton. His modest income and assets included: $2,000 a month from Social Security and his pension; his $400,000 home; and approximately $250,000 in savings. In September, after discussing her

concerns with Eskaton's staff, she learned that Grauss might be able to receive VA benefits. Eskaton referred Masters to Clara Yang, an attorney, who told Masters that they should set up financial planning to spend down Grauss's assets to qualify for VA benefits. Yang recommended a conservatorship, but Masters was initially uncomfortable with this advice and did not hire Yang.

After her father moved to Eskaton, Masters also became worried about changes in his personality. His counselor at Eskaton was concerned that Grauss had dementia and referred Masters to Laura Wayman, a dementia specialist. Masters also made an appointment with Dr. Ang, her father's new primary care physician, for October 7, 2013. She voiced her concerns about her father's personality changes to Dr. Ang, who reviewed Grauss's prior medical records. Dr. Ang noted that Dr. Carew, Grauss's physician in Diamond Bar, had administered a Mini-Mental State Examination (MMSE) in January 2013 and scored him at 19 of 30, indicating moderate dementia. Dr. Ang also learned that Dr. Carew had prescribed Aricept, a medication to prevent dementia from progressing. Dr. Ang administered the MMSE at the October 7 appointment and scored Grauss at 29. Based on his examination and the MMSE score, Dr. Ang concluded that Grauss had only mild cognitive impairment, and referred him for a neurological examination. On November 8, 2013, Dr. Ang again saw Grauss and completed a form summarizing his opinions for Eskaton. On the form, he indicated that Grauss had mild cognitive impairment, described as a conditional state between normal aging and dementia.

Linda Himan, a Harlow's Help supervisor, was also concerned about Grauss's personality changes. She evaluated him after learning that he had asked a caretaker to help him make daily $300 bank withdrawals, and that he had accused another caretaker of stealing from him. Himan reported that Grauss was verbally abusive to Masters at times, accusing her, too, of

stealing from him, but alternated that behavior with being kind and loving to her. Himan concluded that Grauss was suffering from some level of dementia.

4. Masters Attends Advanced Wellness Seminar

Due to Masters's apprehension about her father's finances and her interest in his VA benefits, Wayman referred her to an Advanced Wellness seminar given by Cotney and Justice on October 16, 2013, which Masters and her husband attended. They were impressed with the presentation and afterward met with Cotney and Justice. Cotney gave them an Advanced Wellness intake form and his business card, which stated that he was a family wealth counselor under the supervision of Shafer. Grauss completed and signed the form, which included his financial information, provided copies of his existing trust and power of attorney, and authorized Shafer, Furman, Cotney, and Justice to access his information to coordinate his request for VA benefits.

After the seminar, Shafer discussed the intake form and Grauss's estate documents with Cotney. Shafer determined that Grauss's existing trust was fine and only needed to be updated because of the death of Grauss's wife. Masters was listed on the existing documents as the successor trustee and attorney-in-fact. Shafer directed Cotney to prepare a new Power of Attorney (POA), a Health Insurance Portability and Accountability Act (HIPAA) authorization, and an advanced health care directive using SLG's Wealth Counsel software, which contained forms for these documents. The POA maintained Masters as the attorney-in-fact, consistent with the existing estate documents. Shafer reviewed the documents Cotney prepared before they were provided to Grauss.[9] Shafer also referred Grauss's case to Furman to handle the VA benefits

[9] The hearing judge found that Shafer did not review the documents, citing the testimony and interview summary of Lori Wallerstein, the State Bar's investigator, that Shafer told her he did not review the estate documents because doing so was Cotney's job. Wallerstein's interview summary was written three days after her interview of Shafer and Cotney, after which she destroyed her contemporaneous notes. However, Shafer and Cotney each testified during their

issues. Shafer thought that Grauss would be well served with the three documents he directed to be prepared, whether or not he sought VA benefits with Furman's assistance.

After receiving Shafer's approval of the documents, Cotney spoke with Grauss on the phone to determine if he still wanted to proceed. When Grauss indicated that he did, Cotney scheduled a meeting for Grauss to sign the documents on October 30, 2013. Cotney also sent Grauss's intake form and related documents to Furman. Based on his review of those documents, Furman concluded that he could help Grauss seek VA benefits. Since Furman would be on vacation on October 30, he prepared his fee agreement, a confidentiality and conflict of interest waiver, an intake form, and two authorizations to release information, which he provided to Cotney. He directed Cotney to discuss the agreement generally with Grauss. Furman did not expect Grauss to sign the documents on October 30. Rather, he anticipated that Grauss would review them so they could discuss any issues after Furman returned from vacation. The agreement listed multiple documents that Furman would prepare for Grauss, including an

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direct testimony that Shafer reviewed the draft documents Cotney prepared before they were finalized. Also, Cotney confirmed in his interview that Shafer reviewed the documents during their regular weekly meetings, which was inconsistent with Wallerstein's report. Shafer testified that Wallerstein got his statement wrong, perhaps because he likely told her that he did not review documents prepared by Furman, not Cotney. This statement is consistent with Shafer's acknowledgment that he does not specialize in VA benefits planning and refers those cases to Furman.

Other statements in Wallerstein's notes were also in error: Shafer testified that he began practicing estate law in 1981 in Orange County, not in 2009 when he met Cotney, and that he suffered from lymphoma, not esophageal cancer as noted by Wallerstein.

The hearing judge did not make any credibility findings weighing Shafer's and Cotney's trial testimony against Wallerstein's recollection of her interview. Without a credibility determination, and given the conflicting testimony of Shafer and Cotney, we do not accept the factual finding that Shafer did not review the documents prepared for Grauss. (See *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 968, fn. 2 ["If the hearing panel or officer is unable to assess the relative credibility of the witnesses whose testimony conflicts, the doubt should be resolved in favor of the attorney since the burden in the disciplinary hearing is on the State Bar to establish by clear and convincing evidence that discipline is warranted"]; *Galardi v. State Bar* (1987) 43 Cal.3d 683, 689 [all reasonable doubts must be resolved in favor of respondent].)

irrevocable trust. Cotney sent all the documents to Masters before the October 30 meeting and confirmed that she received them.

5. October 30 Meeting

Shafer was unable to attend the October 30 meeting because he was suffering peripheral neuropathy from his recent chemotherapy treatments. Since walking was painful, he found it difficult to travel from his office. He instructed Cotney to let Grauss know that he was available by phone if Grauss had any questions. On October 30, Cotney met with Grauss, Masters, Masters's husband John, and M. K. Bradley, a notary public. Cotney gave Shafer's and Furman's business cards to Grauss, along with his own, on which it was noted that he was supervised by Shafer. Linda Himan and Grauss's caretaker were also present. Cotney talked about the military and explained the type of VA benefits that might be available to Grauss. He also described the documents he had brought for Grauss to review, particularly the POA that updated his previous one giving Masters power of attorney. He informed Grauss that Shafer could be reached by phone to answer any questions, but Grauss did not have any. Cotney asked Masters and her husband to leave the room and spoke to Grauss with only his caretaker and the notary present. When Cotney asked if anyone was pressuring Grauss to sign the documents, Grauss stated he was signing them voluntarily. Bradley notarized the POA, the HIPAA authorization, and the advanced health care directive and confirmed that Cotney explained them to Grauss. After the meeting, Cotney emailed Furman and Shafer that the documents were signed and that Grauss "has excellent capacity."

6. Grauss Becomes Hesitant

Almost immediately after the October 30 meeting, Grauss had second thoughts about the documents he signed. Himan testified that Grauss was friendly and engaged with Cotney during the meeting, but that he began to criticize Cotney as soon as he left. By November 1, Masters's

husband reported to Furman's assistant, Cara Ouellette, that Grauss was "getting cold feet, didn't really understand and was hesitant." Ouellette relayed this message to Furman and Cotney, suggesting that someone contact Grauss. Still on vacation, Furman responded that Cotney should call Grauss. Masters followed up with Ouellette to report that her father was stubborn, did not like lawyers, did not want to give anyone power of attorney, thought he had enough money, and did not want to hear about how much care cost. On November 4, 2013, Cotney sent Furman and Ouellette an email stating that "Grauss is on Hold" and set a meeting for Furman to talk to Grauss on December 4, 2013.

Considering that Grauss was getting "cold feet," Furman ceased work while he waited for clarification. He planned to speak with Grauss at the December 4 meeting, but Grauss refused to attend. Furman was only able to speak with Masters, who shared her concerns about her father, noting his erratic behavior, his accusations that she and his caretakers were stealing from him, and his indifference to the amount of money he had to pay for assisted living. Masters thought her father's lack of concern about his ability to afford care at Eskaton made no sense. She wanted to explore the possibility of his receiving an additional $1,700 a month in VA benefits. Grauss had initially agreed to explore VA benefits, but continued to change his mind. Furman had the POA that gave Masters broad rights to manage Grauss's financial and personal affairs, to hire attorneys, and to amend Grauss's existing revocable trust or create a new one. But, after hearing Masters's concerns, he suggested that they also get a capacity declaration from Grauss's doctor. Dr. Ang completed the declaration on December 17, 2013, stating that Grauss did not have the capacity to independently manage his affairs.

7. Furman Prepares New Estate Documents

On December 5, 2013, Masters paid Furman his $6,500 retainer for the several documents Furman had prepared. After he received Dr. Ang's capacity declaration, Furman

decided it was best to coordinate his services to Grauss through Masters as her father's attorney-in-fact pursuant to the POA. He met with Masters, who confirmed that she wanted to continue to pursue VA benefits. Although Grauss had equivocated on whether he wanted to apply for them after signing the intake form authorizing Shafer and Furman to evaluate his eligibility for the benefits, he attended an appointment with Dr. Ang on January 2, 2014, during which the doctor completed the paperwork required for VA benefits.

Furman proceeded to prepare the estate documents, which included an irrevocable trust. Masters signed the documents on January 20, 2014. Furman prepared the new trust to mirror Grauss's existing trust, with Masters as trustee and Masters and her husband as beneficiaries. He also included a provision requiring appointment of a special agent who would have to approve any decision by Masters to use the trust funds. He prepared a quitclaim deed to Grauss's house, which was never delivered or recorded. Ultimately, Masters did not transfer anything into the irrevocable trust.

8. Grauss's Nephew Intervenes; Yang Revokes POA and Begins Representing Grauss

On January 24, 2014, Cotney asked Furman to call Masters because she reported that Grauss was withdrawing all his money from his accounts and the bank was not recognizing the capacity declaration. Masters also stated that her father was confused and upset to see her name on his accounts (although she had been on them before he moved to Eskaton). Furman wrote a letter to the bank notifying it about the capacity declaration and asking that Grauss not be allowed to withdraw money. Around the same time, Furman discovered that Grauss had given power of attorney to his nephew, William Ream, who had visited Grauss at Eskaton in late November 2013. Masters had become concerned that Ream was exerting undue influence over her father. On January 29, 2014, Clara Yang wrote a letter to Masters notifying her that her POA was revoked.

After receiving the revocation notice, Furman contacted Yang to inform her about the capacity declaration for Grauss, which he believed invalidated her attempt to revoke the POA. Yang responded that she was not sure she could continue to represent Grauss if the capacity declaration was valid. However, she indicated that he was entitled to a copy of his estate plan in any event and asked Furman to send it either directly to Grauss or to her.

On February 19, 2014, Masters wrote to Furman that she had provided copies of the trusts to her father the day before, after which he called her and was "just livid" about them. She also learned that someone had set up a doctor's appointment for Grauss without her knowledge. She was suspicious that Yang was trying to have the capacity declaration reevaluated, and was upset that Yang would do this without consulting her. She told Furman she felt "at wits end."

Yang indeed arranged for a second opinion regarding Grauss's capacity. On February 27, 2014, Dr. Donald Van Fossan evaluated Grauss. He did not review any of Grauss's previous medical records and knew no medical history other than that self-reported by Grauss. The doctor administered the MMSE, scored Grauss at 27 out of 30, and concluded that he was competent to manage his affairs. His report states that Grauss had "mental status changes . . . consistent with the category of mild cognitive impairment" that put him at risk for future dementia, which he did not currently have.

9. Masters Seeks a Conservatorship; Court Investigator Appointed

After her father withdrew all the money from his bank account, Masters decided she needed to file for conservatorship over him because she felt that the situation had spiraled out of control. Furman told her he could not represent her regarding the conservatorship because he represented Grauss. Masters hired Phyllis Pennington, who filed a petition for conservatorship on March 7, 2014. The petition sought to have Masters serve as conservator for Grauss and to

have a professional appointed to handle his financial affairs. The court appointed Lori Coopwood to investigate whether the conservatorship was appropriate.

Coopwood interviewed multiple parties, including Grauss, Yang, Dr. Ang, Masters, Ream, and a longtime friend of Grauss, Ms. Ammon. Dr. Ang completed a competence declaration for the conservatorship proceeding, which stated that Grauss had mild dementia, was unable to complete complex tasks, but could make his own medical decisions. Given the discrepancy between the doctors' reports, Coopwood consulted with Dr. Ang, who referred Grauss for a neurological evaluation, which Grauss never attended.

Overall, Coopwood believed that all parties wanted what was best for Grauss. She noted that Masters was following the advice she received to limit the information provided to her father because too much information can confuse and agitate dementia patients. Coopwood thought that Grauss experienced some challenges, particularly if subjected to undue influence. She said that he had difficulty understanding complex issues and was confused by his online bank statements. Coopwood concluded that Grauss's living situation at Eskaton was appropriate and that it would not be safe for him to live independently. She could not decide whether a conservatorship was the least restrictive option, and thought that a third medical opinion would help resolve the issue. She noted that Diana Steele, a legal services attorney, questioned whether Ream could effectively supervise Grauss's safety since Ream lived in Utah. Both Coopwood and Steele recommended that any conservatorship be supervised by a local professional conservator. Ultimately, Masters decided to dismiss the conservatorship proceeding before the hearing because of the cost and the toll it would take on her father.

10. Yang Is Appointed as Grauss's Attorney

On March 20, 2014, Cotney and Furman each received a letter purportedly from Grauss asking for the return of his files. Furman did not immediately respond because he was not sure

the letter was actually from Grauss. On April 11, 2014, Yang wrote to Cotney and Furman to inform them that she had been appointed to represent Grauss and to again ask for his files. Furman requested verification of her appointment. Upon receiving it, Furman and Shafer sent her Grauss's electronic file, including his estate planning documents that Masters had already given directly to Grauss. Yang stated that she would review the documents with Grauss, and that "Lewis is not planning to make changes to his estate plan, he just want[s] to know what has been done for him and be part of the process." Despite this assurance, in November 2014, Yang filed a petition to void the irrevocable trust prepared by Furman and obtained a court order returning Grauss's personal property to his original trust. In January 2015, Yang filed an amendment to that trust, naming Ream as trustee entitled to a 2 percent trustee fee. On Grauss's death, Ream was directed to distribute the trust assets to Grauss's granddaughters after death taxes, debts, and expenses were paid. The trust contained only the house in Diamond Bar. In September 2015, Yang created a separate property trust for Grauss that gave Ream a 6 percent trustee fee and provided that if Grauss died before 2030, no distribution from the trust was to be made until after December 30, 2030. After this interval, Ream was to divide the property in equal shares for Grauss's granddaughters. The trust expressly disinherited Masters and her husband John, contradicting Grauss's statement to Coopwood that he intended to "leave everything to Dale and her family."

11. Ream's State Bar Complaint and Grauss's Death

On June 27, 2014, Ream helped Grauss prepare a complaint to the State Bar against Shafer. After Ream and Grauss visited Diamond Bar in August 2015, Ream moved Grauss out of Eskaton and back to his home in November, with care provided for eight hours a day. In December, Grauss again broke his hip while home alone. He returned to assisted living where he died in early 2016 from complications of a urinary tract infection. Ream was on a cruise at the

time. He informed Masters of Grauss's death by email. On September 22, 2016, Masters filed a lawsuit against Ream and Yang for elder abuse. That suit was still pending at the time of the hearing of this disciplinary proceeding.

C. Culpability

1. Hearing Judge's Uncontested Dismissal of Counts One, Three, Four, and Eight

The hearing judge dismissed count one alleging moral turpitude for elder abuse, count three alleging violation of section 6068, subdivision (a), for statutory financial abuse of an elder, count four alleging violation of rule 1-400(C) for solicitation, and count eight alleging violation of rule 3-110(A) for failure to perform with competence. Respondents do not challenge these findings, and OCTC did not appeal. Therefore, we affirm the hearing judge's dismissal of these charges as supported by the record, and focus on the challenged culpability findings.

2. Count Two—Breach of Fiduciary Duty (§ 6068, subd. (a))

Count two alleged that Shafer and Furman breached their common law fiduciary duties to Grauss in violation of section 6068, subdivision (a). The hearing judge agreed with respondents that much of the conduct alleged to be breaches of fiduciary duty overlapped with other charges in the NDC. We affirm the hearing judge's ruling that conduct duplicative of other charged misconduct should be assigned no additional weight. (*In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297, 304 [court need not address § 6068, subd. (a), violation that is cumulative to rule 3-300 violation]; *Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060 ["little, if any, purpose is served by duplicative allegations of misconduct"].)

However, the hearing judge found that Shafer and Furman independently violated their fiduciary duties to Grauss by not honoring his wishes and by continuing to work with Masters to structure Grauss's estate to enable him to seek VA benefits. OCTC agrees that Shafer and Furman violated their fiduciary duties by giving their loyalty and energy to Masters instead of

Grauss. We disagree, as set forth below, and do not find that these actions constitute a violation of Shafer's and Furman's fiduciary duties to Grauss.

No evidence in the record supports the conclusion that respondents were not acting in Grauss's best interest. In fact, Coopwood's report found the opposite to be true. Shafer updated Grauss's existing trust documents with a new POA that retained Masters as a successor trustee, and prepared a HIPAA authorization and an advanced health care directive. These were reasonable documents to prepare to protect the interests of a 93-year-old client in assisted living. Furman developed an estate plan that would serve Grauss's interests by increasing his monthly income through VA benefits. As soon as Furman heard that Grauss was hesitant about moving forward, he ceased work until he could clarify the situation. He attempted to meet with Grauss, but Grauss refused to attend the meeting. Since there were also indications that Grauss had begun to act erratically, Furman appropriately sought a physician's evaluation of Grauss's competency. After Furman received the incompetency declaration, he then properly worked with Masters pursuant to her authority under the POA. (Prob. Code, § 4300 [attorney-in-fact acting under power of attorney shall be afforded same rights and privileges that principal would be afforded if present]; Prob. Code, § 4301 [giving third parties broad authority to "rely on, contract with, and deal with an attorney-in-fact" under power of attorney].) There was no reason to believe that Masters was not an appropriate person to be given POA authority since she was Grauss's daughter, was listed as a successor trustee and attorney-in-fact on the previous estate documents, and was jointly named on her father's bank accounts. Masters was using her best efforts to represent her father's interest by trying to ensure that he had sufficient income to stay at Eskaton, and Shafer and Furman properly followed her direction.

There is no clear and convincing evidence[10] that Shafer and Furman breached their fiduciary duty owed to Grauss, and count two is dismissed with prejudice.

3. Count Five—Aiding UPL (Rule 1-300(A))

In count five, OCTC charged Shafer and Furman with aiding UPL by permitting Cotney to: distribute flyers regarding VA benefits; give a presentation regarding VA benefits; meet with clients at the presentation and give legal advice; review potential clients' financial information and estate planning documents to determine their needs; make legal recommendations to clients; finalize and review estate documents with clients; serve as the conduit of attorney-client communications with clients; and engage in the practice of law by their failure to properly supervise Cotney's interactions with clients. The hearing judge found that the allegations regarding Cotney's participation in the VA benefit presentations and his resulting interactions with potential clients did not support culpability. We agree with this finding as supported by the record.

But the hearing judge found Shafer and Furman culpable of aiding UPL by relying on Cotney's review of clients' financial data and current estate plans to determine their needs, permitting him to make legal recommendations to clients, relying on him to finalize and review estate documents with clients, allowing him to be the conduit of attorney-client communications, and failing to properly supervise his interactions with clients. The judge's culpability findings rely on *In the Matter of Valinoti* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 498 and *In the Matter of Bragg* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 615, and OCTC also cites these cases to support the culpability findings. However, these cases are distinguishable from the facts in this case. Both *Valinoti* and *Bragg* involve nonlawyers engaging in UPL by preparing legal

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

documents or interacting with clients with virtually no supervision. In *Valinoti*, the attorney relied on nonattorney immigration services providers to prepare and file clients' immigration applications, pleadings, and other documents completely without supervision—most cases were not referred to the attorney until after documents had been prepared and filed, and often not until just before the hearing. (*Valinoti*, *supra*, 4 Cal. State Bar Ct. Rptr. at pp. 511-523.) In *Bragg*, a nonattorney who had separate offices in a different town than the respondent, handled cases without any supervision or control. The nonattorney and his staff would settle 30 to 50 cases a month, evaluate whether to accept clients in the attorney's name, set values on clients' claims, and, on occasion, file litigation without attorney control to avoid running the statute of limitations. (*Bragg*, *supra*, 3 Cal. State Bar Ct. Rptr. at pp. 624-627.)

Unlike the nonattorneys in *Valinoti* and *Bragg*, Cotney was supervised. Under appropriate supervision by an attorney, paralegals are allowed to engage in the following tasks: "case planning, development, and management; legal research; interviewing clients; fact gathering and retrieving information; drafting and analyzing legal documents; [and] collecting, compiling, and utilizing technical information to make an independent decision and recommendation to the supervising attorney." (§ 6450, subd. (a).) Mark Tuft, the expert witness who testified at the trial,[11] stressed that the question of aiding UPL "turns on the degree of direction and supervision that is being exercised." Tuft identified the general standard of required supervision: "the lawyer has to exercise sufficient guidance and direction and authority over the work as to which the lawyer is going to be ultimately responsible to satisfy himself . . .

[11] Tuft is a certified legal malpractice specialist and a litigation partner with Cooper, White & Cooper LLP. He represents clients and serves as an expert witness and consultant in the areas of professional responsibility and professional liability matters. He is one of the authors of the California Practice Guide on Professional Responsibility (Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2017)). He has served as a member of the State Bar Commission on the Rules of Professional Conduct, and as chair and special advisor to the State Bar Committee on Professional Responsibility and Conduct.

that the legal assistant is comporting themselves [*sic*] consistent with the lawyer's professional duties to the client." Tuft testified that, based on his review of this case, he did not find UPL and thought Cotney was appropriately supervised. We agree with Tuft's conclusion that Cotney was appropriately supervised, and therefore, that Shafer and Furman did not aid UPL. Count five is dismissed with prejudice.

4. Counts Six and Seven—Conflicts of Interest (Rule 3-310(B)(1), (B)(3))

Counts six and seven alleged that respondents violated rule 3-310(B)(1) and (B)(3) by failing to disclose and obtain a waiver that respondents had a business relationship with Masters, who would be substantially affected by the matter they were handling for Grauss. The hearing judge found culpability based on the fact that Shafer and Furman dealt exclusively with Masters, rather than Grauss. We disagree. There is no evidence that Shafer or Furman had any professional relationship with Masters, other than working with her on Grauss's case pursuant to her valid POA. As cited by respondents, under California law, the POA gave Masters broad authority over her father's affairs, and they had the right to rely on it. (Prob. Code, §§ 4121, 4123, 4300, 4303.) Respondents worked with Masters in furtherance of Grauss's interests—they did not have an attorney-client relationship with her. The Probate Code expressly provides that the fact that Masters may ultimately benefit from her father's estate does not constitute a conflict of interest. (Prob. Code, § 4232.) Moreover, Grauss signed two conflict waivers on October 30, 2013. Furman provided a conflict and confidentiality waiver regarding his communications with Masters in connection with his estate planning for Grauss. And the POA prepared by Shafer also included a provision specifically waiving any conflict related to Shafer's representation.

Counts six and seven are dismissed with prejudice.

5. Count Nine—Failure to Communicate (§ 6068, subd. (m))

Count nine charged Shafer and Furman with violating section 6068, subdivision (m), by failing to keep Grauss reasonably informed of significant developments in their representation of him. The hearing judge found respondents culpable because they communicated exclusively with Masters. We do not find a failure to communicate because Shafer and Furman appropriately communicated with Masters pursuant to the valid POA. Furman attempted to meet with Grauss, but after learning of Grauss's behavioral changes, decided to request a competency declaration from Grauss's doctor. Once he obtained the declaration that Grauss was incompetent, Furman decided it was best to communicate regarding Grauss through Masters, relying on her POA to act for her father. Under these circumstances, we find no culpability for failure to communicate, and count nine is dismissed with prejudice.

D. Disposition

Given our independent review of the evidence and resolving all reasonable doubts in respondents' favor (*Alberton v. State Bar* (1984) 37 Cal.3d 1, 11), we find no culpability for either respondent on any count in the Grauss matter. Accordingly, in this portion of the opinion, we do not analyze the hearing judge's aggravation, mitigation, and discipline recommendations.

II. ORDER (CASE NOS. 14-O-04029, 14-O-06411)

We find Shafer and Furman not culpable of all charges in this matter. Therefore, we order these cases dismissed with prejudice.[12] Furman may move for reimbursement of costs in accordance with section 6086.10, subdivision (d), and rule 5.131 of the Rules of Procedure of the State Bar.

[12] Case Nos. 14-O-04029 and 14-O-06411 are presently consolidated with Case No. 12-O-18163. As set forth above, Case Nos. 14-O-04029 and 14-O-06411 are being dismissed with prejudice. Accordingly, the court orders Case No. 12-O-18163 severed from consolidated Case Nos. 14-O-04029 and 14-O-06411.

III. SHAFER—JOINT BUSINESS VENTURE MATTER (CASE NO. 12-O-18163)

A. Procedural History

On July 6, 2015, OCTC filed a 13-count NDC against Shafer. The matter was abated on September 8, 2015, pending investigation of another case, and the abatement was terminated on May 10, 2016. On October 13, 2016, the fourth day of trial, OCTC filed an amended NDC, dismissing eight of the original 13 counts.[13] The remaining five counts charged Shafer with: (1) violating rule 3-310(B)(1) by representing a client without disclosing his relationship with a related party; (2) violating rule 3-310(C)(1) by representing multiple clients with potential conflicts among them without obtaining their written consent;[14] (3) violating rule 3-310(C)(2) by representing multiple clients with actual conflicts among them without obtaining their written consent;[15] (4) violating rule 3-300 by acquiring an adverse interest to his client without written disclosure and consent;[16] and (5) violating section 6068, subdivision (a), by breaching common law fiduciary duties to his client. On the same day that OCTC filed the amended NDC, Shafer stipulated to culpability on three counts: count one (rule 3-310(B)(1)); count five (rule 3-310(C)(1)); and count seven (rule 3-300).

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[13] We adopt and affirm the unchallenged dismissals of count two (violation of rule 3-310(B)(1)), count three (rule 3-310(B)(3)), count four (rule 3-310(B)(4)), count eight (rule 3-310(C)(1)), count nine (rule 3-310(C)(2)), count ten (rule 3-310(B)(3)), count eleven (rule 3-310(B)(4)), and count twelve (rule 3-300), which were ordered by the hearing judge upon the filing of the amended NDC.

[14] Rule 3-310(C)(1) provides that a member shall not accept representation of more than one client in a matter in which the interests of the clients potentially conflict without obtaining the informed written consent of each client.

[15] Rule 3-310(C)(2) provides that a member shall not accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict without obtaining the informed written consent of each client.

[16] Under rule 3-300, a member shall not enter into a business transaction with a client unless its terms are fair and reasonable to the client and fully disclosed in writing, the client is advised in writing of the client's right to seek independent counsel, and the client consents to the terms in writing.

B. Facts

1. Shafer Meets Miller and Introduces Him to Mann

In February 2010, Shafer met Smith Miller at a networking event. At the time, Miller was employed at Gallina LLP, an accounting firm. Shafer and Miller discussed Miller's interest in starting a business to educate and assist clients regarding research and development tax credits. Miller told Shafer he did not have the capital to start such a business.

On February 15, 2010, Shafer set up a meeting between Miller and Christopher Mann, who was a principal in the accounting firm of Mann, Urrutia, and Nelson (MUN). Shafer had a professional and personal relationship with Mann for about 10 years. Shafer testified that this relationship prompted him to recommend Mann to Miller as a potential partner for the business Miller envisioned. Miller testified that he did not know about the close relationship between Shafer and Mann. At the meeting, Mann and Miller began discussions about forming a joint venture to provide services regarding research and development tax credits.

2. Formation of Strategic Tax Solutions

In March 2010, Miller and his wife Yvonne hired Shafer to provide legal advice and assist them in creating a corporate entity to enter into a business relationship with MUN. Shafer agreed to represent the Millers and filed Articles of Incorporation and Bylaws for Strategic Tax Solutions (STS) on March 25, 2010. At an organizational meeting on April 26, Smith and Yvonne Miller were named as the only directors and officers of STS. At this meeting, they also voted to give Shafer 10,000 shares of STS, a 10 percent share in the company. Shafer testified that he accepted the STS shares as compensation for legal and marketing work he would provide. But he did not assess the value of the shares he accepted or detail the services he would provide.

3. Creation of Joint Venture Between MUN and STS

At this point, Shafer was representing both MUN and STS in the discussions about forming their joint venture. The concept behind the joint venture was that STS would provide research and development tax counseling to clients while MUN would contribute overhead to run the business. At the end of March 2010, Mann, John Urrutia and Miller signed a Letter of Intent (LOI) between MUN and STS to memorialize their vision for the joint venture. The LOI did not include any provision describing potential conflicts related to Shafer representing both parties. On March 29, 2010, Shafer sent the LOI to Miller with a cover email indicating that he had tabled his potential role with STS to avoid any impropriety, but asking if they could "talk about what [his] role will be going forward" since the parties seemed to be moving ahead with a joint venture agreement.

Shafer then prepared an Agreement and a Unilateral Buy-Sell Agreement, which the parties signed on April 22, 2010. These agreements remained in place until they were terminated in May 2012. Although Shafer drafted a series of strategic alliance agreements between the parties, these were the only two agreements signed by MUN and STS. Miller had his attorney friend, Kent Meyer, review both agreements. Meyer made specific suggestions for amendments which Shafer incorporated into the final drafts.

The Agreement incorporated the LOI by reference, and contained terms including: (1) the obligations of the parties for day-to-day operations of the research and development tax business; (2) the term and termination requirements; (3) revenue allocation; (4) a noncompetition clause prohibiting either party from competing with services to be provided by STS; (5) an integration clause requiring changes to be made in writing; (6) a provision creating a management committee comprised of Mann and Urrutia representing MUN, and Smith and Yvonne Miller representing STS; and (7) a provision stating that, in the future, both parties could agree in

writing for Miller to become an equity participant in MUN, including a formula for valuing MUN and STS. The Agreement contained an Independent Counsel provision that stated that Shafer represented both parties, who had executed a written conflict of interest waiver. In fact, at this time, no written conflict waiver was executed by either party. The Agreement also disclosed that Shafer had been offered the opportunity to become an STS shareholder after execution.

4. STS Begins Work with MUN

After execution of these agreements, STS began operation out of MUN's office in Roseville, California. Shafer was not involved in the day-to-day operation of the joint venture, but Miller corresponded with him regularly about the business. Miller provided Shafer with marketing materials for STS, including a detailed description of the research and development tax credit area, the ways to identify a client's potential tax credits, and STS's proprietary "four phase approach" to providing service. In December 2011, Shafer drafted a Confidentiality Agreement for STS to protect "proprietary techniques and confidential information that have great value in its business." The agreement included a noncompetition clause. Shafer also drafted a Licensee Policies and Procedures Manual for STS with a section on how to handle confidential information of STS. The designation of confidential information included "training and operations materials and manuals; methods, formats, specifications, standards, systems, procedures, sales and marketing techniques, knowledge, and experience used in operating the . . . business, including developing and managing the . . . business; marketing and advertising programs for the . . . business."

5. Shafer Works on Additional Agreements Between STS and MUN

Beginning in May 2011, Shafer began drafting a Strategic Alliance Agreement (SAA) between MUN and STS. On May 16, 2011, Shafer emailed the first draft of the SAA to the

parties. By this time, MUN and STS had orally modified their original agreement to allow Miller to receive a monthly draw of $25,000. On June 1, 2011, Shafer circulated a second draft of the SAA, a Buy-Sell Agreement for STS, and a Stock Purchase Agreement for STS and MUN. The new SAA draft included a list of expenses that STS would be responsible for paying, including meals, entertainment and travel, the monthly draw for Miller, and an option for each party to obtain equity ownership in the other company. The Stock Purchase Agreement contemplated each side purchasing shares of stock in the other company, with each set of shares valued at $350,000.

Mann emailed Shafer on June 14, 2011, to inform him about issues that Mann, Urrutia, and Miller had discussed at a recent meeting. These involved the monthly draw for Miller, which was based on an estimated $500,000 in collections from STS from June through December 2011. The email also described unfinished discussions regarding trading MUN shares for STS shares, STS paying its own expenses, and how to facilitate the relationship between MUN and STS while still allowing STS to market to other accounting firms. On September 13, Shafer distributed a third draft of the SAA. On October 20, Mann emailed Shafer proposing a trade of 5 percent of MUN stock for 25 percent of STS stock.

6. No Conflict Waiver until December 2011

Each SAA draft contained a clause explaining the parties' right to independent counsel, stating that they were both represented by Shafer and had executed conflict waivers, and a provision waiving any conflict related to Shafer being a shareholder in STS. While preparing the third draft, Shafer realized that the parties never completed written conflict waivers. He prepared a generic written conflict waiver for the parties to sign before they considered another SAA draft. The conflict waiver did not detail any actual circumstances between STS and MUN that could or

did present conflicts between the parties. Smith and Yvonne Miller signed this conflict waiver on December 1, 2011. Mann and Urrutia also signed it.

7. Shafer Presents New Set of Documents and Miller Loses Confidence in Shafer

On December 12, 2011, Shafer sent MUN and STS a fourth SAA draft, as well as drafts of a Stock Purchase Agreement, a Secured Promissory Note requiring STS to pay $87,500 for shares in MUN (for MUN's purchase of STS shares, the Stock Purchase Agreement provided that the services MUN provided to STS would constitute consideration for the STS shares MUN would acquire), and unanimous written consents for STS to approve the various documents and also to increase the size of its board to five persons. Under the Stock Purchase Agreement, Shafer would retain his 10 percent ownership of STS, and Mann and Urrutia would each acquire 16.7 percent of STS, thus dropping the Millers' interest in their company from 90 percent to 56.6 percent. This was the first time the Millers had seen these terms and they were alarmed to discover many items in the documents that they had never discussed with Shafer, including the Secured Promissory Note, the proposed stock sale that resulted in what they perceived as a serious reduction in their ownership percentage of STS, and the proposal to add directors to STS's board. Assuming that these changes would go through, Shafer filed a Statement of Information with the Secretary of State, which listed Shafer, Mann, and Urrutia as additional directors of STS. Shafer later admitted that he had "jump[ed] the gun" in doing so. Miller testified that after reviewing this set of documents on December 12, he began to suspect that Shafer was working to further Mann's and MUN's interests instead of Miller's. He felt that Shafer and Mann were "working wonderfully together, but they were leaving [him and Yvonne] out."

In late 2011 and early 2012, STS and MUN began to disagree about the joint venture. Mann testified that MUN had to assign a partner to manage the STS work, which he expected

Miller to do. Miller felt that MUN was not providing him with sufficient support. Miller and Mann also became concerned that the revenue forecasts did not justify Miller's monthly draw. Mann testified that revenue forecasts were off by nearly $500,000 by February 2012. Miller was concerned that he would owe money because his monthly draws would exceed the estimated revenue. On February 13, 2012, Miller told Shafer that, from his perspective, the MUN transaction was on indefinite hold. Miller testified that, after reviewing the December 12 email, he had not told Shafer about his concerns with the draft agreements and other documents because he wanted to make a clean exit.

On February 20, 2012, Mann emailed Shafer with a list of issues that he wanted Shafer to address with Miller, including that: (1) Miller had to learn to take constructive criticism; (2) Mann thought Miller's monthly draw was too generous since it was based on erroneous revenue projections—he wanted to stop Miller's monthly draw and have him pay his own expenses; (3) Mann wanted Miller to formally keep track of his time; and (4) Mann was concerned with the amount of money and staff support MUN was providing. Shafer replied that same day that, at lunch with Miller, he had discussed all the issues raised by Mann. Shafer reported that Miller agreed to discontinue his draw, felt that he could use more staff support from MUN, and did not see the need to keep formal track of his time.

8. Miller Terminates His Relationship with MUN and Shafer

In early May 2012, Miller and Mann met and agreed to terminate their joint venture agreement. On May 10, Miller emailed Shafer terminating his legal services immediately, citing conflicts of interest and noting that the terms in the December 2011 agreements "did not reflect in any way the terms we had negotiated with MUN." He also expressed concerns about Shafer's ownership interest in STS. On May 17, Miller informed Shafer that he had obtained new legal representation and asked Shafer to return the shares in STS. On May 23, Shafer signed a

termination agreement with Miller that returned his STS shares to the Millers and included his resignation as a director.

9. Shafer Proposes New Business Venture with MUN

On June 6, 2012, Shafer emailed Mann with a new business proposal:

> I will form an LLC that will be owned by Ed [Cotney, Shafer's employee] and myself. The name will be Business Wealth Consultants, LLC. This entity will market . . . sales presentations as approved by you and facilitate client development, signing them up with a fee agreement for MUN. At that point MUN provides all the services related to the R&D credit and upon receipt of payment from the client, MUN would pay to the LLC a commission.

During the rest of June, the individuals at MUN discussed this new proposal, and circulated Shafer's proposed compensation structure and notes for setting up the business. On July 26, 2012, Shafer and Cotney made a presentation under the name of Business Wealth Advisors that contained a section on "Strategies to Find and Recapture Lost Research and Development Tax Credits." Throughout fall 2012, emails continued to circulate among individuals associated with MUN regarding the new business opportunity, identifying Shafer and Cotney as sources for referrals in the area. Shafer testified that Business Wealth Advisors LLC never successfully engaged in any business in the research and development tax credit area.

C. Culpability

1. Stipulated Culpability

Shafer stipulated to culpability for counts one, five, and seven of the NDC. Count one charged him with violating rule 3-310(B)(1) by accepting and continuing representation of STS without providing written disclosure of his existing relationship with Mann, Urrutia, and MUN. Count five charged Shafer with violating rule 3-310(C)(1) for accepting representation of MUN and STS without informing them of potential conflicts and obtaining their written consent. Count seven charged him with violating rule 3-300 for acquiring an adverse interest by accepting 10 percent of the shares in STS in exchange for legal and marketing work, without disclosing the

value of that work to STS and without obtaining Miller's consent in writing. The hearing judge found culpability on these three counts based on Shafer's stipulation and the evidence at trial. We affirm, as supported by the record.

2. Count Six—Accepting/Continuing Representation of Clients with Actual Conflict without Consent (Rule 3-310(C)(2))

In count six, Shafer was charged with violating rule 3-310(C)(2) by accepting and continuing representation of STS and MUN after actual conflicts developed between them, without obtaining the parties' informed written consent. We affirm the hearing judge's finding that Shafer did continue to represent the parties after actual conflicts arose between them with respect to valuation of their respective companies, revenue projections and the related amount of Miller's monthly draw, and their respective equity interests in the companies. Shafer should have recognized these conflicts, but continued representation without providing an adequate explanation and obtaining the parties' informed written consent.

Shafer did not provide any notice of conflict until December 2011, nearly two years after the parties first met to discuss the joint venture. The notice he did provide was generic and failed to specifically delineate any of the actual conflict issues among the parties. This does not meet the requirements of rule 3-310, which defines informed written consent as agreement following written disclosure where disclosure requires "informing the client . . . of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences." (Rule 3-310 (A)(1) & (2); see also *People v. Baylis* (2006) 139 Cal.App.4th 1054, 1068 [informed consent requires that client discuss potential drawbacks of representation with attorney, be made aware of dangers and possible consequences, be informed of right to obtain independent counsel, and voluntarily wishes to waive that right].)

We reject Shafer's argument that these were not actual conflicts, but merely disagreements that he discussed with the parties. Shafer's duty was to devote his entire energy to

his clients' interests. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 289, quoting *Anderson v. Eaton* (1930) 211 Cal. 113, 116 [rule against representing conflicting interests "'is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent'"].) We agree with the hearing judge that by serving as the mediator of his clients' disagreements, Shafer failed to fulfill this duty. A "[c]onflict of interest between jointly represented clients occurs whenever their common lawyer's representation of the one is rendered less effective by reason of his representation of the other." (*Spindle v. Chubb/Pacific Indemnity Group* (1979) 89 Cal.App.3d 706, 713.)

3. Count Thirteen—Breach of Fiduciary Duties and Duty of Loyalty (§ 6068, subd. (a))

In count thirteen, OCTC alleged that Shafer violated his fiduciary duties and duty of loyalty to Miller by numerous acts detailed in the NDC, including utilizing STS's confidential information to create an entity in direct competition with STS. The hearing judge found Shafer culpable of willfully violating section 6068, subdivision (a), but found that most of the alleged acts were identical to facts establishing Shafer's culpability under rules 3-310(B)(1), 3-310(C)(1), 3-310(C)(2), and 3-300. We agree with the hearing judge that these facts are duplicative and should be assigned no additional weight. (*In the Matter of Hultman, supra*, 3 Cal. State Bar Ct. Rptr. at p. 304; *Bates v. State Bar*, *supra*, 51 Cal.3d at p. 1060.)

However, we affirm the hearing judge's finding that Shafer is culpable under section 6068, subdivision (a), for using STS's confidential information to plan his own business that would compete with STS; this charge is not duplicative of other allegations in the NDC. We reject Shafer's assertion that he did not take or disclose Miller's proprietary information and

adopt the hearing judge's finding that Shafer took Miller's proprietary business model and converted it to his own use. (Rules Proc. of State Bar, rule 5.155(A) [hearing judge's factual findings entitled to great weight].) Miller clearly intended his business model and "four phase approach" to providing research and development tax credit services to be proprietary. Shafer himself drafted confidentiality agreements and manuals describing that the materials were confidential. Despite the proprietary nature of this information, and promptly upon being terminated by Miller, Shafer set up a new business, proposing to MUN that it would refer clients to MUN for the same services that Miller provided in the joint venture.

It is well established that, even when information is not proprietary, an attorney may not "use against his former client knowledge or information acquired by virtue of the previous relationship." (*Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573–574.) This rule is broadly applied to bar use of a former client's information for an attorney's personal benefit. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 822–823 ["It is well established that the duties of loyalty and confidentiality bar an attorney not only from using a former client's confidential information in the course of 'making decisions when representing another client,' but also from 'taking the information significantly into account in framing a course of action' such as 'deciding whether to make a personal investment'—even though, in the latter circumstance, no second client exists and no confidences are actually disclosed"].)

D. Aggravation

Multiple Acts (Std. 1.5(b))[17]

We affirm the hearing judge's finding of aggravation for Shafer's multiple acts of wrongdoing. He is culpable for five counts of varied misconduct in a single client matter,

[17] Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. All further references to standards are to this source.

warranting moderate aggravation. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646–647 [three instances of misconduct considered multiple acts].)

E. Mitigation

OCTC does not challenge any of the findings in mitigation.

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

We affirm the hearing judge's finding of significant weight in mitigation for Shafer's 31 years of discipline-free practice. Standard 1.6(a) provides that mitigation may be assigned for absence of prior discipline over many years "coupled with present misconduct, which is not likely to recur." We agree that significant mitigation is warranted because Shafer's many years of discipline-free practice demonstrate that his misconduct was aberrational and unlikely to recur. (*In the Matter of Sullivan* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 608, 613 [great significance attributed to over 21 years of discipline-free practice]; *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 749 [over 25 years of discipline-free practice entitled to considerable weight in mitigation].)

2. Candor/Cooperation to Victims/State Bar (Std. 1.6(e))

We also affirm the hearing judge's finding of significant weight in mitigation for Shafer's candor and cooperation. He stipulated to culpability on three counts of the NDC and also stipulated to facts. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [more extensive weight in mitigation given to those who admit culpability and facts].)

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

The hearing judge properly assigned significant mitigation for Shafer's extensive good character evidence. Standard 1.6(f) allows mitigation for "extraordinary good character attested to by a wide range of references in the legal and general communities, who are aware of the full extent of misconduct."

Shafer presented 13 witnesses via testimony and declaration who affirmed his integrity, trustworthiness, compassion, respectfulness of others, dedication, humility, generosity, sincerity, and tremendous reputation in the community. The witnesses included former clients, community leaders, business colleagues, retired military leaders, pastors, a paralegal formerly employed by Shafer, and friends. One witness testified that Shafer has a desire to serve others, had enriched the witness's life, and made the community a better place. Another witness who knew Shafer for more than 35 years testified that his moral compass and devotion for serving others are the cornerstone of his character. A witness who knew Shafer for 28 years testified that he "will give the shirt off his back to one in need." And another testified that Shafer is "the epitome of good character and trustworthiness." We find that these witnesses, who include representatives of both the general and legal communities, support the judge's finding of significant mitigation for good character. (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591–592 [significant weight given to testimony of three character witnesses who had long-standing familiarity with attorney and broad knowledge of his good character, work habits, and professional skills].)

4. Pro Bono and Community Service

The hearing judge also assigned significant mitigation based on Shafer's character witnesses' testimony regarding his extensive pro bono work and community service. Shafer has provided pro bono legal work to his neighbors and to members of his local churches, served as chairman of the board of elders in the church, and served on the board of trustees at William Jessup University. He founded the San Diego Chamber Orchestra and served on its board of directors. He has also provided help to the homeless and veterans, including hosting people in his home.

We affirm the hearing judge and find that significant mitigation should be assigned for Shafer's pro bono work and community service, which was corroborated by his character witnesses. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [service to community is mitigating factor entitled to considerable weight]; see also *Schneider v. State Bar* (1987) 43 Cal.3d 784, 799 [considerable weight given for legal and community services where attorney, certified taxation specialist and adjunct law professor, served on several bar and law school committees, founded tax group and pension council, had attorneys, clients, and judge submit supporting letters, and received commendation from local council for "Decade of Friendship"].)

F. Discipline

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to preserve public confidence in the profession; and to maintain high professional standards for attorneys. (Std. 1.1.) The standards, although not binding, are guiding and entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 91–92.) The Supreme Court has instructed us to follow them whenever possible. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.) We also look to comparable case law to determine the proper discipline. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310–1311.)

In analyzing the applicable standards, we first determine which standards apply. If more than one standard applies, we determine which standard specifies the most severe sanction for the at-issue misconduct. (Std. 1.7(a).) Here, multiple standards apply, and standard 2.12(a) is the most severe, providing that disbarment or actual suspension is the presumed sanction for violation of section 6068, subdivision (a).[18] The hearing judge considered all the applicable standards as well as case law that provided a range of discipline from public reproval to a two-year actual suspension, and recommended a one-year actual suspension. Citing his extensive

[18] This section provides that it is the duty of an attorney "[t]o support the Constitution and laws of the United States and of this state." Standards 2.4, 2.5, and 2.19 also apply.

mitigation, Shafer argues that a public reproval is sufficient discipline. OCTC asks that we affirm the hearing judge's recommended discipline of a one-year actual suspension.

The hearing judge's discipline recommendation was partially based upon Shafer's culpability in both this matter and the Grauss matter. We find that a lower level of discipline than the hearing judge recommended is appropriate in light of our dismissal of the Grauss charges. Reviewing cases with facts most similar to Shafer's misconduct, we find that a 60-day actual suspension is appropriate discipline. In *In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, we recommended a 60-day actual suspension for misconduct including representation of adverse parties, failure to obtain conflict waivers, and failure to obtain clients' informed consent before obtaining an interest adverse to the clients. The respondent in that matter had significant aggravation and mitigation, including aggravation for overreaching and mitigation for 25 years of practice without discipline. In *In the Matter of Hultman*, *supra,* 3 Cal. State Bar Ct. Rptr. 297, we recommended 60 days' actual suspension for a respondent's misconduct including obtaining an adverse interest to a client by making loans to himself from a trust, and moral turpitude for filing a misleading accounting with the court. In *In the Matter of Lane*, *supra*, 2 Cal. State Bar Ct. Rptr. 735, we again recommended a 60-day actual suspension for misconduct including engaging in an unfair transaction by loaning $100,000 to a client, and failing to obtain conflict waivers. In *Lane*, we assigned mitigation for the respondent's many years of discipline-free practice. Finally, in *In the Matter of Casey* (Review Dept. 2008) 5 Cal. State Bar Ct. Rptr. 117, we recommended a 90-day actual suspension where a respondent violated his fiduciary duties by failing to adequately explain a business transaction where he represented both parties, misconduct we found constituted moral turpitude. In *Casey*, there was significant aggravation for respondent's prior discipline and the substantial harm he caused, as well as substantial mitigation for respondent's service as a judge pro tem.

An appropriate sanction should fall within the range the applicable standard provides unless the net effect of the aggravating and mitigating circumstances demonstrates that a greater or lesser sanction is needed to fulfill the primary purposes of discipline. (Std. 1.7.) To deviate from the applicable standard, we must state clear reasons for doing so. (Std. 1.1; *Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [requiring clear reasons for departure from standards].) We find Shafer's request for a public reproval to be unsupported. Although we have considered Shafer's substantial mitigation evidence, we see no reason to deviate from the standards given his culpability for five counts of misconduct. Instead, we apply the significant mitigation to support discipline at the lower end of the range recommended under standard 2.12(a).

IV. RECOMMENDATION (CASE NO. 12-O-18163)

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

1. He must be suspended from the practice of law for the first 60 days of the period of his probation.

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

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

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

5. He must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, he must state whether he has complied with the State Bar Act, the Rules of Professional

Conduct, and all of the conditions of his probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

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

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

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

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that David Alan Shafer 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 Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

VI. COSTS

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

HONN, J.

WE CONCUR:

PURCELL, P. J.

McGILL, J.