PUBLIC MATTER
NOT FOR PUBLICATION

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **RICHARD JAMES ANNEN,** A Member of the State Bar, No. 91956.	)	Case No.: **14-O-00949-DFM** **DECISION AND ORDER OF PRIVATE REPROVAL**

INTRODUCTION

Respondent **Richard James Annen** (Respondent) is charged here with four counts of misconduct involving a single client matter. The counts include allegations that Respondent willfully violated (1) rule 3-300 of the Rules of Professional Conduct[1] (acquiring interest adverse to client) [three counts] and (2) Business and Professions Code[2] section 6090.5, subdivision (a)(2) (attorney/client agreement not to file disciplinary complaint). The State Bar had the burden of proving the above charges by clear and convincing evidence. The court finds culpability and recommends discipline as set forth below.

PERTINENT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed in this matter by the State Bar of California on September 20, 2017. On October 16, 2017, Respondent filed his response to the NDC, denying all of the allegations of the NDC and alleging various affirmative defenses.

An initial status conference was held in the matter on October 23, 2017. At that time the case was given a trial date of January 4, 2018, with a two-day trial estimate.

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[1] Unless otherwise noted, all future references to rule(s) will be to the Rules of Professional Conduct.

[2] Unless otherwise noted, all future references to section(s) will be to the Business and Professions Code.

On December 4, 2017, Respondent filed a motion to dismiss the NDC based on the rule of limitations of rule 5.21 of the Rules of Procedure of the State Bar of California. On December 14, 2017, the State Bar filed an opposition to that motion. On December 18, 2017, this court filed an order denying the motion to dismiss, without prejudice to Respondent's ability to assert the rule 5.21 defense at the trial of this matter.

On December 8, 2017, Respondent filed a motion to disqualify State Bar attorney Hugh Radigan as the assigned attorney in this matter. On December 18, 2017, the State Bar filed an opposition to the motion. On December 20, 2017, this court issued an order denying the motion to disqualify attorney Radigan.

Trial was commenced and completed on January 4, 2018, followed by a period of post-trial briefing.

On January 19, 2018, Respondent filed both a post-trial brief and a motion to dismiss. On January 29, 2018, the State Bar filed a post-trial brief and an opposition to the motion to dismiss. Attached to that opposition to the motion to dismiss were declarations, one from attorney Radigan and the other purporting to be from Andre Hardy. On February 6, 2018, the State Bar filed a "supplement" to its opposition to the motion to dismiss, attaching a signature page for the purported Hardy declaration. On February 14, 2018, Respondent filed a motion to strike the declarations attached to the State Bar opposition to the motion to dismiss and references to those declarations in that opposition. On February 27, 2018, the State Bar filed an opposition to the motion to strike.

The State Bar was represented at trial by Senior Trial Counsel Hugh Radigan. Respondent was represented by David Carr.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact are based on Respondent's response to the NDC; the

extensive stipulation of undisputed facts filed by the parties on January 4, 2018; and the documentary and testimonial evidence admitted at trial.

Jurisdiction

Respondent was admitted to the practice of law in California on June 3, 1980, and has been a member of the State Bar at all relevant times.

Case No. 14-O-00949 (Hardy Matter)

In October 2004, Respondent's former law firm, then known as Sparber, Rudolph & Annen (SRA), entered into a written fee agreement with Andre Hardy and Jo Ann Hardy (then using the name Jo Ann Jaffe) to represent them in an action entitled *Lott, et al v. Jo-Ann Jaffe and Andre Hardy*, pending in the San Diego Superior Court (Lott Action). This fee agreement, signed by Respondent on behalf of his firm, provided that the firm's fees for services would be based on the hourly rate of the individual providing legal services on the Hardys' matter; that the Hardys would be billed on a monthly basis for the services being provided; that the bills must be paid by the Hardys within 30 days after mailing; and that a late fee of one and one-half percent per month would be charged for any bills not paid within that 30-day period. This initial fee agreement did not secure the firm's ability to collect its fees with a lien against any asset of the Hardys.

The Lott Action involved a dispute over property purchased by the Hardys from Mr. Lott. After the closing, Lott, his daughter Adjekai Kuma, and her fiancé filed suit on September 23, 2004, claiming, inter alia, that their personal property had been converted by the Hardys.

On March 3, 2005, after SRA had appeared in the action on behalf of the Hardys, Respondent's firm filed a cross-complaint on the Hardys' behalf against the real estate broker, Coldwell Banker. Lott then filed both a cross-complaint against Coldwell Banker on March 24, 2006, and a second amended cross-complaint on September 22, 2006. After the superior court

then sustained Coldwell Banker's demurrers to Lott's cross-complaint without leave to amend, Lott appealed.

Despite the language of the fee agreement, the Hardys were quite remiss in paying the bills sent to them by Respondent's firm. By April 2007, the Hardys owed SRA over $200,000 in fees and costs. On November 14, 2007, the Hardys' unpaid legal fees had increased to $221,540.54. At that time, an agreement was reached between the Hardys and SRA that the Hardys would enter into a promissory note secured by deeds of trust on three real properties owned by the Hardys. This arrangement was proposed by the Hardys. A letter forwarding the proposed promissory note and deeds of trust was sent by Respondent to the Hardys on November 14, 2007. In consideration of the Hardys' agreement to this new contractual arrangement, the firm agreed to continue to represent them in the ongoing litigation.

On or about January 18, 2008, Andre Hardy signed the note and deed of trust on the property held in his name (2329 32nd Street). On or about January 17, 2008, Jo Ann Hardy signed the note and the deeds of trust on the two properties held in her name (9756 Keeneland Row and 368 20th Street.)

On February 8, 2008, the deeds of trust on two of the three properties were recorded. However, Respondent agreed to hold off recording the trust deed on the third property for 90 days to give the Hardys an opportunity to sell the property without that encumbrance. When the Hardys were unable to sell that property, the trust deed was recorded on April 21, 2008.

On September 17, 2008, the court of appeal issued a decision ordering the superior court to vacate its order sustaining Coldwell Banker's demurrers.

On February 1, 2009, Coldwell Banker filed a cross-complaint against the Hardys for indemnity.

On or about September 2, 2009, the Lott Action was settled at mediation with the plaintiffs receiving nothing and Coldwell Banker paying the Hardys $250,000. The Hardys agreed that SRA could apply the $250,000 settlement proceeds against their outstanding legal bills. In turn, SRA agreed to write off $50,538.36 in legal fees, leaving a balance owing of $50,000.[3]

On September 5, 2009, Respondent sent an email to Andre Hardy, confirming that only $50,000 remained unpaid on the January 2008 note and offering payment terms with incentives for early payment. The Hardys did not seek to take advantage of this discount opportunity. Instead, after the litigation against them had been favorably resolved, they generally chose to ignore the outstanding legal bills, making a payment of $500 on the promissory note on November 25, 2009, and only sporadic small payments thereafter.

In May 2010, the Hardys contacted Respondent regarding obtaining a loan on the property located at 368 20th Street. Respondent and SRA co-operated with the Hardys in obtaining that loan by replacing the January 2008 promissory note for $221,540 with a new $50,000 note and a corresponding deed of trust.

In January 2011, Jo Ann Hardy was losing her Keeneland Row property through a short sale. SRA's lien resulted in a payment of $8,000 from the sale proceeds that was applied against the May 2010 note. In return, SRA released its second deed of trust. SRA was specifically required to represent to the first mortgage lender, Chase, that "the sellers [the Hardys] will not be relieved of any deficiency with respect to monies owed this firm as a result of our agreement to release our Second Deed of Trust." On March 16, 2011, Respondent sent a follow-up letter to the Hardys, confirming receipt and application of the $8,000.

[3] The Lott action was formally dismissed on October 23, 2009 (Ex. 1002), and the last legal service for which the Hardys were billed is dated October 27, 2009. (Ex. 32, p. 135.)

On April 19, 2011, Respondent wrote to the Hardys, advising them that SRA had not received any of the promised monthly payments since January 2011. Sporadic payments of $750 or less were thereafter made through November 2012. SRA received no payments after November 2012.

Because the Hardys had made only sporadic payments on the May 2010 note, Respondent's law firm, now called Sparber Annen Morris and Gabriel (SAMG), the successor firm to SRA, filed an action against Jo Ann Hardy on November 27, 2013, to collect $41,592.00 on the now unsecured note.

In response, Ms. Hardy filed a State Bar complaint against Respondent in early 2014. When Respondent was notified by the State Bar of that complaint, he communicated first with State Bar investigator Jamie Saucedo and then with attorney Radigan about the complaint. In one of Respondent's telephone conversations with attorney Radigan, Respondent inquired what he could do to get the matter resolved. Attorney Radigan encouraged Respondent to contact Ms. Hardy "to resolve the dispute between them."

Taking that advice to heart, Respondent promptly had his firm dismiss the pending lawsuit against Hardy; notified her of that fact in an email on July 23, 2014; and sent Hardy a proposed settlement agreement to her last known email address. That email, with its attachment, was also blind copied by Respondent to State Bar investigator Saucedo and attorney Radigan.

Unfortunately, Respondent mistakenly understood attorney Radigan's advice "to resolve the dispute" with Hardy as encompassing both the civil lawsuit and Hardy's complaint to the State Bar. As a result, the proposed settlement agreement included language requiring Hardy to withdraw her State Bar complaint. In addition to this proposed settlement agreement, Respondent's July 23, 2014 email also attached a draft letter for Hardy to sign and send to the State Bar, withdrawing her complaint. When Respondent was quickly notified by the State Bar

of the inappropriateness of his proposal that Hardy withdraw her State Bar complaint, he just as quickly withdrew it in an email to Ms. Hardy on July 28, 2014.

Ms. Hardy never responded to Respondent's settlement proposal. Nor did she withdraw her State Bar complaint. Instead, on November 6, 2014, she filed an civil action against Respondent and his law firm for legal malpractice. In turn, the State Bar filed the instant disciplinary action against Respondent.

Count 1 – Rule 3-300 (Acquiring Interest Adverse to Client)
Count 2 – Rule 3-300 (Acquiring Interest Adverse to Client)

In Count 1 of the NDC, the State Bar alleges:

> On or about November 26, 2007, Respondent acquired an interest adverse to Respondent s client, Jo Ann Hardy ("Hardy"), specifically, Respondent obtained a promissory note secured by three deeds of trust recorded against real property located at 368 20th Street, San Diego, California, 9756 Keeneland Row, La Jolla, California and 2329 32nd Street, San Diego California. Hardy was not advised in writing that she may seek the advice of an independent lawyer of her choice and was not given a reasonable opportunity to seek that independent advice, and Respondent thereby willfully violated Rules of Professional Conduct, rule 3-300.

In Count 2 of the NDC, the State Bar alleges:

> On or about January 17, 2008, Respondent after having acquired an interest adverse to Respondent's client, Jo Ann Hardy ("Hardy"), specifically, Respondent obtained a promissory note secured by three deeds of trust recorded against real property located at 368 20th Street, San Diego, California, 9756 Keeneland Row, La Jolla, California and 2329 32nd Street, San Diego California, Respondent unilaterally modified the terms and conditions of the promissory note. Hardy was not advised in writing that she may seek the advice of an independent lawyer of her choice and was not given a reasonable opportunity to seek that independent advice with respect to the modification, and Respondent thereby willfully violated Rules of Professional Conduct, rule 3-300.

Rule 3-300 of the California Rules of Professional Conduct provides:

> A member shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

> (A) The 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; 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 or the terms of the acquisition.

There is no allegation made in this proceeding that the transaction proposed by the Hardys and entered into by them was not fair and reasonable. Nor is there any contention that it was not fully understood by them. The only allegation of a rule violation is that the Hardys were not advised in writing of their ability to seek the advice of an independent attorney.

Respondent testified credibly that he understood the Hardys were being represented by a personal attorney at the time of the 2007 and 2008 transactions but that he nonetheless provided the required rule 3-300 advisory information to his clients via an email to Mr. Hardy after the meeting in November 2007. However, because of the passage of time his files on the matter are no longer available. While Ms. Hardy testified that she did not receive any such email,[4] Mr. Hardy did not appear as a witness, his whereabouts is unknown [the Hardys are apparently no longer a couple], and his email records are apparently unavailable to any of parties.[5]

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[4] Ms. Hardy's testimony that she would have been a party to any email sent by Respondent to her then husband is not credible or persuasive, being both speculative and contradicted by the State Bar's own exhibits. (See, e.g., Ex. 16 [Respondent's email of September 5, 2009 to Andre Hardy, and not Jo Ann Hardy, regarding terms of modifying original promissory note and deed of trust].)

[5] After this trial was over, the State Bar sought to avoid a dismissal of its 3-300 counts by filing a declaration purportedly from Andre Hardy. That declaration was submitted after the evidentiary portion of this trial had been closed; the declaration is classic hearsay and is not subject to cross-examination; it has not been authenticated by any other source; it provides no contact information for the declarant; and no explanation has been offered as to why this evidence was not timely provided to Respondent and this court, why Mr. Hardy was not previously identified and called as a witness during the trial, and/or why Hardy's contact information was not provided (even now) to Respondent, who had previously requested it.

With respect to the January 2008 transaction, this modification of the proposed promissory note and supporting deeds of trust did not reflect any new transaction but instead merely reflected that the amount of the indebtedness being agreed to and secured by the Hardys had been reduced by an interim partial payment by them.

Respondent contends that these matter should be barred by the five-year rule of limitation of rule 5.21 of the Rules of Procedure of the State Bar. Section 5.21 appears under the chapter heading "Commencement of Proceedings." Section 5.20, the first section in that chapter provides, "A State Bar Court proceeding begins when a party files the initial pleading." Subject to various tolling provisions, section 5.21 then provides:

> **(A) Time Limit for Complaint.** If a disciplinary proceeding is based solely on a complainant's allegations of a violation of the State Bar Act or Rules of Professional Conduct, the proceeding must begin within five years from the date of the violation.
> **(B) When Violation Occurs.** The State Bar Act or a Rule of Professional Conduct is violated when every element of a violation has occurred. But if the violation is a continuing offense, the violation occurs when the offensive conduct ends.

This court agrees with Respondent's contention that these two counts should be dismissed.

Respondent's alleged violations of rule 3-300 took place on November 26, 2007, and January 17, 2008, more than nine years before the filing of the NDC in this matter on September 20, 2017. The conclusion that the five-year limitation period had run before the NDC was filed in this matter is not altered by the two tolling provisions that apply. The first of those tolling provisions is the time period during which Respondent continued to represent Ms. Hardy. The evidence is clear that Respondent and his firm only acted as attorney for Ms. Hardy until October

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Respondent's motion to strike that declaration, as well as that of attorney Radigan, is granted. However, in view of this court's findings in this decision, the Respondent's motion to dismiss is itself dismissed as moot.

27, 2009, and not afterwards. Hence, the running of the statute was tolled until that date, but it then began to run. The NDC was not filed for nearly eight years later.

The second potentially applicable tolling provision is the period of time during which "civil . . . proceedings based on the acts or circumstances as the violation are pending with any governmental agency, court, or tribunal." Assuming that the lawsuits brought by Respondent's firm and by Ms. Hardy both fall within the ambit of this tolling provision, this would only additionally toll the running of the statute after October 27, 2009, for the periods when (1) Respondent's firm's collection action against Hardy was pending (November 27, 2013-July 23, 2014)[6] [a period of slightly less than eight months]; and (2) when Hardy's malpractice action against Respondent was pending (November 6, 2014-July 20, 2015)[7] [a period slightly more than eight months].

Application of the rule of limitations is particularly appropriate here. The documentation regarding the second promissory note and deed of trust confirms Respondent's recollection that he dealt directly with Mr. Hardy, not Ms. Hardy, regarding the payment of the legal fees. The critical issue is whether Respondent sent an email to Mr. Hardy, notifying the Hardys of their entitlement to have the proposed transaction reviewed by an independent attorney. He says that he did. Unfortunately, the passage of nearly a decade before the NDC was filed finds Mr. Hardy, his files, and the files of Respondent unavailable to corroborate that testimony. To impose culpability on Respondent under such circumstances would be palpably unfair – a result that the rule of limitations was enacted to prevent.

In addition, this court also finds that the State Bar has failed to provide clear and convincing evidence of any violation by Respondent of rule 3-300, as alleged above. Its case is

[6] See Exhibits 1003, 1004, and 1009.
[7] See Exhibits 36, p. 1, and 1006.

dependent on the testimony of the complaining witness, testimony that was neither persuasive nor credible. While in most situations this court would look to the respondent to show compliance with the rule, Respondent's stated belief regarding his compliance was credible and his inability after nearly 10 years to provide the documentary proof of such compliance is neither unreasonable nor a basis for finding culpability.

These two counts are dismissed with prejudice.

Count 3 – Rule 3-300 [Acquiring Interest Adverse to Client]

In this count the State Bar alleges:

> On or about May 20, 2010, Respondent acquired an interest adverse to Respondent's client, JoAnn Hardy ("Hardy"), specifically, Respondent obtained a promissory note secured by a deed of trust recorded against real property located at 368 20th Street, San Diego, California. Hardy was not advised in writing that she may seek the advice of an independent lawyer of her choice and was not given a reasonable opportunity to seek that independent advice, and Respondent thereby willfully violated Rules of Professional Conduct, rule 3-300.

Respondent contends that this count should be dismissed because of the time limitation of rule 5.21. In addition, he contends that Ms. Hardy was not his client on May 20, 2010, and the nature of his prior representation was not such to trigger any ongoing obligation to comply with rule 3-300 in his collection dealings with her.

This court agrees with both of the two defenses raised by Respondent to this count.

As discussed above, the NDC in this matter was filed well more than five years after the misconduct alleged in this count, even taking into consideration the various tolling provisions, and the State Bar's case is dependent on the testimony of its complaining witness.

This court also agrees that rule 3-300 did not apply to the 2010 collection transaction between Respondent and his former client. The Review Department has previously rejected efforts by the State Bar to extend the application of rule 3-300 to all former clients. As reflected

in the following discussion of this issue in the recent opinion of the Review Depart in *In the Matter of Allen* (Review Dept. 2010) 5 Cal. State Bar Ct. Rptr. 198, 204-205, the rule does not automatically extend to all former clients of any attorney, but instead is applicable in only very limited circumstances:

> Indeed, the State Bar contends that "the mere fact that the parties enjoyed an attorney client relationship at some time prior to this real estate sale transaction proposal, suffices to trigger the application of the rule [3-300]." At oral argument, the State Bar summarized its position, stating that, under rule 3-300, "once a client, always a client."
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> We do not agree with this proposition. The duration of an attorney/client relationship is dependent upon the nature and scope of the relationship. (Vapnek et. al., Cal. Practice Guide: Professional Responsibility. (The Rutter Group 2008) para. 3:29.5, p. 10-11.) In this case, the sporadic legal services that Allen provided between 1999 and 2002 were limited to four minor matters for which Allen received a total of $150, a few dinners and some discounts on hotel rooms. Although each of these matters concerned real property issues, none of them had any relationship to the purchase of the duplex and Allen did not obtain any confidential or financial information during her earlier representation of Supara that was used in the subsequent negotiations. Nor did Allen use any financial or personal information she otherwise learned about Supara through their prior attorney/client relationship. Moreover, almost two and a half years elapsed between the services provided and the purchase of the duplex.
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> . . .
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> In the alternative, the State Bar seeks to extend rule 3-300 to apply to Supara as a *former* client because "the established long-standing personal friendship and multiple prior attorney/client relations . . . carried with it an ongoing aura of inherent influence associated with the prior history of representation in real property matters." Again, this is rebutted by the specific findings of the jury in *Allen v. Ratanasadudi* that Allen did not exercise undue influence over Supara regarding the Purchase Agreement and that their prior attorney/client relationship did not give Allen any advantage over Supara.
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> Furthermore, we do not find support for the State Bar's broad interpretation of rule 3-300, either in its language or in the decisional law. Rule 3-300 imposes restrictions on an attorney's business transactions with a "client." In limited circumstances, the courts have applied rule 3-300 and its predecessor, former rule 5-101, "to a transaction between an attorney and a former client involving the fruits of the attorney's representation, if there is evidence that the client placed his trust in the

> attorney because of that representation . . . ." (*Hunniecutt v. State Bar* (1988) 44 Cal.3d 362, 372; accord, *Beery v. State Bar* (1987) 43 Cal.3d 802 [attorney solicited investment from former client in precarious venture *before* final distribution of litigation proceeds]; *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 243 [attorney culpable for solicitation of loan or investment "on the heels" of client's receipt of settlement].) The State Bar's reliance on *In the Matter of Peavey* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 483 in support of its extension of rule 3-300 to former clients is misplaced because in *Peavey* the attorney entered into a business transaction with his client while he was still representing the clients' interests in litigation (*id.* at p. 486), and in a second instance, the attorney entered into a business transaction while the clients were still seeking his assistance and advice in an ongoing relationship. (*Id.* at p. 489.)
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> The Supreme Court has not been inclined to "dramatically extend the definition of an 'attorney-client relationship' beyond its common understanding. . . ." (*Hunniecutt v. State Bar, supra,* 44 Cal.3d at p. 372.) We, too, decline to expand the meaning of attorney/client relationship to include Allen's prior representation of Supara.

None of the factors warranting the application of rule 3-300 to a transaction by an attorney with a former client is applicable to the transaction between Respondent's firm and Ms. Hardy in 2010.

This count is dismissed with prejudice.

Count 4 – Section 6090.5, subd. (a)(2) [Attorney/Client Agreement Not to File Complaint]

In this count the State Bar alleges:

> On or about July 24, 2014, Respondent, while acting as an attorney for a party sought agreement from JoAnn Hardy, the defendant in the litigation, that she shall withdraw a disciplinary complaint or shall not cooperate with the investigation or prosecution conducted by the State Bar in exchange for Respondent's agreement to dismiss his complaint against Hardy, in willful violation of Business and Professions Code, section 6090.5(a)(2).

Section 6090.5 provides in pertinent part, "It is cause for suspension, disbarment, or other discipline for any member, whether as a party or as an attorney for a party, to agree or seek agreement, that: . . . (a)(2) The plaintiff shall withdraw a disciplinary complaint or shall not

cooperate with the investigation or prosecution conducted by the disciplinary agency."[8]

Although Respondent's actions resulted from his mistaken belief that he had been encouraged by the State Bar to seek a settlement of Ms. Hardy's State Bar complaint, He stipulated at the commencement of the trial of this matter, and this court finds, that his settlement offer on July 23, 2014, to Hardy, which was contingent on her withdrawing her State Bar complaint against him, constituted a willful violation by him of the prohibition of section 6090.5, subdivision (a)(2).

Aggravating Circumstances

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.5.)[9] The court finds that no aggravating circumstances have been established by clear and convincing evidence in this case.

Mitigating Circumstances

Respondent bears the burden of proving mitigating circumstances by clear and convincing evidence. (Std. 1.6.) The court finds the following with regard to mitigating factors.

No Prior Discipline

Respondent had practiced law in California for 23 years prior to the commencement of the instant misconduct. During that span, Respondent had no prior record of discipline. Respondent's lengthy tenure of discipline-free practice is entitled to significant weight in mitigation. (Std. 1.6(a); *In the Matter of Sullivan* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 608, 613 [21 years: "We attribute great significance to this factor."]; *In the Matter of Lilly*

[8] That Hardy had not yet filed her civil action, and therefore had not yet formally become a "plaintiff," is not a defense to Respondent's violation of the prohibition of section 6090.5. The section goes on to provide that its prohibitions apply to "all settlements, whether made before or after the commencement of a civil action."

[9] All further references to standard(s) or std. are to this source.

(Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 185, 192-193; *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 41, 49 [17 years]; *In the Matter of Burckhardt* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 343, 350 [13 years: "significant" mitigating factor]; *In the Matter of Johnston* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, 589 [12 years: "an important mitigating circumstance"]; *In the Matter of Loftus* (Review Dept. 2007) 5 Cal. State Bar Ct. Rptr. 80, 88 ["entitled to full credit" for 10 years of discipline-free practice]; and *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596 [10+ years: "significant mitigation"].

No Harm

Respondent is entitled to some mitigation credit because his misconduct caused no actual harm to Ms. Hardy, who was the object of the misconduct. (Std. 1.6(c).)

Cooperation

Respondent entered into an extensive stipulation of facts and freely admitted his culpability in this case, for which conduct Respondent is entitled to some mitigation. (Std. 1.6(e); see also *In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 443; (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 190 [where appropriate, more extensive weight in mitigation is accorded those who admit to culpability as well as facts].)

Recognition of Wrongdoing/Atonement

As soon as Respondent was made aware of the prohibition of section 6090.5, he promptly acknowledged the inappropriateness of his prior settlement proposal and withdrew it. This conduct by Respondent is a mitigating factor. (Std. 1.6(g).)

Remoteness of Time/Subsequent Rehabilitation

Respondent's misconduct occurred on July 23, 2014. The State Bar was notified of the misconduct at the very time that it occurred. It was also notified of the fact that Respondent had

acknowledged the inappropriateness of the misconduct and withdrawn the inappropriate demand on July 28, 2014.

The NDC in this matter was not filed for more than three years after Respondent's misconduct, despite the State Bar's awareness of both the misconduct and his subsequent rehabilitation. This is a mitigating factor. (Std. 1.6(h).)

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, the courts, and the legal profession; preserve public confidence in the profession; and maintain the highest possible professional standards for attorneys. (Std. 1.1; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Although the standards are not binding, they are to be afforded great weight because "they promote the consistent and uniform application of disciplinary measures." (*In re Silverton* (2005) 36 Cal.4th 81, 91-92.) Nevertheless, the court is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, the court is permitted to temper the letter of the law with considerations peculiar to the offense and the offender. (*In the Matter of Van Sickle* (2006) 4 Cal. State Bar Ct. Rptr. 980, 994; *Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) In addition, the court considers relevant decisional law for guidance. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 703.) Ultimately, in determining the appropriate level of discipline, each case must be decided on its own facts after a balanced consideration of all relevant factors. (*Connor v. State Bar* (1990) 50 Cal.3d 1047, 1059; *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 920, 940.)

Section 6090.5 provides that a violation of its terms "is cause for suspension, disbarment, or other discipline[.]" There is no standard that specifically applies to a violation of section 6090.5.[10] However, standard 1.7 ("Determination of Appropriate Sanctions") provides important guidance on what discipline is appropriate here. Subpart (c) of that standard provides:

> If mitigating circumstances are found, they should be considered alone and in balance with any aggravating circumstances, and if the net effect demonstrates that a lesser sanction is needed to fulfill the primary purposes of discipline, it is appropriate to impose or recommend a lesser sanction than what is otherwise specified in a given Standard. On balance, a lesser sanction is appropriate in cases of minor misconduct, where there is little or no injury to a client, the public, the legal system, or the profession and where the record demonstrates that the member is willing and has the ability to conform to ethical responsibilities in the future.

Given the nature of Respondent's misconduct here, his prompt action in correcting it, his acknowledgement of misconduct in this proceeding, his many years of discipline-free practice, the three years that have passed since the misconduct with no indication of any repetition or other misconduct, and the lack of any harm to the former client, the public, the courts, or the legal system, it is clear that discipline at the lowest end of the available spectrum is all that is necessary or appropriate to protect the public, the courts, and the legal profession; preserve public confidence in the profession; and maintain the highest possible professional standards for attorneys. (Std. 1.1.) Accordingly, discipline consisting of a private reproval, with conditions of reproval, is imposed as follows. This discipline is consistent with that imposed by the Supreme Court in *Ames v. State* Bar (1973) 8 Cal.3d 910, a case involving comparable circumstances.

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[10] Nor have the parties provided this court with any authority in which the misconduct of the respondent has been solely a violation of section 6090.5.

DISPOSITION

Discipline – Private Reproval

It is ordered that Richard James Annen, State Bar Number 91956, is privately reproved. Pursuant to the provisions of rule 5.127(A) of the Rules of Procedure of the State Bar, this reproval will be effective when this decision becomes final.

Further, pursuant to rule 9.19(a) of the California Rules of Court and rule 5.128 of the Rules of Procedure, the court finds that the protection of the public and the interests of Respondent will be served by the following conditions being attached to this reproval. Failure to comply with any condition attached to this reproval may constitute cause for a separate disciplinary proceeding for willful breach of rule 1-110 of the State Bar Rules of Professional Conduct.

Conditions of Reproval

Respondent is ordered to comply with the following conditions attached to this reproval for one year (Reproval Conditions Period) following the effective date of the reproval.

Review Rules of Professional Conduct

Within 30 days after the effective date of the order imposing discipline in this matter, Respondent 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 Respondent's compliance with this requirement, to the State Bar's Office of Probation in Los Angeles (Office of Probation) with Respondent's first quarterly report.

Comply with State Bar Act, Rules of Professional Conduct, and Reproval Conditions

Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of Respondent's reproval.

Maintain Valid Official Membership Address and Other Required Contact Information

Within 30 days after the effective date of the order imposing discipline in this matter, Respondent must make certain that the State Bar Attorney Regulation and Consumer Resources Office (ARCR) has Respondent's current office address, email address, and telephone number. If Respondent does not maintain an office, Respondent must provide the mailing address, email address, and telephone number to be used for State Bar purposes. Respondent must report, in writing, any change in the above information to ARCR within ten (10) days after such change, in the manner required by that office.

Meet and Cooperate with Office of Probation

Within 30 days after the effective date of the order imposing discipline in this matter, Respondent must schedule a meeting with Respondent's assigned probation case specialist to discuss the terms and conditions of Respondent's discipline and, within 45 days after the effective date of the court's order, must participate in such meeting. Unless otherwise instructed by the Office of Probation, Respondent may meet with the probation case specialist in person or by telephone. During the Reproval Conditions Period, Respondent 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.

State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court

During Respondent's Reproval Conditions Period, the State Bar Court retains jurisdiction over Respondent to address issues concerning compliance with reproval conditions. During this period, Respondent must appear before the State Bar Court as required by the court or by the Office of Probation after written notice mailed to Respondent's official membership address, as provided above. Subject to the assertion of applicable privileges, Respondent must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

Quarterly and Final Reports

a. Deadlines for Reports. Respondent 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 Reproval Conditions Period. 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, Respondent must submit a final report no earlier than ten (10) days before the last day of the Reproval Conditions Period and no later than the last day of the Reproval Conditions Period.

b. Contents of Reports. Respondent must answer, under penalty of perjury, all inquiries contained in the quarterly report form provided by the Office of Probation, including stating whether Respondent 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. Respondent is directed to maintain proof of Respondent's compliance with the above requirements for each such report for a minimum of one year after the Reproval Conditions Period has ended. Respondent is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

State Bar Ethics School

Within one year after the effective date of the order imposing discipline in this matter, Respondent 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 Respondent will not receive MCLE credit for attending this session.

Multistate Professional Responsibility Examination

It is further ordered that Respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within one year after the effective date of the order imposing discipline in this matter

and to provide satisfactory proof of such passage to the State Bar's Office of Probation within the same period. Failure to do so may result in suspension. (Cal. Rules of Court, rule 9.10(b).)

IT IS SO ORDERED.

Dated: April 3, 2018

DONALD F. MILES
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Court Specialist of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on April 3, 2018, I deposited a true copy of the following document(s):

DECISION AND ORDER OF PRIVATE REPROVAL

in a sealed envelope for collection and mailing on that date as follows:

☒ by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

DAVID C. CARR
LAW OFFICE OF DAVID C. CARR
600 W BROADWAY
STE 700
SAN DIEGO, CA 92101 - 3370

☒ by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

HUGH GERARD RADIGAN, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on April 3, 2018.

Marc Krause
Court Specialist
State Bar Court