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PUBLIC MATTER

FILED

OCT 13 2005

THE STATE BAR COURT STATE BAR COURT CLERK'S OFFICE
HEARING DEPARTMENT - LOS ANGELES SAN FRANCISCO

In the Matter of
ROGER A. GERDES,
Member No. 158701,
A Member of the State Bar.

) **Case No. 04-O-12793-PEM**
) **DECISION**

I. Introduction

The above-entitled matter was submitted for decision as of July 20, 2005, after the State Bar of California, Office of the Chief Trial Counsel ("State Bar") waived hearing and filed a brief on the issues of culpability and discipline. The State Bar was represented by Deputy Trial Counsel Fumiko K. Kimura ("DTC"). Respondent Roger A. Gerdes ("respondent") failed to participate either in-person or through counsel, and allowed his default to be entered.

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 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 he makes specified restitution; and until the State Bar Court grants a motion to terminate respondent's actual suspension. (Rules Proc. of State Bar, rule 205(a)-(c).)

II. Pertinent Procedural History

This proceeding was initiated by the State Bar's filing of a Notice of Disciplinary Charges ("NDC") against respondent on January 11, 2005. A copy of the NDC was properly served upon respondent on January 10, 2005, by certified mail, return receipt requested, addressed to respondent



1 at his official membership records address ("official address") as provided pursuant to Business and
2 Professions Code section 6002.1, subdivision (a).¹ The NDC was returned by the U.S. Postal
3 Service ("USPS") on or about January 27, 2005, bearing the stamp, "RETURN TO SENDER -
4 ATTEMPTED NOT KNOWN." The envelope had a forwarding label with a partial address as
5 "8564 ECHO DR APT 3." The forwarding address was crossed out, and written in pen was the
6 word "Unknown." Still attached to the back of the envelope was the return receipt. The membership
7 address was crossed out on the return receipt, and written in pen was "8564 Echo Dr. # 3, La Mesa,
8 CA 91941 ("La Mesa address")

9 On January 10, 2005, a courtesy copy of the NDC was served via certified mail, return receipt
10 requested on respondent at a post office box in Carpentaria. On or about February 7, 2005, this
11 courtesy copy of the NDC was returned to the State Bar by the USPS as "RETURN TO SENDER -
12 UNCLAIMED-UNABLE TO FORWARD."

13 On January 28, 2005, the State Bar served a courtesy copy of the NDC via certified mail,
14 return receipt requested on respondent at the La Mesa address. On or about February 7, 2005, the
15 courtesy copy of the NDC was returned to the State Bar by the USPS as "NOT DELIVERABLE AS
16 ADDRESSED - UNABLE TO FORWARD - RETURN TO SENDER." Written on the envelope
17 were the words, " Unknown at this address."

18 In her declaration, submitted with the State Bar's Notice of Motion and Motion for Entry
19 of Default, DTC Kimura states that after discovering that respondent's official membership records
20 telephone number belonged to someone other than the respondent, she ran a reverse phone search
21 on the internet using the respondent's official membership phone number. It produced two listings
22 for persons other than the respondent. The DTC also ran a reverse address search using respondent's
23 official membership address. It produced a listing for a person other than the respondent.
24 Respondent's address history on file with the Membership Records Department of the State Bar of

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28 ¹References to section are to the Business and Professions Code, unless otherwise stated.

1 California indicates that the respondent has not updated his membership records since 1992.²

2 On June 7, 2005, the DTC called directory assistance for the area code which included
3 respondent's official address and requested all telephone listings for respondent. Directory
4 assistance had no listing for respondent. The DTC also checked the California Directory of
5 Attorneys published by the Daily Journal Corporation. It had a listing for respondent which was the
6 P.O. Box Address; there was no phone number listed.

7 On June 9, 2005, after locating an e-mail address for respondent, the State Bar e-mailed him
8 at RGerdes567@aol.com, requesting that he contact the DTC immediately regarding the disciplinary
9 matter.³

10 Respondent did not file a response to the NDC as required by rule 103 of the Rules of
11 Procedure. On June 15, 2005, the State Bar filed a motion for entry of respondent's default. The
12 motion also contained a request, pursuant to Evidence Code section 452, subdivision (h), that the
13 court take judicial notice of respondent's official membership address which the court grants, and
14 also contained the declaration of DTC Kimura. A copy of said motion was properly served upon
15 respondent on that same date, by certified mail, return receipt requested, addressed to respondent at
16 his official address. On June 15, 2005, courtesy copies were also served by certified mail, return
17 receipt requested, addressed to respondent at the La Mesa address, as well as a post office box
18 address for respondent.

19 The respondent failed to file a written response within 10 days after service of the motion for
20 the entry of his default. On June 30, 2005, the court filed an Order of Entry of Default (Rule 200 -
21 Failure to File Timely Response), Order Enrolling Inactive and Further Orders.⁴ A copy of said order
22

23 ²A certified copy of the respondent's address history on file in the Membership Records
24 Department of the State Bar of California, reflecting respondent's address history from June 8,
25 1992 through June 2, 2005, was attached as an exhibit to the State Bar's Notice of Motion and
Motion for Entry of Default.

26 ³A copy of the e-mail sent to respondent by the State Bar is attached as an exhibit to the
27 State Bar's Notice of Motion and Motion for Entry of Default.

28 ⁴Respondent's involuntary inactive enrollment pursuant to Business and Professions Code
section 6007(e) was effective three days after the service of this order by mail.

1 was properly served upon respondent on June 30, 2005, by certified mail, return receipt requested,
2 addressed to respondent at his official address.

3 **III. Findings of Fact and Conclusions of Law**

4 **A. Jurisdiction**

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

7 **B. Findings of Fact**

8 On or about June 12, 2002, Joel Granath ("Granath") employed respondent to represent him
9 in a family trust matter.

10 On or about March 13, 2003, respondent asked Granath to loan him \$3,000. On that same
11 date, Granath's wife, on behalf of Granath, loaned respondent a total of \$3,000, and respondent
12 provided an unsecured promissory note, agreeing to pay Granath \$3,400 by April 13, 2003.
13 Respondent did not obtain Granath's written consent to the terms of the loan, and at no time did
14 respondent advise Granath in writing that he had the right to seek the advice of an independent
15 attorney prior to making the loan. Respondent did not give Granath the opportunity to seek
16 independent advice about the loan.

17 Respondent failed to pay any portion of the \$3,000 that Granath loaned to him.

18 Pursuant to a complaint filed by Granath, the State Bar opened an investigation. On or about
19 September 7, 2004, State Bar investigator Sandra Burnett sent a letter to respondent at his official
20 address, requesting that respondent reply in writing to the allegations regarding the Granath loan.
21 The letter was not returned as undeliverable or for any other reason. Respondent did not respond to
22 the investigator's letter or otherwise communicate with the investigator, or participate in the
23 investigation.

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1 **C. Conclusions of Law**

2 **1. *Count 1 - Rule 3-300 of the Rules of Professional Conduct (Business Transaction***
3 ***With a Client)***

4 Respondent is charged with a violation of rule 3-300 of the Rules of Professional Conduct⁵
5 which provides, in pertinent part, that a member shall not enter into a business transaction with a
6 client unless the transaction and its terms are fair and reasonable to the client and are fully disclosed
7 in writing to the client; and the client is advised in writing that the client may seek independent legal
8 advice about the transaction, and is given a reasonable opportunity to do so; and the client thereafter
9 consents in writing to the terms of the transaction.

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

15 **2. *Count 2 - Business and Professions Code Section 6068(i)***

16 By failing to respond to the State Bar's letter regarding the Granath complaint, respondent
17 failed to cooperate with the State Bar investigation in wilful violation of section 6068(i).

18 **IV. Mitigating and Aggravating Circumstances**

19 **A. Mitigation**

20 As respondent's default was entered in this matter, no mitigating circumstances were proven.
21 (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(e).)⁶

22 **B. Aggravation**

23 Respondent has a prior record of discipline. (Std. 1.2(b)(i).) In an order filed June 16, 2005,
24 in case No. S132783 (State Bar Court case No. 03-O-03634), the Supreme Court ordered, inter alia,
25 that the respondent be suspended from the practice of law for three years, stayed, that he be actually

26 ⁵References to rule are to the current rules of Professional Conduct, unless otherwise
27 noted.

28 ⁶All further references to standards are to this source.

1 suspended from the practice of law for six months, and until the State Bar Court grants a motion to
2 terminate his actual suspension pursuant to rule 205 of the Rules of Procedure of the State Bar of
3 California. Respondent's culpability in that proceeding, involving three client matters, resulted from
4 respondent's entering into a business transaction with a client in wilful violation of rule 3-300,
5 respondent's failing to perform legal services with competence, in wilful violation of rule 3-110(A),
6 respondent's failing to respond to status inquiries from a client in violation of section 6068(m), and
7 respondent's failing to refund unearned fees in wilful violation of rule 3-700(D)(2).

8 Respondent's misconduct in the current matter caused significant harm to his client, who lost
9 \$3,000 as a result of respondent's failure to repay the loan. (Standard 1.2(b)(iv).)

10 Respondent has made no effort to rectify the misconduct found in connection with the current
11 matter. Therefore, respondent has demonstrated indifference toward rectification of or atonement
12 for the consequences of his misconduct, which is an aggravating circumstance. (Standard 1.2(b)(v).)

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

16 V. Discussion

17 The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect
18 the public, to preserve public confidence in the profession and to maintain the highest possible
19 professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v.*
20 *State Bar* (1987) 43 Cal.3d 1016, 1025; standard 1.3.)

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

24 Standard 2.8 provides that culpability of a member of a wilful violation of rule 3-300, shall
25 result in suspension, unless the extent of the member's misconduct and the harm to the client are
26 minimal, in which case, the degree of discipline shall be reproof.

27 The standards, however, are only guidelines and do not mandate the discipline to be imposed.
28 (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach

1 case must be resolved on its own particular facts and not by application of rigid standards.” (*Id.* at
2 p. 251.)

3 In this matter, respondent has been found culpable under rule 3-300 of an improper business
4 transaction which occurred in March 2003, with his client, and thereafter failing to cooperate in a
5 disciplinary investigation. In aggravation, respondent has a prior record of discipline, has caused
6 significant harm to a client, has demonstrated indifference toward rectification or atonement, and has
7 failed to participate in this disciplinary proceeding prior to the entry of his default.

8 Prior discipline is always a proper factor in aggravation. However, because part of the
9 rationale for considering it is that it is indicative of a recidivist attorney’s inability to conform to
10 ethical norms, the aggravating force of prior discipline is diminished if the misconduct occurred
11 during the same period as the misconduct in the prior matter. In such a circumstance, it is appropriate
12 to consider what the discipline would have been if all the charged misconduct during the time period
13 had been brought as one case. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr.
14 602, 618-619.)

15 In the prior matter for which respondent was disciplined, as in the current matter, he was
16 found culpable of engaging in an improper business transaction which involved requesting and
17 receiving a loan from a client. The incident in that prior disciplinary matter occurred in December
18 2002. The other two client matters for which respondent was previously disciplined occurred
19 between April 2003 and November 2003. Thus, it is apparent that the current misconduct which
20 occurred in March 2003, was contemporaneous with the misconduct in the prior case (case No.
21 S132783 (State Bar Court case No. 03-O-03634)). Accordingly, the court must consider the totality
22 of the findings in the two cases to determine what the discipline would have been had all the charged
23 misconduct in this period been brought in one case. (*In the Matter of Sklar, supra*, 2 Cal. State Bar
24 Ct. Rptr. 602,619.)

25 As stated, *supra*, in the prior matter for which respondent was disciplined he had been found
26 culpable of an improper business transaction with his client, failing to competently perform legal
27 services in connection with two client matters, failing to respond to a status inquiry in connection with
28 one of the client matters, and failing to return unearned fees in connection with the second client

1 matter. In aggravation, respondent had engaged in multiple acts of misconduct, caused significant
2 harm to his clients, demonstrated indifference toward rectification or atonement, and failed to
3 participate in this disciplinary proceeding prior to the entry of his default. In mitigation, respondent
4 had practiced law in this state for approximately ten years before the misconduct began.

5 In the current disciplinary matter the respondent is found culpable of having engaged in an
6 improper business transaction with a client, and failing to cooperate in a disciplinary investigation.
7 The aggravating circumstances are as stated, *supra*.

8 The State Bar, argues that had the instant proceeding and the prior proceeding been brought
9 as one case, it would have recommended that respondent be actually suspended for a total period of
10 18 months. However, given that the respondent has already received a six month actual suspension
11 in the prior proceeding, the State Bar recommends that in the current proceeding an actual suspension
12 of one year be imposed. The State Bar's recommendation as set forth in its Brief on Culpability and
13 Discipline is premised in part on respondent's misconduct being "surrounded by or followed by bad
14 faith, dishonesty, concealment or overreaching." The State Bar bases its premise on facts alleged in
15 a declaration of Granath, submitted for the first time with the Brief on Culpability and Discipline.

16 However, an allegation raised for the first time in the State Bar's Brief on Culpability and
17 Discipline can not be considered as an aggravating circumstance. (Cf. *In the Matter of Johnston*
18 (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 585, 589.) ["Uncharged facts can not be relied upon
19 for evidence of aggravation in a default matter because the respondent is not fairly apprised of the fact
20 that additional uncharged facts will be used against him."] Thus this court can not factor into the
21 discipline the facts alleged in the Granath Declaration.

22 The court finds guidance as to the discipline which should be imposed in *Slavkin v. State Bar*
23 (1989) 49 Cal.3d 894 and *Hunnicutt v. State Bar*(1988) 44 Cal.3d 362.

24 In *Slavkin*, the attorney was found culpable of misconduct in connection with two different
25 client matters. In one matter, she abandoned the client, failing to perform services as agreed; she
26 improperly withdrew from employment; and she failed to returned unearned fees of \$500. In the
27 second matter, she borrowed \$6,500 from the client, who made the loan based upon Slavkin's
28 representation that she was going to receive a large inheritance soon, which was a false representation,

1 made solely for the purpose of inducing the client to make the loan. She failed to inform her client
2 of the right to seek independent advice about the loan and failed to get the client's written consent to
3 the transaction. In addition, she failed to repay the loan. Slavkin was found culpable of engaging in
4 an improper business transaction with the client and an act of deceit. Slavkin, who had no prior record
5 of discipline, received a one year actual suspension among other things, and was ordered to make full
6 restitution.

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

17 Respondent has been found culpable of misconduct in connection with a total of four client
18 matters. The court is of the opinion that respondent's conduct is less serious than that found in either
19 *Slavkin* or *Hunniecutt*, since based on the facts alleged there can be no finding of moral turpitude or
20 deceit in the current matter. However, the court recognizes that Hunnicutt received a 90-day actual
21 suspension because of the mitigation found in that matter.

22 On the other hand, in the current matter respondent did not participate in this disciplinary
23 proceeding, and therefore, put forth no mitigation. Because respondent did not participate in this
24 disciplinary proceeding, the court is without information about any circumstances that would shed
25 some light on the misconduct found herein. And more importantly, the court is without any assurance
26 that whatever problems may have plagued respondent, have been rectified and the misconduct will
27 not reoccur.

28 Upon consideration of the totality of the circumstances, including the misconduct found

1 herein, the lack of any mitigating factors and the aggravating circumstances present in this matter,
2 and including the findings in the prior disciplinary matter, the court recommends, inter alia, placing
3 the respondent on an actual suspension for six months and until he makes specified restitution, and
4 until the State Bar Court grants a motion to terminate respondent's actual suspension. (Rules Proc.
5 of State Bar, rule 205(a),(c).)

6 **VI. Recommended Discipline**

7 Accordingly, the court hereby recommends that respondent ROGER A. GERDES be
8 suspended from the practice of law for three years, that execution of said suspension be stayed, and
9 that respondent be actually suspended from the practice of law for six months, and until he makes
10 restitution to Joel I. Granath (or the Client security fund, if appropriate) in the amount of \$3,000 plus
11 10% interest per annum from March 13, 2003, and furnishes satisfactory proof thereof to the Office
12 of Probation of the State Bar; and until the State Bar court grants a motion to terminate respondent's
13 actual suspension. (Rules Proc. of State Bar, rule 205(a),(c).)

14 If the period of actual suspension reaches or exceeds two years, it is further recommended that
15 respondent remain actually suspended until he has shown proof satisfactory to the State Bar Court of
16 rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard
17 1.4(c)(ii).

18 It is also recommended that respondent be ordered to comply with any probation conditions
19 that may hereinafter be imposed by the State Bar Court as a condition for terminating respondent's
20 actual suspension. (Rules Proc. of State Bar, rule 205(g) .)

21 The court also recommends that respondent be ordered to comply with the requirements of
22 rule 955 of the California Rules of Court within 30 calendar days of the effective date of the Supreme
23 Court order in this matter, and file the affidavit provided for in paragraph (c) within 40 days of the
24 effective date of the order showing his compliance with said order.⁷

25
26 ⁷Failure to comply with rule 955 of the California Rules of Court ("CRC 955") could
27 result in disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent is
28 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 of California. 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 October 13, 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:

- [X] 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

- [X] 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 **October 13, 2005**.


Laurette Cramer
Case Administrator
State Bar Court