PUBLIC MATTER – DESIGNATED FOR PUBLICATION

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REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of **Joshua M. Dale** A Member of the State Bar.	)	**00-O-14350** **OPINION ON REVIEW**

Respondent, Joshua M. Dale, compromised the integrity of the criminal justice system when he systematically befriended and then cajoled Darryl Geyer, an incarcerated 22-year-old with a 10th grade education, into giving a confession about an arson fire at an apartment building. Geyer had previously confessed to the police about the fire, and the voluntariness of that confession was the key issue upon which he was appealing his second degree murder conviction. Respondent, who was representing the tenants in a negligence lawsuit against the apartment owner arising from the same fire and was facing the owner's summary judgement motion, needed Geyer's statement about the condition of the premises when he set the fire.

Respondent knew that the declaration he obtained from Geyer could be used as evidence at Geyer's re-trial if his conviction were reversed on appeal. Geyer's trial and appellate attorneys refused respondent's requests to contact Geyer, and they advised Geyer not to speak with respondent. Nevertheless, respondent intentionally used his status as an attorney to gain access to Geyer while he was in jail and to meet with him in private. He skillfully took advantage of Geyer's vulnerability and exacerbated Geyer's dissatisfaction with his attorneys.

Respondent offered his services to represent Geyer at his parole hearing if he would sign the incriminating declaration, and Geyer acquiesced. Even after obtaining the declaration, respondent continued to curry favor with Geyer so that he would make himself available as a percipient witness at the civil trial. Respondent ultimately obtained a $400,000 settlement in his civil case.

The hearing judge found respondent culpable of violating rule 2-100 of the Rules of Professional Conduct[1] by improperly communicating with a represented party; committing acts of moral turpitude in violation of Business and Professions Code section 6106;[2] and breach of a fiduciary duty owed to a non-client in violation of section 6068, subdivision (a). She recommended, inter alia, four months' actual suspension. For the reasons set forth below, we modify her culpability determinations, but we nevertheless adopt her disciplinary recommendations.

I. FACTUAL AND PROCEDURAL BACKGROUND

The essential facts material to our decision are the subject of a Joint Stipulation in the disciplinary proceedings below. We nevertheless independently review the record (*In re Morse* (1995) 11 Cal.4th 184, 207), and accordingly our findings are based on our de novo review of the evidence adduced at the hearing below as well as the Joint Stipulation.

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[1]All further references to "rule" are to the Rules of Professional conduct, unless otherwise noted.

[2]All further references to "section" are to the Business and Professions Code, unless otherwise noted.

Darryl Geyer confessed to the police that he set several fires, including a fire to an apartment building at 1011 Bush Street, San Francisco on June 11, 1996. One of the occupants died in the fire, several were injured and many suffered property damage. Attorney Kenneth Quigley was appointed to represent Geyer in the criminal matter (*People v. Geyer*) on June 28, 1996. In July 1996, William Burke and several of the tenants at 1011 Bush Street asked respondent to represent them in a suit for personal injuries (*Burke v. Chen*) against the owner of the apartment building, Grace Chen, based on allegations that the premises were maintained negligently, which contributed to the fire. Geyer was not named in the suit, but he was a percipient witness to the condition of the building at the time he set fire to it.

Geyer was indicted on 13 counts of arson (Penal Code section 451) one count of auto theft (Vehicle Code section 10851) and one count of murder with arson special circumstances (Penal Code sections 187 and 190.2, subd.(a)(17)(H)). His criminal trial commenced on July 23, 1999, and lasted until July 27, 1999, when Geyer withdrew his not guilty plea and submitted a guilty plea to six counts of arson. The homicide charge was submitted to the judge who found Geyer guilty of second-degree murder. However, in a carefully crafted plea agreement, Geyer retained his right to appeal the homicide conviction on the grounds of an illegal confession.

Meanwhile, respondent, who was admitted in 1994 and was inexperienced as a civil lawyer,[3] was facing a motion for summary judgement by the owner's attorneys. Respondent believed that Geyer's declaration about his involvement in setting the fire at 1011 Bush Street, and his observations about the condition of the premises at the time he set the fire, were vital to

[3]Respondent is a criminal defense attorney who is experienced in representing individuals charged with driving under the influence. He has no prior record of discipline.

his ability to defeat the summary judgement motion. Sometime during the pendency of the case, and while Geyer was incarcerated, respondent contacted Quigley and asked him if he could interview Geyer in connection with his civil suit. Quigley refused to give his permission. Nevertheless, on at least three occasions respondent waited in the hallway at the Hall of Justice where inmates were kept while they were awaiting court proceedings, specifically to observe Geyer and make contact with him. The only persons with access to this area were court personnel and attorneys. Respondent succeeded in exchanging nods with Geyer, and on one occasion spoke to him, saying in effect "we are going to have to talk someday."

On July 30, 1999, after the conclusion of the trial, but prior to Geyer's sentencing, respondent visited Geyer in the San Francisco County Jail. During this visit respondent gained direct access to Geyer by using the entrance and the procedures reserved for attorneys rather than regular visitors, thus enabling respondent to speak to Geyer face-to-face and in private, rather than through a glass partition in the public reception area. He told Geyer he would need his statement about the 1011 Bush Street fire for his civil trial. Geyer said he wanted to speak with his attorney before he would agree to give a statement, and he followed up with a letter to respondent on August 5, 1999, stating: "I have been unable to contact my attorney Kenneth M. Quigley about giving you a deposition on the events that took place at 1011 Bush Street. . . . I will be unable to respond to questions in regards to 1011 Bush Street. I'm sure that you understand." Respondent persisted with five more visits to the county jail, all of which were prior to Geyer's sentencing and while Quigley was Geyer's counsel of record. Each time respondent had face-to-face conversations with Geyer in private by utilizing the special

procedures reserved for attorneys. The purpose of these visits was to befriend Geyer in order to cultivate him as a favorable witness in respondent's personal injury case. During these visits, they discussed current events, the challenges of life in jail and Geyer's hopes and dreams, in addition to his involvement as a witness in the *Chen* case.

On August 25, 1999, Geyer told Quigley that he was dissatisfied with him and that he wanted to fire him and employ new counsel. However, Geyer did not succeed in replacing Quigley, who remained his court appointed attorney at the time of the trial in the hearing department below. On September 28, 1999, Geyer was sentenced to 20 years to life, with the possibility of parole, at the earliest, in 2013. On September 30, 1999, Quigley signed and filed a notice of appeal, which was lodged in the Court of Appeal on October 29, 1999. Geyer was listed on the Notice of Appeal as representing himself in pro per.

Meanwhile, on October 21, 1999, respondent again visited Geyer, who by this time had been transferred to San Quentin prison. Respondent brought with him a letter agreement, typed on his letterhead, which stated:

> "Pursuant to our many conversations, I offer you the below contract between the two of us. [¶] If you date and sign the enclosed declaration, under penalty of perjury, I will do what I can to assist you when you come up for parole, including but not limited to, being your attorney if you choose, or your witness. [¶] As your witness at any hearing, I would tell how you took responsibility early on . . . . I will also encourage the tenants of 1011 Bush Street to do the same, and some are willing only if you take the first step by telling the truth about the fire, how you entered the building, and what else occurred in the

basement of that building on June 11, 1996. [¶] The declaration is made up of the facts your [*sic*] told in your video taped confession to the police."

Geyer testified that he was grateful for respondent's offer of legal assistance with his parole hearing since he had no confidence in Quigley and could not afford to hire other counsel. With this contract as an inducement, Geyer acquiesced to signing the declaration, which respondent had prepared and brought with him to San Quentin. The declaration stated, in part:

"In the early morning hours of June 11, 1996, I was walking in the vicinity of Bush Street and Jones with a friend, Gabriel Cano. [¶] As I walked along Jones Street, I noticed an empty door. I entered through that door and found it lead [*sic*] to a basement area. I later found out that this was the basement of 1011 Bush Street. . . . While in the basement of 1011 Bush Street I noticed a large amount of paper and cardboard. I also noticed that the walls of the basement were made of exposed wood. Mr. Cano and I stayed in the basement for approximately ten minutes before deciding to leave. Just before I left the basement, I lit a single match and threw it in some of the paper and cardboard I had seen in the basement area."

However, before Geyer would sign this statement, he insisted that respondent add the following, which was inserted in respondent's handwriting:

"Addendum: I have been assured by Joshua M. Dale, Esq., that this document cannot and will not be used or effect [*sic*] my appeal of my conviction in the San Francisco Superior court matter."

After respondent signed the addendum, Geyer signed the declaration under penalty of perjury.

The one area where there is conflicting evidence relates to the nature of respondent's verbal assurances to Geyer at the time he signed the above statement. Respondent asserts that he assured Geyer that his declaration would not harm his appeal, but that he also discussed how Geyer's statement could be used against him at re-trial if he won his appeal. Geyer testified that he was not advised of the full import of his declaration, and that respondent told him repeatedly that the statement could not hurt him in any respect, but would only help him with his eventual parole hearing. Geyer explained: "My primary intention was to make right what I had done to the tenants but I wouldn't have done it if I thought it would hurt me."

Respondent filed the declaration in the superior court in the *Burke v. Chen* case on October 23, 1999. When Quigley found out about the declaration he was furious and demanded that respondent withdraw it. In a letter dated October 25, 1999, to respondent, Quigley stated that respondent had "used [his] status as an attorney to get in the San Francisco County Jail and interview Mr. Geyer, who is still my client. . . . the result of that interview is that you have obtained a declaration that contains admissions by Mr. Geyer that are devastating to his criminal case. . . . [and] so destructive of Mr. Geyer's interest that it could result in him spending his life in a small cage." The following day, respondent attempted to head-off any fallout from Quigley's anger by writing to Geyer: "Kenneth Quigley is trying to get my law license for talking to you even though you'd fired him, and he wasn't even your attorney after sentencing. I'd say you should expect a visit or letter from him, or his representative, soon . . . . I'll write to you soon regarding all the commotion that your declaration has created. I again think that your

telling the truth is the best thing you could have done." In that same letter, he informed Geyer that he had talked with the district attorney (D.A.) about his appeal and parole, and that the D.A. had told him if Geyer won his appeal, he would only serve eight years. Respondent also advised that the D.A. "agrees that you should do your best to make your first parole hearing count."[4]

Respondent communicated with Geyer by mail on at least three other occasions for the purpose of currying his favor as a witness at the upcoming civil trial. For example, one letter, dated November 3, 1999, said, "Your declaration saved the tenants' case. Thank you. Your letter of apology is spectacular, and the tenant will, and some have already, forgive [*sic*] you for the disruption to their lives. You have much to be proud of and I look forward to visiting soon. . . . you are a special person on earth. . . . [Emphasis in the original.]"

John Jordan was appointed as Geyer's appellate counsel of record on January 18, 2000. Nevertheless, respondent continued to communicate with Geyer. Thus, on January 28, 2000, respondent wrote to Geyer, warning him: "I'd really be careful with any promises if they've seen you. They are the ones that got you convicted, remember?" In the same letter, respondent persisted with his cultivation of Geyer's friendship, stating: "I'm enclosing some things for you like before. I've talked with several of the people at your new location. There are many things that you may do there. . . . I'll be able to do more down the road if you begin to send me promising things about you." Three days later, respondent filed a motion in the civil case to obtain a court order to produce Geyer at the trial. Respondent did not serve the notice on Jordan or otherwise notify him and no attorney appeared for Geyer. The motion was granted on

[4]The D.A. disputed that he had such a conversation with respondent.

February 10, 2000. Respondent settled the *Chen* case in mid-February 2000 for $400,000. He never again communicated with Geyer, and he provided no further legal assistance to him. Geyer lost his appeal, although his declaration did not affect the outcome.

Geyer filed a complaint with the State Bar on May 3, 2000. After an investigation by the State Bar, a three-count Notice of Disciplinary Charges (NDC) was filed on April 3, 2002, alleging respondent violated rule 2-100 by improperly communicating with a represented party; committed acts of moral turpitude in violation of Business and Professions Code section 6106; and violated section 6068 subdivision (a) arising from a breach of a fiduciary duty owed to a non-client. A three-day trial was held in the hearing department commencing on April 22, 2003. Kenneth Quigley, Geyer's trial attorney, and John Jordan, Geyer's appeals attorney, offered testimony, and the videotape testimony of Geyer also was admitted in evidence.[5] Seven good character witnesses testified on behalf of respondent.

The hearing judge found respondent culpable of all three counts, and she recommended that respondent be suspended for one year, stayed, and placed on probation for two years, with conditions, including four months' actual suspension. As we discuss in detail below, we do not agree with hearing judge's finding of culpability under rule 2-100, but adopt her findings and conclusions with respect to moral turpitude and breach of fiduciary duty. We also adopt her disciplinary recommendations.

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[5]Prior to trial, Geyer's video deposition was taken, and the parties stipulated that the videotape and transcript could be used at trial in lieu of his personal appearance, subject to valid objections.

II. DISCUSSION

A. Count One: Communication with a Represented Party (Rule 2-100(A))

Respondent was charged in Count One of the NDC with communicating with a represented party in violation of rule 2-100(A). The rule provides: "While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer."[6]

Respondent argues that he did not violate rule 2-100 because: 1) Geyer was not represented by an attorney at the time respondent obtained his declaration; and 2) Geyer was not a party to the civil case, *Burke v. Chen.*

We can readily dispose of respondent's first contention. Respondent stipulated that his meeting with Geyer on October 21, 1999, when he obtained Geyer's declaration, was the culmination of at least five previous meetings, all of which took place while Geyer was awaiting sentencing and was represented by Quigley. Additionally, respondent communicated with Geyer at least two more times while Geyer was represented by appellate counsel, John Jordan. From

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[6]Versions of this "no contact" rule are in effect in all fifty states. Twenty-seven states use the term "party" in their analogous rules to rule 2-100. Of those, eighteen states (Alabama, Arkansas, Arizona, Colorado, Connecticut, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, New Mexico, Pennsylvania, Rhode Island, West Virginia, Wisconsin, and Wyoming) have provided drafter's Commentary to expressly clarify that the rule covers any person whether or not a party to a formal proceeding. Twenty-two states use the word "person" and clearly intend the rule to prohibit communications with any person who is represented by counsel, whether or not a party in a proceeding (Delaware, Florida, Georgia, Hawaii, Idaho, Louisiana, Maryland, Massachusetts, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Oregon, Oklahoma, South Dakota, Tennessee, Texas, Utah, Virginia, and Vermont).

the outset, respondent's communications were directed at securing Geyer's declaration and, ultimately, his testimony at trial about his involvement with the arson fire – the very facts that were the crux of Geyer's defense at his murder trial and were the basis of his appeal.

Respondent's second contention that rule 2-100 is inapplicable because Geyer was not a represented "party" in the *Burke v. Chen* personal injury suit is not so readily disposed of. Geyer's involvement with the civil suit was only as a witness. Thus, in order to find a violation of rule 2-100, we must construe the proscription against communicating with a represented "party" to mean represented "person." This was the approach taken by the hearing judge below, but we find very limited support for this broad interpretation of rule 2-100.

There is one California case which, in dicta, interpreted the term "party" to mean "person." In *Jackson v. Ingersoll-Rand Co.* (1996) 42 Cal.App. 4th 1163, 1167, the appellants sought review of an order disqualifying defense counsel pursuant to rule 2-100 because the attorney communicated with the former wife of a co-plaintiff in a personal injury case. The former wife had been dismissed because she no longer had a claim for loss of consortium. In reversing the order of disqualification, the Court of Appeal asked: "Was Ms. Jackson a represented party? [Fn. omitted.] Under Rule 2-100, 'party' broadly denotes person, and is not limited to litigants, so Ms. Jackson's dismissal from the case does not conclusively settle the question. (Drafter's notes, Rule 2-100.)" The court nonetheless found rule 2-100 was not applicable because, even if the ex-wife was represented by counsel, the defendant's counsel had no knowledge of her prior representation by the plaintiff's counsel. (*Ibid.*) We find some additional support for the hearing judge's interpretation in the drafter's Discussion section that

follows the rule. It states: "Rule 2-100 is intended to control communications between a member and *persons* the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. [Emphasis added.]" Although we may look to the Discussion accompanying the rule as an interpretative aid, it cannot add an independent basis for imposing discipline. (Rule 1-100(C).)

We find scant authority in the drafting history of rule 2-100, the rules of statutory construction, and the decisional law for construing rule 2-100 so as to prohibit contacts with a non-party. Indeed, the drafting history of rule 2-100 provides us with precious little guidance.[7] When the rule was adopted by the Supreme Court in 1988, changes were made to the predecessor rule 7-103, which were directed at contacts with corporate parties. No consideration was given to the usage of the term "party" or whether non-parties were to be included within the definition.[8]

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[7]See Request That the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation (Dec. 1987) Office of Professional Standards of the State Bar of California, pp. 24-26.

[8]The term "party" was carried over from the earlier California rule 7-103 and its predecessor rule 12, both of which were patterned on American Bar Association (ABA) Model Code DR 7-104. The current version of ABA Model Rules of Professional Conduct, rule 4.2 (Model Rule 4.2) was amended in 1995 to substitute the word "person" for "party" specifically to clarify that the rule applies to non-parties. (See drafter's comment to Rule 4.2.) In its current form Model Rule 4.2 provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a *person* the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." (Emphasis added.) Many states have followed suit and similarly amended their no contact rules to apply to persons instead of parties. (See fn. 7 *ante*.)

Turning to rules of statutory construction, we note that the language of rule 2-100 specifically uses the term "person" within its own definition of "party."[9] We therefore must presume that the drafters were aware of the distinction between "party" and "person" when they simultaneously used both terms in the very same statutory definition. " ' "If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose." [Citation.]' " ' (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743.) Moreover, ' " '[w]e are required to give effect to statutes "according to the usual, ordinary import of the language employed in framing them." [Citations.]' " ' (*Ibid.*)

The few cases that have interpreted rule 2-100 have given it a narrow construction, albeit while focusing on different provisions of the rule than those of concern here. Thus, in *Jorgensen v. Taco Bell Corp.* (1996) 50 Cal.App.4th 1398, 1401, the Court of Appeal expressly rejected Taco Bell's assertion that the rule should be construed broadly, finding instead that "Rule 2-100 should be given a reasonable, commonsense interpretation, and should not be given a 'broad or liberal interpretation' which would stretch the rule so as to cover situations which were not contemplated by the rule." (Citing *Continental Ins. Co. v. Superior Court* (1995) 32 Cal.App.4th 94, 120-121.)

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[9]Specifically, rule 2-100 (B) states: "For purposes of this rule, a 'party' includes: (2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such *person* in connection with the matter which may be binding upon or imputed to the organization . . . . [Emphasis added.]"

Discipline has been imposed under rule 2-100 and its predecessors only in those instances when a member made an ex parte communication with an opposing party.[10] (See, e.g., *Crane v. State Bar* (1981) 30 Cal.3d 117 [attorney communicated directly with opposing party]; *Mitton v. State Bar,* (1969), 71 Cal.2d 525 [attorney for the plaintiff communicated with defendant]; *Turner v. State Bar* (1950) 36 Cal.2d 155 [attorney culpable when he had opposing party sign settlement papers]; *Chronometrics, Inc., v. Sysgen, Inc.* (1980) 110 Cal.App.3d 597 [member disqualified for communicating with a represented cross-defendant in a civil action]; *In the Matter of Wyshak* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 70 [attorney communicated directly with opposing party whom he knew to be represented by counsel during litigation].)

Finding no rule of construction or persuasive legal precedent to support a broad interpretation, we conclude we are not at liberty to re-write rule 2-100, which by its plain language is limited to a represented "party." We recognize that a strict construction of the rule, limiting its applicability only to represented parties to litigation or to a transaction[11] could, as in this case, defeat the important public policy underlying the rule, which was described in *United States v. Lopez, supra*, 4 F.3d 1455, 1458-1459: "The rule against communicating with a represented party without the consent of that party's counsel shields a party's substantive interests against encroachment by opposing counsel . . . . [T]he trust necessary for a successful

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[10]Several cases have considered the application of the no contact rule to individuals in the dual role of witness/party. (See, e.g., *Mills Land & Water Co. v. Golden West Refining* Co. (1986) 186 Cal.App.3d 116, 126-128; *United States v. Talao* (9th Cir. 2000) 222 F.3d 1133, 1140; *United States v. Lopez* (9th Cir. 1993) 4 F.3d 1455.)

[11]The Discussion accompanying rule 2-100 makes clear that it is not limited to a litigation context.

attorney-client relationship is eviscerated when the client is lured into clandestine meetings with the lawyer for the opposition." Our Supreme Court echoed this same assessment in *Mitton v. State Bar*, *supra*, 71 Cal.2d 524, 534: "[The no contact rule] shields the opposing party not only from an attorney's approaches which are intentionally improper, but, in addition, from approaches which are well intended but misguided. [¶] The rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such role. If a party's counsel is present when an opposing attorney communicates with a party, counsel can easily correct any element of error in the communication or correct the effect of the communication by calling attention to counteracting elements which may exist."

The instant case illustrates how the concern about interference with the attorney-client relationship as expressed by the Ninth Circuit Court of Appeals and the Supreme Court is equally relevant when the represented individual is not a party to the proceedings. But we defer to the Board of Governors and the Supreme Court for any curative efforts should they determine that the purpose of rule 2-100 is ill-served by its present language. We therefore are compelled to conclude that respondent is not culpable for his communications with Geyer under rule 2-100 because Geyer was not a represented party in the *Burke v. Chen* lawsuit, and we dismiss Count One with prejudice.

B. Count Two: Moral Turpitude (Section 6106)

Our exposition of rule 2-100 does not absolve respondent of culpability. On the contrary, the same misconduct that is alleged to be the basis of a rule 2-100 violation also is alleged in

Count Two of the NDC to constitute acts involving moral turpitude in violation of section 6106. The appropriate resolution of this case does not depend on how many rules of professional conduct or statutes proscribe the same conduct. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.) Indeed, as we discuss below, the moral turpitude allegations provide the underpinnings to our analysis of respondent's misconduct.

Respondent was so focused on avoiding the technical prohibitions of rule 2-100, he was blinded to the larger issue of the overreaching inherent in the circumstances surrounding his relationship with Geyer. Eliciting the incriminating statement from Geyer while he was incarcerated and awaiting the appeal of his confession to the police was the height of irresponsibility and constituted at least gross neglect. Gross negligence is a well established basis for a finding of moral turpitude. (See *Gendron v. State Bar* (1983) 35 Cal.3d 409, 425; *In the Matter of Moriarty* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 9; *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297.) Respondent's conduct is particularly egregious because he was an experienced criminal attorney who knew that Geyer's declaration could be used as evidence to convict Geyer at a re-trial.

We are equally troubled that respondent's conduct was surrounded by overreaching because he took advantage of Geyer's vulnerability as an incarcerated young man with a 10th grade education. He plied Geyer with small gifts such as magazines and stamps, and wrote: "you have much to be proud of" and that he was "a special person on earth." He also took advantage of the county jail procedures reserved for attorneys in order to meet with Geyer in private, and he used these opportunities to systematically befriend him. Respondent then

leveraged this friendship to drive a wedge between Geyer and his attorneys, by writing, for example, "Remember, they are the ones who got you convicted."[12] He intentionally waited until after sentencing to take advantage of the window of time when respondent believed Geyer was acting in pro per to extract Geyer's written confession.

Respondent was not free to unilaterally determine that Geyer was without representation and therefore available to communicate with respondent; he was obliged to either confirm the status of Geyer's representation with Quigley or at a minimum seek authorization from the criminal court with jurisdiction over Geyer's case. (*Jackson v. Ingersoll-Rand Co., supra*, 42 Cal.App. 4th at p. 1168.) Even assuming, arguendo, that respondent had a reasonable belief that Geyer was unrepresented by counsel when he met with him at San Quentin on October 21, 1999, we are compelled to conclude that respondent was culpable of misconduct involving moral turpitude by allowing Geyer to act as his own counsel. Respondent was well aware that Geyer's attorneys objected to his cooperation with respondent, yet he circumvented their objections and ultimately convinced Geyer to reject his attorneys' advice.[13] In so doing, respondent improperly saddled Geyer with the responsibility of representing himself in his negotiations with respondent. Given the intellectual inequality between respondent and Geyer and Geyer's comparative inexperience with legal matters, we are struck by the utter disparity in their

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[12]Geyer was a product of numerous foster care families, had been physically and sexually abused, and had been in the juvenile justice system for years.

[13]Respondent led Geyer to believe that respondent was being honest and had Geyer's best interests at heart, while his attorneys were inept and dishonest. He caused Geyer to second guess and ultimately disregard Quigley's advice. In Geyer's words: "One [attorney] got me believing one way and then another one got me believing the other way. It was kind of a push/pull thing. . . . And Mr. Dale was the one I was having the most contact with at the time."

respective bargaining power. "When the accused assumes functions that are at the core of the lawyer's traditional

role . . . he will often undermine his own defense. Because he has a constitutional right to have his lawyer perform core functions, he must knowingly and intelligently waive that right." (*United States v. Kimmel* (9th Cir. 1982) 672 F.2d 720, 721.) We find no evidence in this record that Geyer gave a knowing and intelligent waiver of his right to counsel at the time that respondent motivated him to embark on his perilous journey to promised salvation. Respondent thus subverted Geyer's right to the protections of the criminal justice system to respondent's own selfish ends. Accordingly, we find respondent committed additional misconduct involving moral turpitude.

Based on the foregoing acts involving overreaching, the additional allegations in Count Two concerning respondent's false and misleading statements to induce Geyer to sign a confession are not essential to our culpability determination. But these allegations are additive, and therefore we address them here. Respondent contends that he truthfully represented to Geyer that his appeal would not be affected by his confession, which ultimately was not considered by the court in denying his appeal. In reality, respondent's explanation to Geyer was only a half-truth. The unvarnished truth was that if Geyer succeeded on appeal, his declaration would have provided the crucial evidence to convict him at his re-trial. Respondent also testified he made Geyer aware of the countervailing considerations in signing the declaration and that Geyer had given up on his appeal because he thought he would not win. The hearing judge found respondent's testimony in this regard was not credible and we agree. Geyer testified "I

wouldn't have [signed the declaration] if I thought it would hurt me." Even though Geyer was an admitted perjurer, the overwhelming evidence supports his testimony. Geyer's insistence on the hand written addendum to his declaration stating that he had "been assured by Joshua M. Dale, Esq., that this [declaration] cannot and will not be used or affect my appeal of my conviction in the San Francisco Superior court matter" makes no sense if he were willing to forfeit the benefits of his appeal on re-trial. It also does not follow that Geyer, who was highly motivated to obtain early parole, would at the same time be willing to do something that could result in receiving a life sentence *without* the possibility of parole.

The fundamental illogic of this situation compels the conclusion that, at best, respondent was grossly negligent in not fully explaining the consequences of Geyer's cooperation, or at worst, that respondent intentionally misrepresented the legal effect of his second confession. A finding of gross negligence in creating a false impression is sufficient for violation of section 6106. (*In the Matter of Moriarty*, *supra*, 4 Cal. State Bar Ct. Rptr. 9, 15; *In the Matter of Wyrick* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 83, 90-91.) Acts of moral turpitude include concealment as well as affirmative misrepresentations. (*Grove v. State Bar* (1965) 63 Cal.2d 312, 315; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266.) Furthermore, " '[n]o distinction can . . . be drawn among concealment, half-truth, and false statement of fact. [Citation.]' [Citation.]" (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) We thus conclude that in addition to gross neglect accompanied by overreaching, respondent is culpable of moral turpitude as charged for making misleading statements in order to induce Geyer to sign a confession.

C. Count Three: Fiduciary Duty to a Non-client (Section 6068, subd.(a))

Count Three of the NDC incorporates by reference the misconduct alleged in Counts One and Two and further alleges that respondent breached his common law fiduciary duty to Geyer, thereby willfully violating section 6068, subdivision(a), when he offered to represent Geyer at his parole hearing and gave him advice about his criminal appeal and parole while at the same time representing the conflicting interests of the tenants who needed Geyer's confession to "save" their case. Respondent argues that this case in essence is about his right to interview witnesses in his zealous representation of the victims of the fire and that he owed no fiduciary duty to Geyer, even if Geyer's testimony resulted in further criminal prosecution, citing *De Luca v. Whatley* (1974) 42 Cal.App.3d 574, 576.

We believe the instant matter implicates vastly different issues than the mere interviewing of third party witnesses as discussed in *De Luca*. The record contains clear and convincing evidence that respondent led Geyer to believe they had a special relationship of trust and confidence and that his interests would be protected by respondent. Respondent's written communications with Geyer were on his letterhead and were signed "Joshua M. Dale, Esq." Each of respondent's letters was denoted as "confidential legal correspondence." Respondent even admonished Geyer in a letter dated January 28, 2000: "I was quite surprised to see that you may have threatened our confidentiality by submitting your letter to the general mail at San Quentin." Respondent even offered a written "contract" for services, promising to help Geyer as his attorney or as a witness at his parole hearing if Geyer signed the declaration (which he did). In a letter dated November 3, 1999, respondent confirmed: "I've made you a promise and I'll do

what ever is legal and possible to help you like I promised. . . ." In response, Geyer wrote: "I promise to follow through with my word and come to [testify at] your trial."

Respondent also provided legal advice to Geyer in the November 3d letter: "I've prepared some research on your parole hearing already, and included it with this letter. As you can see, there are many factors that you'll be reviewed on then." In yet another letter, respondent advised Geyer: "I've talked with several of the people at [San Quentin]. Here are many things that you may do there. . . . I'll be able to do more for you down the road if you begin to send me promising things about you." He also informed Geyer that he had consulted with the D.A. about the effect of his appeal on the length of his sentence, and advised Geyer that the D.A. "agrees that you should do your best to make your first parole hearing count." Geyer expressed his gratitude for their relationship in a letter to respondent: "It means a lot to me to have someone believe in me and to give me hope for the future."

Respondent succeeded in supplanting Geyer's relationship with his attorney, Quigley, and instilled in Geyer the belief that he – not Quigley – had Geyer's best interests at heart. Geyer testified that he believed that respondent "was a good person and I thought he was looking out for me." He also thought that respondent was "just being nicer than Mr. Quigley was . . . which led me to believe that he was probably the more honest one at the time." He further testified, "And he, you know, make it sound peachy like everything was going to be great, and that if I did this, it was good for me."

" 'The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed and who accepts that

trust and confidence is in a superior position to exert unique influence over the dependent party.' [citation.]" (*Beery v. State Bar* (1987) 43 Cal.3d 802, 813.) Respondent assumed a fiduciary duty towards Geyer, a vulnerable criminal defendant, when he used his superior knowledge and position as an attorney to create a confidential relationship of trust and dependancy. In so doing, he caused Geyer to reject his attorneys' advice and accede to respondent's wishes.

Having assumed a fiduciary duty, respondent owed Geyer "the same high duty of honesty and obedience to fiduciary duty as if he were acting as [his] attorney. [Citations.]" (*In the Matter of Wyshak, supra*, 4 Cal. State Bar Ct. Rptr. 70, 80; see also *Guzzetta v. State Bar* (1987) 43 Cal.3d 962, 979.) This duty of honesty and obedience required that respondent ensure that all of the risks and consequences of Geyer's actions were fully known and understood by him. (*In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 242.) This duty also required that respondent ensure that Geyer's interests were fully protected and that the disparity in bargaining power be equalized. This clearly is not what happened in this case.

"[W]hen an attorney assumes a fiduciary relationship and violates his duty in a manner that would justify disciplinary action if the relationship had been that of attorney and client, he may properly be disciplined for his misconduct. (*Clark v. State Bar* [1952] 39 Cal.2d [161,] 166)." (*In the Matter of McCarthy* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 364, 384; accord, *In the Matter of Hultman, supra*, 3 Cal. State Bar Ct. Rptr. 297, 307.) The Supreme Court reaffirmed this position in *Beery v. State Bar, supra*, 43 Cal.3d at p. 813: "An attorney's violation of the duty arising in a fiduciary or confidential relationship warrants discipline even in the absence of an attorney-client relationship." (Accord, *Galardi v. State Bar* (1987) 43 Cal.3d

683, 691; *Worth v. State Bar* (1976) 17 Cal.3d 337, 341; *Lewis v. State Bar* (1973) 9 Cal.3d 704, 713.) Accordingly, we find respondent culpable as charged in Count Three of breaching his fiduciary duty to Geyer, thereby violating section 6068, subdivision(a).

III. DISCIPLINE DISCUSSION

To properly assess the degree of recommended discipline, we first consider each case on its own facts as well as the evidence in mitigation and in aggravation. (See, e.g., *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 316.)

A. Mitigation

The hearing judge found that respondent's five years of practice without a history of discipline was too short a time period to constitute mitigation. We agree. (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 473; Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e)(i).)[14]

Respondent presented seven character witnesses, who testified that he is honest and forthright. Among these witnesses were three attorneys who all worked with respondent and had opportunity to observe respondent's interactions with his clients. (Std. 1.2(e)(vi).)

Howard Spector, an attorney for nine years, specializes in personal injury and workers' compensation cases. Spector met respondent while attending the same law school, and they shared space in the same office suite. Spector testified that respondent is professional with his clients and that he is an extremely moral and honest person and an attorney of the highest

[14]All further references to standards are to these Standards for Attorney Sanctions for Professional Misconduct.

caliber. Spector was aware of the charges against respondent and was of the opinion that respondent would never intentionally violate a rule of professional conduct.

Alexander Perez, an attorney for ten years, is admitted to practice in California, New Jersey, and New York. Perez also met respondent while attending the same law school and they shared office space. Perez remained friends with respondent while practicing law in Los Angeles and after returning to the Bay Area, Perez had almost daily contact with respondent. He had great admiration for respondent and testified that he was one of the most honest people Perez knew. Perez also testified that respondent was very hardworking and served the legal community by publishing and maintaining the California Drunk Driving treatise.

David Uthman, an attorney for eight years, initially met respondent at the police academy over twenty years ago. The two men have a professional as well as personal relationship. Respondent helped Uthman establish a law practice when he was first admitted, they previously shared office space, and they have had at least monthly contact with each other over the last five years. Uthman testified that the respondent is an honest, earnest, and zealous attorney. He further stated that he has never observed respondent to lie to other people, and that it was his opinion that it was not within respondent's character to lie in order to induce a client to sign a confession.

David Hunt, a general contractor for twenty-six years, has known respondent since 1997, when he retained respondent as his attorney. They developed a friendship and Hunt provided construction services to respondent. Hunt testified that over the years he asked respondent for

legal advice and respondent was always very forthright and that he trusted respondent's opinions.

Mary Clark, a retired pension analyst, has known respondent for eight years and considers him to be a very good friend. Clark testified that respondent is very kind, a noble man, a gentleman and that he was incapable of making false and misleading statements.

John Newmeyer, an epidemiologist for thirty-three years, holds a Ph.D. from Harvard University. The two men had known each other for five years and were house mates at the time of the hearing. Newmeyer testified that respondent is a man of great trustworthiness and that he has never witnessed respondent misleading anyone that they have mutually known.

Finally, Dale Fisher, who is a customer relations person for a hardware company, met respondent when he was working as a bartender while attending law school. Fisher and respondent have remained friends for twelve years, and they speak with each other two to three times a week. Fisher testified that respondent is a very honest and loving person and that he would go out of his way to help anybody. He based his opinion on past help respondent has given him and other friends throughout the years. Fisher further testified that respondent had never lied to him and was always honest and up-front.

These character witnesses not only knew respondent well, they came from a wide arena within the community. Accordingly, we give great weight to this testimony.

Respondent cooperated with the State Bar by entering into a comprehensive stipulation of facts, which is deserving of significant mitigation credit. (Std. 1.2(e)(v).)

B. Aggravation

The hearing judge found respondent committed multiple acts of wrongdoing. (Std. 1.2(b)(ii).) We agree. Respondent communicated with Geyer over the express objections of his attorneys, not once or twice, but repeatedly. These were not innocuous conversations, but were purposely designed to groom Geyer as a witness for respondent's trial.

Although respondent's misconduct was surrounded by concealment and overreaching (std. 1.2(b)(iii)), the hearing judge did not consider this in aggravation because such a finding would be duplicative of the misconduct comprising acts of moral turpitude. We agree and do not consider this in aggravation.

We adopt the hearing judge's finding in aggravation that respondent's misconduct significantly harmed the administration of justice. (Std. 1.2(b)(iv).) In actuality, his conduct undermined Geyer's relationship with his attorneys and compromised his Fifth and Sixth Amendment rights.

Lastly, the hearing judge found as aggravation that respondent demonstrated indifference toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) We would characterize respondent's attitude towards his conduct not as indifference, but rather a failure to recognize the serious consequences of his misbehavior, which we find to be an aggravating circumstance. (Std. 1.2(b)(v).)

C. Degree of Discipline

The hearing judge's analysis of the appropriate discipline relied on cases involving rule 2-100 violations, which range from reproval to ninety days' actual suspension. (*Abeles v State Bar* (1973) 9 Cal.3d 603; *Turner v. State Bar*, *supra*, 36 Cal.2d 155; *Carpenter v. State Bar*

(1930) 210 Cal. 520; *Mitton v. State Bar*, *supra*, 71 Cal.2d 525.) However, as we discussed *ante*, the focus of this case is on respondent's misconduct involving moral turpitude and breach of fiduciary duty.

Under standard 2.3 (moral turpitude) discipline can range from actual suspension to disbarment. Standard 2.3 provides: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a . . . client or another person or of concealment of a material fact to a . . . client or another person shall result in actual suspension or disbarment . . . depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law." Respondent's misconduct involved concealment, overreaching and it was closely aligned with his practice. Since the standards are to be construed in light of decisional law (*In the Matter of Respondent F* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 17, 30), we look to those cases involving overreaching resulting in prejudice to a vulnerable client or third party.

Although we uncovered no cases setting forth facts similar to the instant case, we found two cases where attorney misconduct constituting moral turpitude resulted in the compromise of the rights of criminal defendants. In both instances the attorney involved was a prosecutor. In *Price v. State Bar* (1982) 30 Cal.3d 537, a prosecutor with nearly 12 years' experience, received two years' actual suspension for committing acts of moral turpitude involving his alteration of exculpatory evidence in a trial of a defendant charged with two murders. The defendant ultimately was convicted of second degree murder. Without either the knowledge or consent of the defendant's counsel, the prosecutor visited the defendant in jail to obtain a promise from him

that he would not pursue an appeal in exchange for a lighter sentence. His sole motivation was to keep the issue of his alteration of the evidence from being revealed on appeal. When the prosecutor's superior learned of the incident, he reported the misconduct.

In rejecting the Review Department's recommendation of disbarment, the court considered in mitigation the prosecutor's cooperation with the State Bar investigators, his stipulation to the essential facts, his emotional stress due to a heavy workload, and that he was remorseful. Additionally, the court considered the testimony of seven witnesses who attested to the petitioner's integrity.[15]

The other case, *Noland v. State Bar* (1965) 63 Cal.2d 298, involved prosecutorial misconduct that prejudiced the rights of criminal defendants in a more general sense. In *Noland*, the State Bar recommended public reproval of an assistant district attorney who conspired with a clerk of the court to remove 65 names of pro-defense jurors from a list of prospective jurors. By tampering with the selection of potential jurors to gain advantage at subsequent trials, the prosecutor compromised the basic Sixth Amendment guarantee of a trial by an impartial jury. (*Id*. at p. 302.) His misconduct thus constituted a calculated interference with the administration of justice amounting to moral turpitude. (*Ibid.*) The Supreme Court in rejecting the recommended discipline, imposed 30 days' actual suspension because of the prosecutor's

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[15]Justice Richardson, dissenting, urged disbarment. Joined by Justices Bird and Kaus, the dissent echoed the concerns present in the instant matter: "The setting in which petitioner's misbehavior occurred was the prosecution of a defendant charged with multiple murders, the most serious of criminal offenses." (*Price v. State Bar, supra,* 3 Cal.3d at p. 551.) The dissent concluded that it was "self evident" that the misconduct "strikes directly at the very integrity of the judicial process. Such conduct is so violative of every sense of duty and honor as to justify amply the State Bar's recommendation of disbarment." (Ibid.)

"dismaying lack of appreciation of the impartiality required in our traditional jury system." (*Id.* at p. 303.) Such discipline was deemed minimally necessary because "As an active prosecutor, he must be discouraged from attempting any further zealous abuses of judicial administration." (*Ibid.*)

In the remaining cases, an attorney was found culpable of overreaching involving vulnerable individuals, but the misconduct arose in a civil context. In *In the Matter of Johnson*, *supra*, 3 Cal. State Bar Ct. Rptr. 233, we imposed two years' actual suspension as the result of an attorney who exploited her superior knowledge and position of trust to the detriment of a vulnerable relative by borrowing funds from the relative's personal injury settlement and not repaying them. In addition to moral turpitude, we found a violation of former rule 8-101 for the failure to place the settlement funds in a trust account and pay the remainder promptly. In mitigation we found she had 11 years of practice without discipline and the lack of any other charges filed since the inception of the matter. In aggravation we found multiple acts of wrongdoing that significantly harmed her client. Further aggravation was the attorney's indifference towards rectification or atonement and her failure to make restitution.

In *Glickman v. State Bar* (1973) 9 Cal.3d 179, an attorney was given five years' suspension, stayed, five years' probation, and one year actual suspension for taking advantage of a client for financial gain and committing an act involving moral turpitude. The attorney offered a client a one-half interest in three lots located in San Francisco. This was done to obtain funds that the petitioner needed to purchase an apartment building. The attorney told the client that the lots were unencumbered but he subsequently obtained a loan using the lots as security.

Eventually the attorney defaulted on his loan payments and the lots were foreclosed causing injury to the client. The court concluded that the petitioner intentionally deceived his client and abused the trust and confidence his client placed in him in order to gain a financial advantage.

In the case of *In the Matter of Gillis* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 387, an attorney sold his residential property to his client in exchange for a portion of settlement proceeds respondent had obtained for that client as the result of a settlement of a claim for the wrongful death of the client's son. We imposed six months' actual suspension for culpability in a single client matter under rule 3-300 arising out of his failure to disclose the many potential problems and risks inherent in the sale and the circumstances of the sale which were unfair and partially for his own benefit, thereby involving a breach of fiduciary duty and acts of moral turpitude. We found an additional act of moral turpitude because Gillis deliberately attempted to mislead the State Bar investigator, and a violation of section 6068, subdivision (e) (failing to maintain a client's confidences). Gillis' acts were not intentional, (except for misleading State Bar investigation) but we did find gross negligence. In aggravation we found multiple acts of misconduct. We gave mitigative weight to the respondent's 26 years of practice without prior discipline.

We find the *Price* and the *Noland* cases to be the most comparable, indicating a broad range of possible discipline from two years' to 30 days' actual suspension. The civil cases such as *Johnson* and *Gillis* reflect an equally wide range of possible discipline. Respondent's misconduct was serious, but it was directed towards a single individual and respondent has no other record of discipline. (*Boehme v. State Bar* (1988) 47 Cal.3d 448, 451-452; *Edwards v.*

State Bar (1990) 52 Cal.3d 28, 36-37, 39.) We are also impressed with the strength of his good character testimony and his cooperation with the State Bar in entering into a broad Stipulation of Facts. Also, his misconduct occurred more than five years ago without any evidence of additional misconduct, which may be considered as a factor in deciding the appropriate discipline. (*Chefsky v. State Bar* (1984) 36 Cal.3d 116, 132.)

Nonetheless, respondent's failure to understand how severely he compromised Geyer's rights and how seriously he subverted the interests of justice cause us serious concern. The primary purposes of the disciplinary proceedings are the protection of the public, the courts, and the legal profession; the maintenance of high professional standards by attorneys; and the preservation of public confidence in the legal profession. (Std. 1.3; *In re Morse*, *supra*, 11 Cal.4th at p. 205.) In view of his lack of recognition of the serious nature of his wrongdoing, there is a risk that he may again commit similar misconduct. Were it not for his mitigation evidence, and in particular his character witnesses and his cooperation with the State Bar, we would recommend at least six months' actual suspension for the misconduct that occurred here. We adopt the discipline recommended by the hearing judge of four months' actual suspension as both necessary and appropriate in this case.

IV. RECOMMENDATION

We recommend that respondent Joshua M. Dale be suspended from the practice of law in the State of California for one year, that execution of this suspension be stayed, and that respondent be placed on probation for two years on the following conditions:

1. That respondent be actually suspended from the practice of law in the State of California during the first four months of probation.

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

3. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. (See Bus. & Prof. Code, § 6002.1, subd. (a)(5).) Respondent's home address and telephone number will *not* be made available to the general public. (Bus. & Prof. Code, § 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

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

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

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

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

5. Subject to the proper or good faith assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer any inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.

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

7. Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. And, at the end of the probationary term, if respondent has complied with the conditions of probation, the Supreme Court order suspending respondent from the practice of law for one year will be satisfied, and the suspension will be terminated.

V. PROFESSIONAL RESPONSIBILITY EXAMINATION

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

VI. RULE 955

We further recommend that respondent be ordered to comply with rule 955 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

VII. COSTS

We further recommend that the costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such

costs be payable in accordance with Business and Professions Code section 6140.7.

EPSTEIN, J.

We concur:

STOVITZ, P. J.
WATAI, J.