

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of) Case Nos.: **06-O-14552-RAP**
TODD EDWARD MACALUSO,) (07-O-10134; 07-O-10899)
Member No. 133009,)
A Member of the State Bar.)
) **DECISION AND ORDER SEALING**
) **CERTAIN DOCUMENTS**
)

Introduction¹

In this disciplinary proceeding, respondent Todd Edward Macaluso (respondent) was accepted for participation in the State Bar Court's Alternative Discipline Program (ADP). As the court has now found that respondent has successfully completed the ADP, the court will recommend to the Supreme Court that respondent be suspended from the practice of law in California for two years, that execution of that period of suspension be stayed, and that he be placed on probation for three years subject to certain conditions, including a six-month period of suspension.

Pertinent Procedural History

On January 23, 2009, the State Bar of California's Office of the Chief Trial Counsel (State Bar) filed a Notice of Disciplinary Charges (NDC) against respondent in case nos. 06-O-

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

14552 (07-O-10134; 07-O-10899). Respondent sought to participate in the State Bar Court's ADP. On March 26, 2009, this matter was referred to the ADP.

On June 29, 2009, respondent submitted a declaration to the court, establishing a nexus between his mental health issues and the charges in case nos. 06-O-14552 (07-O-10134; 07-O-10899). On July 8, 2009, respondent contacted the State Bar's Lawyer Assistance Program (LAP) to assist him with his mental health issue. On November 30, 2009, respondent signed a LAP Participation Plan.

The parties entered into a Stipulation Re Facts and Conclusions of Law (Stipulation) on December 1, 2009. The Stipulation set forth the factual findings, legal conclusions, and mitigating and aggravating circumstances involved in case nos. 06-O-14552 (07-O-10134; 07-O-10899).

On February 8, 2010, the court issued an order enrolling respondent as an inactive member of the State Bar pursuant to section 6233. This order was effective April 26, 2010.

Following briefing by the parties, the court issued a Confidential Statement of Alternative Dispositions and Orders dated February 8, 2010, formally advising the parties of: (1) the discipline which would be recommended to the Supreme Court if respondent successfully completed the ADP, and (2) the discipline which would be recommended if respondent failed to successfully complete, or was terminated from, the ADP. After agreeing to those alternative dispositions, respondent executed the Contract and Waiver for Participation in the State Bar Court's ADP, the court accepted respondent for participation in the ADP, and respondent's period of participation in the ADP began on February 8, 2010.

On February 8, 2010, the court lodged the Confidential Statement of Alternative Dispositions and Orders and the Contract and Waiver for Participation in the State Bar Court's ADP. That same day, the court filed the Stipulation and its accompanying order.

On December 6, 2010, respondent filed a motion to terminate his inactive enrollment and return to active status. On December 16, 2010, the State Bar filed its opposition. On December 21, 2010, the court ordered that respondent's inactive enrollment under Business and Professions Code section 6233 be terminated that same day.

Respondent participated successfully in the State Bar Court's ADP. On October 21, 2011, after receiving a satisfactory evaluation from a mental health professional, the court issued an order finding that respondent has successfully completed the ADP.

Findings of Fact and Conclusions of Law

The parties' Stipulation, including the court's order approving the Stipulation, is attached hereto and hereby incorporated by reference, as if fully set forth herein. In case nos. 06-O-14552 (07-O-10134; 07-O-10899), respondent stipulated to six counts of misconduct including misappropriating client funds (two counts), failing to maintain client funds in trust (two counts), issuing client trust account checks against insufficient funds, and misusing his client trust account.

In aggravation, respondent committed multiple acts of wrongdoing and caused harm to his client. (Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct, stds. 1.2(b)(ii) & 1.2(b)(iv).)²

In mitigation, respondent had no prior record of discipline (std. 1.2(e)(i)), and made full restitution to his client nine days after her original client trust account check was dishonored. Respondent also displayed spontaneous candor and cooperation to the State Bar (std. 1.2(e)(v)), and provided volunteer and pro bono services.

The court also acknowledges respondent's participation in the ADP. Respondent's successful completion of the ADP, qualifies as clear and convincing evidence that respondent no

² All further references to standard(s) or std. are to this source.

longer suffers from the mental health issues which led to his misconduct. Accordingly, it is appropriate to consider respondent's successful completion of the ADP as a mitigating circumstance in this matter. (Std. 1.2(e)(iv).)

Discussion

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

In determining the appropriate alternative discipline recommendations if respondent successfully completed the ADP or was terminated from, or failed to successfully complete, the ADP, the court considered the discipline recommended by the parties, as well as certain standards and case law. In particular, the court considered standards 2.2(a), 2.2(b), and 2.3; and *Palomo v. State Bar* (1984) 36 Cal.3d 785, and *Waysman v. State Bar* (1986) 41 Cal.3d 452.

Because respondent has now successfully completed the ADP, this court, in turn, now recommends to the Supreme Court the imposition of the lower level of discipline, set forth more fully below, contained in the Confidential Statement of Alternative Dispositions and Orders.

Recommended Discipline

It is hereby recommended that respondent **Todd Edward Macaluso**, State Bar Number 133009, be suspended from the practice of law in California for two years, that execution of that period of suspension be stayed, and that he be placed on probation³ for a period of three years subject to the following conditions:

1. Respondent Todd Edward Macaluso is suspended from the practice of law for six months (with credit given for the period of inactive enrollment pursuant to

³ The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

Business and Professions Code section 6233 which commenced on April 26, 2010, and ended on December 21, 2010).

2. Respondent Todd Edward Macaluso must also comply with the following additional conditions of probation:
 - a. During the probation period, respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct of the State Bar of California;
 - b. Within 10 days of any change, respondent must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar of California (Office of Probation), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code;
 - c. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request;
 - d. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10 and October 10 of the period of probation. Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. Respondent must also state whether there are any proceedings pending against him in the State Bar Court and if so, the case number and current status of that proceeding. If the first report would cover less than 30 days, that report must be submitted on the next quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than 20 days before the last day of the period of probation and no later than the last day of the probation period;
 - e. Subject to the assertion of applicable privileges, respondent must answer fully, promptly and truthfully any inquiries of the Office of Probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with the probation conditions;
 - f. Within one year of the effective date of the discipline herein, respondent must provide to the Office of Probation satisfactory proof of attendance at

- a session of the State Bar Ethics School, and passage of the test given at the end of that session;
- g. 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 State Bar's Client Trust Accounting School, within the same period of time, and passage of the test given at the end of that session; and
- h. Respondent must comply with all provisions and conditions of his Participation Agreement with the Lawyer Assistance Program (LAP) and must provide the Office of Probation with certification of completion of the LAP. Respondent must immediately report any non-compliance with any provision(s) or condition(s) of his Participation Agreement to the Office of Probation. Respondent must provide an appropriate waiver authorizing the LAP to provide the Office of Probation and this court with information regarding the terms and conditions of respondent's participation in the LAP and his compliance or non-compliance with LAP requirements. Revocation of the written waiver for release of LAP information is a violation of this condition. Respondent will be relieved of this condition upon providing to the Office of Probation satisfactory certification of completion of the LAP.

At the expiration of the period of probation, if Todd Edward Macaluso has complied with all conditions of probation, the two-year period of stayed suspension will be satisfied and that suspension will be terminated.

Multistate Professional Responsibility Examination

It is also recommended that Todd Edward Macaluso take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, MPRE Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and provide proof of passage to the Office of Probation in Los Angeles, within one year after the effective date of the discipline herein. Failure to pass the MPRE within the specified time results in actual suspension by the Review Department, without further hearing, until passage. (But see Cal. Rules of Court, rule 9.10(b), and Rules Proc. of State Bar, rule 5.162.)

Costs

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

Direction Re Decision and Order Sealing Certain Documents

The court directs a court case administrator to file this Decision and Order Sealing Certain Documents. Thereafter, pursuant to rule 5.388 of the Rules of Procedure of the State Bar of California (Rules of Procedure), all other documents not previously filed in this matter are ordered sealed pursuant to rule 5.12 of the Rules of Procedure.

It is further ordered that protected and sealed material will only be disclosed to: (1) parties to the proceeding and counsel; (2) personnel of the Supreme Court, the State Bar Court, and independent audiotape transcribers; and (3) personnel of the Office of Probation when necessary for their duties. Protected material will be marked and maintained by all authorized individuals in a manner calculated to prevent improper disclosures. 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: October 27, 2011.

RICHARD A. PLATEL
Judge of the State Bar Court