

**STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT - LOS ANGELES**

In the Matter of)	Case No. 01-O-02625; 01-O-04251;
)	01-O-05300; 01-O-04162;
DUANE R. FOLKE,)	02-O-11285; 02-O-12362;
)	02-O-10672
Member No. 137321,)	
)	DECISION AND ORDER FILING AND
<u>A Member of the State Bar.</u>)	SEALING CERTAIN DOCUMENTS

INTRODUCTION AND SIGNIFICANT PROCEDURAL HISTORY

This original disciplinary proceeding involving respondent Duane R. Folke (respondent) is based on respondent's violations of provisions of the State Bar Act and the Rules of Professional Conduct of the State Bar of California.

After the filing of certain disciplinary charges against respondent in May 2002, respondent sought to participate in the State Bar's Lawyer Assistance Program (LAP) and the State Bar Court's Alternative Discipline Program (ADP).¹

On October 2, 2002, respondent executed a Participation Agreement with the LAP.

In late 2002, respondent submitted to the court a declaration and a letter from a mental health professional which established that at the time of his misconduct, respondent was suffering from substance abuse and mental health issues.

Thereafter, pursuant to an order filed on December 24, 2002, respondent was provisionally accepted into the ADP, pending respondent's execution of the ADP Contract and approval of a stipulation as to facts and conclusions of law.

¹The ADP was formerly known as the State Bar Court's Pilot Program for Respondent's with Substance Abuse or Mental Health Issues.

On October 9, 2003, the parties executed a Stipulation Re Facts and Conclusions of Law,² and on October 10, 2003, the court lodged the State Bar's brief regarding the issue of the appropriate discipline in this matter.³

Thereafter, on April 27, 2004, the court lodged its Decision Re Alternative Recommendations for Degree of Discipline setting forth the recommended discipline if respondent successfully completed or was terminated from the court's ADP. On that same day, respondent entered into a Contract and Waiver for Participation in the State Bar Court's ADP (Contract), and the parties' Stipulation Re Facts and Conclusions of Law and the order approving the stipulation was lodged with the court.

The LAP issued a Certificate of One Year Participation in the Lawyer Assistance Program dated March 5, 2007, which reflects respondent had complied with all drug testing requirements set forth in the LAP Participation Agreement for at least one year prior to March 5, 2007, and that during this time period, no unauthorized substances were detected, and the LAP was not aware of the use of any unauthorized substances during this period.

Respondent successfully completed the LAP on July 30, 2007.

On September 26, 2007, the court, on its own motion, extended the three year ADP participation period indefinitely.

On January 16, 2008, the court issued an order finding that respondent had successfully completed the ADP and giving respondent until January 28, 2008 to file a brief on the issue of the reduction of the low level of discipline. When respondent failed to file such a brief, the matter was submitted for decision on April 9, 2008.

²Respondent's declaration, the physician's letter, and the stipulated facts establish a causal connection between respondent's mental health and substance abuse issues and the misconduct found in this disciplinary proceeding. As such, the court found that respondent had adequately established a nexus between his mental health and substance abuse issues and his misconduct in this matter, i.e., that his mental health and substance abuse issues directly caused the misconduct set forth in this matter.

³Respondent agreed with the proposed range of discipline discussed in the State Bar's brief.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Furthermore, at the time respondent engaged in the misconduct for which he has been found culpable, respondent was suffering from mental health and substance abuse issues which directly caused the misconduct in this proceeding. In accordance with applicable Supreme Court case law, an attorney's rehabilitation from substance abuse problems can be accorded significant mitigating weight if it is established that (1) the abuse was addictive in nature; (2) the abuse causally contributed to the misconduct; and (3) the attorney has undergone a meaningful and sustained period of rehabilitation. (*Harford v. State Bar* (1990) 52 Cal.3d 93, 101; *In re Billings* (1990) 50 Cal.3d 358, 367.)

Likewise, mental health problems or extreme emotional difficulties are a mitigating factor where expert testimony establishes that the mental health problems or emotional difficulties were directly responsible for the misconduct, provided that the attorney also has established, through clear and convincing evidence, that he no longer suffers from the mental health problems or emotional 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.) 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 has successfully completed the LAP and the ADP. Respondent's successful completion of the LAP and the ADP qualify as clear and convincing evidence that respondent no longer suffers from the mental health issues which led to his misconduct and establishes, by clear and convincing evidence, that respondent has undergone a meaningful and sustained period of rehabilitation for his substance abuse problems. (*Harford v. State Bar, supra*, 52 Cal.3d at p. 101; *In re Billings, supra*, 50 Cal.3d at p. 367.) Accordingly, it is appropriate to consider respondent's successful completion of the LAP and the ADP as a further mitigating circumstance. (Rules Proc.

of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, 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.)

The State Bar submitted a brief to the court on the appropriate discipline in this matter. Respondent agreed with the proposed range of discipline discussed in the State Bar's brief. After reviewing the State Bar's brief and considering the standards and case law cited therein, the parties' stipulation setting forth the facts, conclusions of law and aggravating and mitigating circumstances with respect to his disciplinary proceeding, the physician's letter, and respondent's nexus declaration, the parties were advised 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 the ADP.

Respondent entered into a contract to participate in the ADP and successfully completed both the ADP and the LAP. Accordingly, the court will recommend to the Supreme Court the imposition of the discipline set forth in the court's Decision Re Alternative Recommendations for Degree of Discipline if respondent successfully completed the ADP.

RECOMMENDED DISCIPLINE

IT IS HEREBY RECOMMENDED that respondent **DUANE R. FOLKE** be suspended from the practice of law for a period of two years and until (a) he provides satisfactory proof that he has made the restitution set forth below; and (b) he provides satisfactory proof to the State Bar Court of his rehabilitation, present fitness to practice law and present learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. The Court further recommends that execution of such suspension be stayed and that respondent be placed on probation for a period of five years, on the following conditions:

1. Respondent must be actually suspended from the practice of law in the State of California for the first six months of the period of probation and until he provides satisfactory proof to the Office of Probation that he has made restitution to (a) Betty

Ross and Randy Akins, in the amount of \$6,000, plus interest of ten percent (10%) per annum from July 1, 2001, provided that respondent will receive credit for such portion of those monies that respondent is able to satisfactorily prove that either Ross or Akins have recovered from respondent's investigator, James A. Richardson; (b) Octave Hyacinth in the amount of \$2,350, plus interest of ten percent (10%) per annum from July 1, 2001; (c) Emelda Ford and Kenji Howard, in the amounts of (i) \$4,000, plus interest of ten percent (10%) per annum from March 16, 1999; (ii) \$2,500, plus interest of ten percent (10%) per annum from February 9, 1998; (iii) \$1,000, plus interest of ten percent (10%) per annum from April 21, 1999; and (iv) \$2,500, plus interest of ten percent (10%) per annum from January 9, 2000; (d) Wendell Phillips in the amount of \$2,000, plus ten percent (10%) per annum from September 1, 2001; (e) Nedra Armstrong in the amount of \$7,500, plus interest of ten percent (10%) per annum from November 10, 1999; and (f) Armando Oscar Nunez, Jr. in such amount as may be ordered in any fee arbitration proceeding that Nunez may bring against respondent. Respondent agrees to consent to binding arbitration and to abide by any resulting fee arbitration award or order. If the Client Security Fund (CSF) has already reimbursed any of the above-named individuals for all or any portion of their respective losses, respondent must make restitution to CSF of the amount(s) paid, plus applicable interest and costs, in accordance with Business and Professions Code section 6140.5, and must provide satisfactory proof of such payment to the Office of Probation. Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivision (c) and (d). 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 payment(s) provided satisfactory proof of such is or has been shown to the Office of Probation.

2. If respondent's actual suspension reaches or exceeds two years, he must remain suspended from the practice of law until he provides satisfactory proof to the State

Bar Court of his rehabilitation, present fitness to practice law and present learning and ability in the general law pursuant to standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct;

3. Respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct;
4. Within ten (10) calendar days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including his current office address and telephone number, respondent must report such change in writing to both the Office of Probation and to the Membership Records Office of the State Bar;
5. 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 he has complied with the State Bar Act, the Rules of Professional Conduct and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) calendar days, that report must be submitted on the reporting date for the next calendar quarter and must cover the extended period. In addition to all quarterly reports, respondent must submit a final report, containing the same information required by the quarterly reports. The final report must be submitted no earlier than twenty (20) calendar days before the last day of the probation period and no later than the last day of the probation period;
6. Subject to the assertion of applicable privileges, respondent must answer fully, promptly and truthfully, all inquiries of the Office of Probation which are directed to him personally or in writing relating to whether respondent is complying or has complied with these probation conditions;
7. Within one year of the effective date of the Supreme Court's final disciplinary order in this proceeding, respondent must provide the Office of Probation with satisfactory proof of his attendance at a session of State Bar Ethics School and of his passage of

the test given at the conclusion of that session;

8. The period of probation will commence on the effective date of the Supreme Court's final disciplinary order in this proceeding.

Respondent took and passed the Multistate Professional Responsibility Examination (MPRE), administered by the National Conference of Bar Examiners, on August 8, 2003. In light of his passage of the MPRE, this court does not recommend that respondent be required to take and pass the MPRE a second time in this proceeding.

The court recommends that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court and that he be ordered to perform the acts specified in subdivisions (a) and (c) of that rule within thirty (30) and forty (40) calendar days, respectively, after the effective date of the Supreme Court's final disciplinary order in this proceeding.

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.

ORDER FILING AND SEALING CERTAIN DOCUMENTS

The court orders the Case Administrator to file the parties' Stipulation Re Facts and Conclusions of Law lodged on April 27, 2004, including the court's order approving the stipulation,⁴ and the Decision and Order Filing and 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 and all filed documents stamped confidential will be 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

⁴The order approving the stipulation is modified to insert an "x" in the box next to "The stipulation as to facts and conclusions of law is APPROVED."

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.

IT IS SO ORDERED.

Dated: July 8, 2008

RICHARD A. HONN
Judge of the State Bar Court