

**PUBLIC MATTER – DESIGNATED FOR PUBLICATION**

Filed December 13, 2002

**REVIEW DEPARTMENT OF THE STATE BAR COURT**

In the Matter of

**WILLIAM BENSON PEAVEY, JR.,**

A Member of the State Bar.

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**98-O-02234; 00-O-14818**

**OPINION ON REVIEW**

Respondent, WILLIAM B. PEAVEY, JR., was found culpable of seven counts of misconduct including failure to report a civil judgment for fraud to the State Bar, failure to avoid interests adverse to a client, violating his fiduciary duty and committing acts of moral turpitude and dishonesty. The hearing judge recommended that respondent receive three years' suspension, execution stayed, and three years' probation on conditions including that respondent be actually suspended for two years and until he makes restitution.

Respondent requested review, contending that the decision is not supported by the weight of the evidence and that the appropriate discipline is three months' actual suspension with restitution.

Based on our independent review of the record, we generally adopt the hearing judge's findings and conclusions. We also believe that the recommended suspension is clearly warranted and we so recommend to the Supreme Court.

**PROCEDURAL SUMMARY**

The Office of Chief Trial Counsel (OCTC) filed a Notice of Disciplinary Charges (NDC) in case no. 98-O-02234 on August 2, 2000. Respondent timely filed his response to the NDC. On February 27, 2001, OCTC filed an NDC in case no. 00-O-14818. Respondent timely filed his response. The two matters were consolidated on March 12, 2001.

On April 3, 2001, the parties filed a partial stipulation as to undisputed facts.

### **HEARING JUDGE'S FINDINGS OF FACT**

Respondent was admitted to the practice of law in the State of California on December 19, 1973. He has no prior discipline.

In about September of 1995, respondent paid a vanity press about \$76,000 to print 5,000 copies of his book Dignity of the Soul, The Story of Filipino Bravery in World War II. The copies were priced at \$17.95 each, but at the time of the hearing below, the majority of copies were in storage, unsold.

#### **98-O-02234 - The Henson Matter**

The hearing judge found that respondent had represented the Hensons in several matters in the course of 20 years since the late 1970's. Respondent represented Myrtle Henson in the late 1970's in an employment matter. In 1981, the Hensons and some other parents retained respondent to represent their children in a curriculum dispute with their school. In 1988, George Henson and his two daughters were represented by respondent in their personal injury claim. The Hensons were satisfied and pleased with the representations and the results.

The parties stipulated that on May 30, 1994, respondent borrowed \$25,000 at 10 percent interest per annum from the Hensons, payable in full on November 1, 1994. The money was to be used to produce respondent's book. The Hensons were given the option to convert this loan into a partnership interest to share in the proceeds of the sale of the book. The Hensons borrowed \$24,000 from their credit union at 12 percent interest (\$1,000 of their money was put in the loan) to make the \$25,000 loan based on respondent's assurance that the book sales would make enough money, that Mr. Henson would not have to work anymore and that they would be paid in full in six months. The Hensons were given a simple promissory note which included the option to convert the note to a limited partnership interest. Said option rights were to remain in full force and effect until November 1, 1994.

\_\_\_\_\_ Respondent stipulated that he did not advise the Hensons, in writing or orally, that they should seek the advice of an independent attorney. Respondent never secured a written agreement to the terms of the loan signed by the Hensons. The debt was not secured.

To their many requests for payment on the note after November 1994, the Hensons were told that payment was getting close and were assured that they would get paid.

On June 1, 1998, the Hensons brought suit against respondent in the Superior Court of San Joaquin County for failure to pay on the note, failure to account, fraud and breach of fiduciary duty. They obtained a default judgment on November 13, 1998, against respondent in the sum of \$124,188.33. This amount included \$25,000 plus interest, the amount of the cost of the loan plus interest, and \$50,000 in punitive damages and costs. The default judgment was filed on November 24, 1998. Notice of entry of the judgment was filed and served on May 5, 1999.

On October 26, 1999, respondent filed a Motion to Set Aside Default and Default Judgment. The record does not show that a ruling has been made on the motion.

Respondent stipulated that, at all times mentioned, he was aware of the default judgment and that he did not report this judgment to the State Bar. No payment has been made to the Hensons.

#### CONCLUSIONS OF LAW

Based on the above, the hearing judge found respondent culpable of a violation of section 6068, subdivision (o)(2) of the Business and Professions Code,<sup>1</sup> for failure to report to the State Bar the entry of judgment in a civil action for fraud, misrepresentation and breach of a fiduciary duty in a professional capacity.

The hearing judge rejected respondent's argument that there was no attorney-client

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<sup>1</sup>All further references to section(s) are to the provisions of the Business and Professions Code.

relationship between himself and the Hensons and found that a fiduciary relationship existed between them. Respondent was found culpable of a violation of Rules of Professional Conduct, rule 3-300,<sup>2</sup> failure to advise a client regarding an adverse interest. The hearing judge found that the loan was unsecured and therefore not fair and reasonable and that respondent failed to advise the Hensons to seek advice of independent counsel.

The hearing judge found respondent culpable of conduct involving moral turpitude (section 6106) when, at the time he obtained the loan from the Hensons, he knew or should have known that he would be unable to repay the loan in five months. He knew that even if all 5,000 books from the first printing were sold, the publishing costs would still surpass the amount of the sale. He would not realize any profits from the sale.

Respondent was charged in the NDC with a violation of section 6068, subdivision (a), the duty of an attorney to support the Constitution and laws of this state. The hearing judge found this charge to be cumulative to the rule 3-300 violation and declined to give it additional weight in determining the proper discipline.

#### **00-O-14818 - The Chamberlain Matter**

The parties stipulated to the following:

Respondent and Kevin Chamberlain (Chamberlain) had an attorney-client relationship since March 8, 1993, when respondent undertook representation of Chamberlain in a personal injury matter. This lawsuit settled, and on October 31, 1994, Chamberlain received a check for \$132,050. On November 15, 1995, Chamberlain received another check for \$13,532.57.

In August 1995, Chamberlain again hired respondent to represent him in a personal injury matter due to a bicycle accident. This lawsuit settled on November 17, 1997, for the sum of \$7,500, and Chamberlain received a check for \$2,500 as his portion of the settlement proceeds.

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<sup>2</sup>All further references to rule(s) are to the provisions of the Rules of Professional Conduct.

On July 1, 1996, respondent sought a loan of \$25,000 from Chamberlain to be used for a second printing of Dignity of the Soul. In return, respondent promised to pay \$30,000 at 10 percent interest per annum, due and payable on January 1, 1997. Chamberlain withdrew the money from his savings account to loan to respondent, and respondent gave him a promissory note.

Respondent did not advise Chamberlain, in writing or orally, that he may seek the advice of an independent attorney. Respondent did not secure Chamberlain's written consent to the terms of the agreement. The debt was not secured.

The parties stipulated that Chamberlain was induced to loan respondent the money based on the trust and confidence that Chamberlain held for respondent as his attorney.<sup>3</sup>

At the time of entering into the stipulation, respondent had made no payments on the loan to Chamberlain. To his many requests for payment, respondent assured Chamberlain that payment was forthcoming.

On March 9, 2001, summary judgment was granted and entered by the Superior Court of San Francisco in case no. 314414 in the sum of \$43,794.89 in favor of Kevin Chamberlain against respondent. As of the date of this trial, payment had not been made on the judgment by respondent.

#### CONCLUSIONS OF LAW

Based on the above, the hearing judge found respondent culpable of a violation of rule 3-300 by entering into an unfair business transaction that was not secured and by failing to advise Chamberlain to seek the advice of an independent attorney.

Respondent was charged with a violation of section 6068, subdivision (a), failure to obey and follow the laws of California. The hearing judge found this charge to be cumulative to the

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<sup>3</sup>Chamberlain was a carpenter who was severely injured. He required nine surgeries and was unable to work. Before asking for the loan, respondent inquired of Chamberlain whether he still had the settlement funds.

charge of violating rule 3-300 and declined to give it additional weight in determining the proper discipline.

Respondent was found culpable of violating section 6106, committing conduct involving moral turpitude and dishonesty, based on respondent's failure to reveal the true status of the book. Respondent misrepresented to Chamberlain that the borrowed money was to be used for the second printing, when in fact, books from the first printing were still in storage.

### **HEARING JUDGE'S DISCIPLINE ANALYSIS**

#### **MITIGATING CIRCUMSTANCES**

The hearing judge found the following mitigating circumstances:

- a. Respondent does not have any prior record of discipline in over 21 years of practice. (Std. 1.2(e)(i).)<sup>4</sup>
- b. Respondent has performed substantial legal and community pro bono work, which was given significant weight. (Std. 1.2(e)(vi).)
- c. Respondent's character witnesses (six), including attorneys, former clients, a business partner and a community leader, were deserving of some weight in mitigation. (Std. 1.2(e)(vi).)

#### **AGGRAVATING CIRCUMSTANCES**

The hearing judge found many aggravating factors:

- a. Respondent committed multiple acts of wrongdoing in abusing his position of trust for personal gain and enticing his unsophisticated clients into believing that the loan was safe and that the return on the investment would be ludicrously high. (Std. 1.2(b)(ii).)
- b. Respondent's misconduct harmed the Hensons and Chamberlain. The elderly Hensons are burdened with loan payments to Mr. Henson's credit union, and Mr. Henson is unable to retire as planned at age 65. He is still working at age 71. The Chamberlains

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<sup>4</sup>This reference and all further references to standard(s) are to the provisions of the Standards for Attorney Sanctions for Professional Misconduct found in title IV of the Rules of Procedure of the State Bar.

(recently married) are unable to purchase a home. (Std. 1.2(b)(iv).)

c. During this period of 1994 and 1995, respondent borrowed \$37,500 from a friend and former client, Donald Herger, for the publication of Dignity of the Soul. In January 1998, Mr. Herger obtained a default judgment against respondent for the amount of \$49,422 in the Superior Court of San Francisco, case no. 989696. The failure of respondent to repay the loan is uncharged misconduct as further aggravation. (Std. 1.2(b)(iii).)

d. Respondent is indifferent toward rectification of or atonement for the consequences of his misconduct. (Std. 1.2(b)(v).) The Hensons and Chamberlain had not been paid at the time of trial.

e. Respondent's repeated lies to the Hensons and Chamberlain that the money was forthcoming when he knew that he was unable to pay the loans demonstrate respondent's lack of candor and cooperation with his clients. (Std. 1.2(b)(vi).)

Respondent contends that the weight of the evidence does not support the recommended discipline and that the appropriate discipline is three months' actual suspension with restitution. He maintains that culpability should be found only for count one in the Chamberlain matter and all other counts should be reversed.

#### **DISCUSSION - The Henson matter**

Regarding case no. 98-O-02234 (The Henson Matter), the violation of section 6068, subdivision (o)(2),<sup>5</sup> failure to report judgment to the State Bar, respondent contends that he had no duty to report the judgment because (1) the transcript of the default hearing was not offered into evidence; and (2) the default judgment was for money loaned and therefore not reportable. He argues that the default judgment filed on November 13, 1998, does not recite any of the

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<sup>5</sup>Section 6068, subdivision (o)(2) provides in pertinent part that it is the duty of an attorney "[t]o report to the agency charged with attorney discipline, in writing . . . [¶] The entry of judgment against the attorney in any civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity."

grounds listed in section 6068, subdivision (o)(2), i.e., civil action for fraud, misrepresentation, breach of fiduciary duty or gross negligence committed in a professional capacity.

Respondent's arguments are not well taken. First of all, we assume that respondent's reference to "transcript of the default hearing" refers to findings and conclusions of law issued by the court. Code of Civil Procedure section 632 provides in essence that written findings of fact and conclusions of law are not required upon trial by the court and that upon request of any party appearing at the trial, the court shall issue a statement of decision explaining the factual and legal basis for its decision. Respondent allowed this matter to proceed by way of default and therefore is not entitled to findings and conclusions of law. He has not offered any supporting legal authority for his position. He was aware of the complaint at all material times.

On the other hand, if respondent is referring to the reporter's transcript, it would have been his responsibility to obtain the transcript if there had been a reporter in attendance at the default hearing.

As to respondent's argument that the judgment is not reportable because the judgment was for money loaned, we review the Complaint For Damages filed by the Hensons in the matter of *George Henson and Myrtle Henson vs. William B. Peavey, Jr.*, case no. CV 005180. We find the causes of action pleaded to be: Breach of Promissory Note, Failure to Provide Accounting in a Limited Partnership, Fraud and Breach of Fiduciary Duty based on an attorney-client relationship and a limited partnership. The prayer in the complaint included punitive damages. In *Fitzgerald v. Herzer* (1947) 78 Cal.App.2d 127, 131-132, the court held: "By permitting his default to be entered he confessed the truth of all the material allegations in the complaint [citations] . . . . [Citation.] A judgment by default is as conclusive as to the issues tendered by the complaint as if it had been rendered after answer filed and trial had on allegations denied by the answer. [Citations.]" Respondent argues that the court had no authority to include punitive damages in the judgment. However, he was on notice that punitive damages were sought in the

prayer of the complaint. After the judgment was awarded to the Hensons, respondent filed a motion to set aside the default and default judgment, in which he argued that default punitive damages may not be awarded without prior notice of the amount sought.<sup>6</sup> Instead of pursuing the motion, respondent then (according to respondent) requested the court to withhold a ruling pending payment. Payment has not been made, a ruling on the motion has not been made, and therefore, we find the judgment still stands. We do not rule on the validity of the judgment. The hearing judge properly found a violation of section 6068, subdivision (o)(2).

Respondent claims that the Hensons were not clients and therefore there was no attorney-client relationship. He points to the fact that he had not represented the Hensons after Mr. Henson's personal injury matter in 1988 and that was the last matter for which he had been compensated. The Hensons testified to an ongoing relationship with respondent since the 1970's, when respondent represented Myrtle Henson in an employment matter. They sought his assistance and advice in 1981, 1988, 1994, 1995 and 1996. In the 1994 matter, Mr. Henson sought the advice of respondent regarding his pickup truck. Respondent assisted Mr. Henson with some small claims papers. Mr. Henson testified that he had only a seventh grade education and his reading and writing skills are poor. In 1996, Mr. Henson had a real property problem, but after seeking the advice of respondent, Mr. Henson decided not to pursue the real property matter any further. " 'When a party seeking legal advice consults an attorney at law and secures that advice, the relation of attorney and client is established *prima facie*.' [Citation.]" (*Beery v. State Bar* (1987) 43 Cal.3d 802, 811-812.) During this period, the Hensons, who had the highest regard for respondent as their attorney, referred their friends and family to respondent for legal work.

In the case of *Colstad v. Levine* (1954) 243 Minn. 279, 287-288 [67 N.W. 2d 648, 654-

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<sup>6</sup>Respondent argues in his brief that OCTC has not produced any authority supporting the court's award of punitive damages. He mistakenly places the burden on OCTC when it was incumbent on respondent to litigate this matter in the San Joachin Superior Court.

655], on the issue of cessation of fiduciary duty between the attorney and the client, the Supreme Court of Minnesota stated: “Since the duty of fidelity and good faith arising out of the confidential relation of attorney and client is founded, not on the professional relation per se, but on the influence which the relation creates, such duty does not always cease immediately upon the termination of the relation but continues as long as the influence therefrom exists.” It was during this period of influence in 1994 that respondent borrowed \$25,000 at 10 percent per annum interest from the Hensons for the publication of his book. Based on the promise of full repayment in six months and the promise that Mr. Henson would never have to work again, the Hensons borrowed the funds to loan to respondent from Mr. Henson’s credit union at 12 percent per annum interest.

Under these circumstances, we find, as did the hearing judge, that an attorney-client relationship existed between respondent and the Hensons at the time of the loan and that the loan was unsecured, indicating that the loan was not fair and reasonable. The burden is on the attorney to demonstrate that the dealings with the client were fair and reasonable. (*Hunnicuttt v. State Bar* (1988) 44 Cal.3d 362, 372-373.) Respondent failed to meet his burden. The hearing judge also properly found, and we also find, that respondent failed to advise the Hensons in writing to seek the advice of independent counsel and the Hensons did not consent in writing to the transaction, in violation of rule 3-300. “All business dealings between an attorney and client in which the attorney benefits are closely scrutinized for unfairness on the attorney’s part [citations] and attorneys have been disciplined for inducing clients to invest in enterprises without fully apprising them of the risks. [Citations.]” (*Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 445, fn. 4.) “The relation between an attorney and his client is a fiduciary one of the highest trust and confidence and, *as long as the relationship or the influence thereof exists*, requires the attorney to observe the utmost good faith and candor and not to allow his private interest to conflict with those of his client.” (*Colstad v. Levine, supra*, 67 N.W.2d at p. 654, fns. omitted.)

It is clear that respondent took advantage of the Hensons' trust and confidence in him in persuading them to loan him \$25,000.

During this period, the record shows that respondent made many misrepresentations and broke many promises to the Hensons in reference to repayment on the note: e.g., when he sold the books, he would give them their money back; if they wanted to, they could "go partners"; "You don't have to worry because you're getting your money back either way"; "It's getting close. It'll be any day"; "It's getting close. I'll have it on Friday"; "I'll have it in two weeks. I'll call you when I get it"; "The money, the check is in Los Angeles." (Respondent allegedly sent someone to Los Angeles to pick up the check.); "The guy went to Vegas with the check. I'll call you Monday." Mr. Henson testified that it was at this point that his trust of respondent broke down. These placating assurances continued through the years. At one point in time, a Reverend Jefferson called the Hensons on behalf of respondent and told them that respondent was involved in another project for which about a million dollars was in the Bank of America, that it was respondent's intention that the Hensons be paid first from this fund when he received it and that respondent had signed the authorization to pay the Hensons first. No payment was made.

In 1996, respondent wrote to the Hensons from the Philippines that "this trip is a culmination of my project. I have tied up the printing endorsements, marketing and distribution of the book here. And the response has been very positive." At the hearing of this matter, respondent admitted that he had basically agreed in principle with Adams Publishing (in the Philippines) that they would consider distributing his first book, if he wrote a second book. He acknowledged that there was no written contract, only a conversation.

On November 24, 1997, in response to a letter from the Hensons' attorney, respondent wrote to the Hensons that he considered the Hensons as partners in the book venture and laid out a payment plan including the repayment of the \$25,000, interest on the \$25,000, repayment of costs for raising the \$25,000 and profit from the venture anticipated to be another \$25,000.

Respondent anticipated full payment by the end of the year. No payment was made. We note that the option to convert was kept open until November 1, 1994, and the Hensons had not exercised their option. Respondent also stated that “I am in the process of completing the financing for release of the book in the Philippines.” In reference to this statement, respondent testified that he had decided to finance the printing of the book in the Philippines himself because he hadn’t finished his second book. (At this time, he still owed the vanity press approximately \$30,000 for the first printing, and at least half of the books were held in storage. The final payment was not made until April 20, 1999, after a lawsuit, at which time the books were released to respondent by the vanity press.)

On August 5, 1999, respondent wrote to the Hensons (the default judgment had been obtained by the Hensons on November 13, 1998, and respondent has stipulated that he was aware, at all times, of the default judgment) stating, “I want to thank you for staying in touch with me as I move our business venture closer to realizing a profit. As [sic] this time we should finalize our agreement for the payment of your interest in the project.” Respondent refers to his letter of November 24, 1997, and implies that he has been waiting for input from the Hensons to his payment proposal and to the amount they would accept.

From 1994 to the present, it is abundantly clear that respondent was well aware of his financial status,<sup>7</sup> that he could not or did not have the means to repay the Hensons. Yet, he continued to assure them that payment was forthcoming, when it wasn’t, and that the book venture was a success, when it wasn’t. He failed to inform them of the true status of the book venture, but instead told them glowingly of the coming printing in the Philippines. The attorney-client relationship is a fiduciary relation of the very highest character imposing on the attorney a duty to communicate to the client whatever information he has or may acquire in relation to the

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<sup>7</sup> The record reveals outstanding tax liens, both federal and state, during the period of 1992 to 2000.

subject matter of the transaction. (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 189-190.) Although the Hensons did not opt for partnership, and there was no partnership agreement, respondent testified that he treated the Hensons as partners because he wanted them to make money. Yet, in his sworn declaration filed in the *Henson v. Peavey* matter, he declared: “Plaintiffs never elected to become limited partners.” Respondent totally ignored the fact that the Hensons elected to collect on their loan by bringing a lawsuit. The Hensons obtained a judgment for a sum certain, and yet respondent insisted that he was waiting for a sum certain that the Hensons would accept. He places the burden on the Hensons to clarify the terms of the loan, when the terms of the loan should have been clearly set out by respondent in writing in 1994.

As the hearing judge noted, a profit was not going to be realized from the first printing of the book because even if respondent had sold all 5,000 copies of his book at \$17.95, the cost of publishing would not be met. Respondent argues that inability to pay does not constitute “acts of baseness, vileness or depravity.” Respondent may be correct, except that continued misrepresentations since 1994 to the Hensons of the status of the book venture, of imminent payments which never materialized, of the contracts and funds that never materialized, and of referring to the Hensons as partners when no partnership agreement existed do rise to “acts of dishonesty in wilful violation of section 6106.” As held in *Coppock v. State Bar* (1988) 44 Cal.3d 665, 679, “an act by an attorney for the purpose of concealment or other deception is dishonest and involves moral turpitude under section 6106.” This was a situation of “now you see it and now you don’t.”

We also agree with the hearing judge that count four, charging a violation of the laws of this state under section 6068, subdivision (a), due to a violation of a fiduciary duty, is duplicative of the rule 3-300 charge and therefore will not be given any weight or further consideration.

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## **DISCUSSION - The Chamberlain Matter**

Respondent has stipulated that there was an ongoing attorney-client relationship and that based on the trust and confidence Chamberlain held for respondent, Chamberlain was induced to loan respondent \$25,000 on July 1, 1996, payable in the sum of \$30,000 plus interest on January 1, 1997. This loan was unsecured, and Chamberlain was not advised to seek the advice of an independent attorney in reference to this transaction, nor did Chamberlain consent to the transaction in writing. Respondent admitted that he was in violation of rule 3-300, failure to advise a client regarding an adverse interest. The hearing judge so found and we agree.

We also agree with respondent and the hearing judge that the charge of a violation of section 6068, subdivision (a) in count two is duplicative of the rule 3-300 charge, and therefore no weight will be given to this charge in consideration of discipline.

Respondent argues that his conduct in this matter falls far short of moral turpitude. He describes the loan as a long overdue obligation for which he takes full responsibility and which he is committed to paying.

Chamberlain's testimony is that respondent had given him a copy of Dignity of the Soul about a year before the loan. Then respondent requested the loan for a second printing of the book, explaining that he could have gotten the funds from the bank, but instead, borrowed the money from Chamberlain to help them (Chamberlain and his wife). Chamberlain assumed that the first printing must have been a success. In 1999, when payment had not been made, and Chamberlain continued to request payment, respondent told him that payment was forthcoming, that respondent had money due from various sources and that it was a matter of days, or that it was just at the end of the week or the next week. Each time Chamberlain contacted respondent, payment was just around the corner, or a personal injury case was just about to be settled. In March of 2000, Chamberlain wanted to purchase a car and was told by respondent to "[g]o ahead and make plans on it." Based on this, Chamberlain ordered a new vehicle. Payment still was not

forthcoming, and Chamberlain had to borrow the funds from his family. Respondent argues that this was not misrepresentation because he consistently agreed to repay the subject loan with no strings attached.

Respondent's conduct demonstrates the ease with which respondent continued to mislead Chamberlain that payment was imminent when he knew that he still owed Waller Press \$30,000, and he knew that he could not meet his obligation to Chamberlain. This conduct has continued since January 1997. This was not an isolated incident. We concur with the hearing judge that this conduct rises to conduct involving moral turpitude and dishonesty. (*Hallinan v. State Bar* (1948) 33 Cal.2d 246.) At the time of trial, respondent had not paid the judgment of \$43,794.89.<sup>8</sup>

#### **DISCUSSION - The Herger Matter**

OCTC presented the testimony of Donald Herger (Herger) who had played softball with respondent for about 20 to 25 years. Respondent had also represented Herger on two occasions.

In May 1994, Herger loaned respondent \$25,000, and in July 1995 gave respondent another loan in the sum of \$12,500, for research and publication of Dignity of the Soul. Respondent gave Herger a promissory note in return for the \$25,000. The record is unclear whether another promissory note was provided for the \$12,500. The debt was not secured. Subsequently, after many broken promises, Herger obtained a judgment against respondent for the amount owed plus interest.<sup>9</sup>

However, since this matter is an uncharged act of misconduct, we cannot consider this as

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<sup>8</sup>Respondent states in his rebuttal brief that he has fully paid the Chamberlain obligation since the filing of his Opening Brief. However, he has failed to attach any evidence to support his allegation. In any event, the pattern of misrepresentation to Chamberlain, which occurred over a 12-month period, constitutes moral turpitude even if repayment has now been made.

<sup>9</sup>Respondent states in his rebuttal brief that he has paid Herger \$18,000 to date. However, he has failed to attach any evidence to support his allegation.

an independent basis of discipline but may consider it when it is otherwise relevant to an issue in the proceeding. (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 35-36.) When the evidence at the hearing discloses misconduct not charged in the original NDC, OCTC may move to amend the NDC to conform to the proof, but if OCTC fails to do so, the attorney may be disciplined only for the misconduct alleged in the original NDC. (*Id.* at p. 35.) Here, respondent did not object to the testimony of Herger. Respondent testified that the loan from Herger was simply a loan, no strings attached. “We conclude that absent an appropriate objection to the introduction of evidence of misconduct other than that charged, such evidence may, when appropriate, be used as an aggravating factor in disciplinary matters. (*In the Matter of Dixon* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 23, 40-41.) The hearing judge properly considered failure to repay Herger as a circumstance in aggravation.

#### **DEGREE OF DISCIPLINE**

In mitigation, the hearing judge gave significant weight to respondent’s record of 21 years of practice without prior discipline and to his extensive pro bono work. His pro bono work consists of work in the Filipino community; work with the government of the Philippines; work as general counsel of the National Association of Letter Carriers, Branch 214; work as a coach of Little League since 1985; and work as president of South San Francisco Sister City Commission from 1996 to the present. As to the character witnesses, the hearing judge found they lacked understanding or knowledge of the charges against respondent and gave their testimony only some weight. We summarize their testimony as follows:

Denny Roja, a lawyer and venture capitalist, testified that he holds respondent in high esteem. He is aware of respondent’s involvement in the Filipino community and of his expertise in personal injury matters. As to Roja’s knowledge of the charges in these proceedings, he was aware that respondent had business dealings with an alleged client, a partnership dealing in an investment type of a project. He understood that this was a violation of the rules of professional

responsibility. His opinion did not change after reading the stipulation.

Herbert Mitchell is a client and a letter carrier for the Postal Service. Respondent is the legal advisor for the National Association of Letter Carriers and serves pro bono. Mitchell's opinion of respondent is that he is very truthful and up-front with "us union members." Mitchell understands that this proceeding could affect respondent's standing as an attorney. However, he knows nothing about respondent borrowing money from clients or any misrepresentation.

Charles Bridges, a business partner of respondent, is in the insurance business and is a financial consultant with Financial Link in Oakland. He is working with respondent on several projects. These are humanitarian projects with the Elder Jefferson's group covering the last four or five years. He stated that within the next 30 to 60 days, they should see funding start to flow on a project geared to helping people in underdeveloped and needy places. They have evaluated approximately 50 projects. He confirmed that respondent is committed to repaying his creditors.

Michael Comfort is an attorney. He has known respondent for about seven years and attests that respondent's reputation is very high as to honesty and truthfulness. He has never heard a negative comment about respondent. Respondent informed him that the present proceeding involved a "lack of following proper procedures under the State Bar rules in engaging in business with clients" and that respondent was involved in a business relationship with three individuals who were impatient about receiving some money from the business ventures. As a result, the clients submitted a complaint to the State Bar. Comfort's opinion would not change after reading the stipulation.

Horatio Candia, a client, specializes in loan mortgages. He is licensed with the National Association of Securities Dealers and is licensed by the Department of Insurance (life and disability). Respondent has served his family and friends in a good faith capacity in every single aspect. Candia has no specific knowledge of charges against respondent, only that respondent conducted some type of business outside of his attorney-client relationship.

Maria Bell Goldstein is a client. Respondent represented her, pro bono, after she shot and killed her abusive step-father. She was placed in the Youth Guidance Center, where respondent assisted her in reuniting with her mother. She is still in contact with respondent, as are her mother and her brother.

We concur with the hearing judge that some weight should be given the character witnesses' testimony.

The aggravating factors were multiple acts of wrongdoing by repeatedly misrepresenting to the Hensons and Chamberlain that payment was imminent and by failing to disclose the true status of the book venture. (Std. 1.2(b)(ii)). There is harm to the Hensons who took a loan at 12 percent interest per annum, based on respondent's promise to repay in six months, in order to make the loan to respondent at 10 percent interest per annum. Respondent also promised to pay the Hensons the cost of their 12-percent-interest loan, which has not been paid. The Hensons were forced to seek legal counsel before the statute of limitations ran out. George Henson could not retire at age 65 as planned, because he is still paying on the loan, at age 71. The Chamberlains have not been able to purchase a home, and they had to borrow funds to buy a vehicle. They were forced to seek legal counsel to preserve their claim. Herger testified that the money he loaned to respondent was his retirement money and he is now retired without his funds. (Std. 1.2(b)(iv)). Respondent has shown indifference toward rectification of or atonement for the consequences of his misconduct by continuing to profess no wrongdoing and continuing to promise payment soon, despite numerous failures to follow through. (Std. 1.2(b)(v)). We agree with the hearing judge's findings as to these aggravating factors.

The hearing judge found, and we also find, that respondent breached his fiduciary duties to the Hensons and Chamberlain and abused their trust in him as their attorney. Respondent continued to exploit their trust for years by promising payment as soon as the funds came in from one project or another.

Respondent's position is that because he has always acknowledged his obligation, has always intended to repay the loans and has always acted in good faith, he did not violate any rules of professional conduct except that charged in count one in the Kevin Chamberlain matter. His conduct belies his professed intent to pay.

Acknowledgment of obligations or repeated promises to repay does not exonerate respondent from his misconduct. This is not a simple collection case as respondent suggests, but the overreaching by respondent in taking advantage of the clients' trust in him as their attorney and capitalizing on their confidence and trust to obtain an interest adverse to them. He promised full payment in five to six months knowing that he was not in a position to honor that promise. He then promised payment "any time now," which never happened. He failed to disclose that the books were in storage, and instead spoke of books being sold throughout the United States. He failed to disclose that he owed money to the vanity press (Waller Press) for the first printing, and instead spoke of the second printing in the Philippines. He failed to disclose that he needed funds to finance his other ventures, consulting or otherwise, and instead spoke of imminent funding for his other ventures from which he would repay the loan. He continued to present his ventures in the most favorable light to induce the clients to wait for payment. Respondent's conduct was wilful, dishonest and deliberate. In *Levin v. State Bar* (1989) 47 Cal.3d 1140, 1147, the Supreme Court in discussing acts of dishonesty violating the high ethical standards that members of the bar are expected to maintain stated that acts of dishonesty "manifest an 'abiding disregard of " "the fundamental rule of ethics - that of common honesty - without which the profession is worse than valueless in the place it holds in the administration of justice.' " [Citation.]' [Citations.]"

It is troubling that respondent glibly rationalized that the Hensons were neither unsophisticated (in spite of Mr. Henson's seventh grade education) nor harmed because they were property holders and they testified that the money would be used to remodel their rentals so

that they could rent them. Respondent concluded that the nonpayment was only delaying the Hensons' investment plan. As to Chamberlain, respondent argued that he was not harmed because when he is paid by respondent, the housing market might be favorable and he'll have his home.

Respondent has shown no remorse, nor has he accepted responsibility for the harm caused by his misconduct. Instead, he accused the Hensons of going to the State Bar to collect a debt for them. His attitude shows a serious lack of insight into the wrongfulness of his conduct as found by the hearing judge, and we also so find.

Respondent directs our attention to *Rose v. State Bar* (1989) 49 Cal.3d 646 in support of his contention that two years' actual suspension is excessive. Rose was found culpable of, among other things, failure to return client's file upon termination, improper solicitation, improper transaction of business with a client and failure to account. The Supreme Court imposed two years' actual suspension upon a finding that although the acts of misconduct were numerous, there was substantial mitigation and upon an important finding of no moral turpitude in the misconduct unlike in this matter.

The following case law was appropriately relied on by the hearing judge to determine discipline:

In *Krieger v. State Bar* (1954) 43 Cal.2d 604, the Supreme Court found that the attorney affirmatively misrepresented and concealed the true condition of a partnership in order to induce a client to invest \$10,000 in the partnership. Upon the client's request for a return of funds, the attorney promised to repay at various times, but failed to do so. The Supreme Court suspended the attorney for two years.

In *Beery v. State Bar* (1987) 43 Cal.3d 802, the attorney solicited and obtained a loan from his client for a venture in which attorney was involved. The attorney did not fully disclose his involvement with the venture, nor did he disclose that the venture had almost no capital and

that funds were unobtainable from commercial lenders. He further failed to disclose that although he had guaranteed the note, he had no funds to make good on the guarantee. The Supreme Court found this was not an arm's length business deal and found misconduct involving moral turpitude and dishonesty. The Court also held that increased discipline is warranted by an attorney's " 'apparent lack of insight into the wrongfulness of his actions' . . . ." and imposed two years' actual suspension. (*Id.* at p. 816, citation omitted.)

In *Rodgers v. State Bar* (1989) 48 Cal.3d 300, the attorney persuaded his client, a conservator, to loan money from the estate to an ex-client and former business partner, who owed him legal fees. The attorney failed to disclose his professional relationship with his ex-client and then deceived opposing counsel (for the conservatee) and deceived the probate court. The attorney was found to have wilfully violated court orders in several instances and was found to have commingled client funds with his own. The Supreme Court imposed two years' actual suspension.

We also consider *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, in which the attorney was found culpable of, inter alia, breaching her fiduciary duty to a client and entering into an improper business transaction with a client by borrowing the bulk of settlement funds from a vulnerable relative whom she represented in a personal injury action. The unsecured loan of approximately \$20,000 was found to be unfair and unreasonable to the client. The review department found that the conduct involved moral turpitude and recommended that the attorney be placed on actual suspension for two years and until she provided proof of completed restitution.

Standard 2.3 provides in pertinent part: "Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty . . . or of concealment of a material fact to a court, client or another person shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled . . . ."

We have independently reviewed and considered the evidence, balanced the mitigating factors against the aggravating factors and considered the standards for attorney sanctions for professional misconduct applicable to this matter. Bearing in mind the protection of the public, the preservation of confidence in the legal profession and the maintenance of the highest possible professional standard for attorneys (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1055), we believe that the recommendation of the hearing judge of two years' actual suspension with restitution is appropriate.

### **FORMAL RECOMMENDATION**

For the foregoing reasons, we recommend that respondent William Benson Peavey, Jr., be suspended from the practice of law in California for three years, that execution of that suspension be stayed, and that respondent be placed on probation for three years, with the following conditions:

1. Respondent shall be actually suspended from the practice of law for the first two years of probation and until he pays restitution to George and Myrtle Henson (or the Client Security Fund, if it has already paid) in the amount of \$124,188.33, pursuant to the judgment in *Henson v. Peavey*, San Joaquin County Superior Court, case no. CV005180, plus 10 percent simple interest per annum from the date of the judgment until paid, and provides satisfactory proof thereof to the Probation Unit unless, on motion of respondent, he submits satisfactory proof to the State Bar Court that the judgment has been modified; and until he pays restitution to Kevin Chamberlain (or the Client Security Fund, if it has already paid) in the amount of \$43,794.89, pursuant to the judgment in *Chamberlain v. Peavey*, San Francisco County Superior Court, case no. 314414, plus 10 percent simple interest per annum from the date of the judgment until paid, and provides satisfactory proof thereof to the Probation Unit; and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.
2. During the three years of probation, respondent shall comply with the State Bar Act and the Rules of Professional Conduct.
3. Respondent shall submit written quarterly reports to the Probation Unit on each January 10, April 10, July 10 and October 10 of the period of probation. Under penalty of perjury, respondent shall state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report shall be submitted on the next following quarter date, and cover the extended period. In addition to all quarterly reports, a final report, containing the same information, is due no earlier

than twenty (20) days before the last day of the probation period and no later than the last day of the probation period.

4. Subject to the assertion of applicable privileges, respondent shall answer fully, promptly and truthfully, any inquiries of the Probation Unit of the Office of the Chief Trial Counsel, which are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein.
5. Within ten (10) days of any change, respondent shall report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California, 94105-1639, and to the Probation Unit, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.
6. Within one (1) year of the effective date of the discipline herein, respondent shall provide to the Probation Unit satisfactory proof of attendance at a session of the Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015-2299, and passage of the test given at the end of that session. Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE), and respondent shall not receive MCLE credit for attending Ethics School (Rule 3201, Rules of Procedure of the State Bar).
7. The period of probation shall commence on the effective date of the order of the Supreme Court imposing discipline in this matter.
8. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for three years shall be satisfied and that suspension shall be terminated.

It is further recommended that respondent be ordered to comply with rule 955, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule, within thirty (30) and forty (40) days, respectively, from the effective date of the Supreme Court order herein. Wilful failure to comply with the provisions of rule 955 may result in revocation of probation; suspension; disbarment; denial of reinstatement; conviction of contempt; or criminal conviction.<sup>10</sup>

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners,

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<sup>10</sup>Respondent is required to file a California Rules of Court, rule 955(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

MPRE Application Department, P. O. Box 4001, Iowa City, Iowa, 52243, (telephone (319) 337-1287) and provide proof of passage to the Probation Unit during the period of actual suspension. Failure to pass the MPRE within the specified time results in actual suspension by the Review Department, without further hearing, until passage. But see rule 951(b), California Rules of Court, and rule 321(a)(1) and (3), Rules of Procedure of the State Bar.

### **COSTS**

It is further recommended that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10, to be paid in accordance with section 6140.7 of that Code.

WATAI, J.

We concur:

STOVITZ, P. J.

EPSTEIN, J.

Case Nos. 98-O-02234; 00-O-14818

*In the Matter of William Benson Peavey, Jr.*

**Hearing Judge**

JoAnn M. Remke

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