

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – LOS ANGELES

In the Matter of)
) Case No.: **05-O-03058-RAP** (06-O-11185;
) 06-O-14954; 06-O-15005; 07-O-
) 10396; 07-O-10450; 07-O-11028)
DARLA RAE ANDERSON,) & **07-O-10103-RAP** (07-O-13212)
) (Consolidated.)
Member No. 107563,)
) **DECISION & ORDER OF**
) **INACTIVE ENROLLMENT**
A Member of the State Bar.)
_____)

I. INTRODUCTION

In this consolidated original disciplinary proceeding, Deputy Trial Counsel Carla L. Garrett (hereafter DTC Garrett) appeared for the Office of the Chief Trial Counsel of the State Bar of California (hereafter State Bar). Even though respondent **DARLA RAE ANDERSON**¹ appeared in person at a January 23, 2008, status conferences in case number 05-O-03058-RAP, she never filed a response to the notice of disciplinary charges (hereafter NDC) in either that case or case number 07-O-10103-RAP, and her default was entered in both cases. Thereafter, both cases were consolidated for all purposes on October 1, 2008.

¹ Respondent was admitted to the practice of law in the State of California on September 17, 1982, and has been a member of the State Bar of California since that time.

In this proceeding, the State Bar charges respondent with 24 counts of professional misconduct involving six separate client matters. The State Bar recommends that respondent be disbarred. Even though the court finds respondent culpable on only 17 of the 24 counts of misconduct, the court agrees that disbarment is the appropriate discipline recommendation in this proceeding.

II. KEY PROCEDURAL HISTORY

A. Case Number 05-O-03058-RAP

On October 25, 2007, the State Bar filed the NDC in case number 05-O-03058-RAP and properly served a copy of it on respondent at her latest address shown on the official membership records of the State Bar (hereafter official address) by certified mail, return receipt requested in accordance with Business and Professions Code section 6002.1, subdivision (c).² As noted *ante*, respondent appeared in person at a January 23, 2008, status conferences in case number 05-O-03058-RAP, but thereafter, failed to file a response to the NDC.³ Accordingly, on June 6, 2008, the State Bar filed a motion for the entry of respondent's default and properly served a copy of that motion on respondent at her official address by certified mail, return receipt requested. Respondent, however, never filed a response to that motion or to the NDC.

Because all of the statutory and rule prerequisites were met, this court filed an order on June 24, 2008, in which it entered respondent's default in case number 05-O-03058-RAP and, as mandated by section 6007, subdivision (e)(1), ordered respondent's involuntary inactive enrollment. On August 1, 2008, the State Bar filed a waiver of hearing and brief on culpability

² Unless otherwise noted, all further statutory references are to this code.

³ Respondent was required to file a response to the NDC no later than November 19, 2007. (Rules Proc. of State Bar, rule 103(a); see also Rules Proc. of State Bar, rule 63 [computation of time].)

and discipline. On September 20, 2008, the State Bar also filed a certified copy of respondent's prior record of discipline.

B. Case Number 07-O-10103-RAP

On June 24, 2008, the State Bar filed the NDC in case number 07-O-10103-RAP and properly served a copy of it on respondent at her official address by certified mail, return receipt requested in accordance with section 6002.1, subdivision (c). Service of that copy of the NDC was complete upon mailing even if respondent did not receive it. (§ 6002.1, subd. (c); *Bowles v. State Bar* (1989) 48 Cal.3d 100, 107-108; see also *Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

Respondent's response to the NDC was due no later than July 19, 2008. Respondent failed to file a response. Accordingly, on August 14, 2008, the State Bar filed a motion for the entry of respondent's default and properly served a copy of that motion on respondent at her official address by certified mail, return receipt requested. Respondent, however, never filed a response to that motion or to the NDC.

Because all of the statutory and rule prerequisites were met, this court filed an order on September 5, 2008, in which it entered respondent's default in case number 07-O-10103-RAP and, as mandated by section 6007, subdivision (e)(1), again ordered respondent's involuntary inactive enrollment. On September 24, 2008, the State Bar filed a waiver of hearing and brief on culpability and discipline.

On October 1, 2008, the court consolidated case number 05-O-03058-RAP with case number 07-O-10103-RAP for all purposes and took the consolidated matter under submission for decision as of September 24, 2008.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The court's findings of fact are based on: (1) the well-pleaded factual allegations (not the legal contentions or the charges) contained in the two NDC's, which allegations are deemed admitted by the entry of respondent's default (§ 6088; Rules Proc. of State Bar, rule 200(d)(1)(A)); (2) the exhibits attached to the State Bar's waivers of hearing and briefs on culpability and discipline, which exhibits are admitted into evidence in this proceeding (Rules Proc. of State Bar, rule 202(c)); (3) the certified copy of respondent's prior record of discipline that the State Bar filed on September 10, 2008, which the court also admits into evidence (*ibid*); and (4) the facts in the official court files in this consolidated proceeding.

A. Case Number 07-O-10103-RAP

1. The Johnstone Client Matter

In about 2000, K. Johnstone retained respondent to represent her in a wrongful termination matter she wanted to file against Starbucks Coffee Company. And, in November 2002, respondent filed, in the Santa Barbara County Superior Court, a complaint for damages against Starbucks. On about December 26, 2002, Starbucks filed and served on respondent a notice of removal removing the case from the Santa Barbara Superior Court to the United States District Court for the Central District of California. Respondent received the notice of removal.

On about February 19, 2003, the federal district court issued an order to show cause ("OSC") in which it directed respondent to show cause in writing no later than March 7, 2003, why the court should not dismiss the case for want of prosecution. Even though she received notice of the February 19, 2003, OSC, respondent did not inform Johnstone of that order. Nor did respondent file a response to the February 19, 2003, OSC.

On about January 5, 2004, Starbucks filed and served on respondent a motion for summary judgment, which was set for a hearing on February 2, 2004. Respondent received the motion for summary judgment, but she failed to inform Johnstone of the motion.

On about January 6, 2004, Starbucks filed and served on respondent by mail a motion to compel Johnstone to respond to deposition questions and a request for production of documents. The motion to compel was set for a hearing on January 29, 2004. Even though she received the motion to compel, respondent failed to inform Johnstone of the motion.

On about January 22, 2004, Starbucks filed and served on respondent notices of non-opposition to its motion to compel and motion for summary judgment. Respondent received both of those notices.

Neither respondent nor Johnstone appeared at the January 29, 2004, hearing on Starbucks' motion to compel. On January 29, 2004, the federal district court granted the motion to compel and issued an OSC in which it directed Johnstone and/or Respondent to show cause in writing no later than February 11, 2004, why either or both of them should not be sanctioned for failing to appear at the hearing on the motion to compel. Respondent received notice of the January 29, 2004, OSC, but failed to inform Johnstone of that order. Neither respondent nor Johnstone filed a response to the January 29, 2004, OSC.

Respondent failed to appear at the February 2, 2004, hearing on Starbucks' motion for summary judgment. And, on about February 2, 2004, the federal district court granted Starbucks motion for summary judgment and dismissed Johnstone's case against Starbucks with prejudice.

Respondent did not perform any services on behalf of Johnstone in the federal district court. And, on about March 12, 2004, without opposition, the federal district court approved a \$4,526.60 bill of costs against Johnstone in favor of Starbucks.

On about February 23, 2005, Johnstone's new counsel, Attorney Robert Chris Kroes, filed, in the Santa Barbara Superior Court, a complaint against respondent alleging, inter alia, professional negligence (i.e., legal malpractice), fraud, and breach of fiduciary duty. On about March 28, 2006, the superior court entered a default judgment against respondent and in favor of Johnstone on all causes of action in the amount of \$1.5 million. On January 30, 2007, respondent was served with notice of the entry of Johnstone's default judgment. Even though there is no allegation that respondent actually received that notice, the court finds that respondent received it. (Evid. Code, §641 [mailbox rule].) Respondent failed to report the entry of default judgment to the State Bar.

On about February 23, 2007, and then again on about March 6, 2007, a State Bar investigator mailed, to respondent, a letter in which the investigator asked respondent to respond in writing to specific allegations of misconduct that Johnstone had made against respondent. Even though respondent actually received both of those letters, she never responded to them. Nor did she otherwise communicate or cooperate with the investigator.

Count 1 -- Failure to Perform (Rule 3-100(A))

The record clearly establishes that respondent willfully violated rule 3-110(A) by recklessly and repeatedly, if not intentionally, failing to perform legal services with competence in the Johnstone client matter. Specifically, respondent willfully violated rule 3-110(A) when he (1) failed to file a response to the federal district court's February 19, 2003, OSC; (2) failed to attend the January 29, 2004, hearing on Starbucks' motion to compel; (3) failed to attend the February 2, 2004, hearing on Starbucks' motion for summary judgment; and (4) failed to file a response to the district court's January 29, 2004, OSC. However, the record does not establish, by clear and convincing evidence, that respondent willfully violated rule 3-110(A) "by not appearing at the OSC re dismissal held February 19, 2004," or "by not opposing the Bill of Costs

taxed against Johnstone in favor of Starbucks.” Accordingly, those two alleged violations are DISMISSED WITH PREJUDICE.

Count 2 – Failure to Report Fraud Judgment (§ 6068, subd. (o)(2))

The record clearly establishes that respondent willfully violated her duty, under section 6068, subdivision (o)(2), to report the entry of the \$1.5 million civil judgment against him for fraud and breach of fiduciary duty in a professional capacity to the State Bar in writing within 30 days after his knowledge of the order.

Count 3 -- Failure to Cooperate with State Bar (§ 6068, subd. (i))

In count 3, the State Bar charges that respondent willfully violated section 6068, subdivision (i), which requires that an attorney “cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. . . .” The record clearly establishes that respondent willfully violated section 6068, subdivision (i) by failing to respond to the State Bar investigator’s February 23, 2007, and March 6, 2007, letters and by failing to otherwise communicate or cooperate with the investigator.

2. The Holmes Client Matter

In about late 2000, Bradford and Nancy Holmes employed respondent to prepare various corporate documents for their corporation.

Even though the NDC in case number 07-O-10103-RAP alleges that the Holmeses paid respondent a total of \$1,860 in advanced attorney’s fees (see *post*), the NDC fails to clearly allege how much of the \$1,860 in advanced fees respondent earned. At best, the well pleaded factual allegations in the NDC establish the following facts with respect to fees.⁴ On about May

⁴ “A default admits *the material allegations of the complaint*, and no more. . . . [T]he relief given to the plaintiff cannot exceed that which the law awards as the legal conclusion *from the facts alleged* [in the complaint].” (*Ellis v. Rademacher* (1899) 125 Cal. 556, 557, italics added; see also *Jackson v. Bank of America* (1986) 188 Cal.App.3d 375, 387-388.)

11, 2001, the Holmeses paid respondent \$360 in advanced attorney's fees. And, on about December 17, 2003, the Holmeses paid respondent an additional \$1,500 in advanced attorney's fees. Respondent deposited the \$1,500 payment into his client trust account (hereafter CTA). Also, on about December 17, 2003, respondent met with the Holmeses and thereby earned \$337.50 in fees. Respondent, however, did not to perform any legal services for the Holmeses after that time. As of about January 6, 2004, respondent held, in her CTA, a balance of \$1,138.60 in unearned advanced fees on behalf of the Holmeses.

In about December 2006, the Ms. Holmes telephoned respondent and left her a message to schedule a shareholder's meeting. But respondent did not communicate with the Holmeses. On about December 27, 2006, Ms. Holmes sent respondent a letter regarding her legal services and asked respondent contact her and her husband. Respondent, however, did not respond to Ms. Holmes's letter.

Before March 2007, Mr. Holmes left several telephone messages for respondent asking respondent to call him, but respondent did not reply to those messages. By about March 6, 2007, respondent's CTA had a zero balance. On about March 7, 2007, and then again on about March 8, 2007, Mr. Holmes sent respondent a letter in which he demanded that respondent refund the advanced fees. Respondent received both of Mr. Holmes's letters, but did not reply to them. Nor did respondent refund any portion of the advanced fees.

Mr. Holmes also tried to reach respondent by telephone on about April 9, 2007, and on about May 11 and 24, 2007, but was unsuccessful. Accordingly, Mr. Holmes left messages for respondent asking her to call him. Respondent never responded to any of Mr. Holmes's messages.

On about August 29, 2007, and then again on about September 17, 2007, a State Bar investigator mailed, to respondent, a letter in which the investigator asked respondent to respond

in writing to specific allegations of misconduct that the Holmeses had made against her. Even though she actually received both of the investigator's letters, respondent never responded to them. Nor did she otherwise communicate or cooperate with the investigator regarding the Holmeses' complaints.

Count 4 -- Failure to Perform (Rule 3-100(A))

The record clearly establishes that respondent willfully violated rule 3-110(A) by recklessly and repeatedly, if not intentionally, failing to perform legal services with competence in the Holmes client matter. Specifically, respondent willfully violated rule 3-110(A) when he (1) failed to prepare the requested corporate documents for the Holmeses; (2) failed to communicate with the Holmeses in response to their multiple telephone messages and letters; (3) failed to return any portion of the \$1,138.60 in unearned fees in response to Mr. Holmes's March 2007 letters; and (4) failed to perform any legal services for the Holmeses after December 17, 2003.

Count 5 -- Failure to Communicate (§ 6068, subd. (m))

In count 5, the State Bar charges that respondent violated her duty, under section 6068, subdivision (m), to adequately communicate significant developments to her clients and to respond to her client reasonable status inquiries when she failed to respond promptly to the Holmeses' letters of December 27, 2006, and of March 6 and 7, 2007, and to the Holmeses' telephone messages of December 2006 and April 9, 2007, and May 11 and 24, 2007. The court cannot agree. The court must decline to find respondent culpable of violating section 6068, subdivision (m) because the State Bar charged and the court relied on respondent's failures to respond to the Holmeses' letters and telephone messages as a basis for finding respondent culpable of failing to perform legal services competently in violation of rule 3-110(A) under count 4 *ante*. To rely on those same failures again as a basis for finding respondent culpable of

failing to communicate in violation of section 6068, subdivision (m) in count 5 would be duplicative. It is generally inappropriate to find such duplicative violations. (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 128, 148.) That is because “the appropriate level of discipline for an act of misconduct does not depend upon how many rules of professional conduct or statutes proscribe the misconduct. [Citation.]” (*Ibid.*) Accordingly, count 5 is DISMISSED WITH PREJUDICE.

Count 6 -- Failure to Refund Unearned Fees (Rule 3-700(D)(2))

In count 6, the State Bar charges that respondent willfully violated rule 3-700(D)(2) by failing “to refund any portion of the advanced unearned \$1,498.60 (\$360 + \$1,138.60 held in her CTA) in fees paid to her by the Holmeses.” The court cannot agree. First, the record fails to clearly establish that the unearned advanced fees equal \$1,498.60.⁵ As noted *ante*, at best, the record establishes that, as of January 6, 2004, there were only \$1,138.60 in unearned advanced fees. Second, and more importantly, the State Bar charged and the court relied on respondent’s failure to refund the unearned fees as a basis for finding respondent culpable of failing to perform legal services competently in violation of rule 3-110(A) under count 4. To rely on that same failure again as a basis for finding respondent culpable of violating rule 3-700(D)(2) in count 6 would be duplicative and improper. (*In the Matter of Torres, supra*, 4 Cal. State Bar Ct. Rptr. at p. 148.) Accordingly, count 6 is DISMISSED WITH PREJUDICE.

Count 7 – Failure to Maintain Client Funds in CTA (Rule 4-100(A))

In count 7, the State Bar charges that respondent violated rule 4-100(A), which provides, in relevant part, as follows:

All funds received or held for the benefit of clients by [an attorney] shall be deposited in one or more identifiable bank accounts labeled "Trust Account,"

⁵ \$360 plus \$1,500 less \$337.50 equals \$1,522.50, not \$1,498.60.

"Client's Funds Account" or words of similar import. . . . No funds belonging to the [attorney] shall be deposited therein or otherwise commingled therewith except as follows:

(1) Funds reasonably sufficient to pay bank charges.

(2) In the case of funds belonging in part to a client and in part presently or potentially to the [attorney], the portion belonging to the [attorney] must be withdrawn at the earliest reasonable time after the [attorney's] interest in that portion becomes fixed. However, when the right of the [attorney] to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

According to the State Bar, respondent violated rule 4-100(A) "By failing to maintain the balance of the advanced fees received for the benefit of the Holmeses in her CTA." Again, the court cannot agree. When it recommended the adopt of rule 4-100 to the Supreme Court, the State Bar expressly informed the court that it did not intend for the rule to require that advance fees be maintained in a CTA. (Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2008) ¶ 9:107.2, pp. 9-16 to 9-17.) In fact, as construed by the courts, rule 4-100 does not require that advanced fees be maintained in a CTA. (Cal. Compendium on Prof. Responsibility, State Bar Formal Opn. No. 2007-172; accord State Bar, Handbook of Client Trust Accounting for California Attorneys, pp. 13, 14.) In short, count 7 is DISMISSED WITH PREJUDICE.

Count 8 – Failure to Account for Client Funds (Rule 4-100(B)(3))

In count 8, the State Bar charges that respondent violated rule 4-100(B)(3), which requires, in relevant part, that attorneys maintain adequate records of advanced fees received and how (and when) they are earned and that attorneys provide their clients with appropriate accountings of that same information. (*In the Matter of Fonte* (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 758.) In determining the nature and scope of this duty to account for advanced fees, the court looks to section 6148, subdivision (b). (*Ibid.*) And section 6148, subdivision (b)

requires that, “Upon request by the client,” an attorney must provide the client with an adequate bill for the legal services performed. (See also *In the Matter of Fonte, supra*, 2 Cal. State Bar Ct. Rptr. at p. 756 [when client repeatedly requested billing backup for legal fees charged and paid, attorney’s failure to account violated rule 4-100(B)(3)]; *Chang v. State Bar* (1989) 49 Cal.3d 114, 128 [when the client disputed amount of legal fees, attorney’s failure to account violated rule 4-100(B)(3)’s predecessor].) The record in the present proceeding does not indicate, much less establish by clear and convincing evidence, that the Holmeses ever requested an accounting of the advanced fees from respondent. Accordingly, count 8 is DISMISSED WITH PREJUDICE.

Count 9 – Moral Turpitude (§ 6103)

In count 9, the State Bar charges that respondent violated section 6106, which proscribes acts involving moral turpitude, dishonesty, or corruption. According the State Bar, respondent violated section 6106 “By misappropriating at least \$1,138.60 of her client’s funds.” The court cannot agree. The \$1,138.60 was not client funds; it was the unearned portion of an advanced fees, which have heretofore never been afforded the status of client or trust funds. As the review department stated more than 17 years ago in *In the Matter of Frazier* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 676, 692, “after reviewing Supreme Court decisions dealing with the retention of unearned advanced fees, we do not find a basis in the case law to support the proposition that an attorney's failure to return . . . unearned fees [for more than three and one-half years] constitutes an act of moral turpitude encompassed by section 6106. [And, in any event, given] that the retention of unearned fees is a violation of an express duty under [former] rule 2-111(A)(3) (now rule 3-700(D)(2)), we need not make a duplicative finding of culpability for the same misconduct under section 6106. [Citation.]” Accordingly, count 9 is DISMISSED WITH PREJUDICE. Nonetheless, as discussed *post*, respondent’s failure to refund the

\$1,138.60 in unearned fees for more than 20 months since Mr. Holmes requested a refund in April 2007 is an aggravating circumstance.

Count 10 -- Failure to Cooperate with State Bar (§ 6068, subd. (i))

The record clearly establishes that respondent willfully violated her duty, under section 6068, subdivision (i), to cooperate in State Bar disciplinary investigations by failing to respond to the State Bar investigator's August 29, 2007, and September 17, 2007, letters and by failing to otherwise communicate or cooperate with the investigator.

B. Case Number 05-O-03058-RAP

1. The Figuerola Client Matter

On about September 4, 2003, Mr. Antonio Figuerola retained respondent to defend the Figuerola Group, Inc. in a trademark infringement case that Nutraceutical filed against it in the United States District Court for the District of Utah. In about September 2003, respondent employed the Utah law firm of Clayton, Howarth & Cannon (hereafter Clayton law firm) and Attorney Grant Clayton of that firm as local cocounsel. Respondent never disclosed, to the Figuerola Group, the division of legal fees that were to be made with the Clayton law firm or the terms of that division. Nor did she obtain the Figuerola Group's written consent to the division of fees with the Clayton law firm.

On about April 8, 2004, Nutraceutical made a motion for entry of default because respondent failed to file an answer for the Figuerola Group. Thereafter, on April 26, 2004, respondent filed an untimely answer for Figuerola Group. On June 16, 2004, the federal district court denied Nutraceutical's motion for entry of default on the condition that respondent personally pay \$1,200 in sanctions to Nutraceutical's counsel. Even though she paid the sanctions to Nutraceutical's counsel, respondent did not notify the Figuerola Group of the sanctions until about May 12, 2005.

At his deposition on about February 21, 2005, Mr. Figuerola admitted that there were numerous documents that were responsive to Nutraceutical' s prior discovery requests that respondent had not produced. (Mr. Figuerola was unaware that Nutraceutical had requested the withheld documents because respondent failed to provide him with a list of requested documents.) Mr. Figuerola agreed to provide the withheld documents to Nutraceutical to complete his deposition.

The promised documents were not timely produced. Accordingly, at an April 15, 2005, hearing, the federal district court ordered respondent to produce all the requested documents no later than April 22, 2005. Between April 15, 2005 and about April 22, 2005, Attorney Clayton sent respondent numerous emails in which he reminded her of the April 22, 2005, discovery production deadline. Respondent, however, still failed to produce the documents by the court's deadline. Accordingly, Nutraceutical filed a motion for discovery sanctions in accordance with Federal Rules of Civil Procedure, rule 37.

On about May 14, 2005, Mr. Figuerola terminated respondent and employed Attorney Clayton and the Clayton law firm as counsel for the Figuerola Group. Between about May 23, 2002, and June 3, 2005, respondent billed the Figuerola Group \$42,869.42 in attorney's fees for services she performed for it in the trademark infringement case. Respondent did not provide any billing statement or summary itemizing her asserted fees. Moreover, after he terminated respondent's employment, Mr. Figuerola learned for the first time that the Figuerola Group owed legal fees to the Clayton law firm for the services it performed before respondent's employment was terminated.

Also, on about May 14, 2005, the Clayton law firm asked respondent for the Figuerola Group's client file. Between about May 14, 2005, and December 15, 2005, respondent did not give the Figuerola file to the Clayton law firm, the Figuerola Group, or Mr. Figuerola.

With respect to Nutraceutical's motion for discovery sanctions, Attorney Clayton spoke with respondent over the telephone on May 16, 2005, and respondent told Clayton that she would provide the requested discovery documents by May 31, 2005. Respondent, however, again failed to produce the requested documents as promised.

On about May 25, 2005, the Figuerola Group telephoned respondent's office and again asked respondent to send its file to the Clayton law firm. Respondent, however, still failed to send the file to the Clayton law firm. Thus, on about June 17, 2005, the Figuerola Group sent a letter to Respondent demanding that she immediately send its file to the Clayton law firm. Moreover, despite additional requests for the Figuerola Group's file in about August and September 2005, respondent still failed to send the file to the Clayton law firm.

On about September 24, 2005, Nutraceutical filed another motion for sanctions against the Figuerola Group. In that motion, Nutraceutical demanded \$13,561.05 from Figuerola for costs and attorneys fees because respondent failed to timely produce the requested discovery documents.

Count 1 -- Failure to Perform (Rule 3-100(A))

The record clearly establishes that respondent willfully violated rule 3-110(A) by recklessly and repeatedly, if not intentionally, failing to perform legal services with competence in the Figuerola client matter. Specifically, respondent willfully violated rule 3-110(A) when she failed to timely file an answer for the Figuerola Group; failed to tell Mr. Figuerola that she missed the deadline for filing the Figuerola Group's answer; failed to tell Mr. Figuerola that she had paid \$1,200 in sanction to Nutraceutical counsel; and failed to comply with the discovery deadlines, which resulted one or more sanction motions against the Figuerola Group.

Count 2 – Division of Legal Fees (Rule 2-200(A)(1))

In count 2, the State Bar charges that respondent willfully violated rule 2-200(A)(1), which provides that an attorney is not to divide legal fees with a lawyer who is not a partner of, associate of, or shareholder with the attorney unless the client has consented to the division in writing after being given written disclosure of the division and the terms thereof. The record clearly establishes the charged rule 2-200(A)(1) violation. Respondent willfully failed to fully disclose, to the Figuerola Group in writing, the division of legal fees with the Clayton law firm and to thereafter obtain the Figuerola Group's written consent to the division.

Count 3 – Failure to Release Client File (Rule 3-700(D)(1))

In count 3, the State Bar charges that respondent willfully violated rule 3-700(D)(1), which requires that, at the request of the client, an attorney must promptly release to the client all client papers and property. The record clearly establishes the charged violation of rule 3-700(D)(1). After her employment was terminated, respondent failed to release the Figuerola Group's client file to the Clayton law firm, the Figuerola Group, or Mr. Figuerola in accordance with their repeated request that she do so.

Count 4 – Unconscionable Legal Fee (Rule 4-200(A))

In count 4, the State Bar charges that respondent willfully violated rule 4-200(A), which proscribes entering into an agreement for, charging, or collecting an unconscionable fee. According to the State Bar, "By charging her client \$42,869.42 after: subjecting them [sic] to sanctions for failing to file a timely answer; failing to notify them [sic] that she missed the deadline for filing an answer; failing to inform them [sic] of the filing sanctions imposed personally on Respondent; failing to comply with plaintiffs discovery requests; failing to produce discovery documents when repeatedly ordered to by the court; subjecting them [sic] to a motion for discovery sanctions; Respondent entered into an agreement for, charged, or collected an

unconscionable fee.” The court cannot agree. In short, the foregoing facts simply do not constitute clear and convincing evidence that respondent’s fees of more than \$42,000 were unconscionable. As the State Bar is aware, rule 4-200(B) sets forth 11 different factors that are to be considered in determining the conscionability of a fee. The record fails to contain any evidence as to even a single one of those 11 factors. In short, the State Bar has failed to present clear and convincing evidence that the fees respondent charged the Figuerola Group were unconscionable. (*Goldstone v. State Bar* (1931) 214 Cal. 490, 499 [not even an excessive fee is unconscionable unless it is “so exorbitant and wholly disproportionate to the services performed as to shock the conscience of those to whose attention it is called”].) Accordingly, the court must DISMISS count 4 WITH PREJUDICE.

Count 5 – Failure to Communicate (§ 6068, subd. (m))

In count 5, the State Bar charges that respondent violated her duty, under section 6068, subdivision (m) to adequately communicate with her clients. The court cannot agree because the State Bar charged and the court relied on respondent’s failures to notify the Figuerola Group that she did not timely file its answer, that she was sanctioned \$1,200, and that Nutraceutical filed a motion for discovery sanctions as a basis for finding respondent culpable of failing to perform legal services competently in violation of rule 3-110(A) under count 1. To rely on those same failures again as a basis for finding respondent culpable of violating section 6068, subdivision (m) in count 5 would be duplicative and improper. (*In the Matter of Torres, supra*, 4 Cal. State Bar Ct. Rptr. at p. 148.) Accordingly, count 5 is DISMISSED WITH PREJUDICE.

2. The Calderon Client Matter

On about November 16, 2005, respondent received a settlement check for \$2,000 issued by Lags Spine & Sportscares Medical Center, Inc., and payable to only respondent. The check had the notation “Alicia Calderon” typed in the memo section. Calderon was

respondent's client. Respondent deposited the \$2,000 check into her CTA. On about December 19, 2005, respondent deposited, into her CTA, a second \$2,000 check from Lags Spine & Sportscare with "Alicia Calderon" typed in the memo section.

On about December 19, 2005, respondent gave Calderon a \$1,000 check drawn on respondent's CTA. On about December 20, 2005, before Calderon could cash the \$1,000 check, the balance in respondent's CTA was only \$3.46. Nonetheless, on about December 22, 2005, respondent's bank paid the \$1,000, which caused the balance in respondent's CTA to drop to a negative \$1,021.54.

The next year, on about October 16, 2006, respondent gave Calderon a \$2,000 check drawn on respondent's CTA. Also, on about October 16, 2006, respondent's bank notified her that it had dishonored the \$2,000 because the balance in respondent's CTA was only \$123.32.

On about October 23, 2006, respondent gave Calderon yet a second \$2,000 check drawn on respondent's CTA. Also, on about October 23, 2006, respondent's bank notified her that it had dishonored the second \$2,000 check because the balance in respondent's CTA was only \$398.32.

Count 6 – Trust Account Violations (Rule 4-100(A))

In count 6, the State Bar charges that respondent willfully violated rule 4-100(A) by failing to maintain the balance of funds received for the benefit of Calderon in her CTA. The record clearly establishes that respondent willfully violated rule 4-100(A) by not maintaining the sufficient funds on deposit in her CTA to cover the \$1,000 check payable to Calderon; by not maintaining the sufficient funds on deposit in her CTA to cover the first \$2,000 check payable to Calderon; and by not maintaining the sufficient funds on deposit in her CTA to cover the second \$2,000 check payable to Calderon.

The record does not establish by clear and convincing evidence that, when respondent wrote the \$1,000 check and the two \$2,000 checks to Calderon, there was insufficient funds on deposit to cover them. Accordingly, the charged violations of writing three checks against insufficient funds are DISMISSED WITH PREJUDICE.

Count 7 – Misappropriation (§ 6106)

In count 7, the State Bar charges that respondent willfully violated section 6106 by misappropriating approximately \$2,000 from Calderon. The record clearly establishes that on about October 16, 2006, respondent's willfully misappropriated \$1,876.68 (\$2,000 less \$123.32) from Calderon and thereby engaged in an act involving moral turpitude in willful violation of section 6106.

3. The King Client Matter

On June 6, 2006, Delene King employed respondent to write a demand letter to CoCo Vision for allegedly improperly using King's likeness. On June 12, 2006, King paid respondent a \$600 flat fee. On about June 13, 2006, respondent deposited King's \$600 check into her CTA. On July 12, 2006, respondent sent King and King's husband email stating that she should have the demand letter "done by later today so I can send it to you for your review." On about October 31, 2006, King sent respondent an email indicating that she had neither received a copy of a demand letter nor otherwise heard from respondent.

On about November 14, 2006, King sent respondent a second email. In her second email, King stated that she still had not received a copy of a demand letter and requested that respondent return her message by telephone or email. King also left a telephone message with respondent on about November 14, 2006.

Respondent did not respond to King's November 14, 2006, email Message or November 14, 2006, telephone message.

On about December 1, 2006, King and King's husband met with respondent, and respondent promised that she would email the Kings information regarding the matter later that day. By about December 3, 2006, the Kings had still not received any email from respondent. Then, on about December 4, 2006, respondent sent the Kings an email stating that she would "get the materials to [the Kings] today so you can review them." Respondent, however, did not do so. Thus, on about December 12, 2006, King left a telephone message for respondent in which she questioned whether respondent had sent a copy of the demand letter to the Kings. Respondent did not reply to King's December 12, 2006, message.

On about December 14, 2006, King sent respondent an email in which she informed respondent that she had still not received a copy of the demand letter. And, on about December 21, 2006, King sent respondent yet another email in which she again informed respondent that she had not received a copy of the demand letter.

On about January 2, 2007, King sent respondent a letter in which she requested a refund of her \$600 flat fee. On about January 17, 2007, King sent Respondent another email. In that email, King once again informed respondent that she had not received a copy of the demand letter. Respondent never gave King a copy of the draft of the demand letter. Respondent never sent a letter to CoCo Vision. Nor did respondent earn or refund any portion the \$600 flat fee.

Count 8 – Failure to Perform (Rule 3-110(A))

The record clearly establishes that, in willful violation of rule 3-110(A), respondent recklessly and repeatedly failed to perform legal services competently by failing to send a demand letter to CoCo Vision on behalf of King between on about June 6, 2006, and January 22, 2007.

Count 9 – Failure to Communicate (§ 6068, subd. (m))

The record clearly establishes that, in willful violation of section 6068, subdivision (m), respondent failed to adequately communicate with her clients (1) by not replying to the Kings' emails of about July 12, 2006; October 31, 2006; November 14, 2006; December 14, 2006; December 21, 2006; and January 17, 2007; and (2) by not responding to King's telephone messages of about November 14, 2006, and December 12, 2006.

Count 10 – Failure to Refund Unearned Fee (Rule 3-700(D)(2))

The record clearly establishes that, in willful violation of rule 3-700(D)(2), respondent failed to refund the \$600 flat fee. “It is common in State Bar matters involving the failure to perform services to require as a rehabilitative condition, restitution of unearned fees kept by the attorney and *to deem as unearned the entire fee when only preliminary services were performed which did not result in benefit to the client.* [Citations.]” (*In the Matter of Harris* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 219, 231, italics added.)

4. The Harlow Client Matter

On about March 14, 2004, Mr. C. Harlow employed respondent to represent him in a wrongful termination lawsuit against InDyne, Inc. On about October 4, 2004, respondent filed a wrongful termination lawsuit for Harlow in the Santa Barbara County Superior Court.

On about February 17, 2005, InDyne filed a notice of demurrer. On about February 28, 2005, respondent filed an opposition to that demurrer. And, on about March 4, 2005, InDyne filed a reply to respondent's opposition.

On about April 5, 2005, respondent filed a first amended complaint for Harlow. And, on about April 20, 2005, InDyne filed an answer to the first amended complaint.

On about June 17, 2005, InDyne filed a motion for summary judgment. On about August 19, 2005, respondent filed an opposition to that motion. And, on about August 25, 2005, InDyne

filed a reply to respondent's opposition. And, on about August 31, 2005, the superior court entered an order granting InDyne's motion for summary judgment. Then, on about November 28, 2005, respondent filed a notice of appeal of the court's order granting the motion for summary judgment.

On about December 14, 2005, the Clerk of the Court of Appeal advised respondent by letter that the California Rules of Court required her to submit a case information statement for the appeal in Harlow's case. Respondent received that letter.

On about January 9, 2006, the clerk again advised respondent by letter that the case information statement in Harlow's case had not been filed with the Court of Appeal. Respondent received that letter.

Then, on about January 12, 2006, the clerk mailed respondent a notice of default, which respondent received. Respondent did not notify Harlow of the notice of default. And, on about March 8, 2006, the Court of Appeal dismissed Harlow's appeal because respondent failed to file a case information statement. Respondent was sent a copy of the March 8, 2006, order of dismissal and remittitur, which respondent received. Respondent failed to notify Harlow that the dismissal his appeal.

On about June 13, 2006, InDyne filed an abstract of the judgment it recovered against Harlow for \$10,291 in legal fees. InDyne's bill of costs was incorporated into a restated court order for summary judgment. On about June 14, 2006, respondent received copies of the order for summary judgment, the abstract of judgment, and the bill of costs. Respondent did not notify Harlow that InDyne had filed an abstract of judgment against him.

On about June 29, 2006, Harlow's wife received a copy of the abstract of judgment for \$10,291 in legal fees in the mail. Between about July 4, 2006, and January 15, 2007, and on

approximately 123 occasions, respondent, Harlow, and/or Harlow's wife communicated by email, telephone, or in person. And respondent, when she replied, continually misrepresented to the Harlows that she was actively working on a motion to set aside the cost judgment, a stipulation to set aside the judgment for costs, and a brief for the appeal of the order of summary judgment.

On about September 13, 2006, respondent reported by telephone to Harlow's wife that InDyne's attorney had agreed to stipulate to set aside the judgment for costs pending Harlow's appeal of the order of summary judgment. Respondent never made such an agreement with InDyne's attorney. There had been no such concession.

On about October 27, 2006, respondent reported by email to Harlow's wife that the stipulation to set aside the cost judgment was before the superior court trial judge for his approval and that she had asked the Court of Appeal for an extension until November 20, 2006, to file Harlow's appellate brief. In fact, no such stipulation was before the superior court.

On about January 8, 2007, Harlow's wife went on the Internet and looked up Harlow appeal on the Court of Appeal's web site and found that his case had been dismissed on about March 6 or 8, 2006.

Count 11 – Failure to Perform (Rule 3-110(A))

The record clearly establishes that, in willful violation of rule 3-110(A), respondent recklessly and repeatedly failed to perform legal services competently by failing by failing to notify the Harlows about the initial entry of order of summary judgment against them; by failing to file a case information statement, which led to dismissal of Harlow's appeal; and by failing to notify the Harlows of the abstract of judgment.

Count 12 – Moral Turpitude & Dishonesty (§ 6106)

The record clearly establishes that respondent engaged in acts involving moral turpitude and dishonesty in willful violation of section 6106 by misrepresenting to the Harlows (her clients) (1) that the appeal was still pending and (2) that she was arranging for the judgment for costs to be set aside by motion or stipulation.

5. Additional Trust Account Violations

From about February 2, 2007, to March 5, 2007, respondent presented the following four electronic checks for payment from her CTA, which were returned unpaid by respondent’s bank because there were not sufficient funds on deposit to cover them.

<u>Check No.</u>	<u>Date</u>	<u>Deposition</u>	<u>Amount</u>	<u>Balance</u>	<u>Bank Fees</u>
Electronic	02/02/07	Returned NSF	\$45.60	\$32.38	\$25.00
Electronic	02/09/07	Returned NSF	20.00	12.36	
Electronic	02/09/07	Returned NSF	45.60	12.36	
Electronic	03/02/07	Returned NSF	15.00	-18.59	25.00

From about February 12, 2007, to March 5, 2007, respondent’s bank issued the following three overdraft notices on respondent’s CTA.

<u>Check No.</u>	<u>Date</u>	<u>Deposition</u>	<u>Amount</u>	<u>Balance</u>	<u>Bank Fees</u>
Overdraft	02/12/07	Paid	Unknown	-42.60	50.00
Overdraft	03/02/07	Paid	Unknown	-12.64	
Overdraft	03/05/07	Not Paid		-18.59	25.00

Count 13 – Trust Account Violations (Rule 4-100(A))

The record clearly establishes that respondent willfully violated rule 4-100(A) when she presented four electronic checks for payment from her CTA with insufficient funds of deposit to

cover them and when she engaged in banking activities that caused her bank to issue three overdraft notices on his CTA.

6. Additional Failures to Cooperate with State Bar Disciplinary Investigations

On about July 21, 2005, and then again on about August 8, 2005, a State Bar investigator mailed, to respondent, a letter in which the investigator asked respondent to respond in writing to specific allegations of misconduct that had been made against her with respect to her representation of the Figuerola Group. Even though respondent actually received both of those letters, she never responded to them. Nor did she otherwise communicate or cooperate with the investigator.

On about January 10, 2006, and then again on about February 8, 2006, a State Bar investigator mailed, to respondent, a letter in which the investigator asked respondent to respond in writing to specific allegations of misconduct with respect to a notice of CTA checks paid against insufficient funds from respondent's bank. Even though respondent actually received both of those letters and even though she was asked to respond no later than February 22, 2006, respondent did not respond to those letters until May 16, 2006.

On November 7, 2006, a State Bar investigator sent, to respondent's then counsel, a letter regarding alleged insufficient funds activities in respondent's CTA. Then, on November 15, 2006, the investigator sent, to respondent's then counsel, a letter regarding additional insufficient funds activities in respondent's CTA. In each letter, the investigator requested a written response from respondent's counsel. Even though respondent's counsel requested extensions of time to respond to both of the letters, neither he nor respondent ever responded to the letters. Nor did respondent otherwise communicate or cooperate with the investigator regarding those two letters.

On about February 23, 2007, and then again on about March 6, 2007, a State Bar investigator mailed, to respondent, a letter in which the investigator asked respondent to respond

in writing to specific allegations of misconduct that been had made against her with respect to her representation of King. Even though respondent actually received both of those letters, she never responded to them. Nor did she otherwise communicate or cooperate with the investigator.

On about February 23, 2007, and then again on about March 7, 2007, a State Bar investigator mailed, to respondent, a letter in which the investigator asked respondent to respond in writing to specific allegations of misconduct that had been made against her with respect to her representation of Harlow. Even though respondent actually received both of those letters, she never responded to them. Nor did she otherwise communicate or cooperate with the investigator.

On about March 23, 2007, and then again on about April 6, 2007, a State Bar investigator mailed, to respondent, a letter in which the investigator asked respondent to respond in writing to yet additional alleged insufficient funds activities in respondent's CTA. Even though respondent actually received both of those letters, she never responded to them. Nor did she otherwise communicate or cooperate with the investigator.

Count 14 -- Failure to Cooperate with State Bar (§ 6068, subd. (i))

The record clearly establishes that respondent willfully violated her duty, under section 6068, subdivision (i), to cooperate in State Bar disciplinary investigations by failing to respond to 10 letters from State Bar investigators, which were dated July 21, 2005; August 8, 2005; November 7, 2006; November 15, 2006; February 23, 2007; March 6, 2007; March 7, 2007; March 23, 2007; and April 6, 2007.⁶ The record establishes that respondent's former counsel responded to the investigator letters dated January 10, 2006, and February 8, 2006, albeit about

⁶ Two of the letters were dated February 23, 2007.

six weeks late; accordingly, the charged violations based on those two letters are DISMISSED WITH PREJUDICE.

IV. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. Factors in Mitigation

There are no factors in mitigation.

B. Factors in Aggravation

1. Prior Record of Discipline

Respondent has one prior record of discipline. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std 1.2(b)(i).)⁷ Respondent's prior record of discipline is the Supreme Court's November 21, 2008, order in *In re Darla Rae Anderson on Discipline*, case number S166862 (State Bar Court case number 03-O-02481), in which the court placed respondent on three years' stayed suspension, five years' probation, and one year's actual suspension. The Supreme Court imposed that discipline on respondent because respondent stipulated to 13 counts of professional misconduct in seven different client matters, including failing to perform legal services, failing to communicate with his clients, failing to refund unearned fees, failing to maintain client funds in a trust account, engaging in the unauthorized practice of law, and violating a court order.

2. Multiple Acts

Respondent's misconduct in this consolidated proceeding involves multiple acts of misconduct. (Std. 1.2(b)(ii).)

⁷ All further references to standards are to this source.

3. Failure to File a Response to the NDC

Respondent's failures to file a response to the two NDC's in this consolidated proceeding, which allowed her defaults to be entered, are aggravating circumstances. (Std. 1.2(b)(vi).) However, these failures warrant little weight in aggravation because the conduct relied on for this aggravating factor closely equals the misconduct relied on to find respondent culpable of violating section 6068, subdivision (i) and to enter her default. (*In the Matter of Bailey* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 220, 225.)

4. Failure to Refund Unearned Fees

As the review department found in *In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459, 465, an attorney's wrongful retention of an unearned fee for an extended period of time is itself an aggravating circumstance because it approaches a practical appropriation of the client's property. Accordingly, even though the court could not find that respondent misappropriated the \$1,138.60 unearned advanced fee in the Holmes client matter, it finds that respondent's unexplained failure to refund that unearned fee for more than 20 months is a very serious aggravating circumstance.

V. DISCUSSION ON DISCIPLINE

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1095, 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 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of the different sanctions. In the present proceeding, the most

severe sanction for respondent 's misconduct is found in standard 2.3, which applies to respondent's misappropriation of \$1,876.68 in settlement proceeds in the Calderon client matter in trust in violation of section 6106.⁸ Standard 2.2(a) provides:

Culpability of a member of wilful misappropriation of entrusted funds or property shall result in disbarment. Only if the amount of funds or property misappropriated is insignificantly small or if the most compelling mitigating circumstances clearly predominate, shall disbarment not be imposed. In those latter cases, the discipline shall not be less than a one-year actual suspension, irrespective of mitigating circumstances.

The Supreme Court has repeatedly held that misappropriation of trust funds is a grievous violation. Moreover, the Supreme Court has made clear that even an isolated instance of misappropriation by an attorney without a prior record of discipline will result in disbarment in the absence of compelling mitigation. (*Chang v. State Bar* (1989) 49 Cal.3d 114, 128-129; *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1071-1073.) There is no compelling mitigation in this proceeding, and even at this late date, there is no evidence that respondent has paid a single dollar of restitution to his former client.

Moreover, respondent's conduct in the present proceeding is similar to the conduct in his prior record of discipline. Most notably, respondent has been found culpable, in the present proceeding of failing to perform in five separate client matters and failing to refund unearned fees of two of those five matters (\$1,138.60 in unearned fees in the Holmes client matter and \$600 in the King client matter).

In sum, the court concludes that both the standards and case law support a disbarment recommendation in this proceeding. Moreover, the court concludes that respondent should be ordered to make restitution in the Calderon, Holmes, and King client matters.

⁸ Even though respondent misappropriated only of \$1,876.68 of the settlement proceeds in the Calderon client matter, it is clear that respondent still owes Calderon \$2,000 in settlement proceeds.

VI. DISCIPLINE RECOMMENDATION

The court recommends that respondent **DARLA RAE ANDERSON** be **DISBARRED** from the practice of law in the State of California and that her name be stricken from the Roll of Attorneys of all persons admitted to practice in this state. The court further recommends that **DARLA RAE ANDERSON** be ordered to make restitution to (1) Alicia Calderon in the amount of \$2,000 plus 10 percent interest per annum from October 16, 2006; (2) Bradford and Nancy Holmes in the amount of \$1,138.60 plus 10 percent interest per annum from February 5, 2004; (3) Delene King in the amount of \$600 plus 10 percent interest per annum from June 12, 2006; and (4) the Client Security Fund to the extent of any payment from the fund to Calderon, to the Holmeses, or to King plus interest and costs, in accordance with Business and Professions Code section 6140.5, and to furnish satisfactory proof thereof to the State Bar's Office of Probation. The court further recommends that any restitution to the Client Security Fund be enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

VII. RULE 9.20 & COSTS

The court further recommends that **DARLA RAE ANDERSON** be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

Finally, the court recommends 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 OF INACTIVE ENROLLMENT

In accordance with Business and Professions Code section 6007, subdivision (c)(4), the court orders that **DARLA RAE ANDERSON** be involuntary enrolled as an inactive member of the State Bar of California effective three calendar days after the service of this decision and order by mail (Rules Proc. of State Bar, rule 220(c)).

Dated: December 22, 2008.

RICHARD A. PLATEL
Judge of the State Bar Court