

PUBLIC MATTER



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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.: 17-O-01372-YDR
	)	
<b>RAE DIANE SHIRER,</b>	)	<b>DECISION</b>
	)	
<u>A Member of the State Bar, No. 167137.</u>	)	

### Introduction<sup>1</sup>

In this original disciplinary proceeding, respondent Rae Diane Shirer (Respondent) is charged with five counts of professional misconduct. In the first count, Respondent is charged with violating her duty, under section 6068, subdivision (k), to comply with all the conditions of the two-year disciplinary probation that the Supreme Court imposed on her in its May 18, 2016, order in *In re Rae Diane Shirer on Discipline*, case number S233105 (State Bar Court case number 15-O-11121) (*Shirer II*). In the remaining four counts, Respondent is charged with violating section 6106 (acts involving moral turpitude) by allegedly making false statements under penalty of perjury in four probation reports.

The Office of Chief Trial Counsel of the State Bar of California (OCTC) has the burden of establishing Respondent's culpability on the foregoing five counts by clear and convincing

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<sup>1</sup> Unless otherwise indicated, all references to rules are to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code except where otherwise indicated.

evidence.<sup>2</sup> As set forth in detail below, the record clearly establishes that Respondent is culpable only on two section 6068, subdivision (k) violations charged in count 1. The court dismisses the remaining charges with prejudice for want of proof.

In light of Respondent's misconduct, the aggravating and mitigating circumstances; the Standards for Attorney Sanctions for Professional Misconduct;<sup>3</sup> and relevant case law, the court recommends that Respondent be placed on two years' stayed suspension and three years' probation on conditions, including a one-year period of actual suspension.

### **Significant Procedural History**

OCTC initiated this proceeding by filing and serving on Respondent a notice of disciplinary charges (NDC) on December 18, 2017. Respondent filed a response to the NDC on January 3, 2018. The parties filed a partial stipulation as to facts and admission of documents on April 16, 2018.

A two-day trial was held on April 18, 2018, and May 15, 2018. The court took the matter under submission for decision at the conclusion of the trial on May 15, 2018. Thereafter, each party timely filed a posttrial brief on May 30, 2018.

OCTC was represented by Deputy Trial Counsel Timothy G. Byer. Respondent was represented by Attorney Michael V. Hesse.

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

Respondent was admitted to the practice of law in California on December 13, 1993, and has been licensed to practice law in this state since that time.

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<sup>2</sup> Clear and convincing evidence leaves no substantial doubt and is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 552.)

<sup>3</sup> The standards are found in title IV of the Rules of Procedure of the State Bar. All further references to standards (or stds.) are to this source.

The following findings of fact and conclusions of law are based on the parties' April 16, 2018, partial stipulation of facts and admission of documents and the documentary and testimony admitted into evidence at trial.

**Case No. 17-O-01372 – Probation Violation Matter**

**Facts**

In its May 18, 2016, order in *Shirer II*, the Supreme Court placed Respondent on one year's stayed suspension and two years' probation on conditions, including restitution to a former client in the amount of \$450 plus interest, but no actual suspension. The Supreme Court also ordered Respondent to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year. The Supreme Court's May 18, 2016, order became effective on June 17, 2016. Respondent's two-year disciplinary probation in *Shirer II* began on June 17, 2016.

Condition numbers 3 and 4 of Respondent's probation in *Shirer II* provide as follows:

. . .

- (3) Within thirty (30) days from the effective date of discipline [30 days from the effective date of discipline was July 17, 2016], 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.
- (4) 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....

. . .

In addition, the restitution condition of Respondent's probation in *Shirer II* provides as follows:

"Respondent must pay [her former client M. Kent] restitution [in the principal amount of \$450.00 with interest from March 23, 2015] and provide satisfactory proof of payment to the

Office of Probation not later than **thirty days after the effective date of discipline herein** [as noted above, thirty days after the effective date of discipline was July 17, 2016].” (Original bolding.)

On June 30, 2016, Respondent’s probation deputy sent Respondent a letter outlining and setting forth the corresponding deadlines/due dates on certain conditions of Respondent’s probation in *Shirer II*. That letter correctly states that Respondent was required (1) to contact her probation deputy no later than July 17, 2016, to schedule a meeting and (2) to submit quarterly probation reports beginning October 10, 2016. However, that letter erroneously states that Respondent had until June 17, 2018 (i.e., the entire term of Respondent’s two-year probation in *Shirer II*) to pay restitution to her former client Kent. As noted above, Respondent was actually required to pay restitution to Kent no later than July 17, 2016.

Respondent failed to contact the Office of Probation to schedule a meeting and failed to pay any restitution to Kent by the July 17, 2016, deadline. Moreover, Respondent failed to file her first probation report by the October 10, 2016, deadline. Thus, on October 25, 2016, the Office of Probation sent Respondent a letter notifying her that she had failed to comply with the conditions of her probation in *Shirer II* by failing to contact the Office of Probation no later than July 17, 2016, to schedule a meeting and by failing to submit her first probation report to the Office of Probation no later than October 10, 2016.

The October 25, 2016, letter did not, however, advise Respondent that she failed to comply with the conditions of her probation in *Shirer II* by failing to pay restitution to Kent by the July 17, 2016, deadline. Moreover, Respondent had little reason to believe that she had violated her restitution condition because the Office of Probation included, with its October 25, 2016, letter to Respondent, a copy of its June 30, 2016, letter, which erroneously states that Respondent had until June 17, 2018, to pay restitution to Kent.

According to the parties' April 16, 2018, partial stipulation of facts, Respondent initially submitted her first probation report (which was due no later than October 10, 2016) 225 days late on May 23, 2017. In addition, Respondent paid Kent the required restitution with interest 310 days late on May 23, 2017. After discussions with the Office of Probation, Respondent made changes to her first probation report. Then, on June 9, 2017, Respondent resubmitted her first probation report. On June 9, 2017, Respondent also submitted (or resubmitted) her second and third probation reports, which were due no later than January 10, 2017, and April 10, 2017, respectively.

Each of Respondent's first three probation reports clearly disclosed its respective due date (i.e., October 10, 2016, January 10, 2017, or April 10, 2017). In addition, Respondent clearly disclosed, on each of her first three probation reports, that she actually signed them on June 9, 2017. Thus, Respondent's first three probation reports disclose, on their face, that they were submitted many months after their respective due dates. According to the Office of Probation, Respondent's first three probation reports are "non-compliant" because they were submitted late.

On July 5, 2017, Respondent timely submitted her fourth probation report, which as due no later than July 10, 2017. Unlike her first three reports, the Office of Probation considers Respondent's fourth probation report to be "compliant."

In her first report, Respondent reported that "[d]uring the reporting period above, I have complied with all provisions of the State Bar Act, Rules of Professional Conduct, and all conditions of probation **EXCEPT** ...: Unaware that I had been suspended for failure to pay state bar dues, I inadvertently practiced law while not an active member during the period from July 7, 2016 to August 31, 2016 ...."

In her second, third, and fourth probation reports, Respondent reported that “[d]uring the reporting period above, I have complied with all provisions of the State Bar Act, Rules of Professional Conduct, and all conditions of probation.”

On September 8, 2017, Respondent finally contacted the Office of Probation to schedule a meeting with her probation deputy to discuss the terms and conditions of her probation in *Shirer II*. Thereafter, Respondent attended and participated in a telephonic meeting with her probation deputy on September 15, 2017.

### **Conclusions of Law**

#### ***Count 1 – Section 6068, Subdivision (k) (Failure to Comply with Conditions of Probation)***

In count 1, Respondent is charged with willfully violating section 6068, subdivision (k), which provides that an attorney has a duty to comply with all conditions attached to any disciplinary probation. Specifically, Respondent is charged with violating section 6068, subdivision (k) by:

1. failing to pay and to provide proof of payment of restitution to Kent in the amount of \$450 plus interest no later than by July 17, 2016;
2. failing to contact the State Bar's Office of Probation by July 17, 2016, to schedule a meeting with her assigned probation deputy;
3. failing to attend a required meeting with the Office of Probation;
4. failing to submit her first probation report that was due on October 10, 2016;
5. failing to submit her second probation report that was due on January 10, 2017; and
6. failing to submit her third probation report that was due on April 10, 2017.

The record clearly establishes that Respondent willfully violated section 6068, subdivision (k) by failing to pay and to provide proof of payment of the required restitution with interest to Kent no later than July 17, 2016, as required under the restitution condition of Respondent's probation in *Shirer II*.

Respondent credibly testified that she was confused about when she was required to pay the restitution to Kent because, as noted above, the June 30, 2016, letter she received from her

probation deputy clearly states that Respondent had until June 17, 2018, to pay the restitution. However, Respondent's understandable confusion over her deadline for paying restitution is not a defense to her failure to timely pay the required restitution by July 17, 2016. Nonetheless, as noted below, Respondent's understandable confusion is a significant mitigating circumstance and effectively rebuts the section 6106 (moral turpitude) violation charged in count 2.

The record also clearly establishes that Respondent willfully violated section 6068, subdivision (k) by failing to contact the Office of Probation no later than July 17, 2016, to schedule a meeting with her probation deputy in accordance with condition number 3 of Respondent's probation in *Shirer II*.

The record, however, fails to establish, by clear and convincing evidence, that Respondent willfully violated section 6068, subdivision (k) by failing to attend a required meeting with the Office of Probation as charged in count 1. The record clearly establishes that, following Respondent's request for a meeting with her probation deputy, Respondent participated in a telephonic meeting with her probation deputy regarding the terms and conditions of Respondent's probation in *Shirer II* on September 15, 2017. Thus, Respondent is not culpable of violating section 6068, subdivision (k) by failing to attend a required meeting with the Office of Probation as charged in count 1; therefore, that charge is DISMISSED with prejudice.

The record also fails to establish, by clear and convincing evidence, that Respondent willfully violated section 6068, subdivision (k) by failing to submit her first, second, and third probation reports as charged in count 1. Contrary to the charges, the record clearly establishes that Respondent submitted her first, second, and third probation reports to the Office of Probation on June 9, 2017. Thus, Respondent did not violate section 6068, subdivision (k) by failing to submit her first, second, and third probation reports. Instead, Respondent violated

section 6068, subdivision (k) by failing to submit her first, second, and third probation reports by their respective due dates of October 10, 2016, January 10, 2017, and April 10, 2017.

Respondent, however, was not charged with those violations in the NDC.

The purpose of an NDC is to give the respondent attorney “notice of the specific misconduct the State Bar intends to prove [at trial].” (*In the Matter of Glasser* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 163, 171.) The NDC in the present proceeding gave Respondent, and this court, notice that OCTC intended to prove that she never submitted her first three probation reports to the Office of Probation. The NDC did not give Respondent, or this court, notice that OCTC intended to prove that Respondent submitted her first three reports late (i.e., after their respective due dates) on June 9, 2017.

The Supreme Court has made it clear that “the State Bar cannot impose discipline for any violation not alleged in the original notice to show cause. [Citation.]” (*Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 928; see also *Read v. State Bar* (1991) 53 Cal.3d 394, 409 [due process mandates attorneys be disciplined *only for violations charged* in the notice].) In fact, “[i]f the evidence produced before the hearing [judge] shows the attorney has committed an ethical violation that was not charged in the notice, the State Bar must amend the notice to conform to the evidence adduced at the hearing.” (*Van Sloten v. State Bar, supra*, 48 Cal.3d at pp. 928–929 [adequate notice requires being fairly apprised of *precise nature of charges* before proceedings commence]; see also Rules Proc. of State Bar, rule 5.44(C).) OCTC did not amend the notice during or at the close of trial to charge additional or alternative misconduct. In short, the court must stick to the language in count 1. Because Respondent is not culpable of the three charged violations of section 6068, subdivision (k) for failing to submit her first, second, and third probation reports as charged in count 1, those three charges are also DISMISSED with prejudice.



***Count 2 – Section 6106 (Moral Turpitude)***

Section 6106 provides, in part, that the commission of any act involving moral turpitude, dishonesty, or corruption constitutes cause for suspension or disbarment. Count 2 charges that Respondent willfully violated section 6106's proscription of acts involving moral turpitude because she either deliberately or as a result of her gross negligence falsely reported under penalty of perjury, in her first probation report, that she had complied with all of the conditions of her probation. During the time period covered by Respondent's first probation report, Respondent did not comply with her restitution condition. As found above, Respondent violated her restitution condition because she did not pay the required restitution with interest to Kent by the July 17, 2016, deadline. To establish the foregoing section 6106 violation, OCTC must establish, by clear and convincing evidence, either that Respondent deliberately lied with the intent to mislead or deceive the Office of Probation when she falsely reported her compliance or that Respondent falsely reported her compliance as a result of her own gross negligence.

There is no direct evidence that Respondent deliberately lied when she falsely reported her compliance in her first probation report. Furthermore, Respondent's honest and understandable confusion over the date by which she was required to pay restitution, which resulted from the Office of Probation's unequivocal, erroneous statement in its June 30, 2016, letter that Respondent had until June 17, 2018, to pay the restitution, negates any inference that Respondent deliberately lied when she falsely reported her compliance in her first probation report. In addition, Respondent's honest and understandable confusion precludes the court from finding that Respondent's false reporting of her compliance was the result of her own gross negligence. At worst, Respondent's false statement was the result of Respondent's mere negligence, which will not support a finding of moral turpitude. Accordingly, count two is DISMISSED with prejudice for want of proof.

***Count 3 – Section 6106 (Moral Turpitude)***

***Count 4 – Section 6106 (Moral Turpitude)***

***Count 5 – Section 6106 (Moral Turpitude)***

Count 3 charges that Respondent willfully violated section 6106's proscription of acts involving moral turpitude because she either deliberately or as a result of her gross negligence falsely reported under penalty of perjury, in her second probation report, that she had complied with all of the conditions of her probation. During the time period covered by Respondent's second probation report, Respondent did not comply with her reporting condition (i.e., Respondent's condition No. 4) because she did not submit her first probation report to the Office of Probation by its October 10, 2016, due date.

Count 4 charges that Respondent willfully violated section 6106's proscription of acts involving moral turpitude because she either deliberately or as a result of her gross negligence falsely reported under penalty of perjury, in her third probation report, that she had complied with all of the conditions of her probation. During the time period covered by Respondent's third probation report, Respondent again failed to comply with her reporting condition because she did not submit her second probation report to the Office of Probation by its January 10, 2017, due date.

Count 5 charges that Respondent willfully violated section 6106's proscription of acts involving moral turpitude because she either deliberately or as a result of her gross negligence falsely reported under penalty of perjury, in her fourth probation report, that she had complied with all of the conditions of her probation. During the time period covered by Respondent's fourth probation report, Respondent again failed to comply with her reporting condition because she did not submit her third probation report to the Office of Probation by its April 10, 2017, due date.

The record fails to establish, by clear and convincing evidence, the section 6106 violations charged in counts 3, 4, and 5. There is no direct evidence that Respondent deliberately lied when she falsely reported her compliance in her second, third, and fourth probation reports. Moreover, Respondent's first, second, and third probation reports were clearly identified by the dates by which they were to have been submitted to the Office of Probation (i.e., by October 10, 2016; January 10, 2017; and April 10, 2017, respectively). In addition, on those reports, Respondent clearly disclosed that she actually signed the reports on June 9, 2017, which was many months after the dates by which they were to have been submitted. In other words, Respondent's first, second, and third probation reports clearly disclose, on their face, that Respondent failed to submit them timely. Thus, there is no plausible basis for concluding that Respondent deliberately lied with the intent to mislead or deceive when she falsely reported her compliance in her second, third, and fourth probation reports.

The NDC does not allege a factual basis for Respondent's alleged gross negligence. In other words, the NDC fails to allege any facts that, if proved, would establish that Respondent's false reports of compliance were the results of Respondent's gross negligence and not just negligent mistakes. In any event, the fact that the three reports disclose on their face that they were submitted late negates any inference that Respondent's false reports of compliance were the result of gross negligence.

Counts 3, 4, and 5 are DISMISSED with prejudice for want of proof.

#### **Aggravation and Mitigation**

##### **Aggravation**

##### **Prior Records of Discipline (Std. 1.5(a))**

Respondent has the following three prior records of discipline.

### ***Shirer I***

Respondent was privately reprovved in her first prior record of discipline, case No. 06-O-12713, effective July 31, 2008, for a single count of failing to competently perform legal services (rule 3-110(A)). There were no aggravating factors, and Respondent's misconduct was mitigated by her lack of prior discipline.

### ***Shirer II***

Respondent's second prior record of discipline is the Supreme Court's May 18, 2016, order in *Shirer II* placing Respondent on one year's stayed suspension and two years' probation on conditions, including restitution, but no actual suspension, and ordering Respondent to take and pass the MPRE within one year. The Supreme Court imposed that discipline on Respondent in accordance with a stipulation regarding facts, conclusions of law, and disposition that Respondent and OCTC entered into and which the State Bar Court approved in an order filed on January 7, 2016, in State Bar Court case No. 15-O-11121.

The facts and culpability conclusions underlying the Supreme Court's May 18, 2016, disciplinary order in *Shirer II*, as set forth in the parties' stipulation that was approved on January 7, 2016, are as follows. In early 2014, M. Kent retained Respondent to incorporate a nonprofit organization and to prepare and file applications for state and federal tax exempt status for that organization. Kent paid Respondent \$2,500 as a flat fee for Respondent's legal services and \$450 as an advance for costs. Respondent completed the incorporation of the organization. In addition, she prepared the applications for state and federal tax exempt status, but lost them and Kent's contact information when the hard-drive of her law office computer crashed beyond repair in about March 2014.

In early January 2015, Kent filed a complaint against Respondent with the State Bar because, among other things, Respondent failed to file the applications for tax-exempt status and

because Respondent had stopped communicating with him. During OCTC's investigation of Kent's complaint, OCTC sent Respondent two investigation letters seeking information from her. Respondent, however, failed to respond to those letters even though she received them.

In August 2015, OCTC filed the NDC in *Shirer II* charging Respondent with six counts of misconduct. Five of the counts charged Respondent with misconduct in the Kent matter and one of the counts charged Respondent with failing to cooperate with a State Bar disciplinary investigation.

In the January 7, 2016, stipulation in *Shirer II*, Respondent stipulated to culpability on four of the six counts. Specifically, Respondent stipulated to (1) failing to competently perform legal services in the Kent matter (rule 3-110(A)); (2) failing to adequately communicate with Kent (§ 6068, subd. (m)); (3) failing to account to Kent (rule 4-100(B)(3)); and (4) failing to cooperate in OCTC's investigation of Kent's complaint (§ 6068, subd. (m)). The remaining two counts were dismissed.

### ***Shirer III***

Respondent's third discipline is the Supreme Court's April 17, 2017, order in *In re Rae Diane Shirer on Discipline*, case No. S239886 (State Bar Court case No. 15-O-14402) (*Shirer III*) placing Respondent on one year's stayed suspension and two years' probation on conditions, including a 30-day actual suspension. The Supreme Court imposed that discipline on Respondent in accordance with a stipulation regarding facts, conclusions of law, and disposition that Respondent and OCTC entered into and which the State Bar Court approved in an order filed on December 20, 2016, in State Bar Court case No. 15-O-14402.

The facts and culpability conclusions underlying the Supreme Court's April 17, 2017, order in *Shirer III*, as set forth in the parties' December 20, 2016, stipulation, are as follows. As of July 1, 2013, Respondent had completed all of the required 25 hours of Minimum Continuing

Legal Education (MCLE) courses for the compliance period ending on January 31 of the following year. Respondent stored all of her MCLE compliance records on her law office computer's hard drive. In early March 2014, the hard drive on Respondent's computer froze and was unrecoverable, resulting in the loss of all the files on that hard drive, including Respondent's MCLE compliance records. On June 30, 2014, Respondent reported under the penalty of perjury to the State Bar that she had fully complied with her MCLE requirements for the compliance period ending January 31, 2014. Respondent's report of compliance, however, was false because, under rule 2.90 of the Rules of the State Bar, noncompliance with the MCLE requirements includes an attorney's failure to keep a record of his or her MCLE compliance. Moreover, Respondent stipulated that, when she reported to the State Bar that she was in compliance with the MCLE requirements, she was grossly negligent in not knowing that she was not in full compliance. Respondent further stipulated that her unintentional, false reporting of her MCLE compliance involved moral turpitude in willful violation of section 6106 because the false report resulted from her gross negligence.

In the present proceeding, Respondent's three prior records of discipline are significant aggravating circumstances.

#### **Multiple Acts of Wrongdoing**

Respondent's present misconduct does not evidence multiple acts of wrongdoing because she has been found culpable of only two violations of section 6068, subdivision (k). (*In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 839 [two acts are not multiple acts of misconduct aggravation]; see also *In the Matter of Blum* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 170, 177.)

## **Mitigation**

### **Candor/Cooperation to Victims/State Bar (Std. 1.6(e).)**

By entering into an the partial stipulation of facts with OCTC, Respondent has acknowledged her misconduct and demonstrated her willingness to participate in the rehabilitative process and to conform her conduct to the strictures of the profession. Respondent is entitled to significant mitigation for her recognition of wrongdoing, for her willingness to undergo rehabilitation, cooperation, and for saving the State Bar significant resources and time. (*Silva-Vidor v. State Bar* (1989) 49 Cal.3d 1071, 1079 [where mitigating credit was given for entering into a stipulation as to facts and culpability]; *In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 521 [where the attorney's stipulation to facts and culpability was held to be a mitigating circumstance].)

### **Honest and Understandable Confusion**

As noted above, even though Respondent's honest and understandable (i.e., reasonable) confusion over the date by which she was required to pay restitution, which resulted from the Office of Probation's unequivocal, erroneous statement in its June 30, 2016, letter that Respondent had until June 17, 2018, to pay the restitution, is not a defense to the found section 6068, subdivision (k) violation for not timely paying the restitution, Respondent's confusion is a very significant mitigating circumstance with respect to that violation. (Std. 1.6(b).)

### **Community Service and Civic Endeavors**

The Rotary Club is a professional organization devoted to performing local and international community service projects. Respondent not only served as a district governor with the Rotary Club from July 2013 through June 2014, she also served as the local president twice. During her service with the Rotary Club, Respondent participated in the Rotary Club Youth Leadership Camp. During her one-year term as a district governor, her district's fundraising

events raised about \$450,000 which supported eye and dental clinics in Guatemala, provided medical services and medical supplies in Mexico, and supported youth mentorship programs in Orange County. That same year, Respondent's district held an emergency fundraiser which raised \$30,000 to help restore housing for typhoon-affected residents in the Philippines.

Respondent's credible testimony regarding her extensive community service through the Rotary Club was corroborated by the credible testimony of John Bouyer, who is one of Respondent's former clients and who has known her since November 2000. He was satisfied with the legal services Respondent provided. When Bouyer was the president of the local Rotary Club, Bouyer recruited Respondent to join. When Respondent served as a Rotary Club governor, Bouyer worked on her district leadership team. He also credibly testified that, based on his Rotary Club experience with Respondent, he knows her to be honest and of good moral character.

Respondent has established, by clear and convincing evidence, that she is and has been for many years extensively involved in community service through the Rotary Club. (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 785 [community service is a mitigating factor].) For about a two-year period, Respondent's service with the Rotary Club effectively mirrored a full-time job; Respondent often times working seven days a week. Respondent is entitled to substantial mitigating credit for her extensive community service and civic endeavors through the Rotary Club. Without question, Respondent's community service through the Rotary Club is compelling mitigation. (*In the Matter of Yee* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 330, 336.)

In addition to her service through the Rotary Club, Respondent was also involved with service organizations, including the Orange Senior Housing, Inc. (OSHI), where she served on the board from 2014 through 2017. As a member of the OSHI board, Respondent was involved



in its efforts to obtain financing for low income seniors to renovate their homes. While an OSHI board member, Respondent received a nominal \$3,000 fee for her service.

Respondent is entitled to only limited mitigation for her community service though these non-Rotary Club service organizations because the only evidence of that service was Respondent's credible, but uncorroborated testimony. (*In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 840 [limited mitigating weight is given for community service established only by the respondent attorney's testimony].)

### **Good Faith and Belated Compliance**

The record clearly shows that Respondent has acted in good faith. In addition, despite the two violations of Respondent's probation in *Shirer II* found above, Respondent appreciates and takes seriously her duty to, strictly comply with all of the conditions of her disciplinary probation. Respondent contacted and sought guidance from her assigned probation deputy as to what she had to do to comply with her probation conditions. Moreover, Respondent belatedly complied with all of her probation conditions about six months before OCTC filed the present proceeding against her. The court finds Respondent's good faith and belated compliance to be significant mitigating circumstances. "Belated compliance with a probation condition may be considered as a mitigating factor in determining discipline. [Citation.]" (*In the Matter of Rose, supra*, 3 Cal. State Bar Ct. Rptr. at p. 652, citing *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, 150.)

### **Health and Emotional Problems**

Respondent credibly testified that, throughout most of 2016, she suffered from either a severe respiratory infection, depression, emotional distress, or a combination of all three. Even though Respondent failed to present any expert testimony on these issues, she is entitled to limited mitigating credit for them. (E.g., *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1364

[Supreme Court considered lay testimony of emotional problems as mitigation]; see also *In re Brown* (1995) 12 Cal.4th 205, 222.)

### Discussion

The disciplinary analysis begins with the standards, which provide guidance and are intended to promote consistent application of discipline. (*In re Silverton* (2005) 36 Cal.4th 81, 91.) Initially, the court considers standard 1.1, which acknowledges that the purpose of attorney discipline is not to punish the attorney, but to protect the public, the courts, and the legal profession; to preserve public confidence in the profession; and to maintain high professional standards for attorneys.

The applicable standard for the two violations of section 6068, subdivision (k) is standard 2.14. According to that standard, actual suspension is the appropriate discipline for violating section 6068, subdivision (k) with the degree of the sanction to be determined by the nature of the condition violated and the respondent attorney's unwillingness or inability to comply with the disciplinary order. Also relevant is standard 1.8(b). Standard 1.8(b) provides that, if a member has two or more prior records of discipline, disbarment is appropriate if: (1) an actual suspension was ordered in any of the prior matters; (2) the prior and current matters demonstrate a pattern of misconduct; or (3) the prior and current matters demonstrate an unwillingness or inability to conform to ethical responsibilities. Standard 1.8(b) provides for a departure from the appropriate discipline of disbarment where "the most compelling mitigating circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current misconduct." Because standard 1.7(a) directs that when multiple sanctions apply, the most severe sanction should be imposed, the court focuses on standard 1.8(b).

It is well established that when applying a standard that provides for a specific level of discipline based on an attorney's prior record or records of discipline, such as standard 1.8(b), the State Bar Court does not blindly "treat all priors as having equal weight, but [must] consider the facts underlying the various proceedings in arriving at the appropriate discipline." (*Conroy v. State Bar* (1991) 53 Cal.3d 495, 506-507; *Arm v. State Bar* (1990) 50 Cal.3d 763, 778-779.) Moreover, the principle that "[t]he imposition of attorney discipline does not issue from a fixed formula but from a balanced consideration of all relevant factors, including aggravating and mitigating circumstances" (*Rodgers v. State Bar* (1989) 48 Cal.3d 300, 316), precludes the State Bar Court from recommending that an attorney be disbarred based solely on the number of times he or she has been disciplined. (Cf. *In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136 [to fulfill "purposes of lawyer discipline, [the State Bar Court] must examine the nature and chronology of respondent's record of discipline"].)

The court concludes that standard 1.8(b) is to be applied in the same manner as former standard 1.7(b). Former standard 1.7(b) was applied "with due regard to the nature and extent of the respondent's prior records. [Citation.]" (*In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 704.) In that regard, when former standard 1.7(b) was applied, significant weight was placed "on whether or not there is a 'common thread' among the various prior disciplinary proceedings or a 'habitual course of conduct' which justifies disbarment. [Citation.]" (*In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 841.)

There is no common thread between the present proceeding and any of Respondent's prior records of discipline. Moreover, the present misconduct is not sufficiently egregious to recommend disbarment. (Cf. *Conroy v. State Bar, supra*, 53 Cal.3d at pp. 506-507 [disbarment under former std. 1.7(b) was not mandatory even when compelling mitigating circumstances did not clearly predominate].) Nonetheless, under standard 2.14, the court finds that significant

discipline, including a lengthy period of actual suspension, is necessary to fulfill the purposes of attorney discipline. In addition, the court concludes that the recommended period of actual suspension should be greater than the 30-day actual suspension imposed on Respondent in *Shirer III*. (Std. 1.8(a).)

The willful violation of a condition of probation often calls for actual suspension as a reflection of the seriousness with which compliance with probationary duties is held. The court finds *Potack v. State Bar* (1991) 54 Cal.3d 132 to be instructive on the issue of discipline even though it is a probation revocation proceeding. Potack's probation was revoked, and he was actually suspended from practice for two years because he failed to timely submit one quarterly probation report after being given ample opportunity to do so. There were no mitigating circumstances in *Potack*. In aggravation, Potack defaulted in the State Bar Court and had one prior record of discipline.

Even though Potack defaulted and Respondent is participating in this proceeding, Respondent has three prior records of discipline while Potack had only one. Nonetheless, Potack's one prior record involved significantly greater misconduct than the collective misconduct in Respondent's three prior records of discipline. (Potack's prior misconduct warranted a one-year actual suspension; while Respondent's prior misconduct warranted only a 30-day actual suspension. Furthermore, in the present proceeding, Respondent belatedly complied with all of the conditions of her probation before OCTC filed the present case; whereas Potack failed to correct his deficiencies even though he was given ample opportunity to do so by the State Bar.

The Supreme Court rejected the Potack's argument that the recommended two-year suspension was excessive, concluding that Potack's "failure to abide by the terms and conditions

of his probation is a serious violation” warranting the recommended two-year suspension. (*Potack v. State Bar, supra*, 54 Cal.3d at p. 139.)

OCTC argues that disbarment is necessary and appropriate given Respondent’s culpability and the aggravation which far outweighs her mitigation. Citing *In the Matter of Carver* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 348, 356, Respondent argues that the appropriate level of discipline is 90 days’ to one year’s actual suspension.

After carefully considering the factors unique to this case, the court finds that disbarment is not warranted or necessary to protect the public, the profession, or the courts. The Supreme Court has repeatedly stated that disbarment will not be ordered in cases like the present one in which there is no evidence that a sanction less than disbarment is inadequate to deter further misconduct and protect the public. (*In the Matter of Hertz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 456, 472, and cases there cited.) Nonetheless, on balance, the court concludes that the appropriate level of discipline is two years’ stayed suspension and three years’ probation with conditions, including a one-year actual suspension.<sup>4</sup>

### Recommendations

#### **Discipline**

It is recommended that Rae Diane Shirer, State Bar Number 167137, be suspended from the practice of law for two years, that execution of that suspension be stayed, and that Respondent be placed on probation for three years with the following conditions.

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<sup>4</sup> As noted above, Respondent was ordered to take and pass the MPRE in *Shirer II*. Respondent took and passed the August 2017 MPRE. Respondent committed all of the misconduct found in the present proceeding before she took and passed the August 2017 examination. Accordingly, the court does not recommend that Respondent be ordered to take and pass the MPRE again in this proceeding. (*Rhodes v. State Bar* (1989) 49 Cal.3d 50, 61; accord *In the Matter of Dahlz* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 269, 286.)

## **Conditions of Probation**

### **Actual Suspension**

Respondent must be suspended from the practice of law for the first year of Respondent's probation.

### **Review Rules of Professional Conduct**

Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must (1) read the California Rules of Professional Conduct (Rules of Professional Conduct) and Business and Professions Code sections 6067, 6068, and 6103 through 6126 and (2) provide a declaration, under penalty of perjury, attesting to Respondent's compliance with this requirement, to the State Bar's Office of Probation in Los Angeles (Office of Probation) with Respondent's first quarterly report.

### **Comply with State Bar Act, Rules of Professional Conduct, and Probation Conditions**

Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all conditions of Respondent's probation.

### **Maintain Valid Official Membership Address and Other Required Contact Information**

Within 30 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must make certain that the State Bar Attorney Regulation and Consumer Resources Office (ARCR) has Respondent's current office address, email address, and telephone number. If Respondent does not maintain an office, Respondent must provide the mailing address, email address, and telephone number to be used for State Bar purposes. Respondent must report, in writing, any change in the above information to ARCR, within ten (10) days after such change, in the manner required by that office.

### **Meet and Cooperate with Office of Probation**

Within 15 days after the effective date of the Supreme Court order imposing discipline in this matter, Respondent must schedule a meeting with Respondent's assigned probation case specialist to discuss the terms and conditions of Respondent's discipline and, within 30 days after the effective date of the court's order, must participate in such meeting. Unless otherwise instructed by the Office of Probation, Respondent may meet with the probation case specialist in person or by telephone. During the probation period, Respondent must promptly meet with representatives of the Office of Probation as requested by it and, subject to the assertion of applicable privileges, must fully, promptly, and truthfully answer any inquiries by it and provide to it any other information requested by it.

### **State Bar Court Retains Jurisdiction/Appear Before and Cooperate with State Bar Court**

During Respondent's probation period, the State Bar Court retains jurisdiction over Respondent to address issues concerning compliance with probation conditions. During this period, Respondent must appear before the State Bar Court as required by the court or by the Office of Probation after written notice mailed to Respondent's official membership address, as provided above. Subject to the assertion of applicable privileges, Respondent must fully, promptly, and truthfully answer any inquiries by the court and must provide any other information the court requests.

### **Quarterly and Final Reports**

**a. Deadlines for Reports.** Respondent must submit written quarterly reports to the Office of Probation no later than each January 10 (covering October 1 through December 31 of the prior year), April 10 (covering January 1 through March 31), July 10 (covering April 1 through June 30), and October 10 (covering July 1 through September 30) within the period of probation. If the first report would cover less than 30 days, that report must be submitted on the

next quarter date and cover the extended deadline. In addition to all quarterly reports, Respondent must submit a final report no earlier than ten (10) days before the last day of the probation period and no later than the last day of the probation period.

**b. Contents of Reports.** Respondent must answer, under penalty of perjury, all inquiries contained in the quarterly report form provided by the Office of Probation, including stating whether Respondent has complied with the State Bar Act and the Rules of Professional Conduct during the applicable quarter or period. All reports must be: (1) submitted on the form provided by the Office of Probation; (2) signed and dated after the completion of the period for which the report is being submitted (except for the final report); (3) filled out completely and signed under penalty of perjury; and (4) submitted to the Office of Probation on or before each report's due date.

**c. Submission of Reports.** All reports must be submitted by: (1) fax or email to the Office of Probation; (2) personal delivery to the Office of Probation; (3) certified mail, return receipt requested, to the Office of Probation (postmarked on or before the due date); or (4) other tracked-service provider, such as Federal Express or United Parcel Service, etc. (physically delivered to such provider on or before the due date).

**d. Proof of Compliance.** Respondent is directed to maintain proof of Respondent's compliance with the above requirements for each such report for a minimum of one year after either the period of probation or the period of Respondent's actual suspension has ended, whichever is longer. Respondent is required to present such proof upon request by the State Bar, the Office of Probation, or the State Bar Court.

### **Commencement of Probation**

The period of probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the expiration of the probation period, if Respondent has



complied with all conditions of probation, the period of stayed suspension will be satisfied and that suspension will be terminated.


**California Rules of Court, Rule 9.20**

It is further recommended that Respondent be ordered to comply with the requirements of 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 days, respectively, after the effective date of the Supreme Court order imposing discipline in this matter.<sup>5</sup> Failure to do so may result in disbarment or suspension.

**Costs**

It is further recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that the costs be enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment. Unless the time for payment of discipline costs is extended pursuant to subdivision (c) of section 6086.10, costs assessed against a member who is actually suspended or disbarred must be paid as a condition of reinstatement or return to active status.

Dated: August 9, 2018.

  
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YVETTE D. ROLAND  
Judge of the State Bar Court

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<sup>5</sup> For purposes of compliance with rule 9.20(a), the operative date for identification of “clients being represented in pending matters” and others to be notified is the filing date of the Supreme Court order, not any later “effective” date of the order. (*Athearn v. State Bar* (1982) 32 Cal.3d 38, 45.) Further, Respondent is required to file a rule 9.20(c) affidavit even if Respondent has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.) In addition to being punished as a crime or contempt, an attorney’s failure to comply with rule 9.20 is, inter alia, cause for disbarment, suspension, revocation of any pending disciplinary probation, and denial of an application for reinstatement after disbarment. (Cal. Rules of Court, rule 9.20(d).)

**CERTIFICATE OF SERVICE**

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

I am a Court Specialist 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 August 9, 2018, I deposited a true copy of the following document(s):

**DECISION**

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

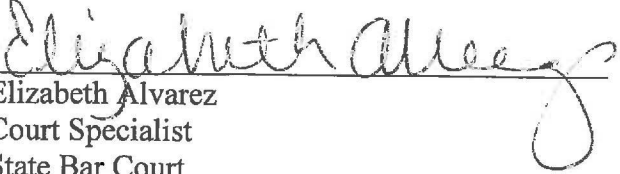
- by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

MICHAEL VAUGHN HESSE  
4515 TYLER ST  
RIVERSIDE, CA 92503 - 2808

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

Timothy G. Byer, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on August 9, 2018.

  
Elizabeth Alvarez  
Court Specialist  
State Bar Court