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STATE BAR COURT  
CLERKS OFFICE  
LOS ANGELES

THE STATE BAR COURT

HEARING DEPARTMENT - LOS ANGELES

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In the Matter of	)	Case No. 00-O-11827-RMT
<b>JON STEVEN KOTTKE,</b>	)	<b>DECISION</b>
<b>Member No. 100968,</b>	)	
<u>A Member of the State Bar.</u>	)	

The above-entitled default matter was submitted for decision as of August 30, 2004, after the State Bar of California, Office of the Chief Trial Counsel ("State Bar") waived the hearing in this matter and submitted a brief regarding discipline. The State Bar was represented by Manuel Jimenez, Deputy Trial Counsel. Respondent Jon Steven Kottke did not fully participate in this matter, and his default was entered as a result of his failure to respond to the charges filed against him.

In light of Respondent's culpability in this proceeding, and after considering the aggravating circumstances surrounding Respondent's misconduct, and the one mitigating circumstance, the Court recommends that Respondent be suspended from the practice of law for two years, that execution of suspension be stayed, and that Respondent be actually suspended for a period of 30 days and until he files a motion with the State Bar Court seeking termination of his actual suspension pursuant to rule 205 of the Rules of Procedure of the State Bar.

**II. PERTINENT PROCEDURAL HISTORY**

This proceeding was initiated by the State Bar's filing of a Notice of Disciplinary Charges ("NDC") against Respondent on October 2, 2003, charging Respondent with three counts of misconduct in connection with a single client matter.

A copy of the NDC was properly served upon Respondent on October 2, 2003, by certified

1 mail, return receipt requested, addressed to Respondent at his official membership records address  
2 (“official address”) maintained by Respondent pursuant to Business and Professions Code section  
3 6002.1, subdivision (a).

4 On December 10, 2003, Respondent appeared for an in-person status conference, at which  
5 time he acknowledged having received the Notice of Disciplinary Charges.<sup>1</sup>

6 As Respondent did not file a response to the NDC as required by rule 103 of the Rules of  
7 Procedure of the State Bar of California (“Rules of Procedure”), on March 9, 2004, the State Bar  
8 filed a motion for the entry of Respondent’s default. A copy of said motion was properly served  
9 upon Respondent on March 9, 2004, by certified mail, return receipt requested, addressed to  
10 Respondent at his official address.

11 When Respondent failed to file a written response within 10 days after service of the motion  
12 for the entry of his default, on March 23, 2004, the Court filed an Order of Entry of Default (Rule  
13 200-Failure to File Timely Response) and Order of Involuntary Inactive Enrollment.<sup>2</sup> A copy of said  
14 order was properly served upon Respondent on Mach 23, 2004, by certified mail, return receipt  
15 requested, addressed to Respondent at his official address.

16 On August 26, 2004, the State Bar filed a brief on the issue of discipline, and therein waived  
17 the hearing in this matter. The matter was submitted for decision on August 30, 2004.

## 18 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### 19 **Jurisdiction**

20 Respondent was admitted to the practice of law in the State of California on December 1,  
21 1981, was a member at all times pertinent to these charges, and is currently a member of the State  
22 Bar of California.<sup>3</sup>

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24 <sup>1</sup>See the Declaration of Charles A. Murray, Deputy Trial Counsel, in support of the State  
25 Bar’s motion for entry of default, filed March 3, 2004.

26 <sup>2</sup>Respondent’s involuntary inactive enrollment pursuant to Business and Professions Code  
27 section 6007(e) was effective three days after the service of this order by mail.

28 <sup>3</sup>Effective September 16, 2004, Respondent was suspended from membership in the State  
Bar as a result of his failure to pay membership dues, and that suspension remains in effect.

1 **The Chen Matter (Counts 1-3)**

2 On February 28, 1998, Charles Chen, M.D. employed Respondent to represent him in a civil  
3 action for securities fraud. On March 6, 1998, Respondent filed a lawsuit in the U.S. District Court  
4 in Santa Ana, California. However, the complaint was defective in that it omitted the key defendant,  
5 an individual named Herb Sands, who was the person who sold stock to Dr. Chen for \$400,000. The  
6 defendants filed a motion to transfer venue to the U.S. District Court in Miami, Florida, on the  
7 grounds that all parties and witnesses, except Dr. Chen, resided in south Florida. The motion was  
8 granted on June 11, 1998.

9 The U.S. District Court in Miami, Florida took jurisdiction of the lawsuit on July 7, 1998,  
10 and assigned it case no. 98-CV-1601.

11 On September 9, 1998, Respondent hired local counsel to represent Dr. Chen in the Miami  
12 court. However, Respondent also filed a request to appear *pro hac vice* in the Florida court. On  
13 September 29, 1998, the federal judge granted Respondent's request.

14 Thereafter, there were several pleading disputes, based mainly on Respondent's failure to  
15 plead the material facts with particularity. Respondent did not inform Dr. Chen of the disputes and  
16 the issues causing the delays and extra fees in the case. As a result, Respondent filed a First  
17 Amended Complaint on December 3, 1998, and a Second Amended Complaint on March 4, 1999.  
18 A Third Amended Complaint was also filed, which the defendants filed a motion to dismiss on April  
19 5, 1999. Respondent took no action to oppose the motion to dismiss. In fact, Respondent did not  
20 advise Dr. Chen that the motion to dismiss had been filed.

21 As a result of Respondent's failure to oppose the motion to dismiss, on May 11, 1999, the  
22 entire action was dismissed without leave to amend. Respondent did not notify Dr. Chen of the  
23 dismissal of the case. Dr. Chen learned of the dismissal of the case from one of the defendants on  
24 or before July 6, 1999.

25 On March 20, 2000, the State Bar opened an investigation pursuant to a complaint filed  
26 against Respondent by Dr. Chen.

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28 (Evid. Code § 452.)

1 On April 10, 2000, a State Bar complaint analyst sent Respondent a letter regarding the  
2 Chen matter. On July 5, 2000, a State Bar investigator send a second letter to Respondent regarding  
3 the complaint from Dr. Chen. Both letters were sent to Respondent at his official membership  
4 address. The letters were mailed by first-class mail, postage prepaid, by depositing them for  
5 collection by the United States Postal Service in the ordinary course of business on or about the date  
6 of the letter, and neither letter was returned by the postal service.

7 Respondent received the letters of the complaint analyst and the investigator, which requested  
8 that Respondent respond in writing to specific allegations of misconduct made by Dr. Chen.  
9 However, Respondent did not respond to the letters or otherwise communicate with the State Bar  
10 regarding the Chen matter.

11 **Count 1: Rules of Professional Conduct, rule 3-110(A) (Failure to Perform)**

12 The State Bar proved by clear and convincing evidence that Respondent wilfully violated rule  
13 3-110(A). Rule 3-110(A) provides that “[a] member shall not intentionally, recklessly, or repeatedly  
14 fail to perform legal services with competence.” By failing to name the primary defendant in the  
15 lawsuit, failing to either properly state a claim or notify Dr. Chen of factual problems with the case,  
16 failing to oppose the final motion to dismiss the action, and failing to obtain Dr. Chen’s permission  
17 to allow the case to be dismissed, Respondent recklessly, repeatedly or intentionally failed to  
18 perform legal service with competence in wilful violation of rule 3-1110(A).

19 **Count 2: Section 6068(m) (Failure to Respond to Client Inquiries)**

20 The State Bar proved by clear and convincing evidence that Respondent wilfully violated  
21 section 6068(m), which requires an attorney to respond promptly to reasonable status inquiries of  
22 clients and to keep clients reasonably informed of significant developments in their cases.  
23 Respondent wilfully violated this section by failing to keep Dr. Chen reasonably informed of  
24 significant developments in his case, in that Respondent failed to inform the client of the pleading  
25 problems, failed to notify Dr. Chen that he would not oppose the fourth motion to dismiss, and  
26 finally, failed to notify Dr. Chen of the dismissal of the entire action.

27 **Count 3: Business and Profession Code, Section 6068(i) (Failure to Cooperate)**

28 The State Bar proved by clear and convincing evidence that Respondent wilfully violated

1 section 6068(i), which requires an attorney to cooperate with and participate in a State Bar disciplinary  
2 investigation or proceeding. Respondent wilfully violated this section by failing to respond to the  
3 April 10, 2000, and July 5, 2000, letters of the State Bar requesting a written response to the  
4 allegations of misconduct being investigated in connection with the Chen matter.

5 **IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES**

6 **Mitigation**

7 Respondent bears the burden of presenting and proving mitigating circumstances by clear and  
8 convincing evidence. (Rule of Proc. of State Bar, Title IV, Standards of Attorney Sanctions for  
9 Professional Misconduct, Standard 1.2(e).)<sup>4</sup> As Respondent's default was entered in this matter,  
10 Respondent failed to introduce any mitigating evidence. The Court takes judicial notice of the  
11 membership records of the State Bar which show that Respondent has no prior record of discipline.  
12 (Evidence Code §452.) Respondent was admitted to the practice of law in December 1981.  
13 Therefore, Respondent has practiced law in this state for approximately twenty-three years without the  
14 imposition of discipline. The Court accords mitigating weight to Respondent's lack of a prior record  
15 of discipline.

16 **Aggravation**

17 Respondent's misconduct evidences multiple acts of wrongdoing. (Standard 1.2(b)(ii).)  
18 Respondent failed to perform the legal services for which he was hired; failed to inform the client of  
19 significant developments in his legal matter; and failed to cooperate in the investigation of the State  
20 Bar.

21 Respondent caused significant harm to his client, which is an aggravating circumstance  
22 pursuant to standard 1.2(b)(iv). Specifically, the client's matter was greatly delayed because of  
23 Respondent's pleading errors. Not only did Respondent fail to inform the client about the problems,  
24 but ultimately, Respondent unilaterally made a decision not to oppose the fourth motion to dismiss the  
25 matter, and allowed the matter to be dismissed without the client's knowledge. The client lost his  
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28 <sup>4</sup>All further references to standards are to the Standards for Attorney Sanctions for  
Professional Misconduct, Title IV, Rules of Procedure.)

1 cause of action as result of Respondent's dereliction of his duties.

2 Respondent's failure to participate in this proceeding prior to the entry of his default  
3 demonstrates a lack of cooperation, and is an aggravating circumstance pursuant to standard  
4 1.2(b)(vi).

## 5 V. DISCUSSION

6 In determining the appropriate discipline to recommend in this matter, the Court looks at the  
7 purposes of disciplinary proceedings and sanctions. Standard 1.3 sets forth the purposes of  
8 disciplinary proceedings and sanctions as "the protection of the public, the courts and the legal  
9 profession; the maintenance of high professional standards by attorneys and the preservation of public  
10 confidence in the legal profession.

11 In addition, standard 1.6(b) provides that the specific discipline for the particular violation  
12 found must be balanced with any mitigating or aggravating circumstances with due regard for the  
13 purposes of imposing disciplinary sanctions.

14 In connection with a single client matter, Respondent has been found culpable of misconduct.  
15 The applicable standards provide for the imposition of a range of sanctions ranging from reproof to  
16 disbarment. (See standards 2.4(b) and 2.6.) In addition, standard 1.6(a) states, in pertinent part, "If  
17 two or more acts of professional misconduct are found or acknowledged in a single disciplinary  
18 proceeding, and different sanctions are prescribed by these standards for said acts, the sanction  
19 imposed shall be the more or most severe of the different applicable sanctions." In this instance,  
20 standard 2.6 is the more severe sanction and it provides for suspension or disbarment, depending on  
21 the gravity of the offense.

22 The standards, however, are only guidelines and do not mandate the discipline to be imposed  
23 (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach case  
24 must be resolved on its own particular facts and not by application of rigid standards." (Id. at p. 251.)

25 In matters involving abandonment of a single client by an attorney with no prior record,  
26 discipline imposed by the Supreme Court has ranged from no actual suspension to 90 days actual  
27 suspension. (See *In the Matter of Aguiluz* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 32; *Harris*  
28 *v. State Bar* (1990) 51 Cal.3d 1082; *Layton v. State Bar* (1990) 50 Cal.3d 889; *Van Sloten v. State Bar*

1 (1989) 48 Cal.3d 921; *Wren v. State Bar* (1983) 34 Cal.3d 81.)

2 In this case, the State Bar recommends, inter alia, that Respondent be actually suspended from  
3 the practice of law for 90 days, citing several cases wherein the actual suspension period ranged from  
4 30 days to one year.<sup>5</sup> However, the Court finds the misconduct in the cases cited was either more  
5 egregious or less mitigated than the misconduct found in this matter.

6 In this default proceeding, Respondent has been found culpable misconduct in connection with  
7 a single client matter, specifically, failure to perform the legal services for which he was hired, failure  
8 to inform the client of significant developments in this case, and failure to cooperate with the State  
9 Bar's investigation. In aggravation, the Court found he engaged in multiple acts of wrongdoing,  
10 caused significant harm to his client, and failed to participate in this matter prior to the entry of his  
11 default. In mitigation, he has a blemish-free record of approximately twenty-three years, which is  
12 clearly strong mitigation. (*In the Matter of Lane* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 735,  
13 749 [ where the attorney had practiced law for more than 25 years before committing misconduct, such  
14 practice was entitled to considerable weight in mitigation].)

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16 <sup>5</sup>*Conroy v. State Bar* (1991) 53 Cal.3d 495 [a one-year suspension as a result of the  
17 attorney's failure to handle two matters for a client, his misrepresentation of the status of the  
18 cases and his failure to keep the client informed for over a three year period]; *Hansen v. State*  
19 *Bar* (1978) 23 Cal.3d 68 [the attorney's failure to complete two matters for a client, coupled with  
20 his misrepresentation to the client regarding the status of the cases, resulted in a six-month  
21 suspension]; *In the Matter of Layton* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 366 [the  
22 attorney received a six-month suspension as a result of his failure to perform in a single probate  
23 matter for over five years, and where he asserted as a defense that he was busy with other  
24 matters; it should be noted that the attorney had practiced law over 30 years with one prior];  
25 *Lester v. State Bar* (1976) 17 Cal.3d 547 [a six-month suspension was imposed as a result of the  
26 attorney's failure to perform legal services in four client matters, failure to communicate, and  
27 failure to return unearned fees until forced to do so]; *In the Matter of Kennon* (Review Dept.  
28 1990) 1 Cal. State Bar Ct. Rptr. 267 [thirty-day suspension as a result of misconduct found in  
connection with two client matters; attorney had no prior discipline]; *Stuart v. State Bar* (1985)  
40 Cal.3d 838 [the court suspended the attorney for thirty days as a result of his failure to  
perform in a single client matter; the attorney had practiced for 12 years, with a prior private  
reproval]; and *Wren v. State Bar* (1983) 34 Cal.3d 81 [attorney suspended for 45 days in  
connection with misconduct in a single client matter wherein he failed to perform for a period of  
22 months, failed to communicate, failed to return the file or unearned fees, and misrepresented  
the status of the case to the client and to the State Bar; the attorney had practiced twenty-two  
years with no discipline imposed].



1 (90) days, Respondent be ordered to comply with the requirements of rule 955 of the California  
2 Rules of Court within 120 calendar days of the effective date of the Supreme Court order in this  
3 matter, and file the affidavit provided for in paragraph (c) within 130 days of the effective date of  
4 the order showing his compliance with said order. Failure to comply with rule 955 could result in  
5 disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent is required to file a  
6 rule 955(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d  
7 337, 341.)

8 It is further recommended that Respondent be ordered to take and pass the Multistate  
9 Professional Responsibility Examination given by the National Conference of Bar Examiners  
10 within one year from the effective date of the Supreme Court's order or during the period of his  
11 actual suspension, whichever is longer, and furnish satisfactory proof of such to the State Bar  
12 Office of Probation within said period.

13 **COSTS**

14 The Court recommends that costs be awarded to the State Bar pursuant to Business and  
15 Professions Code section 6086.10, and that those costs be payable in accordance with section  
16 6140.7.

17  
18 Dated: <sup>December</sup> ~~November~~ <sup>1<sup>st</sup></sup>, 2004

19   
ROBERT M. TALCOTT  
Judge of the State Bar Court

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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 December 2, 2004, I deposited a true copy of the following document(s):

**DECISION, filed December 2, 2004**

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

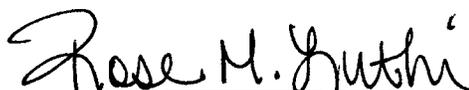
by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

**JON STEVEN KOTTKE, ESQ.**  
**245 FISCHER AVE #A1**  
**COSTA MESA CA 92626**

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

**MANUEL JIMENEZ, ESQ., Enforcement, Los Angeles**

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **December 2, 2004.**



\_\_\_\_\_  
**Rose M. Luthi**  
Case Administrator  
State Bar Court