

**STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT – SAN FRANCISCO**

In the Matter of	)	<b>Case Nos. 03-O-04796-PEM</b>
	)	<b>(04-O-11754;</b>
<b>CHARLA RAE DUKE,</b>	)	<b>04-O-12662; 04-O-13592)</b>
	)	
<b>Member No. 95518,</b>	)	<b>DECISION AND ORDER SEALING</b>
	)	<b>DOCUMENTS</b>
A Member of the State Bar.	)	

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**I. Introduction**

In this disciplinary proceeding, respondent **Charla Rae Duke** stipulated to trust accounting violations, including failing to preserve the identity of client funds, commingling of personal and client funds and issuing insufficiently funded checks.

In May 2006, this court accepted respondent as a participant in the State Bar Court's Alternative Discipline Program (ADP).<sup>1</sup> (Rules Proc. of State Bar, rules 800-807.)<sup>2</sup>

However, respondent has recently been terminated from the State Bar Court's ADP because of her failure to comply with its requirements.

Accordingly, pursuant to rule 803 and in light of her admitted misconduct, the court hereby recommends that respondent be suspended from the practice of law for three years, that execution of the suspension be stayed, and that respondent be placed on probation for three years on conditions that include her actual suspension for two years and until she has shown proof satisfactory to the State Bar Court of her rehabilitation, fitness to practice and learning and ability in the general law

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<sup>1</sup>This program is also known as the State Bar Court's Program for Respondents with Substance Abuse and Mental Health Issues and formerly known as the Pilot Program.

<sup>2</sup>References to rule are to the Rules of Procedure of the State Bar, unless otherwise stated.

pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.

## **II. Significant Procedural History**

### **A. Respondent's Acceptance into the Alternative Discipline Program**

On June 21, 2004, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed a Notice of Disciplinary Charges against respondent. Respondent filed a response.

On May 15, 2006, the court approved a Stipulation re Facts and Conclusions of Law (Stipulation) and accepted respondent into the ADP. On the same day, respondent executed a Contract and Waiver for Participation in the State Bar Court's Alternative Discipline Program (Contract). This court also issued its Confidential Statement of Alternative Dispositions (May 2006 Statement).

Respondent's eligibility and acceptance into the ADP was based on, among other things: 1) her participation in the LAP; 2) the stipulation as to facts and conclusions of law she entered with the State Bar; 3) the nexus evidence she provided; and 4) her agreement to accept the court's low and high levels of recommended discipline set forth in the May 2006 Statement. (Rules Proc. of State Bar, rule 802.) The terms and conditions of participation were set forth in the Contract.

Specifically, paragraph 14 of the Contract provides as follows:

Respondent acknowledges and agrees that Respondent's participation in the ADP may be terminated by the Court for non-compliance with the ADP requirements, including but not limited to the following: (a) positive urinalysis tests on multiple occasions; (b) missed treatment or group meetings; (c) allegations of additional misconduct which occurred after Respondent was accepted into the ADP; or (d) failure to comply with the terms of this Contract.

Respondent agreed to fulfill all of the requirements set forth by the ADP Judge as conditions for respondent's ongoing participation in the ADP, including being placed on involuntary inactive enrollment.

### **B. Respondent's Termination from the Alternative Discipline Program**

In September 2007, the court issued an order to show cause (OSC) why respondent should not be terminated from the ADP. The State Bar alleged that respondent had violated certain conditions of her agreement with LAP and requirements under the Contract. Specifically, the State Bar alleged that respondent failed to cooperate with its investigation of two pending matters against

respondent (Case Nos. 06-O-13944 and 07-O-10371).

On October 24, 2007, the court held an in-person hearing on whether respondent should be terminated from the ADP. At the hearing, the State Bar was represented by Deputy Trial Counsel Cydney Batchelor. But respondent did not appear.

Consequently, by order filed October 24, 2007, the court terminated respondent from the ADP based upon her noncompliance with the conditions of the ADP in that she failed to appear in court for an OSC hearing regarding termination from the ADP and she failed to reply to the State Bar investigator's request for information regarding two pending matters against her.

Moreover, respondent's October 2007 motion for an extension of time to commence the inactive enrollment to June 1, 2008, is hereby denied in light of her termination from the ADP and the recommended discipline of actual suspension.

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

Respondent was admitted to the practice of law in California on December 16, 1980, and has been a member of the State Bar of California at all times relevant to this proceeding.

The Stipulation, approved by the court and filed on October 24, 2007, is attached and incorporated by reference, as if set forth fully herein.

In summary, respondent stipulated to three violations of professional misconduct involving her client trust account, including failing to preserve the identity of client funds, commingling of personal and client funds and issuing insufficiently funded checks.<sup>3</sup>

Pursuant to the stipulation and in the furtherance of justice, the court dismissed case Nos. 04-O-11754; 04-O-12662; and 04-O-13592 without prejudice.

### **IV. Aggravation and Mitigation**

The parties also stipulated to certain aggravating and mitigating factors. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2.)<sup>4</sup>

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<sup>3</sup>Specific violations were: rule 4-100(A) of the Rules of Professional Conduct and Business and Professions Code section 6106.

<sup>4</sup>All further references to standards are to this source.

**A. Aggravation**

The aggravating factors include respondent's two prior records of discipline and multiple acts of wrongdoing. (Stds. 1.2(b)(i) and (ii).) In her first prior record of discipline, she was actually suspended for 90 days in 1993. In her second prior record, she was actually suspended for 60 days in 1998 for failure to file income tax returns.

**B. Mitigation**

Under standard 1.2(e)(iv), extreme emotional difficulties or physical disabilities suffered by the attorney at the time of the professional misconduct may be considered mitigating. The Supreme Court has held that extreme emotional difficulties are a mitigating factor where expert testimony establishes that those 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.) However, the Supreme Court also has held that, absent a finding of rehabilitation, emotional problems are not considered to be a mitigating factor. (*Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1072-1073; *In re Naney, supra*, 51 Cal.3d at p. 197.)

Here, in accepting respondent into the ADP, the court found that respondent had suffered from depression and serious health issues and that there was a sufficient connection between respondent's depression and health problems and her stipulated misconduct. (Rules Proc. of State Bar, rule 802(c).) Respondent was enrolled in the State Bar's Lawyer Assistance Program (LAP) in February 2005 in a five-year commitment to her recovery program. However, respondent's conduct before this court while participating in the ADP prevent the court from making a finding that respondent has established her sustained rehabilitation by clear and convincing evidence. Therefore, the court will not give respondent any mitigation credit for her participation in the LAP or the ADP.

Furthermore, although the parties stipulated that respondent was candid and cooperative with the State Bar during its resolution of these matters, the mitigating force of this factor is dramatically reduced based on respondent's termination from the ADP. (Std. 1.2(e)(v).)

## V. Degree of Discipline

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, preserve public confidence in the profession and maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; standard 1.3.) Standard 1.6(b) provides that the specific discipline for a particular violation found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing disciplinary sanctions. Standard 1.7(b) provides that if the attorney has a record of two prior impositions of discipline, the degree of discipline would be disbarment unless there are compelling mitigating circumstances. In this matter, respondent's emotional and physical difficulties are considered compelling mitigating factors.

The standards applicable to this proceeding are standards 2.2 and 2.3, which provide for suspension or disbarment, depending upon the gravity of the offenses and the harm to the clients. While the standards are not binding, they are entitled to great weight. (*In re Silvertown* (2005) 36 Cal.4th 81, 92.)

Citing to the standards and *Arm v. State Bar* (1990) 50 Cal.3d 763, the State Bar recommended disbarment if respondent fails to complete the ADP.

Respondent, however, argued that, if she does not successfully complete the ADP, she should be actually suspended two years, citing *In the Matter of Robins* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 708 and *In the Matter of Sampson* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 119 in support of her argument.

In *Sampson*, the attorney was actually suspended for 18 months and until he made restitution of about \$25,000 for failing to supervise his personal injury cases and recklessly disregarding his trust account obligations for almost a year, failing to retain \$34,000 in settlement funds in the trust account and failing to provide competent legal services. He had no prior record of discipline in 13 years of practice. Aggravating factors included multiple instances of misconduct and significant harm to a medical lienholder.

The court also finds *Porter v. State Bar* (1990) 52 Cal.3d 518 to be instructive.

In *Porter*, the Supreme Court imposed a two-year actual suspension for an attorney who committed serious misconduct in nine client matters, including misappropriation of settlement funds, writing a bad check, forgery, lying to clients, and unlawfully practice law while suspended. In one matter, he settled the case for \$5,000 without the client's consent or knowledge, forged the client's name to a release and her endorsement on the check, and kept the money. He had strong mitigating factors, such as extreme emotional difficulties and rehabilitation evidenced by community and professional activities.

Here, respondent's misconduct is less egregious than that of *Porter* in that it did not involve nine clients or deceit. However, respondent had two prior records of discipline.

Respondent cited to depression and serious health problems as the major contributing factors to her misconduct. Respondent was seeking and obtaining professional treatment and support to address her difficulties. However, since respondent has been terminated from the ADP, she is not entitled to any mitigating credit for her efforts since she has failed to establish her rehabilitation by clear and convincing evidence.

Therefore, after considering the scope of respondent's acts of misconduct, all of the mitigating and aggravating circumstances and the relevant case law, the court concludes that the imposition of a lengthy period of actual suspension with appropriate conditions is warranted. In particular, as conditions of probation, the court is recommending that respondent be required to continue with her counseling.

## **VI. Recommendation**

**It is hereby recommended** that respondent **Charla Rae Duke** be suspended from the practice of law in the State of California for three years and until she has shown proof satisfactory to the State Bar Court of her rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii), that execution of such suspension be stayed and that respondent be placed on probation for three years on the following conditions:

1. Respondent must be actually suspended from the practice of law for the first two years of the period of probation and until she has shown proof satisfactory to the State Bar Court of her

- rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii);
2. Respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct;.
  3. Within 10 calendar days of any change in the information required to be maintained on the State Bar's membership records pursuant to Business and Professions Code section 6002.1, subdivision (a), including her current office address and telephone or, if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office of the State Bar and to the Office of Probation;
  4. Respondent must submit written quarterly reports to the Office of Probation no later than each January 10, April 10, July 10 and October 10 of the period of probation. Under penalty of perjury, respondent must state whether she has complied with the State Bar Act, the Rules of Professional Conduct and the conditions of probation during the preceding calendar quarter. If the first report will cover less than 30 days, that report must be submitted on the reporting due 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 20 days before the last day of the probation period and no later than the last day of such period;
  5. Within 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;
  6. Subject to the assertion of applicable privileges, respondent must answer fully, promptly and

truthfully, any inquiries of the Office of Probation that are directed to her personally or in writing, relating to whether she 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 to the Office of Probation satisfactory proof of her attendance at a session of State Bar Ethics School and of passage of the test given at the end of that session;
8. Respondent must obtain psychiatric or psychological treatment from a duly licensed psychiatrist, psychologist or clinical social worker at respondent's own expense at a minimum of two times per month, and must furnish evidence to the Office of Probation that she is so complying with each quarterly report. Treatment should commence no later than 30 days after the effective date of the discipline in this matter. Treatment should continue for the period of probation or until a motion to modify this condition is granted and the ruling becomes final;
9. Within one year of the effective date of the discipline herein, respondent must supply to the Office of Probation satisfactory proof of attendance at a session of the Ethics School Client Trust Accounting School, within the same period of time, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015-2299, and passage of the test given at the end of that session. Arrangements to attend Ethics School Client Trust Accounting School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE), and respondent would not receive MCLE credit for attending Trust Accounting School (Rules Proc. of State Bar, rule 3201);
10. Reporting requirements.
  - a. If respondent possesses client funds at any time during the period covered by a required quarterly report, respondent must file with each required report a certificate

from respondent, certifying that: respondent has maintained a bank account in a bank authorized to do business in the State of California, at a branch located within the State of California, and that such account is designated as a “Trust Account” or “Client’s Funds Account”; and respondent has kept and maintained the following: a certified public accountant or other financial professional approved by the Office of Probation, certifying that: respondent has maintained a bank account in a bank authorized to do business in the State of California, at a branch located within the State of California, and that such account is designated as a “Trust Account” or “Client’s Funds Account”; and respondent has kept and maintained the following:

- i. a written ledger for each client on whose behalf funds are held that sets forth:
  1. the name of such client,
  2. the date, amount, and source of all funds received on behalf of such client,
  3. the date, amount, payee and purpose of each disbursement made on behalf of such client, and
  4. the current balance for such client;
- ii. a written journal for each client trust fund account that sets forth:
  1. the name of such account,
  2. the date, amount, and client affected by each debit and credit, and
  3. the current balance in such account.
- iii. all bank statements and canceled checks for each client trust account; and
- iv. each monthly reconciliation (balancing) of (i), (ii), and (iii) above, and if there are any differences between the monthly total balances reflected in (i), (ii), and (iii) above, the reason for the differences, and that respondent has maintained a written journal of securities or other properties held for a client that specifies:
  1. each item of security and property held;

2. the person on whose behalf the security or property is held;
  3. the date of receipt of the security or property;
  4. the date of distribution of the security or property; and
  5. the person to whom the security or property was distributed.
- b. If respondent does not possess any client funds, property or securities during the entire period covered by a report, respondent must so state under penalty of perjury in the report filed with the Office of Probation for that reporting period. In this circumstance, respondent need not file the accountant's certificate described above.
- c. The requirements of this condition are in addition to those set forth in rule 4-100 of the Rules of Professional Conduct;
11. The period of probation will commence on the effective date of the final disciplinary order of the Supreme Court imposing discipline in this proceeding; and
12. At the expiration of the period of this probation, if respondent has complied with all of the terms and conditions of probation, the order of the Supreme Court suspending respondent from the practice of law for three years will be satisfied and that suspension will be terminated.

It is further recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE), administered by the National Conference of Bar Examiners, and to provide proof of passage of the MPRE to the Office of Probation, during the period of actual suspension. Failure to pass the MPRE, and to provide proof of such passage, within the specified time will result in actual suspension by the State Bar Court Review Department, without further hearing, until respondent provides the required proof of passage of the MPRE.

It is also recommended that respondent be ordered to comply with the requirements of the California Rules of Court, rule 9.20, and that she be ordered to perform the acts specified in rule 9.20(a) and (c) within 30 and 40 calendar days, respectively, from the effective date of the Supreme Court's final disciplinary order in this proceeding. Failure to comply with rule 9.20 could result in disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent is required to file a

rule 9.20(c) affidavit even if she has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

### **VII. Costs**

It is further 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.

### **VIII. Order Sealing Documents**

In the course of determining respondent's eligibility for participation in the State Bar Court's Alternative Discipline Program, and while respondent was participating in the Program, various documents were submitted to the court for review under confidential cover, including reports and evaluations regarding respondent's recommended treatment for participation in the Lawyer Assistance Program. Pursuant to Business and Professions Code section 6234(a) and rule 806 of the Rules of Procedure of the State Bar of California, all information concerning the nature and extent of a respondent's treatment is absolutely confidential and is not to be disclosed to the public absent an express written waiver by the respondent.

In light of the foregoing,

**IT IS HEREBY ORDERED** that, pursuant to rules 23 and 806 of the Rules of Procedure of the State Bar of California, the following documents are to remain confidential and sealed:

1. All reports and evaluations by mental health professionals that were submitted to the court as part of respondent's participation in the Alternative Discipline Program;
2. All information concerning the nature and extent of respondent's treatment provided by the LAP, including, but not limited to, participation reports, application agreements and participation agreements; and
3. Contract and Waiver for Participation in the State Bar Court's Alternative Discipline Program.

**IT IS FURTHER ORDERED** that the foregoing 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 official 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.

Dated: November \_\_\_\_, 2007

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**PAT McELROY**  
Judge of the State Bar Court