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<b>State Bar Court of California</b> <b>Hearing Department</b> <b>Los Angeles</b>		
Counsel For The State Bar  <b>Timothy G. Byer</b> Deputy Trial Counsel State Bar of California 1149 S. Hill Street Los Angeles, CA 90015  Bar # 172472	Case Number (s) <b>06-O-10962</b>	(for Court's use)  <div style="text-align: center;"> <p><b>FILED</b></p> <p><b>DEC 23 2008</b> <i>YJC</i></p> <p>STATE BAR COURT CLERK'S OFFICE LOS ANGELES</p> </div> <div style="text-align: center; font-size: 2em; opacity: 0.5; margin-top: 20px;">             PUBLIC MATTER           </div>
Counsel For Respondent  <b>Ellen A. Pansky, Esq.</b> <b>Pansky &amp; Markle</b> 1010 Sycamore Ave., Ste. 101 South Pasadena, CA 91030  Bar # 77688	Submitted to: <b>Settlement Judge</b>	
In the Matter Of: <b>Thomas A. Brackey II</b>  Bar # 162279  A Member of the State Bar of California (Respondent)	STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING  <b>STAYED SUSPENSION; NO ACTUAL SUSPENSION</b>  <input type="checkbox"/> PREVIOUS STIPULATION REJECTED	

**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 **December 14, 1992**.
- (2) The parties agree to be bound by the factual stipulations contained herein even if conclusions of law or disposition are rejected or changed by the Supreme Court.
- (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. Dismissed charge(s)/count(s) are listed under "Dismissals." The stipulation consists of **8** pages, not including the order.
- (4) A statement of acts or omissions acknowledged by Respondent as cause or causes for discipline is included under "Facts."
- (5) Conclusions of law, drawn from and specifically referring to the facts are also included under "Conclusions of Law".
- (6) The parties must include supporting authority for the recommended level of discipline under the heading "Supporting Authority."



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- (7) 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.
- (8) Payment of Disciplinary Costs—Respondent acknowledges the provisions of Bus. & Prof. Code §§6086.10 & 6140.7. (Check one option only):
- costs added to membership fee for calendar year following effective date of discipline.
  - costs to be paid in equal amounts prior to February 1 for the following membership years:  
(hardship, special circumstances or other good cause per rule 284, Rules of Procedure)
  - costs waived in part as set forth in a separate attachment entitled "Partial Waiver of Costs"
  - costs entirely waived

**B. Aggravating Circumstances [for definition, see 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 Act violations:
  - (d)  Degree of prior discipline
  - (e)  If Respondent has two or more incidents of prior discipline, use space provided below or a separate attachment entitled "Prior Discipline."
- (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 victims of his/her misconduct or to the State Bar during disciplinary investigation or proceedings.
- (7)  **Multiple/Pattern of Misconduct:** Respondent's current misconduct evidences multiple acts of wrongdoing or demonstrates a pattern of misconduct. **Respondent's current misconduct evidences multiple acts of wrongdoing, not a pattern of misconduct.**
- (8)  **No aggravating circumstances** are involved.

**Additional aggravating circumstances**

**C. Mitigating Circumstances [see 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 with the victims of his/her misconduct and to the State Bar during disciplinary investigation and proceedings.
- (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 or 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. **Respondent erroneously concluded that, since the Ninth Circuit Court of Appeal was reporting the sanctions to the State Bar, Respondent was excused from doing so.**
- (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 was directly responsible for the misconduct. The difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug 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.
- (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**

**Respondent has no prior record of discipline in nearly 16 years of practice.**

**D. Discipline:**

(1)  **Stayed Suspension:**

(a)  Respondent must be suspended from the practice of law for a period of **1 year**.

- i.  and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and present fitness to practice and present learning and ability in the law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.
- ii.  and until Respondent pays restitution as set forth in the Financial Conditions form attached to this stipulation.
- iii.  and until Respondent does the following:

The above-referenced suspension is stayed.

(2)  **Probation:**

Respondent is placed on probation for a period of **2 years**, which will commence upon the effective date of the Supreme Court order in this matter. (See rule 9.18 California Rules of Court)

**E. Additional Conditions of Probation:**

- (1)  During the probation period, Respondent must comply with the provisions of the State Bar Act and Rules of Professional Conduct.
- (2)  Within ten (10) days of any change, Respondent must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar of California ("Office of Probation"), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.
- (3)  Within thirty (30) days from the effective date of discipline, Respondent must contact the Office of Probation and schedule a meeting with Respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, Respondent must meet with the probation deputy either in-person or by telephone. During the period of probation, Respondent must promptly meet with the probation deputy as directed and upon request.
- (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. Respondent must also state whether there are any proceedings pending against him or her in the State Bar Court and if so, the case number and current status of that proceeding. If the first report would cover less than 30 days, that report must be submitted on the next quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the period of probation and no later than the last day of probation.

- (5)  Respondent must be assigned a probation monitor. Respondent must promptly review the terms and conditions of probation with the probation monitor to establish a manner and schedule of compliance. During the period of probation, Respondent must furnish to the monitor such reports as may be requested, in addition to the quarterly reports required to be submitted to the Office of Probation. Respondent must cooperate fully with the probation monitor.

- (6)  Subject to assertion of applicable privileges, Respondent must answer fully, promptly and truthfully any inquiries of the Office of Probation and any probation monitor assigned under these conditions which are directed to Respondent personally or in writing relating to whether Respondent is complying or has complied with the probation conditions.
- (7)  Within one (1) year of the effective date of the discipline herein, Respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the State Bar Ethics School, and passage of the test given at the end of that session.
- No Ethics School recommended. Reason: .
- (8)  Respondent must comply with all conditions of probation imposed in the underlying criminal matter and must so declare under penalty of perjury in conjunction with any quarterly report to be filed with the Office of Probation.
- (9)  The following conditions are attached hereto and incorporated:
- |   |   |
|---|---|
| <input type="checkbox"/> Substance Abuse Conditions | <input type="checkbox"/> Law Office Management Conditions |
| <input type="checkbox"/> Medical Conditions         | <input type="checkbox"/> Financial Conditions             |

**F. Other Conditions Negotiated by the Parties:**

- (1)  **Multistate Professional Responsibility Examination:** Respondent must provide proof of passage of the Multistate Professional Responsibility Examination ("MPRE"), administered by the National Conference of Bar Examiners, to the Office of Probation within one year. **Failure to pass the MPRE results in actual suspension without further hearing until passage. But see rule 9.10(b), California Rules of Court, and rule 321(a)(1) & (c), Rules of Procedure.**
- No MPRE recommended. Reason:
- (2)  **Other Conditions:**

Attachment language (if any):

ATTACHMENT TO STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION

IN THE MATTER OF:        THOMAS A. BRACKEY II

CASE NUMBER:            06-O-10962

A.    FACTS AND CONCLUSIONS OF LAW:

Respondent admits that the following facts are true and that he is culpable of violations of the specified Rule of Professional Conduct and Business & Professions Code sections.

WAIVER OF RIGHT TO FILING OF NOTICE OF DISCIPLINARY CHARGES:

The parties waive the right to the filing of a Notice of Disciplinary Charges and to a formal hearing on any charge not included in the pending Notice of Disciplinary Charges.

06-O-10962

Facts:

On March 1, 1999, Respondent was employed by Ray Ferry to defend Ferry against a civil action brought against Ferry by his former business partner, plaintiff Forrest Ackerman. After a jury trial, judgment was awarded for Ackerman.

Following the trial, Respondent and Ferry discussed whether to appeal the adverse verdict. In light of Ferry's financial constraints, Respondent and Ferry came to the following agreement: 1) Respondent would pursue the appeal with full cooperation of Ferry; 2) Ferry would incur no attorneys' fees in connection with the appeal; 3) Ferry would "forego any financial interest in the outcome" thereof, and 4) Ferry would "relieve [Respondent] of any responsibility whatsoever associated with the prosecution, or defense" of any matter in the appeal. This agreement was memorialized in a letter to Ferry by Respondent dated May 18, 2000 and later signed by Ferry ("May 18 Agreement").

On February 28, 2001, a hearing was held in state trial court regarding Ferry's compliance with certain post-trial orders, and Respondent was called as a witness. Counsel for Ackerman asked Respondent "Isn't it the case ... that your firm will handle the appeal without charge to Mr. Ferry?" Respondent testified that Ferry's appeal had been "assigned" to Respondent's firm by Ferry, who had also relieved Respondent's firm of potential malpractice exposure if the firm decided to dismiss the appeal at some point. Respondent's testimony left the impression that the real party in interest on the appeal was his firm, and not Ferry.

The above testimony by Respondent, and the meaning of the May 18 Agreement, became issues in the appeal by Ferry of the adverse trial court judgment (as to whether Ferry had assigned away his standing to appeal) and in the subsequent bankruptcy proceeding filed by Ferry (as to whether that right to appeal was an asset of the bankruptcy estate improperly transferred). Respondent filed several declarations in which he explained that his description of the May 18 Agreement as

an "assignment" by Ferry of his appellate rights had been inaccurate. The court ruled that Ferry retained standing to appeal. Ackerman then brought a motion for sanctions in the sum of the attorneys' fees he had expended litigating those questions.

Following a four day evidentiary hearing on Ackerman's sanctions motion, the Bankruptcy Court sanctioned Respondent in the sum of \$29,166.50 for his contradictory statements to the court. Respondent appealed the sanctions to the 9th Circuit Court of Appeals, which upheld the Bankruptcy Court's sanctions order on the ground that the Bankruptcy Court had not been shown to have abused its discretion. Respondent paid the sanctions but did not report them to the State Bar.

#### Legal Conclusions:

By seeking to absolve himself of "any responsibility whatsoever associated with the prosecution, or defense" of any matter in Ferry's appeal, Respondent contracted with a client prospectively limiting his liability to the client for Respondent's professional malpractice, in willful violation of Rules of Professional Conduct, rule 3-400(A). By not reporting the Bankruptcy Court sanctions to the State Bar, Respondent failed to report to the agency charged with attorney discipline, within 30 days of the time Respondent had knowledge of them, of the imposition of judicial sanctions against him, other than discovery sanctions, of at least \$1,000, in willful violation of Business & Professions Code, section 6068(o).

#### AUTHORITIES SUPPORTING RECOMMENDED DISCIPLINE:

Standard 2.10 provides that "[c]ulpability of a member of a violation of any provision of the Business and Professions Code not specified in these standards or of a willful violation of any Rule of Professional Conduct not specified in these standards shall result in reproof or suspension according to the gravity of the harm, if any to the victim, with due regard to the purposes of imposing discipline set forth in standard 1.3."

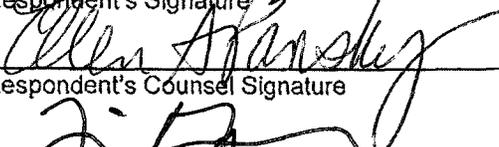
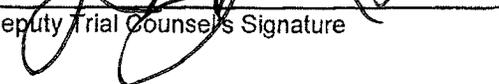
Those purposes are "the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession." Standard 1.3.

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In the Matter of Thomas A. Brackey II	Case number(s): 06-O-10962
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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 Fact, Conclusions of Law and Disposition.

<u>12/2/08</u> Date	 Respondent's Signature	<u>Thomas A. Brackey II</u> Print Name
<u>12/2/08</u> Date	 Respondent's Counsel Signature	<u>Ellen A. Pansky</u> Print Name
<u>12.9.08</u> Date	 Deputy Trial Counsel's Signature	<u>Timothy G. Byer</u> Print Name

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In the Matter Of <b>Thomas A. Brackey II</b>	Case Number(s): <b>06-O-10962</b>
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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 stipulated facts and disposition are APPROVED and the DISCIPLINE RECOMMENDED to the Supreme Court.
- The stipulated facts and disposition are APPROVED AS MODIFIED as set forth below, and the DISCIPLINE IS RECOMMENDED to the Supreme Court.
- All Hearing dates are vacated.

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. (See rule 135(b), Rules of Procedure.) **The effective date of this disposition is the effective date of the Supreme Court order herein, normally 30 days after file date. (See rule 9.18(a), California Rules of Court.)**

12/19/08  
Date

  
\_\_\_\_\_  
Judge of the State Bar Court  
**DONALD F. MILES**

**CERTIFICATE OF SERVICE**

[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on December 23, 2008, I deposited a true copy of the following document(s):

**STIPULATION RE FACTS, CONCLUSIONS OF LAW AND  
DISPOSITION AND ORDER APPROVING STAYED SUSPENSION; NO  
ACTUAL SUSPENSION**

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

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

**ELLEN ANNE PANSKY  
PANSKY & MARKLE  
1010 SYCAMORE AVE #101  
SOUTH PASADENA, CA 91030**

- 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 December 23, 2008.



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Tammy Cleaver  
Case Administrator  
State Bar Court