



JAN 25 2005

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

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In the Matter of)	Case No. 03-O-03634; 03-O-03710;
)	03-O-03797-PEM
ROGER A. GERDES,)	DECISION
)	
Member No. 158701,)	
)	
<u>A Member of the State Bar.</u>)	

INTRODUCTION

The above-entitled matter was submitted for decision as of October 26, 2004, after the State Bar of California, Office of the Chief Trial Counsel ("State Bar") waived hearing in this matter and submitted a brief on the issues of culpability and discipline. The State Bar was represented in this matter by Deputy Trial Counsel Fumiko K. Kimura ("DTC"). Respondent Roger A. Gerdes ("Respondent") failed to participate in this matter either in-person or through counsel and allowed his default to be entered in this matter.

In light of Respondent's culpability in this proceeding, and after considering any and all aggravating and mitigating circumstances surrounding Respondent's misconduct, the Court recommends, inter alia, that Respondent be actually suspended from the practice of law for three years, that execution of said suspension be stayed, and that Respondent be actually suspended from the practice of law for six months and until the State Bar Court grants a motion to terminate Respondent's actual suspension at its conclusion or upon such later date ordered by the court. (Rules Proc. of State Bar, rule 205(a)-(c).)

PERTINENT PROCEDURAL HISTORY

This proceeding was initiated by the State Bar's filing of a five-count Notice of Disciplinary

1 Charges (“NDC”) against Respondent on March 18, 2004. A copy of the NDC was properly served
2 upon Respondent on March 18, 2004, by certified mail, return receipt requested, addressed to
3 Respondent at his official membership records address (“official address”) maintained by
4 Respondent pursuant to Business and Professions Code section 6002.1, subdivision (a). The NDC
5 was returned by the U.S. Postal Service on April 14, 2004, bearing the stamp, “Returned to Sender -
6 Unclaimed.”

7 However, prior to filing a motion for entry of Respondent’s default for not responding to the
8 charges filed against him, the DTC made numerous attempts to locate Respondent, but her efforts
9 proved unsuccessful.¹ As Respondent did not file a response to the NDC as required by rule 103
10 of the Rules of Procedure of the State Bar of California (“Rules of Procedure”), on September 21,
11 2004, the State Bar filed a motion for the entry of Respondent’s default. The motion also contained
12 a request, pursuant to Evidence Code section 452, subdivision (h), that the court take judicial notice
13 of Respondent’s official membership address,² and also contained the declaration of Fumiko D.
14 Kimura, Deputy Trial Counsel. A copy of said motion was properly served upon Respondent on
15 that same date, by certified mail, return receipt requested, addressed to Respondent at his official
16 address.

17 When Respondent failed to file a written response within 10 days after service of the motion

18
19 ¹On February 25, 2004, a 20-day letter was mailed to Respondent at his official address.
20 On March 5, 2004, a courtesy copy of the 20-day letter was mailed to Respondent at an alternate
21 address, P.O. Box 871, Carpinteria, California (the Carpinteria address). On September 10, 2004,
22 the DTC attempted to reach Respondent by telephone at his official membership records
23 telephone number. A man answered the phone, but refused to provide his name, and would only
24 say the number belonged to his sister for a long time and that he did not know a Roger Gerdes.
25 In addition, the DTC called two other telephone numbers contained in Respondent’s file, but was
26 unable to reach Respondent at either number. On September 13, 2004, the DTC attempted to
reach Respondent at yet another telephone number, but was told it was a wrong number. On
September 13, 2004, the DTC also called directory assistance for the area which included
Respondent’s official address, and in addition searched the Parker’s Directory, but obtained no
listing from either source. (See the declaration of the DTC submitted in support of the motion for
entry of default.)

27 ²The court grants the State Bar’s request and takes judicial notice of Respondent’s
28 official membership address which has remained the same since his admission to the practice of
law on June 8, 1992.

1 for the entry of his default, on October 6, 2004, the Court filed an Order of Entry of Default (Rule
2 200 - Failure to File Timely Response), Order Enrolling Inactive and Further Orders.³ Pursuant to
3 the further order of the Court, the State Bar was to file any further declarations, exhibits or legal
4 argument regarding the level of discipline by no later than October 26, 2004. A copy of said order
5 was properly served upon Respondent on October 6, 2004, by certified mail, return receipt requested,
6 addressed to Respondent at his official address.

7 On October 26, 2004, the State Bar filed its brief on the issues of culpability and discipline.
8 A copy of said brief was properly served upon Respondent on October 26, 2004, by regular mail,
9 addressed to Respondent at his official address.

10 This matter was submitted for decision on October 26, 2004.

11 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

12 **Jurisdiction**

13 Respondent was admitted to the practice of law in the State of California on June 8, 1992,
14 and has since been a member of the State Bar of California.⁴

15 **Case No. 03-O-03634 - The Chanon Matter**

16 Between June 6, 1997 and June 9, 2003, Maurice Chanon employed Respondent to perform
17 a variety of legal services, including but not limited to, preparation of a living trust and assistance
18 with a homeowner's insurance claim.

19 On December 5, 2002, Chanon loaned Respondent \$5,000, after Respondent told Chanon
20 that he was experiencing severe financial problems. Respondent deposited the \$5,000 into his
21 personal bank account. Respondent gave Chanon an unsecured, promissory note, agreeing to repay
22 the loan with an interest rate of 10% per annum from December 5, 2002 until paid on January 5,
23

24 ³Respondent's involuntary inactive enrollment pursuant to Business and Professions Code
25 section 6007(e) was effective three days after the service of this order by mail.

26 ⁴Effective September 16, 2003, Respondent was suspended from the practice of law as a
27 result of his failure to pay annual membership fees, and effective September 16, 2004,
28 Respondent was enrolled inactive as a result of his failure to comply with mandatory continuing
education requirements. Both the suspension and the inactive enrollment remain in effect. (Evid.
Code §452.)

1 2003. Respondent did not obtain Chanon's written consent to the terms of the loan, and at no time
2 did Respondent advise Chanon in writing that he had the right to seek the advice of an independent
3 attorney prior to making the loan. Respondent did not give Chanon the opportunity to seek
4 independent advice about the loan.

5 Respondent did not pay the loan on January 5, 2003, despite the terms of the promissory note
6 that Respondent provided to Chanon required him to do so.

7 In April 2003, Respondent appeared in court on behalf of Chanon in connection with a real
8 estate matter. Chanon agreed to waive the \$500 interest due on the above described loan in exchange
9 for Respondent's services in court that day. The modification to the terms of the loan was not
10 reduced to writing.

11 As of the date of the filing of the charges in this disciplinary matter, October 26, 2004,
12 Respondent had not paid the loan.

13 ***Count 1 - Rule 3-300, Rules of Professional Conduct (Business Transaction With a Client)***

14 Respondent is charged with a violation of rule 3-300 of the Rules of Professional Conduct
15 ("rule(s)"), which provides, in pertinent part, that a member shall not enter into a business transaction
16 with a client unless the transaction and its terms are fair and reasonable to the client and are fully
17 disclosed in writing to the client; and the client is advised in writing that the client may seek
18 independent legal advice about the transaction, and is given a reasonable opportunity to do so; and
19 the client thereafter consents in writing to the terms of the transaction.

20 By failing to comply with the requirement that terms of the loan be fair and reasonable, as
21 is evident by the fact that it was an unsecured note; by failing to advise Chanon in writing that he had
22 the right to seek the advice of an independent attorney, and then giving him a reasonable opportunity
23 to do so; and by failing to obtain Chanon's consent in writing to the terms of the loan, Respondent
24 improperly entered into a business transaction with his client, in wilful violation of rule 3-300.

25 **Case No. 03-O-03710 - the Veronique Matter**

26 On April 11, 2003, Raissa Veronique employed Respondent to change the name of the
27 executor of her revocable trust. On that date, Veronique paid Respondent \$250.

28 On May 19, 2003, Respondent gave Veronique drafts of the power of attorney and her will.

1 Respondent told Veronique that he needed to do an amendment to the trust in order to complete the
2 matter. Thereafter, Respondent failed to do the amendment to the trust or otherwise complete the
3 matter.

4 On July 15, 2003, Veronique mailed a letter to Respondent, requesting an update on the status
5 of the trust matter. The letter was mailed first class, postage prepaid, addressed to Respondent at his
6 official State Bar membership address. The letter was not returned by the United States Postal
7 Service. Respondent received the letter, but failed to respond to the request for a status update.

8 ***Count 2 - Rule 3-110(A) (Failure to Competently Perform)***

9 By failing to complete the trust matter of Veronique, Respondent intentionally, recklessly or
10 repeatedly failed to perform legal services with competence, in wilful violation of rule 3-110(A).

11 ***Count 3 - Section 6068(m) Bus. & Prof. Code (Failure to Respond to Status Inquiries)***

12 By failing to respond to the July 15, 2003 letter of Veronique, Respondent violated section
13 6068(m), which requires an attorney to respond promptly to reasonable status inquiries of clients.

14 **Case No. 03-O-03797 - the Felch Matter**

15 On July 10, 2003, Connie Felch employed Respondent to make amendments to her living
16 trust and to her mother's will. On that date Felch paid Respondent \$350.

17 Thereafter, Respondent made no amendments to Felch's living trust, and no amendments to
18 her mother's will, as he was employed and agreed to do.

19 On November 5, 2003, Felch wrote a letter to Respondent and demanded a refund of the \$350
20 she had paid to him for the above described legal services. The letter sent to Respondent at P.O. Box
21 871, Carpentaria, CA 93014, which was an address that Respondent had provided to Felch. The
22 letter was not returned as undeliverable. Respondent received the subject letter, but did not respond
23 to the letter.

24 Despite the fact that Respondent did not provide any services of value to Felch, Respondent
25 did not refund the \$350 Felch paid to him as an advance fee.

26 ***Count 4 - Rule 3-110(A) (Failure to Competently Perform)***

27 By failing to make any amendments to Felch's living trust or to her mother's will,
28 Respondent intentionally, recklessly or repeatedly failed to perform legal services with competence,

1 in wilful violation of rule 3-110(A).

2 ***Count 5 - Rule 3-700(D)(2) (Failure to Refund Unearned Fees)***

3 Respondent performed no services for Felch. Therefore, Respondent did not earn the \$350
4 that Felch advanced to him for his legal services. She wrote a letter to Respondent, demanding a
5 refund of the money paid to him, but Respondent did not refund any of the money.

6 By not refunding the \$350, Respondent wilfully violated rule 3-700(D)(2), which requires an
7 attorney to promptly refund any part of a fee paid in advance that has not been earned.

8 **MITIGATING/AGGRAVATING CIRCUMSTANCES**

9 As Respondent's default was entered in this matter, Respondent did not introduce any
10 mitigating evidence on his behalf. The Court takes judicial notice of the records of the State Bar and
11 notes that Respondent has no prior record of discipline, which is usually a mitigating circumstance.
12 (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, standard 1.2(e)(i)
13 ("standard").) Respondent had been in practice approximately ten years when the misconduct found
14 herein began. The Court accords mitigating weight to Respondent's blemish-free record.

15 The fact that Respondent engaged in multiple acts of wrongdoing in this matter is also an
16 aggravating circumstance. This matter involves three client matters and shows multiple acts of
17 wrongdoing. (Standard 1.2(b)(ii).)

18 Respondent's misconduct caused significant harm to his clients, in particular Chanon who lost
19 \$5,000 as a result of Respondent's failure to repay the loan. In addition, Respondent never completed
20 the legal services he was employed to perform for Veronique and Felch (Standard 1.2(b)(iv).)

21 Respondent has made no effort to rectify the misconduct found in connection with the three
22 client matters. Therefore, Respondent has demonstrated indifference toward rectification of or
23 atonement for the consequences of his misconduct, which is an aggravating circumstance. (Standard
24 1.2(b)(v).)

25 Respondent's failure to participate in this disciplinary proceeding prior to the entry of his
26 default is a further aggravating circumstance. (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 507-508;
27 standard 1.2(b)(vi).)

28

1 DISCUSSION

2 In determining the appropriate discipline to recommend in this matter, the Court looks at the
3 purposes of disciplinary proceedings and sanctions. Standard 1.3 sets forth the purposes of
4 disciplinary proceedings and sanctions as “the protection of the public, the courts and the legal
5 profession; the maintenance of high professional standards by attorneys and the preservation of public
6 confidence in the legal profession.”

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

10 In this case, the standards provide for the imposition of a range of sanctions ranging from
11 reproof to disbarment. (See standards 2.4(b), 2.6, 2.8 and 2.10.) In addition, standard 1.6(a) states,
12 in pertinent part, “If two or more acts of professional misconduct are found or acknowledged in a
13 single disciplinary proceeding, and different sanctions are prescribed by these standards for said acts,
14 the sanction imposed shall be the more or most severe of the different applicable sanctions.” In this
15 instance, standard 2.6 proscribing suspension or disbarment for violation of sections 6068 is the more
16 severe sanction.

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

21 In this matter, Respondent has been found culpable of an improper business transaction with
22 his client, failing to competently perform legal services in connection with two client matters, and
23 failing to respond to a status inquiry in connection with one of the client matters, and failing to return
24 unearned fees in connection with the second client matter. In aggravation, Respondent engaged in
25 multiple acts of misconduct, caused significant harm to his clients, demonstrated indifference toward
26 rectification or atonement, and failed to participate in this disciplinary proceeding prior to the entry
27 of his default. In mitigation, Respondent had practiced law in this state for approximately ten years
28 before the misconduct began.

1 The State Bar recommends, among other things, a six month period of actual suspension,
2 citing as guidance in fashioning a sanction, *Slavkin v. State Bar* (1989) 49 Cal.3d 894 and *Hunniecutt*
3 *v. State Bar*(1988) 44 Cal.3d 362.

4 In *Slavkin*, the attorney was found culpable of misconduct in connection with two different
5 client matters. In one matter, she abandoned the client, failing to perform services as agreed; she
6 improperly withdrew from employment; and she failed to returned unearned fees of \$500. In the
7 second matter, she borrowed \$6,500 from the client, who made the loan based upon Slavkin's
8 representation that she was going to receive a large inheritance soon, which was a false representation,
9 made solely for the purpose of inducing the client to make the loan. She failed to inform her client
10 of the right to seek independent advice about the loan and failed to get the client's written consent to
11 the transaction. In addition, she failed to repay loan. Slavkin was found culpable an improper
12 business transaction with the client and an act of deceit. Slavkin, who had no prior record of
13 discipline, received a one year actual suspension among other things, and was ordered to make full
14 restitution.

15 In *Hunniecutt*, the attorney was found culpable of misconduct in connection with three client
16 matters. In two of the matters, he was found culpable of failing to perform services ad abandoning
17 his clients. In the third matter, he entered into a business transaction with the client wherein the client
18 agreed to invest a \$5,000 personal injury settlement in a real estate venture. The initial investment
19 was secured, but the second investment was not secured, and Hunniecutt subsequently failed to pay
20 when payment became due. He was found culpable of an improper business transaction with a client
21 and engaging in acts of moral turpitude. Hunniecutt had no prior record of discipline, was
22 experiencing marital problems at the time of the misconduct, made an effort to mitigate his clients'
23 damages, and took steps to modify his practice in order to avoid future problems. Balancing all the
24 factors, the court imposed an actual suspension of 90 days, among other things.

25 Respondent has been found culpable of misconduct in connection with three client matters.
26 The Court is of the opinion that Respondent's conduct is less serious than that found in either *Slavkin*
27 or *Hunniecutt* since there is no finding of moral turpitude or deceit. However, the Court recognizes
28 that Hunniecutt received a 90-day actual suspension because of the mitigation found in that matter,

1 which included, among other things, a lack of a prior record of discipline.

2 Respondent, on the other hand, did not participate in this disciplinary proceeding, and
3 therefore, put forth no mitigation. The Court took judicial notice of his lack of a prior record of
4 discipline as the sole mitigating factor in his matter. Because Respondent opted to not participate in
5 this disciplinary proceeding, the Court is without information about any circumstances that would
6 shed some light on the misconduct found herein. And more importantly, the Court is without any
7 assurance that whatever problems may have plagued Respondent, have been rectified and the
8 misconduct will not reoccur.

9 Upon consideration of the totality of the circumstances, including the misconduct found
10 herein, the aggravating circumstances present in this matter, including his failure to participate in this
11 disciplinary proceeding, and the lack of any mitigating factors other than the absence of a prior record
12 of discipline, the Court agrees with the State Bar's recommendation of a six month actual suspension,
13 which will continue until the State Bar Court grants a motion to terminate the suspension at its
14 conclusion or upon such later date ordered by the court. The court finds that the recommended
15 discipline is consistent with prior case law, and that it adequately protects the court, public and legal
16 profession

17 **RECOMMENDED DISCIPLINE**

18 Accordingly, the court hereby recommends that Respondent ROGER A. GERDES be
19 suspended from the practice of law for three years, that execution of said suspension be stayed, and
20 that Respondent be actually suspended from the practice of law for six months and until the State Bar
21 Court grants a motion to terminate his actual suspension at its conclusion or upon such later date
22 ordered by the court. (Rule 205(a), (c), Rules Proc. of State Bar, tit. II, State Bar Court Proceedings.)

23 If the period of actual suspension reaches or exceeds two years, it is further recommended that
24 Respondent remain actually suspended until he has shown proof satisfactory to the State Bar Court
25 of rehabilitation, fitness to practice, and learning and ability in the general law pursuant to Standard
26 1.4(c)(ii), Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct. (See also,
27 rule 205(b).)

28 It is also recommended that Respondent be ordered to comply with the requirements of rule

1 955 of the California Rules of Court within 30 calendar days of the effective date of the Supreme
2 Court order in this matter, and file the affidavit provided for in paragraph (c) within 40 days of the
3 effective date of the order showing his compliance with said order.⁵

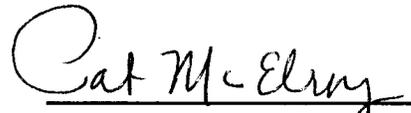
4 It is also recommended that Respondent be ordered to comply with any probation conditions
5 reasonably related to this matter that may hereinafter be imposed by the State Bar Court as a condition
6 for terminating Respondent's actual suspension. (Rule 205(g), Rules Proc. of State Bar.)

7 It is also recommended that Respondent be ordered to take and pass the Multistate
8 Professional Responsibility Examination given by the National Conference of Bar Examiners within
9 one year after the effective date of the discipline imposed herein or during the period of his actual
10 suspension, whichever is later, and furnish satisfactory proof of such to the State Bar's Office of
11 Probation within said period.

12 **COSTS**

13 It is further recommended that costs be awarded to the State Bar pursuant to section 6086.10,
14 and that such costs be payable in accordance with section 6140.7.

15
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17 Dated: January 25, 2005

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19 _____
20 PAT McELROY
21 Judge of the State Bar Court

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26 _____
27 ⁵Failure to comply with rule 955 of the California Rules of Court ("CRC 955") could
28 result in disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent is
required to file a CRC 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 San Francisco, on January 25, 2005, I deposited a true copy of the following document(s):

DECISION

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 San Francisco, California, addressed as follows:

ROGER A. GERDES
1376 VALLECITO PL
CARPINTERIA CA 93013

COURTESY COPY:
ROGER A. GERDES
P. O. BOX 871
CARPINTERIA CA 93014-0871

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

FUMIKO KIMURA, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in San Francisco, California, on **January 25, 2005**.



Bernadette C. O. Molina
Case Administrator
State Bar Court