

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - SAN FRANCISCO

In the Matter of)	Case Nos.: 13-O-10692-PEM (13-O-11454)
)	
DALE IRVING GUSTIN,)	DECISION
)	
Member No. 76642,)	
)	
<u>A Member of the State Bar.</u>)	

Introduction¹

In this original disciplinary proceeding, which proceeded by default after respondent Dale Irving Gustin² failed to appear at trial on June 17, 2014, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) charges respondent with a total of three counts of professional misconduct in two separate client matters. Specifically, in the first client matter, the State Bar charges that respondent (1) failed to competently perform legal services (rule 3-110(A)) and (2) failed to adequately communicate with his client (§ 6068, subd. (m)). In the second client matter, the State Bar charges that respondent failed to release a deceased client's file and other papers in accordance with a request from the deceased client's personal representative (rule 3-700(D)(1)).

¹ Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code unless otherwise indicated.

² Respondent, who is now 77 years old, was admitted to the practice of law in California on December 21, 1977, and has been a member of the State Bar of California since that time. As discussed *post*, he has three prior records of discipline.

///

The court finds, by clear and convincing evidence, that respondent is culpable on each of the three counts. The court further finds that, in light of all the relevant factors, the appropriate level of discipline for the found misconduct is two years' stayed suspension and three years' probation on conditions, including a six-month period of actual suspension.

Significant Procedural History

The State Bar filed and served the notice of disciplinary charges (NDC) in this proceeding on respondent on November 26, 2013. On December 6, 2013, respondent filed both a demurrer and a motion to transfer venue from Los Angeles to San Francisco.³

On December 18, 2013, respondent filed a motion to disqualify State Bar Court Judge Donald F. Miles, who was then the judge presiding over this proceeding. On December 20, 2013, Judge Miles filed a verified answer to respondent's motion. Thereafter, on January 7, 2014, State Bar Court Judge Richard A. Platel denied respondent's motion to disqualify Judge Miles.

On January 8, 2014, Judge Miles granted respondent's motion to transfer venue. And, on January 8, 2014, this proceeding was transferred to San Francisco where it was reassigned to the undersigned judge for all purposes on January 9, 2014.

On February 3, 2014, respondent filed a pleading seeking to "renew" his demurrer and the dismissal of this proceeding. Then, on February 4, 2014, respondent filed yet another such pleading that is substantially identical to the pleading filed on February 3, 2014. In the interests of justice, the court deemed respondent's pleading to be a motion to dismiss the NDC and a request that the court order an Early Neutral Evaluation Conference (ENEC) before a judge of

³ Demurrers are not permitted in the State Bar Court. Respondent inartfully titled his motion to transfer venue as a motion to transfer jurisdiction.

the State Bar Court. The court denied both respondent's motion to dismiss the NDC and request for an ENEC in an order filed on April 14, 2104.

On February 14, 2014, respondent filed a response to the NDC.

The trial in this matter was originally set to begin on May 27, 2014, but on respondent's motion, the court continued the trial until June 17, 2014.

On the record at the pretrial conference, which was held on May 5, 2014, respondent agreed to many, if not most, of the facts set forth on pages 2 through 6 of the State Bar's May 5, 2014 pretrial statement.⁴

When this case was called for trial on June 17, 2014, respondent failed to appear. Accordingly, the court properly entered his default. Moreover, in accordance with section 6007, subdivision (e), the court ordered that respondent be involuntarily enrolled as an inactive member of the State Bar of California pending the final resolution of this proceeding.⁵ As a result of respondent's default, the factual allegations in the NDC are deemed admitted. (Rules Proc. of State Bar, rule 5.82(2).)

On July 2, 2014, respondent filed a motion to set aside default, to reopen, and to reset a trial in this matter. And, on July 28, 2014, respondent filed an amended motion to vacate the default order. In an order filed on September 4, 2014, the court denied respondent's motions to set aside or vacate the default for all purposes, but set aside the default for the limited purpose of determining the appropriate level of discipline in the event the court finds respondent culpable on any of the three counts of charged misconduct. In that same order, the court also set the matter for trial on the issue of discipline on November 5, 2014, and ordered that respondent would be

⁴ Respondent's agreements with those facts on the record are admissions on which the court may rely for all purposes, including culpability and discipline. (See, generally, State Bar Ct. Rules of Prac., rule 1223(c).)

⁵ Respondent's involuntary inactive enrollment became effective on June 20, 2014.

permitted to appear at and participate in the trial by, inter alia, presenting evidence of mitigating circumstances.

On August 11, 2014, Attorney Kenneth C. Kocourek filed a notice of designation to receive service as respondent's attorney of record in this proceeding.

On September 25, 2014, respondent filed a motion for reconsideration of the court's September 4, 2014 order setting aside the default for the limited purpose of determining the appropriate level of discipline. The court denied respondent's motion for reconsideration in an order filed on October 29, 2014.

On November 3, 2014, two days before trial, Attorney Kocourek filed a motion seeking to participate in the November 5, 2014 trial by telephone because respondent was unable to advance him all his travel expenses to attend the trial in San Francisco as respondent had previously agreed in writing.⁶ Respondent did not object to his attorney appearing telephonically. Over the State Bar's objection, the court permitted Attorney Kocourek to appear at and participate in the trial telephonically.

On November 4, 2014, respondent filed a motion to disqualify the undersigned judge. On November 5, 2014, the court properly struck respondent's motion because it was untimely and because it failed to disclose any ground for disqualification. (Code Civ. Proc., § 170.4, subds. (b)&(c)(2); see also Rules Proc. of State Bar, rule 5.46(C)&(I); *Lewis v. Superior Court* (1988) 198 Cal.App.3d 1101, 1104.)

The trial was held on November 5 and 14, 2014. In accordance with the court's September 4, 2014 order, respondent was allowed to participate and present evidence of

⁶ According to Attorney Kocourek, respondent has limited financial resources because respondent is semi-retired and because respondent's primary source of income is Social Security. Attorney Kocourek lives and practices law in Riverside, which is in Southern California, and the trial in the matter was held in San Francisco.

mitigating circumstances at the trial. Senior Trial Counsel Robin Brune represented the State Bar. Attorney Kocourek represented respondent.

Because this court set aside respondent's default only for the limited purpose of determining the appropriate level of discipline, respondent may seek review only of the court's discipline recommendation and not the court's findings on culpability. (Cf. *In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131.) Respondent's sole remedy with respect to the court's culpability findings, even under the current Rules of Procedure of the State Bar, effective January 1, 2011, as revised in July 2014, was to seek review of either the court's September 4, 2014 order setting aside respondent's default only for the limited purpose of determining discipline or of the court's October 29, 2014 order denying respondent's motion for reconsideration of that September 4, 2014 order. (Cf. *In the Matter of Hunter* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63.)

Findings of Fact and Conclusions of Law

The factual allegations in the NDC, which are deemed admitted by the entry of respondent's default; respondent's response to the NDC; the admissions respondent made on the record at the May 5, 2014 pretrial conference; and the evidence presented at trial on November 5 and 14, 2014, establish the following facts by clear and convincing evidence.

Case No. 13-O-10692- The Schwanbeck Matter

Facts

On September 24, 2006, Steven Schwanbeck, a disabled veteran, signed a purchase agreement with Atascadero Ford, Inc. (Atascadero Ford) to purchase a new 2007 Ford Mustang with a cash sales price of \$28,505 (September 24 agreement). The September 24 agreement was set forth on a standard preprinted form that was completed by Atascadero Ford. Under the September 24 agreement, Schwanbeck was to finance the purchase price plus various dealer fees

and costs over 72 months at 10 percent interest for a total sales price with interest of \$48,670.50. On the reverse side of the agreement was a preprinted section entitled “Seller’s Right to Cancel,” which clearly advised Schwanbeck that Atascadero Ford could cancel the agreement if Atascadero Ford was unable to assign (i.e., sell) the September 24 agreement to one of Atascadero Ford’s customary financiers/banks under terms acceptable to Atascadero Ford.

Schwanbeck had a financial manager named Mark Bloodgood, who corresponded and communicated with respondent for Schwanbeck. In August 2007, Bloodgood was replaced by Debra Trout.

Apparently, none of Atascadero Ford’s customary financiers/banks agreed to purchase the September 24 agreement from Atascadero Ford on terms acceptable to Atascadero Ford because, on September 28, 2006, Schwanbeck returned to Atascadero Ford and signed a second purchase agreement to buy the same new 2007 Mustang (September 28 agreement). The cash sales price of the Mustang under the September 28 agreement was \$24,965.50, which was almost \$4,000 less than the \$28,505 cash sales price under the September 24 agreement. However, the interest rate in the September 28 agreement was 18 percent, which was 8 percent higher than the 10 percent interest rate in the September 24 agreement. The total sales price with interest of the Mustang under the September 28 agreement was \$54,071.28, which is \$5,400.78 more than the total sales price with interest under the September 24 agreement of \$48,670.50 (\$54,071.28 less \$48,670.50 equals \$5,400.78).

In October 2006, Schwanbeck retained respondent to resolve a dispute over the dealer arranged financing of the new 2007 Mustang with Wells Fargo Bank. And, on October 10, 2006, respondent wrote to Atascadero Ford informing it that Schwanbeck was disavowing the September 28 agreement allegedly because of some unspecified fraud.

On October 18, 2006, Wells Fargo Bank sent Schwanbeck a letter thanking Schwanbeck for his loan application and advising him that Wells Fargo Bank had approved him for a car loan, but on different terms than he originally sought. In other words, Wells Fargo Bank was willing to buy the September 28 agreement from Atascadero Ford, but not the September 24 agreement.

On October 19, 2006, Attorney Roderick Rodewald, who represented Atascadero Ford, sent a letter to respondent, enclosing a copy of the preprinted section entitled "Seller's Right to Cancel" which is on the reverse side of both the September 24 and September 28 agreements and restating the position of Atascadero Ford, which Attorney Rodewald had stated in an earlier letter to respondent, that the September 28 agreement was valid.

On October 22, 2006, Wells Fargo wrote to Schwanbeck seeking proof that he had insured the new 2007 Mustang in accordance with the September 28 agreement. Wells Fargo sent a second letter to Schwanbeck on November 12, 2006, requesting proof of insurance no later than December 3, 2006.

At respondent's direction, on October 23, 2006, Bloodgood wrote to Atascadero Ford and enclosed a \$675.98 check made payable to Atascadero Ford (not Wells Fargo Bank) as a monthly payment under the old September 24 agreement. On October 30, 2006, Atascadero Ford wrote back to Bloodgood stating that the amount of the check was the wrong amount and that he needed to pay Wells Fargo Bank who had purchased the September 28 agreement from Atascadero Ford.

On November 2, 2006, respondent wrote to Wells Fargo Bank stating that he thought the contract was void because of fraud in the inception and that Schwanbeck was withdrawing his consent to the financing. Respondent wrote virtually identical letters to other Wells Fargo Bank employees/agents on November 13, 2006, and November 27, 2006.

On November 22, 2006, respondent again told Bloodgood to pay Atascadero Ford (and not Wells Fargo Bank). And, on January 9, 2007, Bloodgood wrote to Atascadero Ford and again enclosed a check for only \$675.98 that was made payable to Atascadero Ford allegedly as a monthly payment under the old, superseded September 24 agreement.

On January 18, 2007, Bloodgood wrote to respondent advising him that Atascadero Ford had not cashed the October or November 2006 payments, that the January 2007 payment had also been returned to him, and that Atascadero Ford had again directed him to pay Wells Fargo Bank.

On January 23, 2007, respondent wrote to Wells Fargo Bank confirming that he had spoken to a Wells Fargo Bank supervisor who advised him that the matter would be referred to Wells Fargo Bank's fraud department. Respondent further advised Wells Fargo Bank that "all payments have been timely made and will continue until a court of law tells us differently."

Also on January 23, 2007, respondent wrote to Atascadero Ford informing it that Schwanbeck will continue to pay for the Mustang in accordance with the September 24 agreement and warning that, if Schwanbeck's Mustang was wrongfully repossessed, respondent would IMMEDIATELY (emphasis added) commence suit and include a request for punitive damages.

On January 29, 2007, Bloodgood wrote to respondent, confused by respondent's directive that he pay Atascadero Ford and by Ford's rejection of the payments.

On January 31, 2007, Attorney Rodewald told respondent to pay Wells Fargo Bank and to stop paying Atascadero Ford. On February 2, 2007, Bloodgood again wrote to Atascadero Ford enclosing a check and advising that he had been directed to pay Atascadero Ford.

On February 2, 2007, and again on February 7, 2007, respondent directed Bloodgood to keep paying Atascadero Ford. On March 28, 2007, Wells Fargo Bank told respondent that, due

to respondent's allegations of fraud against Atascadero Ford, Wells Fargo Bank would request that Atascadero Ford repurchase the September 28 agreement from Wells Fargo Bank.

Apparently, Atascadero Ford never repurchased the agreement from Wells Fargo Bank.

On August 13, 2007, Trout, who replaced Bloodgood as Schwanbeck's fiduciary who received and disbursed Schwanbeck's veteran's benefits, wrote to the Department of Veteran Affairs seeking confirmation of her authority to make Schwanbeck's car payment and stating that "Gustin says contract at 18% not valid."

The record establishes that Wells Fargo Bank repossessed the 2007 Mustang from Schwanbeck no later than July 25, 2008.⁷

On March 30, 2011, respondent filed a lawsuit alleging breach of the September 24 agreement and fraud against the following three defendants: (1) Atascadero Ford; (2) Allen Yarborough, who owned Atascadero Ford; and Wells Fargo Bank. Even though respondent had previously threatened to IMMEDIATELY file suit if Schwanbeck's Mustang was wrongfully repossessed, respondent did not file this lawsuit until more than two and one-half years after Schwanbeck's Mustang was repossessed and almost five years since respondent first notified Wells Fargo Bank of Schwanbeck's fraud claims in a November 2, 2006, letter. Moreover, even though the alleged fraud occurred, if at all, before October 2006, respondent delayed filing the lawsuit until 2011, which was years past the two-year statute of limitations for fraud.

Even though respondent served Wells Fargo Bank with Schwanbeck's lawsuit, respondent never served defendant Atascadero Ford or defendant Yarborough. Nor did respondent ever inform Schwanbeck that defendants Atascadero Ford and Yarborough had never been served.

⁷ On July 25, 2008, Wells Fargo Bank sent Schwanbeck a notice of intent to sell the repossessed mustang. The first line of the notice clearly states: "We have your 07 Ford Mustang, Serial No. ... because you broke promises in our agreement." (Ex. 2 at p. 115.)

The record does not establish that respondent failed to file oppositions to Wells Fargo Bank's demurrers to the original complaint that respondent filed on March 30, 2011, or to the first amended complaint that respondent filed on July 25, 2011. Instead, the record establishes only that respondent failed to file *timely* oppositions to Wells Fargo Bank's two demurrers. Moreover, resolving all reasonable doubts in respondent's favor, the court finds that respondent filed an untimely opposition to each of Wells Fargo Bank's demurrers.

Even though respondent received notice from the superior court that a readiness conference was going to be held in Schwanbeck's lawsuit on September 5, 2012, respondent failed to appear at the readiness conference. When respondent failed to appear at the readiness conference, the superior court issued an order to show cause (OSC) why the case should not be dismissed and set the OSC for a hearing on September 26, 2012.

Respondent failed to file a response to the OSC. Moreover, even though respondent received notice of the hearing, respondent failed to appear at the September 26, 2012 hearing on the OSC. Accordingly, the superior court properly dismissed Schwanbeck's lawsuit for respondent's failure to appear and failure to properly prosecute Schwanbeck's lawsuit. Respondent never disclosed to Schwanbeck the fact that his lawsuit was dismissed because respondent failed to appear and properly prosecute the matter.

Conclusions

Count 1 - (Rule 3-110(A) [Failure to Perform Legal Services with Competence])

Rule 3-110(A) provides that an attorney must not intentionally, recklessly, or repeatedly fail to perform legal services with competence. The record clearly establishes that, by delaying for almost five years (from late 2006 until March 30, 2011) to file a lawsuit against Atascadero Ford, Yarborough, and Wells Fargo Bank; by failing to serve defendants Atascadero Ford and Yarborough with Schwanbeck's lawsuit; by filing untimely oppositions to Wells Fargo Bank's

demurrers to the original and the first amended complaints; by failing to appear at the readiness conference; by failing to file a response to the OSC; and finally, by failing to appear at the hearing on the OSC, respondent both recklessly and repeatedly failed to perform legal services with competence in willful violation of Rule of Professional Conduct 3-110(A).

Count 2 - (§ 6068, subd. (m) [Failure to Communicate])

Section 6068, subdivision (m), provides that an attorney has a duty to promptly respond to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services. The record clearly establishes that by failing to inform Schwanbeck that he failed to serve Atascadero Ford and Yarborough with Schwanbeck's lawsuit and by failing to inform Schwanbeck that his lawsuit was dismissed, respondent failed to keep Schwanbeck reasonably informed of significant developments in a matter in which respondent had agreed to provide legal services in willful violation of section 6068, subdivision (m).

Case No. 13-O-11454 – The Bone Matter

Facts

Linda "Carol" Bone is the executor of the estate of her stepmother, Frances L. Bone (Bone). Prior to her tenure as executor, Carol Bone was the conservator over Bone. Respondent's employment as attorney for Bone terminated no later than April 22, 2011, when Bone died. Although Carol Bone has made repeated requests of respondent to release Bone's papers, files, and property to her, to date, respondent has refused to release all of Bone's papers, files, and property to her.

///

///

///

Conclusions

Count 3 - (Rule 3-700(D)(1) [Failure to Return Client Papers/Property])

Rule 3-700(D)(1) requires an attorney, upon termination of employment, to promptly release to the client, at the client's request, all client papers and property, subject to any protective order or non-disclosure agreement. This includes pleadings, correspondence, exhibits, deposition transcripts, physical evidence, expert's reports and other items reasonably necessary to the client's representation, whether the client has paid for them or not. The record clearly establishes that respondent willfully violated rule 3-700(D)(1) because, as respondent admits, he has not released all Bone's papers and files to Carol Bone despite Carol Bone's requests that he do so.

Mitigation⁸

In mitigation, respondent asserts that his delay in filing the Schwanbeck lawsuit was due to the fact that Wells Fargo Bank was investigating Schwanbeck's allegations of fraud against Atascadero Ford and Yarborough. Even if this is true, it does not establish a mitigating circumstance by clear and convincing evidence. Fraud has a two-year statute of limitations. No reasonable attorney would permit a defendant to investigate the actions of a codefendant for fraud for almost five years (from late 2006 to early 2011) without filing a lawsuit (or obtaining a waiver of the statute of limitations from all defendants) to protect the client's rights.

Respondent also asserts that his failures to serve Atascadero Ford and Yarborough and to file timely oppositions to Wells Fargo Bank's demurrers are mitigated by the facts that Atascadero Ford is allegedly no longer an entity and that Yarborough had left the area and is rumored to be hiding in Alaska and broke. Even if these facts are true, they do not establish a

⁸ All references to standards (stds.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

mitigating circumstance by clear and convincing evidence. First, there are multiple methods of pursuing corporations that lose their corporate status. Second, these alleged facts call into question respondent's naming Atascadero Ford and Yarborough as defendants in the first instance. Third, once respondent discovered these alleged facts, respondent should have discussed them with his client and promptly dismissed defendants Atascadero Ford and Yarborough from the lawsuit if he was not going to prosecute the lawsuit against them. Instead, respondent allowed the Schwanbeck lawsuit to needlessly burden the superior court's docket after he settled with Wells Fargo Bank and caused the superior court needlessly (1) to schedule, serve notice of, and hold the readiness conference in early September 2012; (2) to issue and serve the OSC on respondent in early September 2012; and (3) to schedule and hold the hearing on the OSC in late September 2012. Respondent's misconduct clearly harmed the administration of justice, which the court finds to be an aggravating circumstance *post*.

Respondent also argues that it was not necessary for him to oppose Wells Fargo Bank's demurrers because "Respondent settled Schwanbeck's case for \$3,000.00 with Wells Fargo Bank." Assuming this is true, it too fails to establish a mitigating circumstance by clear and convincing evidence.

Respondent's failure to promptly dismiss Wells Fargo Bank once Schwanbeck accepted Wells Fargo Bank's \$3,000 settlement offer clearly harmed the administration of justice, which the court finds is an aggravating circumstance *post*.

In sum, respondent failed to establish any mitigating circumstance by clear and convincing evidence.

///

///

///

Aggravation

Prior Record of Discipline (Std. 1.5(a).)

Respondent has two final prior records of discipline (*Gustin I* and *Gustin II*). The hearing department has also filed a decision in another non-final disciplinary matter (*Gustin III*) which is currently on review in the review department.⁹ However, the aggravating weight of *Gustin I* is reduced significantly by its remoteness; the aggravating weight of *Gustin II* is reduced significantly by its lack of severity and age; and not only is *Gustin III* on review and therefore no final discipline recommendation has been made in the State Bar Court in that matter, the aggravating weight of *Gustin III* is diminished by the fact that the misconduct in that proceeding occurred during the same time period as the misconduct in the present proceeding (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619).

Gustin I

On April 13, 1995, the Supreme Court filed an order in *In re Dale Irving Gustin on Discipline*; case number S044800 (State Bar Court case number 92-O-11303, etc.) placing respondent on one year's stayed suspension and two years' probation on conditions (but no actual suspension). That discipline was imposed on respondent in accordance with a stipulation as to facts and disposition that respondent entered into with the State Bar and that was approved by the State Bar Court in an order filed on December 6, 1994, in State Bar Court case number 92-O-11303, etc. (*Gustin I* stipulation). In the *Gustin I* stipulation, respondent stipulated to committing a total of five ethical violations in two separate client matters. In the first client matter, respondent stipulated to failing to perform legal services competently (rule 3-110(A)) and to failing to properly account for client funds and disburse client funds (rule 4-100(B)(3)&(4)).

⁹ Even though the State Bar proffered a copy of the *Gustin III* decision into evidence as an aggravating circumstance, the State Bar failed to notify this court that the review department abated its review of the *Gustin III* decision pending this court's decision in the present proceeding. Accordingly, this court takes judicial notice of that fact sua sponte.

In the second client matter, respondent stipulated to failing to perform competently (rule 3-110(A)) and improper withdrawal from employment (3-700(A)(2)).

Gustin II

In mid-2003, respondent was privately reproved by the State Bar Court in case number 02-O-11861, in accordance with a stipulation regarding facts, conclusions of law, and disposition that respondent entered into with the State Bar and that was approved by the State Bar Court in an order filed on July 3, 2003 (*Gustin II* stipulation). In the *Gustin II* stipulation, respondent stipulated to committing two ethical violations in a single client matter. Specifically, respondent stipulated to failing to respond to the client's status inquiries (§ 6068, subd. (m)) and to failing to competently perform legal services (rule 3-110(A)) by failing to complete the legal services within the time frame expected by the client.

Gustin III

On April 19, 2013, State Bar Court Judge Donald F. Miles filed a decision in case number 11-O-17015, etc. (*Gustin III* decision). In the *Gustin III* decision, the court found that respondent was culpable on two counts of misconduct in a single client matter and recommended that respondent be placed on two years' stayed suspension and three years' probation on conditions, including a six-month actual suspension that is to continue until respondent pays three sanction awards, which combined total \$8,738.¹⁰ In accordance with a May 2, 2013 order, the discipline recommendation in the *Gustin III* decision was modified to provide that, if respondent remains suspended for two years or more as a result of his not paying the \$8,738 in sanctions, then respondent's actual suspension will continue until respondent establishes his rehabilitation, fitness to practice, and learning in the law in accordance with standard 1.2(c)(1) (formerly standard 1.4(c)(ii).)

¹⁰ The recommendation in the *Gustin III* decision does not include a requirement that respondent pay interest on the \$8,738 in unpaid sanctions.

In the *Gustin* III decision, in count one, the court found that respondent willfully violated his duty to obey court orders issued in connection with or in the course of his profession, which he ought in good faith obey (§ 6103) when respondent failed to pay sanctions totaling \$8,738 in accordance with two superior court sanction orders, which were filed on March 11, 2011, and May 26, 2011, respectively. The superior court imposed those sanctions under Code of Civil Procedure section 128.7, which requires that an attorney or party sign all pleadings, petitions, motions, or similar papers. The signature acts as a certification: (1) that the pleading is being presented for a proper purpose; (2) that the claims, defenses, and other legal contentions made in the pleading are warranted by existing law or by a nonfrivolous argument for a change to existing law or the creation of new law; and (3) the allegations and factual contentions in the pleading have evidentiary support or are likely to have such support after a reasonable opportunity to investigate. An attorney who signs a pleading personally certifies that Code of Civil Procedure section 128.7's requirements have been met.

In count two, the court in *Gustin* III found that respondent willfully violated his duty to report the imposition of sanctions against him to the State Bar within 30 days after the time he learns of them (§ 6068, subd. (o)(3)) because respondent never reported the sanctions totaling \$8,738 to the State Bar.

Multiple Acts (Std. 1.5(b).)

Respondent's misconduct in the present proceedings evidences multiple acts of misconduct.

Harm to Client/Public/Administration of Justice (Std. 1.5(f).)

As noted *ante*, respondent's present misconduct caused significant harm to the administration of justice. In addition, Carol Bone testified respondent's refusal to return Bone's files has been devastating to her and that as result she has lost trust in attorneys.

Indifference Toward Rectification/Atonement (Std. 1.5(g).)

To date, respondent has still not turned over Bone's file to the executor of Bone's estate. Nonetheless, respondent asserts that he is acting in the best of interests of Bone. Moreover, respondent asserts in mitigation that he is justified in withholding certain handwritten letters he received from Bone while she was living because they allegedly deal with the possible misappropriation of Bone's funds by relatives and the possible forgery of Bone's will and because he believes that the letters are evidence of a crime against Bone. First, respondent has not established that the letters deal with possible misappropriation or forgery or that he honestly believes that the letters are evidence of a crime. Second, even if the letters do in fact deal with possible misappropriation or forgery and even if respondent honestly believes that the letters are evidence of a crime, rule 3-700(D)(1) does not contain an evidence-of-a-crime exception.

Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the profession. (Std. 1.1; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Second, the court looks to decisional law for guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.7(a) provides: "If a member commits two or more acts of misconduct and the Standards specify different sanctions for each act, the most severe sanction must be imposed."

However, as noted *ante*, the misconduct in *Gustin III* and the misconduct in the present proceeding occurred during the same time period. Accordingly, the court must consider the two proceedings as one and determine what the appropriate level of discipline would be if the two proceedings were brought at the same time. (*In the Matter of Sklar, supra*, 2 Cal. State Bar Ct. Rptr. at p. 619.) The most severe sanction for the misconduct found in *Gustin III* and the present proceeding is found in standard 2.8(a), which applies to respondent's willful violations of section 6103 in *Gustin III*. Standard 2.8(a) provides: "Disbarment or actual suspension is appropriate for disobedience or violation of a court order related to the member's practice of law"

In *Gustin III*, the State Bar requested that respondent be actually suspended for two years and until he pays the sanctions totaling \$8,738, and cited to *In the Matter of Katz* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 430 to support its request. The court in *Gustin III*, however, aptly concluded "that the State Bar's recommended discipline is neither necessary nor supported by the cited authority. While this court agrees that respondent shares many of the same non-redeeming qualities that were present in *Katz*, including respondent's conduct in this proceeding evidencing his complete lack of remorse, the court also concludes the respondent in *Katz* was guilty of acts of misconduct substantially more numerous and severe than those involved here, including acts of moral turpitude. In addition, the harm caused by the misconduct in *Katz* was more substantial than that caused here."

The court in *Gustin III* then concluded "that a stayed suspension of two years, coupled with a three-year probation, including a period of actual suspension of a minimum of six months and until respondent pays [the \$8,738 in] sanctions awarded pursuant to [Code of Civil Procedure] section 128.7, is appropriate" This court concludes that the appropriate level of discipline for the misconduct found in *Gustin III* and the present proceeding had the two proceedings been brought as one would have been two years' stayed suspension and three years'

probation on conditions, including a one-year period of actual suspension continuing until respondent paid the \$8,738 in sanctions, and that if respondent remained suspended for two years or more as a results of his not paying the sanctions, that his actual suspension continue until he made the requisite showing of rehabilitation, fitness to practice, and present learning and ability in the general law under standard 1.2(c)(1). However, as the hearing department has already recommended an actual suspension that will last for at least six months in *Gustin III* (State Bar Court case numbers 11-O-17015-DFM (12-O-11473)), the court will recommend in this proceeding that respondent be placed on two years' stayed suspension and three years' probation on conditions, including a six-month period of actual suspension.

Recommendations

Discipline

The court recommends that respondent Dale Irving Gustin, State Bar Number 76642, be suspended from the practice of law in California for two years, that execution of that period of suspension be stayed, and that respondent be placed on probation¹¹ for a period of three years subject to the following conditions:

1. Respondent is suspended from the practice of law for the first six months of probation.
2. Respondent is to comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation.
3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar under Business and Professions Code section 6002.1, subdivision (a), including respondent's current office address and telephone number or, if no office is maintained, respondent's address to be used for State Bar purposes, respondent must report such change in writing to the State Bar's Membership Records Office and Office of Probation.
4. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10. Under penalty of perjury, respondent

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

must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation during the preceding calendar quarter. In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the probation period and no later than the last day of the probation period.

5. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.
6. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)
7. At the expiration of the period of probation, if respondent has complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.

Multistate Professional Responsibility Examination

It is recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the Supreme Court order imposing discipline in this matter and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

California Rules of Court, Rule 9.20

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

///

///

///

Costs

It is further recommended that costs be awarded to the State Bar in accordance with section 6086.10 and that such costs be enforceable both as provided in section 6140.7 and as a money judgment.

Dated: February ___, 2015.

PAT E. McELROY
Judge of the State Bar Court