

STATE BAR COURT  
REVIEW DEPARTMENT

In the Matter of

ANTHONY NOVO FONTE

A Member of the State Bar

No. 90-O-18297

Filed March 16, 1994

## SUMMARY

Respondent failed to provide a proper accounting regarding the fees paid to him by clients he represented in real property litigation. He also drafted a trust instrument for the same clients, naming himself as successor trustee, without full disclosure, written advice as to independent counsel, and informed, written client consent. In a separate matter, respondent represented both an elderly couple and another couple who wished to give them in-home personal care in exchange for an interest in their property, without written consent of all clients to the adverse representation. Finding respondent culpable of several rule violations, aggravated by serious uncharged misconduct but mitigated by respondent's long record of practice with no prior discipline and extensive public service, the hearing judge recommended a one-year stayed suspension with two years probation and 60 days of actual suspension. (Hon. Ellen R. Peck, Hearing Judge.)

Respondent sought review, contending that he was not culpable of most of the violations found, that his misconduct was minor and technical, and that the appropriate discipline was a private reproof. The review department rejected respondent's challenges to the hearing judge's findings and conclusions, holding in the first matter that his drafting of the trust agreement naming himself as successor trustee constituted obtaining an adverse interest in a client's property, and in the second matter that respondent had simultaneously represented clients with conflicting interests. Expressing concern about respondent's recognition of his duty to serve his clients' interests faithfully and to avoid overreaching them, the review department adopted the hearing judge's discipline recommendation.

## COUNSEL FOR PARTIES

For Office of Trials: Margaret P. Warren, Allen L. Blumenthal

For Respondent: Eugen C. Andres

## HEADNOTES

**[1] 270.30 Rule 3-110(A) [former 6-101(A)(2)/(B)]**

Where respondent's failure to file answers to interrogatories when due flowed from a simple calendaring error, and respondent handled other discovery timely, respondent was properly found not culpable of failure to provide competent legal services.

[2 a-c] 277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]

280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]

A true retainer fee is one which is paid solely to ensure the attorney's availability over a given period of time, and is earned when paid since the attorney is entitled to it regardless of whether any actual services are performed. Where respondent did not devote certain blocks of time to certain clients' claims or turn away other business to proceed with their matters, and it was evident that clients were paying for more than respondent's ability, respondent was not excused from accounting for an advanced fee on the ground that it was a retainer earned on receipt.

[3 a-d] 204.90 Culpability—General Substantive Issues

242.00 State Bar Act—Section 6148

277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]

280.00 Rule 4-100(A) [former 8-101(A)]

280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]

Attorneys are not permitted to set their fees unilaterally. If a client contests fees charged or paid, the disputed fees must be placed in a trust account until the conflict is resolved. The duty to account for client funds includes a duty to maintain adequate records of fees drawn against an advanced fee and of fee payments made thereafter, and to provide clients with an appropriate accounting. In evaluating the promptness and adequacy of such an accounting, it was appropriate to look to the standards set forth in the statute governing attorneys' bills for fees and costs, even where a violation of that statute was not charged.

[4 a-d] 273.00 Rule 3-300 [former 5-101]

The rule governing acquisition of adverse interests in clients' property, which requires adequate disclosure, written advice regarding consultation with independent counsel, and written client consent to the transaction, encompasses transactions where it is reasonably foreseeable that the interest acquired may become detrimental to the client. When an attorney acquires the ability to extinguish a client's interest in property, the attorney's interest is adverse, no matter what the motivation. Where respondent drafted a trust agreement for an elderly, infirm couple, naming them as trustees and himself as successor trustee, and included in the trust agreement a clause giving trustees unrestricted power to borrow trust assets without any security or oversight, respondent thereby acquired an adverse interest to his clients in the trust property, and the rule applied.

[5 a, b] 274.00 Rule 3-400 [former 6-102]

Rule adopted in 1989, unlike former similar rule, precludes only actual contracts prospectively limiting an attorney's malpractice liability, not attempts to contract. The rule only applies to prospective claims, not to exposure for past malpractice.

[6] 199 General Issues—Miscellaneous

204.90 Culpability—General Substantive Issues

Where words used in a rule are unambiguous, there is no need to go beyond the plain language to extrinsic aids.

[7] 280.50 Rule 4-100(B)(4) [former 8-101(B)(4)]

Where respondent delayed in transferring client trust funds to a client's new counsel due to the new counsel's failure to provide adequate authority for respondent to relinquish the funds, respondent did not violate the rule requiring prompt payment of client trust funds on demand.

**[8 a, b] 273.30 Rule 3-310 [former 4-101 & 5-102]**

Where respondent was initially hired by a married couple to protect their interests arising out of their relationship with an elderly couple to whom they had given in-home care, and respondent subsequently undertook to represent the elderly couple and drafted a proposed agreement between the two couples regarding further in-home care, and the interests of the two couples were in clear conflict, respondent was required to obtain the written consent of all parties at the outset of his representation of the elderly couple. Even if respondent's representation of the two couples was consecutive rather than concurrent, written consent of all affected clients was still required, because the second employment involved the same subject matter as the first.

**[9] 130 Procedure—Procedure on Review**

**136 Procedure—Rules of Practice**

**159 Evidence—Miscellaneous**

Petitions to augment the record on review are generally granted only if it is demonstrated that the record below is incomplete or incorrect. (Prov. Rules of Practice, rule 1304.) The general rule is not to entertain evidence not heard by the hearing judge unless it is the only means of presenting limited evidence of subsequent rehabilitation. It is also unusual for petitions to augment to be granted if contested. Where respondent requested to augment the record with documents relating to one of his complaining clients, and with two newspaper articles, respondent did not show good cause for the review department to consider such evidence over the State Bar's objection.

**[10 a, b] 120 Procedure—Conduct of Trial**

**165 Adequacy of Hearing Decision**

**192 Due Process/Procedural Rights**

**1099 Substantive Issues re Discipline—Miscellaneous**

Where hearing judge's oral comments at close of case regarding appropriate discipline deviated from the recommendation made in judge's written decision, but hearing overall was fair and respondent's counsel had opportunity to present argument regarding degree of discipline, hearing judge's written decision controlled, and respondent was not denied due process. Respondent could not, as a matter of law, rely on hearing judge's oral or written discipline recommendation since it was not binding on review department or Supreme Court.

**[11 a-c] 213.40 State Bar Act—Section 6068(d)**

**243.00 State Bar Act—Sections 6150-6154**

**253.00 Rule 1-400(C) [former 2-101(B)]**

**273.00 Rule 3-300 [former 5-101]**

**273.30 Rule 3-310 [former 4-101 & 5-102]**

**280.40 Rule 4-100(B)(3) [former 8-101(B)(3)]**

**551 Aggravation—Overreaching—Found**

**561 Aggravation—Uncharged Violations—Found**

**591 Aggravation—Indifference—Found**

**710.10 Mitigation—No Prior Record—Found**

**765.10 Mitigation—Pro Bono Work—Found**

**801.41 Standards—Deviation From—Justified**

**824.54 Standards—Commingling/Trust Account—Declined to Apply**

Where respondent violated rules regarding accounting for client funds, obtaining adverse interests in client property, and representing clients with conflicting interests, and respondent's misconduct was aggravated by overreaching, by additional uncharged misconduct including solicitation of a client at the hospital and misleading a court, and by respondent's failure to recognize his ethical

accountability to clients, respondent's misconduct would have warranted substantial discipline absent his long service at the bar and for his community, and 60-day actual suspension was appropriate.

[12]      **101      Procedure—Jurisdiction**  
            **135      Procedure—Rules of Procedure**  
            **218.00   State Bar Act—Section 6090.5**

Respondent's attempts to have clients withdraw pending State Bar complaints as part of settlements of actions which were not for malpractice did not violate statute prohibiting attorneys from conditioning malpractice settlements on agreement by client not to file State Bar complaint. The State Bar may proceed with a disciplinary matter whether or not the complainant is willing. (Trans. Rules Proc. of State Bar, rule 507.)

[13]      **171      Discipline—Restitution**  
            **273.30   Rule 3-310 [former 4-101 & 5-102]**

Where respondent withdrew \$2,500 for attorney's fees from a client's bank account at a time when his representation of the client was improper due to a conflict of interest, restitution of the funds to the client's estate was an appropriate condition of probation.

**ADDITIONAL ANALYSIS**

**Culpability**

**Found**

- 273.01 Rule 3-300 [former 5-101]
- 273.31 Rule 3-310 [former 4-101 & 5-102]
- 280.41 Rule 4-100(B)(3) [former 8-101(B)(3)]

**Not Found**

- 221.50 Section 6106
- 270.35 Rule 3-110(A) [former 6-101(A)(2)/(B)]
- 274.05 Rule 3-400 [former 6-102]
- 280.55 Rule 4-100(B)(4) [former 8-101(B)(4)]

**Aggravation**

**Found**

- 521 Multiple Acts
- 571 Refusal/Inability to Account
- 582.10 Harm to Client
- 611 Lack of Candor—Bar

**Mitigation**

**Found but Discounted**

- 740.31 Good Character

**Discipline**

- 1013.06 Stayed Suspension—1 Year
- 1015.02 Actual Suspension—2 Months
- 1017.08 Probation—2 Years

**Probation Conditions**

- 1021 Restitution
- 1024 Ethics Exam/School
- 1029 Other Probation Conditions

**Other**

- 173 Discipline—Ethics Exam/Ethics School

## OPINION

STOVITZ, J.:

Respondent Anthony Novo Fonte has requested review of a hearing department decision which found that he violated Rules of Professional Conduct concerning representation of adverse parties; requirements of disclosure, independent counsel, and consent before obtaining an interest adverse to clients; and accounting for legal fees paid in advance. In recommending that respondent be suspended for one year, stayed, on conditions including a two-year probation and sixty days of actual suspension, the hearing judge considered respondent's twenty-five years of practice with no prior discipline and extensive public service, but also considered several aggravating circumstances including serious uncharged misconduct. In our independent review of the record, we share the hearing judge's stated concerns about respondent's recognition of his duty to serve his clients' interests faithfully, and to avoid overreaching them. Accordingly, we concur in the need for actual suspension in this case and uphold the decision and recommendation below.

## I. FINDINGS AND CONCLUSIONS

Having independently reviewed the record, we concur with the findings of fact and conclusions of law made by the hearing judge below. They are summarized here, along with a discussion of the three culpability issues raised by respondent on review.

## A. The Fairchild Matters.

1. *Newport litigation.*

In February 1988, Eleanor and Phillip Fairchild hired respondent to defend a civil suit brought against them in Orange County Superior Court for specific performance and damages arising out of the

Fairchilds' attempt to cancel a realty sales contract.<sup>1</sup> Respondent asked for and received a \$5,000 minimum retainer fee and court filing costs of \$176. Respondent's fee for representing the Fairchilds was \$180 per hour and he estimated a total fee in the range of \$10,000 to \$25,000.

Respondent represented the Fairchilds<sup>2</sup> until January 14, 1991, when new counsel substituted in. During the time of respondent's representation, the Fairchilds paid him a total of \$14,416 in legal fees plus the \$176 for court filing costs. Eleanor Fairchild testified that respondent sent her no bills or accountings between February 1988 and January 1991. When the Fairchilds would come to respondent's office for a meeting, he would tell them how much they currently owed and they would pay it. Between February 1988 and fall 1990, the Fairchilds never complained about the fees.

In late 1990, Mrs. Fairchild requested first personally and then through counsel that respondent provide her with "billing backup" for the legal fees spent defending the Fairchilds in the *Newport* suit. Fairchild had not received any such bill by January 1991 and chose other counsel to represent her. As the hearing judge found, respondent testified that he did not reply to Fairchild's request in writing but claimed that he gave her new counsel the requested information by phone.

Respondent prepared an eight-page summary of services he rendered the Fairchilds in the *Newport* case. He dated it July 8, 1991 (nearly six months after Fairchild substituted new counsel). She testified that she had not seen this summary until the day of her State Bar deposition in May 1992. Respondent testified that he was just giving Fairchild the information her new counsel asked for and that it was adequate.

The hearing judge found several incomplete or unusual aspects about this summary: it did not list specific dates when services were performed (only 6 of 57 entries listed even the month and year); all but

1. This lawsuit, *Newport Pacific Enterprises, Inc. v. Fairchild*, case number 544256, will be referred to hereafter as the *Newport* case.

2. Phillip Fairchild died in May 1990.

one of the entries were an aggregation of more than one event, and the billing entries were not strictly chronological. These did not comply with the standards set forth in Business and Professions Code section 6148 (b).<sup>3</sup> Respondent had also charged legal services allegedly performed prior to his retention in the *Newport* case against the \$5,000 for fees advanced at the time of the retainer agreement. Noting that the agreement made no mention of these prior services and his own ledger card began as of the retainer agreement, the hearing judge concluded that respondent's uncorroborated testimony was insufficient and that he had unilaterally determined these fees. The hearing judge found that respondent violated rule 4-100(B)(3) of the Rules of Professional Conduct<sup>4</sup> by failing to render appropriate accounts to Fairchild regarding the fees and costs advanced in the *Newport* case.

[1] Respondent was charged with a violation of rule 3-110(A) by failure to provide competent legal services when he failed to file answers to interrogatories in the *Newport* case after he was given a fourth extension of time to do so. In September 1990, he was sanctioned \$364, the superior court judge finding that respondent's failure was wilful and without substantial justification. The hearing judge found no basis for the rule 3-110(A) violation, concluding that respondent's failure to respond to the interrogatories when due flowed from a simple calendaring error complicated by a recent computer change. The hearing judge also found that respondent did handle other discovery timely. On review, the Office of the Chief Trial Counsel ("OCTC") does not dispute the judge's findings of non-culpability on this charge. This result was appropriate on this record.

## 2. Respondent's culpability of violating rule 4-100(B)(3).

[2a] Respondent contends that he did not have to account for the advanced fee in the *Newport* case because it was a retainer and earned on receipt. [3a]

He also argues that since the word "fees" does not appear in rule 4-100(B)(3), fees are not encompassed in the rule's accounting requirement, and the rule applies only to funds received from the client and placed in a trust account, such as advanced costs, or to property received from a third party for the client, such as settlement proceeds.

[2b] Rule 3-700(D)(2), like former rule 2-111(A)(3) (eff. prior to May 26, 1989), describes a true retainer fee as a "fee which is paid solely for the purpose of ensuring the availability of the member for the matter." The California Supreme Court amplified the definition to some degree in a footnote in *Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164, fn. 4, stating, "A retainer is a sum of money paid by a client to secure an attorney's availability over a given period of time. Thus, such a fee is earned by the attorney when paid since the attorney is entitled to the money regardless of whether he actually performs any services for the client."

[2c] It is evident that the Fairchilds were paying for more than the respondent's availability. In this case, there is no indication that the respondent made any particular provision to allot or set aside blocks of time specifically devoted to pursuing these clients' claims or that he turned away other business in order to proceed with their matters.

In *Matthew v. State Bar* (1989) 49 Cal.3d 784, the Supreme Court found that in two instances an attorney who worked on a \$5,000 and a \$1,000 "non-refundable retainer" violated former rules 2-111(A)(3) and 8-101(B)(4) (eff. prior to May 26, 1989) by failing to refund the unearned portion of fees in excess of reasonable services when he failed to complete legal services contracted by the clients. Notwithstanding the attorney's characterization of the fees, the Court held that since the attorney had completed only a portion of the services for which he was retained, the fees were partly unearned, and he had an obligation to return the unearned amount. (*Id.* at p. 791.)

3. Unless noted otherwise, all future references to sections are to the Business and Professions Code.

4. Unless noted otherwise, all future references to rules are to the Rules of Professional Conduct of the State Bar effective May 27, 1989, to September 13, 1992.

[3b] An attorney is not permitted to set his or her fees unilaterally. (*McKnight v. State Bar* (1991) 53 Cal.3d 1025, 1037.) If a client contests fees charged or paid, the disputed funds must be placed in a trust account until the conflict is resolved. (Rule 4-100(A).) In *Chang v. State Bar* (1989) 49 Cal.3d 114, the Supreme Court found that an attorney who had diverted settlement funds into a trust account with his name on it and later misappropriated the funds, also violated predecessor rule 8-101(B)(3) when he failed to turn over bank records and otherwise account to his client when the client disputed the attorney's fee claim. (*Id.* at p. 128.)

[3c] We do not read the scope of rule 4-100(B)(3) as narrowly as respondent. Respondent would limit the duty to provide a proper accounting to funds required to be held in a trust account, or funds or assets received by the attorney from third parties. In contrast to rule 4-100(A), which limits itself to funds received to be held in trust (see *Hartford v. State Bar* (1990) 50 Cal.3d 1139, 1151 [rule applies to funds; pledged stock not required to be held in trust]), rule 4-100(B)(3) requires an attorney to maintain records of and account for "all funds, securities, and other properties of a client coming into the possession of the member or law firm." This accounting requirement has been interpreted as including such disparate client properties as restaurant equipment (*Rose v. State Bar* (1989) 49 Cal.3d 646, 663-664) and rings given as security for fees. (*Garlow v. State Bar* (1988) 44 Cal.3d 689, 709.) In *Garlow v. State Bar*, *supra*, the attorney had been provided with rings as security for a \$3,000 retainer. The Court found that the attorney was obligated to keep adequate records not only concerning the jewelry given to him as security, but also of partial cash payments made by the client to pay the fees she owed the attorney. His failure to keep such records violated former rule 8-101(B)(3). (*Id.* at pp. 707-708, 710.)

[3d] Therefore, we uphold the hearing judge's conclusion that respondent was obligated under rule 4-100(B)(3) to maintain adequate records of his fees drawn against the \$5,000 advanced by the Fairchilds and their periodic payments to him thereafter, and to provide them with an appropriate accounting. We also agree that in evaluating the promptness and adequacy of respondent's belated "accounting," it

was appropriate to look to the standards set forth in Business and Professions Code section 6148 (b). It was not necessary for respondent to be separately charged with a breach of that statute in addition to violation of rule 4-100(B)(3). For the reasons set forth in the hearing judge's decision, respondent's accounting was insufficient.

### 3. Failure to disclose adverse interest in drafting of Fairchild trust.

In June 1989 the Fairchilds hired respondent to update their estate plan and draft a living trust. Respondent did the requested work and the following month, respondent came to the Fairchilds' home and they signed the trust agreement respondent prepared. It named the Fairchilds co-trustees, and named respondent as alternate or successor trustee if either Fairchild died, became disabled or was unable to act as trustee. The agreement provided that any trustee had the sole discretion to lend money to anyone including the trustee. The agreement also had a no-contest clause; that is, if any heir or beneficiary contested any trust provision or any action taken by the trustee, his or her rights would end and benefits would be withheld. Respondent stipulated that he did not advise the Fairchilds that they could seek advice of independent counsel regarding this trust agreement. Respondent discouraged naming Mr. Fairchild's daughter as successor trustee or co-trustee, he did not give Mrs. Fairchild time to read over the document before she signed it, and he told her he would be able to help her with taxes and property if he served as co-trustee.

Although respondent disputed it, the hearing judge found that respondent did not give Mrs. Fairchild a copy of the trust agreement until November 1990.

In May 1990, Mr. Fairchild died. Respondent became co-trustee. There is no evidence that he borrowed any funds from the trust, but about six months later, Mrs. Fairchild became wary of respondent. He told her he could get her \$5,000 more a month to live on if her residential land were sold and that she should not worry about leaving any money to her stepdaughter or grandchildren. She became upset because the purpose of establishing the trust

was to provide for these heirs. He told her on another occasion that if he were able to get another \$100,000 on the *Newport* case, she should split it with him and that the possible additional funds would give him a stronger incentive to work on the *Newport* litigation. He cautioned her not to tell anyone about this agreement. The hearing judge noted that this arrangement would have been improper because under the trust agreement, all proceeds from the *Newport* case became trust assets.

In December 1990 Mrs. Fairchild hired new counsel to review the trust agreement respondent prepared and to seek respondent's resignation as co-trustee. This effort cost Fairchild about \$7,000 in legal fees. Her counsel wrote to respondent three times requesting his resignation and ultimately filed a petition in superior court to have respondent removed. In March 1991, respondent began to negotiate for his resignation, on two conditions: that Fairchild release him from liability and thereafter write a letter to the State Bar withdrawing her bar complaint. Fairchild refused to accede to respondent's conditions. Respondent resigned as trustee in May 1991, after a superior court judge instructed him to resign unconditionally.

[4a] The hearing judge concluded that respondent wilfully violated rule 3-300 when he included the clause in the Fairchild trust agreement giving him unrestricted power as a successor or alternate trustee to borrow trust assets without any security and without oversight. The judge found that the clause conferred on respondent an interest in trust property which was adverse to the clients, in that he could extinguish the rights of his clients and the clients' heirs and beneficiaries without any judicial scrutiny. He failed to adequately disclose to the Fairchilds the import of this provision, advise them in writing that they might seek the advice of independent counsel and give them the opportunity to do so, and secure their consent to the terms of the transaction in writing as the rule required.

Respondent argues on review that rule 3-300, which restricts an attorney from entering a business transaction with or acquiring an ownership, possessory, security, or pecuniary interest adverse to a client unless specified criteria are met, does not

apply as a matter of law to the facts concerning the creation of the Fairchild trust agreement. He argues that the fact that the trust agreement empowered respondent, as trustee, to loan money from the trust without restriction or security to himself or to others, and stripped any client/beneficiary of all benefits of the trust if he or she should challenge the trustee's (i.e. respondent's) actions, does not create a pecuniary interest adverse to a client until respondent becomes a trustee under the operation of the trust instrument and actually borrows money from the trust. Respondent distinguishes the cases relied on by the hearing judge by pointing out that in most of them, the culpable attorney actually did more than draft an agreement with the loan clause.

[4b] The deputy trial counsel counters that the rule, as interpreted by the Supreme Court, encompasses transactions where it is reasonably foreseeable that the interest acquired may become detrimental to the client. (*Hawk v. State Bar* (1988) 45 Cal.3d 589, 599.) No matter what the attorney's motivation may have been, when the attorney acquires the ability to extinguish a client's interest in property, the interest held is adverse. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1058.) We agree with the deputy trial counsel's position and the hearing judge's conclusions.

In *Schneider v. State Bar* (1987) 43 Cal.3d 784, the Court analyzed a charge that an attorney, in drafting two trust agreements, had violated the disclosure, advice and consent duties of former rule 5-101 (eff. prior to May 26, 1989), a provision substantively identical to rule 3-300. The Court first rejected the argument that the duties did not apply to transactions which arise in the context of a trust agreement, stating, "The terms of the trusts authorizing self-dealing on the part of [the attorney] clearly come within the rule and do not supersede it." (*Id.* at p. 796.) The Court then reviewed the attorney's conduct in drafting and presenting the proposed trusts, which granted the attorney, as trustee, the sole discretion to loan money from the trust to anyone, similar to the power granted to trustees, including respondent, in the Fairchild trust. The Court concluded that this was an interest adverse to the clients involved and that the attorney had violated rule 5-101 when he failed to explain to the clients the import

of this authority and to advise them to seek independent counsel *before* executing the irrevocable trust. The Court then examined the attorney's conduct as trustee as a separate violation of rule 5-101.

[4c] Under *Schneider*, the trust agreement was required to comply with the rule since it conferred on the attorney a broad power to self-deal as trustee. Respondent was not immediately appointed trustee, as was the case in *Schneider*. Rather, he was designated as alternate or successor trustee if either Fairchild died, became disabled or was unable to act as trustee. Given the age and poor state of health of both Fairchilds, it was anticipated that respondent would assume trustee authority and he did so, after the death of Mr. Fairchild, less than a year after the creation of the trust. Therefore, there is little to distinguish this from the *Schneider* case.

Respondent also improperly analogizes the facts of *In the Matter of Respondent C* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 439 to the facts here. In *Respondent C*, the attorney was assigned a third-party note, representing a debt owed to his client, in payment for attorney fees. The client terminated his interest in the property by transferring it to the attorney; in essence, the client simply paid his debt with intangible property (the note) rather than cash. (*Id.* at p. 447.) In contrast, in this case, the clients, as beneficiaries of the trust, retained an interest in the trust property which respondent, acting as trustee, could adversely affect. It is respondent's ability to extinguish his clients' interest in the trust which brings this transaction under rule 3-300. Rule 3-300 does not prohibit an attorney from entering into these kinds of transactions, but mandates fairness, full disclosure, an independent counsel consultation opportunity, and written consent as prophylactic measures if thereby the attorney is to acquire an interest adverse to a client.

[4d] Therefore, we conclude that respondent violated rule 3-300 in drafting and presenting the Fairchild trust agreement by failing to explain in writing the import of his power as successor or alternate trustee to his clients and its possible impact on their interests in the trust, and by not advising his clients in writing to seek the advice of independent counsel. Although respondent secured the consent of his clients through their signatures on the trust document, it was not informed consent, as required by the rule.

The hearing judge exonerated respondent of a moral turpitude charge (Bus. & Prof. Code, § 6106) because it was not factually connected to anything else in the charges. We concur. [5a] She also found respondent not culpable of violating rule 3-400(A) by his attempt to limit his liability for professional malpractice because the rule does not prohibit an *attempt* to limit liability and only applies to prospective claims, not to exposure for past malpractice.

[5b] OCTC does not take exception to the hearing judge's reading of the scope of rule 3-400(A). We concur with the hearing judge's interpretation of the rule, and add only this comment. The prior rule, former rule 6-102, prohibited a member from attempting to limit liability.<sup>5</sup> While the State Bar's comments to the Supreme Court on submission of the amended rule indicated that the redrafted rule 3-400(A) "continues the prohibition . . . on attorneys *attempting* to exonerate themselves from or limit liability . . . [emphasis added],"<sup>6</sup> it is evident from the language of the current rule<sup>7</sup> that it prohibits contracts, not attempts to contract. [6] Where words used in a rule are unambiguous, there is no need to go beyond the plain language to extrinsic aids. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 800, 801.)

5. Former rule 6-102 read as follows: "A member of the State Bar shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice. This rule shall not prevent a member of the State Bar from settling or defending a malpractice claim."

6. See "Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California," State Bar of California (December 1987), p. 36.

7. Rule 3-400(A) states that State Bar members shall not "Contract with a client *prospectively* limiting the member's liability . . . for professional malpractice." (Emphasis added.)

B. The Curtis/Loeloff Matter.

*1. Representation of the Curtises.*

From about September 1989 to May 1990 Jan and Dan Curtis lived in the home of Erwin and Marguerite Loeloff and provided care to the elderly couple. The Loeloffs had not paid the Curtises for their services but at some point they had agreed to give their home to the Curtises in return for the Curtises' services. The Loeloffs' only heir was Mr. Loeloff's brother.

In May 1990, the two couples had a disagreement and the Curtises moved out of the Loeloffs' home. In July 1990, the Curtises hired respondent for advice as to their remedies for the services they had given the Loeloffs and to explore a possible conservatorship. The Curtises gave respondent \$675 in fees. Respondent advised the Curtises that a conservatorship would be inadvisable as it would surely be contested and the public guardian would probably be appointed conservator, rather than the Curtises. In late August 1990 respondent advised the Curtises that he could do nothing more for them.

Shortly thereafter, Mrs. Loeloff's health worsened and she was hospitalized. Mrs. Curtis learned that unless adequate in-home care were provided the Loeloffs, they might be placed in a nursing home. Mrs. Curtis asked respondent to speak to Mrs. Loeloff to explore if the Curtises could return to give in-home care to the Loeloffs. On September 12, 1990, respondent went to the hospital where Mrs. Loeloff was a patient, met with Mrs. Curtis, told her that a conservatorship might be revisited and also told her of the importance of re-establishing good relations with the Loeloffs. He then went to see Mrs. Loeloff, who refused to talk with him since he was the Curtises' lawyer.

*2. Representation of the Loeloffs.*

When Mrs. Loeloff rebuffed respondent, he immediately went back to Mrs. Curtis and asked her

permission to represent Mrs. Loeloff. Mrs. Curtis told respondent verbally that he could do so provided he protect the Curtises' interests. According to respondent, Mrs. Curtis placed no restriction on his representation of Mrs. Loeloff. Although the hearing judge determined that Mrs. Curtis's version was the more credible, she noted that respondent's version would not exculpate him from conflict-of-interest charges because he never spoke to Mr. Curtis about his request to represent Mrs. Loeloff nor did he secure the Curtises' written consent to represent Mrs. Loeloff.

The same day that respondent got Mrs. Curtis's verbal agreement to represent Mrs. Loeloff, he went back to Mrs. Loeloff's hospital room and offered to represent her in negotiations with the Curtises for a home-care arrangement. Mrs. Loeloff agreed that respondent could represent her and the two women agreed to a 30-day trial resumption of home care for the Loeloffs. Respondent told Mrs. Loeloff he would prepare documents to protect both parties' interests and had her execute a power of attorney appointing Mrs. Curtis as Mrs. Loeloff's attorney-in-fact. This document was never filed.

Two days later, September 14, 1990, respondent had both Loeloffs sign powers of attorney naming him as their attorney in fact. That same day, respondent placed his name as co-signatory on the Loeloffs' bank account and immediately transferred \$5,000 from the Loeloffs' account to his trust account. Three days later, he withdrew \$2,500 as his fees. He also drafted that day an agreement between the Curtises and himself, acting as trustee and agent for the Loeloffs. That agreement recited that respondent was now counsel solely for the Loeloffs and was no longer acting as the Curtises' attorney and that the Curtises consented to respondent drafting this agreement.<sup>8</sup>

Mrs. Curtis and Mrs. Loeloff were each unhappy about the contract respondent drafted and neither party signed it. Respondent continued to deal with the Loeloffs' banks. He directed one bank to

8. This contract also acknowledged that the Curtises had paid respondent \$675 in fees, that they had no obligation for the

unstated balance of respondent's fees and costs and that he would look only to the Loeloffs to pay this balance.

send the Loeloffs' monthly account statement and canceled checks to respondent's office and he transferred a \$26,208 Loeloff savings account to a higher-yielding term account which he placed in his name for the benefit of the Loeloffs. He also drafted a living trust agreement for the Loeloffs but they did not sign it. Respondent finally concluded that a conflict of interest had developed.

### *3. Respondent's withdrawal from representation.*

In October 1990, respondent told both parties to get separate counsel, withdrew from his representation of the Loeloffs, and refunded the remaining \$2,500 of the \$5,000 he had earlier withdrawn from one of the Loeloffs' accounts. However, he did not return the \$26,208 which he had transferred into an account in his name, nor the \$2,500 which he had unilaterally withdrawn as fees.

The next month, Mr. Loeloff suffered a stroke and his wife died a few weeks later. Respondent wrote to Mr. Loeloff's brother about a conservatorship for Mr. Loeloff but an attorney representing Mrs. Curtis filed a petition seeking appointment of Curtis as Loeloff's conservator. Curtis's new attorney requested that respondent turn over to him the funds he had taken out of the Loeloffs' bank accounts. Respondent did not relinquish his interest in the Loeloffs' \$26,208 account until a month after he was contacted by the State Bar and after two letters from Mrs. Curtis's new attorney. Six months later, in August 1991, respondent sent a "final offer" to Mrs. Curtis, stating he had spent 4.5 hours for Curtis, out of a total 44 hours representing the Loeloffs and Curtises, and his total fee was \$7,200. While he thought a court would grant his fee request, respondent offered to return \$250 to her and waive any additional fees if she agreed to settle all complaints and disputes.

### *4. Representation of adverse interests.*

The hearing judge concluded that respondent violated the rule against representing adverse interests because he failed to advise both the Loeloffs and Curtises of the conflicts arising from his representation of the Loeloffs and to obtain the written consent of all four to his representation. [7] The hearing judge exonerated respondent from a rule 4-100(B)(4) charge

that he did not promptly pay over to Mrs. Curtis's new attorney the \$26,208 transferred from the Loeloffs' account. The judge reasoned that when Curtis's attorney made his demand, he did not accompany it with adequate authority to oblige respondent to relinquish the funds. On review, OCTC does not dispute this conclusion. The hearing judge also dismissed a moral turpitude charge because, as in the Fairchild matter, the charge was unattached to any specific misconduct. We agree with the hearing judge's conclusions on the rule 4-100(B)(4) and moral turpitude charges.

[8a] On review, respondent urges that his representation of the Loeloffs was consecutive to, not concurrent with, his representation of the Curtises and was not adverse to his prior representation, and that he was not required to comply with rule 3-310(A) until an actual conflict arose during his representation. This interpretation is inconsistent with the evidence and the law. Admittedly, respondent's initial investigation into the Loeloffs' situation was as an attorney for the Curtises. They hired him to protect their interests and seek remedies for the care they had given the Loeloffs. On his first visit to the hospital, Mrs. Loeloff refused to see respondent because she knew he was working on behalf of the Curtises. To secure an agreement from the Loeloffs to reemploy the Curtises, Mrs. Curtis consented to respondent's representation of Mrs. Loeloff so long as he protected her interests as well. Respondent did not withdraw from employment but rather undertook the concurrent legal representation of the Loeloffs and the Curtises. Respondent's draft of the home care agreement and his August 5, 1991, settlement offer to Mrs. Curtis both indicate that he was representing the parties concurrently. Respondent was aware that their interests were in clear conflict as the Curtises demanded payment from the Loeloffs from their prior employment, and a lien or other interest in their home in exchange for caring for them and the Loeloffs desired home care while preserving their assets. The agreement drafted by respondent avoids, instead of resolves, these issues. Rather than protecting the interests of either set of clients, respondent attempted to broker an agreement that was unsatisfactory to all but respondent. Under these facts, respondent was required to obtain the informed written consent of all parties at the outset

assuming, arguendo, that he could have competently performed services on behalf of both clients in this circumstance.

[8b] Even crediting respondent's version of a "consecutive" representation, he would have had to comply with subsection (A) of rule 3-310, because his prior employment by the Curtises involved the same subject matter as his new representation, the care and assets of the Loeloffs. Thus, under either interpretation, all affected clients were required to give their informed written consent to respondent's acceptance of employment by Mrs. Loeloff.

Many years ago, the Supreme Court in *Ander-son v. Eaton* (1930) 211 Cal. 113, 116 set forth the policy which today underlies the principle of rule 3-310: "It is also an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances. [Citation.] By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests. Nor does it matter that the intention and motives of the attorney are honest. The rule 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 an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. [Citation.]"

Respondent clearly breached these principles and wilfully violated rule 3-310(B).

## II. PROCEDURAL ISSUES

Before discussing the question of appropriate discipline, we resolve two procedural matters raised by respondent. [9] Respondent requested permission for late filing of his petition to augment the record before us to include documents relating to one of his former clients. Thereafter, he also asked us to take judicial notice of two articles published in the *Orange County Register*. At oral argument, we denied

both requests. Augmentation petitions are generally granted only if it is demonstrated that the record below is incomplete or incorrect. (Rule 1304, Prov. Rules of Practice of State Bar Court.) As we stated in *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 686, the general rule is not to entertain evidence not heard by the hearing judge unless it is the only means of presenting limited evidence of subsequent rehabilitation. The probate court orders proffered by respondent shed no light on the ethical issues charged in the State Bar Court proceeding. Whether Mrs. Curtis acted properly or not toward Mr. Loeloff is not in issue here. (Cf. *Sodikoff v. State Bar* (1975) 14 Cal.3d 422, 431.) It is also unusual for petitions to augment to be granted if contested. Respondent has not demonstrated good cause for us to consider this evidence over the opposition of OCTC.

[10a] Respondent also contends that he was denied due process when his counsel was misled by the hearing judge's comments at the close of the case concerning the appropriate discipline and her deviation from that position thereafter in her written decision. He asserts that his counsel did not fully present his arguments after the hearing judge's remarks led him to believe that she was not considering recommending an actual suspension. OCTC argues that respondent was accorded a fair hearing and disagrees that respondent's counsel was justified in being lulled into complacency or that he failed to make any arguments attacking the imposition of any suspension of his client's license.

[10b] We agree with OCTC. The record reflects the hearing overall was fair and counsel was not only given the opportunity to present any arguments he chose on the issue of discipline but his argument included distinguishing past cases in which actual suspension was imposed. The verbal comments made by the hearing judge, while leaning toward recommending less discipline, were not definitive. However, on page 56 of her written decision, the hearing judge stated clearly why she ultimately recommended more severe discipline than she had earlier verbally suggested. "Where the hearing judge's impressions varied from [her] ultimate written findings of fact and conclusions of law, the written decision controls." (*In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal.

State Bar Ct. Rptr. 32, 42.) In any event, we undertake de novo review of the record as does the Supreme Court. Respondent could not, as a matter of law, rely on the hearing judge's oral or written disciplinary recommendation since it was not binding on us or the Supreme Court. (Trans. Rules Proc. of State Bar, rule 453(a); *Bernstein v. State Bar* (1972) 6 Cal.3d 909, 916; *In the Matter of Mudge* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 536, 541-542.)

### III. MITIGATION, AGGRAVATION AND HEARING JUDGE'S RECOMMENDATION

In weighing mitigation and aggravation, the hearing judge noted the very strong mitigation of respondent's 25 years of practice with no prior discipline. Respondent also engaged in extensive civic and bar association activities, serving as mayor of an Orange County city and a director of the Orange County Bar Association. A retired superior court judge praised respondent's character and characterized his offenses as "technical," arising perhaps from zeal to protect clients. Two other attorneys also supported him strongly. The hearing judge gave diminished weight to this character evidence as not representative of a wide variety of references.

The hearing judge pointed to aggravating circumstances of overreaching and uncharged misconduct by respondent, including soliciting Mrs. Loeloff while hospitalized (rule 1-400(C)<sup>9</sup>), removing \$2,500 in fees from the Loeloffs' account when he had a conflict of interest in his representation, and trying to induce clients to dismiss their State Bar complaints and possible civil causes against him. In the hearing judge's view, respondent misled the probate court when he stated in his response to the petition to have him removed as trustee in the Fairchild matter that he was entitled to receive compensation for his work on the Fairchilds' trust at a rate of \$220.00 when respondent had a binding fee agreement with Mrs. Fairchild for legal fees at a rate of \$185.00 per hour. (Bus. & Prof. Code, § 6068 (d).) On review, respondent has not disputed these find-

ings. The hearing judge also concluded that respondent was not candid about the facts at the disciplinary hearing and had still not prepared a proper accounting of services he performed in defending the *Newport* suit. She also found that respondent committed multiple acts of misconduct, resulting in significant harm to Mrs. Fairchild, and that he had demonstrated indifference toward rectification or atonement for the consequences. Weighing all the mitigating and aggravating evidence, the hearing judge recommended a one-year stayed suspension and a two-year probation term on conditions including sixty days of actual suspension.

On review, respondent characterizes what little misconduct he concedes as minor, technical infractions and not done for personal enrichment. He emphasizes his long, previously unblemished legal career, his community service and the testimony of his three character witnesses, and contends that this evidence was not accorded sufficient weight below. He again attacks the veracity and integrity of one of the clients who testified against him. The discipline he urges us to impose is private reproof.

In recommending affirmance of the decision below, OCTC notes that respondent's attack on his former client betrays his lack of understanding of his duties and obligations to clients. As to respondent's characterization of his misconduct as minor, OCTC replies that respondent's attitude toward ethical responsibilities is shortsighted and undermines the moral fiber of the profession.

[11a] Respondent's misconduct includes violations of rules 4-100(B)(3), 3-300, and 3-310. The range of discipline available under the Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V ("stds.")) and applicable case law ranges from a private reproof to two years actual suspension. (*Hunnicutt v. State Bar* (1988) 44 Cal.3d 362, 373, citing *Ritter v. State Bar* (1985) 40 Cal.3d 595, 604, fn. 9.) For the violation of rule 4-100(B)(3) alone, the standards

9. Respondent's action also appeared to violate Business and Professions Code section 6152, which prohibits solicitation of legal services in person or by telephone in or about, among

other places, public or private hospitals. (See *Rose v. State Bar, supra*, 49 Cal.3d at pp. 658-659.)

recommend at least a three-month actual suspension. (Std. 2.2(b) [referring to former rule 8-101].) In similar rule 3-300 cases in which the attorney did not have a prior record of discipline, the discipline has encompassed a public reproof for a single instance of holding an interest adverse to a client without proper notice and consent (*Connor v. State Bar*, *supra*, 50 Cal.3d 1047); thirty days actual suspension for rule 3-300 violations, mismanagement, and intentional misrepresentations involving two trusts (*Schneider v. State Bar*, *supra*, 43 Cal.3d 784); and a two-year actual suspension for a business transaction with a client without notice and consent and the improper solicitation of a client, coupled with a client abandonment, failure to communicate with his clients, and failure to return client property and advanced fees promptly. (*Rose v. State Bar*, *supra*, 49 Cal.3d 646.)

[11b] We too are very concerned, as was the hearing judge, by the evidence of overreaching and lack of understanding displayed by respondent in his misconduct and during these disciplinary proceedings. The impropriety of respondent's proposal to Mrs. Fairchild to divert the additional \$25,000 recoverable from the *Newport* litigation which was property of the living trust, was compounded by the fact that respondent was a trustee of the Fairchild trust as well. There are numerous instances of overreaching by respondent toward his former clients: soliciting Mrs. Loeloff in person at her hospital bed to represent her in negotiating home care from another client so that she would not have to be placed in a nursing home; attempting to have Mrs. Fairchild and Mrs. Curtis withdraw their complaints lodged with the State Bar<sup>10</sup> [12 - see fn. 10]; and withholding his resignation as trustee of the Fairchild trust on condition that Fairchild pay him additional legal fees allegedly owed and release him from any civil liability. Although respondent had every right to defend

himself, we are also concerned by his harsh attacks on the motives and candor of both Mrs. Fairchild and Mrs. Curtis at the disciplinary hearing below and before us. It is troubling that while holding himself blameless, he displayed such a controlling attitude toward these clients, two of whom were ill and elderly and thus more vulnerable. The clear and convincing evidence of respondent's improper hospital solicitation of a client and misleading of the superior court as to his fee agreement are alone grounds for actual suspension. The lack of any ameliorative measures or recognition of ethical accountability toward his clients weighs against respondent as well. His long service at the bar and for his community counterbalances misconduct that would otherwise warrant substantial discipline. At the same time, such lengthy practice and professional achievements did not aid respondent in avoiding basic violations of the Rules of Professional Conduct.

[11c] We therefore agree with the hearing judge that a period of actual suspension is required for respondent to examine and understand the serious ethical responsibilities he owes to his clients. [13] Restitution of the \$2,500 in fees to Mr. Loeloff or his estate is appropriate as well, since respondent's representation of the Loeloffs at the time he removed the funds was improper. (See *Goldstein v. Lees* (1975) 46 Cal.App.3d 614, 618.) The other conditions recommended by the hearing decision are appropriate measures to assure the protection of the public and to monitor respondent's rehabilitation.

#### IV. RECOMMENDATION

For the foregoing reasons, we recommend to the Supreme Court that respondent Anthony Novo Fonte be suspended from the practice of law in this state for a period of one year; that execution of said suspen-

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10. [12] We concur with the hearing judge that respondent's attempts to have clients withdraw existing State Bar complaints did not violate Business and Professions Code section 6090.5, which provides that a member may be disciplined for requiring "as a condition of a settlement of a civil action for professional misconduct . . . that the plaintiff agree to not file a complaint with the disciplinary agency concerning that misconduct." Neither settlement proposed by respondent was

to resolve a malpractice action. Further, both clients had filed complaints with the State Bar when the settlements were proposed and the statute does not address settlements in which the client agrees to withdraw a complaint pending with the State Bar. The State Bar may proceed with a disciplinary matter whether or not the complainant is willing. (Rule 507, Trans. Rules Proc. of State Bar.)

sion be stayed; and that respondent be placed on probation for two years on the following conditions: that during the first sixty days of said period of suspension, respondent be actually suspended from the practice of law in the State of California; and that he comply with the remaining conditions of probation attached to the hearing department's decision filed April 30, 1993. Those conditions include restitution to Mr. Loeloff or his representative of \$2,500, delivery to Mrs. Fairchild of a proper accounting of his services in the Newport case and successful completion of the State Bar's Ethics School program and its separate trust account and recordkeeping course.

We also recommend that respondent be required to take and pass the California Professional Responsibility Examination administered by the State Bar's Committee of Bar Examiners within one year of the effective date of the Supreme Court's order in this case. (See *Layton v. State Bar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366, 381, fn. 9 as to the difference between the California Professional Responsibility Examination now regularly ordered by the Supreme Court in suspension cases and the multistate Professional Responsibility Examination administered to applicants for admission.) Finally, we adopt the recommendation that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10.

We concur:

PEARLMAN, P.J.  
NORIAN, J.