PUBLIC MATTER—NOT DESIGNATED FOR PUBLICATION

Filed March 16, 2020

STATE BAR COURT OF CALIFORNIA

REVIEW DEPARTMENT

In the Matter of	)	17-O-00414
	)	
RICHARD JAMES FOSTER,	)	OPINION
	)	
State Bar No. 100710.	)	
	)	

Respondent Richard James Foster is charged with multiple counts of professional misconduct involving conflicts of interest arising from his representation of a professional swimmer and his failure to provide her with written disclosure of his relationships in the professional swimming world. Foster's client was in a contract dispute with USA Swimming, an organization within which Foster maintained close professional relationships. He also previously represented the USA Swimming coach who tendered the contract offer to his client. The hearing judge found Foster culpable of five counts of misconduct, but not culpable of a moral turpitude violation for concealing documents. The judge recommended discipline, including an actual suspension of 60 days.

Both Foster and the Office of Chief Trial Counsel of the State Bar (OCTC) appeal. Foster asserts that he is only culpable of one count of misconduct for failing to provide written disclosure to his client that he had previously represented the client's coach in an employment contract negotiation. Foster believes that an admonition is sufficient discipline. OCTC supports the hearing judge's findings of culpability, but argues that the judge should not have dismissed the moral turpitude violation. OCTC asserts that the hearing judge's discipline recommendation was in error and that we should recommend a one-year actual suspension. Upon our independent

review of the record (Cal. Rules of Court, rule 9.12), we affirm the hearing judge's findings of culpability and her discipline recommendation.

I. PROCEDURAL BACKGROUND

On September 24, 2018, OCTC filed a Notice of Disciplinary Charges (NDC) charging Foster with seven counts, including violations of (1) rule 3-310(B)(1) of the Rules of Professional Conduct[1] (conflict—relationship with a party or witness); (2) rule 3-310(B)(3) (conflict—relationship with an interested person or entity); (3) rule 2-100(A) (communication with a represented party);[2] (4) and (5) Business and Professions Code section 6068, subdivision (e)[3] (client confidences); (6) rule 3-310(E) (conflict—representation adverse to former client); and (7) section 6106 (moral turpitude—concealment). Trial took place on January 24, 29, and 30, 2019. On January 24, 2019, the parties filed a Stipulation as to Facts and Admission of Documents (Stipulation) and a Stipulation as to Admission of Portions of Civil Trial Transcript.[4] The parties submitted closing briefs on February 13, 2019. The hearing judge issued her decision on April 26, 2019.

II. FACTUAL BACKGROUND[5]

A. Foster's Background

Foster has been involved in various organizations related to aquatic sports since the early 1990s. During the time relevant to his misconduct in this matter, he was on the water polo

[1] All further references to rules are to the Rules of Professional Conduct that were in effect from September 14, 1992, to October 31, 2018, unless otherwise noted.

[2] Count three was dismissed with prejudice at trial pursuant to OCTC's request.

[3] All further references to sections are to the Business and Professions Code unless otherwise noted.

[4] *Knutson v. Foster, et al.*, Orange County Superior Court No. 30-2014-00745266-CU-PN-CJC.

[5] The facts included in this opinion are based on the Stipulation, trial testimony, documentary evidence, and the hearing judge's factual findings, which are entitled to great weight. (Rules Proc. of State Bar, rule 5.155(A).)

technical committee for the Fédération Internationale de Natation (FINA),[6] which is an international organization that governs competition in water sports such as swimming, diving, water polo, and synchronized swimming. Previously, Foster had served on the board of directors for the United States Olympic Committee (USOC); as president of United States Aquatic Sports (USAS), which represents the United States in FINA; as president of USA Water Polo; as the organizing committee chair for the 2004 United States Olympic swim trials; and as vice-president and an executive council member for the Swimming Union of the Americas (ASUA), a swimming association for North and South America. When Foster was president of USA Water Polo in 1990, he met Chuck Wielgus at a USAS meeting. Wielgus was involved with USA Swimming, the governing body for competitive swimming in the United States.

B. Dagny Knutson's Background

Dagny Knutson was an outstanding young swimmer who received an athletic scholarship to Auburn University beginning in fall 2010. After her coach at Auburn decided to move to another university, she began to question where she would swim thereafter. In spring 2010, Mark Schubert, a coach for the United States National Team, proposed to Knutson that USA Swimming would pay her rent, living expenses, and college tuition if she trained professionally at USA Swimming's Center of Excellence program in California. Knutson decided to accept Schubert's offer to join USA Swimming, and thus relinquish her amateur status. The agreement was not memorialized in writing. Sports agent Evan Morgenstein began representing Knutson in October 2010 after Knutson's mother signed an Athlete Representation Agreement with Premier Management Group, LLC (PMG) as Knutson's parent/guardian.

[6] This translates to the International Swimming Federation.

C. USA Swimming Backs out of Knutson's Contract and Knutson Hires Foster

Around November 2010, USA Swimming fired Schubert and informed Knutson that Schubert had no authority to make his offer on behalf of USA Swimming. USA Swimming notified Knutson that it would no longer pay her rent, living expenses, and college tuition while she trained at its facility in Fullerton, California. Thereafter, Knutson sought legal representation. Morgenstein introduced Knutson to Foster, who was Morgenstein's attorney. Knutson was aware of this relationship between Foster and Morgenstein. In November 2010, Foster began representing Knutson on a pro bono basis. There was no written agreement between them.

D. Foster Fails to Disclose Professional Relationships

Foster had represented Schubert in an employment contract negotiation with USA Swimming in 2005, but did not disclose this relationship in writing to Knutson. Further, he did not disclose in writing to her that he had a professional relationship with the then-executive director of USA Swimming, Wielgus.

E. Foster's Settlement Negotiations with USA Swimming

Foster exchanged emails with Wielgus in November 2010 regarding the contract dispute between Knutson and USA Swimming. Foster and Wielgus attempted to resolve the dispute before it escalated to litigation.

On November 16, Wielgus wrote a follow-up email to Foster. At the beginning, he wrote, "STRICTLY CONFIDENTIAL – PLEASE JUST KEEP BETWEEN YOU AND ME." Wielgus discussed questions he had posed to USA Swimming's counsel and his thoughts on settlement. Foster forwarded the email to Morgenstein, adding, "Keep this confidential so that I can stay in confidence with Chuck [Wielgus.]" He did not advise Knutson of Wielgus's email. Later that day, Foster responded to Wielgus, writing:

> As you know, I represent a lot of athletes, including a fairly large group of swimmers. It is rare that an issue arises between my clients and USA Swimming. If an issue comes up,

> I will discuss it with you in hopes of resolving the issue. I won't however get involved with litigation against USA Swimming. I have too many friends in your organization, including you.

Foster never informed Knutson that he would not continue his representation of her if a lawsuit against USA Swimming arose.[7]

On February 24, 2011, Foster emailed Richard Young, counsel for USA Swimming, stating that ". . . [Knutson] was going to sleep at the airport because she is out of money." On March 1, Foster emailed Young, mentioning that Knutson was "absolutely broke." Knutson did not authorize Foster to share this information with USA Swimming. Then, on March 17, Foster forwarded to Young an email Knutson wrote to Foster. Her email detailed her thoughts on a settlement offer from USA Swimming. Knutson did not authorize Foster to forward her email. In April 2011, after further negotiation, Knutson signed a new agreement with USA Swimming. The new agreement released both Schubert and USA Swimming from any liability.

F. Foster Arranges for a Release of Liability for Morgenstein

In 2013, Knutson decided to petition the National Collegiate Athletic Association (NCAA) to restore her amateur status with the hope that she could compete at the collegiate level. The NCAA requested a copy of Knutson's Athlete Representation Agreement with PMG, which Knutson requested from Morgenstein. Morgenstein forwarded Knutson's email to his attorney, Foster. Foster emailed Knutson on September 26 that Morgenstein first needed a letter from Knutson waiving any and all claims against Morgenstein. Later that day, Knutson emailed Morgenstein requesting a copy of the agreement using the language that Foster had suggested. She stated, "Please understand that I do not want [a copy of the agreement] for any claims

[7] As noted above, Foster took on Knutson as a pro bono client. Foster explained both at trial and during oral argument that his work focused on negotiations. He testified that his statement in the email referencing not getting involved in litigation meant that he would turn the case over to a litigator if litigation ensued. However, this intention is not clear in his emails with USA Swimming, and, regardless, he did not share this important fact with Knutson during his representation of her.

against you. If this is of concern, I waive any and all claims against you relating to my becoming a professional athlete." On October 1, Foster emailed Knutson, "Thanks for sending the letter to [Morgenstein] confirming that you do not hold him responsible for going pro. [Morgenstein] finally found your contract. A copy is attached."

G. Knutson Sues Foster

Knutson hired a new attorney, Robert Allard, who contacted Foster in April 2014 requesting Knutson's file. After searching his email, Foster produced around 30 pages, including documents and emails, the earliest of which were from April 2011. Allard's assistant asked if he had produced the entire file. Foster stated he could not find any other documents.

In September 2014, Knutson sued Foster in Orange County Superior Court. Foster produced a second batch of documents to Allard in December 2014. Foster testified that he had updated his email program after his initial production, which allowed him to find earlier documents related to Knutson's case. He also credibly testified that he was under a lot of stress and made an inadvertent error in not producing these documents. The second production included over 300 pages of documents. Approximately 180 of the 300 were documents Foster received from Morgenstein after the initial production, none of which were documents that OCTC alleges Foster concealed. Foster then re-produced the documents in the second production. Due to duplications and blank pages, the second production included only 27 new pages.

H. Trial Verdict and Court of Appeal Opinion

In 2016, a jury found in favor of Knutson on her fraudulent concealment and intentional breach of fiduciary duty claims against Foster. The jury awarded $217,810 in damages for past economic loss; $250,000 in damages for past noneconomic loss; and $150,000 in damages for future noneconomic loss. The jury did not award punitive damages despite finding clear and

convincing evidence that Foster's conduct involved malice, oppression, or fraud.[8] The trial court granted Foster's motion for a new trial. However, the Fourth District Court of Appeal reversed and reinstated the jury's verdict. (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1078.)

While the case before the court of appeal involves many similarities with the issues before us, "[t]he purposes of a disciplinary proceeding are quite different from those of a civil proceeding [citation], and the body of law is accordingly different." (*In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112, 117.) Our disciplinary analysis begins with the charges in the NDC, not the allegations in the civil suit. However, we may rely on the civil findings in a court of appeal opinion to which the attorney was a party where the findings "bear a strong similarity, if not identity, to the charged disciplinary conduct." (*Ibid*.)

Many of the court of appeal's factual findings relate to the charges in the NDC. The court of appeal found that Foster: had a relationship with USA Swimming and its personnel, which created a conflict with his representation of Knutson; failed to provide written disclosure of this relationship to Knutson; informed USA Swimming that Knutson was out of money; forwarded attorney-client privileged communications to USA Swimming; withheld emails containing evidence of his conflicts of interest when Knutson requested her file; encouraged Knutson to sign a release of claims against Morgenstein without obtaining any consideration for her; and advised Morgenstein that Knutson's claims against him would be weak. While these findings are not dispositive of the disciplinary issues before us, they bolster the culpability findings as discussed below. We independently consider the record to determine whether OCTC proved culpability by clear and convincing evidence.

[8] Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

III. CULPABILITY

A. Count One: Conflict—Relationship with a Party or Witness (Rule 3-310(B)(1))

The NDC charges in count one that Foster violated rule 3-310(B)(1) when he accepted representation of Knutson in November 2010 without providing her written disclosure that he had personal and/or professional relationships with opposing parties—USA Swimming and one of its officials, Wielgus. Rule 3-310(B)(1) provides that an attorney shall not accept or continue representation of a client without providing written disclosure to the client where the attorney has a "legal, business, financial, professional, or personal relationship with a party or witness in the same matter."[9] The hearing judge found that Foster had a "close professional relationship" with USA Swimming and Wielgus, who had an interest in the subject matter of Foster's representation of Knutson—the contract dispute with USA Swimming. Accordingly, the judge found Foster culpable of violating rule 3-310(B)(1). We agree and find that the record supports Foster's culpability as charged.

Foster argues that he did not have a close professional relationship with USA Swimming or Wielgus. He claims that his involvement in FINA, USAS, and the USOC concerned water polo, which was separate from USA Swimming. He contends that he had an adversarial relationship with USA Swimming due to his involvement in water polo. Therefore, he argues that he was not required to disclose that relationship to Knutson. As to Wielgus, he asserts that he was just a colleague, which would also not require disclosure to Knutson.

We reject Foster's arguments. The requirements of written disclosure under rule 3-310 apply to a wide range of relationships. "Conflicts of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his

[9] Disclosure is defined under rule 3-310 as "informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client."

responsibilities to another client or a third person or by his own interests." (*People v. Bonin* (1989) 47 Cal.3d 808, 835.) Foster was heavily involved in the aquatic sports world, holding several high-level positions in organizations related to competitive swimming and the Olympic Games. When he represented Knutson, he had known Wielgus for over 20 years and had been involved in the aquatics world for just as long. Foster even admitted that he did not want to litigate against his "friends" at USA Swimming, but he did not mention this to Knutson.[10] Under rule 3-310(B)(1), Foster was required to provide a written disclosure to Knutson acknowledging his relationships with Wielgus and USA Swimming.[11] Foster provided no such disclosure and is therefore culpable under count one.

B. Count Two: Conflict—Relationship with Interested Person or Entity (Rule 3-310(B)(3))

Count two alleges that Foster violated rule 3-310(B)(3) when he accepted representation of Knutson in November 2010 without providing her written disclosure that he had a professional relationship with Schubert. Count two further charges that Foster knew or reasonably should have known that Schubert would be affected by resolution of Foster's representation of Knutson as Schubert had made the offer to Knutson on behalf of USA Swimming and could be subject to potential liability. Rule 3-310(B)(3) provides that an attorney shall not accept or continue representation of a client without providing written disclosure to the client where the attorney has or had a legal, business, financial, professional, or personal relationship with another person or entity the attorney knows or reasonably should know would be affected substantially by resolution of the matter. The hearing judge found Foster culpable as

[10] Foster also refused to represent Schubert in a wrongful termination suit against USA Swimming so as not to jeopardize his relationship with the organization. The court of appeal found that Foster believed representing Schubert against USA Swimming would create a conflict of interest.

[11] Our finding is identical to the court of appeal's determination that Foster had a relationship with USA Swimming and its personnel that required written disclosure to Knutson, which he failed to provide.

charged and we agree. On review, Foster does not contest that he violated rule 3-310(B)(3). He admits that he had represented Schubert before representing Knutson and should have so notified Knutson in writing.

C. Count Four: Client Confidences (§ 6068, subd. (e))

Count four charges Foster with a violation of section 6068, subdivision (e), for revealing Knutson's confidences without her permission. It alleges that Foster discussed Knutson's finances with Young, including that she was "out of money" and "absolutely broke." Section 6068, subdivision (e)(1), provides that it is the duty of an attorney to "maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his or her client." The ethical duty of confidentiality under section 6068, subdivision (e), is broad in scope and protects communications that would not be protected under the evidentiary attorney-client privilege. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189.) Attorneys must not disclose confidential facts or allegations that might cause a client public embarrassment. (*Ibid.*) The hearing judge found that Foster revealed specific confidential information about Knutson's finances without her permission, thereby violating section 6068, subdivision (e). We agree.

Foster argues that Knutson's agent, Morgenstein, instructed him to relay information about her financial status and, therefore, he did not violate her confidentiality because agency law permitted him to assume that any instruction from Morgenstein came from her. In addition, he claims that Knutson's financial condition was not confidential because it was generally known. These arguments fail. Knutson never authorized Foster to communicate specific details about her financial status to USA Swimming. It was not publicly known that her financial situation was so dire that she almost slept in the airport or that she was "absolutely broke." Additionally, Knutson never authorized Morgenstein to reveal her financial problems to USA Swimming. But, regardless, Morgenstein's relationship with Knutson does not exempt Foster from maintaining

client confidences. Foster breached Knutson's confidence by revealing details about her financial status to USA Swimming and, therefore, violated section 6068, subdivision (e).[12]

D. Count Five: Client Confidences (§ 6068, subd. (e))

Count five alleges that Foster again violated section 6068, subdivision (e), by revealing Knutson's confidences without her permission when he forwarded to Young an email from Knutson containing her evaluation of a pending settlement offer from USA Swimming. The hearing judge found that Knutson's email was a confidential communication between her and her attorney and that Foster should not have forwarded it to USA Swimming without Knutson's explicit authority. We agree that Foster is culpable as charged.

Foster asserts that he did not violate section 6068, subdivision (e), because the email he forwarded contained nothing confidential and Knutson wanted him to discuss the issues in the email with USA Swimming. We dismiss this argument as Foster never had permission from Knutson to forward the email and her specific written communication was confidential. Attorneys must maintain client confidences in order to foster frank and open communication between them and their clients so that they can be fully informed and do their best to achieve the client's goals. (*In the Matter of Johnson*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 190.) Knutson emailed her confidential thoughts directly to her attorney. It was unreasonable of Foster to believe he could simply forward her email to the opposing party. Of course, he could restate her thoughts in shaping a counteroffer, but he could not forward his client's confidential email without her permission. His actions did nothing to maintain Knutson's confidences or foster frank and open communication between attorney and client.[13] Accordingly, Foster violated section 6068, subdivision (e).

[12] The court of appeal also found that Foster improperly revealed to USA Swimming that Knutson was out of money.

[13] The court of appeal similarly found that Foster improperly forwarded Knutson's email.

E. Count Six: Conflict—Representation Adverse to Former Client (Rule 3-310(E))

In count six, the NDC alleges that Foster violated rule 3-310(E) by failing to obtain Knutson's informed written consent to Foster's representation of Morgenstein. It further alleged that a conflict arose in September 2013 when Foster directed Knutson to waive all claims against Morgenstein relating to her status as a professional athlete in exchange for a copy of her Athlete Representation Agreement. Rule 3-310(E) provides that an attorney shall not, without the informed written consent[14] of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the attorney has obtained confidential information material to the employment. The hearing judge found Foster culpable as charged. We agree.

Foster argues that he did not need Knutson's consent since her request in 2013 occurred after he no longer represented her. He contends that he was not acting as Knutson's attorney, but was "merely trying to resolve a simple issue of obtaining a document." He also claims that he did not possess any confidential information from his representation of Knutson because Morgenstein, as her agent, knew everything that Foster knew. He argues that OCTC offered no evidence that Foster had obtained confidential information.

We reject Foster's arguments. He had previously represented Knutson in her contract dispute with USA Swimming from November 2010 through April 2011. Acting as Morgenstein's attorney in 2013 regarding Knutson's request for a copy of her Athlete Representation Agreement, Foster had a duty to obtain Knutson's informed written consent to the representation of Morgenstein. We agree with the hearing judge: "To advise his former client to waive any claim against his current client clearly demonstrates [Foster's] failure to avoid representation of adverse interest to his former client." Further, to be culpable of a

[14] Informed written consent is defined under rule 3-310 as "the client's or former client's written agreement to the representation following written disclosure."

violation of rule 3-310(E), "[a]ctual possession of confidential information need not be demonstrated; it is enough to show a substantial relationship between representations to establish a conclusive presumption that the attorney possesses confidential information adverse to a client." (*In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735, 747.) After Knutson emailed Morgenstein requesting a copy of the Athlete Representation Agreement, Morgenstein asked Foster for help as his attorney. As such, there was plainly a substantial relationship between Foster's former representation of Knutson and his continuing representation of Morgenstein, establishing that Foster possessed confidential information adverse to Knutson. Due to Foster's involvement in the situation, Knutson waived any claims against Morgenstein.[15] Foster did not obtain Knutson's informed written consent to representation of Morgenstein. Clear and convincing evidence establishes that Foster violated rule 3-310(E).

F. Count Seven: Moral Turpitude—Concealment (§ 6106)

In April 2014, Knutson's new attorney asked Foster for Knutson's client file. The NDC alleges that Foster violated section 6106 when he produced the file and intentionally concealed material information—communications between himself and Wielgus that demonstrated his conflicts of interest. The NDC also states that concealment as a result of gross negligence may constitute a violation of section 6106. Section 6106 provides, "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise . . . constitutes a cause for disbarment or suspension." The hearing judge found that there was no clear and convincing evidence to support a section 6106 violation for concealment. We agree.

OCTC argues that in April 2014 Foster intentionally concealed three emails from November 2010: (1) Wielgus told Foster that he did not want to escalate the situation; (2) Foster

[15] The court of appeal found that Foster improperly encouraged Knutson to sign a release of claims against Morgenstein.

replied that neither did he; and (3) Foster told Wielgus that he would not get involved in litigation against USA Swimming. OCTC asserts that even if we do not find Foster acted intentionally, we should at least find that he was grossly negligent.

The hearing judge determined that Foster testified credibly when he stated that he failed to properly search his email archives and thus only produced emails from 2011 in the initial production. We give this credibility finding great weight. (Rules Proc. of State Bar, rule 5.155(A).) OCTC did not produce evidence disputing Foster's testimony. While Foster had a duty to return the entire client file, he believed he had done so. When he later discovered that he had missed some documents, he produced them well over a year before the civil trial. Foster's actions do not involve impropriety that would constitute a moral turpitude violation. (See *In the Matter of Yee* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 330, 333–334 [must consider totality of circumstances when determining whether grossly negligent conduct involves moral turpitude].) Accordingly, OCTC failed to provide clear and convincing evidence that Foster intentionally concealed material information or acted with gross negligence. Therefore, we affirm the hearing judge's dismissal of count seven with prejudice. (*In the Matter of Kroff* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838, 839 [dismissal of charges for want of proof after trial on merits is with prejudice].)

IV. AGGRAVATION AND MITIGATION

Standard 1.5[16] requires OCTC to establish aggravating circumstances by clear and convincing evidence. Standard 1.6 requires Foster to meet the same burden to prove mitigation.

[16] Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct. All further references to standards are to this source.

A. Aggravation

1. Multiple Acts (Std. 1.5(b))

The hearing judge found Foster's multiple violations to be an aggravating factor. We agree and assign moderate weight. (*In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 646–647 [three instances of misconduct considered multiple acts].)

2. Intentional Misconduct, Bad Faith, or Dishonesty (Std. 1.5(d))

Standard 1.5(d) provides that aggravating circumstances may include intentional misconduct, bad faith, or dishonesty. The hearing judge found that Foster acted dishonestly towards Knutson. He did not make certain disclosures to her, letting his self-interest in maintaining his standing in the aquatics world cloud his professional judgment. Foster knew about the potential conflicts of interest, yet did not advise Knutson of them, violating her trust and confidence. The judge found his dishonesty and disloyalty to his client to be aggravating factors.

We disagree with the hearing judge that Foster's misconduct involved dishonesty as there is no clear and convincing evidence that Foster committed acts of deceit or intended to deceive Knutson. However, we do find that his misconduct was intentional. The judge detailed Foster's actions in finding aggravation under standard 1.5(d): he told Wielgus that he would not escalate to litigation, he advised Knutson to sign an agreement releasing Schubert and USA Swimming from liability, and he instructed Knutson to release Morgenstein from any liability in exchange for a copy of her Athlete Representation Agreement. While these actions indicate an intentional breach of conflicts rules, they do not evidence dishonesty. We do not assign any aggravation as these facts establishing intentional misconduct were already considered in determining culpability. (*In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 68 [where factual findings used to find culpability, it is improper to consider again in aggravation].)

3. Significant Harm (Std. 1.5 (j))

We find that Foster caused Knutson significant emotional harm. (Std. 1.5(j) [significant harm to client, public, or administration of justice is aggravating circumstance].) Knutson testified that she trusted Foster to represent her interests and she was not aware until 2014 that the conflicts of interest existed. She was hurt and betrayed by his actions. During the civil trial, she testified that Foster's actions caused feelings of anxiety, pressure, shock, and fear of others.

In finding significant harm, the hearing judge noted the finding in the civil case that Foster acted with malice, oppression, or fraud and that he had failed to pay the judgment in that matter. The judge also based her aggravation finding on Knutson's health and swimming performance issues as a consequence of Foster's actions. We do not find clear and convincing evidence that Foster caused these problems and thus do not assign aggravation for these facts. OCTC did not prove by clear and convincing evidence that Foster's professional misconduct was the cause of the economic damages that the jury found. Damages found in a civil suit do not automatically establish aggravation for economic harm in a disciplinary matter. We are unable to interpret the jury's award of damages as a finding of economic harm in this matter. Similarly, we do not find harm, as the hearing judge did, for the fact that Foster advised Knutson to sign a new agreement with USA Swimming that included performance requirements. There is no clear and convincing evidence that Foster's negotiations caused the decline in Knutson's swimming career. The harm that Foster caused Knutson warrants minimal aggravation.

4. Indifference (Std. 1.5(k))

Standard 1.5(k) provides that an aggravating circumstance may include "indifference toward rectification or atonement for the consequences of the misconduct." The hearing judge assigned significant aggravation, finding that Foster minimized the conflicts and their consequences during the trial proceedings. We do not agree. Failure to accept responsibility or

understand the wrongfulness of his or her actions may be an aggravating factor. (*Carter v. State Bar* (1988) 44 Cal.3d 1091, 1100–1101.) However, lack of insight may not be used in aggravation if "his attitude is based on an honest, although mistaken, belief in his innocence." (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 932–933.) Foster's opposition to the charges against him was based on his honest belief that he did nothing wrong, and cannot form the basis for a finding of indifference. Also, he admitted culpability under count two. Foster has a right to "defend himself vigorously," (*In re Morse* (1995) 11 Cal.4th 184, 209), which is what he has done here. We decline to assign aggravation for indifference.

5. High Level of Victim Vulnerability (Std. 1.5(n))

The hearing judge found that Knutson was a vulnerable victim, but did not assign a weight in aggravation. The judge described her as a young athlete who relied on Foster to represent her best interests. Knutson stated that she would not have agreed to Foster's representation if she had known about his relationships with Schubert and USA Swimming. Foster claims that Knutson was not vulnerable because she had adults looking out for her. He argues that he negotiated a lucrative contract for her, and her agent and mother were involved in the negotiations. Foster's arguments are without merit. He was the professional who was hired to represent her best interests, yet he let conflicts of interest stand in the way. We affirm the judge's finding that Knutson was highly vulnerable, and find that this factor warrants substantial consideration in aggravation.[17]

[17] OCTC argues that the hearing judge should have found Foster's experience and "heightened sensitivity" as an additional aggravating factor. However, the judge did consider this when assigning aggravation for victim vulnerability.

B. Mitigation

1. No Prior Record (Std. 1.6(a))

Mitigation is available where no prior record of discipline exists over many years of practice, coupled with present misconduct that is not likely to recur. (Std. 1.6(a).) The hearing judge assigned significant mitigation for Foster's lack of a prior record of discipline in 29 years of practice at the time of his misconduct in 2010. OCTC argues that Foster should not be entitled to full weight in mitigation because of the judge's assignment of aggravation for indifference. We do not find aggravation for indifference, however, or that his misconduct is likely to recur. Therefore, we assign substantial mitigation under standard 1.6(a). (*Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [substantial mitigation where attorney practiced over 10 years before first act of misconduct and misconduct not likely to recur].)

2. Candor and Cooperation with State Bar (Std. 1.6(e))

Foster's Stipulation is a mitigating circumstance. (Std. 1.6(e) [spontaneous candor and cooperation with State Bar is mitigating].) However, he did not admit culpability, and "more extensive weight in mitigation is accorded those who, where appropriate, willingly admit their culpability as well as the facts." (*In the Matter of Johnson*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 190.) Further, the Stipulation was not extensive and contained easy-to-prove facts. (*In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 318 [limited weight for non-extensive stipulation to easily proved facts].) Therefore, we assign limited weight in mitigation for this circumstance.

3. Extraordinary Good Character (Std. 1.6(f))

Foster may obtain mitigation for "extraordinary good character attested to by a wide range of references in the legal and general communities, who are aware of the full extent of the misconduct." (Std. 1.6(f).) The hearing judge gave mitigation credit for Foster's good character.

Six character witnesses testified at trial to Foster's integrity and honesty including one attorney, one former attorney, and friends and colleagues. His attorney in the civil appellate matter, Tracy Anielski, has known Foster for about 25 years and has done work for him for the past 15 years. She stated that her high opinion of him as honest and straightforward was based on working with him for many years. We give serious consideration to this evidence because attorneys have a "strong interest in maintaining the honest administration of justice." (*In the Matter of Brown* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 309, 319.) All of the witnesses were aware of the full extent of the misconduct and attested that the charges in the NDC did not change their high opinion of Foster. Most have known Foster for a considerable amount of time, including one witness who has known him for over 50 years, and have observed him in the community and in his various roles in the aquatics world. Accordingly, we assign substantial mitigating credit under standard 1.6(f). (*In the Matter of Davis* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 576, 591–592 [significant mitigation for testimony on issue of good character where witness observed attorney's "daily conduct and mode of living"].)

4. Pro Bono Work and Community Service

Pro bono work and community service are mitigating circumstances. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785.) The hearing judge found that Foster is strongly committed to charity and helping others. Foster has volunteered his time and services in various aquatics organizations since the 1990s including FINA, USAS, and USA Water Polo. He has also contributed to local charitable organizations including the Long Beach Century Club, which supports amateur athletes in the city of Long Beach. In addition, Foster testified that he does pro bono work and is currently working pro bono on a case for a past Olympic gold medalist dealing with elder financial abuse. Finally, Foster was instrumental in adding women's water polo to the Olympic program. His proven dedication to serving his community deserves substantial

mitigation credit. (*Rose v. State Bar* (1989) 49 Cal.3d 646, 667 [mitigation for legal abilities, dedication, and zeal in pro bono work].)

V. DISCIPLINE

The purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to preserve public confidence in the profession; and to maintain high professional standards for attorneys. (Std. 1.1.) Our disciplinary analysis begins with the standards. While they are guidelines for discipline and are not mandatory, we give them great weight to promote consistency. (*In re Silverton* (2005) 36 Cal.4th 81, 91–92.) The Supreme Court has instructed us to follow the standards "whenever possible." (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11.)

In analyzing the applicable standards, we first determine which standard specifies the most severe sanction for the misconduct at-issue. (Std. 1.7(a) [most severe sanction must be imposed where multiple sanctions apply].) Here, standard 2.5(d) is the most severe and applicable, providing for actual suspension for rule 3-310 violations where the attorney causes significant harm to a client or former client.[18] We decline to apply standard 2.11 as advocated by OCTC because we do not find a moral turpitude violation for concealment.

OCTC argues that a one-year actual suspension is appropriate discipline due to Foster's breach of his duties of loyalty and confidentiality and his violations of the conflict rules. It describes his actions as a betrayal of Knutson that resulted in significant harm to her as a vulnerable client. OCTC's central argument for increased discipline is based on a culpability finding of a serious act of moral turpitude for concealment, as charged in count seven, which we do not find here. Therefore, we reject OCTC's assertion that *In the Matter of Davis, supra*,

[18] Standard 2.6(a) is also applicable and provides for suspension when an attorney intentionally reveals client confidences. The hearing judge did not apply standards 2.5 or 2.6, but instead applied 2.19, the standard for a violation of a provision of the Rules of Professional conduct not specified in the standards.

4 Cal. State Bar Ct. Rptr. 576 is analogous to this matter. That case involved culpability for a moral turpitude violation involving misappropriation, along with other trust account violations with aggravation for multiple conflicts of interest.

Few published California disciplinary opinions deal with disclosure, client conflicts, and client confidences under rule 3-310. When these issues are discussed in a published opinion, the conflicts charge is usually a minor charge among more serious charges. Looking to the discipline in these cases for guidance would not be appropriate. (See, e.g., *In the Matter of Guzman*, *supra*, 5 Cal. State Bar Ct. Rptr. 308 [culpable of 24 counts of misconduct including several moral turpitude violations]; *In the Matter of Gillis* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 387 [culpable of three counts involving moral turpitude]; *In the Matter of Davis, supra*, 4 Cal. State Bar Ct. Rptr. 576 [culpable of misappropriation involving moral turpitude].) Therefore, we understand why the hearing judge looked to cases that primarily involved improper business transactions with a client under rule 3-300 instead of disclosure and client conflicts under rule 3-310. The judge examined cases under rule 3-300 where the attorney did not have a prior record of discipline and found discipline ranging from a public reproval to two years of actual suspension.

While Foster's matter does not involve more serious moral turpitude violations, and therefore, no published opinion with analogous facts exists as a clear disciplinary example, we find guidance in *In the Matter of Gillis*, *supra*, 4 Cal. State Bar Ct. Rptr. 387. Gillis sold a residential property to a client for a substantial portion of the proceeds of a wrongful death settlement that he had obtained for the client. Gillis was culpable of violating rule 3-300 (business transaction with a client) and section 6068, subdivision (e) (client confidences). He was also culpable of three moral turpitude violations. Gillis received mitigation for practicing law for 26 years without prior discipline and aggravation for significant harm and multiple acts. He was

actually suspended for six months. Foster's conduct was less egregious than Gillis's and did not involve moral turpitude. Therefore, an actual suspension of less than six months is proper.

We also find guidance in the policy behind rule 3-310 as it was set forth many years ago by the Supreme Court. In *Anderson v. Eaton* (1930) 211 Cal. 113, 116, the court held:

> It is also an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of the facts and circumstances. [Citation.] By virtue of this rule, an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests. Nor does it matter that the intention and motives of the attorney are honest. [¶] The rule is designed, not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. [Citation.]

Foster clearly failed to protect Knutson. His relationships with USA Swimming, Wielgus, Schubert, and Morgenstein prevented him from fulfilling his duties as her attorney. Knutson was unaware that Foster intended to pursue negotiation with, and not litigation against, USA Swimming due to his personal friendships. Foster put himself in multiple situations where he had to weigh conflicting interests. And he favored Morgenstein over Knutson and shielded him from liability by advising Knutson to sign a waiver in exchange for a copy of the Athlete Representation Agreement.

We agree with the hearing judge that Foster should have been more attentive to the ethical and fiduciary duties he owed to Knutson and the legal profession. His misconduct was easily avoidable. Foster chose to care more about protecting his own interests in the aquatic sports world than fulfilling his duty of loyalty to his client. However, he displayed impressive mitigation that outweighs aggravation, justifying discipline at the lower end of the spectrum. (Std. 1.7(c).) Foster's substantial mitigation includes almost 30 years of discipline-free practice, extraordinary good character, and good works that contributed to the betterment of his community. Considering

the requirement under standard 2.5(d) for actual suspension, the comparable case law, and the facts of this matter, we affirm the hearing judge's recommendation of a 60-day suspension.

VI. RECOMMENDATION

We recommend that Richard James Foster, State Bar No. 100710, be suspended from the practice of law for one year, that execution of that suspension be stayed, and that he be placed on probation for two years with the following conditions:

1. **Actual Suspension.** Foster must be suspended from the practice of law for the first 60 days of his probation.

2. **Review Rules of Professional Conduct.** Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Foster must (1) read the California Rules of Professional Conduct (Rules of Professional Conduct) and Business and Professions Code sections 6067, 6068, and 6103 through 6126, and (2) provide a declaration, under penalty of perjury, attesting to his compliance with this requirement, to the State Bar's Office of Probation in Los Angeles (Office of Probation) with his first quarterly report.

3. **Comply with State Bar Act, Rules of Professional Conduct, and Probation Conditions.** Foster must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of his probation.

4. **Maintain Valid Official State Bar Record Address and Other Required Contact Information.** Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Foster must make certain that the State Bar Attorney Regulation and Consumer Resources Office (ARCR) has his current office address, email address, and telephone number. If he does not maintain an office, he must provide the mailing address, email address, and telephone number to be used for State Bar purposes. Foster must report, in writing, any change in the above information to ARCR, within 10 days after such change, in the manner required by that office.

5. **Meet and Cooperate with Office of Probation.** Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Foster must schedule a meeting with his assigned probation case specialist to discuss the terms and conditions of his discipline and, within 30 days after the effective date of the court's order, must participate in such meeting. Unless otherwise instructed by the Office of Probation, he may meet with the probation case specialist in person or by telephone. During the probation period, Foster must promptly meet with representatives of the Office of Probation as requested by it and, subject to the assertion of applicable privileges, must fully, promptly, and truthfully answer any inquiries by it and provide to it any other information requested by it.

6. **State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court.** During Foster's probation period, the State Bar Court retains jurisdiction over him to address issues concerning compliance with probation conditions. During this period, he must appear before the State Bar Court as required by the court or by the Office of Probation after written notice mailed to his official membership address, as provided above. Subject to the assertion of applicable privileges, he must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

7. **Quarterly and Final Reports**

   a. Deadlines for Reports. Foster must submit written quarterly reports to the Office of Probation no later than each January 10 (covering October 1 through December 31 of the prior year), April 10 (covering January 1 through March 31), July 10 (covering April 1 through June 30), and October 10 (covering July 1 through September 30) within the period of probation. If the first report would cover less than 30 days, that report must be submitted on the next quarter date and cover the extended deadline. In addition to all quarterly reports, Foster must submit a final report no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.

   b. Contents of Reports. Foster must answer, under penalty of perjury, all inquiries contained in the quarterly report form provided by the Office of Probation, including stating whether he has complied with the State Bar Act and the Rules of Professional Conduct during the applicable quarter or period. All reports must be: (1) submitted on the form provided by the Office of Probation; (2) signed and dated after the completion of the period for which the report is being submitted (except for the final report); (3) filled out completely and signed under penalty of perjury; and (4) submitted to the Office of Probation on or before each report's due date.

   c. Submission of Reports. All reports must be submitted by: (1) fax or email to the Office of Probation; (2) personal delivery to the Office of Probation; (3) certified mail, return receipt requested, to the Office of Probation (postmarked on or before the due date); or (4) other tracked-service provider, such as Federal Express or United Parcel Service, etc. (physically delivered to such provider on or before the due date).

   d. Proof of Compliance. Foster is directed to maintain proof of his compliance with the above requirements for each such report for a minimum of one year after either the period of probation or the period of his actual suspension has ended, whichever is longer. He is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

8. **State Bar Ethics School.** Within one year after the effective date of the Supreme Court order imposing discipline in this matter, Foster must submit to the Office of Probation satisfactory evidence of completion of the State Bar Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and Foster will not receive MCLE credit for attending this session. If he provides satisfactory evidence of completion of the Ethics School after the date of this opinion but before the effective date of the Supreme

Court's order in this matter, Foster will nonetheless receive credit for such evidence toward his duty to comply with this condition.

9. **Commencement of Probation/Compliance with Probation Conditions.** The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the probation period, if Foster has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

VII. MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION

We further recommend that Richard James Foster be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners within one year after the effective date of the Supreme Court order imposing discipline in this matter and to provide satisfactory proof of such passage to the Office of Probation within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).) If Foster provides satisfactory evidence of the taking and passage of the MPRE after the date of this opinion but before the effective date of the Supreme Court's order in this matter, he will nonetheless receive credit for such evidence toward his duty to comply with this condition.

VIII. COSTS

We further recommend that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, such costs being enforceable as provided in section 6140.7 and as a money judgment. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against an attorney who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

HONN, J.

WE CONCUR:

PURCELL, P. J.

McGILL, J.