

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

HENRY DANIEL FANDEY

A Member of the State Bar

No. 90-O-11973

Filed March 28, 1994

SUMMARY

In a single client matter, respondent aided and abetted his client's flight from California in order for the client to avoid complying with a child support order, and was also found culpable of two separate instances of improperly obtaining an interest in the client's property and/or entering into a business transaction with the client, in connection with the sale of the client's home to respondent's parents and the occupancy by the client of respondent's parents' home. Based thereon, the hearing judge recommended that respondent be suspended from the practice of law for 18 months, that such suspension be stayed, and that respondent be placed on 18 months probation on conditions, including 6 months actual suspension. (Hon. Carlos E. Velarde, Hearing Judge.)

Respondent requested review, arguing that there was insufficient evidence to support the charges, and that, even if the hearing judge's culpability conclusions were upheld, the discipline should be a reproof or stayed suspension. The State Bar argued in reply that the recommended discipline should be increased to three years stayed suspension with one year actual suspension. The review department concluded that respondent was culpable of the aiding and abetting charge, but not culpable of the charges arising out of the property transactions between the client and respondent's parents. Nevertheless, in light of the impact of respondent's misconduct on the integrity of the legal profession, as well as the heightened public concern with payment of child support, the review department found the misconduct sufficiently serious, and the circumstances surrounding the property transactions sufficiently aggravating, to warrant adopting the discipline urged by the State Bar.

COUNSEL FOR PARTIES

For Office of Trials: Ronald E. Magnuson, Allen Blumenthal

For Respondent: Barbara G. Azimov

HEADNOTES

- [1 a, b] **130 Procedure—Procedure on Review**
194 Statutes Outside State Bar Act
In order to promote membership understanding of lawyers' professional obligations and to enhance public awareness of review department dispositions, review department initially followed policy of publishing its opinions in all public matters in which oral argument was held. After reaching point at which automatic publication of all such matters no longer appeared necessary, review department began to publish its opinions in public matters generally in accordance with standards governing other intermediate appellate courts in California. (Cal. Rules of Court, rule 976(b).)
- [2] **148 Evidence—Witnesses**
166 Independent Review of Record
Although review department's review of record is independent, it must give great weight to hearing judge's credibility determinations and it is reluctant to deviate from hearing judge's credibility-based factual findings in absence of specific showing of error. Where respondent argued that his version of events was more credible because State Bar's witnesses had reason to be less than truthful, this argument ignored respondent's own obvious similar motive, and was not grounds to depart from hearing judge's credibility determinations.
- [3] **142 Evidence—Hearsay**
146 Evidence—Judicial Notice
Taking judicial notice of court records does not mean noticing the existence of facts asserted in the documents in the court file; a court cannot take judicial notice of the truth of hearsay just because it is part of a court record. Accordingly, where respondent requested review department to take judicial notice of court documents, this would only result in taking notice that various allegations had been made in various legal matters, and would not alter review department's conclusion regarding hearing judge's credibility determination.
- [4] **148 Evidence—Witnesses**
162.19 Proof—State Bar's Burden—Other/General
165 Adequacy of Hearing Decision
The testimony of a single witness who is entitled to full credit is sufficient for proof of any fact. Where hearing judge found complaining witness's version of events to be more credible, and such testimony, though at odds with respondent's, was consistent on material issues, review department found no basis to disturb hearing judge's factual findings.
- [5] **213.30 State Bar Act—Section 6068(c)**
272.00 Rule 3-210 [former 7-101]
Where respondent did not simply advise client of consequences of not paying child support order, but actively counseled client on ways to accomplish goal of violating order, respondent was culpable of violating statute requiring attorneys only to counsel actions that appear legal or just, and rule prohibiting attorneys from advising the violation of any law or court order.
- [6 a, b] **221.00 State Bar Act—Section 6106**
Where respondent, knowing that his client had stopped paying child support and intended to move with the express purpose of avoiding complying with a child support order, provided the client with affirmative help in moving, these facts demonstrated that respondent acted in conscious disregard of his obligation to uphold the law, and his misconduct therefore involved moral turpitude despite his lack of specific intent to help the client avoid the support order.

- [7] **273.00 Rule 3-300 [former 5-101]**
There is no requirement, for purposes of the rule of professional conduct prohibiting an attorney from improperly obtaining an interest in a client's property and/or entering into a business transaction with a client, that the attorney represent the client with regard to the particular transaction in question.
- [8 a, b] **273.00 Rule 3-300 [former 5-101]**
Where there was no evidence that respondent was a party to or benefited financially from property transactions between respondent's client and respondent's parents in which respondent was closely involved, respondent was not culpable of improperly obtaining an interest in a client's property and/or entering into a business transaction with a client.
- [9] **615 Aggravation—Lack of Candor—Bar—Declined to Find**
Where hearing judge did not find respondent's testimony regarding respondent's interpretation of certain events to be credible, record did not, without more, establish that respondent's testimony was less than truthful for purposes of aggravation.
- [10] **430.00 Breach of Fiduciary Duty**
 551 Aggravation—Overreaching—Found
The relationship between an attorney and client is a fiduciary relationship of the very highest character. In light of such fiduciary obligations, respondent's conduct in arranging real property transactions between respondent's client and respondent's father involved overreaching, where respondent was closely involved with his father and did not safeguard the client's interests in the transactions.
- [11 a, b] **204.90 Culpability—General Substantive Issues**
 273.30 Rule 3-310 [former 4-101 & 5-102]
 551 Aggravation—Overreaching—Found
 561 Aggravation—Uncharged Violations—Found
Respondent's simultaneous representation of a client and of respondent's father during the time that respondent arranged real property transactions between the client and the father was an aggravating circumstance in that the dual representation was rife with potential and actual conflicts of interest that could have been, if charged, the basis for additional culpability for violating the rule regarding representation of conflicting interests. The fact that respondent was not found culpable of any misconduct involving the real property transactions did not preclude treating respondent's conduct therein as an aggravating factor, because other related misconduct involving the same client was surrounded by and followed by the attorney's conduct in the real property transactions.
- [12 a-c] **213.30 State Bar Act—Section 6068(c)**
 272.00 Rule 3-210 [former 7-101]
 551 Aggravation—Overreaching—Found
 586.11 Aggravation—Harm to Administration of Justice—Found
 1091 Substantive Issues re Discipline—Proportionality
 1093 Substantive Issues re Discipline—Inadequacy
In light of all relevant evidence and comparable case law, as well as heightened concern regarding enforcement of child support orders, respondent's very serious misconduct of advising and aiding a client in avoiding a child support order, which misconduct was substantially aggravated by respondent's overreaching in arranging real property transactions between the client and respondent's father, warranted increasing recommended discipline to one-year actual suspension coupled with three years of probation, even though review department found respondent culpable of less misconduct than did hearing judge.

ADDITIONAL ANALYSIS**Culpability****Found**

- 213.31 Section 6068(c)
- 221.19 Section 6106—Other Factual Basis
- 272.01 Rule 3-210 [former 7-101]

Not Found

- 221.50 Section 6106
- 273.05 Rule 3-300 [former 5-101]

Aggravation**Found**

- 543.10 Bad Faith, Dishonesty
- 582.10 Harm to Client

Found but Discounted

- 553 Overreaching

Declined to Find

- 582.50 Harm to Client
- 595.90 Indifference

Mitigation**Found**

- 710.10 No Prior Record

Found but Discounted

- 740.33 Good Character
- 765.32 Pro Bono Work
- 793 Other

Discipline

- 1013.09 Stayed Suspension—3 Years
- 1015.06 Actual Suspension—1 Year
- 1017.09 Probation—3 Years

Probation Conditions

- 1024 Ethics Exam/School

OPINION

NORIAN, J.:

We review the recommendation of a hearing judge that respondent, Henry Daniel Fandey, be suspended from the practice of law for 18 months, that such suspension be stayed, and that he be placed on 18 months probation on conditions, including 6 months actual suspension. The recommendation is based on respondent's misconduct in a single client matter that involved aiding and abetting the client's flight from California in order for the client to avoid complying with a child support order, and two separate instances of improperly obtaining an interest in a client's property and/or entering into a business transaction with a client.

Respondent requested review, arguing that there is insufficient evidence to support the charges, and that, even if the hearing judge's culpability conclusions are upheld, the discipline should be a reproof or stayed suspension. The Office of the Chief Trial Counsel (OCTC) initially requested review, but later withdrew that request. Instead, that office argues in reply that the record supports all of the hearing judge's findings and, based thereon, that the recommended discipline should be increased to three years stayed suspension with one year actual suspension.

We have independently reviewed the record and conclude that respondent is culpable of the aiding and abetting charge, but not culpable of the charges that he improperly obtained an interest in a client's property and/or entered into a business transaction with the client. Nevertheless, we find the misconduct sufficiently serious and the circumstances surrounding the property transactions sufficiently aggravating to warrant adopting the discipline urged by OCTC.¹ [1 a, b - see fn. 1]

FACTS AND FINDINGS

In December 1987, respondent was retained by Bruce Lee to represent him in a child support matter.² Lee paid respondent \$7,000 as advanced attorney's fees. In March 1988, Lee stipulated to pay \$250 per month for support of his two children, ages 9 and 5, plus arrearages. Thereafter, Lee complained to respondent that he was angry and unhappy about having to pay child support. In response, respondent advised Lee that he had three options: pay the child support, go to jail, or disappear. Respondent then provided Lee with two books on how to change his identity.

Lee decided to disappear and respondent went out of his way to help Lee move. After recommending that Lee could vanish to El Paso, Texas, respondent physically assisted Lee in the move. Prior to Lee's

1. This opinion has been designated for publication because, in our view, it meets the publication standards set forth in rule 976(b) of the California Rules of Court. [1a] Since its inception, this review department, in order to promote membership understanding of lawyers' professional obligations and to enhance public awareness of review department dispositions, has followed an initial policy of publishing its opinions in all public matters in which oral argument was held. The review department generally has not published its opinions on *ex parte* review of volunteer referees or on review of orders in other public matters when the parties did not have the opportunity to participate in oral argument regarding the issues addressed therein. (But see *In the Matter of Mesce* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 658.) The review department, however, has recognized that eventually it would wish to follow the practice of other intermediate appellate courts in selectively publishing opinions.

[1b] It is now four years after the review department issued its first published opinion in March of 1990. We have reached

the point at which automatic publication of all orally argued public matters no longer appears necessary. Henceforth, the review department intends to publish its opinions in public matters generally in accordance with the standards governing the publication of opinions of other intermediate appellate courts in California. (See Cal. Rules of Court, rule 976(b).)

It is contemplated that in the near future, the Executive Committee of the State Bar Court will be requested to consider a proposal to add to the Rules of Practice a new rule addressing the publication of review department opinions. Until such a rule becomes effective, parties to any case before the review department in which the resulting opinion is not deemed appropriate for publication will be so notified in the opinion and given the opportunity to seek reconsideration under rule 455 of the Transitional Rules of Procedure.

2. Several other attorneys had previously represented Lee in his divorce action.

decision to move to El Paso, respondent had decided to move there also. Lee and respondent assisted one another in moving away from California for mutual convenience. Respondent accompanied Lee on at least four occasions to El Paso, found a new residence in El Paso for Lee, helped Lee pack furniture and furnishings for the purpose of moving to El Paso, loaned Lee his truck and trailer to use in moving to El Paso, and even personally moved some of Lee's personal belongings. Respondent also acted as the guarantor on behalf of Lee in Lee's application to have his utilities turned on in his new residence in El Paso. Respondent also advised Lee on how to avoid leaving a paper trail and traceable monetary assets and told Lee to use cash instead of credit cards when Lee was moving to Texas. Lee stopped making child support payments prior to his move to El Paso.

Lee's home in Irvine, California, had been for sale for some period of time prior to Lee's move to El Paso. Respondent introduced Lee to his parents, Joseph S. and Edith D. Fandey, as potential buyers, and then assisted his parents in subsequent dealings with Lee. Joseph Fandey also obtained advice from respondent regarding legal matters in California.

Joseph Fandey owned several properties and was interested in purchasing additional property to complete a "1031 exchange." (26 U.S.C. § 1031.) Respondent was present during the negotiations between Lee and respondent's father and assisted in the preparation of documents in the sale of Lee's home to the father. Lee's property had been listed at \$180,000 and respondent induced Lee to discount the property by \$30,000 under the guise of tax savings. The escrow closed in November 1988.³ Lee

received about \$53,000 in sale proceeds from the Irvine property. Respondent advised Lee that the transaction should be conducted in cash so that no "paper trail" would exist as to the sale proceeds.

Respondent's father also owned a house on Sterling Place in El Paso. When Lee moved from California in late 1988, he moved into the Sterling Place house. In November 1988, Lee withdrew about \$53,000 in cash from his bank account and subsequently delivered the cash to respondent. Respondent placed the cash in a brown paper bag and delivered the money to his father.⁴ Lee testified that the \$53,000 given to respondent was a down payment for the El Paso property. Respondent and Joseph Fandey, on the other hand, claimed that Lee rented the house and the money was a security deposit. The hearing judge found Lee's testimony to be the more credible.

Lee occupied the El Paso property without having to make any payments. Following Lee's complaint to the New Mexico Bar Association charging respondent with misconduct, Lee was served with a notice to pay rent or quit and notice of termination of tenancy in April 1990, by the Fandey's attorney.⁵ The notice to pay rent or quit indicated that there was no rental agreement and that the amount of past due rent was calculated on a reasonable basis. At the time of the State Bar hearing in this matter, Lee and the Fandey's were suing each other as to the ownership of the El Paso property,⁶ and Lee had remained in the Sterling Place house and was paying \$1,000 per month to the Texas court.

In mitigation, the hearing judge found that respondent did not have a prior record of discipline

3. The hearing judge found that the escrow company involved in the sale of the Irvine property was owned by respondent's parents. OCTC asserts in its brief on review that the record does not support this finding and we agree.

4. The hearing judge found that respondent had physical control of the cash for a substantial period of time. We do not find support for this finding in the record. Respondent merely stated that he had access to the cash and respondent's father testified that he had the money, not respondent.

5. The record is silent as to the resolution, if any, of the New Mexico Bar Association complaint.

6. An unlawful detainer action was filed by respondent's parents against Lee and Lee cross-complained against respondent and his parents. The cross-complaint apparently alleged fraud and sought title to the property. The record is not clear as to the resolution, if any, of the lawsuits. Respondent asserts in his brief on review that the cross-complaint was dismissed for lack of prosecution and a judgment was entered against Lee for restitution of the El Paso property. However, the record below includes as an exhibit an order from the Texas court which indicates that the cross-complaint was reinstated.

during 11 years of practice prior to the misconduct; that respondent presented several family members (his parents, wife, and three of his children) and one attorney who attested to his good character; that respondent has done volunteer work with Aid to Victims of Crime and the Diabetes Association; that respondent has written a children's book; and that, although he is also admitted to practice law in New Mexico, respondent is currently not practicing as an attorney in any state.

In aggravation, the hearing judge found that respondent's improper advice to his client on how to avoid compliance with a court order was surrounded by dishonesty and overreaching; that respondent's involvement in a business transaction with Lee and failure to avoid adverse interests significantly harmed Lee, the public and the administration of justice, and as a result of respondent's misconduct, there are pending lawsuits with respect to the El Paso property; that respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct as shown by his control of Lee's \$53,000 which should have been, but was not, deposited into a client trust account until the dispute over the money was resolved; and that respondent displayed a lack of candor during the State Bar proceedings in that he was less than truthful regarding his personal involvement in the sale of the Irvine property.

Count one of the four-count notice to show cause alleged that respondent aided and abetted Lee in Lee's flight from California in order to avoid the child support order in violation of sections 6068 (c) and 6106 of the Business and Professions Code,⁷ and former rule 7-101 of the Rules of Professional Conduct of the State Bar of California.⁸ The hearing judge concluded that respondent's improper advice to Lee on how to disappear to Texas in order to avoid

the child support payments, and his overwhelming involvement in Lee's escape, constituted wilful violations of section 6068 (c) and rule 7-101. However, the hearing judge treated both violations as one for purposes of discipline because they both arose from the same facts and circumstances. The hearing judge also concluded that respondent's conduct in aiding and abetting Lee in evading the child support court order amounted to acts of moral turpitude and dishonesty in wilful violation of section 6106.

Count two of the notice alleged that respondent entered into a business partnership with Lee and received \$60,000 from Lee as start-up costs for the partnership in violation of rule 5-101 and section 6106. Lee testified that he gave \$60,000 to respondent for the purpose of a future business partnership with respondent, and respondent claimed that he had never received \$60,000 from Lee. The hearing judge concluded that the State Bar failed to prove by clear and convincing evidence that Lee gave respondent the \$60,000 and therefore concluded that respondent was not culpable in this count.⁹

Counts three and four of the notice involved the sale of the Irvine property and the purchase of the El Paso property, respectively. Count three alleged that respondent entered into a business transaction with Lee by purchasing the Irvine property and count four alleged that respondent entered into a business transaction with Lee by acquiring an adverse interest in the El Paso property in that respondent received \$53,000 from Lee for the purchase of the El Paso property and respondent used that money to purchase the house in his father's name. Both counts charged violations of rule 5-101 and section 6106. On respondent's motion at the first day of trial the hearing judge dismissed the section 6106 charges from both counts because the notice did not properly allege such violations. OCTC withdrew its

7. All further references to sections are to the Business and Professions Code, unless otherwise noted.

8. All references to rules herein, unless otherwise stated, are to the former Rules of Professional Conduct of the State Bar of California, in effect from January 1, 1975, to May 26, 1989.

9. On review, neither party contests the hearing judge's ruling on this count. In light of the hearing judge's unarticulated though clear credibility determination that the testimony of Lee and his second wife, without more, was not sufficient, and the lack of any other evidence showing that Lee gave respondent the money, the record supports the hearing judge's conclusion. No further discussion of this count occurs in this opinion.

opposition to the motion at trial and, on review, does not contest the hearing judge's ruling.

The hearing judge concluded that respondent violated rule 5-101 in both counts three and four by entering into the Irvine and El Paso property transactions without complying with the rule. In count three, the hearing judge found that even though respondent was not a party to the sale of the Irvine property, "the closeness of the relationship between respondent and his parents is tantamount to respondent himself entering into the business transaction with Lee." In count four, it is not clear whether the hearing judge concluded that respondent entered into a business transaction with Lee, or acquired an interest in Lee's property that was adverse to Lee, or both.¹⁰

In mitigation, the hearing judge found that respondent did not have a record of prior discipline during his 11 years of practice at the time of the misconduct (standard 1.2(e)(i), Standards for Attorney Sanctions for Professional Misconduct, Trans. Rules Proc. of State Bar, div. V (standard[s])); that respondent had demonstrated his good character (std. 1.2(e)(vi)); that he had performed volunteer work for a diabetes association; and that respondent was not currently practicing law.

In aggravation, the hearing judge found that respondent's advice to Lee on how to avoid compliance with the court order was surrounded by dishonesty and overreaching (std. 1.2(b)(iii)); that respondent's misconduct significantly harmed Lee (std. 1.2(b)(iv)); that respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct in that he controlled the \$53,000 Lee had given him and did not place the money in a trust account pending resolution of the

dispute with regard to the funds (std. 1.2(b)(v)); and that respondent displayed a lack of candor during the State Bar proceeding in that he was less than truthful regarding his personal involvement in the sale of the Irvine property (std. 1.2(b)(vi)).

DISCUSSION

Respondent contends on review that the State Bar's witnesses are not credible, that there is insufficient evidence to support the charges, and that the misconduct found by the hearing judge does not warrant the recommended discipline. OCTC argues in reply that we should adopt the hearing judge's findings and increase the recommended discipline.

[2] We are unpersuaded by respondent's contention that the hearing judge's credibility determinations are in error. In effect, respondent is arguing that his version of the events is more credible because the State Bar's witnesses may have had reasons to be less than truthful. Although our review of the record is independent, we must give great weight to the hearing judge's credibility determinations. (Rule 453, Trans. Rules Proc. of State Bar.) We are reluctant to deviate from the hearing judge's credibility-based factual findings in the absence of a specific showing that they were in error. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 638.) No such showing has been made here. Respondent's argument conveniently ignores the obvious motive respondent may have had to be less than truthful and assumes that the hearing judge did not consider all relevant factors in determining credibility. The record provides no basis for this assumption and no basis to depart from the hearing judge's credibility determinations.¹¹ [3 - see fn. 11]

10. The notice to show cause was not amended and respondent has not asserted any error, either before the hearing judge or us, regarding the variance between the charges in the notice to show cause and the findings.

11. [3] By letter dated November 1, 1993, respondent notified us that at oral argument he intended to rely on "judicially noticeable facts" contained in several documents attached to the letter, which he contends are relevant to the issue of the credibility of the State Bar's witnesses. We note that some of the documents predate the trial in this matter and therefore

should have been presented to the hearing judge. Respondent offers no explanation for not doing so. Also, as we have explained before, "Taking judicial notice of court records does not mean noticing the existence of facts asserted in the documents in the court file; a court cannot take judicial notice of the truth of hearsay just because it is part of a court record." (*In the Matter of Carr* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 244, 254.) Thus, at best, we could judicially notice that various allegations have been made in various legal matters. This would not alter our conclusion with respect to the hearing judge's credibility determinations.

Count One

Respondent's argument in this count that there is insufficient evidence to support the findings is basically a reiteration of his contention, which we rejected above, that the State Bar's witnesses are not credible. He asserts that he presented sufficient evidence to make it equally likely that he is telling the truth and therefore the State Bar has not met its burden of proof. According to respondent, it was Lee's decision to leave California to avoid the child support order and respondent only advised Lee as to what would happen if Lee did not pay the child support. Furthermore, any help respondent provided to Lee in the move was not an attempt on the part of respondent to aid and abet Lee to avoid the support order, but rather was done for mutual convenience as respondent was also moving to El Paso.

The evidence relating to whether respondent counseled or advised Lee to avoid the support order consisted primarily of the testimony of Lee and respondent. Lee testified that he asked respondent what would happen if he did not pay the support and respondent told him he could pay, go to jail, or disappear; that respondent told Lee that if he refused to pay, his best option was to change his name and go elsewhere; that respondent gave Lee two books, one on how to change your identity and the other on getting new identification; that the two books were discussed between respondent, Lee, and their respective wives; that respondent asked Lee where he would go and when Lee told him Colorado or Wyoming, respondent said those destinations were not a good place because they would be the first places people would look for Lee because of Lee's previous ties to those states; that respondent told Lee that he was moving to El Paso and invited Lee to accompany him to see the area; that respondent told Lee that he was thinking of purchasing a house in the mountains of New Mexico and that that would be a good place for Lee to move because no one would find Lee there; that Lee and respondent took several trips to New Mexico and El Paso; that on one of those trips Lee

used respondent's brother's name to purchase an airline ticket, and that every time they went anywhere, respondent told Lee to use cash and not credit cards or checks so Lee would not leave a paper trail.

Respondent testified that he did not tell Lee that Lee had three options; that Lee told him that Lee was not going to pay the support; that he urged Lee to pay the support and that he told Lee if Lee did not pay the support, Lee would go to jail; that he never advised Lee to leave; that the books he gave to Lee also included parts that warned of the consequences of changing your identity and he gave Lee those books to caution Lee as to the problems of changing your identity; that he did not tell Lee to change his name; and that he helped Lee move to El Paso because he was moving there and their wives had become friends and wanted to be close to each other.

[4] Although the hearing judge did not detail Lee's testimony in the factual findings, it is clear from the findings that he found Lee's version of the events to be the more credible. As indicated above, we must afford this credibility determination great weight. Lee's testimony, although at odds with respondent's testimony, was consistent on the material issues and was found to be credible. The testimony of a single witness who is entitled to full credit is sufficient for proof of any fact. (Evid. Code, § 411.) On this record, we do not find any basis to disturb the hearing judge's factual findings.¹² Whether those findings support the legal conclusions of culpability is another issue.

[5] As indicated above, the hearing judge found respondent violated sections 6068 (c) and 6106 and rule 7-101. Section 6068 (c) provides that it is an attorney's duty "To counsel or maintain such actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense." Rule 7-101 (now rule 3-210) provided in relevant part that an attorney "shall not advise the violation of any law, rule or ruling of a tribunal unless he believes in good faith

12. We recognize that the dismissal of count two reflects on the hearing judge's assessment of Lee's credibility in that count. Nevertheless, that is not a sufficient reason to disturb the

credibility determinations in count one, where there is evidence apart from Lee's testimony.

that such law, rule or ruling is invalid.” Respondent informed Lee that Lee could disappear and informed and acquainted Lee on how to disappear by providing Lee with the two books; he advised Lee to use cash in order to avoid detection, and he advised Lee on locations to which Lee could move to avoid detection. Under these circumstances, respondent did not simply advise Lee as to the consequences of not paying the support order; rather, he actively counseled Lee on ways to accomplish the illegal goal of violating the court order. Accordingly, we conclude that the record supports the conclusion that respondent is culpable of wilfully violating section 6068 (c) and rule 7-101.

[6a] The hearing judge also concluded that respondent’s conduct in “aiding and abetting Lee in evading” the support order constituted acts of moral turpitude in violation of section 6106. Respondent argues that the assistance he provided to Lee was not an attempt on his part to aid and abet Lee in avoiding the support order, but rather was an act of mutual convenience, citing to the hearing judge’s finding that respondent and Lee helped one another in the move to El Paso for mutual convenience. This argument ignores the circumstances surrounding the move. Respondent knew Lee had been ordered to pay support and that Lee intended to move to El Paso and change his identity for the express purpose of avoiding the court order. As the child support was paid through respondent, he was also aware that Lee stopped making the payments prior to the move. Despite this knowledge, respondent helped Lee move, acted as a guarantor on Lee’s application to have utilities turned on at the house in El Paso, and advised Lee on ways to avoid detection.

In *In re Young* (1989) 49 Cal.3d 257, the attorney was convicted of violating Penal Code section 32 (accessory to a felony). Young assisted a client with the intent to help the client avoid arrest. The Supreme Court held that Young’s crime “necessarily involve[d] moral turpitude since it requires that a party has a specific intent to impede justice with knowledge that his actions permit a fugitive of the law to remain at large. An attorney convicted of this crime necessarily acts with conscious disregard of his obligation to uphold the law.” (*Id.* at p. 264.)

[6b] Respondent was not found to have had the specific intent to help Lee avoid the support order. Nevertheless, respondent’s knowledge of the order, of Lee’s violation of the order by stopping payments prior to the move, and of Lee’s express purpose in moving, coupled with affirmative help he provided Lee in moving, demonstrates that respondent acted in conscious disregard of his obligation to uphold the law. We therefore agree with the hearing judge that respondent’s misconduct involved moral turpitude in violation of section 6106.

Counts Three and Four

Respondent argues that he is not culpable of violating rule 5-101 in either of these counts because he was not Lee’s attorney at the time of the property transactions; he was not a party to the transactions; he did not acquire an interest in the property, and he did not gain financially from the transactions. The record is clear that respondent did have an attorney-client relationship with Lee at the time of the transactions. Respondent represented Lee in a number of matters other than the child support matter. He testified that he remained the attorney of record in some of those matters because Lee did not want to alert the opposing sides to Lee’s departure to Texas. [7] Respondent does not cite any authority and our research reveals none, requiring, for purposes of rule 5-101, that the attorney represent the client with regard to the particular transaction in question.

[8a] The hearing judge’s basis for finding the rule 5-101 violations in these counts was that even though respondent was not a party to the transactions, he was so closely involved that it was tantamount to respondent entering into the transactions and therefore rule 5-101 applied. It is undisputed that respondent was not a party to either transaction and that he did not acquire an interest in either property. Furthermore, no clear and convincing evidence establishes that respondent financially gained from either transaction. Neither party cites any cases and we are not aware of any that have applied rule 5-101 in situations where the attorney was neither a party to, nor financially gained from, the transaction at issue. (See, e.g., *Brockway v. State Bar* (1991) 53 Cal.3d 51 [attorney obtained quitclaim deed to client’s

property to secure payment of legal fees]; *Sugarman v. State Bar* (1990) 51 Cal.3d 609 [loan to attorney from client]; *Rose v. State Bar* (1989) 49 Cal.3d 646 [attorney induced client to invest settlement proceeds in a business venture and the attorney received corporate stock for procuring financing for the venture]; *Rodgers v. State Bar* (1989) 48 Cal.3d 300 [attorney persuaded client to loan money from an estate over which client was conservator to attorney's ex-client and attorney received most of proceeds of one of the loans as payment of the ex-client's legal fees]; *Hawk v. State Bar* (1988) 45 Cal.3d 589 [attorney acquired note secured by client's property to secure payment of fees]; *Beery v. State Bar* (1987) 43 Cal.3d 802 [client loaned settlement proceeds to corporation in which attorney was a principal and attorney personally guaranteed the loan]; *Kapelus v. State Bar* (1987) 44 Cal.3d 179 [attorney persuaded client, a charitable corporation, to loan money to a limited partnership in which attorney was a general partner]; *Silver v. State Bar* (1974) 13 Cal.3d 134 [attorney purchased house owned by client's former husband which house was the subject of the litigation for which the attorney was hired and was the only asset the former husband had to satisfy the client's judgment].)

[8b] There is no evidence in the record that respondent was a party to or benefited financially from either property transaction. We therefore conclude that respondent is not culpable of violating rule 5-101 in either of these counts. However, as indicated below, we view respondent's conduct in these property transactions as a significant aggravating factor.

Mitigation

With regard to the mitigating circumstances found by the hearing judge, we adopt the finding that respondent had practiced law for 11 years without prior discipline prior to his misconduct. (Std. 1.2(e)(i).) However, we do not accord significant weight to the good character testimony as it was only attested to by respondent's wife and three children and one attorney. (See std. 1.2(e)(vi).) We also do not give great weight to respondent's pro bono work, given its limited nature, and we find little mitigating value on this record to respondent not practicing law.

Aggravation

With regard to the hearing judge's finding in aggravation that respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct (std. 1.2(b)(v)), there is no evidence that respondent held the \$53,000 for any length of time. He and his father testified that the money was given to the father promptly after it was received from Lee. Respondent's statement that he had access to the money is not inconsistent with this testimony.

[9] Also, we do not find support for the conclusion that respondent was less than truthful in his State Bar testimony regarding the Irvine property transaction. (Std. 1.2(b)(vi).) The only findings supporting this conclusion were that respondent's testimony regarding the \$53,000 being a security deposit was "incredible, self-serving and not supported by any evidence," and that respondent's testimony that he was "only acting as a 'messenger boy for the money' in the Irvine-El Paso property dispute was not believable." The hearing judge clearly did not find respondent's testimony on these issues credible, but without more, we cannot conclude that the record establishes by clear and convincing evidence that respondent was "less than truthful" in presenting his interpretation of the relevant events.

We also discount the hearing judge's finding that respondent's advice to Lee on how to avoid compliance with the court order was surrounded by dishonesty and overreaching. We do not find any evidence in the record to support these conclusions separate and apart from the evidence that supports the culpability conclusions in that count.

[10] "The relationship between an attorney and client is a fiduciary relationship of the very highest character." (*Clancy v. State Bar* (1969) 71 Cal.2d 140, 146.) In light of respondent's fiduciary obligations to Lee, we conclude that respondent's conduct with regard to the property transactions involved overreaching. Respondent was closely involved with his father in these property transactions. Perhaps because of the conflicting loyalties respondent faced between Lee and respondent's father, respondent did not safeguard Lee's interests in these transactions: he

induced Lee to reduce the sales price of the Irvine property for tax reasons that apparently did not benefit Lee; he did not adequately explain the transactions to Lee or advise Lee to seek independent counsel; he did not ensure that the transactions were properly documented; he advised Lee to conduct the sale and purchase of real property in cash and to that end, accepted \$53,000 in cash from Lee in a brown paper bag; and, incredibly, he asserted to his client and at the State Bar proceeding that the \$53,000 was a security deposit for the rental of a single family house.

[11a] We also conclude that respondent's representation of Lee in these transactions between Lee and respondent's father was rife with potential and actual conflicts of interest that could have been, if charged, the basis for additional culpability under rule 5-102. The record supports the hearing judge's finding that respondent represented both Lee and respondent's father.¹³ The father admitted that respondent provided legal advice to him on matters within California. The consequences that resulted from the real property transactions are the consequences of conflicting loyalties that rule 5-102 was designed to avoid. As was noted long ago by our Supreme Court, the rule against representing conflicting interests is designed not only "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.]" (*Anderson v. Eaton* (1930) 211 Cal. 113, 116.) Respondent's relationship with his father required him to choose between conflicting duties to the detriment of Lee. Based on the above, we conclude that the circumstances surrounding the real property transactions aggravate respondent's misconduct under standard 1.2(b)(iii).

[11b] Standard 1.2(b)(iii) provides that it is an aggravating circumstance where the "member's mis-

conduct was surrounded by or followed by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct . . ." Respondent argues that his conduct in the property transactions cannot be considered an aggravating circumstance pursuant to this standard because he was not found culpable of any misconduct in these counts and, therefore, there was no misconduct which was surrounded by or followed by overreaching or other ethical violations. We reject this argument on this record. Although the notice to show cause charged four separate counts, the misconduct in this case all involved a single client and all involved essentially the same transaction of aiding Lee to avoid the child support order. Thus, respondent's misconduct in count one of helping Lee disappear, and to that end, moving him to El Paso, was surrounded by and followed by his conduct in the property transactions.

As we have not found respondent culpable of the charged misconduct in counts three and four, we delete the hearing judge's finding in aggravation that respondent's misconduct in these counts significantly harmed Lee. Nevertheless, as indicated above, respondent's misconduct involved a single client and essentially a single transaction and we therefore conclude that harm to Lee is an appropriate aggravating circumstance based on respondent's misconduct in count one. In addition, we agree with the hearing judge that respondent's misconduct in aiding Lee to avoid the child support order significantly harmed the administration of justice. (See std. 1.2(b)(iv).)

Discipline

The hearing judge and OCTC cite to *In re Young, supra*, 49 Cal.3d 257, in support of their respective views on the appropriate degree of discipline. Young was actually suspended for four years with credit for three years interim suspension as a result of his conviction. Young knew his client had committed or been charged with a felony and specifically intended to help the client avoid arrest. Young

13. Respondent does not assert on review that this finding, which is outside the charges contained in the notice to show cause, in any way implicated his due process rights. In

addition, respondent presented evidence at trial in defense of the claim that he represented his father.

also arranged bail for the client under a false name. (*Id.* at pp. 264-265.)

The parties do not cite and our research has not revealed any recent California cases that involved advising a violation of the law. However, in several older cases, the attorneys were given lengthy suspensions for similar misconduct. In *Goldman v. State Bar* (1977) 20 Cal.3d 130, the attorneys were suspended for one year for several instances of improper client solicitation that included advising cappers on how to violate the solicitation laws. The attorneys had approximately ten years of practice with no prior disciplinary record. In *Paonessa v. State Bar* (1954) 43 Cal.2d 222, the attorney was suspended for two years for instructing his clients in two annulment matters not to disclose the existence of children of the marriages and to testify falsely regarding the children. In *Townsend v. State Bar* (1948) 32 Cal.2d 592, an attorney with a prior record of discipline was suspended for three years for advising a client to make a conveyance of property to defraud a creditor.

OCTC cites to three discipline cases from other jurisdictions involving similar misconduct. In two of these cases, it is not clear from the opinions whether the attorneys were found culpable of acts of moral turpitude. (*In the Matter of Disciplinary Proceedings Against Schrank* (1991) 161 Wis.2d 382 [468 N.W.2d 11]; *State ex rel. Nebraska State Bar Ass'n v. Cohen* (1989) 231 Neb. 405 [436 N.W.2d 202].) In *Schrank*, an attorney with no prior record of discipline was suspended for six months for advising a client to hide children from the other parent who had joint custody, for failing to communicate with and return materials to a client, and for failing to cooperate with the disciplinary investigation. In *Cohen*, an attorney with no prior record of discipline was suspended for six months for aiding a client in a plan to hold savings bonds for ransom from the rightful owners and to destroy the bonds if the client did not receive a finder's reward. In the third case, the attorney was found culpable of acts of moral turpitude and was disbarred. (*People v. Calt* (Colo. 1991) 817 P.2d 969.) There, the attorney had no prior record of discipline and was found culpable of assisting a client in preparing a fraudulent statement of settlement in an effort to obtain reimbursement

for the client under a relocation policy of the client's employer.

In another similar non-California case, the attorney was not found culpable of acts of moral turpitude. (*Matter of Wojihoski-Shaler* (Ind. 1992) 603 N.E.2d 1347.) The attorney was suspended for 30 days by agreed disposition as a result of the attorney's conviction for assisting a company that enabled viewers to see television programs descrambled in violation of federal law. The court characterized the attorney's conduct as counseling another on the theft of property rights, but noted that the attorney was a passive participant in the commission of the crime and that there was no evidence that the attorney sought financial gain through her conduct. (*Id.* at p. 1348.)

We agree with the hearing judge that the misconduct in *In re Young* was more egregious than respondent's misconduct. As indicated above, Young had "a specific intent to impede justice with knowledge that his actions permit a fugitive of the law to remain at large." (*In re Young, supra*, 49 Cal.3d at p. 264.) Although respondent acted in conscious disregard of his obligation to uphold the law, as did Young, there is no evidence that respondent assisted Lee with the specific intent to help Lee violate the support order. In addition, Young's conduct in arranging bail for the client under a false name involved dishonesty and constituted a fraud on the court. (*Id.* at p. 265.) No such dishonesty or fraud occurred here.

[12a] Nevertheless, we view respondent's misconduct as more serious than did the hearing judge. Respondent's knowledge of Lee's unlawful purpose in moving, his advice to Lee on how to accomplish that unlawful purpose, and the help he provided to Lee to achieve that unlawful purpose constituted very serious misconduct for an officer of the court. Counseling and aiding clients to violate the law adversely impacts the integrity of the legal profession and the administration of justice, and puts the client in jeopardy of further criminal and/or civil proceedings. Such conduct is flagrant behavior unbecoming an attorney.

[12b] In addition, the enforcement of child support orders is of heightened concern as evidenced by the recent enactment of Welfare and Institutions

Code section 11350.6 and Business and Professions Code section 6143.5. These statutes provide for the suspension of attorneys (as well as other licensed professionals) for non-payment of child support and are a recognition of the seriousness of failing to pay child support in our society.

We also note that Young presented compelling mitigation not found in the present record. The Supreme Court found that Young had good motives for his misconduct in that he intended to convince his client to surrender, not to help his client flee the jurisdiction; that Young undertook appropriate rehabilitative steps; that he had practiced for 20 years without any prior discipline; that he was cooperative with authorities; that he expressed remorse; and that he engaged in the misconduct while suffering from physical, mental, and emotional exhaustion. (*In re Young, supra*, 49 Cal.3d at pp. 268-270.) In contrast, respondent had practiced for 11 years without prior discipline and his misconduct was accompanied by several aggravating factors not found in *Young*. Thus, even though we do not view respondent's misconduct as so egregious as Young's, his misconduct was surrounded by less mitigation and more aggravation than Young's misconduct.

In another case similar to *In re Young*, we recommended one year of stayed suspension and 60 days actual suspension. (*In the Matter of DeMassa* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 737.) The attorney was convicted of harboring a fugitive, an offense that involved moral turpitude per se. DeMassa allowed a client indicted on federal drug charges to spend the night in his home. This crime was essentially the same crime committed by Young. We found compelling mitigating circumstances, including DeMassa's belief that he was at all times doing his best to serve the interests of both his client and the criminal justice system. (*Id.* at p. 754.) Good motives were not part of respondent's misconduct.

[12c] We recognize that we have found respondent culpable of less misconduct than did the hearing judge. Nevertheless, we view the misconduct as more serious than did the hearing judge and we consider the circumstances surrounding the property transactions to amount to significant aggravation. We also do not find the compelling mitigating circumstances that were present in *In re Young* and in *In the Matter of DeMassa*. These factors warrant increasing the hearing judge's recommended discipline. On balance, and in light of all relevant evidence and the above cases which imposed discipline ranging from sixty days actual suspension to disbarment for similar misconduct, we conclude that the prospective one-year actual suspension ordered in *Young*, coupled with three years probation as urged by OCTC, is appropriate in the present case.

RECOMMENDATION

For the foregoing reasons, we recommend that respondent be suspended from the practice of law for a period of three years, that execution of the order of suspension be stayed, and that he be placed on probation for a period of three years on the conditions of probation recommended by the hearing judge, except conditions number 1 and 9, which we modify to reflect an actual suspension of one year. We also recommend that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court and be ordered to take and pass the California Professional Responsibility Examination, as recommended by the hearing judge. Finally, as did the hearing judge, we recommend that the State Bar be awarded costs in this matter pursuant to section 6086.10 of the Business and Professions Code.

We concur:

PEARLMAN, P.J.
STOVITZ, J.