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STATE BAR COURT
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LOS ANGELES

PUBLIC MATTER

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of)	Case No.: 12-H-11014-DFM
)	
MICHAEL LEWIS DUNCAN,)	DECISION AND ORDER SEALING
)	CERTAIN DOCUMENTS
Member No. 93385,)	
)	
<u>A Member of the State Bar.</u>)	

Introduction¹

In this disciplinary proceeding, Respondent Michael Lewis Duncan (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 recommends 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 two years subject to certain conditions, including a six-month period of suspension, with credit given for the period of inactive enrollment commencing on May 1, 2013, and terminating on December 16, 2013, pursuant to section 2033.

Pertinent Procedural History

On May 29, 2012, 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 No. 12-H-11014.

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

Respondent then sought to participate in and was referred to Judge Honn of this court as Program Judge for evaluation for inclusion in the ADP.

On August 1, 2012, he submitted a declaration to the court, establishing a nexus between his mental health issues and the charges in this matter.

The parties entered into a Stipulation Re Facts and Conclusions of Law (Stipulation) in October 2012. The Stipulation set forth the factual findings, legal conclusions, and mitigating and aggravating circumstances involved in this matter.

Respondent had contacted the State Bar of California's Lawyer Assistance Program (LAP) to assist him with his mental health issues. On November 14, 2012, he executed a Participation Agreement with LAP.

Following briefing by the parties, the Program Judge issued a Confidential Statement of Alternative Dispositions and Orders, dated January 30, 2013, 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 January 31, 2013.

On January 31, 2013, the Program Judge issued an order enrolling Respondent as an inactive member of the State Bar pursuant to section 6233. This order was effective May 1, 2013.

On February 7, 2013, 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 April 12, 2013, the Review Department of the State Bar Court issued an order, among other things, increasing the level of actual suspension for the successful completion of the ADP to six months and until Respondent showed proof satisfactory to the State Bar Court of two of the factors enumerated in then-standard 1.4(c)(ii), Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct²: his rehabilitation and fitness to practice. Accordingly, the court issued an Amended Confidential Statement of Alternative Dispositions and Orders, 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. Agreeing to those alternative possible dispositions, Respondent executed the Amended Contract and Waiver for Participation in the State Bar Court's ADP; the court accepted Respondent for continued participation in the ADP; and Respondent did so.

An Amended Order Enrolling Respondent Inactive pursuant to section 6233 was filed on July 11, 2013. This order was effective, nunc pro tunc, May 1, 2013.

After successfully proving rehabilitation and fitness to practice, Respondent's petition for relief from inactive enrollment was granted on November 26, 2013. (State Bar Court case No. 13-V-16017.) Respondent returned to active status and was entitled to resume the practice of law on December 16, 2013.

Respondent participated successfully in the State Bar Court's ADP. On May 9, 2015, the case was reassigned to the undersigned as the Program Judge. On December 5, 2014, after receiving a satisfactory evaluation from a mental health professional, the court issued an order finding that Respondent has successfully completed the ADP.

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

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 No. 12-H-11014, Respondent stipulated to violating rule 1-110 of the Rules of Professional Conduct by not complying with conditions attached to a reproof. In aggravation, Respondent committed multiple acts of wrongdoing, had four prior disciplinary records and was indifferent toward rectification of or atonement for the consequences of his misconduct. (Former stds. 1.2(b)(i), (ii) and (v).) There were no mitigating factors.

Supreme Court and Review Department case law establish that extreme emotional difficulties are a mitigating factor where expert testimony establishes that these 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; *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 701-702.) In contrast, the Supreme Court has 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's successful completion of the ADP qualifies as clear and convincing evidence that Respondent no longer suffers from the mental health issues resulting in his prior misconduct. Accordingly, it is appropriate to consider Respondent's successful completion of the ADP as a mitigating circumstance in this matter. (Former 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 then-standards 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, and 2.9 and *In the Matter of Laden* (Review Dept. 2004) 4 Cal. State Bar Ct. Rptr. 678 [when there is a close nexus between previous misconduct and current probation violation, ordinarily a substantially greater degree of discipline is needed than would otherwise be necessary]; *In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131 [standard 1.7 cannot be applied without regard to other standards, especially standard 1.3; to properly fulfill the purposes of discipline, the nature and chronology of respondent's discipline record must be examined; "Merely declaring that an attorney has three impositions of discipline, without more analysis, may not adequately justify disbarment in every case"]; *In the Matter of Buckley* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 201, 205, fn. 2 [disbarment not imposed as it would be manifestly disproportionate to the respondent's cumulative misconduct]; *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229 [disbarment not imposed due to compelling mitigating circumstances – including mental health issue now under control]; *Arm v. State Bar* (1990) 50 Cal.3d 763 [disbarment not imposed due to compelling mitigating circumstances and no common thread in current and past three disciplinary matters]; *In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208 [disbarment not imposed even though attorney had two prior records of discipline; although priors were not remote in time, they were of a different character than misconduct in present matter]; *Blair v. State Bar* (1989) 49 Cal.3d 762 [attorney had three priors but not disbarred; two years' actual suspension];

In the Matter of Shalant (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829 [disbarment recommendation not based solely on the number of respondent's past disciplinary proceedings, but after careful examination of the substance and nature of respondent's disciplinary history with due regard to the facts and circumstances of the present misconduct]; *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697 [nature and extent of respondent's two prior discipline records was not sufficiently severe to justify disbarment recommendation under standard 1.7(b)]; *In the Matter of Bouyer* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 888 [prior record would ordinarily require disbarment under standard 1.7(b) unless compelling mitigating circumstances predominate, but disbarment not imposed as second and third priors did not result in actual suspension and all three priors differ from the current misconduct]; *In the Matter of Shinn* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 96 [two prior records of discipline; disbarment recommendation but first disciplinary matter too remote in time to merit "significant" weight on issue of discipline]; *In the Matter of Rose* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 646; *In the Matter of Respondent X* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 592; and *In the Matter of Posthuma* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 813.

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 Amended Confidential Statement of Alternative Dispositions and Orders.

Recommended Discipline

It is hereby recommended that Respondent **Michael Lewis Duncan**, State Bar Number 93385, 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 two years subject to the following conditions:

1. Respondent Michael Lewis Duncan is suspended from the practice of law for six months (with credit given for the period of inactive enrollment pursuant to Business and Professions Code section 6233 which commenced on May 1, 2013, and ended on December 16, 2013).
2. 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;
3. 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;
4. 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;
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 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;
6. 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;

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.)

7. 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 Michael Lewis Duncan 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 Michael Lewis Duncan provide proof of passage of the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners 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 until passage without further hearing.

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: 2/2/15



DONALD F. MILES
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rules Proc. of State Bar; Rule 5.27(B); Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on February 2, 2015, I deposited a true copy of the following document(s):

**DECISION AND ORDER SEALING CERTAIN DOCUMENTS; and
STIPULATION RE FACTS AND CONCLUSIONS OF LAW**

in a sealed envelope for collection and mailing on that date as follows:

- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

**ELLEN ANNE PANSKY
PANSKY MARKLE HAM LLP
1010 SYCAMORE AVE UNIT 308
SOUTH PASADENA, CA 91030**

- by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

ANAND KUMAR, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on February 2, 2015.



Tammy Cleaver
Case Administrator
State Bar Court