

Filed April 15, 2002

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of

THOMAS OSCAR GILLIS,

A Member of the State Bar.

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96-O-02494

OPINION ON REVIEW

The hearing judge found respondent Thomas Oscar Gillis culpable of three counts of misconduct in a single client matter. Respondent sold his residential property to his client in exchange for a substantial portion of the proceeds of a settlement that respondent obtained for that client as the result of the wrongful death of the client's son. Respondent was found to have violated rule 3-300, Rules of Professional Conduct,¹ section 6106, Business and Professions Code² prohibiting acts of moral turpitude and section 6068, subdivision (e) requiring an attorney to maintain the confidences of his or her client. The hearing judge recommended a stayed suspension of three years conditioned upon probation for that same period and an actual suspension of six months.

Both the State Bar and respondent seek review. The State Bar argues that three additional counts involving moral turpitude (§ 6106) and one count of failure to support the law (§ 6068, subd. (a)) deserve findings of culpability. Based on these arguments, the State Bar seeks a recommendation that respondent be actually suspended for two years and until he complies with

¹All further references to rules are to the Rules of Professional Conduct.

²All further references to sections are to the Business and Professions Code, unless otherwise indicated.

standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.³ It also seeks a recommendation that respondent be ordered to pay restitution in the sum of \$110,000 to his client.

Respondent contends that the hearing judge committed error in not allowing respondent to qualify as an expert on real estate matters, giving insufficient weight to the value of the house he sold to his client and that there was insufficient evidence to find violations of section 6106 and section 6068, subdivision (e).

We agree with the hearing judge's findings of culpability of a violation of rule 3-300 and with his finding of moral turpitude in connection with respondent's transaction with his client. We also agree with the hearing judge's finding of culpability of a violation of section 6068 subdivision (e), by not maintaining confidential the amount of his client's settlement, but additionally find that violation involves moral turpitude in violation of section 6106. We further find culpability on one of two counts charging moral turpitude in respondent's response to letters of investigation from the State Bar. We recommend, as did the hearing judge, that respondent be suspended for three years, stayed, on the conditions that he be placed on probation for three years and that he be actually suspended for six months.

PROCEDURAL HISTORY

Respondent was charged with thirteen counts of misconduct involving two client matters. In the first client matter, respondent obtained at settlement of \$250,000 for a client, we shall refer to as Anita, as the result of the wrongful death of her minor son. Respondent was charged with twelve counts of misconduct in his subsequent dealings with Anita. Counts 10, 11 and 12 were dismissed before trial on the motion of respondent. Those dismissals are not challenged on appeal, and we do not further consider them. Respondent was found not to be culpable in counts

³The standards are found in Title IV of the Rules of Procedure of the State Bar. All further references to standards are to this source.

7 and 8 (involving maintaining funds in trust and moral turpitude), and the State Bar does not challenge those findings. Following our review of the record, we agree with those findings of no culpability and do not further consider counts 7 and 8. In count 13, involving an unrelated client, the hearing judge found that culpability was not proven. The State Bar notes that it does not dispute the hearing judge's finding in that client matter, and following our review, we agree with that finding and do not further address count 13.

As noted, the State Bar seeks a finding of additional culpability on count four involving moral turpitude for failure to maintain inviolate his client's secrets, counts five and six, each involving alleged false statements to the State Bar during the investigative stage of this proceeding, and count nine alleging that respondent willfully failed to comply with California law by not providing Anita with the written disclosures required by Civil Code section 1102 et seq. These issues are discussed *post*.

FACTS

Respondent was admitted to practice in 1967 and has been a member of the bar since that time. In August 1993 respondent was retained by Anita to represent her in a wrongful death action arising out of the death of her minor son Danny, one of her seven children. The retainer agreement provided that respondent's fee would be computed on the recovery before any deduction for costs at the rate of 25 percent before service of process and 33 1/3 percent thereafter. Respondent had previously represented Anita as one of a group of tenants, pro bono, in a successful action alleging "slum lord" conditions. In October of 1993, respondent was successful in reaching an agreement for the settlement of Anita's wrongful death action for \$250,000. That settlement agreement and general release was signed by Anita and respondent on October 2, 1993, and contained a clause drafted by the insurance company, that neither respondent nor Anita would disclose the fact of a settlement or the amount of the settlement.

Between the time of respondent's retention and the time of reaching the agreement for settlement, Anita informed respondent that she was about to be evicted from her apartment. Respondent had lived for 20 years on a three acre parcel in French Camp, California⁴, consisting of a house occupied by respondent as his residence and office, a cabin, a mobile home and various other buildings, including chicken coops, a barn with corrals, a swimming pool and associated improvements. Respondent offered to let Anita move onto his property rent free. Anita, her boy friend, Paco, and at least three of her children moved onto the French Camp property, occupying the cabin and mobile home. Respondent agreed to, and did, pay Anita modest sums for housekeeping following her moving onto the property.

Respondent knew that Anita lacked skills for employment other than housekeeping, was unemployed, received no financial or other assistance from the father of her children and had no other source of income. Respondent also knew that she was receiving financial assistance from Aid to Families with Dependent Children (AFDC).

The \$ 250,000 settlement draft came into respondent's possession on November 16 or 17, 1993. Between the time of reaching the settlement agreement and the arrival of the settlement draft, there were discussions between respondent and Anita concerning the purchase by Anita of the French Camp property by use of a portion of Anita's share of the settlement proceeds. There is a conflict in the evidence as to who initiated that discussion. Respondent, his wife and former secretary testified that such discussion was initiated by Anita, who had overheard a discussion between respondent and his fiancée about where they would live. On the other hand, Anita asserted that the sale was the idea of respondent. There is no doubt that Anita, Paco and her children found living on the property most desirable.

While the hearing judge found that the discussion was initiated by respondent, we conclude that the evidence demonstrates that the discussion was in fact initiated by Anita and

⁴French Camp is located in San Joaquin County.

Paco.⁵ The evidence clearly demonstrates that respondent, both of his secretaries and respondent's fiancée urged Anita, repeatedly, to look at other homes and to seek independent advice before purchasing the French Camp property. Respondent not only advised Anita in writing to seek independent counsel, but had follow-up discussions with Anita urging her do so, and offered to pay for any charges that were incurred. Respondent had one of his secretaries sit down with Anita and go over a directory of attorneys seeking to select an attorney to provide advice to her. Anita left that discussion to talk with Paco, and on her return stated, in effect, she did not want to see another attorney. It is also clear that, independent of directions from respondent, one of the secretaries strongly urged Anita to look at other property and obtain independent advice.

In spite of these precautions by respondent, we must further examine the transaction in light of the charge of a violation of rule 3-300. In November 1993 respondent gave Anita a copy of an appraisal dated August 28, 1992, showing the fair market value of the property to be \$178,500.⁶ As found by the hearing judge, on November 10, 1993, respondent gave Anita a letter, in effect, offering to sell the French Camp property to her for \$175,000. That letter noted that the loan on the property was about \$115,000 at an adjustable rate of 11 percent and that Anita would have to pay respondent \$60,000 for his equity and also pay \$50,000 to reduce the loan and “[y]ou would assume and pay the balance of the loan.” That letter concluded: “You should look at other homes you might be interested in to buy (sic) before you make a decision on mine. You also should consult with another attorney to make sure the purchase would be in

⁵Anita's first knowledge that the property was for sale appears to have been an overheard conversation between respondent and his fiancée.

⁶The only other evidence of the value of the French Camp property is the testimony of respondent, who testified that, in his opinion, the fair market value of the property was \$210,000 at the time of the sale to Anita.

your best interest.” Although Anita did not recall seeing that letter, the hearing judge found that such a letter was delivered to her. We agree.

At the time of that letter, the French Camp property was encumbered by a deed of trust securing a “line of credit” loan from Beneficial California Inc. (Beneficial) in the maximum amount of \$116,000 in favor of respondent and his former wife. The monthly payment established by the promissary note was \$1,104.69 plus insurance charges. The initial provision on the deed of trust securing that loan stated “[i]f trustor voluntarily shall sell or convey the Property, in whole or part, or any interest in that Property . . . without obtaining the written consent of [Beneficial], then [Beneficial], at its option, may declare the entire balance of the loan plus interest on the balance due and payable.”⁷

At the time of respondent’s November 10 letter to Anita, respondent was in arrears two payments of \$1,045 each on the loan from Beneficial. This was not disclosed to Anita. In correspondence to Beneficial, a letter from respondent’s office advised the Beneficial representative that he had just settled a large case and provided that representative a copy of Anita’s confidential settlement agreement, showing the amount of the settlement reached on behalf of Anita. While that letter was not signed by respondent, it was sent on his letterhead, from his office and bore a signature in his name followed by initials. The hearing judge found that respondent knew the letter was being sent and, following our review, we reach the same finding, although we are unable to determine that respondent knew the exact language or content of that letter.

The record shows that Anita “dropped out” of high school in the eleventh grade as the result of the birth of her first child, never held a job, had no credit record, never had a checking account or credit card and had a bill with the telephone company for approximately \$500 that she

⁷In addition, the credit line account agreement provided a prepayment penalty of six months interest on any amount of prepayment in excess of 20 percent of the outstanding balance within a 12-month period.

was unable to pay. During the course of negotiations for settlement of the wrongful death claim, respondent filed, as Anita's attorney, a dissolution of marriage action.

The record also shows that, at the same time, respondent was substantially indebted in addition to his delinquent obligations to Beneficial. He owed \$22,000 to his former wife as an equalization payment on the dissolution of his marriage, \$4,200 on a judgment against him, and various other bills, including salary to his secretary, law office advertizing bills and personal loans, all approximating a total of \$60,000. We note however, that the equalization payment to his former wife was not due until that sale of the French Camp property and that the remaining creditors were not then pressing for payment.

The deposit and disbursement of the \$250,000 settlement draft occurred on November 17, 1993, and a written agreement between respondent and Anita for the sale of the French Camp property was executed that same day. That agreement recited that respondent was Anita's attorney, that she had been advised to seek independent counsel, had time to do so, but elected not to follow that advice. That written agreement provided that Anita would accept the house in "as is" condition, that there would be no escrow or title insurance, that Anita would pay respondent \$60,000 cash for his equity, pay \$50,000 to Beneficial to reduce the existing loan and assume the balance of the existing loan. The agreement recited the approximate balance on the Beneficial loan to be \$115,590 with an interest rate of 11 percent that was adjustable, that there were no liens on the property other than to Beneficial and that respondent would not repair an existing roof leak. The agreement further recited that Anita had been provided a recent appraisal showing the value of the property to exceed \$175,000. That was the appraisal dated August 28, 1992, that we noted, *ante*, which was obtained in connection with the line of credit loan obtained by respondent and his then wife from Beneficial.

Respondent deposited the fully endorsed settlement draft into his client trust account, obtained instant credit from the bank for that deposit, wrote himself a check for \$62,000,

representing his attorney's fees of 25%, and wrote a check to Anita for \$186,009.⁸ That check to Anita was immediately deposited into a new account opened in her name. Drawing on Anita's new account, respondent immediately wrote, and Anita signed, a check in the amount of \$50,000 to Beneficial and a series of 16 checks, totaling \$60,000, to various other creditors of respondent. Included in this group of 16 checks was a payment to Beneficial for the installment accruing at the end of November 1993. This left a total of \$76,009 in Anita's account. Respondent promptly delivered the \$50,000 check to Beneficial and gave to Anita a deed to the property in apparently recordable form.⁹

Anita testified that she did not know what an escrow was or what it was for, what title insurance was or what it was for, what function a real estate broker performed or that she should take any action to formally assume the Beneficial loan. Respondent did not order a title report or provide Anita any other evidence of the condition of title, did not provide Anita with a real estate transfer statement as required by former section 1102.6 of the Civil Code,¹⁰ nor did he offer or provide any assistance to Anita in assuming the Beneficial loan. Respondent advised Anita that

⁸Disposition of the balance of the \$250,000 is not explained in the record. (\$62,000 plus \$186,009 equals \$248,009.) A check in the amount of \$1,991 cleared that account November 26, 1993.

⁹Respondent received a deed from his former wife, dated November 15, 1993. That deed was recorded February 17, 1994. In February 1994 Anita expressed concern to respondent about the form the of the deed she had received from him, and he provided her a new deed, again in apparently recordable form.

¹⁰Beginning in January 1987, former section 1102.6 of the Civil Code (enacted by Stats. 1985, ch. 1574, § 2, operative Jan. 1, 1987, and amended by Stats. 1986, ch. 460, § 5; Stats.1989, ch. 171, § 1; Stats.1990, ch. 1336, § 2; Stats.1994, ch. 817, § 2; Stats. 1996, ch. 240, § 2; Stats.1996, ch. 925, § 1; Stats.1996, ch. 926, § 1.5; Stats.2001, ch. 584, § 1) required covered residential real estate sellers to make detailed disclosures regarding the condition of the real estate using a specific form "real estate transfer disclosure statement." That statutory form disclosure statement was modified in 1990 and 1994. In 1996, a second version of the statutorily prescribed statement was enacted and became effective July 1, 1997 (Civ. Code. § 1102.6).

it was up to her whether or not she recorded the grant deed, but that if she did so, there would be an increase in taxes. He also told her that, in the event he were sued, he would let her know before any liens could attach to the property. Respondent did not know whether there was a clause in the incumbrance recorded by Beneficial allowing a buyer to assume the Beneficial loan.

A long time district manager for Beneficial made clear that Beneficial would not permit the assumption of a loan by a person with Anita's record, which included being on welfare, unemployed, the sole support of four children and with no source of income. Beneficial would not rely on Anita's bank account because there was no assurance that it would remain available in the event of a default. The monthly statements were addressed to respondent following the execution of the contract of sale and up to the time of foreclosure, and the foreclosure was in respondent's name.

Anita made the payments to Beneficial that were due through April 1994, although the March 1994 payment was made in April, and in March she contacted respondent with a request that he either buy the property back or return her money. Some time prior to the middle of March 1994, Paco and a friend came to respondent's office carrying a baseball bat resulting in a call for law enforcement. In a March 14, 1994 letter, respondent advised Anita that he would not repurchase the house. In that same letter he provided advice on the maintenance of the pool and offered to plow the weeds and repair the pool and hot tub. That letter contained the following statement: "If you don't want the house, I will help you fix it up to sell it. You have more than \$110,000 in equity. The prices are now moving up. I believe if you clean up the yard, you can sell it for more than you paid for it." This was followed by a series of letters from respondent to Anita covering April to August of 1994, advising her of the consequences of her failure to make payments to Beneficial and urging her to list the property for sale in order to obtain some return on her equity in the property. In April he asked Anita not to come to the office without an

appointment because of recurring disturbances caused by Paco.¹¹ In the absence of further payments, Beneficial exercised its right of sale under the deed of trust in the fall of 1994, and Anita and her family were evicted from the property in December 1994.

DISCUSSION OF CULPABILITY

Respondent argues that, in selling the property to Anita, he complied with the requirements of rule 3-300, that he advised Anita to seek independent counsel, and that the hearing judge failed to give weight to the value of the property he sold to Anita. He further argues that there is not clear and convincing evidence of his moral turpitude in violation of section 6106 in his entering into that transaction with his client and contends that the evidence does not support a finding of violation of section 6068 , subdivision (e), as he claims there is no evidence that he provided Beneficial with the confidential information concerning Anita's settlement. Finally, he argues at length that the hearing judge committed error in not allowing him to testify as an expert on real estate matters.

On the other hand, the State Bar urges that respondent committed an additional violation of section 6106 in sending the confidential settlement agreement to Beneficial, and is culpable of two additional violations of that section in his alleged untruthful responses to State Bar investigators. Finally, it urges that respondent is culpable of failing to support state law in violation of section 6068, subdivision (a) by failing to provide Anita with the disclosures required by Civil Code section 1102 et seq.

We first address the arguments of respondent, followed by our discussion of the position urged by the State Bar.

¹¹We note that, in February 1994, Anita closed her account with the bank, withdrawing somewhere between \$10,000 and \$16,000.

COUNTS ONE AND TWO, RULE 3-300 (BUSINESS TRANSACTION WITH A CLIENT)
AND SECTION 6106 (MORAL TURPITUDE)

When an attorney enters into a business transaction with a client, the attorney must, at his or her peril, comply with rule 3-300.¹² A violation of any part of that rule gives rise to culpability. (Cf. *Read v. State Bar* (1991) 53 Cal.3d 394, 411 [construing the predecessor to rule 3-300, whose language was substantially identical to that of the current rule 3-300].) “The relationship between an attorney and client is a fiduciary relationship of the very highest character. All dealing between an attorney and his client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for any unfairness [citation.]” (*Clancy v. State Bar* (1969) 71 Cal.2d 140, 146.) “When an attorney-client transaction is involved, the attorney bears the burden of showing that the dealings between parties were fair and reasonable and were fully known and understood by the client. [citation.]” (*Hunnecutt v. State Bar* (1988) 44 Cal.3d 362, 372-373.)

With these principles in mind, we look to the facts and circumstances of the transaction between respondent and Anita. Respondent knew that any significant recovery in the wrongful death action would terminate even her financial aid from AFDC. By the time of the settlement, he knew that Anita was, at best, naive in financial matters, if not irresponsible.

On the other hand, respondent was two months behind in making payments on the loan from Beneficial and had assured Beneficial that he was receiving money from Anita’s settlement, had made an unsuccessful effort to sell the property some three years earlier and was indebted to

¹²That rule provides: “[An attorney] shall not enter into a business transaction with a client; . . . unless each of the following requirements have been satisfied: [¶] (A) The transaction . . . and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and [¶] (B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client’s choice and is given a reasonable opportunity to seek that advice; and [¶] (C) The client thereafter consents in writing to the terms of the transaction . . .”

others, including his secretary, his former wife¹³ and a judgment creditor for a total in excess of \$60,000. For all practical purposes, the deposit of the settlement funds, the agreement for the sale of the property and the disbursement of the funds occurred simultaneously. On that same day, respondent delivered a grant deed to the property to Anita with the advice that, if she recorded it, her property taxes would be increased. He made no mention of the documentary transfer tax that would be imposed at the time of recording.

At the time of delivering the deed to Anita, respondent had not recorded the deed from his former wife conveying her interest in the French Camp property to him.¹⁴ While he claimed to have personally done a title search to satisfy himself that he was conveying good title, there was no evidence of the extent of that search or what he included in that purported search. Respondent testified that he did not know of the “Notice of Code Violation” recorded by the San Joaquin County Redevelopment Department, giving notice of code violation consisting of building without a permit and electrical wiring without a permit. Nor did respondent have any concern for the recorded deed of trust that clearly provided that, if he should voluntarily divest himself of title, Beneficial could declare the entire balance of the loan due and payable.

Respondent testified that such “due on sale” provisions were not enforceable, and he was not concerned with whether Anita could assume the Beneficial loan. Respondent’s understanding of the law is incorrect, as well established authority shows. In 1982 the Garn-St. Germain Depository Institutions Act (12 U.S.C. § 1701j-3) preempted state control, making all but a few “due on sale” clauses in deeds of trust nationwide enforceable, rendering ineffective *Wellenkamp v. Bank of America* (1978) 21 Cal.3d 943. (See 3 Witkin, Summary of Cal. Law (9th ed. 1987)

¹³At least a portion of the sums due his former wife did not become payable until the sale of the French Camp property.

¹⁴The record does not show whether the decree of dissolution that may have conveyed the property to respondent was recorded.

Security Transactions in Real Property §81, pp. 586-588; 4 Millar & Starr (3d ed. 2000) §10:108, p. .) We note that the Beneficial encumbrance was not a “purchase money deed of trust” and thus Beneficial was not precluded by Code of Civil Procedure section 580b from seeking a judicial foreclosure, that may not limit the recovery to the value of the property. This left Anita at risk in that Beneficial had the option, on learning of the sale by respondent, to declare the balance on the note secured by the deed of trust due and exercising its right of sale on the deed of trust or initiating a judicial foreclosure under Code of Civil Procedure section 725a.

For purposes of his own, and in contravention of normal business practice, respondent prepared for Anita’s signature some 13 or 14 individual checks totaling \$60,000, the amount he was to receive for his equity in the French Camp property, payable to his creditors directly from Anita’s account. While respondent was entitled to a down payment of \$60,000, such unique procedure was totally without benefit to Anita. While it is true conditioning the sale to Anita on the payment by her of \$50,000 to Beneficial increased Anita’s equity, to her benefit, it did not serve to reduce the monthly payment she was to make to Beneficial, or otherwise reduce her current cash demands to make her more secure in her ownership of the property. It did, however serve to reduce respondent’s risk in the event Beneficial elected to undertake a judicial foreclosure rather than exercise their rights under the power of sale in the deed of trust.

Respondent argues that he did give Anita notice in writing recommending that she consult with another attorney as required by rule 3-300, and we have found that to be true. Respondent complains that the hearing judge gave scant attention to the value of the property at the time of Anita’s purchase. Because respondent has the burden to prove that the transaction was fair, he had the burden to prove the price Anita paid for the property was not excessive compared to the fair market value. The only evidence before us, as to the property’s fair market value, is an appraisal estimating the value at \$178,500 dated approximately one year before the sale and respondent’s testimony placing the fair market value at \$210,000. Thus, we must weigh the

transaction with the view that the sale price was in the range of the fair market value of the property. This record does not demonstrate that the fundamental requirement of rule 3-300 has been complied with. The heart of that rule requires that the terms of the transaction be both “fair and reasonable to the client.” The fact that the sale price was at or about the fair market value does not constitute compliance with that basic requirement. The question is not merely whether the sale price was fair and reasonable in an abstract sense, but rather whether the entire transaction, in the language of rule 3-300, was “fair and reasonable to the client.” Further, we must consider all of the circumstances of the client to determine if the transaction was a prudent investment for a person in her circumstances. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 662-663.) In weighing the circumstances of the transaction, we take particular note of the observation of the Supreme Court in *Hunnicutt v. State Bar*, *supra*, 44 Cal.3d at page 370; that “[a] client who receives the proceeds of a judgment or settlement will often place great trust in the investment advice of the attorney who represented him in the matter. This is especially likely when the client is unsophisticated and a large amount of money is involved. This trust arises directly from the attorney-client relationship, and abuse of this trust is precisely the type of overreaching that rule 5-101 [which was the predecessor to rule 3-300] is designed to prevent.” Although we do not find a breach of trust in respondent’s dealings with Anita, we do find there are a number of areas on the periphery of the transaction that preclude it from being fair and reasonable to Anita.

It is clear that, at the time of the sale, the property was encumbered with a deed of trust containing a “due on sale” clause which, based on the record before us, was enforceable. This information was not given to Anita; nor was Anita informed that Beneficial had the apparent right to collect the entire balance due on the promissory note secured by the French Camp property or to exercise their right of sale under the deed of trust as the result of the sale. Anita was not provided title insurance; she was not informed that such insurance was usual and customary; nor was she advised as to the purposes or benefits of such insurance. She was not advised to consult a

real estate broker; nor was she informed of the services such a broker might provide her. She was not given the option of having the transaction handled through a formal escrow as is customary; nor was she advised of the services such an escrow agent might provide. She was not advised of the fact that a notice of code violations had been recorded, or of the effect that that recording might have on her future use, improvement or sale of the property. She was given an option not to record the deed from respondent on the basis that such a recording would trigger a reassessment of the property and a probable increase in taxes. She was not advised that by failing to advise the county assessor of the transfer of the title she subjected the property to a later assessment for escaped taxes, along with interest and penalties. For property tax purposes a deed need not be recorded, but Revenue and Taxation Code section 480 mandates, with exceptions not here relevant, that a buyer file a "change of ownership statement" within 45 days of the date of change of ownership. The failure to file such statement results in a statutory penalty of \$100 or 10 percent of the assessed taxes. (Rev. & Tax. Code, § 4809, subd. (c).) Finally, respondent failed to provide Anita with the disclosure statement as mandated by former section 1102.6 et seq. of the Civil Code.

Respondent argues that each of these omissions was for the purpose of reducing the cost to Anita. What he fails to acknowledge is that Anita was not given the opportunity to exercise any choice in these matters. She did not know what title insurance was, did not know what escrow was, did not know what a real estate broker did, and had no idea of the risks she was assuming because of the rights of Beneficial to take action against the property. Further, respondent's arguments concerning costs savings are only partially true because in some cases he would have typically borne all or part of the expenses (brokers commission typically paid out of the proceeds of sale - escrow charges, etc.). We conclude that under the circumstances, the terms of the transaction were not fully disclosed to Anita, nor were all of the terms transmitted in writing to Anita in a manner that should have reasonably been understood by her.

When these deficiencies in the conduct of respondent are combined with the relationship between the parties and the manner in which the transaction was carried out, it is clear that respondent has failed to sustain “ the burden of showing that the dealings between parties were fair and reasonable and were fully known and understood by the client [citation.]” (*Hunniecutt v. State Bar*, *supra*, 44 Cal.3d at 372-373.)

We cannot help but conclude that at least a partial purpose of respondent entering into the agreement for the sale of his long time home and office property was for his personal benefit, and not that of Anita. He had a fiduciary duty to work for Anita’s benefit alone. (*Hunniecutt v. State Bar*, *supra*, 44 Cal.3d 362.) And that duty was clearly breached by the terms of the agreement and manner in which it was handled. As we have noted, respondent failed to disclose many potential problems with the sale and the assumption of the loan, the risks of no title insurance and the risks of not recording the deed. It is obvious that Anita was not otherwise aware of these risks. Nor can we overlook the manner in which the transaction was handled, occurring simultaneously with the disbursement of the proceeds of the settlement of Anita’s wrongful death case, the opening of Anita’s first bank account and the disbursement of funds directly to respondent’s creditors. Each of these factors are considered and contribute to our findings that respondent was overreaching and acting in at least part for his own benefit. We conclude that the transaction was a breach of a fiduciary obligation and is precisely what rule 3-300 is designed to prevent.

Respondent argues that the hearing judge erred in not permitting him to qualify as an expert on real estate transactions. The errors of law we have outlined impeach respondent’s qualifications as an expert, but even aside from that, we find no abuse of discretion on the part of the hearing judge in refusing to qualify respondent as an expert. “The trial court has broad discretion to determine whether a particular witness qualifies to testify as an expert. *Douglas v. Ostermeier* (1991) 1 Cal.App.4th 729, 738,” (1 Jefferson Cal. Evidence Benchbook, (Cont. Ed. Bar 3d ed. 1997), § 29.18, p. 585.(hereafter Jefferson).) It is equally clear that when the trier

of fact is able to form a conclusion from the evidence with the same intelligence as an expert, expert testimony is not admissible. (*McCleery v. City of Bakersfield* (1985)170 Cal. App. 3^d 1059, 1074, fn. 10; Jefferson, § 29.23, p. 587.) In any event, the hearing judge gave respondent wide latitude in his testimony, allowing him to voice many opinions on his transactions with Anita. We find no abuse of discretion in the hearing judge's refusal to qualify respondent in real estate transactions.

In addition to the charge of a violation of rule 3-300, respondent is charged with moral turpitude in selling the French Camp property to Anita. We do not see respondent's conduct on this record as venal, intentionally dishonest or corrupt. The evidence demonstrates that the property was worth at least what Anita paid for it and respondent appeared substantially motivated to see Anita enjoy the property as owner, which she strongly desired. Moreover, not every wilful violation of rule 3-300 warrants a finding of moral turpitude. But those points do not exonerate respondent of the moral turpitude charges before us. For many years, moral turpitude has been broadly defined. (E.g., *In re Mostman* (1989) 47 Cal.3d 725, 736-737; *In re Strick* (1983) 34 Cal.3d 891, 901-903; *In re Higbie* (1972) 6 Cal.3d 562, 569-570.) Moral turpitude typically occurs whenever an attorney intentionally breaches a fiduciary duty to a client. (*Hunniecutt v. State Bar, supra*, 44 Cal.3d 362, 372-373; *Giovanazzi v. State Bar* (1980) 28 Cal.3d 465, 472-473), and may occur even if an attorney acts non-deliberately to breach a fiduciary duty to a client where the breach occurs as a result of gross carelessness and neglect. (*In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 208, citing, inter alia, *Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020.). As we have discussed in detail in connection with respondent's violation of rule 3-300, *ante*, there was ample evidence demonstrating his violation of his fiduciary duty to his client, arising from the unfairness of the manner of the handling and the peripheral aspects of the transaction, and that the transaction was, at least in part, for his own

benefit. As such, we are compelled to the conclusion that respondent violated section 6106 in connection with the sale of his property to Anita.

COUNTS THREE AND FOUR, SECTION 6068, SUBDIVISION (e) (MAINTAIN CONFIDENCES OF CLIENT), AND SECTION 6106 (MORAL TURPITUDE)

In counts three and four, respondent is charged with violating his client's confidence by disclosing to Beneficial the amount of Anita's settlement of her wrongful death claim to Beneficial and for moral turpitude in that conduct. As we have noted, respondent denied authoring the letter to Beneficial enclosing the confidential settlement agreement resolving Anita's wrongful death claim. The hearing judge concluded that, at a minimum, respondent knew that letter was being sent from his office on his letterhead and that it contained a copy of, at least, the greater portion of the confidential settlement agreement. We concur in that finding, and further find that his knowledge of the sending of that letter renders him culpable of a violation of section 6068, subdivision (e).

Following our consideration of the specific language of section 6068 subdivision (e), we, contrary to the finding of the hearing judge, find that respondent is culpable of moral turpitude in permitting his office to provide a copy of Anita's confidential settlement agreement to Beneficial. That section requires an attorney "[t]o maintain inviolate the confidence, *and at every peril to himself or herself to preserve the secrets, of his or her client.*" (Emphasis added.) The disclosure of the terms of that agreement placed Anita at risk of action by the insurance company that was a party to that settlement agreement. The sole purpose of providing Beneficial with information concerning Anita's settlement was to aid respondent in gaining time in which to bring his delinquent payments current, in violation of that subdivision of section 6068. In doing so he placed his interests above those of his client in violation of section 6106.

COUNTS 5 AND 6, SECTION 6106 (MORAL TURPITUDE IN RESPONSE TO INVESTIGATIVE LETTERS)

In count 5, the State Bar charges that respondent lied in his response to an investigative letter sent by the State Bar, dated May 13, 1996, when he stated that he had not deposited Anita's settlement check in his trust account, but that at the bank's suggestion he had divided the settlement, deposited his fee in his general account, less \$2,500 that was paid directly to him, and deposited \$186,000 into Anita's account. As the record shows the entire \$250,000 was deposited into respondent's trust account, from which respondent's fee was taken and the balance transferred to Anita's newly opened account. While respondent's response to the State Bar's letter was not accurate, it is true that none of the funds came to rest in respondent's trust account. It is clear that respondent's response to the State Bar was negligent, but we do not find the gross negligence necessary to elevate that conduct to moral turpitude. Further, we find no benefit to respondent, either expected or actual that suggests a willful attempt to mislead the State Bar.

In count 5, the State Bar also charges respondent lied in his response to the May 13, 1996, letter when he stated that he paid Anita's December, 1993 payment as a gift. We disagree. It is true that the payment made on November 17, 1993, covering the payment due November 28, 1993, was drawn on Anita's new account along with 15 or 16 additional checks, all prepared by respondent. The total of these checks represented the \$60,000 that Anita paid respondent for the sale of the French Camp property. Thus, while the check was signed by Anita and drawn on her account, it did represent a portion of funds that were due respondent for the sale of the property under the terms of the agreement between them.

We conclude there is no clear and convincing evidence of moral turpitude in respondent's letter in answer to the State Bar's letter of inquiry dated May 13, 1996.

In count 6, The State Bar charges that in response to a July 2, 1997,¹⁵ letter, respondent lied when he stated that after the sale to Anita, she assumed “the [Beneficial] note and mortgage as a part of our Contract of Sale. . . .They billed her for the payments after that.”

Under the “Contract of Sale” for the French Camp property, paragraph 7 provided that Anita “also agrees to assume and pay the loan at Beneficial” Thus, as between respondent and Anita, she had assumed the loan. It is equally clear that as between Anita and Beneficial no such assumption took place. Standing alone, such a statement did not show that respondent was referring to a formal assumption by Anita of respondent’s obligations to Beneficial when his response to the July 2, 1997, inquiry by the State Bar was made.

It is clear that Beneficial never billed Anita for the payment on the property and that they continued to bill respondent. It is equally clear that respondent knew that at the time of his response to the State Bar investigative letter of July 2. Contrary to the holding of the hearing judge, we find that this evidence, combined with respondent’s ambiguous statement concerning Anita’s assumption of the loan, shows an intent to mislead the investigator into believing that Anita had successfully assumed respondent’s obligations under the Beneficial loan. We find that such a deliberate attempt to mislead a State Bar investigation constitutes moral turpitude in violation of section 6106.

¹⁵We invite attention to two factors that appear to have unduly prolonged the resolution of this matter. First, we note that the matter was taken under submission on March 1, 2000, and the decision of the hearing judge was not filed until January 22, 2001, in clear violation of rule 220(b), Rules of Procedure of the State Bar. Second, the first investigative letter to respondent was dated May 13, 1996, while the record shows no follow up on that investigation until August 18, 1997, some 15 months later. These factors, in combination, represent a delay of almost 26 months, the majority of which appear unjustified. While the delay is not jurisdictional (*In the Matter of Brimberry* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 390, 396), it is an unacceptable delay in public protection and determining the rights of respondent.

COUNT NINE, SECTION 6068, SUBDIVISION (a) (FAILURE TO SUPPORT STATE LAW)

The State Bar contends that respondent's failure to provide Anita with the disclosure statement required by Civil Code section 1102 et seq. constitutes a violation of section 6068, subdivision (a). That subdivision requires an attorney to support the Constitution and laws of the United States and of this state. The hearing judge concluded that because the contract of sale with Anita contained a provision that the French Camp property was sold "as is," Anita waived the requirements of Civil Code section 1102 et seq. and respondent was not required to comply with the provisions of Civil Code section 1102.6 as it then existed. We disagree with the hearing judge's conclusion regarding a waiver of the Civil Code section, but reach the same conclusion regarding respondent's culpability under this charge using different reasoning.

It is true that at the time of respondent's sale of the French Camp property the apparent controlling law permitted a waiver of the requirements of Civil Code section 1102 et seq. (*Loughrin v. Superior Court* (1993) 15 Cal. App.4th 1188.) However, as *Loughrin* notes at page 1195, "a knowing and explicit waivers of the benefits of section 1102 et seq. can be effective." We conclude that there was neither a knowing nor an explicit waiver of those sections by Anita in the contract of sale. Anita had no knowledge of those Civil Code sections; nor is there any evidence that the existence or import of those sections was explained or described to her. However, this omission by respondent was charged in count one as one of the elements constituting his violation of rule 3-300 and is one of the factors that we use to determine that there was a violation of rule 3-300 as charged in that count. To again rely on that identical failure to provide a disclosure statement as a separate ethical violation is not proper. (Cf. *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 279.) We conclude that respondent is not culpable of a violation of section 6068, subdivision (a) as charged in count nine.

DISCIPLINE

In determining discipline we look first to mitigating and aggravating circumstances, each of which must be established by clear and convincing evidence (*In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 699; Std.1.2(b), (e)).

MITIGATION AND AGGRAVATION

At the time of the found misconduct respondent had practiced in this state for 26 years without prior discipline. “Absence of a prior disciplinary record is an important mitigating circumstance when an attorney has practiced for a significant period of time.” (*In re Young* (1989) 49 Cal.3d 257, 269 [20 years without complaint]; Std. 1.2(e)(i).) We agree with the hearing judge’s finding that there is no clear and convincing evidence of significant pro bono activities. We note that respondent has not pursued that issue on appeal.

The hearing judge found that respondent’s misconduct was aggravated by harm caused to Anita by that misconduct. We agree in part, but believe that finding needs some additional explanation. It is true that Anita lost the property as the result of Beneficial exercising its right of sale under the deed of trust. That occurred as the result of Anita’s lack of ability to manage her funds or understand that she alone was responsible for making the payments to preserve the property. It is clear that this lack of ability on the part of Anita was a risk that was foreseeable by respondent. However, we do not agree that Anita’s failure to make any payments after four months, or make any effort to either save or sell the property was foreseeable. Anita must bear the primary responsibility for the loss of the property. Had she preserved any of her funds she would have at least been able to sell the property and recover at least some portion of her investment. We do not find that her inability to accomplish this small task was foreseeable. Following the sale, respondent repeatedly wrote Anita urging her to make the payments to Beneficial and offering to help clean up the property in order to permit her to sell it prior to foreclosure.

We do find respondent culpable of multiple offenses in his violation of rule 3-300 and three counts of moral turpitude, in breaching his duties to Anita in the property transaction, in sending the settlement agreement to Beneficial and in his response to the State Bar's second investigative letter. We do consider these multiple offenses to be aggravating. (Std. 1.2 (b)(ii).)

DISCUSSION REGARDING DISCIPLINE

We find that although respondent's conduct in the sale of the French Camp property to Anita involved moral turpitude, it has not been shown by clear and convincing evidence to have been either intentionally dishonest or venal. Even in retrospect, the potential for benefits to Anita and her children in the sale can be seen. It is impossible to allocate responsibility for Anita's loss between respondent and Anita. It is for this reason that we reject the State Bar's request that any recommendation for discipline include an order for restitution.

It is clear that at least some portion of the rationale for respondent entering into the sale was personal benefit. Nonetheless, had Anita acted responsibly the sale could have proven beneficial to her. In this sense, the sale of the property here is distinguishable from cases in which the total control of the investment was in the hands of the attorney or his associates. (See *Rose v. State Bar*, *supra*, 49 Cal.3d 646 [investment in restaurant equipment]; *Hunnicutt v. State Bar*, *supra*, 44 Cal.3d 362 [loan to attorney, originally secured, converted to unsecured].)

Violation of the predecessor rule to 3-300 has resulted in a wide range of discipline, from private reproof to two years' actual suspension. (*Hunnicutt v. State Bar*, *supra*, 44 Cal.3d at p. 373.) In arguing that respondent be actually suspended for two years as the result of his misconduct, the State Bar relies on *Rose v. State Bar*, *supra*, 49 Cal.3d 646, *Beery v. State Bar* (1987) 43 Cal.3d 802 and *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233.

In *Rose* the attorney was found culpable of willfully failing to communicate with clients, failure to promptly discharge obligations regarding client funds, improper solicitation of clients

and improper business dealings with a client. Rose withheld proceeds of a personal injury settlement from client for three years and delayed paying an expert he had hired, and then satisfied these obligations only after disciplinary proceedings had been commenced against him. In additional matters, Rose was found culpable of failing to promptly return a client's file and culpable of soliciting the victim of a helicopter crash on the victim being released from intensive care, then failing to communicate with him and another client involved in that same crash. Also, Rose settled a wrongful death action on behalf of the deceased's widow. He then persuaded the widow to invest \$70,000 of her approximately \$93,000 settlement in a restaurant franchise without disclosing that he was receiving compensation as a promoter for that franchise. Rose was actually suspended for two years.

In *Beery v. State Bar, supra*, 43 Cal.3d 802 the client's personal injury action was settled for \$250,000. The attorney solicited a loan from the client for a satellite venture without telling the client of his personal involvement in the venture or other material facts including the fact that funds were not available from other sources. The attorney personally guaranteed the investment, although he knew he could not perform on that guarantee. The attorney was found culpable of moral turpitude in soliciting the loan. In imposing a two-year actual suspension, the Supreme Court noted that the attorney persisted in his failure to recognize the seriousness of his misconduct. A two-year actual suspension was imposed in *In the Matter of Johnson, supra*, 3 Cal. State Bar Ct. Rptr. 233 where the attorney exploited a vulnerable relative for whom she had obtained a recovery in a personal injury action by borrowing the bulk of the relative's recovery and not repaying the loan. Moral turpitude as well as serious aggravation was found and the attorney was actually suspended for a period of two years.

In *Hawk v. State Bar* (1988) 45 Cal.3d 589, the attorney obtained a deed of trust on a client's property, without complying with the predecessor to rule 3-300, to secure his fee. He was also culpable of moral turpitude by misleading the clients in the time they had to pay off their

indebtedness and changing the amount of indebtedness after the note had been executed. The Supreme Court adopted a recommendation of six months actual suspension, noting that there was mitigation and that, at that time, the application of the rule to Hawk's circumstances was a matter of first impression.

On the other hand, in *Connor v. State Bar* (1990) 50 Cal.3d 1047, the review department of this court recommended that the attorney be actually suspended for two years, but the Supreme Court rejected that recommendation and imposed the discipline of a public reproof. Connor had acquired title to the client's property in Lake Arrowhead and then obtained a home equity loan on the property, falsely stating on the loan application that his address was that of the Lake Arrowhead property, that he was then renting and buying the property from the client, and, by a check mark, that he intended to occupy the property as his primary residence. He then provided the proceeds of the loan to the client to avoid foreclosure. In light of the attorney's strong testimony that he did not intend to mislead the lender, the Supreme Court determined that the evidence did not support the review department's finding that Connor intended to deceive the lender.

In *Hunnecutt v. State Bar*, supra, 44 Cal.3d 362, the State Bar hearing panel recommended actual suspension for 90 days and that Hunnecutt make restitution. The Supreme Court adopted that recommendation. In that case, the attorney had abandoned two clients and violated the predecessor to rule 3-300. He persuaded his client, by personally guaranteeing the loan, to invest the proceeds of a personal injury settlement that he obtained for the client in an unsecured real estate transaction in which Hunnecutt had an interest. The real estate venture resulted in large losses to the attorney, and he was unable to repay the loan. The Supreme Court affirmed a finding of moral turpitude.

In *Ritter v. State Bar* (1985) 40 Cal. 3d 595, it was found that, although the transaction was reasonable, there was a violation of the predecessor to rule 3-300, because no opportunity was

given for the client to discuss the transaction with a third person. There, the loan agreement between Ritter and the client was signed by the client upon presentation. Ritter was suspended for 60 days. In *In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, the attorney loaned his client \$100,000 without complying with rule 3-300. Thereafter, he represented the client, sued the client and was a co-defendant with the client, resulting in repeated violations of the Rules of Professional Conduct, but no finding of moral turpitude. In mitigation Lane showed 25 years of practice without discipline and a good reputation in the community. Lane was suspended for 60 days.

In considering the cases relied on by the State Bar, we find that they demonstrate more egregious misconduct than that before us. In both the *Berry* and *Johnson* matters the attorney was found culpable of moral turpitude in the transaction with the client. While no moral turpitude was found in the attorney's transaction with his client, in *Rose v. State Bar*, supra, 49 Cal.3d 646 there was significant, if not controlling, additional misconduct resulting in a two-year actual suspension. Further, in each of the cases relied on by the State Bar, there was far less fairness, or potential for benefit to the client, in the dealings between the attorney and client.

Although we find no case setting forth facts that directly guide us, we look to *Hawk*, *Hunnicutt*, *Ritter* and *Conner* for assistance. In *Hunnicutt* it appears that the transaction between the attorney and client lacked the potential for fairness and reasonableness that existed in respondent's sale of the French Camp property to Anita. In our judgement these findings of three counts of moral turpitude make the present case more serious than *Hunnicutt*. In *Conner*, the Supreme Court rejected the finding of moral turpitude and the recommended two-year period of actual suspension and imposed a public reproof. Again in *Ritter*, the Supreme Court affirmed the transaction was fair and reasonable, but also affirmed that there was a violation of the rule concerning transactions between attorney and client. On balance, we find respondent's action to

have been more egregious than that of the attorneys in either *Ritter* or *Hunnicutt*, and roughly equivalent to the misconduct of the attorney in *Hawk*.

Therefore, we adopt the recommendation of the hearing judge that respondent Thomas Oscar Gilles be suspended from the practice of law for a period of three years, that execution of that three-year suspension be stayed, and that he be placed on probation for three years on each of the conditions recommended by the hearing judge in his decision filed on January 22, 2001, including the condition that respondent be actually suspended from the practice of law for six months.

We also recommend that respondent be ordered to comply with rule 955 of the California Rule 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's order in this matter.

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination given by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court's order in this matter and that he be ordered to furnish satisfactory proof of his passage of that examination to the State Bar Probation Unit within that one-year period.

COSTS

Finally, we recommend that costs be awarded to the State Bar pursuant to Business and Professions Code section 6068.10 and that such costs be made payable to accordance with Business and Professions Code section 6104.7.

OBRIEN, Judge Pro tem.

We concur:

STOVITZ, P.J.
WATAI, J.

Case No. 96-O-02494

In the Matter of Thomas Oscar Gillis

Hearing Judge

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