

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case Nos.: 04-N-10859 ; 04-O-14438;
)	05-O-01845 (Cons.)
MARLENE GERDTS,)	
)	DECISION; ORDER TERMINATING
Member No. 93815,)	INACTIVE ENROLLMENT; ORDER
)	SEALING CERTAIN DOCUMENTS
A Member of the State Bar.)	

On June 1, 2004, respondent Marlene Gerds (respondent) contacted the State Bar of California's Lawyer Assistance Program (LAP) to assist her with her mental health issue(s).

The State Bar of California, Office of the Chief Trial Counsel (State Bar), filed a Notice of Disciplinary Charges (NDC) against respondent in case no. 04-N-10859 on October 15, 2004. This matter was initially assigned to the Honorable JoAnn M. Remke.

Respondent executed a Participation Agreement with the LAP on November 5, 2004.¹

The State Bar filed a NDC against respondent in case no. 04-O-14438 on April 5, 2005. This matter was initially assigned to the Honorable JoAnn M. Remke.

On May 16, 2005, Judge Remke filed an order in case nos. 04-N-10859; 04-O-14438 (not consolidated) referring these matters to the State Bar Court's Alternative Discipline Program

¹ Respondent executed an amendment to her Participation Agreement/Plan on June 3, 2005.

(ADP)² before the undersigned judge.

Thereafter, the court issued an order on June 9, 2005 in case nos. 04-O-14438 and 04-N-10859 (not consolidated) reassigning these cases to the Honorable Richard A. Platel for all further proceedings.

On August 3, 2005, Judge Platel filed an order consolidating case nos. 04-O-14438 and 04-N-10859.

Respondent submitted a declaration to the court in September 2005, which established a nexus between her mental health issue(s) and her misconduct in case nos. 04-N-10859; 04-O-14438 (Cons.). Respondent's supplemental declaration regarding the nexus between her mental health issue(s) and her misconduct was received in case nos. 04-O-14438; 04-N-10859 (Cons.) and 05-O-01845 on October 18, 2006.

The parties entered into a Stipulation Re Facts and Conclusions of Law (Stipulation) in case nos. 04-O-14438; 04-N-10859 (Cons.) and 05-O-01845 (Investigation matter) which was received by the court on January 5, 2007.

On September 14, 2007, the court executed a Confidential Statement of Alternative Dispositions and Orders (Confidential Statement) in case nos. 04-N-10859; 04-O-14438 (Cons.); 05-O-01845 (Investigation matter) which set forth the discipline which would be recommended to the Supreme Court if respondent successfully completed the ADP and the discipline which would be recommended if respondent was terminated from, or failed to successfully complete, the ADP.

Also on September 14, 2007: (1) respondent and his counsel executed the Contract and Waiver for Participation in the State Bar Court's ADP (Contract) in case nos. 04-N-10859; 04-O-14438 (Cons.); 05-O-01845 (Investigation matter); (2) the court executed an order approving the

² The State Bar Court's Alternative Discipline Program was previously known as the Program for Respondents with Substance Abuse or Mental Health Issues.

parties' Stipulation; (3) the Confidential Statement, Contract, and the parties' Stipulation were lodged; and (4) respondent's period of participation in the ADP commenced.³

In addition, the court filed an order on September 14, 2007, enrolling respondent as an inactive member of the State Bar of California pursuant to Business and Professions Code section 6233 effective on that date.

Effective October 5, 2009, case nos. 04-N-10859; 04-O-14438 (Cons.) and 05-O-01845 (Investigation matter) were reassigned to the undersigned judge. The matters were again reassigned to the Honorable Richard A. Platel on October 28, 2009.

On January 26, 2010, the court found that respondent has successfully completed the ADP; the parties' Stipulation was filed; and this matter was submitted for decision.⁴ These matters were reassigned to the undersigned judge effective April 16, 2010.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On December 23, 2003, the California Supreme Court filed order no. S118399 (suspension order) requiring respondent to comply with rule 955⁵ of the California Rules of Court by performing the acts specified in subdivisions (a) and (c) within 30 and 40 days, respectively, after January 22, 2004, the effective date of the suspension order. Respondent received a copy of the suspension order and a rule 955 reporting compliance form. However, respondent did not timely file, with the Clerk of the State Bar Court, a declaration stating compliance with rule 955. After an untimely declaration was rejected, respondent filed a new affidavit with the Clerk of the State Bar Court on October 19, 2004, in compliance with rule 955, which was approved for filing only by the Office of Probation on October 22, 2004.

³ On September 17, 2007, the court filed an order finding that respondent is accepted into the ADP, and the start date of her participation in the ADP is September 14, 2007.

⁴ On February 3, 2010, the court filed an order finding that respondent has successfully completed the ADP.

⁵ Rule 955 has since been renumbered as rule 9.20.

In about May 2003, Carmen Morales employed respondent to represent her son, Mauricio Morales in a criminal appeal. Thereafter, respondent stipulated in case no. 04-O-14438 that she: (1) intentionally, recklessly, or repeatedly failed to perform legal services with competence in willful violation of rule 3-110(A) of the Rules of Professional Conduct of the State Bar of California⁶ by failing to timely file the opening brief in Mauricio's appeal within the originally scheduled time, by failing to file the opening brief within the extended time, by failing to inform the court why no opening brief had been filed, and by failing to file any pleading regarding the dismissal of the appeal; (2) failed to keep a client reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services in willful violation of Business and Professions Code section⁷ 6068, subdivision (m) by not promptly responding to her client's inquiries and by not informing Morales or Mauricio that she had not filed the opening brief and that the Court of Appeal had dismissed his appeal; (3) committed an act or acts involving moral turpitude, dishonesty or corruption in willful violation of section 6106 by not telling Morales or Mauricio that Mauricio's appeal had been dismissed and that she was suspended from the practice of law and would not do further work on his matter; and (4) willfully failed to refund unearned fees to her client in willful violation of rule 3-700(D)(2) by failing to refund to Morales the \$22,000 advanced fees which respondent did not earn.

On May 25, 2003, Maria Abrego employed respondent to represent her in a dissolution of marriage action. Respondent stipulated in case no. 05-O-01845 (Investigation Matter) that she failed to keep a client reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services in willful violation of section 6068, subdivision

⁶ Unless otherwise indicated, all further references to rule(s) refer to the Rules of Professional Conduct of the State Bar of California.

⁷ Unless otherwise indicated, all further references to section(s) refer to provisions of the Business and Professions Code.

(m) by not informing Abrego of her upcoming suspension when respondent was served with the suspension order.

With respect to case nos. 04-N-10859, 04-O-14438 and investigation matter 05-O-01845, respondent stipulated that she willfully violated section 6103 which required her to obey an order of the court requiring her to do an act connected with her profession which she ought in good faith to do by: (1) failing to file the rule 955 declaration that was due March 2, 2004, with the Clerk of the State Bar Court until October 22, 2004; (2) by failing to inform Morales or Mauricio of her suspension until September 23, 2004; (3) by failing to return the client file in the Morales matter until September 23, 2004; (4) by failing to refund the unearned fees in the Morales matter; and (5) by failing to notify opposing counsel in the Abrego matter of her suspension and then file a copy of that notice with the court in the Abrego matter as required by the suspension order.

In addition, with respect to case no. 04-O-14438 and Investigation Matter 05-O-01845, respondent stipulated that she committed acts involving moral turpitude, dishonesty or corruption in willful violation of section 6106 by stating, under penalty of perjury, on her rule 955 declaration that within 30 days of the effective date of the suspension order she had: (1) notified all clients by certified or registered mail about her suspension from the practice of law when, in fact, she had not done so in the Morales matter; (2) notified opposing counsel about her suspension and filed a copy of said notice with the court before which litigation was pending when she had not done so in the Abrego matter; (3) returned all client files and urged said clients to seek legal advice elsewhere, calling attention to the urgency of seeking another attorney when, in fact, she had not done so in the Morales matter; and (4) earned all fees when, in fact, she had not earned the \$22,000 in fees in the Morales matter.

In aggravation, respondent has a prior record of discipline. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(i) (standard(s)).) Effective January

22, 2004, in Supreme Court matter S118399 (S.B.C. Nos. 99-O-12936; 99-O-13583; 99-O-13586) respondent was ordered suspended for three years; the execution of the suspension was stayed; and respondent was placed on probation for four years on conditions that included actual suspension for two years and until she makes specified restitution and until she provides proof satisfactory to the State Bar Court of her rehabilitation, present fitness to practice, and learning and ability in the general law in accordance with standard 1.4(c)(ii). Discipline in this matter was based upon findings that: (1) in one matter, respondent violated rule 3-700(D)(2) for failing to promptly refund unearned fees upon termination of employment; (2) in a second matter, respondent violated rule 3-110(A) for repeatedly and recklessly failing to competently perform legal services; violated section 6068, subdivision (m) for failing to respond promptly to reasonable status inquiries of the client and to keep the client informed of significant developments; was culpable of conduct involving moral turpitude in violation of section 6106 for failing to disclose to her client that her case had been dismissed, concealing matters about her trust account in a judgment debtor's examination, and concealing assets under the trust account label; and (3) in a third matter, respondent violated rule 4-100(A) by using her trust account for personal and business purposes and by commingling her funds with those of her clients; was culpable of conduct involving moral turpitude in violation of section 6106 for issuing five NSF checks on her trust account as a result of gross negligence in managing the account; and was culpable of a second violation of section 6106 for using one of her trust accounts to secrete more than \$54,000 from her creditors and using a second trust account to secrete more than \$79,000 from her creditors.

Respondent's misconduct also significantly harmed clients Morales and Abrego. (Standard 1.2(b)(iv).) Morales was denied a timely criminal appeal regarding his conviction. He was not told that his appeal had been dismissed due to respondent's inaction. In addition, his

attorney fees of \$22,000 were not returned, thus affecting his ability to hire new counsel to represent him in this matter. Abrego was suddenly left without legal representation in the middle of active and ongoing divorce negotiations and with no funds to retain another attorney to represent her due to a dispute between her and respondent regarding the amount of fees that should have been returned upon termination.⁸

Finally, the numerous violations in this matter evidences multiple acts of wrongdoing. (Standard 1.2(b)(ii).)

In mitigation, respondent displayed cooperation and candor to the State Bar during the disciplinary investigation and these proceedings. (Standard 1.2(e)(v).) Respondent is remorseful and has been contrite, candid, and cooperative. (Standard 1.2(e)(vii).) From November 15, 2003 through the middle of 2004, respondent suffered from a series of illnesses and/or physical problems, including hospitalization for an intestinal blockage and an enlarged thyroid gland. Her illness resulted in financial difficulties from both not being able to earn an income and from extraordinary medical expenses. Respondent was evicted in August 2004; filed for bankruptcy protection on August 16, 2004; and lost her job in October 2004. Respondent was also having family problems in the summer of 2004. (Standard 1.2(e)(iv).) Finally, respondent provided several letters from various sources supporting her good character. (Standard 1.2(e)(vi).)

The parties' stipulation as to facts and conclusions of law, including the court's order approving the stipulation, is attached hereto and hereby incorporated by reference, as if fully set forth herein. The stipulation as to facts and conclusions of law set forth the factual findings, legal conclusions, and aggravating and mitigating circumstances in this matter.

⁸ However, a Statement of Decision and Award following fee arbitration dated September 17, 2009, found that the fee paid was reasonable for the services provided and nothing further must be paid by either the client or respondent.

In addition to the mitigating circumstances set forth above, at the time of her misconduct, respondent was suffering from mental health issue(s). Supreme Court and Review Department case law establish that extreme emotional difficulties are a mitigating factor where expert testimony establishes that these emotional difficulties were directly responsible for the misconduct, provided that the attorney has also established, through clear and convincing evidence, that he or she no longer suffers from such difficulties. (*Porter v. State Bar* (1990) 52 Cal.3d 518, 527; *In re Naney* (1990) 51 Cal.3d 186, 197; *In re Lamb* (1989) 49 Cal.3d 239, 246; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 701-702.) However, the Supreme Court has also held that, absent a finding of rehabilitation, emotional problems are not considered a mitigating factor. (*Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1072-1073; *In re Naney, supra*, 51 Cal.3d at p. 197.)

Respondent executed a Participation Agreement with the LAP on November 5, 2004.⁹ Respondent has provided the court with a LAP Certificate of Completion which certifies that she has complied with all of the terms of her agreement with the LAP and which recognizes her successful completion of the LAP on April 27, 2009.

Respondent also successfully completed the ADP. Respondent provided the court with letters from a mental health professional providing a recommendation satisfactory to the court.

Respondent's successful completion of the ADP, which required her successful participation in the LAP, as well as the Certificate of Completion from the LAP and the letters from a mental health professional, qualify as clear and convincing evidence that respondent no longer suffers from the mental health issue(s) which led to her misconduct. Accordingly, it is

⁹ Although respondent executed a LAP Participation Agreement on November 5, 2004, she initially contacted the LAP on June 1, 2004. Respondent's Participation Agreement was amended in June 2005.

appropriate to consider respondent's successful completion of the ADP and LAP as a mitigating circumstance in this matter. (Standard 1.2(e)(iv).)

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney but, rather, to protect the public, to preserve public confidence in the legal profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

After reviewing the parties' briefs on the issue of discipline and considering the standards and case law cited therein, the parties' Stipulation setting forth the facts, conclusions of law, and the aggravating and mitigating circumstances in this matter, and respondent's declarations regarding the nexus between her mental health issue(s) and her misconduct, the court advised the parties of the discipline which would be recommended to the Supreme Court if respondent successfully completed the ADP and the discipline which would be recommended if respondent was terminated from, or failed to successfully complete, the ADP.

In determining the appropriate discipline to recommend in this matter if respondent successfully completes the ADP, the court considered the discipline recommended by the parties, as well as certain standards and case law. In particular, the court considered standards 1.2, 1.3, 1.4, 1.5, 1.6, 1.7(a), 2.3, 2.4(b), 2.6 and 2.10, and the case law cited in the parties' briefs, including *In the Matter of Rodriguez* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 480; *In the Matter of Grueneich* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 439; *In the Matter of Babero* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 322; *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229; and *Chefsky v. State Bar* (1984) 36 Cal.3d 116. After agreeing to the discipline which the court would recommend to the Supreme Court if respondent successfully completed or was terminated from, or failed to successfully complete, the ADP,

respondent executed the Contract to participate in the ADP and began her participation in the ADP on September 14, 2007.

Thereafter, respondent successfully participated in both the ADP and the LAP and, as discussed earlier, on January 10, 2010, the court found that respondent has successfully completed the ADP. Accordingly, the court will recommend to the Supreme Court the imposition of the discipline set forth in the court's Confidential Statement if respondent successfully completed the ADP.

ORDER TERMINATING INACTIVE ENROLLMENT

In light of respondent's successful completion of the LAP and the ADP, and as respondent has been enrolled as a inactive member of the State Bar of California pursuant to Business and Professions Code section 6233 for more than two years (the recommended period of suspension if respondent successfully completes the ADP), the court orders that the inactive enrollment of respondent **MARLENE GERDTS** pursuant to Business and Professions Code section 6233 is hereby terminated effective April 20, 2010 (the date of the filing of this decision).¹⁰

RECOMMENDED DISCIPLINE

IT IS HEREBY RECOMMENDED that respondent **MARLENE GERDTS**, State Bar Number 93815, be suspended from the practice of law in California for three (3) years, that execution of that period of suspension be stayed, and that she be placed on probation for a period of four (4) years subject to the following conditions:

¹⁰ Despite the termination of respondent's inactive enrollment pursuant to Business and Professions Code section 6233, respondent will not be entitled to resume the practice of law in this state until she has fully complied with any other requirements for her return to active membership status and is otherwise entitled to practice law.

1. Respondent Marlene Gerdt is suspended from the practice of law for the first two (2) years of probation¹¹ (with credit given for the period of inactive enrollment pursuant to Business and Professions Code section 6233 which commenced on September 14, 2007 and ended on April 20, 2010).
2. Respondent Marlene Gerdt must also comply with the following additional conditions of probation:
 - a. During the probation period, respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct of the State Bar of California;
 - b. Within ten (10) days of any change, respondent must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar of California (Office of Probation), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code;
 - c. Within thirty (30) days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request.
 - d. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10 and October 10 of the period of probation. Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. Respondent must also state whether there are any proceedings pending against her in the State Bar Court and if so, the case number and current status of that proceeding. If the first report would cover less than thirty (30) days, that report must be submitted on the next quarter date, and cover the extended period. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the period of probation and no later than the last day of the probation period;
 - e. Subject to the assertion of applicable privileges, respondent must answer fully, promptly and truthfully any inquiries of the Office of Probation

¹¹ The probation period and these probation conditions will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with the probation conditions; and

- f. During her period of probation, respondent must pay restitution to Carmen Morales in the amount of \$22,000 plus 10% interest per annum from January 21, 2004 (or to the Client Security Fund to the extent of any payment from the fund to Carmen Morales, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnish satisfactory proof thereof to the State Bar's Office of Probation. Any restitution to the Client Security Fund (CSF) is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d). To the extent the CSF has paid only principal amounts, respondent will still be liable for interest payments to Carmen Morales as set forth above.

Ninety (90) days after the Supreme Court's disciplinary order in this matter is filed, respondent must file a financial disclosure form with the Office of Probation. Respondent is also to continue paying Carmen Morales \$20.00 per month for owed interest, and once paid, respondent is to pay \$20.00 per month to the Client Security Fund.

With each written quarterly report required herein, respondent must provide to the Office of Probation satisfactory proof of all restitution payments made by her during that quarter or applicable reporting period.

To the extent that respondent has paid any restitution prior to the effective date of the Supreme Court's final disciplinary order in this proceeding, respondent will be given credit for such payments provided satisfactory proof of such is or has been shown to the Office of Probation;

- g. Unless she has already done so, respondent must provide the Office of probation with certification of her completion of the LAP;¹² and
- h. Within thirty (30) days after the effective date of discipline, respondent must contact the Office of Probation and determine whether the Office of Probation received a copy of the Statement of Decision and Award dated September 17, 2009, in the Sandoval (Abrego) fee arbitration matter. If the Office of Probation has not received a copy of the Statement of Decision and Award, respondent must send to the Office of Probation, by certified mail, return receipt requested, a copy of the Statement of Decision and Award which must be postmarked no later than sixty (60) days after the effective date of discipline in this matter.

¹² Ethics School is not recommended as a condition of probation in this matter as respondent completed Ethics School on February 9, 2006.

3. At the expiration of the period of probation, if Marlene Gerdtz has complied with all conditions of probation, the three (3) year period of stayed suspension will be satisfied and that suspension will be terminated.

It is not recommended that Marlene Gerdtz take and pass the Multistate Professional Responsibility Examination (MPRE) as she passed the MPRE on March 11, 2006.¹³

COSTS

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

DIRECTION RE DECISION AND ORDER SEALING CERTAIN DOCUMENTS

The court directs a court case administrator to file this Decision; Order Terminating Inactive Enrollment; Order Sealing Certain Documents. Thereafter, pursuant to rule 806(c) of the Rules of Procedure of the State Bar of California (Rules of Procedure), all other documents not previously filed in this matter are ordered sealed pursuant to rule 23 of the Rules of Procedure.

It is further ordered that protected and sealed material will only be disclosed to: (1) parties to the proceeding and counsel; (2) personnel of the Supreme Court, the State Bar Court and independent audiotape transcribers; and (3) personnel of the Office of Probation when necessary for their duties. Protected material will be marked and maintained by all authorized individuals in a manner calculated to prevent improper disclosure. All persons to whom protected material is disclosed will be given a copy of this order sealing the documents by the person making the disclosure.

¹³ It is recommended that respondent receive credit for the period of her inactive enrollment under section 6233 toward her period of suspension imposed in this matter. If such recommendation is adopted by the Supreme Court, respondent will therefore not serve any period of suspension after the effective date of the Supreme Court's order imposing discipline in this matter. It is therefore not recommended that respondent be ordered to comply with rule 9.20 of the California Rules of Court.

IT IS SO ORDERED.

Dated: March _____, 2011

RICHARD A. HONN
Judge of the State Bar Court