

PUBLIC MATTER – DESIGNATED FOR PUBLICATION

FILED May 22, 2001

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of

Ronald Robert Silverton,

A Member of the State Bar.

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95-O-10829

OPINION ON REVIEW

In this matter, involving the handling of personal injury claims, the State Bar seeks review of a hearing judge’s decision exonerating respondent, Ronald Silverton,¹ of five charged counts of misconduct, involving two client matters, in both of which he acquired from his clients the right to keep for his own benefit any sums resulting from a compromise of the claims of medical care providers. In one instance the agreement for the acquisition of those rights occurred in a separate agreement executed at or about the time of the settlement of the personal injury claim and in the other as a result of a separate paragraph in the original retainer agreement between respondent and his clients. The hearing judge dismissed counts four and five, involving Kelly and de Jong before trial and dismissed counts one two and three, involving the Hous, following trial.

The State Bar argues that such conduct by respondent constituted a business transaction with his clients in which he acquired a pecuniary interest adverse to his clients in violation of rule 3-300 of the Rules of Professional Conduct,² and that it represented an unconscionable fee in violation of rule 4-200(A). Respondent argues that the agreements are for fees, that they are not covered by rule

¹Respondent was admitted to practice in June 1958, disbarred in July 1975, and readmitted in October 1992.

²All further references to rules are to the Rules of Professional Conduct, unless otherwise noted.

3-300, and that such agreements are not unconscionable under rule 4-200(A) but, rather, confer a benefit on clients.

We reverse the hearing judge's dismissal of counts four and five in the Kelly and de Jonge matter charging violations of rules 3-300 and 4-200, and remand those counts for trial. We reverse the dismissal of count one in the Hou matter, determine that respondent is culpable of a violation of rule 3-300 as charged in that count, and remand that count for a hearing to determine the appropriate discipline. In the Hou matter, we agree with the hearing judge's dismissal of counts two and three, but add that those dismissals are with prejudice. For ease of analysis we first address counts four and five, followed by a consideration of counts one, two and three.

KELLY & DE JONGE MATTER Counts four (adverse interest) and five (unconscionable fee)

As the charges in the Kelly and de Jonge matter were dismissed prior to trial, we look to the Notice of Disciplinary Charges (NDC) to determine whether rule violations have been adequately pled. Here, Kelly and de Jonge are alleged to have employed respondent to represent them and their children in a personal injury matter. As alleged, the retainer agreement provided that respondent was to receive one-third of any recovery if the claim was settled before suit and 40 percent of such recovery after filing suit or request for arbitration. There was no allegation of liens by any health care provider.

COUNT FOUR (ADVERSE INTEREST)

Rule 3-300 prohibits an attorney from entering into a transaction with a client where the attorney acquires an "ownership, possessory, security, or other pecuniary interest adverse to a client" unless (A) the terms of the transaction are fair and reasonable to the client, are fully disclosed in writing, and are set forth in a manner that reasonably should be understood by the client, (B) the client is advised in writing that the client may seek advice of an independent attorney, and (C) after compliance with the above terms the client consents in writing. The discussion under that rule makes clear that rule 3-300 is not intended to apply to retainer

agreements between the attorney and client “unless the agreement confers on the [attorney] an ownership, possessory, security, or other pecuniary interest adverse to the client.” It is only after the finding of the existence of an agreement by which an attorney obtains an ownership, possessory, security or other pecuniary interest adverse to a client that such a transaction must meet the tests set forth in subdivisions (A), (B) and (C) of rule 3-300. If the transaction is a “fee agreement” it must meet the standards set forth in rule 4-200. However, if that fee agreement also involves the transfer of an interest proscribed under rule 3-300, the requirements of that rule must also be satisfied. The rules are not mutually exclusive.

Count four charges a violation of rule 3-300, alleging that respondent obtained a pecuniary interest adverse to Kelly and de Jonge without their informed written consent in that “[u]nder a separate provision of the retainer agreement, respondent was entitled to retain as an additional fee the difference between any medical bill and the compromised amount of any such bill.” Count four also alleges that the terms of the agreement were not (1) fair and reasonable or (2) fully disclosed or transmitted to Kelly and de Jonge in a manner that should have been reasonably understood by them, and as a result respondent failed to obtain the informed consent to the retainer agreement. Further, that count alleges that respondent failed to inform the clients of their right to obtain the advice of independent counsel. It is further alleged that respondent did not inform Kelly and de Jonge that it is usual and customary for attorneys in personal injury matters to negotiate reduction of medical liens at no charge to the clients and that the clients are ordinarily entitled to the benefit of any such reduction.

Count four was dismissed by the hearing judge prior to trial, on respondent’s motion. As recited in the decision of the hearing judge, both counts four and five were dismissed pursuant to rule 262 of the Rules of Procedure of the State Bar (Rules of Procedure). Although that rule sets forth various grounds for dismissal, from a reading of the transcript, we determine that the dismissal was for failure of the pleading to state a disciplinable offense as covered by subsection

(c)(1) of Rule of Procedure 262. The hearing judge apparently found that the agreement, as pled in the NDC, could not have conveyed an adverse pecuniary interest from Kelly and de Jonge to respondent within the meaning of rule 3-300.

We conclude that the allegations of count four, if proved, show that the requisite adverse interest was transferred from Kelly and de Jonge to respondent. In count four, the State Bar has alleged that the portion of the retainer agreement between respondent and Kelly and de Jonge transferring to respondent the right to retain the proceeds of any compromise of medical bills was a “fee agreement.” While this allegation would appear to charge a violation of rule 4-200, it does not preclude a charge of rule 3-300. (See rule 3-300, *Discussion*.) As we have noted, count four also alleges a transfer of a pecuniary interest and a violation of each of the elements of rule 3-300. Absent an understanding of the facts and circumstances involved in the making of such an agreement and a full understanding of what, if anything, was conveyed by that agreement, we cannot say, as a matter of law, that no violation of rule 3-300 occurred. Those facts, circumstances, and full understanding can only come following an evidentiary hearing.

Respondent argues the transfer of the right to compromise medical bills is no more a transfer of a pecuniary interest than is the usual contingent fee agreement containing a provision for an attorney to obtain a lien for his or her services on the proceeds of the client’s recovery. There can be no question that contingent attorney retainer agreements are permitted in California. (Bus. & Prof. Code, § 6147.) Under such an agreement, an attorney employed to handle a contingent fee matter may properly obtain an interest for the value of his or her services in any recovery obtained for the benefit of the client. It is equally clear that an attorney may properly obtain a lien for attorney’s fees upon the prospective recovery sought on behalf of a client. (*Cetenko v. United California Bank* (1982) 30 Cal.3d 528, 531; *In the Matter of Feldsott* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 754, 757.) No case has been called to our attention requiring compliance with rule 3-300 by an attorney seeking to obtain a lien for attorney’s fees on

the prospective recovery of a client where that attorney is providing legal representation on a contingent fee basis, nor do we here suggest that such is required under rule 3-300.

In response, the State Bar invites our attention to a number of agreements between attorneys and clients, ostensibly for fees or security for fees, that have been found to run afoul of rule 3-300 and its predecessor rule 5-101. Among those cases are *Morgan v. State Bar* (1990) 51 Cal.3d 598, 605 [attorney obtained right to use client's credit card in exchange for payment of existing balance]; *Hawk v. State Bar* (1988) 45 Cal.3d 589, 600-601 [note secured by deed of trust given as security for attorney's fees]; *Sugarman v. State Bar* (1990) 51 Cal.3d 609, 616 [loan to attorney in lieu of fees]; and *In the Matter of Yagman* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 788, 796, fn. 7 [transfer of right to attorney's fees in civil rights action].

While none of the cases cited by the State Bar are directly controlling, they do provide a cautionary tale for an attorney who seeks an interest in clients' property. We also note that the Supreme Court in *Hawk v. State Bar, supra*, 45 Cal.3d at pages 599-600, quoted with approval the court's prior observation that the predecessor to rule 3-300 "prohibits 'circumstances where it is reasonably foreseeable that [the attorney's] acquisition may be detrimental, i.e., adverse, to the interests of his client. [Citation.]'" In *Silver v. State Bar* (1974) 13 Cal.3d 134, at page 139 (cited with approval in *Hawk*, at p. 600), the Supreme Court confirmed that there were two reasons that attorneys in a prior case had violated the predecessor to rule 3-300. The attorneys had (1) acquired an interest in the subject matter of the litigation for which they had been retained and (2) placed themselves in a position to extinguish their client's interest in the property. Based on the pleadings alone it appears that each of these events occurred in the present matter. In the pleadings respondent is alleged to have acquired the exclusive right to that portion of the settlement attributable to the medical expenses. Upon negotiating a compromise with the medical care providers and paying that compromised sum respondent was in a position to extinguish his client's interest in that property.

The discussion following rule 3-300 makes clear that the mere fact that a provision conferring on an attorney a pecuniary interest adverse to a client appears in an attorney employment agreement does not exempt that provision from scrutiny under rule 3-300. Although the designation of a provision as an additional fee represents an agreement to that effect between client and attorney, we do not consider such a designation to be controlling for disciplinary purposes where it is alleged that the transfer of a pecuniary interest or other allegation that such a provision is a “business transaction” as distinguished from a fee agreement. (See *In the Matter of Lais* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 923.)

We reverse the hearing judge’s dismissal of count four and remand that count to the hearing department for trial to determine culpability and if culpability is found, to determine the appropriate discipline.

COUNT FIVE (UNCONSCIONABLE FEE)

By incorporating the factual allegations from count four, count five alleges that the fee agreement between respondent and Kelly and de Jonge gave respondent the option to retain as additional attorney’s fees any amount saved by compromising medical bills. That count further alleges that respondent failed to inform his clients that it is customary for attorneys handling personal injury matters to attempt to negotiate compromises of medical liens for the benefit of their clients, that the terms of the agreement were not fair and reasonable to the clients nor were those terms fully disclosed nor transmitted to Kelly and de Jonge in a manner that could have reasonably been understood by the clients and that respondent failed to obtain their informed consent.

Rule 4-200(A) prohibits an attorney from entering into an illegal or unconscionable fee agreement. Rule 4-200(B) provides, “Unconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where

the parties contemplate that the fee will be affected by later events.” That subsection then lists 11 factors among the items to be considered in determining the conscionability of a fee.³

We initiate our consideration of rule 4-200 by noting that “in general, the negotiation of a fee agreement is an arm’s-length transaction. . . .” (*Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 913, citations omitted; *Setzer v. Robinson* (1962) 57 Cal.2d 213, 217.) However, this authority is limited by the observation of the Supreme Court that the right to practice law “is not a license to mulct the unfortunate.” (*Recht v. State Bar* (1933) 218 Cal. 352, 355, quoted with approval in *Bushman v. State Bar* (1974) 11 Cal.3d 558, 564.) It is clear that a gross overcharge by an attorney may warrant discipline. “The test is whether the fee is “so exorbitant and wholly disproportionate to the services performed as to shock the conscience” [Citations.]’ (*Id.* at p. 563.)⁴

In this count the pleadings allege that respondent was entitled to one-third of any recovery if the client’s claim was settled before suit and 40 percent of any recovery after suit or request for arbitration. As pled, respondent was entitled to the designated portion of the gross recovery, which, in the event of any recovery, would ordinarily include recovery of special damages, including medical expenses incurred by the clients as the result of the negligent conduct of the defendant. In addition to a substantial portion of those special damages, the agreement allowed

³Those factors are (1) the amount of the fee in proportion to the value of the services performed; (2) the relative sophistication of the attorney and the client; (3) the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly; (4) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney, (5) the amount involved and the results obtained; (6) the time limitations imposed by the client or by the circumstances; (7) the nature and length of the professional relationship; (8) the experience, reputation, and ability of the attorney, (9) whether the fee is fixed or contingent; (10) the time and labor involved; and (11) the informed consent to the fee.

⁴We note that the California rule appears to be at variance with ABA Model Rule 1.5. (See Vapnek et al., Cal. Practice Guide: Professional Responsibility, (*The Rutter Group 2000*) ¶ 5:4, p.5-2.)

respondent to retain any additional sums resulting from a compromise of the obligation to pay those medical expenses. Whether such an agreement is unconscionable is ultimately a question of fact and requires an understanding of all of the surrounding facts. However, the pleadings do put those facts in issue.

As alleged, the provision of the retainer agreement in question gave respondent the right, but not the obligation, to compromise the medical bills and retain as an additional fee any reduction in those bills. It is, at best, difficult to find any benefit to the clients in such an agreement. Again, the conscionability of such a provision is a question for the trier of fact.

It is further alleged that respondent failed to inform his prospective clients that it was customary for attorneys to seek to compromise the claims of medical care providers for the benefit of the clients. It is also alleged that respondent failed to obtain the informed consent of the clients, one of the 11 non-exclusive tests set forth in rule 4-200 to determine the unconscionability of fee agreements. It is clear that additional issues raised by the pleading also place in question (1) the amount of the fee in proportion to the value of the services performed, (2) the fact that the fee was contingent, and (3) the time and labor involved in reaching a compromise of the health care charges. The assignment of the right to compromise, if not deemed an acquisition of a pecuniary interest by respondent, is clearly a fee agreement, and subject to a factual determination of whether or not it is unconscionable under rule 4-200. The NDC clearly places in issue factual questions that, if found to be true, would permit the trier of fact to determine that that portion of the fee agreement relating to the fees for compromising the medical charges is unconscionable under rule 4-200.

Count five of the NDC properly alleges a violation of rule 4-200. It is alleged that respondent failed to inform Kelly and de Jonge that it is customary for attorneys to include the negotiation for compromise of medical expenses as a portion of the bargained-for contingent fee. If all portions of that allegation are true there is a possibility that respondent did not obtain the

informed consent of the clients. It is alleged that the agreement is not fair and reasonable to Kelly and de Jonge. If true, it is evidence that the agreement is unconscionable. As we have previously noted, in a case dealing with medical liens “at a minimum, one seeking fees for reduction of a lien should be required to show the value of the services and the informed consent of the client.” (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 851.) The fee agreement must be fair and fully explained to the client. (*Ibid*; see *In the Matter of Yagman, supra*, 3 Cal. State Bar Ct. Rptr. At p. 796, fn. 7.)

We reverse the dismissal of count five and remand that count to the hearing department for trial to determine culpability and if culpability is found to determine appropriate discipline.

THE HOU MATTER Counts one (adverse interest), two (unconscionable fee) & three (moral turpitude)

Each of the counts in the Hou matter were tried by the hearing department. We have independently reviewed the record and adopt the hearing judge’s findings of fact as set forth below.

In June 1992, Janette Hou hired David L. Watson to represent her and her children Raymond and Phillip for injuries arising from a traffic accident involving a truck operated by Durham Transportation Inc. Janette’s mother, Fan Hou, was a passenger in Janette’s auto at the time of that accident and hired Watson at the same time. The agreements called for Watson to receive as a contingent fee one-third of the gross recovery if settled before filing suit or demand for arbitration and 40 percent thereafter. A separate paragraph of the retainer agreements provided, “Should client require attorney to perform other legal services such as collecting excess medical pay, . . . Watson shall receive” one third of any amounts recovered by or on behalf of client.

In addition to their claim against Durham Transportation Inc. the Hous had a policy with 20th Century Insurance that provided medical benefits to the Hous. From 20th Century insurance, Watson received a total of \$7,391 for reimbursement of the medical expenses of all four of the

Hous. From this sum, Watson took \$2,470.73 for his own account and placed \$4,910.68 in his trust account.

In May 1994, Watson associated respondent to assist in the handling of the Hou case and informed his clients of his action. In providing that information he assured the Hous that there would be no increase in the fees. In August 1994, with the consent of the Hous, respondent settled the *Hou v. Durham Transportation Inc.* case for a total of \$16,500 (Janette and Fan \$7,000 each, Raymond \$1,500, and Phillip \$1,000). On August 30, Janette and Fan authorized respondent to endorse the drafts, and he paid \$3,000 to Fan and \$4,000 to Janette for their share of settlement proceeds.

On that same day Fan and Janette signed a document presented to them by respondent entitled "AUTHORIZATION TO COMPROMISE DOCTOR'S BILL," giving respondent the right to compromise doctors' bills "and keep the amount saved by said compromise as an addition to its fees and costs for handling said accident case. This authorization is given in consideration for the fact that the [respondent] has reduced the medical bills in considering the disbursement to me and has accepted as its risk the possibility that the doctor may not compromise to the extend [sic] I have been benefitted by the consideration of said compromise on the Disbursement Sheet." That authorization was not signed by respondent. At the time of this meeting respondent did not know if 20th Century Insurance would, or could, make demand for reimbursement out of the proceeds of the settlement. Ultimately, no such demand was made. On September 8, 1994, Durham Transportation Inc. issued its settlement checks in the total amount of \$16,500.⁵

At this point there was, between Watson and respondent, a total of \$21,410.68 (\$16,500 + \$4,910.68) held for the benefit of the clients. Of this sum \$400 was reimbursed to the attorneys to recover costs that under the retainer agreement were the responsibility of the clients. There were

⁵We note, but do not address, the discrepancy between the date respondent issued checks to the clients and the date he received the settlement checks from Durham Transportation, Inc.

bills from medical providers for services arising out of the accident in the total sum of \$7,991. Absent any reduction in medical charges and after deducting the balance of attorney's fees and costs, the clients were entitled to receive \$14,410.68 ($\$21,410.68 - \$7,000 (\$6,600 \text{ attorneys' fees (at 40 percent of } \$16,500) + \$400 \text{ costs}) = \$14,410.68$). In the absence of liens requiring the payment of medical expenses by the attorneys, the clients were obligated to pay the charges of medical care providers in the sum of \$7,991. Thus, after payment of the billed medical expenses the clients as a group would have netted \$6,419.68.

On August 30, 1994, respondent distributed to Fan and Janette a total of \$7,000, that included \$580.32 more than the retainer agreement called for. On September 14, respondent wrote Watson enclosing Watson's share of the settlement proceeds and inviting him to seek a compromise from the medical care providers, stating, "One third of \$16,500 is \$5,500 (the amount to which I am sure I would get the doctors to compromise their bills)." At that time respondent knew that the principal doctor was complaining about not being paid.

Some six months later and on March 24, 1995, Janette wrote respondent complaining that Dr. Hung had not been paid and asking him to release the medical payments as soon as possible. On April 5, Janette again wrote respondent seeking to rescind the authorization to compromise the medical bills. In that letter she claimed respondent "failed to disclose your true intentions and misled us to sign the Authorization to Compromise Doctor's Bill." Respondent refused to rescind that agreement. On April 20, 1995, the Hous and the doctor wrote the State Bar stating the matter had been taken care of and "[w]e are completely satisfied with the handling of our case . . . by [respondent]."

Respondent compromised all of the medical charges for a total of \$5,500. As the result of that compromise, the attorneys had retained, in addition to the sums provided in their original contingent fee agreement, a total of \$1,910.68 after paying the Hous \$580.32 over the amounts called for in the original fee agreement. The return on the transaction respondent entered into

with the Hous concerning the compromise of the medical charges arising out of the Hous' automobile accident was \$1,910.68 to respondent and \$580.32 to the Hous.

Fan spoke no English. Janette spoke English, but her husband, Steven, had a much better command of English. Steven was present with Janette and Fan on August 30, 1994, the time that both the releases of the defendants in their litigation and the authorization to compromise the doctors' bills were signed by the Hous. Respondent told them he would cut his fee and try and compromise the doctors' bills, but in effect those bills would be respondent's responsibility. Respondent claims he orally advised the clients they could seek independent counsel before they signed the agreement giving respondent the benefit of any compromise of the doctors' bills in exchange for his assuming the obligation of those bills. Janette, the only witness called by the State Bar other than respondent, who was present at the meeting of August 30, 1994, claimed she had no recollection of the discussion between the Hous and respondent on the date the authorization to compromise the doctors' bills was signed.

COUNTS ONE AND TWO (ADVERSE INTEREST AND AND UNCONSCIONABLE FEE)

In count one respondent is again charged with a violation of rule 3-300 for entering into an authorization to compromise doctors' bills with the Hous, separate from the original retainer agreement, under which the Hous authorized respondent to compromise the doctors' bills arising out of their claim against Durham Transportation Inc. and to retain as additional "fees and costs" any amount saved by such a compromise. In exchange, respondent paid to the Hous \$580.32 over and above the share of the settlement proceeds to which they were entitled under the terms of the retainer agreement and association of counsel under which respondent had been employed. The hearing judge concluded that the authorization to compromise "was, in essence" a supplement to the retainer agreement. He then observed that negotiation of a fee agreement is an arm's-length transaction, citing *Ramirez v. Sturdevant, supra*, 21 Cal.App.4th at p. 913. He further concluded that the agreement did not confer on respondent a pecuniary interest adverse to his clients.

Although not spelled out in that “AUTHORIZATION TO COMPROMISE DOCTOR’S BILLS,” executed by the Hous and based upon the statements made by respondent to the Hous at the time they signed it, we conclude that under the terms of that authorization respondent assumed the obligation to pay those medical bills. The issue we resolve is whether or not such an agreement, entered into after the primary services of the retainer agreement have been performed and the amount of recovery is known, is a business transaction between an attorney and client covered by rule 3-300 or whether it is a fee agreement and thus subject to the provision of rule 4-200. Contrary to the findings of the hearing judge, under the facts and circumstances demonstrated by the evidence in this case we conclude the transaction was a business agreement between an attorney and client covered by rule 3-300. We reach this conclusion by determining that the authorization to compromise constituted an immediate transfer from the Hous of both the ownership and possessory interest in all funds remaining after payment to the Hous of their distributive share of the settlement proceeds and the payment of attorney’s fees as called for in the original retainer agreement. Respondent paid the Hous \$582.32 by disbursing that added amount to the client’s distributive share of the proceeds of the settlement.

The argument that the authorization to compromise the medical bills was a fee agreement must also fail because of respondent’s noncompliance with section 6147, subdivision (a) of the Business and Professions Code (section 6147). If the authorization to compromise were considered a fee agreement, it was a contingent fee agreement since respondent’s compensation was contingent on the amount by which the health care bills were compromised. Section 6147 requires that contingent fee agreements be in writing and, inter alia, signed by both the attorney and client. In the present matter not only was the agreement not signed by respondent, he did not assume any obligation under the provisions of the authorization to compromise the medical bills. That is, under the agreement he was authorized, but not obligated, to seek a compromise of those bills. Further, when Watson associated respondent to handle the suit for the Hous he assured

them that such association would not involve any additional attorney's fees. To treat the agreement as other than a business transaction would place respondent in a position of violating that representation by Watson to the Hous.

With that transfer of the ownership and possessory interest from the Hous to respondent, there passed to respondent the obligation to satisfy each of the medical bills. Absent liens or notice of a contractual obligation of the clients to pay medical care providers, respondent had no prior ethical obligation to satisfy the claims for medical services. (*Farmers Ins. Exchange v. Smith* (1999) 71 Cal.App.4th 660, 671-672; see also *Kaiser Foundation Health Plan, Inc. v. Aguiluz* (1996) 47 Cal.App.4th 302, 305-307 [“[A]n attorney on notice of a third party’s contractual right to funds received on behalf of his client disburses those funds to his client at his own risk. [Fn. omitted]”].) Without the assignment of the right to compromise, the funds held to satisfy the medical claims belonged to the Hous.

The discussion under rule 3-300 provides that rule “is not intended to apply to the agreement by which the [attorney] is retained by the client” unless the agreement confers on the attorney the proscribed interest adverse to the client. In the matter before us, respondent was not being retained by the Hous, and, as we have found, the agreement does confer on respondent an interest prohibited by rule 3-300 absent compliance with the stated requirements.

Among the requirements for an attorney entering into a business transaction with a client is that of advising the client in writing that the client may seek the advice of an independent lawyer of the client’s choice. (Rule 3-300(B).) It is clear that respondent failed to comply with this provision.

Although we have found culpability because respondent failed to provide his clients with written notice of their right to have the transaction reviewed by independent counsel, we are also concerned with whether “[t]he transaction or acquisition 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.” (Rule 3-300(A)).

Since the agreement in question constituted a business transaction with a client, the burden shifted to respondent to show that the transaction was fair and reasonable to the client and fully disclosed in writing in a manner that the client should have reasonably understood. (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 314; *Hunnicutt v. State Bar* (1988) 44 Cal.3d 362, 372-273.) While it is true that the agreement was in writing and signed by the client, respondent has failed to carry his burden of showing the agreement to be fair and reasonable. The record makes clear that respondent was confident that he could get the medical providers to reduce their claims to a total of \$5,500. Respondent produced no evidence that this information was conveyed to his clients. As the evidence shows, it is clear that respondent stood in a fiduciary relation with the Hous as one of their retained attorneys. Because of the fiduciary relationship between respondent and the Hous, he was obligated to provide them with that information. (*Mayhew v. Benninghoff* (1997) 53 Cal.App.4th 1365, 1368-1370 [lawyer must give advice against himself that he would give against a third person].) Nowhere in the record is there evidence that he shared with his clients the confidence he had of his ability to compromise those medical claims, information he so freely shared with his co-counsel. As a result we conclude there was overreaching on the part of respondent that prevents us from finding that the business transaction between respondent and the Hous was fair and reasonable to the clients. We also conclude that in the absence of that information the clients could not have reasonably understood the transaction, as required by rule 3-300(A),

We find respondent culpable of a violation of rule 3-300, as charged in count one.

As we have noted respondent was in an attorney-client relationship with the Hous at the time of entering into the authorization to compromise the doctors’ bills. Had that authorization to compromise constituted the initial retainer agreement between the parties, such that the

compromise of medical claims was the only issue giving rise to the retention of the attorney, the ethical propriety of the transaction might well be measured by the provisions of both rule 4-200 and rule 3-300. That is, in a proper situation, both of those rules may apply to a retainer agreement, in the event that retainer agreement includes a provision whereby an attorney obtains a pecuniary interest that is distinguishable from the usual contingent fee agreement, including the granting of a lien to secure that contingent attorney's fee.

Because we have treated the authorization to compromise as a business transaction between respondent and the Hous, and not as a fee agreement, we find rule 4-200 inapplicable and concur in the hearing judge's dismissal of count two, but add that the dismissal is with prejudice.

COUNT THREE (BUS. & PROF. CODE § 6106)

In count three, respondent is charged with engaging in an act of moral turpitude in obtaining an additional fee from the Hous under the provisions of the authorization to compromise doctors' bills in violation of section 6106 of the Business and Professions Code. As we have determined, respondent entered into a business transaction with the Hous by having them sign that authorization, not a fee agreement. We acknowledge that respondent did not make a full disclosure to his clients in presenting that agreement to them, but we do not find that misconduct to rise to the level of moral turpitude. But, we have used that failure to disclose as part of our reason to find a violation of rule 3-300. We conclude that to find moral turpitude there must be more than is before us. The record shows that, although mistaken, respondent honestly and reasonably held the belief that he had the right to negotiate at arms length with the Hous for the assignment of the right to compromise the medical bills. Based on the facts as found in this case, that reasonable and honestly held belief precludes a finding of moral turpitude. (Cf. *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 321, 332.) We concur in the hearing judge's dismissal of count three, but add that the dismissal is with prejudice.

DISPOSITION

We remand this matter to the hearing department for a trial on count four and five and if appropriate a hearing on, and recommendation of, the appropriate discipline to be imposed. We also remand for a hearing to determine discipline as the result of the found culpability in count one. The balance of the counts are dismissed with prejudice.

OBRIEN, P.J.

We concur:

WATAI, J.
MARCUS, J.*

* Sitting on assignment by order of the presiding judge.