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STATE BAR COURT
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PUBLIC MATTER

THE STATE BAR COURT

HEARING DEPARTMENT - LOS ANGELES

8 In the Matter of 9 DOUGLAS BRIAN KANE, 10 Member No. 92752, 11 <u>A Member of the State Bar.</u>)))))	Case No. 03-C-00227-RAH DECISION
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1. Introduction

This default proceeding is based upon the conviction of Respondent **DOUGLAS BRIAN KANE** of a misdemeanor violation of Health and Safety Code section 11550, subdivision (a) (under influence of a controlled substance, to wit, methamphetamine). Respondent did not participate in this proceeding either in person or through counsel.

After considering the facts and circumstances surrounding Respondent's conviction, the aggravating evidence, and relevant case law, the court recommends that Respondent be suspended from the practice of law for two years, that execution of said suspension be stayed, and that Respondent be actually suspended for one year and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice, and learning and ability in the general law pursuant to Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, standard 1.4(c)(ii), and until the State Bar Court grants a motion to terminate Respondent's actual suspension under rule 205 of the Rules of Procedure of the State Bar.

2. Pertinent Procedural History

On April 15, 2003, the Review Department of the State Bar Court issued an order (augmented on June 12, 2003), referring this matter to the Hearing Department for a hearing and

1 decision recommending the discipline to be imposed if the Hearing Department finds that the facts
2 and circumstances surrounding Respondent's criminal violation involved moral turpitude or other
3 misconduct warranting discipline.

4 The State Bar Court issued a Notice of Hearing on Conviction on April 25, 2003, and a copy
5 of said notice and a Notice of Assignment and Notice of Initial Status Conference was properly
6 served upon Respondent on that date by certified mail, return receipt requested, addressed to
7 Respondent at his official membership record address maintained by Respondent pursuant to
8 Business and Professions Code section 6002.1, subdivision (a).¹ A copy of the Review Department's
9 referral order was attached to the Notice of Hearing on Conviction. The mailing was not returned
10 as undeliverable. Respondent did not file a response to the Notice of Hearing on Conviction.

11 Although he was served with proper notice, Respondent failed to appear either in person or
12 through counsel for the June 3, 2003 status conference.

13 On motion of the State Bar, Respondent's default was entered on July 11, 2003. The order
14 of entry of default was sent to Respondent's official address by certified mail, return receipt
15 requested.

16 Respondent was enrolled as an inactive member under section 6007(e) on July 14, 2003. The
17 court took this matter under submission on August 15, 2003, following the filing of the State Bar's
18 brief.²

19 3. Findings of Fact and Conclusions of Law

20 Respondent is conclusively presumed, by the record of his conviction in this proceeding, to
21 have committed all of the elements of the crime of which he was convicted. (Bus. & Prof. Code, §
22 6101(a); *In re Crooks* (1990) 51 Cal.3d 1090, 1097; *In re Duggan* (1976) 17 Cal.3d 416, 423; *In the*
23 *Matter of Respondent O* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 581, 588.)

24 A. Jurisdiction

25 _____
26 ¹All references to section are to the provisions of the Business and Professions Code,
unless otherwise indicated.

27 ²Exhibits 1-7 attached to the State Bar's brief on the issues of culpability and discipline
28 are admitted into evidence.

1 Respondent was admitted to the practice of law in the State of California on May 30, 1980,
2 and has been a member at all times since that date. However, Respondent has not been entitled to
3 practice law since September 1, 2001.

4 **B. The Conviction**

5 On November 18, 2002, Respondent was arrested by the Santa Maria Police Department for
6 violation of probation, using and being under the influence of a controlled substance, possession of
7 drug paraphernalia and possession of less than one ounce of marijuana.

8 On December 4, 2002, a misdemeanor criminal complaint was filed against Respondent in
9 Santa Barbara County Superior Court, case No. 1085249, charging three counts of violating Health
10 and Safety Code sections.

11 On December 18, 2002, with the assistance of counsel, Respondent pled no contest to
12 violating Health and Safety Code section 11550, subdivision (a) (under influence of a controlled
13 substance, to wit, methamphetamine). The remaining counts were dismissed.

14 On January 27, 2003, the court accepted Respondent's plea, and Respondent was convicted
15 on the basis of his plea. Respondent was sentenced to a three-year probation with conditions.
16 Among other things, he was to attend family life counseling, pay fees and fines and not use or
17 possess any controlled drugs or narcotics unless prescribed by a licensed physician. Respondent did
18 not appeal his criminal conviction.

19 **C. Prior Criminal Conviction**

20 On March 22, 2000, Respondent was convicted of violating Health and Safety Code section
21 11377 (unauthorized possession of a controlled substance, specifically methamphetamine), a felony.
22 The conviction was the basis for his underlying record of discipline in 2001, as discussed below as
23 aggravating evidence.

24 **D. Conclusions of Law**

25 The State Bar did not contend that the facts and circumstances surrounding Respondent's
26 criminal violation involved moral turpitude.

27 The California Supreme Court has found that an attorney's conviction for being under the
28

1 influence of PCP does not per se establish moral turpitude. (See *In the Matter of Carr* (Review
2 Dept. 1992) 2 Cal. State Bar Ct. Rptr. 108, 117.)

3 Similarly, Respondent's conviction for being under the influence of methamphetamine does
4 not *per se* establish moral turpitude. Moreover, the facts and circumstances surrounding
5 Respondent's 2003 conviction of violating Health and Safety Code section 11550, subdivision (a)
6 do not involve moral turpitude.

7 However, given that Respondent has one prior possession of controlled substance conviction
8 in 2000 and that Respondent appears to have a continuing or reoccurring drug abuse problem as
9 evidenced by his second conviction in 2003, the court finds that the facts and circumstances
10 surrounding Respondent's criminal violation, while not involving moral turpitude, do constitute
11 other misconduct warranting discipline. "Clearly, [R]espondent's substance abuse is adversely
12 affecting his private life and we cannot and should not wait until the substance abuse problems affect
13 his practice of law." (*In the Matter of Carr, supra*, 2 Cal. State Bar Ct. Rptr. 108, 117, citing *In re*
14 *Kelley* (1990) 52 Cal.3d 487, 495.)

15 **4. Mitigating and Aggravating Circumstances**

16 **A. Mitigation**

17 No mitigating factor was submitted into evidence. (Rules Proc. of State Bar, tit. IV, Stds.
18 for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)³

19 **B. Aggravation**

20 There are several aggravating factors. (Std. 1.2(b).)

21 Respondent has one prior record of discipline. (Std. 1.2(b)(i).) In California Supreme Court
22 case No. S093653 (State Bar Court case No. 00-C-10075), filed February 26, 2001, Respondent
23 stipulated to a stayed suspension of two years and a three-year probation with an actual suspension
24 of six months for his drug conviction. Respondent's current criminal matter occurred when he was
25 still under disciplinary probation.

26 Respondent's failure to participate in this disciplinary proceeding prior to the entry of his

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28 ³All further references to standards are to this source.

1 default is considered an aggravating circumstance. (Std. 1.2(b)(vi).)

2 The State Bar argues that Respondent's criminal conviction involved multiple acts of
3 wrongdoing, was surrounded by bad faith, significantly harmed the public and demonstrated
4 indifference toward rectification of the consequences of his misconduct. (Stds. 1.2(b)(ii), (iii), (iv),
5 and (v).) There is no clear and convincing evidence to support these factors as aggravation.

6 5. Discussion

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

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

15 In this criminal conviction case involving other misconduct warranting discipline, the
16 standards provide for the imposition of sanctions ranging from reproof to disbarment depending on
17 the nature and extent of the attorney's misconduct. (Std. 3.4.) "[D]iscipline is imposed according
18 to the gravity of the crime and the circumstances of the case." (*In the Matter of Katz* (Review Dept.
19 1991) 1 Cal. State Bar Ct. Rptr. 502, 510.)

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

24 Standard 1.7(a) provides that where an attorney has a record of prior discipline, the degree
25 of discipline imposed in the current proceeding shall be greater than that imposed in the prior
26 proceeding unless the prior discipline imposed was so remote in time and the offense was so minimal
27 in severity that imposing greater discipline in the current proceeding would be manifestly unjust.

28

1 The State Bar recommends, among other things, that Respondent be actually suspended for
2 one year to adequately protect the public, citing several cases, including *In the Matter of Carr, supra*,
3 2 Cal. State Bar Ct. Rptr. 108, *Slavkin v. State Bar* (1989) 49 Cal.3d 894 and *In the Matter of Mesce*
4 (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 658.

5 Respondent's prior discipline of a six-month actual suspension was imposed in February
6 2001, less than two years before he was again arrested for similar substance abuse violation in
7 November 2002. Therefore, the prior discipline imposed was not remote in time and the criminal
8 offense here was not minimal in severity.

9 The court is deeply concerned about the strong implications of a reoccurring drug abuse
10 problem, which are evident in this matter, and Respondent's failure to participate in this disciplinary
11 proceeding. Respondent's failure to participate in this proceeding leaves the court without any
12 understanding as to the underlying cause or causes for Respondent's misconduct or from learning
13 of any other mitigating circumstances which would justify this court's departure from the discipline
14 recommended by the standards.

15 In view of Respondent's criminal conviction, his prior discipline of six months' actual
16 suspension and other aggravating factors, the degree of discipline imposed in the current proceeding
17 should be greater than that imposed in the prior proceeding.

18 Therefore, the court finds that the appropriate discipline recommendation in this matter
19 should include a long period of actual suspension which will continue until the court grants a motion
20 to terminate Respondent's actual suspension. Since Respondent has not been entitled to practice law
21 since September 2001, he must also show proof satisfactory to the State Bar Court of his
22 rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard
23 1.4(c)(ii).

24 **6. Recommended Discipline**

25 Accordingly, the court hereby recommends that Respondent be suspended from the practice
26 of law for two years, that execution of said suspension be stayed, and that Respondent be actually
27 suspended from the practice of law for one year and until he has shown proof satisfactory to the State
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1 Bar Court of his rehabilitation, fitness to practice and learning and ability in the general law pursuant
2 to Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional
3 Misconduct, standard 1.4(c)(ii), and until the State Bar Court grants a motion to terminate
4 Respondent's actual suspension at its conclusion or upon such later date ordered by the court. (Rules
5 Proc. of State Bar, rule 205(a)-(c).)

6 It is also recommended that the Supreme Court order Respondent to comply with rule 955,
7 paragraphs (a) and (c), of the California Rules of Court, within 30 and 40 days, respectively, of the
8 effective date of its order imposing discipline in this matter.⁴

9 It is also recommended that Respondent be ordered to comply with any probation conditions
10 reasonably related to this matter that may hereinafter be imposed by the State Bar Court as a
11 condition for terminating Respondent's actual suspension. (Rules Proc. of State Bar, rule 205(g).)

12 It is not recommended that Respondent be ordered to take and pass the Multistate
13 Professional Responsibility Examination since he has already been ordered to do so in Supreme
14 Court case No. S093653.

15 **7. Costs**

16 It is also recommended that costs be awarded to the State Bar pursuant to Business and
17 Professions Code section 6086.10, and that those costs be payable in accordance with section 6140.7.

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22 Dated: November 7, 2003



RICHARD A. HONN
Judge of the State Bar Court

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26 _____
27 ⁴Failure to comply with California Rules of Court, rule 955, could result in disbarment.
28 (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent is required to file a rule 955(c)
affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

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 13, 2003, I deposited a true copy of the following document(s):

DECISION, filed November 13, 2003

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:

DOUGLAS BRIAN KANE ESQ
1417 SHETLAND CT
SANTA MARIA, CA 93455

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

Susan Jackson, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **November 13, 2003**.


Milagro del R. Salmeron
Case Administrator
State Bar Court