PUBLIC MATTER - DESIGNATED FOR PUBLICATION

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	)	No. 95-O-14321
	)	
BOLDEN BRUCE KITTRELL,	)	**OPINION ON REVIEW**
	)	
A Member of the State Bar.	)	
	)	

Respondent, Bolden Bruce Kittrell, sought our review from a hearing judge's recommendation that he be disbarred. Respondent was admitted to practice in 1967 and has no prior record of discipline. The hearing judge found that respondent committed several serious violations of rule 3-300 of the Rules of Professional Conduct[1] regulating an attorney's conduct in a business transaction with an unsophisticated client who lost her life savings she had earmarked to use to buy a home. Following our earlier opinion in this proceeding (see *post*), the hearing judge also found respondent culpable of acts of moral turpitude while engaged in this business transaction proscribed by Business and Professions Code section 6106.[2] After respondent's client won a civil fraud judgment against him, respondent was found to have violated section 6068, subdivision (o)(2) by failing to timely report entry of this judgment to the State Bar. Respondent has pressed a variety of substantive and procedural attacks on the findings. The

[1]Unless noted otherwise, all references to rules are to the Rules of Professional Conduct of the State Bar. The version of rule 3-300 at issue here is that in effect between May 27, 1989, and September 13, 1992.

[2]Unless noted otherwise, all references to sections are to the Business and Professions Code.

State Bar urges that we adopt the hearing judge's decision and disbarment recommendation. Upon our independent review of the record (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we uphold the hearing judge's findings and conclusions but recommend suspension, which we believe better comports with the discipline imposed in similar cases, while recognizing the serious evidence of aggravating circumstances in this case.

I. Procedural Background.

This is the second plenary review we have conducted in this proceeding. In *In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195 (*Kittrell I*), we upheld the hearing judge's conclusions, applying principles of collateral estoppel, that respondent committed acts of moral turpitude (§ 6106) but remanded that matter to the hearing judge[3] to determine the nature and extent of those acts. We also adopted the hearing judge's conclusion that respondent violated section 6068, subdivision (o)(2) by failing to timely notify the State Bar of the entry of a fraud judgment in a civil suit brought by his former client. We noted that respondent did not challenge earlier this conclusion or the factual findings supporting it. (*Kittrell I, supra*, 4 Cal. State Bar Ct. Rptr. at p. 210.). We also concluded that the application of collateral estoppel did not establish the elements of a violation of former rule 3-300, and we remanded this case to the hearing judge to make necessary findings of fact. Finally, we rejected the hearing judge's findings in mitigation and aggravation and remanded for the making of new findings and an

[3]On remand, the case was assigned to a different trial judge than heard the matter originally.

appropriate recommendation of discipline.[4] Although we remanded this matter, we rejected respondent's argument that it was inappropriate to apply principles of collateral estoppel and his claim that the hearing judge was not impartial.

On remand, we authorized the use of the evidence already made a part of the record but required that respondent be given an opportunity to "contradict, temper, or explain" that evidence.

In July 2001 the hearing judge conducted the remand hearing. The State Bar argued that the evidence already adduced proved the charges and chose to introduce no additional evidence. The hearing judge gave respondent ample and repeated opportunities to temper or explain the evidence and to present evidence favorable to him concerning the charges. Respondent declined to do so giving two reasons: that he did not want to waive any rights he had in view of a pending appeal before the Supreme Court of the United States and the evidence in *Kittrell I* already contained the evidence he would offer. After concluding that respondent was culpable of violations of the State Bar Act and former rule 3-300(A) and (B), and that evidence of aggravating circumstances outweighed evidence in mitigation, the hearing judge recommended disbarment. Respondent's current appeal followed.

II. Findings and Legal Conclusions of Culpability.

Unlike in *Kittrell I*, the current findings of the hearing judge do not rest on application of collateral estoppel. Rather, the judge independently used the evidence adduced in the civil trial brought by respondent's client to prove the charges. We summarize the hearing judge's factual

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[4]The hearing judge in *Kittrell I* had recommended that respondent be suspended for five years, stayed, on conditions of probation including three years' actual suspension and until respondent established his entitlement to be returned to law practice.

findings. Despite the extensive evidence, the essential facts are simple and not the subject of any reasonable dispute based on the record.

At the pertinent time, 1991, Czarine Hope James was a 55-year-old naturalized United States citizen who had completed the equivalent of the 12th grade in Jamaica. She had done computer data entry work, but in 1991 was employed as a clerk in a public storage facility earning about $6 per hour. She had minimal prior investment experience. She desired to purchase a condominium and was looking for an investment for her life savings of $68,000.[5] James's friend, Johnnie Maxey, had invested earlier with respondent and recommended him to James.

In addition to being an attorney, respondent owned Bolden Group and Bolden Realty. As he conceded, Bolden Group was the same as respondent in identity. Respondent used Bolden Realty to do business with equityholders in real estate who could not qualify for conventional bank loans. Respondent testified that none of his investors lost money in 12 to 15 years until the recession of 1992 to 1993, when he experienced problems with trust deeds. His own home of 17 years was foreclosed and sold in 1994.

In late November 1991, James met respondent in his law office. He gave James his law office's business card, mentioned he was an attorney but did not mention his ownership of Bolden Realty. At this time, James had asked respondent for legal advice about the tax consequences of her family law settlement. Respondent advised her at a later time after reviewing her documents.

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[5]James also had retirement accounts totaling about $12,000.

Also, at this November 1991 meeting, respondent offered James an investment in a trust deed in Moro Landis Studios, commercial property in Studio City, which was principally used as a dance studio. At the time, respondent had no written appraisal of the property. However, he had invested in this property earlier, raising $600,000 from investors. He was aware that the property needed considerable improvements and that it was encumbered with first and second trust deed balances totaling $895,000. Together with the third trust deed balance held by respondent's realty group, the encumbrances on Moro Landis Studios totalled nearly $1.5 million. In contrast, the annual income of the property was $70,000 and the annual debt service on just the first and second trust deeds was $100,000.

In 1990 respondent listed Moro Landis Studios for $1.95 million but only received one offer below $1 million. He tried unsuccessfully to refinance the property in 1990 and 1991.

To obtain funds to service the debt on Moro Landis Studios, in March 1990 respondent issued a new third trust deed for $450,000. When the $450,000 note became due, and respondent was unable to refinance or sell the property for an adequate amount, he extended the note's due date to March 1993 and increased the note's amount to $550,000. To finance this note, he sought James's investment. A month before James's first meeting with respondent, the holder of the first trust deed on Moro Landis Studios, Pacific Lighting Company, filed a notice of default on the property.

Between 1991 and 1993, respondent earned at least $244,000 in commissions and management fees from the Moro Landis Studios.

When respondent offered James an investment in the Moro Landis Studios in November 1991, he told her that it would pay 14 percent interest, that there would be monthly payments and that her principal would be repaid in 3 to 4 months. Although respondent told James that

anything can happen, he also assured her that the Moro Landis Studios investment was a good one and that she could not lose money. Respondent did not consider James a sophisticated investor when he met her. Respondent did not inform James that the debt service on the Moro Landis Studios exceeded its income and that he had no current written appraisal on the property.[6] At this meeting, respondent did not give James any writing concerning her investment, nor did he inform her that she could seek the advice of independent counsel.

Within a week of her meeting respondent, James sent him $61,000 for her investment in the Moro Landis Studios. At respondent's request, James made the funds payable to Bolden Realty, but respondent did not inform James that he was Bolden Realty.

By early January 1992, respondent had sent James her first monthly payment, and on January 9, he sent her a trust declaration and beneficiary agreement to sign and return. These papers failed to mention that James's investment was in a third trust deed, did not recite the risks of the transaction and misstated that the note amount was $450,000 rather than $550,000. They also set the due date for return of James's principal as March 1, 1993, rather than the March 1992 date James had understood. When James called respondent about this, he assured her that she would have her funds back in April or May of 1992, and that the 1993 date was for convenience in case she wanted to reinvest her funds. Relying on respondent's statements, James signed the agreement; but she did not fully understand the nature of her investment or with whom it was placed.

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[6]At the time he met with James, respondent had two appraisals on Moro Landis Studios. One was four years old ($2.2 million appraised value) and the other three years old ($2.25 million appraised value). Based on an appraiser's testimony, the hearing judge found that as of November 1991, the property's fair market value was $725,000.

By late February 1992, James had decided to purchase a condominium. Respondent told her that she would have her funds soon and James opened an escrow to buy the condominium. However, respondent did not return James's funds and her intended purchase of the condominium fell out of escrow. Again, relying on respondent's promise that he would return her investment soon, James opened a second escrow in summer 1992. Again, James's purchase was frustrated when respondent failed to return her funds and escrow had to be cancelled. The same thing happened a third time in fall 1992 when James opened an escrow to buy a home in a senior citizen community. By this time, respondent had ceased making interest payments to James. Respondent made 11 interest payments to James totaling $7,333.

Because of the three failed escrows, James spent $2,300 on escrow fees and had to pay storage charges for her personal property. The experience also caused James stress. As a result of losing her investment, James was forced to rent a room in a friend's home.

In April 1993, James sued respondent in Superior Court, Orange County, for several causes of action, including breach of fiduciary duty and fraud. After jury verdict, the court awarded James compensatory damages of $217,235, plus interest and costs and exemplary damages of $61,000. The verdict found by clear and convincing evidence that respondent's conduct toward James involved malice, oppression or fraud. The judgment on the verdict was affirmed by the Court of Appeal, Fourth Appellate District, in an unpublished opinion. (*James v. Kittrell* (Oct. 16, 1996, G017179).)[7]

On appeal, the only issue respondent raised was the sufficiency of evidence to support the judgment. The appellate court found substantial evidence to support the judgment. Supporting

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[7]Although the opinion of the Court of Appeal is not for publication, it may be cited in this disciplinary proceeding. (Cal. Rules of Court, rule 977(b)(2).)

the award of exemplary damages was evidence showing that respondent had sizeable personal assets.[8]

The Supreme Courts of California and of the United States each denied respondent's requests to file late petitions for review.

Respondent told the attorney who represented James in the civil litigation, Evan Borges, that he had no intention of paying James the judgment. Borges served pro bono for James, both defending respondent's attempts to defeat the judgment in bankruptcy proceedings and attempting unsuccessfully to collect for James on the judgment. When Borges tried to reach respondent's Arizona ranch, respondent transferred it to an entity owned by his wife. Borges did not have funds to continue to collect on the judgment.

Despite Borges's pro bono help to James, she was required to pay about $10,000 for the costs of the superior court and other actions. In 1994 James received about $27,000 from respondent's former law partners and $31,000 from the State Bar's Client Security Fund (CSF). In addition to the financial burdens, James's health suffered from her loss of funds. She broke out in a severe rash, and suffered dental problems which she could not afford to remedy. This caused gum problems and loss of several teeth. She also suffered from varying blood pressure, hair loss and depression.

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[8]As the Court of Appeal, in its opinion, summarized respondent's testimony in the punitive damage phase of the civil trial, respondent owned and lived in an eight-acre equestrian estate in Rolling Hills which included a "main house, one bedroom guest house, swimming pool, tennis court, a six-stall barn and groom's quarters." This estate had been appraised at $2.9 million as of June, 1992. He also owned an airplane worth $125,000, owned an Arizona ranch worth $700,000, and leased 1991 Mercedes and Lincoln cars. During the three years prior to the civil trial, respondent conceded that he had made several hundred thousand dollars of deposits into his bank account. Respondent testified that his assets were encumbered for more than their value and he invested his deposits in other property. (*James v. Kittrell*, *supra*, (typescript opn.), p. 4.)

Respondent contended that his assets have been foreclosed or sold in bankruptcy and his lifestyle is far more modest than before. His only income is from his law practice which had yielded about $100,000 in both 1996 and 1997. He claims that he had paid James $18,200 and offered to pay her an additional $17,400 but did not have those funds available. He also contends that his insurer had paid James. Respondent believed that he did not owe James any additional sums since she has recovered more than her original investment from him and from CSF.

From these findings, the hearing judge concluded that respondent wilfully violated rule 3-300(A) and (B), by, respectively, entering into a business transaction with James which was not fair and reasonable and was not fully disclosed to James and failing to advise James in writing that she could consult independent counsel of her choice. In so concluding, the hearing judge determined that an attorney-client relationship existed between respondent and James in order to trigger rule 3-300 requirements and that the Moro Landis Studios transaction placed respondent in a position adverse to James.

The hearing judge also concluded that the moral turpitude which we had previously determined in *Kittrell I* respondent had committed, was evident in respondent's concealment to James, whom he knew to be an unsophisticated investor, of the risks of her investment in the Moro Landis Studios and in his self-dealing with that investment and failing to honor his commitment to repay James within three to four months.

Finally, the hearing judge incorporated in his decision our earlier dismissal in *Kittrell I* of the charge that respondent violated section 6068, subdivision (o)(1) and our earlier conclusion that respondent violated section 6068, subdivision (o)(2) by failing to report to the State Bar the judgment for fraud obtained by James.

III. Evidence in Aggravation and Mitigation and Hearing Judge's Recommendation.

Respondent had been admitted to practice for 24 years before the start of misconduct. The hearing judge gave this factor weight in mitigation.

Respondent presented testimony of two character witnesses. Gary W. Stephens, the acting director of corporate security of Sempra Energy, a large public utility, knew respondent for about 50 years in a business and personal relationship and considered him one of his closest friends. Stephens had a favorable opinion of respondent's character and considered him honest, generous and a person of integrity. Stephens had not heard of any State Bar proceedings concerning respondent but, based on information from respondent, was generally familiar with the civil law suit brought against respondent by James. Stephens's mother had invested in the Moro Landis Studios and had lost money in that investment. Stephens and respondent loaned each other money over the years and respondent owed Stephens about $15,000.

Alex Dugally, retired at the time of his testimony, had been a deputy clerk of the Los Angeles Superior Court for 30 years and had known respondent as a friend and an attorney for between 25 and 30 years. As did Stephens, Dugally enjoyed a close social relationship with respondent. Dugally had a favorable opinion of respondent's character, terming respondent a person of high integrity.

The hearing judge gave this character evidence little weight for failing to meet the element in standard 1.2(e)(vi), Standards for Attorney Sanctions for Professional Misconduct,[9]

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[9]Unless noted otherwise, all references to "standards" are to these Standards for Attorney Sanctions for Professional Misconduct, found in title IV of the Rules of Procedure of the State Bar.

that the evidence show an extraordinary demonstration of positive character by a wide range of legal and general references.

The hearing judge found many factors to be aggravating on the issue of degree of discipline. These included the multiple acts of wrongdoing toward his client (std. 1.2(b)(ii)), his significant harm to James (std. 1.2(b)(iv)), his indifference to remedying the consequences of his misconduct (std 1.2(b)(v)), his continued assertion of contrary facts to those found by trial and appellate courts and that his misconduct was surrounded by dishonesty and concealment (std. 1.2(b)(iii)).

After weighing factors deemed appropriate and after reviewing other cases of attorneys' involvement with unfair business transactions with their clients, the hearing judge recommended disbarment.

IV. Discussion.

A. Respondent's claims.

Respondent levies a number of attacks on the recommendation and proceedings below, some of them reminiscent of his previous arguments in *Kittrell I.*

We shall group them into two broad categories: claims attacking the procedures utilized and those attacking the substantive findings and the recommendation.

1. Procedural attacks.

We begin with respondent's attack on the use of collateral estoppel. Our opinion in *Kittrell I*, determined that respondent's culpability of moral turpitude was established by application of the doctrine of collateral estoppel, but that the charged violations of rule 3-300 were not. (4 Cal. State Bar Ct. Rptr. at pp. 208-210.) That opinion has become final and respondent cannot continue to attack our earlier holding regarding the doctrine of collateral

estoppel. Moreover, it is clear from the record of this proceeding, that the hearing judge did not rely on that doctrine to establish respondent's misconduct under rule 3-300, but used the evidence in the record to make independent and detailed findings. We have independently reviewed the record and, as we shall discuss *post*, in resolving respondent's attack on the substantive findings, those findings rest on clear and convincing evidence. Most of the findings are undisputed and rest on respondent's own testimony.

Also rendered final in *Kittrell I* is our finding, adopted by the hearing judge in *Kittrell II*, that respondent violated section 6068, subdivision (o)(2), by failing to report timely to the State Bar the entry of the fraud judgment against him in the civil action brought by James. Having failed to challenge this finding in his review of *Kittrell I* and we having sustained that finding on an independent review, respondent cannot now seek to reopen the matter as he urges us to do. (Compare *In the Matter of Freydl* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 349, 357.)

Respondent argues that he was denied the right to present evidence or cross-examine witnesses in the first and second State Bar Court trials. Although our concern that respondent did not have an opportunity in the hearing below in *Kittrell I* to temper the evidence led to our remand to the hearing department in that first proceeding, there is absolutely no doubt that respondent received every reasonable opportunity to introduce evidence favorable to him in *Kittrell II*. The hearing judge extended repeated invitations to respondent to present his evidence. Except for very brief testimony or argument and the testimony of two character witnesses, respondent deliberately declined to offer further evidence. One of his grounds for declining was his incredulous assertion that any new evidence he offered would be redundant. His other reason for declining was also unmeritorious, that the United States Supreme Court was considering a pending appeal. In sum, having given respondent the express opportunity to

present his evidence, his unpersuasive reasons for failing to do so cannot now be the basis of any claim of error.[10]

2. Substantive attacks.

We have carefully reviewed respondent's substantive attacks on the findings and conclude that they are without merit.

Respondent's contention that the finding that he engaged in moral turpitude in violation of section 6106 is impermissibly vague echoes the belatedness of some of his procedural claims. Our decision in *Kittrell I* noted that respondent had made the same claim on review in that case. We resolved it against respondent (4 Cal. State Bar Ct. Rptr. at p. 209) and that determination has long since become final.[11]

Respondent argues that the civil action brought by James did not establish or present the issue of whether respondent wilfully violated rule 3-300. We agree that the purpose of the James civil action was to resolve civil causes of action, and not to decide whether the California Rules of Professional Conduct were violated to warrant discipline. But that does not serve to exonerate respondent, as the evidence introduced in that civil action, together with other evidence, did serve to establish clearly and convincingly that respondent wilfully violated the rule. A related claim by respondent, that the findings of the hearing judge are not supported by clear and convincing evidence, also is not meritorious.

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[10]Respondent's claim that he was not given sufficiently timely information as to whether the State Bar would call certain witnesses and the location of those witnesses, even if established, did not obviate respondent from calling these witnesses on his own based on his own investigation of their whereabouts, if he wished to elicit their testimony.

[11]In *Kittrell I,* we cited eight decisions defining the term "moral turpitude" or applying it to specific alleged conduct. (4 Cal. State Bar Ct. Rptr. at p. 208.)

B. Evidence and culpability conclusions.

There was ample clear and convincing evidence that respondent knew of the limited sophistication and educational level of his client, James, that he knew of her goal to use the principal invested to secure her own residence, that he knew of the distressed financial history of the Moro Landis Studios and still respondent recommended that James invest in a third trust deed as a "can't lose" investment maturing in just a few months. Respondent's admitted conduct proved clearly that he violated the provisions of rule 3-300. There is no dispute that respondent failed to give James an adequate written description of the transaction and its essential terms necessary for her to be informed of the risks inherent in the junior trust deed in which she was investing. By his own testimony, respondent never informed James that she had an opportunity to seek the advice of independent counsel. James relied on respondent as her attorney and she first consulted him as her attorney.[12]

In addition to respondent's utter failure to present James with a writing of the basic terms of the transaction, the transaction was neither fair nor reasonable to James.

Cases of business transactions between attorney and client which failed to comply with rule 3-300 or its predecessor, rule 5-101 are regrettably abundant. (See, e.g., *In the Matter of Peavey* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 483, 494-495; *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 243-244.) From these cases, it is clear that, among the purposes the rule serves, it is designed to recognize the very high level of trust a client

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[12]Although the existence of an attorney-client relationship is not disputed, one clearly existed in order to invoke the rule's requirements. (See *Beery v. State Bar* (1987) 43 Cal.3d 802, 811-812 (attorney-client relationship existed when client consulted attorney about preparation of a will at the same time that attorney induced client's entry into business transaction).)

reposes in his or her attorney and to ensure that that trust is not misplaced. (See *Rose v. State Bar* (1989) 49 Cal.3d 646, 662; *Beery v. State Bar*, *supra*, 43 Cal.3d 802, 812-813).

Sadly, this case stands with too many others as an example of an attorney's preference of his personal interests in manifest disregard of the interests of his client. (E.g., *In the Matter of Priamos* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 824, 829-830.) Without doubt, respondent's wilful violations of rule 3-300 were multiple and significant and we uphold the hearing judge's findings and conclusions as to rule 3-300.

Although our conclusion that respondent engaged in acts of moral turpitude is final, the record on remand shows two bases for that conclusion: first, respondent concealed material facts and known risks from James about the Moro Landis Studios investment. (See *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 315.) Specifically, respondent concealed that encumbrances on the property were greater than its market value, that respondent had no current appraisal on the property, that the property's debt service exceeded its income, that recent attempts to refinance or sell the property were unavailing and that the property had a history of defaults and foreclosure actions. Additionally respondent overreached James, knowing that James was respondent's client; had limited income, education and experience in investing; and was depending on the promised prompt return of her principal to use for housing. (Compare *In the Matter of Johnson*, *supra*, 3 Cal. State Bar Ct. Rptr. 233, 242-244.) Given the financially distressed history of the Moro Landis property, there was no reasonable way that the investment offered James was appropriate for either a sophisticated investor seeking to preserve principal, or for James who expected her funds to be returned shortly so that she could purchase a home. (See *Rose v. State Bar*, *supra*, 49 Cal.3d 646, 662-663.) We cannot escape the conclusion that these aspects of the transaction represent moral turpitude in violation of section 6106, under any of the definitions of

moral turpitude adopted by the Supreme Court. (See *Kittrell I, supra*, 4 Cal. State Bar Ct. Rptr. at p. 208.)

C. Degree of discipline.

Past cases which involved centrally the entry into a business transaction with a client which either failed to comply with the applicable rule of professional conduct or breached the attorney's fiduciary duty to the client have ranged widely from disbarment (*In the Matter of Priamos, supra*, 3 Cal. State Bar Ct. Rptr. 824) to reproval. (See cases discussed in *Rodgers v. State Bar, supra*, 48 Cal.3d at p. 318, and *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297, 308.)

Here respondent's misconduct extended beyond rule 3-300 offenses and into statutory violations, including moral turpitude. Accordingly, we must look to cases that reflect misconduct beyond violations of the Rules of Professional Conduct for fair guidance. In that light, we see as more comparable, *Rose v. State Bar, supra*, 49 Cal.3d 646; *Beery v. State Bar, supra*, 43 Cal.3d 802; *In the Matter of Peavey, supra*, 4 Cal. State Bar Ct. Rptr. 483; and *In the Matter of Johnson, supra*, 3 Cal. State Bar Ct. Rptr. 233.

Rose induced a widow with two children to invest $70,000 in a restaurant equipment business in which Rose was involved financially. The client had almost no business experience and limited resources, except for settlement funds which Rose had obtained for this client. Rose was found to have failed to disclose the significant risks of this investment with his client and failed to advise her to seek the advice of independent counsel. The Supreme Court found Rose culpable of misconduct in four other matters but also considered mitigating evidence in Rose's favor. It ordered a two-year actual suspension as a condition of probation.

Beery persuaded a severely injured client for whom he had recovered damages to invest $35,000 in a venture that would provide satellite television service to hotels and businesses. Beery failed to disclose his financial condition or his connection with the satellite venture; nor did he advise his client to seek the advice of independent counsel on the investment. When the satellite business became unsuccessful, Beery defaulted on his personal guarantee to repay the loan. The Supreme Court found that Beery had concealed material facts and had abused the trust placed in him by his client. As in *Rose*, the Supreme Court suspended Beery for two years actual as a condition of probation.

A two-year actual suspension was also imposed in *Peavey*. There, the attorney solicited $25,000 loans or investments from each of two different clients in order to publish a book Peavey was writing. Peavey failed to disclose known risks and facts about the book venture and we found that he wilfully violated rule 3-300 in several respects in these transactions. Moreover, he failed to honor any part of civil judgments obtained by both clients against him; and similar to the present case, failed to report timely to the State Bar that one of the judgments was for fraud or intentional breach of fiduciary duty.

Finally, in *Johnson*, we found the attorney culpable of breaching her fiduciary duty to her sister-in-law who was also a client, represented by Johnson in recovering damages for personal injuries. We found that Johnson's unsecured loan of $20,000 was neither fair nor reasonable to her client who was in fragile health and unsophisticated in business matters, and we also found that Johnson had engaged in acts of moral turpitude by overreaching her client.

In their briefs on review, neither party cites cases guiding on the degree of discipline to recommend. However, at oral argument the State Bar suggested that the cases of *In the Matter of Priamos*, *supra*, 3 Cal. State Bar Ct. Rptr. 824, and *In the Matter of Wyshak* (Review Dept. 1999)

4 Cal. State Bar Ct. Rptr. 70, should guide us to recommend disbarment. We disagree as both cases involve decidedly more serious misconduct than presented here. *Wyshak* involved serious misconduct in a total of four matters including two acts of defrauding sellers of real estate of hundreds of thousands of dollars in consideration in escrows Wyshak was administering. *Priamos* involved an attorney's repeated acts of self-dealing over a seven-year period in over $500,000 of the client's property coupled with Priamos's unilateral appropriation of $450,000 of his client's property for management fees.

We must also weigh mitigating and aggravating circumstances to achieve a balanced recommendation. (E.g, *Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) We assign more weight in mitigation than the hearing judge to respondent's long years of practice without prior discipline (*In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 225; *Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090-1091) and we note with favor respondent's community service activities (*In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 521). However, we agree with the hearing judge that respondent's character evidence is entitled to little weight as the two witnesses were social friends who hardly represented a broad showing contemplated by standard 1.2(e)(vi). (*In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 171.)

We agree with the hearing judge's assessment of aggravating circumstances. We are most concerned with the multiple offenses; and, as the hearing judge observed in his decision, with respondent's "lack of insight, recognition or remorse for any of his wrongdoing." Respondent has still failed to reimburse the CSF for its payment to James on account of respondent's dishonest acts. We also share the judge's concern over respondent's litigation of this matter. Having won a remand from us to allow him an opportunity to present the evidence

he claimed he was precluded from presenting in *Kittrell I*, respondent refused to present any evidence in *Kittrell II*. On review after remand, he insists on relitigating some claims which were, long ago, finally resolved against him. On this record, it is difficult to avoid concluding that respondent's strategy has not been in good faith but primarily for delay.

Despite our sharing so many of the concerns of the hearing judge regarding respondent's offenses and its surrounding circumstances, we have concluded that disbarment is excessive, although we can appreciate many of the considerations which led the hearing judge to recommend it. At bottom, this transaction involved a single client. It appears most comparable to *Beery* and *Peavey*. Yet the confluence of aggravating circumstances we have cited, which we deem more serious than in either *Beery* or *Peavey*, particularly respondent's protracted indifference to making amends and his abiding lack of appreciation for his wrongdoing, cause us to conclude that the appropriate degree of discipline is suspension for five years, stayed, on conditions including a three-year actual suspension and until restitution is made[13] and proof of rehabilitation, fitness to practice and present learning and ability are established (see std. 1.4 (c)(ii)).

V. Formal Recommendation.

For the foregoing reasons, we recommend that respondent, Bolden Bruce Kittrell, be suspended from the practice of law in California for five (5) years, that execution of that suspension be stayed and that respondent be placed on probation for a period of five (5) years on the following conditions:

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[13]As to our recommendation to award restitution of the civil judgment won by respondent's client, as a condition of probation, see, e.g., *In the Matter of Peavey*, *supra*, 4 Cal. State Bar Ct. Rptr. at page 495.

1. That respondent be actually suspended from the practice of law for the first three (3) years of probation and until he has: a) made restitution to the State Bar's Client Security Fund in the sum of $31,000, plus interest thereon at the rate of 10 percent simple interest per annum from the date of the payment by the Fund until repayment by respondent and statutory processing costs, representing the Fund's reimbursement of Czarine Hope James on account of the losses caused dishonestly by respondent; b) made restitution to Czarine Hope James in the sum of $221,516.41, plus interest thereon at the rate of 10 percent simple interest per annum from November 21, 1994, until paid in full and provides satisfactory proof of payment of such restitution to the State Bar's Office of Probation in Los Angeles and c) shown proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all the conditions of this probation.

3. Subject to the proper assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer all inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent is complying or has complied with the conditions of this probation.

4. Respondent must report, in writing, to the State Bar's Office of Probation in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation ("reporting dates"). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of respondent's probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit or under penalty of perjury under the laws of the State of California as follows:

   (a) in the first report, whether respondent has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation since the beginning of this probation; and

   (b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation during the period.

   During the last 20 days of this probation, respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

5. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current office address and telephone number or, *if no office is maintained*, an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. (See Bus. & Prof. Code, 6002.1, subd. (a)(5).) Respondent's home address and telephone number shall *not* be made available to the general public. (Bus. & Prof. Code, 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of this information no later than 10 days after the change.

6. Within the period of his actual suspension, respondent must: (1) attend and satisfactorily complete the State Bar's Ethics School; and (2) provide satisfactory proof of completion of the school to the State Bar's Office of Probation in Los Angeles. This condition of probation is separate and apart from respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Accord, Rules Proc. of State Bar, rule 3201.)

7. Respondent's probation shall commence on the effective date of the Supreme Court order in this matter. And, at the end of the probationary term, if he has complied with the terms and conditions of probation, the Supreme Court order suspending him from the practice of law for five years shall be satisfied, and the suspension shall terminate.

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within the period of his actual suspension and to provide satisfactory proof of his passage of that examination to the State Bar's Office of Probation in Los Angeles within that same time period.

In addition, we recommend that respondent be ordered to comply with rule 955 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

Finally, we recommend that costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs be payable in accordance with Business and Professions Code section 6140.7.

STOVITZ, P. J.

We concur:
WATAI, J.
McELROY, J.*

*Hon. Patrice McElroy, Hearing Department Judge, sitting by designation, pursuant to the provisions of rule 305(e), Rules of Procedure of the State Bar.

Case No. 95-O-14321

In the Matter of Bolden B. Kittrell

Hearing Judge

Robert M. Talcott

Counsel for the Parties

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CERTIFICATE OF SERVICE

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court. 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 November 18, 2003, I deposited a true copy of the following document(s):

OPINION ON REVIEW, FILED NOVEMBER 18, 2003.

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

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

Bolden B. Kittrell
25200 Crenshaw Blvd., #201
Torrance, CA 90505

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

Charles Weinstein, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **November 18, 2003**.

Shemainee Carranza

Shemainee Carranza
Case Administrator
State Bar Court