

ORIGINAL



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State Bar Court of California Hearing Department <input type="checkbox"/> Los Angeles <input checked="" type="checkbox"/> San Francisco PROGRAM FOR RESPONDENTS WITH SUBSTANCE ABUSE AND MENTAL HEALTH ISSUES		
Counsel for the State Bar Cydney Batchelor Deputy Trial Counsel 180 Howard St., 7th Fl. San Francisco, CA 94105 Tele: 415/538-2204 Bar # 114637	Case Number(s) <p style="text-align: center; font-size: 1.5em;">PUBLIC MATTER</p> 04-0-12658-JMR	(for Court use) CONFIDENTIAL <p style="text-align: center; font-size: 1.5em;">LODGED</p> <p style="text-align: center;">OCT 18 2006</p> <p style="text-align: center;">STATE BAR COURT CLERK'S OFFICE SAN FRANCISCO</p> <p style="text-align: center; font-size: 1.5em;">FILED</p> <p style="text-align: center;">SEP 27 2010</p> <p style="text-align: center;">STATE BAR COURT CLERK'S OFFICE SAN FRANCISCO</p>
<input checked="" type="checkbox"/> Counsel for Respondent <input type="checkbox"/> In Pro Per Susan L. Margolis, Esq. 2000 Riverside Dr. Los Angeles, CA 90039 Tele: 323/953-8996 Bar # 104629	Submitted to Program Judge <p style="text-align: center;">STIPULATION RE FACTS AND CONCLUSIONS OF LAW</p> <input type="checkbox"/> PREVIOUS STIPULATION REJECTED	
In the Matter of DAMIAN R. FERNANDEZ Bar # 206662 A Member of the State Bar of California (Respondent)		

Note: All information required by this form and any additional information which cannot be provided in the space provided, must be set forth in an attachment to this stipulation under specific headings, e.g., "Facts," "Dismissals," "Conclusions of Law," "Supporting Authority," etc.

A. Parties' Acknowledgments:

- (1) Respondent is a member of the State Bar of California, admitted 5/31/2000 (date)
- (2) The parties agree to be bound by the factual stipulations contained herein even if conclusions of law or disposition (to be attached separately) are rejected or changed by the Supreme Court. However, if Respondent is not accepted into the Lawyer Assistance Program, this stipulation will be rejected and will not be binding on Respondent or the State Bar.
- (3) All investigations or proceedings listed by case number in the caption of this stipulation are entirely resolved by this stipulation and are deemed consolidated, except for Probation Revocation Proceedings. Dismissed charge(s)/count(s) are listed under "Dismissals." The stipulation and order consists of 8 pages.
- (4) A statement of acts or omissions acknowledged by Respondent as cause or causes for discipline is included under "Facts." See attached
- (5) Conclusions of law, drawn from and specifically referring to the facts, are also included under "Conclusions of Law." See attached

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- (6) No more than 30 days prior to the filing of this stipulation, Respondent has been advised in writing of any pending investigation/proceeding not resolved by this stipulation, except for criminal investigations.
- (7) Payment of Disciplinary Costs—Respondent acknowledges the provisions of Bus. & Prof. Code §§ 6086.10 & 6140.7 and will pay timely any disciplinary costs imposed in this proceeding.

B. Aggravating Circumstances [Standards for Attorney Sanctions for Professional Misconduct, standard 1.2(b)]. Facts supporting aggravating circumstances are required.

- (1) Prior Record of Discipline [see standard 1.2(f)]
- (a) State Bar Court Case # of prior case _____
- (b) Date prior discipline effective _____
- (c) Rules of Professional Conduct/State Bar Action violations _____
- (d) Degree of prior discipline _____
- (e) If Respondent has two or more incidents of prior discipline, use space provided below or under "Prior Discipline" (above)
- (2) Dishonesty: Respondent's misconduct was surrounded by or followed by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct.
- (3) Trust violation: Trust funds or property were involved and Respondent refused or was unable to account to the client or person who was the object of the misconduct for improper conduct toward said funds or property.
- (4) Harm: Respondent's misconduct harmed significantly a client, the public or the administration of justice.
- (5) Indifference: Respondent demonstrated indifference toward rectification of or atonement for the consequences of his or her misconduct.
- (6) Lack of Cooperation: Respondent displayed a lack of candor and cooperation to the victims of his/her misconduct or the State Bar during disciplinary investigation or proceedings.
- (7) Multiple/Pattern of Misconduct: Respondent's current misconduct evidences multiple acts of wrong doing or demonstrates a pattern of misconduct.
- (8) No aggravating circumstances are involved.

Additional aggravating circumstances:

None.

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C. Mitigating Circumstances [standard 1.2(e)]. Facts supporting mitigating circumstances are required.

- (1) **No Prior Discipline:** Respondent has no prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious.
- (2) **No Harm:** Respondent did not harm the client or person who was the object of the misconduct.
- (3) **Candor/Cooperation:** Respondent displayed spontaneous candor and cooperation to the ~~State Bar~~ State Bar during disciplinary investigation and proceedings. See attached
- (4) **Remorse:** Respondent promptly took objective steps spontaneously demonstrating remorse and recognition of the wrongdoing, which steps were designed to timely atone for any consequences of his/her misconduct.
- (5) **Restitution:** Respondent paid \$ _____ on _____ in restitution to _____ without the threat of force of disciplinary, civil or criminal proceedings.
- (6) **Delay:** These disciplinary proceedings were excessively delayed. The delay is not attributable to Respondent and the delay prejudiced him/her.
- (7) **Good Faith:** Respondent acted in good faith.
- (8) **Emotional/Physical Difficulties:** At the time of the stipulated act or acts of professional misconduct Respondent suffered extreme emotional difficulties or physical disabilities which expert testimony would establish were directly responsible for the misconduct. The difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drugs or substance abuse, and Respondent no longer suffers from such difficulties or disabilities.
- (9) **Severe Financial Stress:** At the time of the misconduct, Respondent suffered from severe financial stress which resulted from circumstances not reasonably foreseeable or which were beyond his/her control and which were directly responsible for the misconduct.
See attached
- (10) **Family Problems:** At the time of the misconduct, Respondent suffered extreme difficulties in his/her personal life which were other than emotional or physical in nature.
- (11) **Good Character:** Respondent's good character is attested to by a wide range of references in the legal and general communities who are aware of the full extent of his/her misconduct.
- (12) **Rehabilitation:** Considerable time has passed since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation.
- (13) **No mitigating circumstances are involved.**

Additional mitigating circumstances:

See attached

ATTACHMENT TO
STIPULATION RE FACTS AND CONCLUSIONS OF LAW

IN THE MATTER OF: **DAMIAN R. FERNANDEZ**

CASE NUMBERS: **04-O-12658-JMR**

FACTS AND CONCLUSIONS OF LAW.

Facts:

1. On November 27, 2001, Carlos Pineda Rodriguez ("Father Pineda") employed Respondent to represent him and his son, Marvin Edgardo Pineda ("Son Pineda") in a personal injury matter. On December 11, 2001, respondent filed a complaint on behalf Father and Son Pineda entitled, *Rodriguez and Pineda v. Mosser, et al.*, Los Angeles County Superior Court, case number MC013189.

2. On September 5, 2003, respondent settled Father and Son Pineda's claims. On October 8, 2003, respondent received two settlement checks payable to "Carlos Pineda, Attorney Damien Fernandez and Kuzyk Law" in the amount of \$7,000 and to "Marvin Pineda, Attorney Damien Fernandez and Kuzyk Law" in the amount of 5,500, totaling \$12,500.

3. On October 20, 2003, respondent opened his Client Trust Account ("CTA") at Washington Mutual, account number 0934967631, ("CTA") and deposited the \$12,500 into the CTA.

4. On October 21, 2003, respondent began negotiations to settle medical liens held by Quality Health Medical Center's ("QHMC") on behalf of medical providers for Father and Son Pineda.

5. On February 27, 2004, respondent issued CTA check number 97 payable to Father and Son Pineda in the amount of \$3,887.80. Check number 97 was not negotiated by Father or Son Pineda until May 18, 2004.

6. In March 2004, following threats of being sued by the hospital and the ambulance company, Father Pineda paid the hospital and the ambulance company \$1565.50.

7. After subtracting Respondent's contingency fee from Father and Son Pineda's settlement funds, respondent was required to maintain in the CTA the approximate sum of \$8250. However, from March 15, 2004 through May 17, 2004, the balance in the CTA fell below the \$8250 on five occasions, as follows:

Date	Balance
3/15/04	\$7,936.13
3/19/04	3,927.56
3/22/04	5,027.56
4/30/04	4,868.18
5/14/04	4,867.56

JMR

8, Respondent ~~willfully~~ or by gross negligence misappropriated Rodriguez and Pineda's settlement funds.

9. In the first week of August 2004, Father Pineda authorized respondent to disburse funds to pay QHMC's lien. On September 15, 2004, respondent issued CTA check number 1003 payable to QHMC in the amount of \$2,601.16.

10. On September 15, 2004, respondent issued CTA check number 1001 payable to Rodriguez and Pineda in the amount of \$278.87 for "balance after negotiation with chiropractor."

11. On September 15, 2004, respondent issued CTA check number 1004 payable to Father and Son Pineda in the amount of \$1565.50 for "reimbursement for your personal payments to hospitals."

by gross negligence

JMR

Conclusions of Law: By ~~willfully~~ misappropriating at least \$4,322.44 of the Father and Son Pineda's settlement funds, respondent committed an act of moral turpitude, in violation of Business and Professionals Code section 6106. By willfully not maintaining at least \$8250 received on behalf of Father and Son Pineda in the CTA, respondent failed to maintain client funds in a trust account in violation of rule 4-100(A) of the Rule of Professional Conduct 4-100(A).

PENDING PROCEEDINGS.

The disclosure date referred to, on page one, paragraph A.(6), was July 27, 2006.

MITIGATING FACTORS.

Facts Supporting Mitigating Circumstances.

Cooperation with State Bar: Through his counsel, respondent has been candid and cooperative with the State Bar in resolving this case.

Severe Financial Difficulties: At the time of the misconduct, respondent was unable to work, had insufficient funds to live on and no savings, and became behind in his office and house payments.

ADDITIONAL MITIGATING CIRCUMSTANCES.

Restitution: Although he did not do so until contacted by the State Bar in June 2004, respondent did pay restitution to Father and Son Pineda on September 15, 2004.

Participation in Lawyer's Assistance Program. On February 15, 2006, respondent contacted the State Bar Lawyer Assistance Program ("LAP"); on February 24, 2006, he completed the intake process and signed an evaluation plan to be assessed and monitored for a period of time by the LAP to determine whether he was suitable for long-term participation. At the conclusion of the process, respondent was accepted into LAP by its Evaluation Committee, and is in the process of signing a long-term participation agreement.

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In the Matter of DAMIAN R. FERNANDEZ	Case number(s): 04-0-12658-JMR
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SIGNATURE OF THE PARTIES

By their signatures below, the parties and their counsel, as applicable, signify their agreement with each of the recitations and each of the terms and conditions of this Stipulation Re Facts and Conclusions of Law.

Respondent enters into this stipulation as a condition of his/her participation in the Program. Respondent understands that he/she must abide by all terms and conditions of Respondent's Program Contract.

If the Respondent is not accepted into the Program or does not sign the Program contract, this Stipulation will be rejected and will not be binding on Respondent or the State Bar.

If the Respondent is accepted into the Program, upon Respondent's successful completion of or termination from the Program, this Stipulation will be filed and the specified level of discipline for successful completion of or termination from the Program as set forth in the State Bar Court's Statement Re: Discipline shall be imposed or recommended to the Supreme Court.

8/2/2006
Date

Damian R. Fernandez
Respondent's signature

DAMIAN R. FERNANDEZ
Print name

8/3/06
Date

Susan L. Margolis
Respondent's Counsel's signature

SUSAN L. MARGOLIS
Print name

8/7/06
Date

Cydney Batchelor
Deputy Trial Counsel's signature

CYDNEY BATCHELOR
Print name

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In the Matter of DAMIAN R. FERNANDEZ	Case number(s): 04-O-12658
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ORDER

Finding the stipulation to be fair to the parties and that it adequately protects the public, IT IS ORDERED that the requested dismissal of counts/charges, if any, is GRANTED without prejudice, and:

- The stipulation as to facts and conclusions of law is APPROVED.
- The stipulation as to facts and conclusions of law is APPROVED AS MODIFIED as set forth below.
- All Hearing dates are vacated.

On page 5, in paragraph 5 and under the Conclusions of Law, the stipulation is modified to provide that Respondent misappropriated the funds through his gross negligence.

The parties are bound by the stipulation as approved unless: 1) a motion to withdraw or modify the stipulation, filed within 15 days after service of this order, is granted; or 2) this court modifies or further modifies the approved stipulation; or 3) Respondent is not accepted for participation in the Program or does not sign the Program Contract. (See rule 135(b) and 802(d), Rules of Procedure.)

10/10/06
Date



JOANN M. REMKE
Judge of the State Bar Court

CERTIFICATE OF SERVICE

[Rule 630(b), Rules Proc. of State Bar; Code Civ. Proc., §§ 1011, 1013]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Following standard court practices, in the City and County of San Francisco, I served a true copy of the following document(s):

CONFIDENTIAL STATEMENT OF ALTERNATIVE DISPOSITIONS AND ORDERS

CONTRACT AND WAIVER FOR PARTICIPATION IN THE STATE BAR COURT'S ALTERNATIVE DISCIPLINE PROGRAM

STIPULATION RE FACTS AND CONCLUSIONS OF LAW

as follows:

- By PERSONAL SERVICE by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

**DAMIAN R. FERNANDEZ
180 HOWARD STREET, 6TH FLR
SAN FRANCISCO, CA 94105**

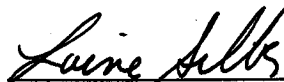
- by FIRST-CLASS MAIL, with postage thereon fully prepaid, through the United States Postal Service at San Francisco, California, addressed as follows:

**SUSAN LYNN MARGOLIS
MARGOLIS & MARGOLIS LLP
2000 RIVERSIDE DR
LOS ANGELES, CA 90039 - 3758**

- By PERSONAL SERVICE by leaving the documents in a sealed envelope or package clearly labeled to identify the attorney being served with a receptionist or a person having charge of the attorney's office, addressed as follows:

**CYDNEY BATCHELOR
STATE BAR OF CALIFORNIA
OFFICE OF THE CHIEF TRIAL COUNSEL
180 HOWARD STREET
SAN FRANCISCO, CA 94105**

I hereby certify that the foregoing is true and correct. Executed at San Francisco, California, on **October 10, 2006.**



Laine Silber
Case Administrator
State Bar Court