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STATE BAR COURT
CLERKS OFFICE
LOS ANGELES

PUBLIC MATTER

**THE STATE BAR COURT
HEARING DEPARTMENT - LOS ANGELES**

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In the Matter of DAVID R. KLUGE, Member No. 38800, <u>A Member of the State Bar.</u>)))))	Case No. 03-N-03283-AIN DECISION AND ORDER OF INVOLUNTARY INACTIVE ENROLLMENT
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INTRODUCTION

The sole issue in this case is whether Respondent David R. Kluge wilfully failed to obey an order of the California Supreme Court requiring him to comply with rule 955 of the California Rules of Court and, if so, the appropriate discipline to be imposed.

For the reasons stated below, this Court finds, by clear and convincing evidence, that Respondent wilfully failed to comply with the requirements of rule 955 as ordered by the Supreme Court. As a result, this Court recommends that Respondent be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys.

PROCEDURAL HISTORY

This proceeding was initiated by the filing of a Notice of Disciplinary Charges ("NDC") by the Office of the Chief Trial Counsel of the State Bar of California ("State Bar") on September 15, 2003. The NDC was properly served upon Respondent on the same date, by certified mail, return receipt requested, addressed to Respondent's official membership address ("official address") pursuant to Business and Professions Code section 6002.1, subdivision (c)

1 and rule 60 of the Rules of Procedure of the State Bar (“Rules of Procedure”).¹

2 On September 22, 2003, the State Bar received the receipt for the NDC, indicating that
3 the mailing was received by “Ruth Kluge” on September 18, 2003. (Declaration of Charles T.
4 Calix, Deputy Trial Counsel, submitted in support of the motion for entry of default in this
5 matter.)

6 Respondent did not file an answer to the NDC as required by the rules governing these
7 proceedings. Thereafter, on October 15, 2003, the State Bar filed a Notice of Motion and Motion
8 for Entry of Default. The Notice of Motion and Motion were served upon Respondent on
9 October 15, 2003, by certified mail, return receipt requested, at his official membership address.

10 The Court entered Respondent’s default on November 6, 2003, after Respondent failed to
11 file an answer to the NDC within ten days after service of the Motion for Entry of Default. (See
12 Rules Proc. of State Bar, rule 200(c).) Notice of Entry of Default was properly served upon
13 Respondent on the same date by certified mail addressed to him at his official address.

14 The State Bar was represented throughout these proceedings by Deputy Trial Counsel
15 Charles T. Calix. Respondent did not participate at any stage of these proceedings, either
16 personally or through counsel.

17 On December 2, 2003, the State Bar filed its Brief Regarding Culpability and Discipline
18 and Waiver of Hearing, wherein the State Bar waived its right to request a default hearing
19 pursuant to rule 202(c) of the Rules of Procedure and requested that the matter be submitted on
20 the record. The State Bar included a copy of Respondent’s prior record of discipline with its
21 Brief and recommended that Respondent be disbarred from the practice of law in California.

22 This matter was taken under submission for decision on December 2, 2003.

23 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

24 Respondent was admitted to the practice of law in California on June 28, 1966, and has
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28 ¹At all times since February 4, 1986, Respondent’s official address has been 23550 S.W.
Loganberry Ln. Sheridan, OR 97378 (Evid. Code §452.)

1 been a member of the State Bar at all times since.²

2 On June 5, 2003, the Supreme Court of California entered a final disciplinary order in *In*
3 *re David R. Kluge on Discipline*, Supreme Court Case No. S113838 (State Bar Court Case No.
4 02-J-11316). In its order, the Supreme Court suspended Respondent from the practice of law for
5 three years, stayed execution of the suspension, and actually suspended Respondent for two years
6 and until he completed the Multistate Professional Responsibility Examination, and until the
7 State Bar Court grants a motion terminating his actual suspension, and until he complies with
8 standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

9 As relevant to this proceeding, the Supreme Court also ordered Respondent to comply
10 with subdivisions (a) and (c) of rule 955 of the California Rules of Court within 30 and 40 days,
11 respectively, after the effective date of the Supreme Court's order. The order of the Supreme
12 Court became effective on July 5, 2003.

13 Upon filing of the June 5, 2003 order, in accordance with rule 24(a) of the California
14 Rules of Court, the Office of the Clerk of the Supreme Court of California served Respondent
15 with a copy of the Supreme Court's order imposing discipline and directing Respondent's
16 compliance with rule 955. (See Evid. Code, § 664.)

17 Respondent did not file an affidavit with the State Bar Court evidencing his compliance
18 with the requirements of rule 955, as ordered by the Supreme Court, either by the date ordered by
19 the Court (i.e., August 14, 2003) or at any time thereafter.

20 On June 30, 2003, the Office of Probation of the State Bar sent a letter to Respondent by
21 first-class mail, postage prepaid, to his official address. The Probation Deputy enclosed in the
22 subject letter, among other things, a copy of the Supreme Court's final disciplinary order in Case
23 No. S113838, directing compliance with rule 955, as well as a form approved by the State Bar
24 Court Executive Committee for reporting compliance with the subject rule. The U.S. Postal
25 Service did not return the letter to the State Bar as undeliverable for any reason.

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28 ²Effective January 1, 1979, Respondent was placed on voluntary inactive enrollment,
which remains in effect. (Evid. Code § 452(h).)

1 The fact that Respondent may not be aware of the requirements of rule 955 or of his
2 obligation to comply with those requirements is immaterial. "Wilfulness" in the context of rule
3 955 does not require actual knowledge of the provision which is violated. The Supreme Court
4 has disbarred attorneys whose failure to keep their official addresses current prevented them from
5 learning that they had been ordered to comply with rule 955. (See *Powers v. State Bar* (1988)
6 44 Cal.3d 337, 341.)

7 Accordingly, this Court concludes that the State Bar has established by clear and
8 convincing evidence that Respondent wilfully failed to comply with rule 955 by failing to file an
9 affidavit attesting to his compliance with subdivision (a) of that rule, as ordered by the Supreme
10 Court in its June 5, 2003 order. Respondent's failure to comply with rule 955, as ordered by the
11 Supreme Court, also constitutes a wilful violation of Business and Professions Code section 6103
12 which provides that the wilful disobedience or violation of an order of a court constitutes cause
13 for disbarment or suspension.

14 LEVEL OF DISCIPLINE

15 Factors in Mitigation

16 There are no mitigating factors presented by the record in this proceeding.

17 Factors in Aggravation

18 Respondent has been disciplined on one previous occasion, which is an aggravating
19 factor pursuant to Standard 1.2(b)(i) of the Standards for Attorney Sanctions for Professional
20 Misconduct.³

21 In the underlying disciplinary matter, which was also a default proceeding, Respondent's
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23 ³The Court judicially notices its files which show that on May 29, 2003, the State Bar
24 filed an additional Notice of Disciplinary Charges against respondent based on discipline
25 imposed in the state of Oregon (State Bar Court Case No. 03-J-01574). Respondent's default has
26 been entered in that matter based on his failure to file an answer. Since the matter is under
27 submission, and there is neither a finding of culpability nor recommendation of discipline, the
28 matter is not a prior, and will not be used as aggravation. The Court notes and is concerned that
respondent failed to respond to the charges, and allowed the matter to go by default, as he did in
both his prior disciplinary case and the instant matter. It is quite apparent that respondent is non
responsive to the disciplinary authorities that oversee the practice of law in this state..

1 culpability was based upon discipline imposed in Oregon. Respondent's misconduct included (a)
2 commission of an act of dishonesty by representing that he was a notary public when he knew
3 that he was not [Bus. & Prof. Code § 6106]; (b) practicing law in a jurisdiction where to do so
4 would be in violation of the regulations of the profession in that jurisdiction, to wit, engaging in
5 the private practice of law without professional liability insurance from Oregon State Bar's
6 Professional Liability Fund ("PLF") [rule 1-300(B), Rules of Professional Conduct]; and
7 (c) commission of an act of dishonesty by his representations to the PLF in 1995, 1996, 1997
8 and 1998 that he was entitled to the exemption from paying for PLF coverage because he did not
9 engage in the private practice of law, when, in fact, he did engage in such practice [section 6106].

10 Respondent's failure to file the rule 955 compliance affidavit with the Clerk of the State
11 Bar Court significantly harmed the public and the administration of justice. (Standard 1.2(b)(iv).)

12 **Discussion**

13 Rule 955(d) provides in part that "[a] suspended member's wilful failure to comply with
14 the provisions of this rule constitutes a cause for disbarment or suspension and for revocation of
15 any pending probation."

16 Timely compliance with rule 955 is essential to ensure that all concerned parties
17 (including clients, co-counsel, opposing counsel and all courts in which the attorney has pending
18 litigation) learn about the attorney's actual suspension from the practice of law. Compliance
19 with rule 955 also keeps the State Bar Court and the Supreme Court informed of the location of
20 attorneys who are subject to their respective disciplinary authority. (*Lydon v. State Bar* (1988)
21 45 Cal.3d 118, 1187.)

22 Disbarment is generally the appropriate sanction to be imposed for a wilful violation of
23 rule 955. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116,131.)

24 Respondent has exhibited a disregard for both the Supreme Court and the State Bar Court
25 in their efforts to fulfill their respective responsibilities to oversee the practice of law in the State
26 of California. Respondent's disregard is exemplified by (1) his failure to comply with rule 955;
27 and (2) his failure to participate in either the current proceeding or the prior disciplinary
28 proceeding.

1 This Court is unaware of any facts or circumstances that would justify a departure from
2 the usual sanction of disbarment for Respondent's wilful violation of rule 955 and his resulting
3 violation of Business and Professions Code section 6103. One of this Court's obligations is to
4 ensure that its disciplinary recommendations to the Supreme Court are fair and consistent. (*In re*
5 *Young* (1989) 49 Cal.3d 257, 268.)

6 Respondent's disbarment is necessary to protect the public, the courts and the legal
7 profession, to maintain high professional standards and to preserve public confidence in the
8 profession. It would seriously undermine the integrity of the disciplinary system and damage
9 public confidence in the legal profession if Respondent were not disbarred for his wilful and
10 unexplained disobedience of the Supreme Court's June 1, 2003, order.

11 **RECOMMENDED DISCIPLINE**

12 This Court recommends that Respondent **DAVID R. KLUGE** be disbarred from the
13 practice of law in the State of California and that his name be stricken from the roll of attorneys
14 in this State.

15 It is also recommended that the Supreme Court order Respondent to comply with rule
16 955(a) of the California Rules of Court within 30 calendar days of the effective date of the
17 Supreme Court order in this matter and to file the compliance affidavit required by rule 955(c)
18 within 40 days of the effective date of the Court's order.

19 **COSTS**

20 It is further recommended that costs be awarded to the State Bar pursuant to Business and
21 Professions Code section 6086.10 and that such costs be made payable in accordance with
22 Business and Professions Code section 6140.7.

23 **ORDER OF INVOLUNTARY INACTIVE ENROLLMENT**

24 In light of this Court's recommendation that Respondent be disbarred from the practice of
25 law, pursuant to the provisions of Business and Professions Code section 6007, subdivision
26 (c)(4) and rule 220(b) of the Rules of Procedure, it is hereby ordered that Respondent **DAVID R.**
27 **KLUGE** be involuntarily enrolled as an inactive member of the State Bar. The order of
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1 involuntary enrollment shall be effective three days after the date upon which this Decision is
2 served.

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Dated: December 10, 2003

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ALBAN I. NILES
Judge of the State Bar Court

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 12, 2003, I deposited a true copy of the following document(s):

DECISION, filed December 12, 2003

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


by certified mail, No. **7160 3901 9844 8570 3957**, with return receipt requested, through the United States Postal Service at Los Angeles, California, addressed as follows:

DAVID RICHARD KLUGE
23550 S.W. LOGANBERRY LN
SHERIDAN OR 97378

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

CHARLES CALIX, ESQ., Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **December 12, 2003**.


Angela Owens-Carpenter
Case Administrator
State Bar Court